



## MAR-A-LAGO: THE DANGERS OF RECKLESS STATEMENTS AND THE RESILIENCE OF THE LEGAL PROCESS

### I. EXECUTIVE SUMMARY

Words matter and have consequences, particularly when spoken by lawyers and public leaders about contentious legal processes. In these circumstances lawyers, in particular, have an important role to play in upholding, not undermining, the rule of law and the independence of the judicial system.<sup>1</sup> And, in a highly charged environment, like the one we find ourselves in today, violence cannot be an unanticipated outcome when the words used are inflammatory, misleading, or reckless.

The execution of a search warrant by the FBI on former President Trump’s Mar-a-Lago complex unleashed an uproar with little precedent that quickly escalated to threats and acts of violence against federal law enforcement personnel and a federal judge. In the course of this controversy, lawyers and high public office holders have provided misleading and confusing statements and have expressed contempt for - and leveled thinly-veiled threats against - law enforcement officers, a judge, and the entirety of the criminal justice system and those who

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<sup>1</sup> The City Bar has issued numerous statements calling on lawyers and public officials to be mindful of how their speech, in particular, can serve to incite threats and violence against third parties, including judges. See, e.g., New York City Bar Association Calls on American Lawyers to Support the Rule of Law, Dec. 2020, <https://www.nycbar.org/media-listing/media/detail/calling-american-lawyers-to-action-support-the-rule-of-law>; New York City Bar Association Statement on Lawyers’ and Public Officials’ Obligations During the Presidential Transition Period, Nov. 2020, <https://www.nycbar.org/media-listing/media/detail/lawyers-and-public-officials-obligations-during-the-presidential-transition-period>; Election Day Message from New York City Bar Association President Sheila S. Boston, Nov. 2020, <https://www.nycbar.org/media-listing/media/detail/election-day-message-from-city-bar-president-sheila-s-boston>; The Lawyer’s Obligation by Roger Juan Maldonado, July 2018, <https://www.nycbar.org/media-listing/media/detail/the-lawyers-obligation-by-roger-juan-maldonado>; New York City Bar Association Condemns Recent Acts of Identity-Based Violence and Calls for Recommitment to Pluralism and Civil Speech, Nov. 2018, <https://www.nycbar.org/media-listing/media/detail/identity-based-violence-and-hateful-rhetoric-in-america>. One specific example is the City Bar’s previous admonishment of Majority Leader Chuck Schumer for his use of the word “hit” in comments criticizing opinions issued by Justices Brett Kavanaugh and Neil Gorsuch. Schumer subsequently apologized. Political figures are free to criticize judicial opinions as they see fit, but they must refrain from the use of language connoting physical violence. City Bar President Roger Juan Maldonado on Comments by Elected and Appointed Officials that Denigrate or Threaten Judges, March 2020, <https://www.nycbar.org/media-listing/media/detail/statement-by-city-bar-president-roger-juan-maldonado-on-comments-by-elected-and-appointed-officials-that-denigrate-or-threaten-judges>. (All websites last visited August 23, 2022.)

#### **About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

administer it. Remarks have demonstrated an alarming acceptance of violence as a means of redress of perceived wrongs committed by law enforcement officers against the former President, and were quickly echoed and amplified, in both words and deeds, by those who would advocate violence as an acceptable response.

The New York City Bar Association (City Bar) calls on all members of the bar and political leaders to refrain from making knowingly false or misleading statements about the legal process or Government institutions or officers executing the Mar-a-Lago search warrant, to recognize the gravity and significance of the issues raised by this case, and to allow any legitimate legal issues to be heard and resolved in court. The City Bar also calls on Congress to urgently take up and debate in earnest The Daniel Aderl Judicial Security and Privacy Act so that additional measures can be taken to protect the safety of our judges.<sup>2</sup>

## II. BACKGROUND

Following news reports surrounding the removal of Government records from the White House to Mar-a-Lago at the close of the Trump Administration, the National Archives and Records Administration (National Archives or NARA) referred the matter to the Department of Justice (DOJ), and a grand jury was empaneled.<sup>3</sup> In late 2021 and early 2022, meetings occurred between representatives of the National Archives, DOJ and Federal Bureau of Investigation (FBI) on one hand, and counsel for former President Donald J. Trump on the other. These discussions resulted in the return to the National Archives of 15 boxes of documents from Mar-a-Lago in mid-January 2022.<sup>4</sup> After reviewing these documents, the archivists concluded that a significant number of documents still had not been returned.<sup>5</sup>

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<sup>2</sup> Available at <https://www.congress.gov/bill/117th-congress/senate-bill/2340/text>.

<sup>3</sup> Zach Montague and Lauren McCarthy, “The Timeline Related to the F.B.I.’s Search of Mar-a-Lago,” New York Times, Aug. 9, 2022, <https://www.nytimes.com/2022/08/12/us/politics/trump-classified-records-timeline.html>.

<sup>4</sup> Id.; National Archives, Press Statement in Response to Media Inquiries, Feb. 7, 2022, <https://www.archives.gov/press/press-releases/2022/nr22-001>; Haberman, Kantor, Goldman and Protes, “Trump Had More Than 300 Classified Documents at Mar-a-Lago,” New York Times, Aug. 22, 2022, <https://www.nytimes.com/2022/08/22/us/politics/trump-mar-a-lago-documents.html> (“The initial batch of documents retrieved by the National Archives from former President Donald J. Trump in January included more than 150 marked as classified...In total, the government has recovered more than 300 documents with classified markings from Mr. Trump since he left office...”).

<sup>5</sup> Johnson, McCoy and Jackson, “National Archives letter to Trump’s lawyers in May outlined urgency of Mar-a-Lago document inquiry,” USA Today, Aug. 23, 2022, <https://www.usatoday.com/story/news/politics/2022/08/23/archives-letter-trump-mar-lago-document-investigation/7872613001/>, citing Letter from Debra Steidel Wall, Acting Archivist of the United States to Evan Corcoran, Esq., May 10, 2022, <https://www.archives.gov/files/foia/wall-letter-to-evan-corcoran-re-trump-boxes-05.10.2022.pdf> (Ms. Wall stated, “As you are no doubt aware, NARA had ongoing communications with the former President’s representatives throughout 2021 about what appeared to be missing Presidential records, which resulted in the transfer of 15 boxes of records to NARA in January 2022. In its initial review of materials within those boxes, NARA identified items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials.”); Montague and McCarthy, *supra* n. 3.

