

CHAPTER EIGHT

MR. BIDEN'S FIRST BOOK, *PROMISES TO KEEP*, AND THE CLASSIFIED SENATE DOCUMENTS IN THE DELAWARE GARAGE

The Afghanistan documents were not the only marked classified documents in Mr. Biden's garage. FBI agents also found boxes containing organized files related to several international trips Mr. Biden took as a young senator in the late 1970s.⁷⁰⁵ Like the 2009 debate over the troop surge in Afghanistan, Mr. Biden viewed these trips as seminal episodes in his public life. Indeed, in his 2007 memoir *Promises to Keep: On Life and Politics*, Mr. Biden described these trips as historic and formative experiences that prepared him for the presidency.⁷⁰⁶

As explained below, some of the documents in these files were marked classified, though, because of the passage of time, we do not know whether Mr. Biden willfully retained the classified documents or consulted them when writing the book.

I. IN 2023, THE FBI FOUND FILES RELATED TO THE TRIPS CHRONICLED IN *PROMISES TO KEEP* IN MR. BIDEN'S DELAWARE GARAGE

During the January 2023 search of Mr. Biden's Delaware garage, FBI agents recovered boxes labeled "International Travel 1973-1979" and "Foreign Travel."⁷⁰⁷ Agents found these boxes in a storage closet, in the same garage where they found the box containing the classified Afghanistan documents, as shown below.⁷⁰⁸

⁷⁰⁵ Evidence items 1B17, 1B18.

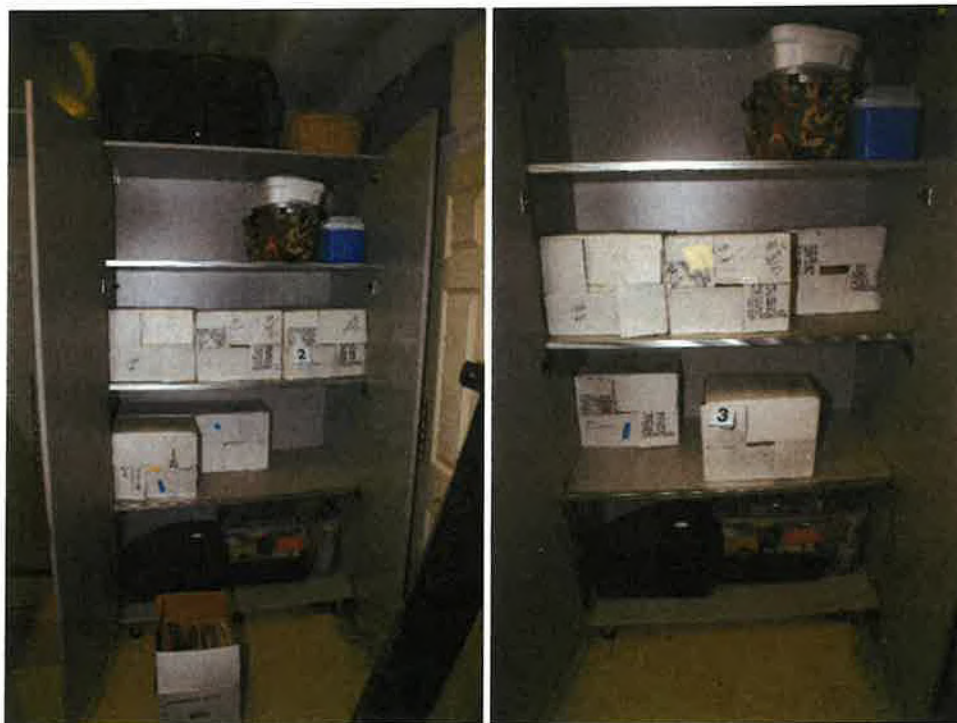
⁷⁰⁶ Joseph R. Biden, *PROMISES TO KEEP: ON LIFE AND POLITICS* (Random House Trade Paperback ed. 2008).

⁷⁰⁷ Evidence items 1B17, 1B18.

⁷⁰⁸ FBI Serials 35, 77 1A86.



Garage box and storage closet in Mr. Biden's Delaware garage (Dec. 21, 2022)⁷⁰⁹



Interior of Mr. Biden's garage storage closet containing Senate documents (Jan. 20, 2023)⁷¹⁰

⁷⁰⁹ 20221221_ERT_0013; FBI Serial 35 1A42.

⁷¹⁰ 20230120_FBI_0054; 20230120_FBI_0058; FBI Serial 35 1A42.

Like the box containing the classified Afghanistan documents, these boxes contained files and documents related to Mr. Biden's foreign policy experience and expertise—namely, organized files documenting his official foreign travel, including trips to the Soviet Union, West Germany, and Yugoslavia that he wrote about in his first book.⁷¹¹ The files contained handwritten notes, briefing materials, and travel itineraries related to the trips.⁷¹²

II. *PROMISES TO KEEP*

In 2007, Mr. Biden published a memoir titled *Promises to Keep: On Life and Politics*. As with his later book, Mr. Biden hired Zwonitzer as a ghostwriter.⁷¹³ Written in anticipation of Mr. Biden's run for president in 2008, *Promises to Keep* covered his life and political career from his childhood through his final years in the Senate.

In *Promises to Keep*, Mr. Biden discussed several international trips he took as a young senator in the late 1970s, including a congressional delegation to the Soviet Union where he met with the Soviet Premier, a trip to West Germany where he met with the Chancellor, and a trip to Yugoslavia, where he represented the United States at the state funeral of a Yugoslavian leader.⁷¹⁴

According to Zwonitzer, he and Mr. Biden included these anecdotes to show how then-Senator Biden gained experience in foreign policy “not just learning by being a staff member but by literally sitting across the table from people like [the

⁷¹¹ Biden, *PROMISES TO KEEP* 132, 143, 248; Evidence items 1B4, 1B17, 1B18.

⁷¹² Evidence items 1B17, 1B18.

⁷¹³ Biden, *PROMISES TO KEEP* 366; Zwonitzer 7/31/23 Tr. at 31-35.

⁷¹⁴ Biden, *PROMISES TO KEEP* 132, 142-43, 248-52.

Soviet Minister of Foreign Affairs].”⁷¹⁵ During a recorded interview with Zwonitzer, Mr. Biden explained that during these international trips, he learned the importance of foreign policy experience and that “[i]t matters what kind of personal relationships and rapport you can establish with foreign leaders.”⁷¹⁶ Mr. Biden said that when he later considered a presidential run, he “was never worried . . . whether I could sit across [from] [Soviet President Leonid] Brezhnev or sit across from [British Prime Minister Margaret] Thatcher . . . or [that I would] sit there and be intimidated.”⁷¹⁷

Promises to Keep put these anecdotes in a similar context. In discussing his decision to run for president in 1988, for example, Mr. Biden wrote that despite his relative youth, he felt he “measured up” to the other candidates in part due to his foreign policy experience:

I was just forty-two years old, but after a decade on the Senate Foreign Relations Committee and nearly that long on the Senate Select Committee on Intelligence, I knew the world and America’s place in it in a way few politicians did. My education in foreign affairs wasn’t just the time spent in committee hearings but in traveling the world and meeting leaders.⁷¹⁸

III. FOREIGN TRIPS CHRONICLED IN *PROMISES TO KEEP*

A. Mr. Biden’s 1979 trip to Yugoslavia

One of the trips Mr. Biden wrote about was his 1979 trip to Yugoslavia to represent the United States at the state funeral of a Yugoslavian political leader. Mr. Biden described the trip as “a strange kind of awakening for me.”⁷¹⁹ He made the trip

⁷¹⁵ Zwonitzer 7/31/23 Tr. at 46-47.

⁷¹⁶ 1978-race.doc at 18, Zwonitzer-00009492.

⁷¹⁷ 1988.doc at 10, Zwonitzer-00009499.

⁷¹⁸ Biden, *PROMISES TO KEEP* 143.

