

THE ELEMENTS OF THE OFFENSE FOR AN 18 USC 793E PROSECUTION

Back on August 10, I did a post laying out the elements of the offense from some pattern jury instructions for 18 USC 793e, which is what a judge would instruct a jury to consider if the Trump document theft ever went to trial.

I want to update with contents of the affidavit that so that others understand how things like the June 3 meeting at Mar-a-Lago were not only an attempt to get the stolen classified documents back, but were, short of doing so, a way to establish probable cause in the event that Trump would not cooperate. These efforts would overcome the real challenges – laid out in this WaPo article – of holding a former President accountable.

Key to holding Donald J. Trump accountable for the theft of classified documents will not be, as it is in most cases, reference to the multiple Non-Disclosure Agreements that cleared people have to sign (for the reasons the WaPo laid out). Instead, it would be to show that the Presidential Records Act required Trump to return *every* Presidential Record, classified or not, and that because he did not have clearance after he was no longer President nor (according to Joe Biden) a need to know, he could not retain any NDI. Given the atrocious conditions under which he kept this stuff at Mar-a-Lago and his refusal to fix that, the guidelines on retaining classified information (which are cited in the affidavit) would also be key.

Here's what jurors would be asked to decide:

Did the defendant, without authorization, have possession of, access to, or control over a document that was National Defense Information?

Yes. As of January 20, 2021, Donald Trump (FPOTUS) had an affirmative obligation to return

all Presidential Records to the National Archives, whether or not those records had National Defense Information.

From May 6, 2021 until late December 2021, NARA informed FPOTUS of missing documents and attempted to negotiate their return. Upon retrieval of those documents, NARA sent a referral to DOJ regarding the classified documents. Inventories and witness testimony confirmed FPOTUS retained further Presidential Records, including classified records. On May 12, the FBI subpoenaed the remaining classified documents at Mar-a-Lago, but when Jay Bratt arrived to retrieve them on June 3, he discovered FPOTUS continued to withhold classified documents.

From January 20, 2021 until August 8, 2022, FPOTUS retained 100s of documents including NDI in defiance of the Presidential Records Act, as well as other documents.

Did the document in question relate to the national defense?

From January 20, 2021 until January 2022, FPOTUS retained the following documents containing NDI:

- 67 Confidential documents
- 92 Secret documents
- 25 Top Secret documents
- Others marked HCS, FISA, ORCON, NOFORN, and SI
- Some documents with Trump's handwritten notes

From January 2022 until June 3, 2022, FPOTUS retained [description of the documents turned over]. On that day, representatives showed Jay Bratt—but refused to turn over—identifiable documents containing NDI.

From January 20, 2021 until August 8, 2022, FPOTUS had unauthorized possession of 11 boxes including NDI documents, including documents classified TS/SCI.

All of these documents were closely held, related to national defense, would do grave damage if released.

Did the defendant have reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation?

Trump is such a psychopath that the answer to this might normally be in question. After all, he routinely treated top secret intelligence like it was toilet paper or party favors for visiting Russians. But because of that June meeting, they will likely be able to reach that, as well.

On June 3, 2022, DOJ's head of Counterintelligence traveled to Mar-a-Lago to discuss the unlawfully retained documents. FPOTUS acknowledged Mr. Bratt's goal and acceded to the goal of securing the documents. After Mr. Bratt sent attorney for FPOTUS a communication on June 8, 2022, directing him to secure all NDI material according to the terms of 32 CFR Parts 2001 and 2003. Attorney for FPOTUS acknowledged receipt and took action in response. However, on August 8, 2022, both the storage closet containing 10 boxes of documents including NDI information and one box, including TS/SCI documents, stored in a hotel safe, remained insecure.

Did the defendant retain the above material and fail to deliver it to the officer or employee of the United States entitled to receive it?

From May 2021 until January 2022, NARA informed FPOTUS of the requirements to comply with the Presidential Records Act. On May 12, 2022, the FBI subpoenaed remaining classified information.

Nevertheless, FPOTUS refused to comply, even with a lawful subpoena, and remained in possession of 11 boxes including NDI information on August 8, 2022.

Did he keep this document willfully?

In addition to refusing NARA's legal requests to return the documents and a lawful subpoena, FPOTUS took efforts to conceal NDI information from his representatives to prevent them from returning documents. Multiple witnesses have testified that FPOTUS responded to consultations about the importance of returning NDI information by insisting they were, "Mine!"

All of the above, aside from the witness testimony declaring Presidential Records including classified NDI, "Mine," would be backed by multiple exchanges of paperwork.