Consequently, a subpoena issued in the spring of 2022 requiring the return of further documents and records. On June 3, 2022, a meeting occurred at Mar-a-Lago in which the DOJ was represented by Jay Bratt, the chief of the Justice Department's Counterintelligence and Export Control Section and attorneys representing the former President. Shortly thereafter, an attorney representing the former President in his dealings with the National Archives and FBI signed a letter stating that all documents marked as classified and held in storage at Mar-a-Lago had already been returned to the Government.<sup>6</sup> For reasons likely set out in papers seeking the search warrant,<sup>7</sup> the DOJ concluded that the former President had not complied in good faith with the subpoena and continued to hold documents within its scope. The DOJ then, with the approval of Attorney General Merrick Garland and on the recommendation of Deputy Attorney General Lisa Monaco, applied on August 5, 2022 to the United States District Court for the Southern District of Florida for a warrant authorizing a search of specified parts of the former President's Mar-a-Lago residence<sup>8</sup> for purposes of retrieving boxes of documents believed to be property of the United

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<sup>6</sup> The New York Times subsequently identified Christina Bobb as the attorney who signed the letter claiming that all documents within the scope of the subpoena had been returned. Maggie Haberman, Jodi Kantor, Adam Goldman and Ben Protess, "Trump Had More Than 300 Classified Documents at Mar-a-Lago," New York Times, Aug. 22, 2022, <https://www.nytimes.com/2022/08/22/us/politics/trump-mar-a-lago-documents.html>. Further background found in Maggie Haberman, Ben Protess and Glenn Thrush, "Trump received a subpoena from the Justice Department ahead of the F.B.I.'s Mar-a-Lago search," New York Times, Aug. 11, 2022, <https://www.nytimes.com/2022/08/11/us/politics/trump-received-a-subpoena-from-the-justice-department-ahead-of-the-fbis-mar-a-lago-search.html>; Maggie Haberman and Glenn Thrush, "Trump Lawyer Told Justice Dept. That Classified Material Had Been Returned," New York Times, Aug. 13, 2022, <https://www.nytimes.com/2022/08/13/us/politics/trump-classified-material-fbi.html> ("At least one lawyer for former President Donald J. Trump signed a written statement in June asserting that all material marked as classified and held in boxes in a storage area at Mr. Trump's Mar-a-Lago residence and club had been returned to the government, four people with knowledge of the document said."); Evan Perez, Kaitlan Collins and Sara Murray, "Trump lawyer claimed no classified material was at Mar-a-Lago in signed letter to Justice Department," CNN, Aug. 13, 2022, <https://www.cnn.com/2022/08/13/politics/trump-attorney-classified-documents-mar-a-lago-search/index.html>; Alex Leary, Aruna Viswanatha and Sadie Gurman, "FBI Quest for Trump Documents Started With Breezy Chats, Tour of a Crowded Closet," Wall Street Journal, Aug. 10, 2022, <https://www.wsj.com/articles/fbi-quest-for-trump-documents-started-with-breezy-chats-tour-of-a-crowded-closet-11660169349>.

<sup>7</sup> Efforts to unseal the affidavit are discussed below.

<sup>8</sup> The Mar-a-Lago compound is a private club which receives club members and their guests during most hours of the day. The Trump family occupies residential space within the compound. Several incidents have been reported raising concerns about foreign intelligence services attempting to penetrate the compound. Because of its status as a private club, Trump has resisted efforts by the U.S. Secret Service to perform the security and screening functions it usually performs at the residences of Presidents and former Presidents. Steve Holland and Karen Freifeld, "Trump's Mar-a-Lago resort posed rare security challenges, experts say," Reuters, Aug. 13, 2022, <https://www.reuters.com/legal/trumps-mar-a-lago-security-nightmare-that-housed-classified-documents-2022-08-13/> ("It's a nightmarish environment for a careful handling of highly classified information," said a former U.S. intelligence officer. "It's just a nightmare."); Ali Soufan, "Mar-a-Lago is a Counterintelligence Nightmare," Washington Post, Apr. 10, 2019, [www.washingtonpost.com/opinions/mar-a-lago-is-a-counterintelligence-nightmare/2019/04/10/93cb0bfa-5ba9-11e9-a00e-050dc7b82693\\_story.html](http://www.washingtonpost.com/opinions/mar-a-lago-is-a-counterintelligence-nightmare/2019/04/10/93cb0bfa-5ba9-11e9-a00e-050dc7b82693_story.html). For instance, in November 2019, Yujing Zhang, a self-described Chinese businesswoman, in possession of highly sophisticated surveillance equipment, was apprehended attempting to attend an event at Mar-a-Lago; she was detained for over two years and then deported to China. U.S. DOJ Press Release, "Chinese National Sentenced to Prison for Entering the Restricted Grounds at Mar-a-Lago and Lying to U.S. Secret Service Agents," Nov. 26, 2019, <https://www.justice.gov/usao-sdfl/pr/chinese-national-sentenced-prison-entering-restricted-grounds-mar-lago-and-lying-us>; "Mar-a-Lago trespasser deported to China," Washington Times, Nov. 14, 2021, <https://www.washingtontimes.com/news/2021/nov/14/yujing-zhang-mar-lago-trespasser-deported-china/>.

States, many of which were classified (or otherwise protected national security documents) which should be committed to the custody of the National Archives. The DOJ appears to have represented that it has specific evidence showing these documents were in former President Trump's possession, and that he, either directly or through his attorney, had made misleading or false statements about them. The DOJ's application cited three criminal statutes in support and suggested that urgent action was necessary because of a risk of removal, destruction or unlawful use of the documents.<sup>9</sup> The federal magistrate judge to whom the application came, after review of the submission, determined that probable cause existed to support it and issued the search warrant.

On August 8, a team of several dozen FBI agents accompanied by DOJ attorneys and representatives of the National Archives executed the search warrant at Mar-a-Lago. The former President was in New York at the time, but he was notified of the execution of the warrant and two of his attorneys, Lindsey Halligan (a member of the Florida bar) and Christina Bobb (a member of the California bar), were on hand. Bobb stated that the former President personally monitored the execution of the warrant from New York using the Mar-a-Lago security camera system.<sup>10</sup> The FBI delivered a copy of the search warrant to Bobb. After removing 11 sets of documents bearing classification markings together with photos, written notes and other items, for a total of 25 boxes, they also delivered two property receipts to Bobb, which she countersigned. The documents retrieved included documents marked as Top Secret/SCI, Top Secret, Secret and Confidential.<sup>11</sup>

Adhering to standard practices, the FBI and DOJ made no public statements concerning the execution of the warrant on that day. However, the former President, as is his right, elected to disclose the fact that it had occurred, issuing a statement through his political action committee:

These are dark times for our Nation, as my beautiful home, Mar-A-Lago in Palm Beach, Florida, is currently under siege, raided, and occupied by a large group of FBI agents. Nothing like this has ever happened to a President of the United States before. After working and cooperating with the relevant Government agencies, this

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<sup>9</sup> The three statutes cited in the warrant are: 18 U.S.C. § 793: Gathering, transmitting or losing defense information, which carries a penalty of up to 10 years in prison; 18 U.S.C. §§ 2071: Concealment, removal, or mutilation generally, which carries a penalty of up to three years in prison and disqualification from holding office; and 18 U.S.C. §§ 1519: Destruction, alteration, or falsification of records in Federal investigations and bankruptcy, which carries a penalty of up to 20 years in prison.

