

WHAT WE CAN'T RULE OUT WITH BIDEN'S CLASSIFIED DOCUMENTS

The FBI did a consensual, almost 13-hour search of President Biden's Wilmington home yesterday. The FBI found and seized six more classified documents "with surrounding materials" (some of which date from Biden's time in the Senate) as well as hand-written notes from his time as Vice President.

Note that after Biden's lawyer's found a document in the room adjoining his garage, they stopped searching. DOJ came to fetch that document and took 5 more pages, all of which may have been in the same place. It's possible (though in no way certain) that these additional documents were simply stored in the same place, the obvious outcome of DOJ's effort to return and do a more thorough search.

The voluntary nature with which Biden has given information back to DOJ still starkly distinguishes him from Trump. And that comparison may give DOJ leverage to try to obtain the records it believes Trump still has.

But at this point, we can't rule out several of the most damning details that are known to be present with Trump to also be present with Biden.

There are, as far as we know, at least three things that make Trump's retention of classified records particularly damning:

- The existence of a leatherbound trophy box in his office storing the most classified documents (alongside Time Magazine covers, which is one piece of evidence these are

trophies)

- The existence of 46 empty classified folders, which may be one reason DOJ suspects not all of Trump's documents are accounted for yet
- Two compiled documents integrating classified records with other materials, one dating from Trump's presidency (the grant of clemency for Roger Stone) and one that includes at least 3 messages that post-date his presidency

I'll review that last document, because it hasn't gotten nearly enough attention yet.

One of the last filings released in Trump's Special Master process, summarizing the disputes, described a "compilation" of two classified records (one Confidential, one Secret), and what appears to be four other documents: messages from a book author, a religious leader, and a pollster, as well as what appears to be a fourth document involving a lawyer. The messages all post-date January 20, 2021.

One potentially privileged document that had been scanned was removed from the database (SM_MAL_00001185 to SM_MAL_00001195). That document – excluding the one potentially privileged page (SM_MAL_00001190) – is discussed in the next section about the Filter Materials Log. The potentially privileged page is the subject of a separate letter from the Filter Team to Your Honor, which is sent today.

[snip]

This document is a compilation that includes three documents that post-date Plaintiff's term in office and two classified cover sheets, one SECRET and the other CONFIDENTIAL. Because Plaintiff can only have received the documents bearing classification markings in his capacity as President, the entire mixed document is a Presidential record.

Besides the classified cover sheets, which were inserted by the FBI in lieu of the actual documents, none of the remaining communications in the document are confidential presidential communications that might be subject to a claim of executive privilege. Three communications are from a book author, a religious leader, and a pollster. The first two cannot be characterized as presidential advisers and all three are either dated or by content occurred after Plaintiff's administration ended.
[my emphasis]

In other words, this document, which was stored in a desk drawer, suggests that Trump *used* classified documents at least once after he left the White House.

While there are press reports that Trump otherwise accessed documents after DOJ started looking for them – in part, by curating the ones he was willing to send back in January 2022 and hiding some from Evan Corcoran so they wouldn't be turned over in the June 2022 search – this compilation seems to show that Trump not only knew the classified records were in his home, but he used them, at least once, after he left the White House.

Given the discoveries in yesterday's Biden search, we can't rule that out in his case, either. Bauer's statement described the FBI taking, "documents with classified markings and surrounding material," which doesn't rule out a

compiled document – though it also could describe documents and the other contents of the folder or box they were found in, which would be consistent with how DOJ approached the search of Trump’s home.

And the seizure of hand-written notes from the time Biden was Vice President means we can’t rule out the equivalent of the letters from Kim Jung Un that Trump took, memorabilia that, because it pertains to foreign policy, should also be treated as classified (and would be covered by the Presidential Records Act).

Both both-sides journalists and hopeful lefties are jumping to conclusions about what the Biden seizures mean. The truth is, we simply don’t know yet. We know the most damning details about documents Trump had largely *because* of his legal challenges, not because they would otherwise be available from this kind of report on the investigation.

Here’s a comparison of what we know of the two cases:

	Trump	Biden
Total documents with classified markings	~325	~21 to 30
Obstruction	Yes	None known
Proof of personal knowledge	Yes	Unclear
Trophy documents	Yes	Possible
Compiled documents	Yes	Possible
Empty folders	Yes	None known
Suspected outstanding documents	Yes	None known

The obstruction is still what distinguishes Trump from Biden, because DOJ would most likely charge a Constitutional officer only with 18 USC 793(e), refusing to give classified documents back. Biden has made multiple efforts to give documents back: Trump has made multiple efforts to refuse to give documents back.

But as for the other damning details we know exist with Trump? We can’t rule them out with Biden.

Update: I’ve changed the number of Biden docs, to allow for some uncertainty about these are

being referenced. We don't have the FBI inventory, like we do for Trump.