**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**WEST PALM BEACH DIVISION**

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| UNITED STATES OF AMERICA,<br>vs.<br>DONALD J. TRUMP, *et al.*,<br>Defendants. | **Case No. 23-80101-CR**<br>**CANNON/REINHART** |

**PRESIDENT TRUMP'S RESPONSE TO THE COURT'S MARCH 18, 2024 ORDER**

President Donald J. Trump respectfully submits this response to the Court's March 18, 2024 Order regarding proposed jury instructions relating to Counts 1 through 32 of the Superseding Indictment. ECF No. 407. Attached as Exhibit A are proposed jury instructions addressing scenario (a) from the Court's Order, with annotations and additional sub-exhibits providing supporting legal authorities.[1] Attached as Exhibit B is a proposed verdict form relating to scenario (a), which uses Count 1 as an example for each of Counts 1 through 32. Scenario (b) from the Court's Order is addressed below in connection with President Trump's renewal of his pretrial motion to dismiss Counts 1 through 32 on vagueness grounds, and because the Court's correct statement of the law in scenario (b) means that Counts 1 through 32 fail to state an offense under Rule 12(b)(3)(iv).

This important exercise further illustrates that crafting instructions applying the Espionage Act in this case would require recourse to "judicial gloss" and other authorities not included in or

[1] President Trump reserves the right to submit supplemental and/or modified instructions relating to Counts 1 through 32, the other charges in the Superseding Indictment, additional defenses developed as the case proceeds, and any other issues, pursuant to Rule 30(a) and on a schedule set by the Court. President Trump further reserves the right to file objections to proposed jury instructions submitted by the Special Counsel's Office in response to the Court's March 18, 2024 Order, at an appropriate time prior to any potential trial in this case.

authorized by the statute, such as Executive Order 13526 and the Presidential Records Act ("PRA"). Therefore, as applied to President Trump, § 793(e) is unconstitutionally vague and "no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). We therefore renew President Trump's void-for-vagueness challenge, ECF No. 325, which the Court denied without prejudice on March 14, 2024, "to be raised as appropriate in connection with jury-instruction briefing and/or other appropriate motions," ECF No. 402.

Under *Davis*, neither an Article III court nor a jury can address the constitutional problems that we have outlined in prior submissions and at the March 14, 2024 hearing. To hold otherwise would be to "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges"—as well as to jurors—and to "leave people with no sure way to know what consequences will attach to their conduct." *Davis*, 139 S. Ct. at 2323. Here, "the role of courts under our Constitution is not to fashion a new, clearer law to take [§ 793(e)'s] place, but to treat the law as a nullity and invite Congress to try again." *Id.* That is a situation of Congress's own making due to the body's failure to address decades of judicial and public concern relating to obvious and unacceptable ambiguities in this statute. *See, e.g.*, Harold Edgar and Benno C. Schmidt, Jr., The Espionage Statutes and Publication of Defense Information, 73 COLUM. L. REV. 929, 998 (1973) (explaining that "key terms were formulated with hopeless imprecision, and as a consequence, the legislative materials indicate a basic and continuing congressional confusion about the ends sought to be achieved").

In addition to the fatal vagueness problem, the Court has correctly stated the law in scenario (b) of the March 18 Order. The Superseding Indictment alleges, and the Special Counsel's Office has elsewhere conceded, that President Trump "caused" the records at issue to be removed from the White House during the end of his term in Office. ECF No. 85 ¶¶ 4; *see also, e.g.*, ECF No.

277 at 3. Thus, it is undisputed, as stated in scenario (b), that this case involves "an outgoing president's decision to exclude what he/she considers to be personal records from presidential records transmitted to [NARA]," which "constitutes a president's categorization of those records as personal under the PRA." ECF No. 407 at 2. Based on the PRA, it is simply not the case—as a matter of law—that President Trump was "unauthorized" to possess the documents in question under § 793(e). There can be no appropriate jury instructions relating to factual issues in scenario (b) because that scenario forecloses prosecution of President Trump on Counts 1 through 32. The result is not, as the Special Counsel's Office has argued, an "implied[] repeal" of § 793(e) by the PRA. ECF No. 73 at 21. Rather, Counts 1 through 32 do not state offenses under these circumstances, and the Office cannot meet its burden of proof on those charges. Setting aside the vagueness problem, § 793(e) remains on the books, but it does not prohibit the conduct alleged by the Office against President Trump.

Specifically, under *Judicial Watch*, backed by decades of practice by NARA under the PRA, and consistent with the history of former Presidents and government officials retaining classified records when they leave office, "an outgoing president's decision to exclude what he/she considers to be personal records from presidential records transmitted to [NARA] constitutes a president's categorization of those records as personal under the PRA." ECF No. 407 at 2; *see also* 44 U.S.C. § 2203(f) (mandating that, "[d]uring a President's term of office," "[t]he President shall remain exclusively responsible for custody, control, and access to . . . Presidential records"); *Judicial Watch, Inc. v. NARA*, 845 F. Supp. 2d 288, 301 (D.D.C. 2012) ("[T]he PRA does not confer any mandatory or even discretionary authority on the Archivist to classify records.").

"Neither a court nor a jury is permitted to make or review such a categorization decision" due to, *inter alia*, the separation-of-powers concerns such review would present. ECF No. 407 at

2; *see also Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) ("*Armstrong I*") ("Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations."); *CREW v. Cheney*, 593 F. Supp. 2d 194, 198 (D.D.C. 2009) (reasoning that Congress "limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions").

"[C]ourts may review *guidelines* outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records." *Armstrong v. Exec. Off. of the President, Off. of Admin.*, 1 F.3d 1274, 1294 (D.C. Cir. 1993) ("*Armstrong II*") (emphasis added); *see also Cheney*, 593 F. Supp. 2d at 217 (considering judicial review of "*policies and guidelines* that exclude from the reach of the PRA all but a narrow category" of Vice Presidential Records (emphasis added)). In *American Historical Association v. Peterson*, for example, the court, in a civil case, reviewed an agreement between NARA and the Bush Administration that, in effect, created the types of "policies" and "guidelines" discussed in *Armstrong II* and *Cheney*. 876 F. Supp. 1300, 1314 (D.D.C. 1995) (considering judicial review of agreement that "on its face constitutes an opting out of the provisions of the PRA governing the Archivist's disposal of Presidential records following a term of office," which "are distinct from those that govern disposal of Presidential records by an incumbent President"). *Peterson* held that "this matter is subject to judicial review because the *Archivist's compliance* with the PRA is reviewable." *Id.* at 1313 (emphasis added).

However, whereas *Peterson*, *Cheney*, and *Armstrong II* involved guidelines and policy-level applications of the PRA, *Judicial Watch* involved the type of document-specific PRA categorization issue that is presented in this case. In that context, the *Judicial Watch* court

concluded that "a close reading of the *Armstrong II* decision suggests that the limited judicial review authorized by the D.C. Circuit left untouched that portion of *Armstrong I* that gave the President unfettered control over his own documents." *Judicial Watch*, 845 F. Supp. 2d at 297; *see also id.* at 298 (noting "that the D.C. Circuit has not yet blessed" *Peterson*). To the extent *Armstrong II* authorized anything, it was a civil proceeding "to review guidelines outlining what is, and what is not, a 'presidential record' under the terms of the PRA." 1 F.3d at 1290. The D.C. Circuit was clear that such civil review was authorized "for the limited purpose of ensuring that they do not encompass within their operational definition of presidential records materials properly subject to the FOIA." *Id.*

The Biden Administration and NARA never attempted to obtain such civil review, preferring instead to weaponize DOJ and the Special Counsel's Office in furtherance of their election-inference mission in a manner that, if not halted, would read out of existence the PRA and the above-described authorities interpreting it. As is clear from *Judicial Watch*, *Armstrong II* provides no authority for judicial review of document-specific PRA categorization decisions in the context of a criminal investigation, much less a criminal jury trial. Because that is so, as a matter of law, the Office cannot establish that President Trump's alleged possession of certain documents was "unauthorized" under § 793(e) for purposes of Counts 1 through 32. The merit of these propositions, as properly articulated in the Court's scenario (b), has implications for several pending motions.

*First*, the Court should grant President Trump's motion to dismiss the Superseding Indictment based on the PRA. The charges "fail[] to state an offense," Fed. R. Crim. P. 12(b)(3)(B)(v), because there is no basis for the Special Counsel's Office, this Court, or a jury to second-guess President Trump's document-specific PRA categorizations.

*Second*, the lack of legal authority and historical precedent for reviewing President Trump's PRA categorization decisions supports the pending selective and vindictive prosecution motions to dismiss the Superseding Indictment, which the Court should grant, or, at minimum, order discovery and hold a hearing on those issues.

*Third*, for similar reasons, President Trump's motion to dismiss based on prosecutorial misconduct and due process violations requires a hearing and should ultimately be granted. DOJ, NARA, the Biden Administration, the FBI, and, subsequently, the Special Counsel's Office colluded on the basis of non-existent authority under the PRA to demand records and responses to which they were not entitled, to execute search warrants based on legally meritless and unprecedented PRA arguments, to illegally pierce President Trump's attorney-client privileges based on similar flawed claims, and to initiate this wrongful and lawless prosecution.

*Fourth*, because the non-particularized and unlawfully executed search warrant that was used to raid Mar-a-Lago improperly delegated review of PRA categorization decisions to agents executing the warrant, which purported to authorize the seizure of "Presidential records," the fruits of that search must be suppressed on that basis and due to the other deficiencies identified in our suppression motion.

*Fifth*, the proposed jury instructions relating to scenario (a) illustrate that, if this case is presented to a jury—which it should not be—the jury would be forced to resolve factual issues relating to not only PRA categorizations, but also documents' alleged classification status. As such, the aspects of President Trump's motions to compel bearing on classification status and declassification efforts should be granted for the reasons set forth in the Classified Supplements supporting those motions and the related reply submission.

Finally, both scenarios posited in the Court's March 18 Order are consistent with President Trump's position that this prosecution is based on official acts that President Trump took during his first term in Office. The Special Counsel's Office cannot prevail without offering evidence of official acts, such as exercises of classification authority, declassification authority, receipt of Presidential briefings during which the documents at issue were allegedly presented, and PRA categorizations. However, the Office may not offer such evidence under the presidential immunity doctrine. These circumstances further support President Trump's request that the presidential immunity motion be held in abeyance pending the Supreme Court's resolution of *Trump v. United States*, and—to the extent the case is not dismissed on other grounds beforehand—the need for an evidentiary hearing following that ruling in order to prevent the Office from violating the presidential immunity doctrine.