<sup>10</sup> Maroosha Muzaffar, "Trump and family watched FBI Mar-a-Lago search on security cameras from New York, his attorney reveals," Yahoo News, Aug. 12, 2022, <https://news.yahoo.com/trump-family-watched-fbi-mar-085136055.html>.

<sup>11</sup> A good description of the significance and use of these classifications can be found in Michelle D. Christensen, "Security Clearance Process: Answers to Frequently Asked Questions," Congressional Research Service, Oct. 7, 2016, <https://sgp.fas.org/crs/secret/R43216.pdf>. It should also be noted that documents marked as Top Secret/SCI can generally only be viewed in a Sensitive Compartmented Information Facility (SCIF), which is "an area, group of rooms, buildings, or installation certified and accredited as meeting Director of national Intelligence security standards for the processing, storage, and /or discussion of sensitive compartmented information (SCI)." [https://csrc.nist.gov/glossary/term/sensitive\\_compartmented\\_information\\_facility](https://csrc.nist.gov/glossary/term/sensitive_compartmented_information_facility).

unannounced raid on my home was not necessary or appropriate. It is prosecutorial misconduct, the weaponization of the Justice System, and an attack by Radical Left Democrats who desperately don't want me to run for President in 2024, especially based on recent polls, and who will likewise do anything to stop Republicans and Conservatives in the upcoming Midterm Elections. Such an assault could only take place in broken, Third-World Countries.<sup>12</sup>

In the hours that followed, two attorneys for the former President appeared on various media outlets, elaborating on his announcement. For example:

- Attorney Alina Habba (a member of the New York, New Jersey and Connecticut bars) appeared on Fox News on August 9 stating, “Quite honestly, I’m concerned that they [the FBI] may have planted something. At this point, who knows.”<sup>13</sup>
- On August 9, Bobb appeared on Real America’s Voice stating she didn’t “necessarily think that they [the FBI] would even go to the extent of” planting documents because “they just make stuff up and come up with whatever they want.” She said “[t]here’s just nothing there.”<sup>14</sup>
- On August 9, Habba appeared on Fox News stating that “my understanding from the attorneys on the ground is that they weren’t given the warrant, they were allowed to see it and it was taken back.”<sup>15</sup>
- On August 11, Halligan appeared on Fox News and, referencing prior document production by the former President, stated that there was “no issue with document compliance whatsoever.”<sup>16</sup>
- On August 12, Habba told a Real America’s Voice audience that she had advised former President Trump “if you would like me to resolve all your litigation, you should announce that you are not running for office, and all of this will stop.”<sup>17</sup>

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<sup>12</sup> Kevin Breuniger and Dan Mangan, “Trump says the FBI raided his Mar-a-Lago home,” CNBC, Aug. 8, 2022, <https://www.cnbc.com/2022/08/08/trump-says-fbi-raiding-his-mar-a-lago-home.html> (reproducing Trump statement).

<sup>13</sup> Interview with Alina Habba, Fox News, Aug. 9, 2022, <https://twitter.com/atrupar/status/1557156566167609346>.

<sup>14</sup> Elizabeth Elkind, “Trump attorney at Mar-a-Lago during raid says agents were ‘respectful’ but fears DOJ will push ‘bogus charges’, insists there is nothing criminal in documents and suggests FBI could have ‘planted’ evidence,” DailyMail.com, Aug. 9, 2022, <https://www.dailymail.co.uk/news/article-11096137/Trump-attorney-Christina-Bobb-raid-documents-FBI-evidence.html> (linking Christina Bobb’s interview with Real America’s Voice).

<sup>15</sup> Interview with Alina Habba, Fox News, Aug. 9, 2022, <https://twitter.com/jesseprimetime/status/1557145421037838338>.

<sup>16</sup> Interview with Jesse Watters, Fox News, Aug. 11, 2022, <https://www.youtube.com/watch?v=JxeO2EyMvsA>.

<sup>17</sup> Steve Gruber Interviews Alina Habba, Real America’s Voice, Aug. 12, 2022, at 6:29, <https://americasvoice.news/video/DFcc0EosWc6DPZ3/>.

- In a podcast interview with former Trump attorney Rudy Giuliani on August 12, Bobb stated that the affidavit underlying the search warrant had not been unsealed because “I’m not convinced there’s an informant” providing evidence based upon which the warrant could have been issued.<sup>18</sup> She also stated “everybody recognizes the FBI is not trustworthy.”<sup>19</sup>
- In an appearance on Fox News’ “The Ingraham Angle” on August 12, Bobb stated: “This is what the Democrats do. They don’t have any good reason for doing what they did. The pathetic presser that Merrick Garland held for three minutes was insufficient, so they had to create fear. Normally, they should come out with exactly what happened, and why, and explain themselves and if it was a good reason, they would have solid ground. They are not on solid ground. They had to come up with something that would potentially terrify the American public into freely giving up their constitutional freedoms.”<sup>20</sup>

No effort appears to have been made by these attorneys to correct the factually false claims surrounding the delivery of a copy of the warrant or of the property receipts to Bobb, as confirmed by Attorney General Garland and the receipts themselves.<sup>21</sup> Likewise, no effort appears to have been made to correct the record regarding the former President’s handling of prior document requests which, according to NARA, required efforts “throughout 2021” to secure from the former President what turned out to be 700 pages of classified documents, followed by efforts by former President Trump’s lawyers to keep NARA from sharing those documents with the FBI despite significant national security concerns.<sup>22</sup> Bobb and Habba both noted that the former President was being represented by other, unidentified, lawyers in Washington, D.C., in his dealings with the FBI and National Archives, but Bobb was present for at least one of the meetings with DOJ and National Archive representatives at Mar-a-Lago. The lawyers should have taken care<sup>23</sup> to have

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<sup>18</sup> Rudy Giuliani’s Common Sense, “We are the FBI and we can do what we want: Inside the Trump Raid,” interview with Christina Bobb, Aug. 12, 2022, <https://podcasts.apple.com/us/podcast/we-are-the-fbi-and-we-can-do-what-we-want-inside/id1505388703?i=1000575879724>.

<sup>19</sup> *Id.*

<sup>20</sup> Interview with Christina Bobb, Fox News, Aug. 12, 2022, <https://www.foxnews.com/media/trump-lawyer-slams-ag-merrick-garlands-press-conference-fbi-raid-mar-a-lago-pathetic>.

<sup>21</sup> A copy of the warrant is available at <https://s.wsj.net/public/resources/documents/search-warrant-1100-S-Ocean-Bldv-08-12-2022.pdf>.