⁷¹⁹ *Id.* at 248.

with Averell Harriman, one of America's most distinguished diplomats, who "adopted" Mr. Biden and served as his "own personal tutor."⁷²⁰ During the trip, Mr. Biden and Harriman had a private meeting with longtime Yugoslavian president and World War II hero Josip Broz Tito.⁷²¹ Mr. Biden called the meeting "remarkable," an opportunity to be in the room with "the last two living men who remembered" the Yalta Conference at the end of World War II.⁷²²

B. Mr. Biden's 1979 congressional delegation to the Soviet Union

Elsewhere in the book, Mr. Biden wrote that he observed the benefits of direct engagement with foreign leaders during a congressional delegation he led to the Soviet Union in 1979. The purpose of the trip was to discuss arms control and the SALT II strategic nuclear arms limitations agreement.⁷²³ In *Promises to Keep*, Mr. Biden described how he "gained the grudging respect" of his Russian counterpart during a frank and sometimes tense face-to-face meeting with the Soviet Premier, where Mr. Biden also met President Leonid Brezhnev.⁷²⁴

Mr. Biden also sought to put the trip in the larger context of his foreign policy expertise and political ambitions. As the 1988 presidential election approached, Mr. Biden explained, "it was becoming clear that the new Soviet leader, Mikhail Gorbachev, was looking for a partner to write the end to the Cold War. And there

⁷²⁰ Biden, *PROMISES TO KEEP* 248.

⁷²¹ *Id.* at 248, 250-52.

⁷²² *Id.* at 251.

⁷²³ *Id.* at 143-45.

⁷²⁴ *Id.*

wasn't anybody lining up to run for the nomination I thought would be a better partner than me."⁷²⁵

IV. THE FILES RELATED TO THE TRIPS CHRONICLED IN *PROMISES TO KEEP* IN MR. BIDEN'S DELAWARE GARAGE CONTAINED MARKED CLASSIFIED DOCUMENTS

One of the boxes containing organized files about the trips Mr. Biden wrote about in *Promises to Keep* contained marked classified documents from the late 1970s.⁷²⁶ The box labeled "International Travel 1973-1979" contained materials from Mr. Biden's trips to Asia and Europe, including trips to Yugoslavia and the Soviet Union.⁷²⁷ The box contained roughly a dozen marked classified documents that are currently classified at the Secret level.⁷²⁸



*"International Travel" box containing marked classified documents*⁷²⁹

⁷²⁵ Biden, *PROMISES TO KEEP* 146.

⁷²⁶ Evidence item 1B18.

⁷²⁷ *Id.*

⁷²⁸ *Id.*; Recovered documents D11-19.

⁷²⁹ 20211221_ERT_0102; FBI Serial 35 1A42.

For example, the “International Travel 1973-1979” box contained files related to the congressional delegation that Mr. Biden led to the Soviet Union in 1979.⁷³⁰ Inside the files were more than a dozen folders devoted to aspects of the trip, including Mr. Biden’s travel itinerary, handwritten notes, letters, and briefing material.⁷³¹

The files also contained documents marked as classified. For example, a folder labeled “Senator Biden” stored several documents, including background information about Soviet officials.⁷³² These documents were marked “CONFIDENTIAL” and “CONFIDENTIAL NOFORN [not releasable to foreign nationals].”⁷³³ The intelligence community has determined that these documents are currently classified at the Secret level.⁷³⁴

The box also contained a file related to Mr. Biden’s 1979 trip to Yugoslavia.⁷³⁵ A note on the front page indicates that the file consists of a “reproduction of the contents of [Mr. Biden’s] Yugoslavia file.”⁷³⁶ The file contained documents marked “Classified” and “Confidential” as well as a memo marked “SECRET.”⁷³⁷ The

⁷³⁰ Evidence item 1B18.

⁷³¹ *Id.*

⁷³² *Id.*; Recovered documents D11-D19.

⁷³³ Recovered documents D11-D19.

⁷³⁴ FBI Serial 676; Recovered documents D11-D19. The reason for the change is that the relevant intelligence agency no longer uses the designation “Confidential.” Information that was previously classified as “Confidential” is now classified as “Secret.”

⁷³⁵ Recovered documents D04-D06, folder labeled “Yugoslavia.”

⁷³⁶ Evidence item 1B18.

⁷³⁷ Recovered documents D04-D06, folder labeled “Yugoslavia.”

intelligence community has determined that these documents are classified at the Secret level.⁷³⁸

* * *

We were limited in our ability to investigate these documents because of the significant passage of time since their creation. Although we cannot prove that Mr. Biden retained these classified documents willfully or used them in writing *Promises to Keep*, he did write about the foreign trips that were the subject of the documents. And like the classified Afghanistan documents, the classified files in Mr. Biden's garage relating to the trips discussed in *Promises To Keep* were part of a larger set of materials in Mr. Biden's home chronicling his experiences and achievements, particularly in foreign policy.

⁷³⁸ FBI Serial 676.

CHAPTER NINE
LEGAL STANDARDS

Our investigation focused on the “possible unauthorized removal and retention of classified documents or other records discovered at the” Penn Biden Center, the University of Delaware, and Mr. Biden’s personal residences.⁷³⁹ The criminal statutory provision that best fits the facts of our investigation is 18 U.S.C. § 793(e), a section of the Espionage Act that proscribes unauthorized retention and disclosure of national defense information. The law governing that crime is discussed below in sections I and II. We discuss other criminal prohibitions, and why they do not apply, in section III.

I. UNAUTHORIZED RETENTION OF NATIONAL DEFENSE INFORMATION

To prove unauthorized retention of national defense information under 18 U.S.C. § 793(e) the government must show: (1) the defendant had unauthorized possession of a document, writing, or note; (2) the document, writing, or note related to the national defense; and (3) the defendant willfully retained the document, writing, or note and failed to deliver it to an employee or officer entitled to receive it.⁷⁴⁰

⁷³⁹ Office of the Attorney General, Order No. 5588-2023, Appointment of Robert K. Hur as Special Counsel (January 12, 2023).

⁷⁴⁰ See *United States v. Rosen*, 445 F. Supp. 2d 602, 623-26 (E.D. Va. 2006), *amended*, Order, No. 1:05-cr-225, 2006 WL 5049154 (E.D. Va. Aug. 16, 2006); Court’s Instruction to the Jury at 19, *United States v. Brown*, No. 21-cr-348 (M.D. Fla. Dec. 12, 2022), ECF No. 304; Government’s Proposed Jury Instructions at 18, *United States v. Sterling*, No. 1:10-cr-485 (E.D. Va. Oct. 11, 2011), ECF No. 258; Final Jury Instructions at 44, *United States v. Ford*, No. 05-cr-235 (D. Md.).

A. Unauthorized possession

The Espionage Act does not define “unauthorized possession,” but courts in recent decades have construed that language and a related phrase in the same statute (“entitled to receive”) by referencing the executive order governing the handling of classified information in effect at the time of the conduct.⁷⁴¹ As explained in Chapter One, under that executive order a private citizen’s access to classified information is authorized only if he or she receives a favorable eligibility determination, signs an approved non-disclosure agreement, and has a need to know the information or obtains a formal waiver of that requirement.⁷⁴² Classified information must also be kept in approved and secure storage containers.⁷⁴³

By implication from the exception in § 4.4 of the executive order, the restrictions on access to classified information in the order appear to govern a former

⁷⁴¹ *United States v. Morison*, 814 F.2d 1057, 1075 (4th Cir. 1988) (construing governing executive order and holding, “the words ‘entitled to receive’ in [18 U.S.C. § 793(d) and (e)] can be limited and clarified by the Classification Regulations”); *Rosen*, 445 F. Supp. 2d at 622 (“the rule regulating who is ‘entitled to receive’ is the Executive Order setting forth a uniform classification system for national security information”); *see also United States v. Hung*, 629 F.2d 908, 919 n.10 (4th Cir. 1980) (“The trial judge provided adequate content for [‘unauthorized possession’] by advising the jury that a person would have authorized possession if he had an appropriate security clearance and if he gained access to the document because it was necessary to the performance of his official duties.”). Jury instructions in Espionage Act cases have generally mirrored the executive order’s requirements for access to classified information by defining unauthorized possession to mean that the possessor lacks a security clearance, lacks a need to know, or removes the information from its proper storage location. *See* Final Jury Instructions at 45, *Ford*, No. 05-cr-235; Government’s Proposed Jury Instructions at 10, *Sterling*, No. 1:10-cr-485, ECF No. 258; Transcript of Jury Instructions at 194, *United States v. Morison* (“An individual has unauthorized possession of documents and writings when he possesses those under circumstances or in a location which is contrary to law or regulation for the conditions of his employment.”).