Dated: April 2, 2024

Respectfully submitted,

*/s/ Todd Blanche*
Todd Blanche (PHV)
toddblanche@blanchelaw.com
Emil Bove (PHV)
emil.bove@blanchelaw.com
BLANCHE LAW PLLC
99 Wall Street, Suite 4460
New York, New York 10005
(212) 716-1250

*/s/ Christopher M. Kise*
Christopher M. Kise
Florida Bar No. 855545
ckise@continentalpllc.com
CONTINENTAL PLLC
255 Alhambra Circle, Suite 640
Coral Gables, Florida 33134
(305) 677-2707

*Counsel for President Donald J. Trump*

**CERTIFICATE OF SERVICE**

I, Christopher M. Kise, certify that on April 2, 2024, I electronically filed the foregoing document with the Clerk of Court using CM/ECF.

*/s/ Christopher M. Kise*
Christopher M. Kise

***EXHIBIT A: APRIL 2, 2024 PROPOSED JURY INSTRUCTIONS [SCENARIO (A)]***

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**WEST PALM BEACH DIVISION**

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**Table of Contents (Scenario (a))**

**Introduction: Counts 1 – 32**

Counts 1 through 32 charge President Trump with willfully retaining national defense information. I am going to list the elements now, and then provide more detailed instructions regarding each of them. For each of Counts 1 through 32, the government must prove beyond a reasonable doubt the following seven elements:

First, the government must prove beyond a reasonable doubt that, on or about the dates alleged in the Count you are considering, President Trump possessed the document specified in that Count;

Second, the government must prove beyond a reasonable doubt that, on or about the dates alleged in the Count you are considering, President Trump was not authorized to possess the document associated with that Count;

Third, the government must prove beyond a reasonable doubt that President Trump failed to deliver the document associated with the Count you are considering to a person entitled to receive it[1];

Fourth, the government must prove beyond a reasonable doubt that the document associated with the Count you are considering contained information related to national defense, which I am going to refer to as national defense information or NDI;

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[1] Although the Special Counsel's Office has argued that the "entitled-to-receive language is not part of the actus reus," this element has been included in instructions relating to document-retention cases under § 793(e). *Compare* 3/14/24 Tr. 51, *with* Ex. A-1 at 44 (jury instructions from *United States v. Ford*, No. 05 Cr. 235 (D. Md.) (hereinafter, "*Ford* Jury Instructions")), *and* Amended Jury Instructions, *United States v. Davila*, 2005 WL 6228515 (E.D. Wash. June 3, 2005) (DOJ's proposed instructions). These instructions are consistent with the statutory text—and the Office's position is not—because § 793(e) contains a distinct prohibition delimited by the term "or," and then describes retention and entitlement in the conjunctive: "willfully retains the same *and* fails to deliver it to the officer or employee of the United States entitled to receive it." 18 U.S.C. § 793(e) (emphasis added).

Fifth, the government must prove beyond a reasonable doubt that any NDI in the document associated with the Count that you are considering was closely held by the United States[2];

Sixth, the government must prove beyond a reasonable doubt that disclosure of any NDI in the document associated with the Count that you are considering would be potentially damaging to the United States or useful to an enemy of the United States[3]; and

Seventh, the government must prove beyond a reasonable doubt that President Trump acted willfully.

**Element 1: Possession**

The first element that the government must prove beyond a reasonable doubt is that, on or about the dates alleged in the Count you are considering, President Trump possessed the document specified in that Count.

The term "possession" includes actual, constructive, sole, and joint possession. I am going to define each of those different types of possession. "Actual possession" of a thing occurs if a

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[2] In *United States v. Hernandez, et al.*, a district court in the Southern District of Florida described the "closely held" concept as a separate element. *See* Ex. A-2 at 19 (jury instructions from *United States v. Hernandez, et al.*, No. 98 Cr. 721 (S.D. Fla. June 5, 2001), *aff'd sub nom. United States v. Campa*, 529 F.3d 980 (11th Cir. 2008) (hereinafter, the "*Campa* Jury Instructions")).

[3] *See United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988); *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978) ("The Court gave a limiting instruction to the jury that in order to show relationship to the national defense, the Government must prove that 'disclosure of information in the document would be potentially damaging to the national defense, or that information in the document disclosed might be useful to an enemy of the United States.'"); *United States v. Kiriakou*, 898 F. Supp. 2d 921, 923 (E.D. Va. 2012) ("[I]n prosecutions under both the documents and the information clauses, the government must show that the disclosed NDI 'relate[s] to the national defense,' meaning that it is 'closely held' and that its disclosure 'would be potentially damaging to the United States or might be useful to an enemy of the United States.'" (quoting *Morison*, 844 F.2d at 1071-72)); *see also* 3/14/24 Tr. 72-73 (Special Counsel's Office acknowledging that "there were certain circumstances" where a "potential harm" instruction is appropriate and "it would be something else that the jury would be asked to find").

person knowingly has direct physical control of it.[4] In order to find that President Trump acted "knowingly," the government must prove beyond a reasonable doubt that the act was done voluntarily and intentionally and not because of a mistake or by accident.[5] Medical science has not yet devised an instrument which can record what was in one's mind in the distant past. Rarely is direct proof available to establish the state of one's mind. State of mind may be inferred from what a person says or does: his words, his actions, and his conduct, as of the time of the occurrence of certain events. The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after the occurrence. Accordingly, intent, including knowing and willfulness (as I will define that term for you later today) are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inference to be drawn from them.[6]

"Constructive possession" of a thing occurs if a person does not have actual possession of the thing, but has both the power and the intention to take control over the thing later.[7] Therefore, "Constructive possession" requires proof beyond a reasonable doubt that President Trump (1) was aware or knew of the document's presence, and (2) had the ability and intent to later exercise dominion and control over that document.[8]

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[4] Special Instruction S6, Eleventh Circuit Pattern Instructions.

[5] Basic Instruction B9.1A, Eleventh Circuit Pattern Instructions.

[6] Ex. A-1, *Ford* Jury Instructions at 31.

[7] Special Instruction S6, Eleventh Circuit Pattern Instructions.

[8] *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011) (defining "constructive possession" in context of 18 U.S.C. § 924(c)); *see also* Ex. A-1, *Ford* Jury Instructions at 45 (defining "constructive possession").

"Sole possession" of a document occurs if a person is the only one to possess it. "Joint possession" of a document occurs if two or more people share possession of it.[9]

Possession cannot be found solely on the grounds that President Trump was near or close to a document. Nor can the government meet its burden of proof on the possession element of a particular Count solely on the grounds that President Trump was present at a scene where the document was discovered, or solely because President Trump associated with a person who did control the document when it was discovered. However, these factors may be considered by you, in connection with all other evidence, in making your decision whether the government has proven beyond a reasonable doubt that President Trump possessed a document in connection with the first element of each of Counts 1 through 32.[10]

If you find that the government has failed to prove beyond a reasonable doubt that President Trump possessed the relevant document during the timeframe alleged in the Count you are considering, mark "Not Guilty" for that Count on the Verdict Form. If you find that the government has established this element beyond a reasonable doubt, then you should consider the second element.

**Element 2: Unauthorized Possession**

The second element that the government must prove beyond a reasonable doubt is that, on or about the dates alleged in the Count you are considering, President Trump was not authorized to possess the document associated with that Count.

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[9] Special Instruction S6, Eleventh Circuit Pattern Instructions.

[10] Ex. A-1, *Ford* Jury Instructions at 45.

For purposes of this element, possession was unauthorized if President Trump was not entitled to possess the document on the dates alleged in the Count that you are considering.[11] I instruct you that President Trump was authorized to possess the documents at issue in Counts 1 through 32 during his Presidency, and that applicable law authorizes former Presidents and Vice Presidents (and their designees) to access classified information after their terms are completed under certain circumstances.[12] When considering this element, you may consider evidence relating to other former Presidents, Vice Presidents, and other government officials being authorized to possess documents containing classified information after they left their positions, without criminal prosecution by the government.[13]

I also instruct you that President Trump was authorized by a law called the Presidential Records Act to possess a category of documents defined as "personal records," both during and after his term in office. On the other hand, under the Presidential Records Act, after President

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[11] *See* Ex. A-3 at 2330 (trial transcript from *United States v. Schulte*, No. 17 Cr. 548 (S.D.N.Y. Aug. 1, 2022) (hereinafter, "*Schulte* Jury Instructions")).

[12] *See* 3/14/24 Tr. 59 ("So you would agree, of course, during the presidency, the access is authorized?" // "Yes."); Executive Order 13526 § 4.1(a)(3); *see also* ECF No. 277 at 49 n.25 ("Presidents are not required to obtain security clearances before accessing classified information[.]" (citing 50 U.S.C. § 3163)).

[13] *See, e.g.*, Superseding Indictment ¶ 24 (quoting President Trump's statement regarding "the practice of former officials maintaining access to our Nation's most sensitive secrets long after their time in Government has ended"); Hur Report at 192 ("[P]ast presidents routinely took national security files including briefing materials for the President, records of negotiations with foreign governments, correspondence with foreign heads of state or governments, and correspondence with or directives to agencies within the Executive branch on foreign affairs."); *see also id.* at 200 (referring to DOJ's "prior treatment of former presidents and vice presidents who kept national security materials"); NARA Briefing Tr. 63, U.S. House of Rep., Permanent Select Comm. on Intelligence, Washington, D.C. (Mar. 1, 2023), https://intelligence.house.gov/uploadedfiles/3.1.23_nara_briefing_transcript.pdf (NARA official acknowledging that in "every PRA administration from Reagan forward," NARA has "found classified information in unclassified boxes" following the administration's conclusion).

Trump's term concluded, the government owned a category of documents defined under the Presidential Records Act as "Presidential records."[14] Therefore, in order to establish that President Trump's possession of the document in the Count that you are considering was "unauthorized" for purposes of the second element, the government must prove beyond a reasonable doubt that the document you are considering is a "Presidential record" and not a "personal record."[15] Now I am going to give you instructions regarding the meaning of the terms "Presidential record" and "personal record."

A "Presidential record" is a document created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.[16]

The term "Presidential record" does not include extra copies of documents produced only for convenience of reference, when such copies were clearly so identified.[17] Therefore, in order for the government to meet its burden of proof on this element, the government must prove beyond a reasonable doubt that the document you are considering was not such a copy. When you are addressing this issue during your deliberations, you should consider the evidence—or lack

[14] 44 U.S.C. §§ 2202, 2203(g)(1).

