

THE ABCS (AND PROVISIONS E, F, AND G) OF THE ESPIONAGE ACT

When Donald Trump wrote the Acting Archivist to give Kash Patel and John Solomon access to what they have since claimed were his Presidential Archives, he made a point of emphasizing that neither had been convicted of the crime that would disqualify them from accessing the records archived in official government archives at 700 Pennsylvania Avenue and elsewhere: “a crime that involves reviewing, retaining, removing, or destroying NARA records.”

Both individuals meet the requirements for access to records under 36 C.F.R. § 1270.44(a)(4).

That is, as far as we know, true. Neither has been convicted of a crime specifically involving access to the Archives.

But Solomon has long been publicly implicated in an investigation into a Dmitry Firtash-linked attempt to funnel Trump Russian-provided dirt. And The Hill’s review of his work included many details that might allow DOJ to treat him as something other than a journalist in that investigation.

As for Kash, at least in April 2021, he was reportedly under investigation for leaking classified information, something that might have led the government to strip his clearance if they hadn’t already.

Both would be wildly inappropriate people to give preferential access to Trump’s Presidential archives. But they nevertheless *would* qualify under statute.

But Trump *wasn’t* writing to give Kash and Solomon access to his Archives. His letter

explicitly stated he was giving them access to, “Presidential records of my administration.” A week ago, the FBI carted away 27 boxes of “Presidential records of [Trump’s] administration” that had not been properly turned over to the custody of the Archives for safe keeping.

Those details from Trump’s letter, plus new reporting on the events of June, adds to the possibility that this letter was an attempt to retroactively justify access to classified records that, in addition to documents pertaining to the Russian investigation, also likely included even more sensitive documents.

In a largely insipid storyline of the search, Christina Bobb described the WaPo about DOJ’s request after touring the storage closet in which Trump was hoarding classified documents differently than previous, anonymous explanations that likely *also* come from her.

Bobb told The Post that the group toured the storage facility, opening boxes and flipping through the records inside. She said Justice Department officials indicated they did not believe the storage unit was properly secured, so Trump officials added a lock to the facility.

By description, that’s not (as earlier reported) a request that Trump buy a bigger lock. It almost certainly was a reminder that classified information must be stored according to certain guidelines. DOJ’s letter probably even included a citation to 20 CFR § 2001.43, which describes (among other things) the standard of lock that must be used to store classified documents (*italicized below*).

(a) General. Classified information shall be stored only under conditions designed to deter and detect unauthorized access to the information. Storage at overseas locations shall be

at U.S. Government-controlled facilities unless otherwise stipulated in treaties or international agreements. Overseas storage standards for facilities under a Chief of Mission are promulgated under the authority of the Overseas Security Policy Board.

(b) Requirements for physical protection—

(1) Top Secret. Top Secret information shall be stored in a GSA-approved security container, a vault built to Federal Standard (FED STD) 832, or an open storage area constructed in accordance with Sec. 2001.53. In addition, supplemental controls are required as follows:

(i) For GSA-approved containers, one of the following supplemental controls:

(A) Inspection of the container every two hours by an employee cleared at least to the Secret level;

(B) An Intrusion Detection System (IDS) with the personnel responding to the alarm arriving within 15 minutes of the alarm annunciation. Acceptability of Intrusion Detection Equipment (IDE): All IDE must be in accordance with standards approved by IS00. Government and proprietary installed, maintained, or furnished systems are subject to approval only by the agency head; or

(C) Security-In-Depth coverage of the area in which the container is located, provided the container is equipped with a lock meeting Federal Specification FF-L-2740.

(ii) For open storage areas covered by Security-In-Depth, an IDS with the personnel responding to the alarm arriving within 15 minutes of the alarm annunciation.

(iii) For open storage areas not covered by Security-In-Depth, personnel responding to the alarm shall arrive within five minutes of the alarm annunciation.

(2) Secret. Secret information shall be stored in the same manner as Top Secret information or, until October 1, 2012, in a non-GSA-approved container having a built-in combination lock or in a non-GSA-approved container secured with a rigid metal lockbar and an agency head approved padlock. Security-In-Depth is required in areas in which a non-GSA-approved container or open storage area is located. Except for storage in a GSA-approved container or a vault built to FED STD 832, one of the following supplemental controls is required:

(i) Inspection of the container or open storage area every four hours by an employee cleared at least to the Secret level; or

(ii) An IDS with the personnel responding to the alarm arriving within 30 minutes of the alarm annunciation.