⁷⁴² Executive Order 13526 §§ 4.1(a), 4.4.

⁷⁴³ *Id.* § 4.1(g); *see* 32 C.F.R. §§ 2001.43(b)(1) and (2), 2001.53; Office of the Director of National Intelligence, Intelligence Community Directive 705.

vice president, which Mr. Biden was between January 2017 and January 2021.⁷⁴⁴ Under the executive order's provisions, a former vice president (or former president) may receive a waiver of the need-to-know requirement, but only if a senior official of the agency that originated the classified information "determines in writing that access is consistent with the interest of national security" and "takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order[.]"⁷⁴⁵

For all of the classified materials recovered during this investigation, after the vice presidency, Mr. Biden did not receive a written waiver of the need-to-know requirement, and no agency official made the findings required by the executive order. Therefore, Mr. Biden's possession of those materials in unsecured spaces in his home after his vice presidency was unauthorized within the meaning of the Espionage Act.⁷⁴⁶

The White House Counsel's Office and Mr. Biden's personal attorneys have argued to us that, despite these requirements, the Presidential Records Act authorizes a former president or vice president to keep classified materials in locations that are not approved for storage of classified information at home, as long as those materials are not defined as presidential records under the Act. Counsel note

⁷⁴⁴ Executive Order 13526 § 4.4.

⁷⁴⁵ *Id.* §§ 4.1, 4.4; *Trump v. United States*, No. 22-13005, 2022 WL 4366684, at *8.

⁷⁴⁶ See *Trump v. United States*, No. 22-13005, 2022 WL 4366684, at *8; Superseding Indictment ¶¶ 18-19. *United States v. Trump, et al.*, No. 23-cr-80101 (S.D. Fla. July 27, 2023), ECF No. 85.

that the Presidential Records Act excludes personal records (which can include diaries) from government ownership and preexisting White House guidance has interpreted the Act to exclude rough meeting notes from its definition of records. Pointing to Mr. Reagan's treatment of his diaries containing Top Secret/Sensitive Compartmented Information (as discussed in Chapter Ten), counsel contend that a former president or vice president may lawfully retain written national defense information provided it is not a presidential record under the Act and that Mr. Biden's notebooks, like Mr. Reagan's diaries, are not presidential records.

The approach that the Department and courts have taken in Espionage Act cases after passage of the Presidential Records Act cuts against this view.⁷⁴⁷ Courts and the Department have determined whether possession of national defense information is authorized principally based on the terms of the executive order. The order specifically addresses and is the primary source of law governing access to such information, in contrast with the Presidential Records Act, which mentions classified material in just one irrelevant provision.⁷⁴⁸ The executive order's restrictions on access to classified information also appear to apply to former presidents and vice presidents.⁷⁴⁹ We therefore decline to adopt the argument that compliance with the

⁷⁴⁷ *E.g.*, *Trump v. United States*, No. 22-13005, 2022 WL 4366684, at *8; Superseding Indictment ¶¶ 18-19, *United States v. Trump*, No. 23-cr-80101, ECF No. 85.

⁷⁴⁸ *See* 44 U.S.C. § 2204(a)(1)(A).

⁷⁴⁹ *See* nn.744-46 above.

Presidential Records Act authorizes former presidents and vice presidents to retain national defense information in unsecured and unapproved locations.⁷⁵⁰

As explained in Chapters Ten, Twelve, and Thirteen, we do consider the historical practices of former presidents and vice presidents—including Mr. Reagan’s treatment of his diaries—when evaluating whether Mr. Biden acted willfully and when weighing the factors set forth in the Principles of Federal Prosecution.

B. Related to the national defense

The Espionage Act, including Section 793(e), is concerned with “information relating to the national defense,” which is distinct from but related to the term “classified information.”⁷⁵¹ “Classified information” is defined by the executive order as information whose “unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]”⁷⁵² Information relating to the national defense (often referred to as “national defense information”) is not defined in the Espionage Act and so its meaning has been construed by courts. As the Supreme Court held in the seminal case *Gorin v. United States*, “national defense” is a “generic concept of broad connotations, referring to military and naval

⁷⁵⁰ Additionally, the Presidential Records Act makes no mention of the relevant criminal statutes and there is no conflict between the Act and those criminal laws. See *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (“Absent a clearly expressed congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.”) (cleaned up).

⁷⁵¹ Compare 18 U.S.C. § 793 (concerning information “relating to the national defense”), with 18 U.S.C. § 1924 (concerning “classified information of the United States,” which is statutorily defined as “information originated, owned, or possessed by the United States Government concerning the national defense or foreign relations of the United States that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security.”).

⁷⁵² Executive Order 13526 §§ 1.2, 1.4, 6.1(i).

establishments and the related activities of national preparedness.”⁷⁵³ It includes “all matters directly and reasonably connected with the defense of our nation against its enemies.”⁷⁵⁴

Information relating to the national defense must be “closely held” and not lawfully “made public” or “available to the general public.”⁷⁵⁵ But “[t]he mere fact that similar but unofficial information is publicly available does not automatically remove information in closely-held documents from the realm of ‘national defense’ information.”⁷⁵⁶

In determining whether information relates to the national defense under the Espionage Act, the fact that the information is classified is neither sufficient nor necessary, but it is “highly probative” evidence.⁷⁵⁷

⁷⁵³ *Gorin v. United States*, 312 U.S. 19, 28 (1941).

⁷⁵⁴ *Id.* at 30; see *United States v. Drummond*, 354 F.2d 132, 151-52 (2d. Cir. 1965) (applying *Gorin* definition to 18 U.S.C. § 794 and finding jury instructions “more than ample” where district court instructed jury to consider documents as well as testimony about their content and significance to determine whether standard was met).

⁷⁵⁵ *Morison*, 844 F.2d at 1071-72; see also *Hung*, 629 F.2d at 918 n.9 (publicly available information not national defense information under the Espionage Act); *United States v. Dedeyan*, 548 F.2d 36, 39-40 (4th Cir. 1978) (affirming jury instruction for Section 793(f) stating information did not relate to the national defense if it was “made public [by the government and] . . . is found in sources lawfully available to the general public” or if government “made no effort to guard such information”).

⁷⁵⁶ *United States v. Squillacote*, 221 F.3d 542, 579 (4th Cir. 2000).

⁷⁵⁷ *Rosen*, 445 F. Supp. 2d at 623. Jury instructions follow this principle. *E.g.*, Jury Charge at 22-23, *United States v. Schulte*, No. 17-cr-548 (S.D.N.Y. July 8, 2022), ECF No. 879 (“In determining whether material is ‘closely held,’ you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent . . . I caution you that the mere fact that information is classified does not mean that the information qualifies as NDI.”); Court’s Instructions to the Jury at 20, *Brown*, No. 21-cr-348, ECF No. 304 (same); Government’s Proposed Jury Instructions at 44, *Sterling*, No. 1:10-cr-485, ECF No. 258 (“[Y]ou are to determine whether certain information in this case was national defense information. That is not the same as ‘classified information.’ However, you may consider the fact that information was classified in determining whether the

C. Willfully retains

Finally, the government must prove that a defendant willfully retained the material and failed to deliver it to an officer or employee “entitled to receive” the information. The statute does not define who is “entitled to receive” the information, so again, courts have looked to the governing rules concerning the handling of classified materials, primarily the executive order.⁷⁵⁸ Generally, those entitled to receive the information are people with the requisite security clearance and the need to know.⁷⁵⁹

Willfulness is a heightened *mens rea*, which as articulated by the Supreme Court in *Bryan v. United States*, requires proof “that the defendant acted with knowledge that his conduct was unlawful.”⁷⁶⁰ Under the Espionage Act, an act is willful when “it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law.”⁷⁶¹ While willfulness requires proving an intent to disobey

information at issue was national defense information.”); Final Jury Instructions at 46, *Ford*, No. 05-cr-235 (“In determining whether material is ‘closely held,’ you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent . . .”).

