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## 'This Is the A-Team:' MoFo's Brandon Van Grack on DOJ's Legal Strategy in Trump Documents Case

Morrison & Foerster partner Brandon Van Grack said the special master review is a substantial hindrance to the Justice Department's investigation, even with classified documents excluded from the assessment.

BY ANDREW GOUDSWARD

For weeks, the U.S. Justice Department has been engaged in an unprecedented legal battle with former President Donald Trump over the documents seized during an FBI search of his private club, Mar-a-Lago.

The litigation over a special master, along with efforts by media organizations to unseal key documents, has given the public a rare glimpse into an ongoing criminal probe with massive national security and political implications.

Through the many twists and turns so far in the case, Twitter users and cable news viewers have come to rely on Brandon Van Grack, a partner and co-chair of the national security and crisis management groups at Morrison & Foerster, as an authority on the investigation. Van Grack, whose decade-long career at the Justice Department included leading the department's Foreign Agent Registration Act unit and working on Special Counsel Robert Mueller's team, has taken an active role in breaking down the latest developments in the probe.

Van Grack recently spoke with Law.com and the National Law Journal about the Justice Department's legal strategy, the team of government attorneys working on the case and why the special master review remains a significant hindrance to the investigation. This interview was

conducted before Trump's attorneys asked the U.S. Supreme Court to intervene in the case to mandate that classified documents be part of the special master review.

*The conversation has been edited for length and clarity.*

**National Law Journal: We're in a position now where the 11th Circuit has issued their initial ruling on the classified documents issue, and the special master is now in place. What's your read on where things stand both in terms of the litigation over the special master and then on the criminal investigation more generally?**

**Brandon Van Grack:** We're still early in the investigation. The Department of Justice has now repeatedly said as much to the courts. We also know that the government has not been able to make a lot of progress since they've made those representations because they've been denied access to most of the materials that were seized at



Brandon L. Van Grack of Morrison Foerster.

Courtesy photo

Mar-a-Lago. There are other signals as well that we're early, including the fact that we still have not seen a significant presence of a U.S. attorney's office, which you would normally see if you were getting close to charges. Also, the Justice Department has just obtained, arguably, its most important evidence, and they've been denied access to most of that evidence. That doesn't mean that there hasn't been a lot of significant developments in the investigation, but it's still early. We are still many months away from some sort of decision or conclusion.

Where are we in the special master process? With respect to the 100 classified documents, it's largely been resolved. The Justice Department is now reviewing those and using them both for its criminal investigation and for the national security review that's occurring. With respect to what appears to be hundreds of thousands of other pages of documents that were seized, in many ways the Justice Department has been ground to a halt. That's because there has been between the special master, the District Court and the parties this tension between expediting this review as quickly as possible, and ultimately affording the former president's attorneys the opportunity to allow the process to take longer.

The special master's review as scripted is going to take until the end of the year. That doesn't account for the fact that whatever the special master decides, if those deadlines are adhered to, all of this can still—and will still—be presented to the District Court for her review, for her briefing and for her decision making. On top of that, you can expect that whatever decision that Judge Cannon makes will be appealed in some fashion now to the 11th Circuit. That process will take us well into 2023 regardless of what the special master decides. It will be well into 2023 before we know the fate of these hundreds of thousands of pages.

**As you mentioned, the department can now use the documents it has deemed classified to further its investigation, why is it still a significant hindrance for DOJ to not have access to all the other documents that were not classified?**

**BVG:** There's a few parts of that. The Department of Justice would argue that many, if not most, of those pages are also evidence of a crime—not the crime related to the Espionage Act—but in terms of obstruction and concealment of presidential records, the Justice Department appears to be arguing that some of those documents are in fact the presidential records that were concealed. So, it is denying the Department of Justice evidence of some of the crimes at issue.

Second, many of these documents were commingled with the classified documents. Those documents can be, and this is what the Department of Justice just said to the 11th Circuit, incredibly helpful. They could be incredibly helpful in determining why these documents were taken from the White House, who took these documents, who removed them, who was involved in the storage of them and who had access to them?

It's one thing for a witness to just recall that there were boxes where they saw something top secret. It's another thing to be able to show them the materials in the boxes that they may have been involved in packing or storing and moving, and asking them, "Where did this come from? Why was this not provided to the Department of Justice?" These documents are incredibly helpful to helping understand that story and creating an understanding of the key evidence in the investigation.

**What did you make of DOJ's strategy on appeal focusing initially just on those 100 or so classified documents?**

**BVG:** I think it's been validated as the right strategy and was in fact the correct strategy for

two reasons. One is that those documents are the most important documents involved here. In many ways, it's the reason we are all here talking about this because there were over 100 classified and highly classified documents in an unsecured location. From an investigative and a national security perspective, they were the most important. But apart from that, Judge Cannon's order denying the Department of Justice use and access to classified documents was just untenable. It really would have created a tension between the executive branch and the judicial branch in terms of control and use of sensitive national security information. From a legal principle, as well as a practical one, they had to employ that strategy. Considering how quickly the 11th Circuit ruled, that appears to have been the right strategy.