<sup>22</sup> See n. 5, *supra*; Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany and Rosalind S. Helderman, “FBI’s Mar-a-Lago Search Followed Months of Resistance, Delay by Trump,” Washington Post, Aug. 23, 2022, <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>23</sup> Trump spokesman Taylor Budowich identified former federal prosecutors Evan Corcoran and James Trusty as his lead counsel in dealings with the Government on document return requests. Isaac Arnsdorf, Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany and Rosalind S. Helderman, “Trump is rushing to hire seasoned lawyers — but he keeps hearing ‘No,’” Washington Post, Aug. 16, 2022, <https://www.washingtonpost.com/national-security/2022/08/16/trump-lawyers-fbi-raid/>. These lawyers have not engaged the press on the subject, as is their prerogative.

informed themselves more thoroughly about the history of relevant events before offering public comment.<sup>24</sup>

### **III. FURTHER COMMENTARY AMPLIFYING STATEMENTS BY THE FORMER PRESIDENT AND HIS LAWYERS: THREATS AGAINST THE FBI AND MAGISTRATE JUDGE REINHART**

Unsurprisingly, a great deal of the commentary in various media outlets and on social media echoed the claims of former President Trump and his attorneys, adding the use of heated and often violent rhetoric, and similar claims were picked up by current and former senior public officials and other allies of the former President. Also not surprisingly, these comments often stoked anger based on the supposed procedural irregularities and dishonest and offensive conduct described by the former President's attorneys, moving quickly to violent language. For instance, statements called for the FBI and DOJ to be "choked," compared FBI agents to "wolves," talked about "war" or "civil war," named and denigrated the judge who issued the search warrant, suggested an intention to murder the former President, and said that the FBI "must be destroyed."<sup>25</sup>

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<sup>24</sup> These remarks are not intended nor should they be understood as a review of – or opinion on – the conduct of these attorneys under applicable standards, rules or codes of professional conduct or responsibility, or other applicable bar or court ethics rules. Any such review and determination can come only pursuant to applicable procedures of the bar, the courts, and other oversight authorities.

<sup>25</sup> House Minority Leader Kevin McCarthy (R-CA) wrote "The Department of Justice has reached an intolerable state of weaponized politicization." Zoe Richards, "Republicans lash out at Justice Department after FBI searches Trump's Mar-a-Lago home," NBC News, Aug. 8, 2022, <https://www.nbcnews.com/politics/donald-trump/republicans-lash-justice-department-fbi-searches-trumps-mar-lago-home-rcna42139>; House Minority Whip Steve Scalise (R-LA) stated on Fox News in response to questions about statements "demonizing" the FBI since the search that "it concerns everybody if you see some agents go rogue and you see an agency that doesn't have the right checks and balances at the top" and that "they're weaponizing other agencies." Interview with Steve Scalise, Fox News, Aug 11, 2022, <https://twitter.com/atrupar/status/1557746258646863872>.

Senator Marco Rubio (R-FL) (a member of the Florida bar) said, "Using government power to persecute political opponents is something we have seen many times from 3<sup>rd</sup> world Marxist dictatorships. But never in America." Marco Rubio (@marcorubio), Twitter (Aug. 8, 2022, 8:07 PM), <https://twitter.com/marcorubio/status/1556794178792824832>. He subsequently said that "the next step in this process is going to be that people who are supporters of Donald Trump or just conservatives complaining about this are going to begin to get harassed, are going to begin to get labeled as potential insurrectionists and are going to begin to get harassed by law enforcement.," and then proceeded to attack the judge who issued the warrant by name stating: "They found some Obama donor judge, not even a judge, a magistrate, to write and give them the search warrant." Interview with Marco Rubio, Fox News, Aug 10, 2022, <https://www.youtube.com/watch?v=DBOGLjgLTyE>.

Senator Ted Cruz (R-TX) (a member of the Texas bar) called the search "corrupt & an abuse of power." Ted Cruz (@tedcruz), Twitter (Aug. 8, 2022, 11:13 PM), <https://twitter.com/tedcruz/status/1556840953511550976>. Governor Ron DeSantis (R-FL) (a member of the Florida bar) claimed, "The raid of [Mar-a-Lago] is another escalation in the weaponization of federal agencies against the Regime's political opponents." Ron DeSantis (@RonDeSantisFL), Twitter (Aug. 8, 2022, 8:43 PM), <https://twitter.com/rondesantisfl/status/1556803433939755010>.

Rep. Lauren Boebert (R-CO) said of the FBI's search, "This is gestapo crap, and it will not stand" and "the Justice Department must be cleaned out." Lauren Boebert (@laurenboebert), Twitter (Aug. 9, 2022, 12:49 PM), [https://twitter.com/BreitbartNews/status/1557046451485741057?ext=HHwWgsC4-e\\_f3psrAAAA](https://twitter.com/BreitbartNews/status/1557046451485741057?ext=HHwWgsC4-e_f3psrAAAA).

Rep. Marjorie Taylor Greene (R-GA) insisted, "This is the rogue behavior of communist countries, NOT the United States of America!!! These are the type of things that happen in countries during civil war." Marjorie Taylor Greene (@RepMTG), Twitter (Aug. 8, 2022, 7:25 PM),

In the outrage that followed, law enforcement officers and the federal judge who issued the warrant were frequently singled out for abusive and violent comments. The judge, and later two of the senior agents involved in the execution of the warrant, were identified in social media.<sup>26</sup>

Following numerous statements by Trump’s lawyers, by Trump and by senior Republican officials impugning the DOJ and the FBI, Attorney General Garland made a brief statement on August 11, 2022: “Since I became Attorney General, I have made clear that the Department of

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[https://twitter.com/RepMTG/status/1556783786976845824?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwt](https://twitter.com/RepMTG/status/1556783786976845824?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwt). She also called for defunding the FBI and said Republicans, if they seize control of the House, should take on “the enemy within.” Marjorie Taylor Greene (@RepMTG), Twitter (Aug. 8, 2022, 8:44 PM), <https://twitter.com/RepMTG/status/1556984844072140802>.

Rep. Barry Moore (R-AL) said “Every single American should be outraged. No perceived enemy of this lawless administration—whether a concerned parent deemed a ‘domestic terrorist,’ a struggling taxpayer, or a political rival—is safe from the full force of the federal gov’t being used to persecute them.” Barry Moore (@RepBarryMoore), Twitter (Aug. 8, 2022, 9:35 PM), [https://twitter.com/RepBarryMoore/status/1556816424257175552?ref\\_src=twsrc%5Etfw](https://twitter.com/RepBarryMoore/status/1556816424257175552?ref_src=twsrc%5Etfw).

“Failure is not an option,” Rep. Paul Gosar (R-AZ) tweeted. “We must destroy the FBI. We must save America. I stand with Donald J. Trump.” Paul Gosar (@RepGosar), Twitter (Aug. 8, 2022, 9:57 PM), <https://twitter.com/RepGosar/status/1556821907726630915>.

Former senior White House advisor Bannon said we are at a “political and ideological war,” called the FBI “the Gestapo” and said, “We need to use the appropriations process to choke down the FBI and choke down the Justice Department.” Interview with Steve Bannon, Fox News, Aug. 9, 2022, <https://www.youtube.com/watch?v=XU6SnVa0zA>.