⁷⁵⁸ *Morison*, 844 F.2d at 1075 (“the words ‘entitled to receive’ in [18 U.S.C. § 793(d) and (e)] can be limited and clarified by the Classification Regulations . . .”); *Rosen*, 445 F. Supp. 2d at 622 (“the rule regulating who is ‘entitled to receive’ is the Executive Order setting forth a uniform classification system for national security information”).

⁷⁵⁹ *Rosen*, 445 F. Supp. 2d at 622-23.

⁷⁶⁰ *Bryan v. United States*, 524 U.S. 184, 191-92 (1998); *accord Ratzlaf v. United States*, 510 U.S. 135, 136-37 (1994); *United States v. Bursley*, 416 F.3d 301, 308-09 (4th Cir. 2005).

⁷⁶¹ *Morison*, 844 F.2d at 1071; *accord* Court’s Instructions to the Jury at 22, *Brown*, No. 21-cr-348, ECF No. 304; Government’s Proposed Jury Instructions at 15, *Sterling*, No. 1:10-cr-485, ECF No. 258; Final Jury Instructions at 19, *Ford*, No. 05-cr-235.

the law, courts have applied *Bryan*'s standard of "simple willfulness" to Section 793(e) and rejected any need for the government to prove an intent to cause harm.⁷⁶²

Accordingly, to prove a violation of Section 793(e) we would need to show that Mr. Biden knowingly retained national defense information and failed to deliver it to an appropriate government official, and that he knew this conduct was unlawful. As discussed in more detail below, because of the interrelation between "national defense information" and "classified information," when evaluating a potential Section 793(e) charge, the Department considers whether the information the person possessed was classified and whether the person knew it was classified.

II. UNAUTHORIZED DISCLOSURE OF NATIONAL DEFENSE INFORMATION

Section 793(e) also prohibits the willful communication, delivery, or transmission of national defense information to a person not entitled to receive it. The first two elements, unauthorized possession and relating to the national defense, are identical to those addressed above in sections I.A. and I.B. The element of willful disclosure to a person not entitled to receive is addressed below.

⁷⁶² *United States v. Hitzelberger*, 991 F. Supp. 2d 101, 107-08 (D.D.C. Dec. 3, 2013) (applying *Bryan*'s willfulness standard to Section 793(e) and explaining "the core of 'willful' misconduct is to act with the knowledge or intent to disregard the law, not an evil intent to injure the United States"); *United States v. Drake*, 818 F. Supp. 2d 909, 918 (D. Md. 2011) (applying *Bryan*'s willfulness standard to Section 793(e) and noting the definition is consistent with Fourth Circuit precedent predating *Bryan*); see also *United States v. Kim*, 808 F. Supp. 2d 44, 54 (D.D.C. 2011) (applying *Bryan*'s willfulness standard to Section 793(d)).

A. Willfully communicates, delivers, or transmits to a person not entitled to receive

Just as with retention, disclosure under Section 793(e) requires that the defendant act willfully—that is, with the intent to do something the law forbids.⁷⁶³ A person is not entitled to receive national defense information if he or she lacks a need to know and an appropriate clearance as required by the executive order.⁷⁶⁴

For an oral disclosure of information (as opposed to the disclosure of a classified document), the government must also prove that “the possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation.”⁷⁶⁵ Accordingly, to establish that Mr. Biden violated Section 793(e) when he read information from his notebooks to his ghostwriter, we would need to prove that he acted with an intent to violate the law and had reason to believe the information he disclosed could be used to harm the United States or benefit a foreign nation.

⁷⁶³ *Rosen*, 445 F. Supp. 2d at 625-26 (applying willfulness standard to disclosure under Sections 793(d) and 793(e)).

⁷⁶⁴ See nn.758-59 above; Chapter One.

⁷⁶⁵ 18 U.S.C. § 793(e); *Rosen*, 445 F. Supp. 2d at 625-26 (when disclosure involves intangible information government must prove this “additional and significant scienter requirement” that is analogous to bad faith, but this requirement does not apply in instances where the disclosure is through a tangible medium such as a document); *accord Drake*, 818 F. Supp. 2d at 917 (“Section 793(e) provides for different scienter requirements depending on the character of the national defense item or data that a defendant is charged with possessing. In cases like this one, involving documents, the defendant need only have acted willfully, as a defendant will more readily recognize a document relating to the national defense based on its content, markings or design than it would intangible or oral ‘information’ that may not share such attributes.”).

III. OTHER CRIMINAL PROVISIONS

A. Other Espionage Act provisions

The other provisions of the Espionage Act do not fit the facts of this case. Subsections (a), (b), and (c) of Section 793 are facially inapplicable because at no point did we find evidence that Mr. Biden intended or had reason to believe the information would be used to injure the United States or to benefit a foreign nation, which is a requirement of those subsections.⁷⁶⁶ Subsection (d) also does not apply, because it requires a failure to deliver materials *on demand*, and when asked to return any classified materials from his vice presidency, Mr. Biden consented to searches and returned all potentially classified materials that were discovered.⁷⁶⁷

Among other reasons, Section 793(f) does not fit because that subsection requires removal of national defense information from “its proper place of custody” by a person who has lawful possession. That is a difficult requirement to apply here because presidents and vice presidents are generally permitted to retain classified information at their residences while in office. Because Section 793(f) can only be violated when Mr. Biden had lawful possession (*i.e.* when he was vice president) any removal of classified information would have occurred while Mr. Biden was still vice president, when that conduct was not proscribed by the executive order issued

⁷⁶⁶ 18 U.S.C. § 793(a) requires acting “for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation.” Subsections (b) and (c) incorporate this requirement by reference to “the purpose aforesaid.”

⁷⁶⁷ 18 U.S.C. § 793(d) criminalizes conduct where the defendant “fails to deliver [the national defense information] on demand to the officer or employee of the United States entitled to receive it.”

pursuant to the president's authority to control national security information. It is at least arguable that as vice president, Mr. Biden could not have removed national defense information "from its proper place of custody," as the statute requires, because his home and other locations were proper places of custody during his time in office. In any case, interpreting Section 793(f) to apply to a sitting vice president's conduct in that context would raise significant separation of powers concerns.⁷⁶⁸ Where such concerns exist, the Supreme Court and the Department of Justice have declined to interpret statutes as applying to the president⁷⁶⁹ or vice president⁷⁷⁰ absent clear statutory text.

⁷⁶⁸ *United States v. United States District Court*, 407 U.S. 297, 310 (1972) (President "has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.'"); *Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. 159, 172 (1997) ("The Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including the collection and dissemination of national security information.").

⁷⁶⁹ See *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (out of respect for separation of powers, "[w]e would require an express statement by Congress" before applying the Administrative Procedure Act to the president); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 178 (1996) ("plain statement rule" is rooted in principles of constitutional avoidance and separation of powers); *Application of Consumer Credit Reporting Reform Act of 1996 to Presidential Nomination and Appointment Process*, 21 Op. O.L.C. 214, 214 (1997) ("It is a well settled principle of law, applied frequently by both the Supreme Court and the executive branch, that statutes that do not expressly apply to the President must be construed as not applying to him if such application would involve a possible conflict with his constitutional prerogatives."); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351-53 (1995) (articulating the "well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives").

