

NO CRIME ALLEGED IN THE MAR-A-LAGO INDICTMENT OCCURRED IN DC; OTHER CRIMES DID

Today, SCOTUS ruled that the government can retry someone in the proper venue if the original case is thrown out on venue grounds without violating double jeopardy.

The decision matters for Vladislav Klyushin, “Putin’s pen-tester,” whose sole post-trial challenge to his Boston insider trading conviction was on venue grounds. The decision makes it more likely he’ll just move to sentencing and maybe decide to make his life easier by cooperating with the US government.

Contrary to what a bunch of TV lawyers are saying – who adopted this challenge as their favorite explanation for why Jack Smith would charge Trump under 18 USC 793(e) in Southern District of Florida rather than DC – the decision would never have mattered for Donald Trump.

I can’t tell you whether Smith charged Trump in Florida because he knew Trump would have successfully challenged venue elsewhere, because he has a larger strategy in mind, or because he just believes you don’t look for easy wins if you’re going to charge the former President of the United States. I suspect it is all of those things, plus a decision to do as much as possible to convince Republicans that this prosecution is legitimate, not merely an attempt to get Donald Trump.

I know that when Smith spoke publicly for all of three minutes, he mentioned the Florida venue twice.

Frankly, all the hand-wringing about venue in

SDFL plays into the Republican doubters' hands, because it sure makes it sound like *you* are trying to get Trump rather than prosecute a crime.

I can tell you those who think DC would have worked misunderstand the charge and misunderstand the only way an 18 USC 793(e) charge was going to be viable against the former President.

As a reminder, these are the elements of offense of 18 USC 793(e), taken from the very same jury instructions that a jury in SDFL one day may receive. As I showed in August, there was already abundant evidence that Trump met the elements of offense.

There are five elements:

- Unauthorized possession (proof he had the documents after such time as he was no longer permitted to have them)
- National Defense Information (NDI) (reasons a jury would agree that these documents were closely held and important to keeping the US safe)
- Damage to the US (some kind of proof that Trump knew both that these documents could damage the US and that classified information could generally)
- Willful (proof that he knew he had the documents, as distinct from – like Pence and probably Biden – he just accidentally removed them)

from his office along with other papers)

- Refusal (some proof that he didn't just not return the documents, but refused to do so)

To charge a former President – as distinct from someone who had clearance and brought stuff home from work – you have to prove two things: One, he knew he had documents that remained classified *after* he left the Presidency, and two, that after such time as he realized he still had classified documents, he refused to give them back.

Biden and Pence discovered they had unauthorized possession of classified documents and they rushed to give them back.

By July 2021 – when Trump bragged about having documents that remained classified to a ghost writer – Trump knew he had unauthorized possession of classified documents. The Archives, Trump's lawyers, and DOJ told him over and over that he had to give them back.

And then, in two different incidents, he took classified documents and *removed them* from a set of other documents that he did give back. That's the refusal.

You do not have a crime with which you can charge a former President – as distinct from someone whose possession of classified documents would be unauthorized once he brought them outside the SCIF he had agreed to hold them in – until such time as he realizes he has them, someone asks for them back, and he refuses.

It is the refusing to give the documents back that is the provable crime, not the possession *per se*.

And Trump's two big refusals – the two times he went to great efforts to sort through boxes *personally* to cull out documents he wanted to

keep rather than return – were both in Florida, both long after he left the White House.

According to the indictment, Trump committed the act of refusing to give documents back under 18 USC 793(e) twice: once, from November 2021 until January 2022, when having been convinced he had to return documents, he went through box after box and carefully curated the boxes he returned on January 18, 2022 to keep some. The proof that he refused to give everything back in January 2022 is that there were still 38 classified documents when Evan Corcoran conducted a search in June, ten of which are charged as separate counts.

Trump refused again in May and June 2022, when he duped Evan Corcoran into claiming he had done a diligent search when in fact Trump had made sure that Corcoran would only search 30 of the 64 boxes Trump knew he still possessed. The proof that he withheld classified documents in June are the 100-some classified documents that the FBI found him to still have in his possession on August 8 of last year, 21 of which are charged as separate counts.

Jack Smith's decision to charge this case in Florida – knowing full well he might face Aileen Cannon – was a decision about whether he could prove the elements of the offense of a crime that happened in Florida.

He is provably still considering charging crimes that happened in DC. He might even be contemplating charges for crimes that happened in New Jersey. Or maybe he is contemplating charging crimes that started in DC and ended in New Jersey.

I suspect we're going to be surprised with the crimes he does charge, as virtually all the people saying this could have been charged in DC were surprised that he did choose to charge 18 USC 793(e), rather than just obstruction.

I wasn't surprised. I laid out exactly how it would look last August; the big surprise to me are the pretty pictures proving Trump's

possession of these documents in Florida.

I also think virtually everyone is imagining that Smith is searching for the one trial to take Trump down, rather than making decisions about a package of conduct about which he might be able to reach a just resolution for the public interest.

I personally doubt an 18 USC 793(e) trial will happen in Florida (or elsewhere), because 793 prosecutions rarely go to trial.

They plead out.

And I promise you that Jack Smith would prefer to get a plea agreement with Donald Trump – however improbable that may seem to us now – than air 31 of the country's most classified documents at trial.

The only prosecutorial decision Jack Smith has made public thus far is to charge a crime in Florida that happened in Florida. And none of us know how that decision fits in with the other prosecutorial decisions Smith might make or may already have made.