[15] For the avoidance of doubt, President Trump reiterates his objection, as stated in his motion to dismiss based on the Presidential Records Act and in his April 2, 2024 submission, to the jury being permitted to second guess his PRA categorization decisions. Neither the statute nor related caselaw permits such a usurpation of Presidential authority and discretion.

[16] 44 U.S.C. § 2201(2).

[17] 44 U.S.C. § 2201(2)(B)(iv).

thereof—surrounding the manner in which the document you are considering was created and handled, including whether and how it was shown to President Trump.

The term "Presidential record" does not include President Trump's "personal records."[18] Therefore, in order for the government to meet its burden of proof on the second element, the government must prove beyond a reasonable doubt that the document you are considering is not a "personal record."

A "personal record" is a document of a purely private or nonpublic character which does not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.[19] Before the end of President Trump's term in Office on January 20, 2021, President Trump had exclusive authority under the Presidential Records Act to, himself or in working with his staff, categorize records as either "Presidential records" or "personal records," and he was authorized to possess both types of records.[20]

The term "personal records" includes diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting government business.[21] The term "personal records" also includes materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.[22] The term "personal records" also includes materials relating exclusively to the

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[18] 44 U.S.C. § 2201(2)(B)(ii).

[19] 44 U.S.C. § 2201(3).

[20] 44 U.S.C. §§ 2203(b), 2203(f).

[21] 44 U.S.C. § 2201(3)(A).

[22] 44 U.S.C. § 2201(3)(B).

President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.[23] Under the Presidential Records Act, President Trump's decision to exclude what he considered to be "personal records" from "Presidential records" constitutes his categorization of those records as "personal."[24]

Finally, I instruct you that regulations relating to authorization to possess classified information do not apply to a former President's "personal records."[25] Therefore, if President Trump designated a document as a "personal record" under the Presidential Records Act, then the classification status of that document, if any, is not relevant to your evaluation of whether the government has met its burden of proving beyond a reasonable doubt that the document you are considering is a "Presidential record."

If you find that the government has failed to prove beyond a reasonable doubt that the document in the Count you are considering is a "Presidential record," then mark "No" on Question 1 of the Verdict Form for that Count. If you find that the government has proven beyond a

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[23] 44 U.S.C. § 2201(3)(C).

[24] ECF No. 407 at 2; *see also* 44 U.S.C. § 2203(f) (mandating that, "[d]uring a President's term of office," "[t]he President shall remain exclusively responsible for custody, control, and access to . . . Presidential records"); *Judicial Watch, Inc. v. NARA*, 845 F. Supp. 2d 288, 301 (D.D.C. 2012).

[25] The definition of "records" in Executive Order 13526 does not include a former President's "personal records." *See id.* § 6.1(hh) (defining "records" to mean "records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code"). The definition contains some internal tension, in that it includes both "records of an agency" and "Presidential records" under the PRA, but the PRA defines "Presidential records" to *exclude* "official records of an agency, 44 U.S.C. § 2201(2)(B)(i). What is clear, however, is that § 6.1(hh) does not include a former President's "personal records," as that term is also excluded from the PRA's definition of "Presidential records." 44 U.S.C. § 2201(2)(B)(ii).

reasonable doubt that the document you are considering is a "Presidential record," then mark "Yes" on Question 1 for that Count on the Verdict Form. If, and only if, you conclude that the government has met its burden of proving that a document is a "Presidential record," then you must consider whether the government has proven beyond a reasonable doubt that President Trump was not authorized to possess the document during the timeframe alleged in the Count you are considering. If, and only if, you find that the government has met its burden of proof on this second element, then you should consider the third element.

**Element 3: A Person Entitled To Receive It**

The third element that the government must prove beyond a reasonable doubt is that President Trump failed to deliver the document associated with the Count that you are considering to an officer or employee of the United States entitled to receive it.

A person is not entitled to receive classified information if he did not hold a security clearance, or if he holds a security clearance but has no need to know the information.[26]

The phrase "need to know" means a determination within the Executive branch that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.[27]

If you find that the government has not proven beyond a reasonable doubt that President Trump failed to deliver the document to a person entitled to receive the document in connection with the Count you are considering, mark "Not Guilty" for that Count on the Verdict Form. If you

[26] *See* Preliminary Jury Instructions, *United States v. Abu-Jihaad*, 2008 WL 536674 (D. Conn. 2008).

[27] Executive Order 13526 § 6.1(dd).

find that the government has established this element beyond a reasonable doubt, then you should consider the fourth element.

**Element 4: National Defense Information**

The term "national defense information," or NDI, means information that is directly or indirectly connected to the defense of the United States against any of its enemies.[28]

The mere fact that the government argues the information is classified does not mean that the information qualifies as NDI. In deciding this issue, you are to examine the information and consider the testimony of witnesses who testified regarding the information's content, significance, purpose, and use to which the information could be put. Whether the information is connected with the national defense is a question of fact that you, the jury, must determine following the instructions that I have just given you about what the term NDI means.[29]

If you find that the government has not proven beyond a reasonable doubt that the document associated with the Count that you are considering contained NDI, mark "Not Guilty" for that Count on the Verdict Form. If you find that the government has established this element beyond a reasonable doubt, then you should consider the fifth element.

**Element 5: Closely Held**

The fifth element that the government must prove beyond a reasonable doubt is that any NDI in the document associated with the Count that you are considering was "closely held" by the United States.

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[28] *Morison*, 844 F.2d at 1071; *see also* Ex. A-2, *Campa* Jury Instructions at 19. The instructions in *Morison* and *Campa* also used the phrase "activities of national preparedness" to define NDI, but that phrase lacks necessary specificity and clarity, and President Trump objects to its use in any jury instructions that may ultimately be necessary in this case.

[29] Ex. A-3, *Schulte* Jury Instructions at 2327.

In determining whether NDI is closely held, you may consider whether the NDI at issue was already in the public domain. Information typically cannot be considered to be closely held if it is already in the public domain. For example, where information has been made public by the government itself, it is not closely held. Similarly, where information has been made public by a person or entity other than the government, and the government confirms that the information came from the United States government, it is not closely held. If the particular information at issue has been so widely circulated and is so generally believed to be true or to have come from the government that confirmation that it came from the United States government would add nothing to its weight, the information is not closely held.[30]

As another example, information about weapons, munitions of war and intelligence, which has been made public by Congress or the Department of Defense and is found in sources lawfully available to the general public, is not closely held.[31]

In determining whether material is closely held, you may consider whether it was appropriately classified, and whether it remained classified on the dates alleged in the Count you are considering. However, the mere fact that the government argues that certain information is classified does not mean that it is closely held.[32]

"Classified information" means information that is classified at the "Top Secret," "Secret," or "Confidential" level, and marked in a manner that is immediately apparent with five things:

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[30] Ex. A-3, *Schulte* Jury Instructions at 2325-26; *see also United States v. Squillacote*, 221 F.3d 542, 576 (4th Cir. 2000). The court in *Schulte* provided additional instructions to the jury regarding the "closely held" element due to the nature of the allegations in that case, which, unlike here, related to leaking classified information to the public.

[31] *Dedeyan*, 584 F.2d at 39-40.

[32] Ex. A-3, *Schulte* Jury Instructions at 2327.

first, the classification level; second, the identity, by name and position, or by personal identifier, of the original classification authority; third, the agency and office of origin, if not otherwise evident; fourth, declassification instructions; and fifth, a concise reason for classification.[33]

Information is appropriately classified at the "Top Secret" level where the unauthorized disclosure of the information reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe. Information is appropriately classified at the "Secret" level where the unauthorized disclosure of the information reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe. Information is appropriately classified at the "Confidential" level where the unauthorized disclosure of the information reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe. If there is significant doubt about the appropriate level of classification, the governing rules require that it be classified at the lower

[33] Executive Order 13526 §§ 1.2(a), 1.6(a), 2.1 (relating to derivative classification); *see also* 50 U.S.C. § 3164(2); *Dedeyan*, 584 F.2d at 41 ("The Court's charge was fair and impartial and left to the jury the determination of the classification issue and its bearing, if any, upon whether the Vulnerability Analysis related to the national defense. The Court read to the jury parts of Executive Order # 11652 by which it stated the 'classification of this document is controlled.'"); *United States v. Kim*, 808 F. Supp. 2d 44, 55 (D.D.C. 2011) ("To the extent that Defendant intends to argue that the information he is charged with leaking was previously disclosed or was not properly classified, he may do so as part of his defense . . . ."); Ex. A-1, *Ford* Jury Instructions at 46.

level.[34] In order to qualify as "classified information," the information must be marked to indicate its classified status with the five pieces of information that I described to you.[35]

As President of the United States, President Trump was what is called an "original classification authority" based on his power under the Constitution and related laws, which means that it was his authority that was used, by himself and others that he delegated it to, to classify information.[36] As President of the United States, President Trump also had absolute and unreviewable authority to declassify documents and information.[37] You heard evidence during the trial that President Trump exercised that authority, at times verbally and at times without using formal procedures, while he was President. I instruct you that those declassification decisions are examples of valid and legally appropriate uses of President Trump's declassification authority while he was President of the United States.

If you find that the government has not proven beyond a reasonable doubt that NDI in the document associated with the Count that you are considering was "closely held" by the government, mark "Not Guilty" for that Count on the Verdict Form. If you find that the

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[34] Executive Order 13526 §§ 1.2(a), 1.2(c); *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.").

[35] Executive Order 13526 § 6.1(i).

[36] Executive Order 13526 §§ 1.1(a)(1), 1.3(a)(1), 1.3(c)(2)-(3).

[37] Executive Order 13526 § 3.1(b)(1); *see also Egan*, 484 U.S. at 530 ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

government has established this element beyond a reasonable doubt, then you should consider the sixth element.

**Element 6: Potential Damage**

The sixth element that the government must prove beyond a reasonable doubt is that disclosure of NDI in the document would be potentially damaging to the United States or useful to an enemy of the United States.

If you find that the government has not proven this element beyond a reasonable doubt for the Count that you are considering, mark "Not Guilty" for that Count on the Verdict Form. If you find that the government has established this element beyond a reasonable doubt, then you should consider the seventh element.

**Element 7: Willfully**

The seventh element that the government must prove beyond a reasonable doubt is that President Trump acted willfully.