Former Assistant Secretary of Health and Human Services Michael Caputo, said, “With this militant raid on President Trump’s home, we have become Russia. The FBI is the KGB.” Brandon Gillespie, “Former Trump official Michael Caputo blasts FBI’s Mar-a-Lago raid: ‘Full-blown constitutional crisis,’” Fox News, Aug. 8, 2022, <https://www.foxnews.com/politics/former-trump-official-michael-caputo-fbi-mar-a-lago-raid-constitutional-crisis>.

Former Speaker of the House Newt Gingrich echoed suggestions by Trump’s lawyers that the FBI might have planted evidence against Trump. When asked by Charlie Kirk, a talk-show host, why the FBI would do this, Gingrich said, “We’d be better off to think of these people as wolves”—wolves who “want to eat you, wolves who want to dominate.” According to Gingrich, the FBI has “been totally corrupted and now could actually be called the American Stasi because its behavior is more like the German secret police” and “declared war on the American people at such a level and with such total dishonesty.” We are seeing “the ugly face of a tyranny” And there “is no law here.” Interview with Newt Gingrich, Charlie Kirk Show, Aug. 9, 2022, <https://omny.fm/shows/the-charlie-kirk-show/mar-a-lago-raided-how-to-respond-when-your-enemies>; “Charlie Kirk and Newt Gingrich suggest the FBI planted evidence in Mar-a-Lago,” MediaMattersfor America, Aug. 9, 2022, <https://www.mediamatters.org/charlie-kirk/charlie-kirk-and-newt-gingrich-suggest-fbi-planted-evidence-mar-lago>.

Former New York City Police Commissioner Bernard Kerik, said he is worried that “Democrats might try to assassinate Donald Trump.” “This is the first time in my lifetime that I would say I am deathly afraid for Donald Trump. I would not put assassination behind these people.” Kipp Jones, “Bernard Kerik Says Democrats May Try to Orchestrate Trump’s ‘Assassination’ After FBI Raid,” Mediaite, Aug. 8, 2022, <https://www.mediaite.com/tv/bernard-kerik-says-democrats-may-try-to-orchestrate-trumps-assassination-after-fbi-raid/>.

*Source* for many of the above statements: Peter Wehner, “Now They’re Calling for Violence,” The Atlantic, Aug. 11, 2022, <https://www.theatlantic.com/ideas/archive/2022/08/trump-fbi-mar-a-lago-search-republican-reaction/671104/>.

<sup>26</sup> See discussion at Point V, *infra*.



Justice will speak through its court filings and its work. Just now, the Justice Department has filed a motion in the Southern District of Florida to unseal a search warrant and property receipt relating to a court-approved search that the FBI conducted earlier this week. That search was of premises located in Florida belonging to the former President. The Department did not make any public statements on the day of the search. The former President publicly confirmed the search that evening, as is his right. Copies of both the warrant and the FBI property receipt were provided on the day of the search to the former President’s counsel, who was on site during the search. The search warrant was authorized by a federal court upon the required finding of probable cause. The ‘property receipt’ is a document that federal law requires law enforcement agents to leave with the property owner.”<sup>27</sup> He added: “let me address recent unfounded attacks on the professionalism of the FBI and Justice Department agents and prosecutors. I will not stand by silently when their integrity is unfairly attacked. The men and women of the FBI and the Justice Department are dedicated, patriotic public servants. Every day, they protect the American people from violent crime, terrorism, and other threats to their safety, while safeguarding our civil rights. They do so at great personal sacrifice and risk to themselves. I am honored to work alongside them.”<sup>28</sup>

#### IV. MOTIONS TO UNSEAL THE DOJ FILINGS

The DOJ’s motion to unseal the search warrant and property receipts was granted on August 12, 2022 after the former President announced he would not object. Indeed, even before these documents were unsealed, unredacted copies were furnished to Breitbart.com and the Wall Street Journal apparently so that these publications could lead media reporting.<sup>29</sup>

After the search warrant was executed, a significant number of media and public interest organizations applied to the court to have the affidavit supporting the search warrant released as well. In support of their unsealing motion, the proposed intervenors (The Washington Post, CNN, NBC News and The Scripps Company) sought all search warrant records, including supporting affidavits and motions to seal, urging that the “tremendous public interest” in the search of a former President’s residence “outweighs any purported interest” in keeping the documents secret.<sup>30</sup> The

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<sup>27</sup> Attorney General Merrick Garland Delivers Remarks, Aug. 11, 2022, <https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks>.

<sup>28</sup> Id.

<sup>29</sup> Alex Leary, Aruna Viswanatha and Sadie Gurman, “FBI Recovered 11 Sets of Classified Documents in Trump Search, Inventory Shows,” Wall Street Journal, Aug. 12, 2022, <https://www.wsj.com/articles/fbi-recovered-eleven-sets-of-classified-documents-in-trump-search-inventory-shows-11660324501> (reporting, in advance of the unsealing of the search warrant, on its contents and noting that the Journal had been allowed to review the documents); Breitbart.com, Aug. 12, 2022, <https://www.breitbart.com/politics/2022/08/12/exclusive-warrant-shows-doj-fbi-waited-several-days-after-judge-approved-to-conduct-mar-a-lago-raid/> (publishing an unredacted copy of the search warrant and receipts).

<sup>30</sup> Motion to Intervene, For Access to Search Warrant Records and in Support of the United States’ Partial Motion to Unseal (Unsealing Motion), United States v. Sealed Search Warrant, No. 9:22-mj-08332-BER (S.D. Fla. 8/11/22). (Id. at 2.) The movants maintained that they had been reporting on this extraordinary event and wished to continue to inform the public about “the government’s unprecedented actions and motivations.” (Id. at 3.) Their legal arguments were based upon the public’s presumptive right of access to court records, and the Government’s acknowledgement of that right in the Attorney General’s statement. They noted that disclosure can serve as a curb on excesses by prosecutors or courts, and that their own motivation was solely to inform the public of a historically significant event, and not for any illegitimate purpose. They observed that the former President had already

movants urged that narrow redactions would satisfy any ongoing law enforcement interests and requested a hearing before the court. The former President neither joined in the motion of the proposed intervenors nor filed his own unsealing motion with the court.

The Government responded arguing that there was a need “to protect the integrity of an ongoing law enforcement investigation that implicates national security.”<sup>31</sup> The Government averred that disclosure at this time would “cause significant and irreparable damage to this ongoing criminal investigation,” and would be likely to furnish a “roadmap” of the probable course of the investigation in a manner likely to jeopardize future investigations.<sup>32</sup> It further claimed that the affidavit contained highly sensitive witness information, that revealing the identity of witnesses could chill future cooperation by both the witnesses in this case and in other high-profile investigations, and because highly classified materials were involved, the potential for harm from premature disclosure was amplified. In reply, the proposed intervenors again noted the historical significance of the events and that the former President had not objected to the unsealing, and in fact had issued a statement on social media calling for the immediate release of the unredacted affidavit.<sup>33</sup>

On August 18, 2022, the court held a hearing on the matter and heard argument from the media intervenors and from the Government. Although counsel for the former President was present, she did not seek to intervene and offered no argument. In ruling orally from the bench at the conclusion of the hearing, the court stated that it was “very important” that the public have as “much information” as possible about the unprecedented search.<sup>34</sup> He added that “This is going

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disclosed the search warrant execution and that the inquiry related to the recovery of Presidential records and the possible violation of the Presidential Records Act as to classified material, obviating any concerns for his privacy interests. The movants claimed that disclosure would shed light on the Government’s legal basis for its action, including whether or not it was based on credible information.