⁷⁷⁰ The Executive power is vested in the president, U.S. CONST. art. II § 1, and the vice president has limited constitutionally enumerated functions, U.S. CONST. art. I § 3, amends. XII, XX, XXV (vice president's constitutional duties include serving as president of the Senate, opening the certified votes from electors for the president and vice president, and duties related to the death, disqualification, or inability of the president). Thus, it could be argued that the separation of powers concerns giving rise to the express statement rule are

B. Unauthorized removal of classified materials

We also considered the applicability of 18 U.S.C. § 1924, which criminalizes the unauthorized removal of classified material by an officer, employee, contractor, or consultant of the United States. In addition to concerns about the statute's five-year limitations period,⁷⁷¹ the statute's text suggests that it should not apply to the conduct of a sitting president or vice president.

First, the statute requires removal "without authority," and when Mr. Biden was vice president he was authorized to take and keep classified materials at his private residences. Because any act of removal must have occurred when Mr. Biden was vice president, it was arguably done with authority.

Second, the statute does not explicitly apply to a president or vice president, and given the significant separation of powers concerns that would result from the statute's application to a sitting president or vice president, the express statement rule cautions against construing the statute to apply.⁷⁷²

less applicable to the vice president. See Mem. from Laurence H. Silberman, Dep. Att'y Gen., for Richard T. Burrell, Office of the President, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution*, at 2 (Aug. 28, 1974). Nonetheless, given that the vice president is an elected constitutional officer who is regularly delegated significant executive duties, the Department of Justice has long applied the express statement rule to vice presidents. *Whether the Office of the Vice President is an "Agency" for Purposes of the Freedom of Information Act*, 18 Op. O.L.C. 10, 11 (1994) ("Because the Vice President is also a constitutional officer, the same 'express statement' rule should apply" (citation omitted) in the context of determining whether the Freedom of Information Act applies to the Office of the Vice President.); *Conflict of Interest Problems*, at 5-6 (concluding that a federal conflict-of-interest statute does not apply to either the president or vice president because "[i]t would be strange for Congress to subject the President and the Vice President to possible criminal prosecution without naming them explicitly . . .").

⁷⁷¹ 18 U.S.C. § 3282.

⁷⁷² See nn.768-70 above.

Finally, because Section 1924 requires that a defendant “knowingly remove[d]” classified information “without authority and with the intent to retain [it] at an unauthorized location,” a prosecution under this statute would face many of the same evidentiary hurdles discussed in Chapters Eleven and Twelve.

C. Removing, concealing, or destroying a government record

Title 18 U.S.C. § 2071 criminalizes removing, concealing, or destroying government records. While there is scant case law, most courts that have addressed the statute’s elements have required proof that the defendant deprived, or attempted to deprive, the government of its ability to use a given record.⁷⁷³ We found no evidence that the government was deprived of the use of any of the materials recovered during this investigation or that Mr. Biden acted with the intent to deprive the government of any record. In fact, no one in the government seems to have noticed that any classified materials were missing at any point from the time Mr. Biden left office on January 20, 2017, until marked classified documents were found at the Penn Biden

⁷⁷³ *United States v. Hitzelberger*, 991 F. Supp 2d 108, 122-24 (D.D.C. March 5, 2014) (analyzing case law and concluding “the government will need to prove that [the defendant] obliterated information from the public record”); *United States v. Rosner*, 352 F. Supp. 915, 921 (S.D.N.Y. 1972); *United States v. North*, 708 F. Supp. 364, 369 n.3 (D.D.C. 1988); accord *United States v. Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989) (“The obvious purpose of the statute is to prohibit the impairment of sensitive government documents”); *McInerney v. United States*, 143 F. 729, 730-31 (1st Cir. 1906) (Section 2071’s predecessor statute was “enacted for the purpose of protecting records, papers, and proceedings of courts of justice, and papers, documents, and records filed or deposited in the public offices of the federal government”); *United States v. De Groat*, 30 F. 764, 765 (E.D. Mich. 1887) (the “essential element” of Section 2071’s predecessor statute was “the specific intent to destroy them *as records* of a public office; or in other words, to obliterate or conceal them as evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs”); but see *United States v. Lang*, 364 F.3d 1210, 1221-22 (10th Cir. 2004) (finding that “a copy of a government record itself functions as a record for purposes of § 2071”), *cert. granted, rev’d on other grounds*, 543 U.S. 1108 (2005), and *opinion reinstated in part*, 405 F.3d 1060 (10th Cir. 2005).

Center on November 2, 2022. It is therefore unlikely we could prove deprivation. Section 2071 also requires proof of willfulness, a heightened *mens rea* discussed above in sections I.C, II.A. And so even putting aside the issue of deprivation, any Section 2071 charge would fail for the same reasons discussed in Chapters Eleven and Twelve.

CHAPTER TEN

HISTORICAL BACKGROUND

I. HISTORICALLY, FORMER PRESIDENTS AND VICE PRESIDENTS TREATED ALL RECORDS AS PERSONAL PROPERTY

For most of our nation's history, presidents and vice presidents treated all records from their respective administrations—including records relating to issues of national security—as personal property that they took with them upon leaving office.⁷⁷⁴ A congressionally commissioned study found in 1977 that, when leaving office, past presidents routinely took national security files including “briefing materials for the President, records of negotiations with foreign governments, correspondence with foreign heads of state or governments, [and] correspondence with or directives to agencies within the Executive branch on foreign affairs.”⁷⁷⁵

The practice of outgoing presidents and vice presidents retaining their records was reconsidered in the 1970s, culminating in the passage of the Presidential Records Act in 1978.⁷⁷⁶ The Act provides that all “Presidential records”—documents created

⁷⁷⁴ See *Nixon v. United States*, 978 F.2d 1269, 1270 (D.C. Cir. 1992) (remarking upon the “long and unbroken history relating to the use, control, and disposition of presidential papers” and concluding “that Mr. Nixon, like every President before him, had a compensable property interest in his presidential papers”); *Title to Presidential Papers—Subpoenas*, 43 Op. Att’y Gen. 11, 11 (1974) (former presidents’ ownership of materials from their administration was a matter of “almost unvaried understanding of all three branches of the Government since the beginning of the Republic”); FINAL REPORT OF THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS at 16 (March 31, 1977) (“The papers of Vice Presidents of the United States have traditionally been disposed of in the same manner as Presidential papers; that is, Vice Presidents have removed them when they left office.”).

⁷⁷⁵ FINAL REPORT OF THE NATIONAL STUDY COMMISSION at 14-15.

⁷⁷⁶ Before the Presidential Recordings and Materials Preservation Act of 1974, which applied only to former President Nixon, “Presidents exercised complete dominion and control over their presidential papers.” *Nixon*, 978 F.2d at 1277. “In 1978, Congress prospectively

or received by the president or his staff to assist or advise him in carrying out his official duties—belong to the government.⁷⁷⁷ In contrast, “[p]ersonal records” remain the property of the former officeholder.⁷⁷⁸

The Act defines “personal records” to mean “all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”⁷⁷⁹ Such personal records include “diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business.”⁷⁸⁰

While the Presidential Records Act marked a turning point in the treatment of presidential materials, as discussed in Chapter Nine, the Act does not exempt former presidents and vice presidents from specific prohibitions on removing, retaining, losing, or disclosing classified and national defense information.⁷⁸¹

After the Act’s passage, at least one former president, President Reagan, left office with his presidential diaries, which contained classified information, and stored those diaries at his private home. The Department of Justice, the National Archives, and others knew that President Reagan treated his diaries (containing classified

abolished presidential ownership of White House materials with the Presidential Records Act.” *Id.* at 1277 n.19.

⁷⁷⁷ 44 U.S.C. §§ 2201-02.

⁷⁷⁸ *Id.* §§ 2201-03; *Nixon*, 978 F.2d at 1277 n.19.

⁷⁷⁹ 44 U.S.C. §§ 2201(3).