The word "willfully" means that the act was done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids.[38]

President Trump's conduct was not "willful" if it was due to innocent intent, negligence, inadvertence, or mistake.[39]

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[38] Basic Instruction B9.1B, Eleventh Circuit Pattern Instructions. President Trump respectfully submits that, under the circumstances presented by this case, the § 793(e) charges "involve [a] 'highly technical statute[] that present[s] the danger of ensnaring individuals engaged in apparently innocent conduct.'" *Id.* Annotations & Comments To Basic Instruction B9.1A (quoting *Bryan v. United States*, 524 U.S. 184, 194 (1998)). Therefore, the government "must prove more than the defendant knew that his conduct was done with a bad purpose to disobey the law in general." *Id.*

[39] Ex. A-1, *Ford* Jury Instructions at 19.

When considering the evidence relating to this element, you may consider, as I explained earlier, that President Trump was authorized to possess the documents at issue in Counts 1 – 32 during his term as President.[40] You may consider evidence that government officials discussed classified information with President Trump and provided classified briefings and documents to President Trump before and during his Presidency—including inside President Trump's private offices and residences, such as at Bedminster, New Jersey, and Mar-a-Lago, in Palm Beach, Florida, as well as at Trump Tower in New York City.

You may also consider, as I explained earlier, that President Trump acted as an "original classification authority" while he was President of the United States, which means that all classification decisions during his term as President were based on his authority, and that he also had absolute and unreviewable authority to declassify documents and information. You may also consider, as I explained earlier, that former Presidents, Vice Presidents, and other government officials are authorized to possess documents containing classified information under certain circumstances.[41] Finally, you may also consider, as I explained earlier, evidence relating to former Presidents, Vice Presidents, and other public officials being authorized to possess documents

[40] 3/14/24 Tr. 59 ("So you would agree, of course, during the presidency, the access is authorized?" // "Yes."); Executive Order 13526 § 4.1(a)(3); *see also* ECF No. 277 at 49 n.25 ("Presidents are not required to obtain security clearances before accessing classified information[.]" (citing 50 U.S.C. § 3163)).

[41] Executive Order 13526 § 4.1(a)(3).

containing classified information without criminal prosecution by the government after they left their positions.[42]

[42] *See, e.g.*, Superseding Indictment ¶ 24 (quoting President Trump's statement regarding "the practice of former officials maintaining access to our Nation's most sensitive secrets long after their time in Government has ended"); Hur Report at 192 ("[P]ast presidents routinely took national security files including briefing materials for the President, records of negotiations with foreign governments, correspondence with foreign heads of state or governments, and correspondence with or directives to agencies within the Executive branch on foreign affairs"); *see also id.* at 200 (referring to DOJ's "prior treatment of former presidents and vice presidents who kept national security materials"); NARA Briefing Tr. 63, U.S. House of Rep., Permanent Select Comm. on Intelligence, Washington, D.C. (Mar. 1, 2023), https://intelligence.house.gov/uploadedfiles/3.1.23_nara_briefing_transcript.pdf (NARA official acknowledging that in "every PRA administration from Reagan forward," NARA has "found classified information in unclassified boxes" following the administration's conclusion).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| **UNITED STATES OF AMERICA** | : | |
| **v.** | : | **CRIMINAL NO. PJM-05-0235** |
| **KENNETH FORD, Jr.,** | : | |
| **Defendant** | | |

**...oooOooo...**

# FINAL JURY INSTRUCTIONS

**JURY INSTRUCTION NO. 1**
**(Juror Attentiveness)**

Ladies and gentlemen, you are about to enter your final duty, which is to decide the fact issues in the case.

Before you do that, I will instruct you on the law. Please pay close attention. I will go as slowly as I can and be as clear as possible.

I told you at the very start of the trial that your principal function during the taking of testimony would be to listen carefully and observe each witness who testified. It has been obvious to me and to counsel that you have faithfully discharged this duty. Your interest never flagged, and it is evident that you followed the testimony with close attention.

I ask you to give me that same careful attention, as I instruct you on the law.

**JURY INSTRUCTION NO. 2**
**(Role of the Court)**

You have now heard all of the evidence in the case and very shortly you will hear the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney states a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be -- or ought to be -- it would violate your sworn duty to base a verdict upon any other review of the law than that which I give you.

**JURY INSTRUCTION NO. 3**
**(Role of the Jury)**

Your final role is to pass upon and decide the issues of fact that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them.

I shall later discuss with you how to pass upon the credibility -- or believability -- of the witnesses.

In determining the facts, you must rely upon your own recollection of the evidence. What the lawyers say in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. In this connection, you should bear in mind that a question put to a witness is never evidence. It is only the answer which is evidence. Nor is anything I may have said during the trial or may say during these instructions with respect to a matter of fact to be taken in substitution for your own independent recollection. What I say is not evidence.

The evidence before you consists of the answers given by witnesses -- the testimony they gave, as you recall it -- and the exhibits that were received in evidence.

The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

You may also consider the stipulations of the parties as evidence.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any

indication of my views of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witness. You are expressly to understand that the court has no opinion as to the verdict you should render in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias, prejudice or sympathy as to any party.

**JURY INSTRUCTION NO. 4**
**(Juror Obligations)**

In determining the facts, the jury is reminded that before each member was accepted and sworn to act as a juror, he or she was asked questions concerning competency, qualifications, fairness and freedom from prejudice and bias. On the faith of those answers, the juror was accepted by the parties. Therefore, those answers are as binding on each of the jurors now as they were then, and should remain so, until the jury is discharged from consideration of this case.

**JURY INSTRUCTION NO. 5**
**(The Government as a Party)**

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality.

This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, it is important to the defendant, who is charged with serious crimes.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a litigation. By the same token, the government is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice.

**JURY INSTRUCTION NO. 6**
**(Conduct of Counsel)**

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

**JURY INSTRUCTION NO. 7**
**(Sympathy)**

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial, hard-core question that you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of a defendant beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that a defendant is guilty of the crimes charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear or prejudice, or bias or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

**JURY INSTRUCTION NO. 8**
**(Improper Considerations)**

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, sex or age. All persons are entitled to the presumption of innocence and the government has the burden of proof, as I will discuss in a moment.

It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision making process.

To repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in the case.

**JURY INSTRUCTION NO. 9**
**(Jury to Consider Only This Defendant)**

You are about to be asked to decide whether or not the government has proven beyond a reasonable doubt the guilt of this defendant. You are not being asked whether any other person has been proven guilty. Your verdict should be based solely upon the evidence or lack of evidence as to this defendant, in accordance with my instructions and without regard to whether the guilt of other people has or has not been proven.

**JURY INSTRUCTION NO. 10**
**(Punishment)**

The question of possible punishment of the defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence rests exclusively with the court. Your function is to weigh the evidence in the case and determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your verdict, in any way, or, in any sense, enter into your deliberations.

**JURY INSTRUCTION NO. 11**
**(Your Recollection Prevails)**

If any references by the court or by counsel to matters of testimony or exhibits that does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the court or of counsel.

You are the sole judges of the evidence received in this case.

**JURY INSTRUCTION NO. 12**
**(Objections and Rulings)**

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not be prejudiced against an attorney or his or her client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

When the court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if he or she had been permitted to answer the question.

**JURY INSTRUCTION NO. 13**
**(Testimony, Exhibits and Stipulations)**

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received in evidence and stipulations.

Exhibits which have been marked for identification but not received may not be considered by you as evidence. Only those exhibits received may be considered as evidence.

Similarly, you are to disregard any testimony when I have ordered it to be stricken. As I indicated before, only the witnesses' answers are evidence and you are not to consider questions as evidence. Similarly, statements by counsel are not evidence.

You should consider the evidence in light of your own common sense and experience, and you may draw reasonable inferences from the evidence.

Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded.

**JURY INSTRUCTION NO. 14**
**(Multiple Counts -- One Defendant)**

The Superseding Indictment consists of a total of two counts. Each count charges the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each. Whether you find the defendant guilty or not guilty as to one offense should not affect your verdict as to any other offense charged.

**JURY INSTRUCTION NO. 15**
**(Variance -- Dates)**

You will note the Superseding Indictment charges that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence in this case establishes beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

**JURY INSTRUCTION NO. 16**
**(Knowingly)**

You have been instructed that in order to sustain its burden of proof, the government must prove that the defendant acted knowingly. In the course of my instructions, I will be using the term "knowingly" frequently. When I use the term, I mean the following: a person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case.

**JURY INSTRUCTION NO. 17**
**(Willfully)**

I instruct you that in order to sustain its burden of proof the government must prove that the defendant acted willfully. "Willfully" means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law.

The defendant's conduct was not "willful" if it was due to negligence, inadvertence, or mistake.

**JURY INSTRUCTION NO. 18**
**(Presumption of Innocence -- Burden of Proof)**

Although the defendant has been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendant has pled not guilty to that Superseding Indictment.

As a result of the defendant's plea of not guilty the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

The defendant begins the trial here with a clean slate. The presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.

The presumption was with the defendant when the trial began and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the government has proven his guilt beyond a reasonable doubt.

**JURY INSTRUCTION NO. 19**
**(Number of Witnesses and Uncontradicted Testimony)**

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this you must look at all the evidence. (After examining all the evidence, you may decide that the party calling the most witnesses has not persuaded you because you do not believe its witnesses, or because you believe the fewer witnesses called by the other side).

In a moment, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the government and the defendant is not required to call any witnesses or offer any evidence, since he is presumed to be innocent.

**JURY INSTRUCTION NO. 20**
**(Specific Investigative Techniques Not Required)**

During the trial you have heard testimony of witnesses and argument by counsel that the government did not utilize specific investigative techniques. You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, you also are instructed that there is no legal requirement that the government use any of these specific investigative techniques to prove its case. Law enforcement *techniques* are not your concern.

Your concern, as I have said, is to determine whether or not, on the evidence or lack of evidence, the defendant's guilt has been proved beyond a reasonable doubt.

**JURY INSTRUCTION NO. 21**
**(Direct and Circumstantial Evidence)**

There are two types of evidence which you may properly use in deciding whether a defendant is guilty or not guilty.

One type of evidence is called direct evidence. Direct evidence is where a witness testifies to what the witness saw, heard, or observed. In other words, when a witness testifies about what is known to the witness of the witness' own knowledge by virtue of his or her own senses -- what he or she sees, feels, touches or hears -- that is called direct evidence.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside.

As you were sitting here, someone walked in with an umbrella which was dripping wet. Somebody else then walked in with a raincoat which was also dripping wet.

Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact the existence or the nonexistence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

**JURY INSTRUCTION NO. 22**
**(Stipulation of Facts)**

A stipulation is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true.