<sup>31</sup> United States’ Omnibus Response to Motions to Unseal (Government Response), *United States v. Sealed Search Warrant*, No. 9:22-mj-08332-BER (S.D. Fla. Aug. 15, 2022), at 1. The Government stated that it was not opposed to unsealing various cover sheets and other documents which had been previously been redacted, and referenced its earlier motion to unseal the search warrant and return, but that it opposed unsealing of the supporting affidavit information. The Government initially noted that there was no right, even under the First Amendment right to public access, to the unsealing of search warrant materials prior to the bringing of charges. (*Id.* at 4.) The prosecution further argued that a compelling governmental interest outweighed such right, because the criminal investigation was ongoing, disclosure could result in the destruction of evidence and alter the trajectory of the investigation by undermining its ability to gather evidence, and that public disclosure at this juncture of the case could have devastating consequences for the individuals mentioned in the affidavit. (*Id.*) The Government explained that it had considered redactions, but that they would have to be so extensive as to render the remaining text “devoid of meaningful content,” and would not serve the public interest. (*Id.* at 1, n. 1.) Finally, the Government noted that where affidavits have been unsealed, it has typically been after indictments have been filed, and has not occurred merely days after the execution of the search warrant. (*Id.* at 11.)

<sup>32</sup> *Id.* at 8.

<sup>33</sup> Consolidated Reply of All Media Intervenors In Further Support of Motion For Access to All Search Warrant Records, *United States v. Sealed Search Warrant*, No. 9:22-mj-08332-BER (S.D. Fla. 8/17/22), citing <https://truthsocial.com/@realDonaldTrump/108830529259405266>.

<sup>34</sup> Patricia Mazzei and Alan Feuer, “Judge May Release Affidavit in Trump Search, But Only after Redaction,” *New York Times*, Aug. 18, 2022, <https://www.nytimes.com/2022/08/18/us/politics/trump-fbi-affidavit-warrant.html?smid=url-share>.

to be a considered, careful process.<sup>35</sup> The judge explained that “I’m not prepared to find the affidavit should be fully sealed. I believe based on my initial careful review of the affidavit many times that there are portions that could preemptively be unsealed.”<sup>36</sup> The court indicated that it would not rule on the unsealing motion until it had had an opportunity to review the government’s proposed redactions, and that its ruling would be stayed pending any appeal.<sup>37</sup>

On August 22, 2022, the court issued a written order memorializing its oral rulings.<sup>38</sup> The court rejected both the intervenors' motion for complete unsealing and the Government's argument for complete sealing. The court explained: “I cannot say at this point that partial redactions will be so extensive that they will result in a meaningless disclosure, but I may ultimately reach that conclusion after hearing further from the Government.”<sup>39</sup>

## V. THREATS AND ACTS OF VIOLENCE

On August 11, a vocal supporter of the former President attempted to force his way into the FBI offices in Cincinnati, Ohio, firing a nail gun and brandishing an AR-15 assault rifle. His actions led to a blockade of the area and stopping traffic on near-by highways. The assailant was subsequently shot and killed in a gun battle with Ohio law enforcement officers. The assailant had made social media posts before his action expressing fury against the FBI over the execution of the search warrant at Mar-a-Lago and advocating violent action against the FBI.<sup>40</sup>

These incendiary statements were by no means an isolated occurrence. In the days immediately following the search and the media storm whipped up with claims of false conduct and improper behavior by FBI agents, social media connected with the former President and his supporters was filled with threats of violence against FBI agents, prosecutors and the judge. A former Trump Administration aide posted personal information about the FBI agents involved in the execution of the warrant to social media in order to intimidate the special agents and ensure

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<sup>35</sup> Id.

<sup>36</sup> Josh Dawsey and Perry Stein, “Judge Signals He’s Willing to Unseal Some of Mar-a-Lago Affidavit,” Washington Post, Aug. 18, 2022, <https://www.washingtonpost.com/national-security/2022/08/18/trump-mar-a-lago-affidavit/>.

<sup>37</sup> Id.

<sup>38</sup> Order on Motions to Unseal, In re: Sealed Search Warrant, No. 22-8332-BER (S.D. FLA. Aug. 22, 2022) (Aug. 22, 2022 Order).

<sup>39</sup> Id. at 12. On August 25, the day after this statement was published, the Government proposed a redacted version of the supporting affidavit, as per the August 22 Order. On August 26, the Court ordered that the affidavit as so redacted be released. The affidavit is available here: [https://www.documentcloud.org/documents/22267187-affidavit-mal?fbclid=IwAR3Dumw1h1Dx3bDJ2Hu5c6u0M0Uj3mfpOffiv4Nh0s\\_H50Uk5Nazj07nfrA](https://www.documentcloud.org/documents/22267187-affidavit-mal?fbclid=IwAR3Dumw1h1Dx3bDJ2Hu5c6u0M0Uj3mfpOffiv4Nh0s_H50Uk5Nazj07nfrA). The Government's Ex Parte Memorandum of Law Regarding Proposed Redactions is available here: <https://s3.documentcloud.org/documents/22267147/notice-of-filing-of-redacted-memorandum.pdf>.

<sup>40</sup> Drew Harwell and Meryl Kornfield, “FBI attacker was prolific contributor to Trump’s Truth Social website,” Washington Post, Aug. 12, 2022; Will Carless, “Kill FBI on sight’: Truth Social reveals the final days of the Cincinnati attacker,” USA Today, Aug. 13, 2022, <https://www.usatoday.com/story/news/nation/2022/08/13/ricky-shiffer-trump-truth-social-fbi-attack/10312278002/?gnt-cfr=1>.

that they don't "get a good night's sleep for the rest of 2022."<sup>41</sup> Comments advocating acts of violence such as "helicoptering" against the FBI agents involved and the federal judge proliferated on Trump's proprietary Truth Social media network, the dominant rubric being calls for "civil war."<sup>42</sup> Armed supporters of the former President surrounded the FBI headquarters in Phoenix, Arizona.<sup>43</sup> The FBI and Department of Homeland Security (DHS) were prompted by these developments to issue a joint intelligence bulletin on August 12, shared with state, local and tribal law enforcement offices: "the FBI and DHS have observed an increase in violent threats posted on social media against federal officials and facilities, including a threat to place a so-called dirty bomb in front of FBI Headquarters and issuing general calls for 'civil war' and 'armed rebellion.'" The bulletin continued: "Since 8 August 2022, the FBI and DHS have identified multiple articulated threats and calls for the targeted killing of judicial, law enforcement, and government officials associated with the Palm Beach search, including the federal judge who approved the Palm Beach search warrant. The FBI and DHS have also observed the personal identifying information of possible targets of violence, such as home addresses and identification of family members, disseminated online as additional targets."<sup>44</sup>