⁷⁸⁰ *Id.*

⁷⁸¹ See Executive Order 13526 §§ 4.1 4.4; 18 U.S.C. § 793.

information) as personal property, but no agency took action to recover the classified materials or to investigate or prosecute the former president.

II. THE REAGAN DIARIES

The first president subject to the Presidential Records Act, Mr. Reagan kept a diary in which he wrote an entry nearly each day while he served as president.⁷⁸² His diaries contained information that was classified up to Top Secret/Sensitive Compartmented Information level, and remained so until 2007 or later, years after Mr. Reagan died. Mr. Reagan took all five volumes of his diaries home with him when he left office, and at that time, it was known to the Department of Justice, the Iran-Contra Independent Counsel, and the National Archives that (1) Mr. Reagan's diaries contained Top Secret classified information, and (2) Mr. Reagan treated his diaries as personal property that was not in the National Archives' possession.⁷⁸³ The

⁷⁸² Ronald Reagan, *THE REAGAN DIARIES* ix (Douglas Brinkley ed., First Harper Perennial Ed. 2009).

⁷⁸³ Other former presidents kept diaries or journals that they took with them after they left office. For example, President George H. W. Bush regularly kept a dictated diary that was later quoted extensively in published works. Interview by George W. Bush with Jon Meacham, Author, *DESTINY AND POWER*, (Nov. 8, 2015), <https://www.c-span.org/video/?400044-2/destiny-power>; JON MEACHAM, *DESTINY AND POWER: THE AMERICAN ODYSSEY OF GEORGE HERBERT WALKER BUSH* (Kindle ed. 2015); George H. W. Bush & Brent Scowcroft, *A WORLD TRANSFORMED* (First Vintage Books ed. 1999). President Carter also kept a dictated diary that was typed up by his secretary and that he took with him upon leaving office. Jimmy Carter, *WHITE HOUSE DIARY* xii-xv (2010). Mr. Carter published excerpts from that diary—keeping the original, full version with him at his home and transferring a copy to his presidential library. *Id.* While there is some reason to think that the Bush and Carter diaries may have also contained classified information, the historical record is clear that Mr. Reagan's diaries did and that relevant government entities knew of Mr. Reagan's possession of that material.

We also examined the practices of other former Presidents predating the Presidential Records Act, but we were unable to glean much from that inquiry. Like the key statutory provision, 18 U.S.C. § 793(e), the modern classification system did not come into being until the mid-20th century. See Cong. Research Serv., *The Protection of Classified Information:*

Department of Justice also repeatedly described the diaries in public court filings as Mr. Reagan's personal records.⁷⁸⁴

Mr. Reagan's personal possession of his diaries, and the fact that portions of his diaries were classified up to the Top Secret level, was also known to the Congress⁷⁸⁵ and the federal courts.⁷⁸⁶ In the wake of the Iran-Contra affair, Mr. Reagan produced relevant excerpts from his diaries to various investigative bodies, including congressional committees and the Independent Counsel.⁷⁸⁷ During the Independent Counsel's prosecution of former National Security Adviser John

The Legal Framework 1 (updated Feb. 2, 2023). Two Presidents during this period died in office (Franklin D. Roosevelt and John F. Kennedy), and several appear to have entered agreements while in office expressly contemplating their continued access to classified information in their presidential papers after the end of their terms. See Letter for James B. Rhoads and Robben W. Fleming from Gerald R. Ford, annex B, § 5(c)(vii), (d), (g) (Dec. 13, 1976), <https://www.fordlibrarymuseum.gov/library/forddeed.asp>; Letter for Lawson B. Knott, Jr., from Lyndon B. Johnson, §§ 2(c)(ii) & (c), 5 (Aug. 13, 1965), reprinted in 111 Cong. Rec. 21661-62 (1965); Letter for Franklin Floete from Dwight D. Eisenhower, §§ 5, 7(a), 8 (Apr. 13, 1960), reprinted in *The "Public Documents Act": Hearings on H.R. 16902 and Related Legislation Before the Subcomm. on Printing of the H. Comm. on H. Admin., 93d Cong., 2d Sess.* 134 (1974). Nor were we able to find specific evidence that the Department of Justice was contemporaneously aware of any instances where these earlier Presidents kept classified materials without appropriate safeguards. For these and other reasons, what we have been able to discern about the earlier history sheds little light on the question at hand and our analysis focuses on the Reagan diaries as the most probative historical example.

⁷⁸⁴ See, e.g., Memorandum in Support of Motion to Quash Subpoena to Archivist and Statement of Interest by the Department of Justice at 5-6, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG) (D.D.C. Dec. 6, 1989) (DOJ Mot. to Quash in *Poindexter*).

⁷⁸⁵ Lawrence Walsh, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS: VOLUME III at 686 n.30 (1993) ("Access to the President's relevant diary entries was provided by the President to the Tower Commission, the Congressional Committees and to the Independent Counsel, who reviewed them in 1987.")

⁷⁸⁶ *United States v. Poindexter*, 732 F. Supp. 135, 137-41 (D.D.C. Jan. 30, 1990).

⁷⁸⁷ Memorandum of Points and Authorities in Support of Motion by Former President Ronald W. Reagan to Quash Subpoena at 32-33, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG) (D.D.C. Dec. 6, 1989) (Reagan Mot. to Quash in *Poindexter*); David E. Rosenbaum, *Reagan Will Allow Investigators to See Diary Items on Iran Affair*, N.Y. TIMES (Apr. 9, 1987), <https://www.nytimes.com/1987/04/09/world/reagan-will-allow-investigators-to-see-diary-items-on-iran-affair.html>.

Poindexter, Poindexter sought Mr. Reagan's diary entries for purposes of his criminal defense.⁷⁸⁸ In numerous public filings and judicial opinions in 1989 and 1990 after Mr. Reagan left office, the Department of Justice and the U.S. District Court both acknowledged that Mr. Reagan's diaries contained information that was classified, including Top Secret information about sensitive matters.⁷⁸⁹

While this litigation was ongoing, Mr. Reagan was a private citizen living in California, where he kept his diaries at his private home, apparently outside of facilities that were authorized to store Top Secret information.⁷⁹⁰ According to the editor of the published versions of Mr. Reagan's diaries, "[f]or several years after their return to California, the Reagans would often sit together in their den after dinner, reading aloud from their diaries and reminiscing about their White House years."⁷⁹¹ While it is unlikely that, after leaving office, Mr. Reagan's den was approved for the storage of Top Secret/Sensitive Compartmented Information, Mr. Reagan retained Secret Service protection at his home for the remainder of his life.⁷⁹² Mr. Reagan maintained the ability to receive and handle classified information after leaving the

⁷⁸⁸ Memorandum in Support of Motion to Quash Subpoena to Archivist and Statement of Interest by the Department of Justice at 5-6, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG) (DOJ Mot. to Quash in *Poindexter*); Lawrence Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters: Volume III* at 686 n.30 (1993).

⁷⁸⁹ E.g., DOJ Mot. to Quash at 5-7, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG); *Poindexter*, 732 F. Supp. at 137-41.

⁷⁹⁰ See Ronald Reagan, *THE REAGAN DIARIES* x (Douglas Brinkley ed., First Harper Perennial ed. 2009).

⁷⁹¹ *Id.* It is not clear that the Department of Justice knew, at the time of the *Poindexter* litigation, how Mr. Reagan's diaries were stored, or who had access to them.

⁷⁹² Act of Sept. 15, 1965, Pub. L. No. 89-186, 79 Stat. 791 (1965) (codified as amended at 18 U.S.C. § 3056); Former Reagan Official Tr. at 51-52 (Mr. Reagan's private residence had Secret Service protection that involved converting portions of the home into Secret Service Space. Former Reagan Official described the home as a "very tight secured 24/7 protected facility.").

