

Why Donald Trump Will Soon be Indicted

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It gives me no joy to write this piece.

Even a cursory review of the redacted version of the affidavit submitted in support of the government’s application for a search warrant at the home of former President Donald Trump reveals that he will soon be indicted by a federal grand jury for three crimes: Removing and concealing national defense information (NDI), giving NDI to those not legally entitled to possess it, and obstruction of justice by failing to return NDI to those who are legally entitled to retrieve it.

When he learned from a phone call that 30 FBI agents were at the front door of his Florida residence with a search warrant and he decided to reveal this publicly, Trump assumed that the agents were looking for classified top-secret materials that they’d allege he criminally possessed. His assumptions were apparently based on his gut instinct and not on a sophisticated analysis of the law. Hence, his public boast that he declassified all the formerly classified documents he took with him.

Unbeknownst to him, the feds had anticipated such a defense and are not preparing to indict him for possessing classified materials, even though he did possess hundreds of voluntarily surrendered materials marked “top secret.” It is irrelevant if the documents were declassified, as the feds will charge crimes that do not require proof of classification. They told the federal judge who signed the search warrant that Trump still had NDI in his home. It appears they were correct.

Under the law, it doesn’t matter if the documents on which NDI is contained are classified or not, as it is simply and always criminal to have NDI in a non-federal facility, to have those without security clearances move it from one place to another, and to keep it from the feds when they are seeking it. Stated differently, the absence of classification — for whatever reason — is not a defense to the charges that are likely to be filed against Trump.

Yet, misreading and underestimating the feds, Trump actually did them a favor. One of the

elements that they must prove for any of the three crimes is that Trump knew that he had the documents. The favor he did was admitting to that when he boasted that they were no longer classified. He committed a mortal sin in the criminal defense world by denying something for which he had not been accused.

The second element that the feds must prove is that the documents actually do contain national defense information. And the third element they must prove is that Trump put these documents into the hands of those not authorized to hold them and stored them in a non-federally secured place. Intelligence community experts have already examined the documents taken from Trump's home and are prepared to tell a jury that they contain the names of foreign agents secretly working for the U.S. This is the crown jewel of government secrets. Moreover, Trump's Florida home is not a secure federal facility designated for the deposit of NDI.

The newest aspect of the case against Trump that we learned from the redacted affidavit is the obstruction allegation. This is not the obstruction that Robert Mueller claimed he found Trump committed during the Russia investigation. This is a newer obstruction statute, signed by President George W. Bush in 2002, that places far fewer burdens on the feds to prove. The older statute is the one Mueller alleged. It characterizes any material interference with a judicial function as criminal. Thus, one who lies to a grand jury or prevents a witness from testifying commits this variant of obstruction.

But the Bush-era statute, the one the feds contemplate charging Trump with having violated, makes it a crime of obstruction by failing to return government property or by sending the FBI on a wild goose chase looking for something that belongs to the government and that you know that you have. This statute does not require the preexistence of a judicial proceeding. It only requires that the defendant has the government's property, knows that he has it and baselessly resists efforts by the government to get it back.

Where does all this leave Trump? The short answer is: in hot water. The longer answer is: He is confronting yet again the federal law enforcement and intelligence communities for which he has rightly expressed such public disdain. He had valid points of expression during the Russia investigation. He has little ground upon which to stand today.

I have often argued that many of these statutes that the feds have enacted to protect themselves are morally unjust and not grounded in the Constitution. One of my intellectual heroes, the great Murray Rothbard, taught that the government protects itself far more aggressively than it protects our natural rights.

In a monumental irony, both Julian Assange, the WikiLeaks journalist who exposed American war crimes during the Afghanistan and Iraq wars, and Edward Snowden, the former National Security Agency employee who exposed criminal mass government surveillance upon the American public, stand charged with the very same crimes that are likely to be brought against Trump. On both Assange and Snowden, Trump argued that they should be executed. Fortunately for all three, these statutes do not provide for capital punishment.

Rothbard warned that the feds aggressively protect themselves. Yet, both Assange and Snowden are heroic defenders of liberty with valid moral and legal defenses. Assange is protected by the Pentagon Papers case, which insulates the media from criminal or civil liability for revealing stolen matters of interest to the public, so long as the revealer is not

the thief. Snowden is protected by the Constitution, which expressly prohibits the warrantless surveillance he revealed, which was the most massive peacetime abuse of government power.

What will Trump say is his defense to taking national defense information? I cannot think of a legally viable one.

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