Magistrate Judge Bruce Reinhart, who found probable cause and signed the search warrant, has faced a barrage of unfounded criticism, character assassination, anti-Semitic attacks and threats of violence. The Palm Beach Police Department has said it is aware of specific threats of violence against the judge and is working with the U.S. Marshals Service to ensure his safety. The Anti-Defamation League's Center for Extremism says it is "monitoring the increased level of threat language generally, and also towards this specific judge."<sup>45</sup> Media accounts falsely linked Reinhart to the criminal activities of widely-known and convicted sexual predator Jeffrey Epstein,

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<sup>41</sup> Zachary Patrizzo, "Ex-Trump Aide Sics MAGA Lackeys on Alleged FBI Agents' Families," The Daily Beast, Aug. 13, 2022, <https://www.thedailybeast.com/ex-trump-aide-sics-maga-lackeys-on-alleged-fbi-agents-families>. The post was later taken down.

<sup>42</sup> Ben Collins and Ryan J. Reilly, "After Mar-a-Lago search, users on pro-Trump forums agitate for 'civil war' — including a Jan. 6 rioter," NBC News, Aug. 9, 2022, <https://www.nbcnews.com/politics/justice-department/mar-lago-search-users-trump-forums-agitate-civil-war-jan-6-rioter-rcna42148>; Alan Feuer, "As Right-Wing Rhetoric Escalates, So Do Threats and Violence," New York Times, Aug. 13, 2022, <https://www.nytimes.com/2022/08/13/nyregion/right-wing-rhetoric-threats-violence.html>; Jacob Rosen and Nicole Sganga, "Online violent extremist rhetoric soars after Mar-a-Lago search," CBS News, Aug. 12, 2022, <https://www.cbsnews.com/news/online-violent-extremist-rhetoric-soars-after-mar-a-lago-search/> (collecting close parallels between statements of Republican leaders and advocacy of violence by Trump supporters). On August 15, Adam Bies was arrested in Pennsylvania and charged with "influencing, impeding or retaliating against a federal law enforcement official" after he made threatening posts against FBI agents on Gab social media. Ryan J. Reilly, "Pennsylvania man arrested and accused of threats against FBI after Mar-a-Lago search," NBC News, Aug. 15, 2022, <https://www.nbcnews.com/politics/justice-department/pennsylvania-man-arrested-threats-fbi-mar-lago-search-rcna43209>.

<sup>43</sup> "Armed Trump Supporters Gather at Phoenix FBI Office," Politico, Aug. 14, 2022, <https://www.politico.com/video/2022/08/14/armed-trump-supporters-gather-at-phoenix-fbi-office-668392>.

<sup>44</sup> Nicole Sganga, "FBI and DHS warn of increased threats to law enforcement and government officials after Mar-a-Lago search," CBS News, Aug. 15, 2022, <https://www.cbsnews.com/news/mar-a-lago-search-fbi-threat-law-enforcement/>.

<sup>45</sup> Matt Dixon, "Florida judge who approved FBI search of Mar-a-Lago faces barrage of antisemitic online attacks," Politico, Aug. 13, 2022, <https://www.politico.com/news/2022/08/12/florida-judge-fbi-search-of-mar-a-lago-anti-semitic-attacks-00051489>.

and Fox News broadcast a doctored image in which Reinhart's face was photo-shopped over Epstein's in a picture in which Ghislaine Maxwell was massaging his feet in a setting suggesting sexual intimacy.<sup>46</sup>

## VI. APPLICABLE LEGAL PRINCIPLES AND CALL TO ACTION

The City Bar urges those involved in this controversy, and particularly the lawyers, to dial down the tone of their rhetoric, confirm all facts before issuing public statements which are reasonably likely to incite violent action, and consider the damage caused to the rule of law by allowing false claims of misconduct to persist against law enforcement officers, prosecutors, and judges unabated.

### Conclusions Drawn from a Review of the Search Warrant Process

- A search warrant issued in a procedurally proper fashion benefits from a presumption of regularity. This is the case, for instance, when an affidavit resting upon the information furnished by a confidential informant claiming a basis of knowledge of a crime is shown to be reliable. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). Counsel for former President Trump have so far offered no reason to believe that the two prongs of *Aguilar-Spinelli* are not met; moreover, the property receipt suggests that the information contained in the application was materially correct.<sup>47</sup> In any event, the former President and others affected by the warrant remain free to challenge the warrant and its execution through appropriate legal process.<sup>48</sup>
- Although the issuance of a search warrant for a former President is historically unprecedented, the full timeline in this case suggests that the DOJ and FBI followed established procedures at every step, seeking to use the least intrusive means available to secure return of highly sensitive documents they believed to be the property of the United States. They first engaged in amicable conversation, then turned to issuance of a subpoena for the documents when they concluded that not everything had been

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<sup>46</sup> Maya Yang, "Fox News airs false photo of Trump search judge with Ghislaine Maxwell," The Guardian, Aug. 12, 2022, <https://www.theguardian.com/media/2022/aug/12/fox-news-fake-photo-judge-trump-search-warrant-ghislaine-maxwell>. While a criminal defense lawyer in private practice, Bruce Reinhart represented in court proceedings some clients who had been linked to the illicit activities of Epstein. Gary Fineout, "Judge Who Approved FBI's Mar-a-Lago search Represented clients linked to Jeffrey Epstein," Politico, Aug. 9, 2022, <https://www.politico.com/news/2022/08/09/judge-mar-a-lago-epstein-00050739>.

<sup>47</sup> In its August 22, 2022 Order, the court stated: "I was-and am-satisfied that the facts sworn by the affiant are reliable." (Aug. 22, 2022 Order, at 12.)

<sup>48</sup> On August 22, 2022, the former President filed a Motion For Judicial Oversight And Additional Relief, which seeks an order that: (a) appoints a Special Master; (b) enjoins further review of seized materials by the Government until a Special Master is appointed; (c) requires the Government to provide a more detailed Receipt for Property; and (d) requires the Government to return any item seized that was not within the scope of the search warrant. Polantz, Collins and Sneed, "Trump's legal team asks for 'special master' to go through Mar-a-Lago evidence and determine if some should be returned," CNN, Aug. 22, 2022, <https://www.cnn.com/2022/08/22/politics/donald-trump-special-master-request/index.html>.

returned. An attorney for Trump appears to have given written confirmation that the subpoena had been complied with. A search warrant was sought only after the Government obtained information that it and a federal judge deemed credible that the subpoena had not, in fact, been complied with and that there was cause to believe that the documents were at risk of being destroyed or used improperly.<sup>49</sup>

### **The Responsibilities of Lawyers**

- Attorneys are generally free to turn to public media to explain the legal position of their clients. They are free to note any substantive or procedural grievance their client has concerning the conduct of law enforcement officers, prosecutors, and judges. They should not, however, make claims of wrongdoing against officers of the court for which they have no factual basis, or which they know to be incorrect.<sup>50</sup>
- Particularly when making public statements in a highly charged environment of public interest, attorneys should not characterize the judicial processes or judicial officers with comments they know to be demonstrably misleading or palpably false. If they do make statements that are later shown (or known) to be false or misleading, they should correct them at the earliest possible moment, taking care to ensure that the correction reaches the same audience as the original false or misleading statement.
- The physical safety and integrity of judicial officers must be held sacrosanct. Attorneys confronted with advocacy of violence against judicial officers should not remain silent in the face of such arguments. They are bound by their oath to uphold the Constitution and the Rule of Law, and that bears directly on threats of violence against judicial officers.