White House, as he continued to receive national security briefings at his office space located a few miles from his home, and he consulted with President George H. W. Bush about foreign affairs.⁷⁹³ Notably, Secret Service agents collected daily intelligence briefing materials after Mr. Reagan had finished with them and ensured that they were properly destroyed.⁷⁹⁴

The wider American public also knew of the existence of Mr. Reagan's diaries. Indeed, the diaries served as sources for at least three publications that Mr. Reagan or his representatives authorized: (1) *An American Life*,⁷⁹⁵ Mr. Reagan's autobiography published in 1990; (2) *Dutch*, a biography authored by Edmund Morris and published in 1999;⁷⁹⁶ and (3) *The Reagan Diaries*, a collection of the diaries themselves first published in 2007 after Mr. Reagan's death.⁷⁹⁷ Notably, *An American Life* was being written during the *Poindexter* litigation⁷⁹⁸ and includes dozens of verbatim quotations from Mr. Reagan's diaries.⁷⁹⁹ And even as early as 1989, the classified nature of Mr. Reagan's diaries was discernable to any member of the public who read filings and opinions from the *Poindexter* litigation.⁸⁰⁰

⁷⁹³ Former Reagan Official Tr. at 26-41.

⁷⁹⁴ *Id.*

⁷⁹⁵ Ronald Reagan, AN AMERICAN LIFE (First Threshold trade paperback ed. Jan. 2011).

⁷⁹⁶ Edmund Morris, DUTCH (Random House 1999).

⁷⁹⁷ Ronald Reagan, THE REAGAN DIARIES (Douglas Brinkley ed., First Harper Perennial ed. 2009).

⁷⁹⁸ Robert Lindsey, GHOST SCRIBBLER: SEARCHING FOR REAGAN, BRANDO AND THE KING OF POP, Chapter 37 (2d ed. 2014) (explaining that ghostwriter Robert Lindsey began helping Mr. Reagan write the book after a March 1989 interview).

⁷⁹⁹ *E.g.*, Reagan, AN AMERICAN LIFE 445-47.

⁸⁰⁰ *E.g.*, DOJ Mot. to Quash at 5-7, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG); *Poindexter*, 732 F. Supp. at 137-41.

Mr. Reagan died in 2004.⁸⁰¹ In 2005, Nancy Reagan provided his diaries to the Reagan Library,⁸⁰² which is run by the National Archives,⁸⁰³ so that the diaries could be publicly displayed as part of the collection of Mr. Reagan's personal papers.⁸⁰⁴ At that time, the Archives worked with officials at the National Security Council to identify several pages of material that were still classified up to the Top Secret/Sensitive Compartmented Information level. Archives officials removed all pages containing classified information from the diaries so they could be publicly displayed.

Meanwhile, a historian reviewed the unclassified portions of Mr. Reagan's diaries and compiled a collection of them for publication in 2007.⁸⁰⁵ *The Reagan Diaries* was a bestseller,⁸⁰⁶ and a New York Times article from May 2007 remarked that "readers can get a retroactive sense of being in on some classified information."⁸⁰⁷ Today, anyone can view online the full set of Mr. Reagan's presidential diaries,

⁸⁰¹ Press Release, The White House, *Announcing the Death of Ronald Reagan* (June 6, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040606-1.html>.

⁸⁰² Anna Bakalis, *Library Gets First Look at 'Reagan Diaries'*, VC STAR (May 20, 2007), <https://archive.vcstar.com/news/library-gets-first-look-at-reagan-diaries-ep-375630016-352887941.html>.

⁸⁰³ *Ronald Reagan Presidential Library & Museum: About Us*, Ronald Reagan Presidential Library & Museum, <https://www.reaganlibrary.gov/about-us> (last visited Feb. 2, 2024).

⁸⁰⁴ Interview of Michael Duggan & Douglas Brinkley (Apr. 27, 2007), <https://www.c-span.org/video/?198343-1/the-reagan-diaries#>.

⁸⁰⁵ Anna Bakalis, *Library Gets First Look at 'Reagan Diaries'*, VC STAR (May 20, 2007), <https://archive.vcstar.com/news/library-gets-first-look-at-reagan-diaries-ep-375630016-352887941.html>.

⁸⁰⁶ *BEST SELLERS: July 29, 2007*, N.Y. TIMES (July 29, 2007), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9C05E7DD1431F93AA15754C0A9619C8B63.html>.

⁸⁰⁷ Motoko Rich, *History Made Intimate Through Reagan's Diaries*, N.Y. TIMES (May 3, 2007), <https://www.nytimes.com/2007/05/03/books/03diar.html>.

excluding a small number of excerpts that were redacted for personal reasons or national security concerns.⁸⁰⁸

There is no indication that Mr. Reagan acted with any ill intent, attempted to secret away his diaries, or hid their existence or content from appropriate authorities. Quite the opposite, he disclosed the existence of his diaries to several investigative bodies during the Iran-Contra investigations. And during the *Poindexter* litigation, Mr. Reagan's personal attorneys and the Department of Justice repeatedly asserted that the diaries were Mr. Reagan's personal property.⁸⁰⁹ But it was apparent his diaries contained classified information. Indeed, some diary entries specifically described information recorded there as "very hush, hush" or "top secret."⁸¹⁰ Some entries were obviously classified at the time he wrote them; some continued to be classified until at least 2007; and some contain national security information that appears to be sensitive to this day.⁸¹¹

⁸⁰⁸ E.g., *White House Diaries, Diary Entry 01/20/1988*, Ronald Reagan Presidential Foundation & Institute, <https://www.reaganfoundation.org/ronald-reagan/white-house-diaries/diary-entry-01201988/> (last visited Feb. 2, 2024).

⁸⁰⁹ Reagan Mot. to Quash at 1-2, *United States v. Poindexter*, Crim. No. 88-0080-01 (HHG).

⁸¹⁰ 12/1/23 National Security Council production of classified excerpts from Reagan diaries.

⁸¹¹ We reviewed some of the materials that were deemed to be classified at the Top Secret/Sensitive Compartmented Information level when the National Security Council conducted prepublication review for the *Reagan Diaries*. While we did not submit those unpublished entries for a new classification review, the subject matter appears to us to be sensitive even today. 12/1/23 National Security Council production of classified excerpts from Reagan diaries. Additionally, National Archives officials seem to have inquired about the classification status of the diaries in 2022 and were told that the diaries remained classified at the Top Secret/Sensitive Compartmented Information level. NARA Employee Tr. at 61-63.

CHAPTER ELEVEN

ANALYSIS OF THE EVIDENCE – CLASSIFIED AFGHANISTAN DOCUMENTS

I. INTRODUCTION

There is evidence that, after his vice presidency, Mr. Biden willfully retained marked classified documents about Afghanistan and unmarked classified handwritten notes in his notebooks, both of which he stored in unsecured places in his home. He had no legal authority to do so, and his retention of these materials, and disclosure of classified information from his notebooks to his ghostwriter, risked serious damage to America's national security.

But the evidence falls short of proof beyond a reasonable doubt that Mr. Biden retained and disclosed these classified materials willfully. The Department's prior treatment of former presidents and vice presidents who kept national security materials also counsels against prosecution of Mr. Biden, as do the most relevant aggravating and mitigating facts presented here.⁸¹² Therefore, under established Department principles, we decline criminal charges against Mr. Biden relating to the classified Afghanistan documents and his classified notebooks.⁸¹³ We would do so even if we were not bound by the Office of Legal Counsel's legal conclusion that a sitting president may not be charged with federal crimes.⁸¹⁴

In reaching these conclusions, we consider two questions. First, whether the evidence proves beyond a reasonable doubt that a crime occurred; and then, if so,

⁸¹² See U.S. Dep't of Just., Just. Manual § 9-27.320 (2023).

⁸¹³ See *id.* at §§ 9-27.001, 9-27.220, 9-27.230 (2023).

