

HOW TO FACT CHECK TRUMP'S LIES ABOUT HIS DOCUMENT CASE

I just won the case in Florida. Everyone said that was the biggest case, that was the most difficult case. And I just won it.

Biden has a similar case, except much worse. I was protected under the Presidential Records Act. Biden wasn't, because he wasn't President at the time. And he had 50 years worth of documents, and they ruled that he was incompetent, and therefore he shouldn't stand trial.

And I said, isn't that something? He's incompetent and he can't stand trial – and yet, he can be President. Isn't that nice? But they released him on the basis that–

[Goba attempts to interrupt]

– that he was incompetent. They said he had no memory, nice old guy, but he had no memory. Therefore we're not gonna prosecute him.

I won the case. It got very little publicity. I didn't notice ABC doing any publicity on it, George Slopodopoulos. I didn't notice you do any publicity on it at all.

[Scott tries to interrupt]

I won the case, the biggest case. This is an attack on a political opponent. I have another one where I have a hostile judge

Scott: Sir, if you don't mine, we have you for a limited time. I'd love to move onto a different topic.

Trump: No excuse me, you're the one that held me up for 35 minutes.

The three women who attempted to interview Trump yesterday had an uneven performance. At times, their questioning flummoxed Trump. But in several cases, when he took over the interview, they just sat there silently as he lied at length.

A particularly egregious moment came in his false claims about the parallel investigations into his and President Biden's retention of classified information. Trump told several lies without (successful) interruption. It was an unfortunate missed opportunity for correction, because Trump repeats these lies in his stump speech all the time, and it may be some time before someone competent has the ability to correct them in real time again.

Since Trump is going to keep telling the lie, I'd like to talk about how to fact check it.

Elements of the Offense

It starts with the elements of the offense – the things that prosecutors would have to prove if presenting this case to a jury. While Aileen Cannon has entertained doing fairly novel things with jury instructions, a model jury instruction for 18 USC 793(e), the statute considered with both men, includes the following five elements:

Did the defendant have possession of documents without authorization? The investigations into both Trump and Biden started when the Archives became aware that they had classified documents at their home. Contrary to what Trump said, the Presidential Records Act applies to both him and Biden, insofar as both were required to turn over any document that was a Presidential record when the Administration in which they served ended. That's the basis of the proof that they had unauthorized possession of the documents that happened to be classified. That said, the PRA has an exception, however, for, "diaries,

journals, or other personal notes serving as the functional equivalent of a diary," which is relevant to why Biden wasn't charged in two of four items Robert Hur considered charging seriously.

Trump has claimed that he had the ability to convert Presidential Records – even highly classified ones – into personal records, and thereby to take them home. But if this ever goes to trial, prosecutors would show that Trump first espoused that theory, which he got from non-lawyer Tom Fitton, in February 2022, long after the time he would have had to convert the documents to personal records.

Did the document in question relate to the national defense? The question of whether a document is National Defense Information or not is left to the jury to decide. That's likely one reason why Jack Smith's team included a bunch of highly classified documents among those charged. Generally, juries are asked to decide whether the government continues to take measures to keep a charged document secret, and whether it has to do with protecting the United States. A number of the documents charged against Trump pertain to either the US or other countries (like Iran's) nuclear weapons programs.

Did the defendant have reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation? Generally, prosecutors prove this by pointing to training materials cleared personnel get on classified information, and that's one reason Jack Smith obtained the letters Trump's White House sent out about classified information. With both Trump and Biden, however, prosecutors would also rely on their public comments talking about how important it is to protect classified information. In Trump's case, prosecutors would or will use both the things he said to Mark Meadows' ghost writer and Susie Wiles when he shared classified information, but also the things he said during the 2016 campaign – targeted at Hillary – about the import of

protecting classified information.

Did he keep this document willfully? For both men, prosecutors would need to show that they realized they had classified documents, and then retained them. Given the extended effort to recover documents from Trump, it would be far easier to do for Trump than for Biden.

Did the defendant retain the above material and fail to deliver it to the officer or employee of the United States entitled to receive it? This is an element of the offense that Robert Hur misstated in his report (as I wrote here). It's not enough to prove that someone willfully retained classified documents he wasn't authorized to have, you also have to prove he failed to give them back. Normally, this is done (in part) by pointing to someone's exit interview, when they are read out of their compartments and asked to give everything back. Because Presidents and Vice Presidents don't have clearance and so aren't read out of them, it is normally harder to prove that someone affirmatively refused to give documents back. But not in Trump's case, which is what really distinguishes him from Biden, because the Archives and DOJ kept asking for the documents, including via subpoena, and Trump kept playing games to withhold them.

Theories of Biden Crime

Documents	Location	PRA	Classified	Willful
Iran documents	Penn Center	Yes	Yes	No
Afghan documents	Garage	Yes	Reasonable doubt	Reasonable doubt
Afghan memo	Office drawer	Reasonable doubt	Reasonable doubt	Yes
Diaries	Office drawer	Reasonable doubt	Yes	Yes

There were four main documents or sets of documents for which Robert Hur considered charging Biden. They don't include the 50 years of documents Trump described. Those were included in boxes of documents sent to universities; most were barely classified still if at all, and since Biden had given them away, it would be hard to prove he intentionally kept them.

Iran documents: The most sensitive documents found in the Biden investigation were some documents pertaining to Iran found in a box in a closet in Penn Center. Hur determined they had been sent to the Naval Observatory for a meeting Biden had with a bunch of Senators to suss out where they were on Obama's Iran deal. They may never have gotten moved back to the White House, and were likely stuck in a box and moved to Penn Center by staffers when Biden moved out of the Naval Observatory. These documents were unquestionably Presidential records and National Defense information, but Hur had no evidence Biden knew they were there.