### **Possible Disclosure of the Affidavit Underlying the Search Warrant**

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<sup>49</sup> The City Bar takes no position on the legality of the search warrant or its execution, or on the appropriateness of the actions of the DOJ and FBI.

<sup>50</sup> With elections on the horizon, this guardrail is even more urgent. As we noted in our “Call to American Lawyers to Support the Rule of Law” in December 2020: “Prompt and visible action by our profession is necessary because lawyers have been prominently involved in causing the damage to our community’s respect for law and our Constitutional government. We have all witnessed the extraordinary number of frivolous lawsuits attacking election results with entirely unsupported or outright false claims of systemic fraud, an apparently coordinated campaign that consciously sought to sow public suspicion of the democratic process itself despite the unprecedented level of public participation in the recent Presidential election.” <https://www.nycbar.org/media-listing/media/detail/calling-american-lawyers-to-action-support-the-rule-of-law>; In that same statement we said this: “As guardians of the rule of law, lawyers bear a unique duty to educate our fellow citizens on the foundational role of law in our constitutional democracy, a message we can convey both by our words and our deeds, not simply (or even primarily) in court, but in our advice to clients, in our public statements and in the myriad ways that lawyers contribute to our society by serving on boards of directors, assisting non-profit organizations or holding positions of leadership in communities across our nation.” See also “New York City Bar Association Statement on Lawyers’ and Public Officials’ Obligations During the Presidential Transition Period,” Nov. 2020, <https://www.nycbar.org/media-listing/media/detail/lawyers-and-public-officials-obligations-during-the-presidential-transition-period>.

- Media outlets and others have called for release of the affidavit based upon which the search warrant was issued. In the ordinary course, a supporting affidavit of this sort will become public only after it is clear that its release will not impede an ongoing investigation or subject any informant or source to unreasonable risk. All parties agree that these events are far different from the normal course of proceedings regarding disclosure of sealed search warrant materials in criminal cases. In this case, both the public interest in the justification for the search warrant and the DOJ's interest in protecting an ongoing criminal investigation, protecting witnesses and avoiding harm to national security appear to be far stronger than in typical cases. However, particularly in view of the former President's decision to make the probe public and his efforts to portray the entire matter as political, and given the extraordinary level of public interest in this matter, the City Bar believes that release of at least some further information, preferably in the form of a redacted version of the affidavit, may be a desirable outcome.

### **The Security and Safety of Judicial Officers**

- Members of both parties should take up and debate, in earnest, The Daniel Aderl Judicial Security and Privacy Act, which was unanimously reported out of the Senate Judiciary Committee in December 2021, and resolve any outstanding issues.<sup>51</sup> Among other things the bill calls for increased resources to be allocated to the U.S. Marshals Service, which is responsible for protecting federal judges. In a 2021 report, the DOJ's Office of the Inspector General reported an 81% increase over FY 2016 in threats to members of the judiciary. The report also noted that the U.S. Marshals Service lacks the staffing and resources necessary to adequately respond to rising threats.<sup>52</sup> The 2021 report, however, does not include state court judges, who are also experiencing increases in threats. The judge empaneling the Special Purpose Grand Jury in the Georgia election inquiry, for example, recently took the drastic step of issuing an order concerning certain security procedures in order to protect members of the grand jury.<sup>53</sup> This order came in the wake of, among other things, the torture and murder of a Wisconsin State Court Judge and the arrest of an armed individual near the home of Supreme Court Justice Brett Kavanaugh.<sup>54</sup> Adequate protections for the judiciary are

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<sup>51</sup> For a full description of the City Bar's recommendations, see Statement by New York City Bar Association President Susan J. Kohlmann, *The Disturbing Trend of Threats and Violence Against Judges and the Vital Importance of Judicial Security*, June 2022, <https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security>.

<sup>52</sup> DOJ OIG, *Audit of the U.S. Marshals Service Judicial Security Activities*, June 2021, [https://oig.justice.gov/sites/default/files/reports/21-083\\_0.pdf](https://oig.justice.gov/sites/default/files/reports/21-083_0.pdf); Sarah N. Lynch, "U.S. Federal Judges Faced Over 4500 Threats in 2021 Amid Rising Extremism," Reuters, Feb. 15, 2022, <https://www.reuters.com/world/us-us-judges-faced-over-4500-threats-2021-amid-rising-extremism-official-2022-02-14/>.

<sup>53</sup> "Grand Jury Provided for Special Security," *America's News*, Aug. 16, 2022, [https://www.youtube.com/watch?v=g3\\_I0ZtySCQ](https://www.youtube.com/watch?v=g3_I0ZtySCQ); a redacted copy of Judge McBurney's Aug. 15, 2022 order can be viewed here: <https://twitter.com/kyledcheney/status/1559288955299848192>.

<sup>54</sup> See New York City Bar Association Statement Condemning Assassination of Former Wisconsin Judge John Roemer and Calling for Greater State and Federal Judicial Security, June 2022, <https://www.nycbar.org/media-listing/media/detail/statement-condemning-assassination-of-former-wisconsin-judge-john-roemer-and-calling-for-greater-state-and-federal-judicial-security>; Statement by New York City Bar Association President Susan J.

required under Article III of the U.S. Constitution and under relevant international standards.<sup>55</sup>

August 24, 2022\*\*

Susan J. Kohlmann, President  
New York City Bar Association

Marcy L. Kahn, Chair  
Task Force on the Rule of Law

Christopher Pioch, Chair  
Task Force on the Independence of Lawyers and Judges

*\*The City Bar extends its appreciation to Rule of Law Task Force Student Member William Sangjun Kim (Cardozo Law School Class of 2023) for his research assistance in preparation of this statement.*

*\*\*Updated August 26, 2022 in order to reflect subsequent court activity; see n. 39.*

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Kohlmann, The Disturbing Trend of Threats and Violence Against Judges and the Vital Importance of Judicial Security, June 2022, <https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security>.

<sup>55</sup> The 1985 U.N. Basic Principles on the Independence of the Judiciary provide that judges be allowed to decide cases impartially “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,” and prohibit “inappropriate or unwarranted interference with the judicial process.” See U.N. Basic Principles on the Independence of the Judiciary (Gen. Ass. Res. 40/32 and 40/146) (1985).