(3) Confidential. Confidential information shall be stored in the same manner as prescribed for Top Secret or Secret information except that supplemental controls are not required.

(c) Combinations. Use and maintenance of dial-type locks and other changeable combination locks.

(1) Equipment in service. Combinations to dial-type locks shall be changed only by persons authorized access to the level of information protected unless other sufficient controls exist to prevent access to the lock or knowledge of the combination. Combinations shall be changed under the following conditions:

(i) Whenever such equipment is placed into use;

(ii) Whenever a person knowing the combination no longer requires access to it unless other sufficient controls exist to prevent access to the lock; or

(iii) Whenever a combination has been subject to possible unauthorized disclosure.

(2) Equipment out of service. When security equipment is taken out of service, it shall be inspected to ensure that no classified information remains and the combination lock should be reset to a standard combination of 50-25-50 for built-in combination locks or 10-20-30 for combination padlocks.

(d) Key operated locks. When special circumstances exist, an agency head may approve the use of key operated locks for the storage of Secret and Confidential information. Whenever such locks are used, administrative procedures for the control and accounting of keys and locks shall be included in implementing regulations required under section 5.4(d)(2) of the Order. [my emphasis]

This section of 32 CFR Parts 2001 and 2003 gets cited in search warrant affidavits for 18 USC 793e; here's how it appeared, for example, in Reality Winner's search warrant:

32 C.F.R. Parts 2001 and 2003 regulate the handling of classified information. Specifically, 32 C.F.R. § 2001.43, titled "Storage," regulates the physical protection of classified information. This section prescribes that Secret and Top Secret information "shall be stored in a GSA-approved security container, a vault built to Federal Standard (FMD STD) 832, or an open storage area

constructed in accordance with § 2001.53." It also requires periodic inspection of the container and the use of an Intrusion Detection System, among other things.

In Trump's search warrant, a similar paragraph or one following it would include language about how, when the head of DOJ's Espionage division, Jay Bratt, went and inspected Trump's storage facility storing documents classified at least at the Secret level on June 3, he found some easily picked lock from WalMart or whatever it was on the door.

Given that the email Bratt sent Trump on June 8 did *not* say, buy a new lock but instead said, you're not complying with the requirements for storing classified information, it may also have made a request for proof that someone with clearance at the Secret level was coming to check his stash of documents every 4 hours (see the language bolded above). A refusal to provide that proof voluntarily (because Trump wasn't complying) may explain why DOJ subpoenaed Trump for such information, reportedly on June 22. Or they may have had other reason to worry, such as Kash Patel's claims, made on May 4, to have specific knowledge of which documents Trump had returned (which, if Kash's clearance got stripped when he was under investigation for leaking, he would have no legal basis to know).

But DOJ did subpoena Trump for two months of security footage. And it turned out to show people moving documents in and out of the closet seemingly in conjunction of requests for DOJ.

The Justice Department also subpoenaed surveillance footage from Mar-a-Lago recorded over a 60-day period, including views from outside the storage room. According to a person briefed on the matter, the footage showed that, after one instance in which Justice Department officials were in contact with Mr. Trump's team, boxes were moved in and

out of the room.

That activity prompted concern among investigators about the handling of the material. It is not clear when precisely the footage was from during the lengthy back-and-forth between Justice Department officials and Mr. Trump's advisers, or whether the subpoena to Mr. Trump seeking additional documents had already been issued.

Given that Trump had no reason to expect that DOJ would ask to see this storage closet on June 3, the moving of boxes may reflect an effort to hide the classified documents from the lawyer who affirmed there were no classified documents there, rather than an effort to hide them from DOJ (in which case the lawyer in question, possibly the suddenly-silent Evan Corcoran, would be in a legal conflict with Trump and might be forced to testify against him).