**There had been tremendous criticism from Trump and people in his orbit after the FBI search. Do you think the special master litigation became a useful way for DOJ to lay out their view of things?**

**BVG:** I don't think there was gratuitous information in any of the filings we've seen. These filings have undergone as much scrutiny as any pre-charging motion or filing probably has ever had in the department's history, up and down. It is being run by an attorney general who has really made the apolitical nature of the department his primary issue and concern. I don't think that speaking to the public through these filings has been a primary concern or focus at all. I do think most of the details in there, at least that I've seen, are directly related to the issues themselves. In fact, as I read these filings, I still see restraint in many of the representations and actions of the Department of Justice.

**Can you elaborate on that?**

**BVG:** You don't see any attacks or really harsh critiques of defense counsel in terms of

their conduct or their actions. You also don't see any critiques directed towards the District Court judge. Even the decision to only initially challenge the classified documents, they could have just challenged everything, but they did it incrementally in terms of the issues they chose to directly appeal.

**What should people know about Jay Bratt, the DOJ official that seems to be spearheading this whole investigation?**

**BVG:** Jay Bratt (chief of the counterintelligence and export section section), Julie Edelstein (the section's deputy chief), Sophia Brill (senior counsel in the national security division)—the team that made an appearance at the hearing and whose names have been on all the filing—they are some of the most experienced national security attorneys at the department. Jay Bratt is one of the most experienced overall national security attorneys in the Department of Justice period.

Julie Edelstein is arguably as experienced in areas of counterintelligence and espionage as anyone in the department. She is a supervisor so she has been handling cases involving the retention and mishandling of classified information for years. Sophia Brill is one of the best national security appellate lawyers.

So it's a group of attorneys who are the best attorneys that the national security division has. This is the A-team. This is a team that is experienced with these issues and these areas of law. On top of that, these are people who have been involved in cases that are difficult or may have political issues associated with them. They've been through the grinder before. I don't think anyone has been through quite this type of grind before, but they've been through it before. You're going to have professionals who are totally and singularly focused on figuring out what happened here, as opposed to being distracted by the political noise.

**When there are political implications, how does that affect you as a prosecutor when you're conducting an investigation?**

**BVG:** The important thing for these prosecutors is that I don't think it will affect them, other than realizing that there will be hyper scrutiny of their work and their decisions. But I do not believe it will affect any decisions that they actually reach. The reality is I think there's much more scrutiny both inside the department, with additional reviews, and outside the department of every decision made and every filing provided.

**Do you have a read on whether, if there is a case to be brought here, it would be brought in D.C. or in the Southern District of Florida?**

**BVG:** No, I think right now the signals are that the department hasn't made that decision. And it's in part because they still have been denied access to the key evidence that would impact any charging decision.

**What factors would affect that decision?**

**BVG:** I think some of the evidence in terms of how and when the material was even sent to Mar-a-Lago as well as what communications were made to the Department of Justice and from where were those communications made. Venue ultimately is going to be a key issue, and we the public don't have a lot of that information. The Department of Justice certainly needs to track all that down before it determines where it would be able to charge and where it would want to charge.

**You've been focused quite a bit on the national security implications of the investigation. We've heard talk in court filings about the intelligence community review of these documents. What is involved in that assessment?**

**BVG:** There are actually a couple pieces of it. There's an initial piece that involves a classification review to determine are these documents, in fact, classified. Then there's an initial assessment as to what damage may have been caused by the fact that these documents were not secured and that they may have been disclosed to persons who didn't have a clearance. Then there'll be some initial remediation that goes on. At some point later, there's a full on damage assessment, which involves actually piecing together through investigation what is the best available understanding of who specifically may have had access to the documents and how they may have been compromised. That's where you get fingerprint evidence and evidence that has been seized in the criminal investigation really feeding that assessment. Then at the end is a full on assessment of the damage, and there may be additional remediation taken because of that.

**What are the main things that you're watching for in the coming months involving this investigation?**

**BVG:** I do think the special master process, regardless of what happens with this latest appeal, is going to take months. It's going to be many weeks or months before we see any real output from that process. It doesn't mean the Department of Justice is no longer investigating the case. For example, there have been representations that they have concerns that they may not have all the classified information. There are additional witnesses that it seems like they maybe have not interviewed before. If in fact there is a concern that they don't have everything, you'd look to see if there are additional searches conducted. To be clear, I don't know. But that would be yet another escalation in terms of the seriousness of the investigation.