**JURY INSTRUCTION NO. 23**
**(Charts and Summaries Admitted as Evidence)**

The government has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

**JURY INSTRUCTION NO. 24**
**(Charts and Summaries Not Admitted as Evidence)**

The charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these schedules or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts, schedules or summaries correctly present the information contained in the testimony and in the exhibits on which they are based. You are entitled to consider the charts, schedules and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

**JURY INSTRUCTION NO. 25**
**(Admission of Defendant)**

There has been evidence that the defendant made certain statements in which the government claims he admitted certain facts charged in the Superseding Indictment.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all of the evidence.

**JURY INSTRUCTION NO. 26**
**(Improper Consideration of Defendant's Right Not to Testify)**

The defendant did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

**JURY INSTRUCTION NO. 27**
**(Inference Defined)**

I have mentioned that you may draw reasonable inferences from the evidence. An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw -- but not required to draw -- from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts which you find to be proven, such reasonable inferences as would be justified in light of your experience.

Here again, let me remind you that, whether based upon direct or circumstantial evidence, or upon the logical reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict.

**JURY INSTRUCTION NO. 28**
**(Consciousness of Guilt from False Exculpatory Statement)**

You have heard testimony that defendant Kenneth Ford made certain statements outside the courtroom in which the defendant claimed that his conduct was consistent with innocence and not with guilt. The government claims that these statements in which he exonerated or exculpated himself are false.

If you find that the defendant gave a false statement in order to divert suspicion from himself, you may, but are not required, to infer that the defendant believed that he was guilty. You may not, however, infer on the basis of this alone, that the defendant is in fact guilty of the crime for which he is charged.

Whether or not the evidence as to defendant's statements shows that the defendant believed that he was guilty and the significance, if any, to be attached to such evidence, are matters for you, the jury, to decide.

**JURY INSTRUCTION NO. 29**
**(Knowledge, Willfulness, Intent)**

Knowledge, willfulness and intent involve the state of a person's mind. Medical science has not yet devised an instrument which can record what was in one's mind in the distant past. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does: his words, his actions, and his conduct, as of the time of the occurrence of certain events.

The intent with which an act is done is often more clearly and conclusively shown by the act itself, or by a series of acts, than by words or explanations of the act uttered long after the occurrence. Accordingly, intent, willfulness and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred, or the events took place, and the reasonable inferences to be drawn from them.

**JURY INSTRUCTION NO. 30**
**(Proof of Motive Not Required)**

Proof of motive is not a necessary element of the crimes with which the defendant is charged.

Proof of motive does not establish guilt, nor does want of proof of motive establish that a defendant is innocent.

If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be - or whether any motive be shown, but the presence or absence of motive is a circumstance which you may consider as bearing on the intent of a defendant.

**JURY INSTRUCTION NO. 31**
**(Witness Credibility)**

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues under the counts of the Superseding Indictment, in the face of the very different pictures painted by the government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony.

Your decision whether or not to believe a witness may depend on how the witness impressed you. Was the witness candid, frank, and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with the way the witness testified on cross-examination? Was the witness consistent in his or her testimony or did the witness contradict himself or herself? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with the government or the defendant which may affect the way he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth; or does the witness have some bias, prejudice or hostility that may have caused the witness --

consciously or not -- to give you something other than a completely accurate account of the facts to which he or she testified?

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about and you should also consider the witness' ability to express himself or herself. Ask yourself whether the witness' recollection of the facts stands up in the light of common experience and all the other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor and explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment and your experience.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always ask yourself whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

Sand, Modern Federal Jury Instructions, No. 7-1 (modified)

**JURY INSTRUCTION NO. 32**
**(Opinion and Reputation)**

The defendant has called witnesses who have testified to his good reputation in the community or to their opinion of his good character. This testimony is not to be taken by you as the witness's opinion as to whether the defendant is guilty or not guilty. That question is for you alone to determine. You should, however, consider this character evidence together with all other facts and all other evidence in the case in determining whether the defendant is guilty or not guilty of the charges.

Such character evidence alone may indicate to you that it is improbable that a person of good reputation would commit the offense charged. Accordingly, if, after considering the question of the defendant's good character, you find that a reasonable doubt has been created, you must acquit him of all the charges.

On the other hand, if, after considering all of the evidence, including that of the defendant's character, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should not acquit the defendant merely because you believe him to be a person of good character.

**JURY INSTRUCTION NO. 33**
**(Law Enforcement Witness)**

You have heard the testimony of a law enforcement official. The fact that a witness may be employed by the federal government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

**JURY INSTRUCTION NO. 34**
**(Expert Witness Generally)**

You have heard testimony from certain persons who were qualified as expert witnesses. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his or her opinions, his or her reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness' testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

**JURY INSTRUCTION NO. 35**
**(Handwriting Expert)**

Some of the evidence you have heard involves a factual issue about whether handwriting in question is that of the defendant. There has been testimony of a witness who claims special qualification in the field of handwriting identification and he was allowed to express his opinion on that issue.

The witness was allowed to express an opinion in order to help you decide whether it is the defendant's handwriting. You may therefore consider the witness' opinion in reaching your independent decision on this issue.

In weighing this opinion testimony, you may consider the witness' qualifications and opinions and his reasons for testifying, in addition to all of the other considerations that apply to ordinary witnesses whose credibility you must determine. You may give the opinion testimony such weight, if any, as you find it deserves in light of all the evidence. You should not permit the witness' testimony to be a substitute for applying your own reason, judgment and common sense. You may accept it or reject it, in whole or in part, as you believe best. The determination of the facts in this case rests solely with you.

**JURY INSTRUCTION NO. 36**
**(Search Warrants)**

You have also heard testimony in this case regarding evidence seized by the government during the execution of a search warrant. You are hereby instructed that it is the responsibility of the court alone to determine the validity and legality of that search warrant, and the court has determined that the warrant in this case was valid and legal. It is up to you to decide what significance, if any, the evidence seized may have in this case.

JURY INSTRUCTION NO. 37
(Voluntariness of Confession)

A confession must be the expression of free choice.

Whether a confession was voluntary depends upon the totality of the circumstances, including the crucial element of police coercion, the length of the interrogation and its continuity, the defendant's maturity, education, physical condition, and mental health, and the failure of the police to advise the defendant of his rights to remain silent and to have counsel present during the custodial interrogation.

The prosecution bears the burden of providing that a confession to law enforcement authorities was made voluntarily.

**JURY INSTRUCTION NO. 38**
**(The Superseding Indictment is Not Evidence)**

With these preliminary instructions in mind, let us turn to the charges against the defendant, as contained in the Superseding Indictment. I remind you that an indictment itself is not evidence. It merely describes the charges made against the defendant. It is an accusation. It may not be considered by you as any evidence of the guilt of the defendant.

In reaching your determination of whether the government has proved the defendant guilty beyond a reasonable doubt, you may consider only the evidence introduced or lack of evidence.

The Superseding Indictment in this case contains two counts. You will have the Superseding Indictment with you in the jury room for your deliberations.

**JURY INSTRUCTION NO. 39**
**(The Superseding Indictment and the Statute – Count One)**

The defendant has been charged in the Superseding Indictment with knowingly and willfully retaining national defense information.

[Read Superseding Indictment]

The relevant statute on this subject is 18 U.S.C. § 793(e). It provides:

> (e) Whoever having unauthorized possession of ... any document ... relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts [thereto] ... the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the office or employee of the United States entitled to receive it ...[commits a crime].

**JURY INSTRUCTION NO. 40**
**(Purpose of the Statute)**

Protection of the military secrets of the United States is crucial to the security of the United States and to its people. Congress, therefore, has made it a crime to jeopardize the security of the United States by gathering, transmitting, delivering or retaining information pertinent to the national defense.

**JURY INSTRUCTION NO. 41**
**(Elements of the Offense)**

In order to prove the defendant under consideration guilty of Count One in the Superseding Indictment, the government must prove:

First, that on or about the date set forth in the Superseding Indictment, the defendant had unauthorized possession or control over documents relating to the national defense of the United States;

Second, that the defendant willfully retained the same documents and failed to deliver the documents to an officer and employee of the United States who is entitled to receive them.

**JURY INSTRUCTION NO. 42**
**(First Element – Information Related to National Defense)**

The first element the government must prove beyond a reasonable doubt is that the defendant had unauthorized possession of information that relates to the national defense.

For the purpose of Count One, the following definitions apply:

(1) "Unauthorized possession" means possession of classified information by a person who does not hold a security clearance, by a person who holds a security clearance without the need to know, or by a person who holds a security clearance, has a need to know, but removed the classified information from the official premise without authorization. A person has unauthorized possession of something if he is not entitled to have it.

(2) "Need to know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function.

(3) "Possession" is a commonly used and commonly understood word. Basically, it means the act of having or holding property – in this case, documents – or the detention of property in one's power or command. Possession may mean actual physical possession or constructive possession. A person has constructive possession of documents if he knows where it is and can get it at any time he wants, or otherwise can exercise control over it. Possession cannot be found solely on the grounds that the defendant was near or close to the documents. Nor can it be found simply because the defendant was present at a scene where the documents were discovered, or solely because the defendant associated with a person who did control the documents when they were discovered. However, these factors may be considered by you, in connection with all other evidence, in making you decision whether the defendant has unauthorized possession of the documents.

The term "relating to the national defense" is a broad term which refers to United States military and naval establishments and the related activities of national preparedness, and includes all matters that directly or may be reasonably connected with the defense of the United States against its enemies. The parties have stipulated that that the information contained in the classified documents relates to the national defense. I therefore instruct you to that this fact has been agreed to and you need not deliberate about it further.

In determining whether material is "closely held," you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent to the Superseding Indictment.

**JURY INSTRUCTION NO. 43**
**(Second Element – Willful Retention)**

The second element the government must prove beyond a reasonable doubt is that the defendant willfully retained the documents in question and failed to deliver them to an officer and employee of the United States authorized to receive them.

In deciding whether the defendant willfully retained the documents, you may consider all the evidence introduced at trial, including any evidence concerning the classification status of the documents or testimony concerning limitations on access to the documents or retention of them.

As I have instructed you already, an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law forbids, with a bad purpose either to disobey or disregard the law.

**JURY INSTRUCTION NO. 44**
**(The Superseding Indictment and the Statute – Count Two)**

The defendant has been charged in the Superseding Indictment with knowingly and willfully making false statements to the United States government.

[Read Superseding Indictment]

The relevant statute on this subject is 18 U.S.C. § 1001. It provides:

> Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme or device a material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; [shall be guilty of a crime].

**JURY INSTRUCTION NO. 45**
**(Purpose of the Statute)**

The purpose of section 1001 is to protect the authorized functions of the various governmental departments from any type of misleading or deceptive practice and from the adverse consequences which might result from such deceptive practices.