Which brings us to what is still a chicken-and-egg moment, which might be any of the following:

- Trump refused to provide surveillance video voluntarily knowing it wouldn't show compliance with the CFR but would show damning information, which led DOJ to subpoena it, which led to the discovery of uncleared people accessing classified materials (a violation of 18 USC 793f or g, in addition to the violation of 793e)
- A Trump lawyer realizing the email about CFR compliance meant Trump was in trouble

and needed to cover his tracks

- DOJ finding other reason to be concerned, such as the Kash comments from May seeming to reflect personal knowledge of Trump's classified documents or Trump's letter to the Archives reflecting plans to give two people about whom DOJ would have particularized security concerns access to "Presidential records of my administration"

Like I said, thus far it's a chicken-and-egg thing, but all these things came to a head in late June.

Ultimately, on June 19, Trump filed paperwork that provides the appearance of official access for Kash and Solomon, and (reportedly on June 22), DOJ served a subpoena asking for records showing who had entered and exited the closet. *On June 22*, so by reports, the same day that Trump got the subpoena but three days after Trump gave Kash the access, Kash went public with his claim to be accessing Trump's records *at the Archive*, which is not what the letter asks for.

The *problem*, though, is that Trump was no longer an original classification authority after January 20 – even his own clearance would be limited! So while he could give Kash and Solomon monitored, privileged access at the Archives (because, while they were both security concerns, they had never been convicted of stealing records from the Archives), Trump had no authority to give them access to the Presidential records at his golf resort, because

they included classified records that neither had clearance to access much less a need to know.

Here are all the ways that 18 USC 793 of the Espionage Act add to someone's liability if they share classified information with people not entitled to receive it,

(d)Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note 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 to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it**, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e)Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note 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 to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f)Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) **through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust**, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) **If two or more persons conspire to violate any of the foregoing provisions of this section**, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.
[my emphasis]

Note, I included 18 USC 793d, but I think that under the Presidential Records Act, Trump no longer had authorization to store those

documents. I included it because, if Trump pushed the point, he could be charged under that statute instead of 793e.

Both before and, especially, since this has blown up, Kash Patel and John Solomon have been the loudest purveyors of false claims that this is about classified information. Both were insisting in July, for example, that they knew that all the Russian-related documents Trump tried to declassify in the last minutes during which he still had authority had in fact been declassified and remained declassified. Kash, especially, knows that the Espionage Act is not about classified information anyway, but instead National Defense Information.

I still don't think that these events are primarily about Kash and Solomon. But I think Trump's efforts to have them continue to purvey false claims that he had not actually been implicated with improper ties to Russia may have led him to do stupid things that expanded his own (and their) liability under the Espionage Act.

DOJ could have written the warrant to convey that Trump was *only* under investigation for 18 USC 793e, the most obvious clause covering his refusal to give documents back. They did not. And all the people around Trump should be more worried about their own legal liability right now than spreading false claims that any attempt by Trump to declassify National Defense Information could change his legal exposure.

emptywheel Trump Espionage coverage

Trump's Timid (Non-Legal) Complaints about
Attorney-Client Privilege

18 USC 793e in the Time of Shadow Brokers and
Donald Trump

[from Rayne] Other Possible Classified Materials
in Trump's Safe

Trump's Stolen Documents

John Solomon and Kash Patel May Be Implicated in
the FBI's Trump-Related Espionage Act
Investigation

[from Peterr] Merrick Garland Preaches to an
Overseas Audience

Three Ways Merrick Garland and DOJ Spoke of
Trump as if He Might Be Indicted

The Legal and Political Significance of Nuclear
Document[s] Trump Is Suspected to Have Stolen

Merrick Garland Calls Trump's Bluff

Trump Keeps Using the Word "Cooperate." I Do Not
Think That Word Means What Trump Wants the Press
To Think It Means

[from Rayne] Expected Response is Expected:
Trump and Right-Wing DARVO

DOJ's June Mar-a-Lago Trip Helps Prove 18 USC
793e

The Likely Content of a Trump Search Affidavit

All Republican Gang of Eight Members Condone
Large-Scale Theft of Classified Information,
Press Yawns

Some Likely Exacerbating Factors that Would
Contribute to a Trump Search

FBI Executes a Search Warrant at 1100 S Ocean
Blvd, Palm Beach, FL 33480

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Espionage Act