Afghan documents: Hur spent a lot of time trying to prove that, when Biden told his ghost writer during a meeting in his Virginia house on February 16, 2017 that, "I just found all this classified stuff downstairs," he was referring to several dated folders pertaining to Afghanistan that were found in a ratty box in Biden's garage in a consensual search. There were many problems with this theory: Hur couldn't prove that the documents had ever been in the Virginia house (and so could have been downstairs when Biden made the comment); he couldn't prove that Biden had personally put them in the box where they were found; he couldn't come up with a compelling argument for why he would have retained them. When Hur included his language about what a forgetful old fogey Biden was, he did so to cover the possibility that Biden forgot he had the documents he hypothetically discovered in 2017 and so didn't return them at that point, in 2017. But Hur would never have gotten close to where Biden would be relying on faulty memory, because Hur didn't have very compelling evidence to prove his hypothesis about how the documents got into the garage in the first place, much less that Biden was involved in that process.

Afghan memo: Hur's extended effort to make a case out of the Afghan documents was particularly difficult given that the best explanation for what Biden was referring to when

mentioning classified documents was a 40-page handwritten memo Biden sent Obama in Thanksgiving 2009 to try to dissuade him from surging troops in Afghanistan. (The second best explanation for what Biden was referring to was a set of documents he had recently returned in 2017 when he made the comment.) That memo was found in a drawer in Biden's office. Biden ultimately admitted to keeping it for posterity, meaning it might fall under the PRA exception for diaries. Because it was handwritten, it had no classification marks and couldn't be proven to have obviously classified information, much less information still classified in 2023, when it was found.

Diaries: The FBI also found a bunch of notebooks that Biden called diaries and Hur called notebooks. When reading them to his ghost writer, Biden exhibited awareness they included sensitive information, which Hur argued was proof he knew they had classified information. Biden had a very good case to make that these fell under the PRA exception for diaries, as well as decades of precedent, including Ronald Reagan, that DOJ would not charge someone for classified information in his diaries. It would have been impossible to prove that Biden willfully retained something he knew he couldn't retain, because Biden knew other Presidents and Vice Presidents hadn't been prosecuted for doing the same exact thing.

There simply was no document or set of documents for which Hur could prove all the elements of offense.

Why You Can Charge Trump

As noted above, the thing that distinguishes Trump from Biden is that Biden found classified documents and invited the FBI to come look for more, making it virtually impossible to prove the final element of offense (the one Hur botched), that Biden refused to give them back.

Trump, by contrast, spent a full year refusing to give documents back, including after DOJ specifically subpoenaed him for documents with classification marks.

There were 32 documents charged against Trump. They include:

- The document that Trump showed to Meadows' ghost writers in 2021 and acknowledged was classified; that was returned to NARA in January 2022. You can charge this because prosecutors have a recording of Trump acknowledging it was classified months before he ultimately returned it.
- Ten documents among those returned in response to a subpoena in June 2022. It's unclear how Smith intends to prove that Trump knew he had these after he returned the first set of documents in 2021. But most if not all of them date to fall 2019, so he may know why Trump would have retained them. Matt Tait has argued at least some of them pertain to the US withdrawal from Turkey.
- Ten documents found, in the August 2022 search, in the same box also containing bubble wrap and a Christmas pillow. Among the ten documents was one classified

Formerly Restricted, meaning that, under the Atomic Energy Act, Trump could not have declassified it by himself.

- Five more documents, also found in August 2022, that had been stored in boxes in the storage closet, including the one captured in a picture Walt Nauta took of documents that had spilled out of the boxes.
- Three documents found during the Mar-a-Lago search in the blue leather bound box found in the closet in Trump's office. At least a few of these likely pertain to Trump's withdrawal from the Iran deal. These are likely documents that Trump referred to.

For every charged document besides the Iran one, then, prosecutors can show that Trump withheld the documents after he first returned documents in January 2021. Trump will certainly argue that he may not have known he had those specific documents. But Trump's decision to end his sorting process in January 2021 and his efforts to thwart Evan Corcoran's June 2022 search will go a long way to prove intent.

How Trump's Case Got Dismissed

Trump falsely claimed he "won" his classified documents case. That's false: Aileen Cannon dismissed it, just in time for the RNC. Her

argument that Jack Smith was unconstitutionally appointed isn't even the primary one that Trump's attorneys were making: that Smith required Senate approval and that his funding was improper. Rather, she argued that Merrick Garland simply didn't have the authority to appoint Smith in the way he did.

There are several reasons the distinction is important.

First, if SCOTUS upholds Cannon's theory, then it will hold for all similar appointments. That extends unquestionably to Hur's appointment, because like Smith he was a non-DOJ employee when appointed. It likely also extends to Alexander Smirnov, into whom most investigative steps occurred after David Weiss was appointed as a Special Counsel under the same terms as Smith and Hur, and whose alleged crimes happened somewhere besides Delaware. Whether it applies to Hunter Biden is a closer question: Judge Mark Scarsi seems poised to argue that since Weiss had already charged Hunter, his appointment is different (and given the way Scarsi has worked so far, I don't rule out him trying to find a way to make this unappealable).

In other words, if the steps Jack Smith took after November 2022 were unconstitutional, then it means everything Hur did after January 2023 was also unconstitutional. If Trump "won," then he needs to stop making any claims about Hur's interview with Biden, because it was unconstitutional.

More importantly, not even Aileen Cannon has ruled that Trump didn't knowingly and intentionally retain classified documents. All she has ruled is that if DOJ wants to charge him for it, they need to recreate the investigative steps completed since November 2022, under the review of US Attorney for Southern Florida Markenzy Lapointe.