To establish a violation of section 1001, it is necessary for the government to prove essential elements – which I will soon describe for you – beyond a reasonable doubt. However, I want to point out now that it is not necessary for the government to prove that the government agency was, in fact, misled as a result of the defendant's action. It does not matter that the agency was not misled, or even that it knew of the misleading or deceptive act, should you find the act occurred. These circumstances would not excuse or justify a concealment undertaken, or a false, fictitious or fraudulent statement made, or a false writing or document submitted, willfully and knowingly about a matter within the jurisdiction of the government of the United States.

**JURY INSTRUCTION NO. 46**
**(Elements of the Offense)**

In order to prove the defendant under consideration guilty of the charges in the Superseding Indictment, the government must prove:

First, that on or about the date set forth in the Superseding Indictment, the defendant made a material statement or representation;

Second, the statement was false, fictitious or fraudulent;

Third, the false, fictitious or fraudulent statement was made knowingly and willfully; and,

Fourth, the statement or representation was made in a matter within the jurisdiction of the government of the United States.

**JURY INSTRUCTION NO. 47**
**(First Element -- Statement or Representation)**

The first element the government must prove beyond a reasonable doubt is that the defendant made a statement or representation. In this regard, the government need not prove that the defendant physically made or otherwise personally prepared the statement in question. It is sufficient if he caused the statement charged in the Superseding Indictment to have been made. Under this statute, there is no distinction between written and oral statements.

The government must also prove beyond a reasonable doubt that the statement or representation was material. A statement is material if it could have influenced the government agency's decisions or activities. However, proof of actual reliance on the statement by the government is not required.

**JURY INSTRUCTION NO. 48**
**(Second Element – False, Fictitious or Fraudulent Statement)**

The second element the government must prove beyond a reasonable doubt is that the statement was false, fictitious or fraudulent. A statement is "false" or "fictitious" if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A statement or representation is "fraudulent" if it was untrue when made and was made or caused to be made with the intent to deceive the government agency to which it was submitted.

**JURY INSTRUCTION NO. 49**
**(Third Element – Knowing and Willful Conduct)**

The third element the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

As I have told you, an act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

An act is done willfully if it is done with an intention to do something the law forbids, a bad purpose to disobey the law.

**JURY INSTRUCTION NO. 50**
**(Good Faith)**

Good faith is an absolute defense to Count Two of the Superseding Indictment. A statement made with a good faith belief in its accuracy does not amount to a false statement and is not a crime. This is so even if the statement is, in fact, erroneous.

The burden of establishing lack of good faith and criminal intent rests upon the prosecution. A defendant is under no burden to prove his good faith, rather, the prosecution must prove bad faith or knowledge of falsity beyond a reasonable doubt.

**JURY INSTRUCTION NO. 51**
**(Fourth Element – Matter Within the Jurisdiction of the United States)**

The final element the government must prove with respect to Count Two is that the statement or representation be made with regard to a matter within the jurisdiction of the government of the United States. The government here alleges that the defendant made the statement or representation on the Standard Form 86 (SF-86) to Lockheed Martin. The government is not required to prove that that the defendant actually knew that a federal agency was involved or which department the statement or representation would be submitted to, so long as he reasonably should have known this to be the case. In this case, there is evidence that the SF-86 was submitted to the Central Intelligence Agency (CIA), which I charge you is a department of the United States government.

There is no requirement that the document actually have been directed to or given to CIA, although in this case there is evidence that that was done. All that is necessary is that you find that the defendant reasonably should have known that the document was to be utilized in a matter within the jurisdiction of the government of the United States. To be within the jurisdiction of a department or agency of the United States government means that the statement must concern an authorized function of that department or agency.

**JURY INSTRUCTION NO. 52**
**(Verdict -- Unanimous -- Duty to Deliberate)**

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or himself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

**JURY INSTRUCTION NO. 53**
**(Foreperson -- Verdict Forms)**

In my courtroom, juror no. 1 has been designated as the foreperson for the jury. If you need to communicate with me, the foreperson will sign a note to me.

A form of verdict has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, and then date and sign the form. After you have done so, please advise the court, by sending a note through the Marshal, that you have reached a verdict. When I receive that note, I shall have you return with your verdicts to the courtroom.

**JURY INSTRUCTION NO. 54**
**(Communication With the Court)**

If it becomes necessary during deliberations to communicate with the court, you may send a note by a Marshal, signed by your foreperson, or by one or more members of the jury. No member of the jury should communicate with the court by any means other than a signed writing, and the court will not communicate with any member of the jury on any subject touching on the merits of the case, otherwise than in writing, or orally here in open court.

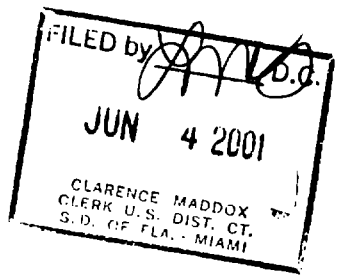
You will note from the oath about to be taken by the Marshal that he, too, as well as all other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind that you may not reveal to any person -- not even to the court -- how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-721-Cr-LENARD/DUBÉ (s)(s)

UNITED STATES OF AMERICA,
v.
GERARDO HERNANDEZ,
a/k/a Manuel Viramontez,
a/k/a "Giro,"
a/k/a "Giraldo,"
JOHN DOE No. 2,
a/k/a Luis Medina III,
a/k/a "Allan,"
a/k/a "Johnny,"
a/k/a "Oso,"
RENE GONZALEZ,
a/k/a "Castor,"
a/k/a "Iselin,"
ANTONIO GUERRERO,
a/k/a "Lorient,"
JOHN DOE No. 3,
a/k/a Ruben Campa,
a/k/a "Vicky,"
a/k/a "Camilo,"
a/k/a "Oscar,"




Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt

the specific facts necessary to find the Defendants guilty of the crimes charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendants or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all; and if a Defendant elects not to testify, you should not consider that in any way during your deliberations. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must *consider* all of the evidence, I do not mean that you must *accept* all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

In this case the Government called as one of its witnesses a person named as a co-Defendant in the indictment, with whom the Government has entered into a plea agreement providing for the possibility of a lesser sentence than the witness would otherwise be exposed to. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

And, of course, the fact that a witness has plead guilty to the crime charged in the indictment is not evidence, in and of itself, of the guilt of any other person.

The government and the defendants have stipulated, or agreed, what certain individuals' testimony would be if those individuals were called as witnesses. You should consider that testimony in the same way as if those individuals had given the testimony here in court.

During the trial, certain testimony has been presented by way of depositions. The depositions, conducted pursuant to Court order, consisted of sworn, recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason is not present to testify from the witness stand may be presented in writing, or on a videotape, under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by you, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

Objections during the video depositions were ruled on by the Court and edited out for your convenience.

At this time I will explain the indictment which charges 26 separate offenses called "counts." I will not read it to you at length because you will be given a copy of the indictment for reference during your deliberations.

In summary, Count 1 charges that the Defendants knowingly and wilfully conspired together to act as agents of a foreign government, that is, the Republic of Cuba, without prior notification to the Attorney General as required by law, and to defraud the United States of and concerning its governmental functions and rights. Count 2 charges that Defendants Gerardo Hernandez, John Doe No. 2, also known as Luis Medina III, and Antonio Guerrero knowingly and wilfully conspired together to communicate, deliver and transmit, directly and indirectly, to a foreign government, that is, the Republic of Cuba, information relating to the national defense of the United States. Count 3 charges that Defendant Gerardo Hernandez conspired with other persons to perpetrate murder, that is, the unlawful killing of human beings with malice aforethought, and premeditated intent in the special maritime and territorial jurisdiction of the United States.

Counts 4 through 26, respectively, charge the commission of what are referred to as substantive offenses, namely that the Defendants knowingly acted as agents of a foreign government, that is, the Republic of Cuba, without prior notification to the Attorney General as required by law; that certain of the Defendants caused others so to act; that certain Defendants possessed, accepted, obtained and received documents prescribed by statute and regulation for entry in the United States, which documents the defendants knew to be forged, counterfeited, altered and falsely made, and to have been otherwise procured by fraud and unlawfully obtained; that certain Defendants knowingly

possessed in and affecting interstate and foreign commerce, with intent to use unlawfully, five or more identification documents not lawfully issued for the use of the Defendants, and false identification documents, and that a certain Defendant wilfully and knowingly made a false statement in an application for a passport with intent to induce and secure for his own use the issuance of a passport under the authority of the United States. I will explain the law governing those substantive offenses in a moment.

First, however, as to Counts 1, 2 and 3, you will note that Defendants are not charged in those Counts with committing a substantive offense; rather, they are charged with having conspired to do so.

Count 1 of the indictment charges defendants Gerardo Hernandez; John Doe No. 2 a/k/a Luis Medina III; Rene Gonzalez; Antonio Guerrero; and John Doe No. 3 a/ka/ Ruben Campa.

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense.

Title 18, United States Code, Section 371, also makes it a Federal crime or offense for anyone to conspire or agree with someone else to defraud the United States or any of its agencies. To "defraud" the United States means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery.

So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is *not* necessary for the Government to prove that all of the people named in the indictment were members of the scheme; *or* that those who *were* members had entered into any formal type of agreement; *or* that the members had planned together *all* of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case *must* show beyond a reasonable doubt is:

*First*: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

*Second:* That the Defendant, knowing the unlawful purpose of the plan, wilfully joined in it;

*Third:* That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

*Fourth:* That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and wilfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

In this instance, with regard to the alleged conspiracy charged in Count 1, the indictment charges that the Defendants conspired to act as agents of a foreign government, that is, the Republic of Cuba, without prior notification to the Attorney General as required by law, and to defraud the United States of and concerning its governmental functions and rights. It is charged, in other words, that they conspired to commit two separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit both of those substantive offenses. It would be sufficient if the government proves, beyond a reasonable doubt, that the Defendant willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses the Defendant conspired to commit.

In order to conclude that a Defendant was part of a conspiracy to act as agents of a foreign government, that is, the Republic of Cuba, without prior notification to the Attorney General, you must conclude that the Defendant knew that at least one co-conspirator other than himself acted as an agent of a foreign government, that is, the Republic of Cuba, without prior notification to the Attorney General.

You are further instructed, with regard to the alleged conspiracy offense charged in Count 1, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in Count 1 of the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges in Count 1.

