HOW DOJ CONTINUES TO BUILD ITS CASE THAT TRUMP IMPROPERLY RETAINED NATIONAL DEFENSE INFORMATION

DOJ's response to Trump's request for a Special Master last night did a bunch of things — most notably, debunking lies Trump's camp had been telling.

But I want to point to several details presumably designed not just to impress Judge Aileen Cannon that this is more serious than Trump has made out, but to give Trump and his attorneys notice that they're dealing with National Defense Information.

As I and others have noted repeatedly, the Espionage Act doesn't criminalize the refusal to return *classified* information. It criminalizes the refusal to return National Defense Information. That's a legacy of how old the law is — it predates the current US classification system.

But it means Trump's crowing about having declassified documents is simply bluster, irrelevant to his exposure under the statute.

The distinction between classified and National Defense Information not only shows up in Trump's affidavit, but it shows up in a key spot: modifying a still-redacted paragraph between the discussion of the June 3 meeting (which, because it pertained to grand jury information, is entirely redacted in the affidavit) and the discussion of Jay Bratt's June 8 follow-up.

> 2 18 U.S.C. § 793(e) does not use the term "classified information." but rather criminalizes the willful retention of "information relating to the national defense." The statute does

> not define "information related to the national defense." but courts have construed it broadly. See Gorin, .. United States. 312 U.S. 19. 28 (1941) (holding that the phrase "information relating to the national defense" as used in the Espionage Act is a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"). **In addition, the information must be "closely held" by the U.S. government.** See United States v. Squillacote. 221 F.3d 542, 579 (4th Cir. 2000) ("[I]nformation made public by the government as well as information never protected by the governent is not national defense information."); United States, .. Morison. 844 F.2d 1057, 1071-72 (4th Cir. 1988). Certain courts have also held that the disclosure of the documents must be potentially damaging to the United States. See Morison, 844 F.2d at 1071-72. [my emphasis]

In context, when Bratt contacted Evan Corcoran and instructed him to secure the storage room where, DOJ suspected correctly, classified documents were still being stored, he was asking Corcoran to protect the information.

In yesterday's filing, the government demonstrated what properly protecting NDI looks like in practice. The example that has — deservedly — gotten the most attention is the description of case agents and National Security Division attorneys having to get *additional* clearances to access this information.

> In some instances, even the FBI counterintelligence personnel and DOJ attorneys conducting the review required additional clearances before they were permitted to review certain documents.

Trump was storing this stuff in a hotel safe. But when FBI and DOJ got the materials back, they wouldn't let anyone look at the documents until they got additional clearances first.

DOJ also described that the classified materials that have been seized have been segregated and properly stored.

> All of the classified documents seized in the August 8 search have been segregated from the rest of the seized documents and are being separately maintained and stored in accordance with appropriate procedures for handling and storing classified information.

DOJ intends that these special protections will extend to these court proceedings: DOJ demanded that if Judge Cannon decides to appoint a Special Master, she pick someone who is already cleared at the TS/SCI level.

> If the special master must be permitted to review classified documents, in order to avoid unnecessary delay, the special master should already possess a Top Secret/SCI security clearance.

And finally, there's the rationale that DOJ raised over and over again for why it needs to retain access to all the classified materials: The Intelligence Community needs to and has already started the process of assessing what kind of damage Trump did by keeping this stuff in his hotel safe.

> The Intelligence Community is also reviewing the seized documents to assess the potential risk to national security that would result if these materials were disclosed while they were unlawfully stored at the Premises.
>
> [snip]
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> As the government has explained, the Intelligence Community, under the

> supervision of the Director of National Intelligence, is conducting a classification review of those documents and an assessment of the potential risk to national security that could result from their disclosure.

Thus far, Trump's lawyers have been oblivious to such warnings.

But if DOJ were to charge this, his attorneys' obliviousness may be Trump's downfall. I laid out (most recently in this post) what a jury would be asked to consider if Trump ever were put on trial for his actions. One central question would be whether the jury believed this was NDI, including whether (as bolded above) it was closely held. And one thing prosecutors would demonstrate, at length, is that whatever the former President did with these documents, the rest of the government continued to closely hold the materials.

If Trump's lawyers were smart, they'd read last night's filing and realize that every time they make DOJ write up another document, DOJ further documents things that would be key evidence against Trump at trial.

This stunt about a Special Master — whatever else it is — is also helping DOJ strengthen any prosecution of Trump for his actions.