What you must do is determine whether the single conspiracy charged in Count 1 of the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the Defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular Defendant was a member of some other conspiracy, and was not a member of the conspiracy charged in Count 1 of the indictment, then you must acquit that Defendant of Count 1.

In other words, to find a Defendant guilty of Count 1 you must unanimously find that such Defendant was a member of the conspiracy charged in Count 1 of the indictment and not a member of some other separate conspiracy.

Count 2 of the indictment charges the defendants Gerardo Hernandez; John Doe No. 2 a/k/a Luis Medina III; and Antonio Guerrero.

Title 18, United States Code, Section 794(c), makes it a Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to certain particular Federal crimes or offenses, that is, communicating, delivering and transmitting, directly and indirectly, to a foreign government, information relating to the national defense of the United States.

I have already described to you the law of conspiracy, as it pertains to Count 1. This law applies in the same way to Count 2. The difference is that Count 2 charges a conspiracy to violate Title 18, United States Code, Section 794(a).

Title 18, United States Code, Section 794(a) reads, in part:

"Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . either directly or indirectly, any . . . information relating to the national defense" shall be guilty of an offense against the United States.

In order to establish a violation of Count 2 of the indictment, the government must prove all of the following beyond a reasonable doubt:

*First*, that on or about the dates charged in Count 2 of the indictment, the defendants wilfully and unlawfully combined, conspired, confederated and agreed, with each other and with other

persons, to communicate, deliver and transmit, directly and indirectly, information to a foreign government, that is, the Republic of Cuba, as charged in the indictment;

*Second,* that information the defendants conspired to communicate, deliver or transmit related to the national defense;

*Third,* that information the defendants conspired to communicate, deliver or transmit was of a type that the government sought to protect or safeguard from public disclosure;

*Fourth,* that the defendants acted with the intent or with reason to believe that the information would be used to the injury of the United States or to the advantage of a foreign nation; and

*Fifth,* that one or more overt acts in furtherance of the conspiracy was committed.

The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.

To prove that information relates to the national defense, there are two things that the Government must prove. First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States. And second, it must prove that the material is closely held by the United States government.

Where the information has been made public by the United States government and is found in sources lawfully available to the general public, it does not relate to the national defense.

Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

"Reason to believe" as that term is used in this instruction means that the defendant knew

facts from which he concluded or reasonably should have concluded that the information relating to the national defense could be used for the prohibited purposes.

In considering whether or not the defendant acted with intent or having reason to believe that the material would be used to the injury of the United States or to the advantage of a foreign country, you may consider the nature of the information involved.

The Government does not have to prove that the information had been or would be used both to injure the United States and to the advantage of a foreign country. The statute reads in the alternative. So, proof of either will suffice.

Further, the country to whose advantage the information would be used need not be an enemy of the United States. The statute does not distinguish between friend and enemy.

Count 3 charges defendant Gerardo Hernandez.

Title 18, United States Code, Section 1117 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which if actually carried out, would amount to a violation of Title 18, United States Code, Section 1111. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the

indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

Title 18, United States Code, Section 1111, makes it a Federal crime or offense for anyone to murder another human being within the special maritime or territorial jurisdiction of the United States.

A Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the victims named in the indictment are dead:

Second: That the Defendant caused the death of the victims with "malice aforethought";

Third: That the Defendant did so with "premeditated intent;" and

Fourth: That the killing occurred within the special maritime or territorial jurisdiction of the United States.

The special maritime or territorial jurisdiction of the United States includes an aircraft, belonging in whole or in part to the United States, or to any citizen thereof, or to any corporation created by or under the laws of the United States or any state, while such aircraft is in flight over the high seas. The high seas include all waters beyond the territorial seas [twelve (12) nautical miles] of the United States and beyond the territorial seas [twelve (12) nautical miles] of the Republic of Cuba.

To kill with "malice aforethought" means to kill another person deliberately and intentionally; but the Government need not prove that a Defendant hated the person killed or felt ill will toward the victim at the time.

Killing with "premeditated intent" is required in addition to proof of malice aforethought in

order to establish the offense of first degree murder. Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused deliberates, or thinks the matter over, before acting. The law does not specify or require any exact period of time that must pass between the formation of the intent to kill and the killing itself. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.

You are instructed that the location of the alleged murder, as described in the indictment, if you find beyond a reasonable doubt that such offense occurred there, would be within the special maritime or territorial jurisdiction of the United States.

Count 4 charges Defendant Gerardo Hernandez in connection with purported passport #042259745, bearing his photographic likeness.

Count 6 charges Defendant Gerardo Hernandez in connection with purported passport #Z5823064, bearing the photographic likeness of defendant John Doe No. 4, a/k/a Albert Manuel Ruiz.

Count 7 charges Defendant John Doe No. 3, a/k/a Ruben Campa, in connection with purported passport #043291559, bearing his photographic likeness.

Count 9 charges Defendant John Doe No. 2, a/k/a Luis Medina III, in connection with purported passport #043705311, bearing his photographic likeness.

Count 11 charges Defendant John Doe No. 2, a/k/a Luis Medina III, in connection with passport #044551646, bearing his photographic likeness.

Title 18, United States, Section 1546 makes it a Federal crime or offense for anyone to knowingly possess, accept, obtain or receive a false, counterfeit or fraudulently obtained document prescribed by statute or regulation for entry into the United States.

In order to establish a violation of these counts of the indictment, the government must prove all of the following beyond a reasonable doubt:

*First*, that the Defendant knowingly possessed, accepted, obtained or received a document prescribed by statute or regulation for entry into the United States; and

*Second,* that in so doing the Defendant acted wilfully and with knowledge that such document had been forged, counterfeited, altered or falsely made, or had been procured by means

of false claim or statement, or had been otherwise procured by fraud or unlawfully obtained.

With regard to Count 11 only, the second element is that in so doing the Defendant acted wilfully and with knowledge that such document had been procured by means of false claim or statement, or had been otherwise procured by fraud or unlawfully obtained.

A passport is a document prescribed by statute and regulation for entry into the United States.

Count 5 charges Defendant Gerardo Hernandez.

Count 8 charges Defendant John Doe No. 3, a/k/a Ruben Campa.

Count 12 charges Defendant John Doe No. 2, a/k/a Luis Medina III.

Title 18, United States Code, Section 1028, makes it a Federal crime or offense for a person knowingly to possess five or more false identification documents with intent to use them unlawfully.

In order to establish a violation of these counts of the indictment, the government must prove all of the following beyond a reasonable doubt:

*First*, that the defendant possessed five or more identification documents which were false or not issued lawfully for the use of the possessor;

*Second,* that the defendant did so with the wilful intent to use the false identification documents unlawfully; and

*Third,* that the defendant possessed the documents in or affecting interstate or foreign commerce.

"Identification document" means a document made or issued by or under the authority of the United States Government or a state (including the Commonwealth of Puerto Rico) which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals. The definition of "identification document" includes incomplete documents, false documents purporting to be identification documents, and identification documents other than one issued lawfully for the use of the possessor.

When considering whether the defendant possessed five such documents, you must be

unanimous as to at least five specific false identification documents the defendant possessed.

To intend to use a document "unlawfully" means that the intended use would violate one or more federal, state or local laws, or is part of the making of a misrepresentation that violates a law.

The term "interstate" commerce means, transportation or movement between one state and another state. The term "foreign" commerce means transportation or movement between someplace within the United States and someplace outside the United States.

The term "in or affecting interstate or foreign commerce" simply means and requires that the prohibited possession has no more than a minimal nexus with interstate or foreign commerce. Such a minimal interstate or foreign commerce nexus means that the document in possession has had to have some effect in interstate or foreign commerce. The prohibited act need not be contemporaneous with the move in or effect upon interstate commerce, nor is it necessary for the purpose of the prohibited act to use or effect interstate or foreign commerce. This requirement is satisfied if you find beyond a reasonable doubt from the evidence in this case that the defendant had an intent to do acts which, if complete would have affected interstate or foreign commerce.

In this regard the government is not required to prove that the defendant was aware of the future effect upon or in interstate or foreign commerce, but only that the full extent of the scheme, if successful, would have had such results.

In other words, the Government is not required to prove the defendant had knowledge of the interstate or foreign commerce nexus.

Count 10 charges Defendant John Doe No. 2, a/k/a Luis Medina III.

Title 18, United States Code, Section 1542, makes it a Federal crime or offense for a person wilfully and knowingly to make a false statement to obtain a United States passport, contrary to the laws and rules regulating the issuance of passports. The rules regulating the issuance of passports provide, in part, that "[t]he passport applicant shall truthfully answer all questions . . ."

In order to establish a violation of these counts of the indictment, the government must prove all of the following beyond a reasonable doubt:

*First,* that the defendant wilfully and knowingly made a false statement in an application for a passport;

*Second,* that the defendant did so with the intent to induce or secure the issuance of a passport under the authority of the United States, for his own use; and

*Third,* that the defendant acted wilfully and with knowledge of the statement's falsity.

A statement is "false" when made if it is untrue and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

The indictment charges that the defendant made three statements in a passport application knowing each to be false: that his name was Luis Medina III; that his father's name was Luis Ybarra Medina; and that his mother's maiden name was Raquel Guerrero. It is not necessary for the Government to prove that the Defendant made all three statements knowing each to be false. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendant

knowingly and wilfully made one of these statements, knowing it to be false; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the statements the Defendant wilfully made, knowing it to be false.

Count 13 charges Defendant Gerardo Hernandez.

Count 14 charges Defendant John Doe No. 2, a/k/a Luis Medina III.

Count 15 charges Defendant Rene Gonzalez, and charges Defendant Gerardo Hernandez with aiding and abetting him.

Count 16 charges Defendant Antonio Guerrero, and charges Defendants Gerardo Hernandez; John Doe No. 2, a/k/a Luis Medina III; and John Doe No. 3, a/k/a Ruben Campa, with aiding and abetting him.

Count 17 charges Defendant John Doe No. 3, a/k/a Ruben Campa.

Count 18 charges a defendant who is not present.

Count 19 charges Defendant Gerardo Hernandez with aiding and abetting Juan Pablo Roque.

Counts 20 and 21 charge defendants who are not present.

Count 22 charges Defendant Gerardo Hernandez with aiding and abetting Alejandro Alonso.

Count 23 charges Defendant Gerardo Hernandez with aiding and abetting Nilo Hernandez.

Count 24 charges Defendant Gerardo Hernandez with aiding and abetting Linda Hernandez.

Count 25 charges Defendant John Doe No. 2, a/k/a Luis Medina III with aiding and abetting Joseph Santos.

Count 26 charges Defendant John Doe No. 2, a/k/a Luis Medina III with aiding and abetting Amarylis Silverio Santos.

Title 18, United States Code, Section 951, makes it a Federal crime or offense for a person knowingly to act in the United States as an agent of a foreign government without prior notification

to the Attorney General.

In order to establish a violation of these counts of the indictment, the government must prove all of the following beyond a reasonable doubt:

*First,* that the defendant acted as an agent of a foreign government, in this case the government of Cuba;

*Second,* that the defendant failed to notify the Attorney General that he would be acting as an agent of the government of Cuba in the United States prior to so acting;

*Third,* that the defendant acted knowingly, and knew that he had not provided prior notification to the Attorney General; and

*Fourth,* that the defendant acted, at least in part, as an agent for the government of Cuba in the Southern District of Florida.

An "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official.

An "agent of a foreign government", however, does not include any officially and publicly acknowledged and sponsored official or representative of a foreign government. The meaning of any officially and publicly acknowledged and sponsored official or representative of a foreign government includes any official of a foreign government on a temporary visit to the United States for the purpose of conducting official business internal to the affairs of that foreign government.

Notification under the statute shall be effective only if it is made by the agent in the form of a letter, telex or facsimile, addressed to the Attorney General, prior to the agent commencing the services in the United States on behalf of the foreign government.

You are instructed that you must return a verdict of not guilty as to any count charging the defendant with acting as a foreign agent, unless the government proves beyond a reasonable doubt that the defendant was not an officially and publicly acknowledged and sponsored official or representative of a foreign government.

Title 18, United States Code, Section 2, provides the guilt of a Defendant in a criminal case may be proved without evidence that the Defendant personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for one's self may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are wilfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by wilfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had personally engaged in such conduct.

However, before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant wilfully associate in some way with the crime, and wilfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

In regard to Count 3 of the Second Superseding Indictment, you are instructed that every nation has complete and exclusive sovereignty over the airspace above its territory. The territory of every state consists of the land areas and territorial waters adjacent thereto under the sovereignty and protection of such state. Every nation also has complete and exclusive sovereignty and control over its territorial airspace extending 12 nautical miles out to sea. International rules applicable to civil aircraft are not applicable to state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft. No state aircraft are permitted to fly over the territory of another nation without authorization.

It is for you to determine whether or not an aircraft acted as a state aircraft or a civil aircraft.

The International Civil Aviation Organization ("ICAO") has among its provisions the following:

The aims and objectives of ICAO are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to insure the safe and orderly growth of international civil aviation throughout the world.

Due regard shall be had by States when developing regulations and administrative directives to principles including the following:

Interception of civil aircraft will be undertaken only as a last resort:

If undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome; navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established.

States shall publish a standard method that has been established for the maneuvering of aircraft intercepting a civil aircraft. Such method shall be designed to avoid any hazard for the intercepted aircraft.

Special procedures shall be established in order to insure that:

air traffic services units are notified if a military unit observes that an aircraft which is, or might be, a civil aircraft is approaching, or has entered, any area in which interception might become necessary;

all possible efforts are made to confirm the identity of the aircraft and to provide it with the navigational guidance necessary to avoid the need for interception.

As soon as an air traffic services unit learns that an aircraft is being intercepted in its area of responsibility, it shall take such of the following steps as are appropriate in the circumstances:

attempt to establish two-way communication with the intercepted aircraft on any available frequency, including the emergency frequency 121.5 MHz, unless such communication already exists;

inform the pilot of the intercepted aircraft of the interception;

establish contact with the intercept control unit maintaining two-way communication with the intercepting aircraft and provide it with available information concerning aircraft;

relay messages between the interception aircraft or the intercept control unit and the intercepted aircraft, as necessary;

in close coordination with the intercept control unit take all necessary steps to ensure the safety of the intercepted aircraft; and

inform air traffic services units serving adjacent flight information regions if it appears that the aircraft has strayed from such adjacent flight information regions.

During the course of this trial you heard references to the Neutrality Act.

The Neutrality Act makes it unlawful for anyone within the United States, to knowingly begin or set on foot or provide or prepare a means for or furnish the money for, or take part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace.

You should note these Defendants are not charged with any violations of the Neutrality Act.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who knowingly has direct physical control of something is then in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.

Whenever the word "possession" has been used in these instructions it includes constructive as well as actual possession, and also joint as well as sole possession.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "wilfully," as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

Intent and motive should not be confused. Motive is what prompts a person to act, while intent refers to the state of mind with which the act is done.

So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by the Defendant voluntarily as an intentional violation of a known legal duty - that is, with specific intent to do something the law forbids-then the element of "willfulness" as defined in these instructions has been satisfied even though the Defendant may have believed that the conduct was politically or morally required, or that ultimate good would result from such conduct.

On the other hand, if you have a reasonable doubt as to whether the Defendant acted in good faith, sincerely believing himself to be exempt by the law, then the Defendant did not intentionally violate a known legal duty - that is, the Defendant did not act "willfully" - and that essential part of the offense would not be established.

In regard to Count 1 of the Second Superseding Indictment, it is the defendants' theory of defense that they were monitoring the activities of persons and organizations in order to prevent acts of violence and aggression against Cuba. In other words, it is the defendants' theory of defense that they did not act with the necessary bad purpose to disobey or disregard the law because they were acting as agents of the Cuban government in the United States to prevent acts of violence from being carried out.

The Government has the burden of proving beyond a reasonable doubt that the defendant acted with the requisite specific intent to violate the law and if it fails to do so, you must return a verdict of not guilty in favor of the defendant.

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find any one or more of the Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

In this case you have been permitted to take notes during the course of the trial, and most of you – perhaps all of you – have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 17 Cr. 548 (JMF)

JOSHUA ADAM SCHULTE,

Defendant.

Trial

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New York, N.Y.
July 8, 2022
9:00 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge
-and a Jury-

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: DAVID W. DENTON JR.
MICHAEL D. LOCKARD
Assistant United States Attorneys

JOSHUA A. SCHULTE, Defendant *Pro Se*

SABRINA P. SHROFF
DEBORAH A. COLSON
Standby Attorneys for Defendant

Also Present: Charlotte Cooper, Paralegal Specialist

If you find that the government has proved beyond a reasonable doubt that the defendant copied the backup files, you should next consider the second element.

The second element that the government must prove beyond a reasonable doubt for the purpose of Count One is that the material the defendant is accused of taking is national defense information, or "NDI," which is to say that it is directly and reasonably connected with the national defense.

The term "national defense" is a broad term that refers to United States military establishments, intelligence, and to all related activities of national preparedness.

To qualify as NDI, the government must prove that the material is closely held by the United States government. In determining whether material is closely held, you may consider whether the material at issue was already in the public domain; information typically cannot qualify as NDI if it is already in the public domain. But where information is in the public domain, the fact that the information comes from the United States government, or the fact that the United States government considers the information to be accurate or inaccurate may, itself, be NDI.

Thus, where information has been made public by the United States government itself, it is not closely held and cannot be NDI. Similarly, where information has been made public by someone other than the United States government, and

the United States government confirms that the information came from the United States government, it is not closely held and cannot be NDI. But,the United States government's assessment of the reliability or unreliability of publicly available information, as opposed to the information itself, can itself be closely held information relating to the national defense. In such instances, it is the confirmation of the accuracy or inaccuracy of material in the public domain and not the public domain material itself that can qualify as information relating to the national defense. The distinction between a confirmation of information relating to the national defense already in the public domain that can be NDI and one that cannot depends on whether the confirmation itself could potentially harm the national security.

All of that said, if the particular information at issue has been so widely circulated and is so generally believed to be true or to have come from the United States government that confirmation that it came from the United States government would add nothing to its weight, it is not closely held even if there has been no official confirmation by the United States government.

In determining whether material is closely held, you may consider whether it has been classified by appropriate authorities and whether it remained classified on the dates pertinent to the indictment. Although you may consider whether

information has been classified in determining whether it has been closely held, I caution or remind you that the mere fact that information is classified does not mean that the information qualifies as NDI.

In deciding this issue, you examine the information and also consider the testimony of witnesses who testified as to its content and significance and do describe the purpose and the use to which the information could be put.

Whether the information is connected with the national defense is a question of fact that you, the jury, must determine following the instructions that I have just given you about what those terms mean.

The third element that the government must prove beyond a reasonable doubt for the purpose of Count One is that the defendant acted for the purpose of obtaining the information respecting the national defense and with the intent or with reason to believe that the information were to be used to the injury of the United States or used to the advantage of a foreign country.

In considering whether or not the defendant had the intent or reason to believe that the information would be used to the injury of the United States or to provide an advantage to a foreign country, you may consider the nature of the documents or information involved. I emphasize that to convict the defendant of Count One you must find that the defendant had

pertaining to internal computer networks of the CIA including DevLAN. In particular, Count Three is based on the following passage on page 3 of Government Exhibit 812 and the following passage alone:

"In reality, two groups -- EDG and COG -- and at least 400 people, have access. They don't include COG who is connected to our DevLAN through Hickok, an intermediary network that connected both COG and EDG. There is absolutely no reason they shouldn't have known this connection exists. Step one is narrowing down the possible suspects and to completely disregard an entire group and half the suspects as reckless. All they needed to do was talk to one person on infrastructure branch or through any technical description/diagram of the network."

For purposes of this first element, the word "possession" is a commonly used and commonly understood word. Basically it means the act of having or holding property or the detention of property in one's power or command. It may mean actual physical possession or constructive possession. A person has constructive possession of something if he knows where it is and can get it any time he wants or otherwise can exercise control over it. A person has unauthorized possession of something if he is not entitled to have it.

The second element that the government must prove beyond a reasonable doubt for purposes of Counts Two and Three

***EXHIBIT B: APRIL 2, 2024 PROPOSED VERDICT FORM [SCENARIO (a)]***

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**WEST PALM BEACH DIVISION**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>vs.<br>DONALD J. TRUMP, *et al.*,<br>Defendants. | **Case No. 23-80101-CR**<br>**CANNON/REINHART** |

**VERDICT FORM**

We the jury unanimously return the following verdict:

**Count 1**:

Question 1: Did the government prove beyond a reasonable doubt that the document associated with Count 1 is a "Presidential record"? If not, mark "No" and proceed to Count 2. If the government met its burden of proof, mark "Yes" and proceed to Question 2 for Count 1.

No _____ Yes _____

Question 2: Did the government prove beyond a reasonable doubt the seven elements of Count 1? If not, mark "Not Guilty." If the government met its burden of proof, mark "Guilty."

Not Guilty _____ Guilty _____

[. . .]