⁸¹⁴ *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 260 (2000).

whether criminal charges are warranted. Thus, the Department's Justice Manual requires federal prosecutors to determine whether the person under investigation committed a federal offense and whether "the admissible evidence will probably be sufficient to obtain and sustain a conviction."⁸¹⁵ Next, the Manual directs prosecutors to evaluate relevant aggravating and mitigating facts and to determine whether criminal charges are supported by a "substantial federal interest."⁸¹⁶ A prosecutor should seek criminal charges only after considering each of these questions and making "a policy judgment that the fundamental interests of society *require* the application of federal criminal law to a particular set of circumstances[.]"⁸¹⁷

We address the first question, the sufficiency of the evidence, for the classified Afghanistan documents immediately below, then for the classified notebooks in Chapter Twelve. We discuss the second question, whether criminal charges are otherwise warranted, for both sets of classified material in Chapter Thirteen.

II. THERE IS EVIDENCE THAT MR. BIDEN WILLFULLY RETAINED THE CLASSIFIED AFGHANISTAN DOCUMENTS

In a recorded conversation on February 16, 2017, at Mr. Biden's rental home in Virginia, Mr. Biden told Mark Zwonitzer that Mr. Biden had "just found all the

⁸¹⁵ U.S. Dep't of Just., Just. Manual § 9-27.220 (2023).

⁸¹⁶ *See id.* at § 9-27.220 (2023). In determining whether prosecution would serve a substantial federal interest, prosecutors should weigh "all relevant considerations," including: (1) federal law enforcement priorities; (2) the nature and seriousness of the offense; (3) the deterrent effect of prosecution; (4) the person's culpability; (5) the person's criminal history, or its absence; (6) the person's willingness to cooperate in the investigation or prosecution of others; (7) the person's personal circumstances; (8) the interests of any victims; and (9) the probable sentence or other consequences if the person is convicted; and (10) other relevant facts. *Id.* § 9-27.230.

⁸¹⁷ *Id.* § 9-27.001 (emphasis added).

classified stuff downstairs.”⁸¹⁸ According to what Mr. Biden told Zwonitzer, “all the classified stuff” related to President Obama’s 2009 decision to surge American troops to Afghanistan, and to a pivotal moment when Mr. Biden sent President Obama his handwritten Thanksgiving memo opposing the troop surge.⁸¹⁹ Photos of the Virginia home show that the lowest level “downstairs”—where Mr. Biden told Zwonitzer he had “just found all the classified stuff”—included rooms that Mr. Biden used as work and storage spaces.⁸²⁰

Six years later, during this criminal investigation, the FBI recovered marked classified documents relating to the debate over the 2009 Afghanistan troop surge in a box in Mr. Biden’s Delaware garage.⁸²¹ The classified documents were in folders that also contained drafts of Mr. Biden’s Thanksgiving memo, other source documents for that memo, and other memos establishing Mr. Biden’s strong contemporaneous opposition to the surge.⁸²² The folders of classified Afghanistan documents appear to be files of Mr. Biden’s creation, labeled in his handwriting, and containing memos and intelligence products he removed from the ordinary flow of paper he received as vice president.⁸²³ Inside Mr. Biden’s home office, agents found his “Af/Pak 1” notebook with the classified Thanksgiving memo tucked inside.⁸²⁴

⁸¹⁸ *See* Chapter Five.

⁸¹⁹ *See* Chapters Five and Six.

⁸²⁰ *See* Chapter Five.

⁸²¹ *See* Chapter Six.

⁸²² *See id.*

⁸²³ *See id.*

⁸²⁴ *See id.*

In the same box in the garage where FBI agents found the classified Afghanistan documents, agents also found other documents of great personal importance to Mr. Biden, including photos of his son Beau and documents Mr. Biden filed, accessed, and used in early 2017, during the same time he told Zwonitzer he found the classified documents about Afghanistan in his Virginia home.⁸²⁵ The evidence suggests that Mr. Biden maintained these files himself.

Mr. Biden had a strong motive to keep the classified Afghanistan documents. He believed President Obama's 2009 troop surge was a mistake on par with Vietnam.⁸²⁶ He wanted the record to show that he was right about Afghanistan; that his critics were wrong; and that he had opposed President Obama's mistaken decision forcefully when it was made—that his judgment was sound when it mattered most.⁸²⁷

This evidence provides grounds to believe that Mr. Biden willfully retained the marked classified documents about Afghanistan. If he was not referring to those documents—later found in his garage—when he told Zwonitzer he had “just found all the classified stuff downstairs,” it is not clear what else Mr. Biden could have been referring to.⁸²⁸

Nevertheless, for the reasons below, we believe this evidence is not strong enough to establish Mr. Biden's guilt beyond a reasonable doubt.

⁸²⁵ See Chapters Five and Six.

⁸²⁶ See Chapter Six.

⁸²⁷ See *id.*

⁸²⁸ See Chapters Five and Six.

III. THE EVIDENCE FALLS SHORT OF ESTABLISHING MR. BIDEN'S WILLFUL RETENTION OF THE CLASSIFIED AFGHANISTAN DOCUMENTS BEYOND A REASONABLE DOUBT

In February 2017, when Mr. Biden told Zwonitzer he had “just found all the classified stuff downstairs,” Mr. Biden was at his home in Virginia.⁸²⁹ In December 2022, the FBI recovered the marked classified documents about Afghanistan in the garage of Mr. Biden’s home in Delaware, nearly six years later and over one hundred miles away.⁸³⁰ When the FBI recovered the documents in 2022, Mr. Biden was the sitting president, and he was authorized to have classified documents in his private home. Thus, any criminal charges would most plausibly depend on Mr. Biden’s possession of the Afghanistan documents in the Virginia home in 2017, when he was not in office.

There are at least three defenses likely to create reasonable doubt as to such charges. First, Mr. Biden could have found the classified Afghanistan documents at the Virginia home in 2017 and then forgotten about them soon after. This could convince some reasonable jurors that he did not willfully retain them. Second, Mr. Biden might not have retained the classified Afghanistan documents in the Virginia home at all. They could have been stored, without his knowledge, at his Delaware home since the time he was vice president. This would rebut charges that he willfully retained the documents in Virginia. Finally, Mr. Biden could have found only some of the classified Afghanistan documents in the Virginia home in 2017—the ones in the manila “Afganastan” folder found in the garage box—and it is unclear whether

⁸²⁹ See Chapter Five.

⁸³⁰ See Chapter Six.

this folder contained national defense information. This too would rebut charges that he willfully retained national defense information, as required by the criminal statute.⁸³¹

We discuss each potential defense in turn.

A. Mr. Biden may have found the classified documents in Virginia in February 2017 and then forgotten about them

It is possible that Mr. Biden encountered the classified Afghanistan documents at the Virginia home in February 2017, told Zwonitzer about them, and then, soon after, forgot about them and did not willfully retain them. While such a swift and permanent bout of forgetfulness may seem implausible, several pieces of evidence provide some support for this possibility.

If Mr. Biden discovered classified documents at the Virginia home on February 16, 2017, when he told Zwonitzer he “just found all the classified stuff downstairs,” it may not have been something he found memorable. Mr. Biden, after all, had seen classified documents nearly every day for the previous eight years. As vice president, he regularly—and permissibly—kept classified documents in his home.⁸³² When he spoke to Zwonitzer in February 2017, Mr. Biden had left the White House less than a month earlier. After more than forty years in the highest ranks of government, he was accustomed to having staff members attend to the details of handling, storing, and retrieving classified documents.⁸³³ For a person of his position, the presence of classified documents might not have been noteworthy, and it may have seemed

⁸³¹ See 18 U.S.C. § 793(e).

⁸³² See Chapter Three.

⁸³³ See *id.*

natural that someone else would inevitably take care of it, because, for Mr. Biden, that is how it had nearly always worked.

In response to this defense, the government could note that several weeks before the February 2017 conversation with Zwonitzer, just after leaving the vice presidency, Mr. Biden returned different classified material he found in the Virginia home, giving a slim binder of material possibly relating to foreign leader calls to his personal aide to return to the White House.⁸³⁴ One explanation is that Mr. Biden returned the binder of foreign leader calls because he did not care about it, whereas he intentionally kept the classified Afghanistan documents because he cared about them a great deal.

But another inference the evidence permits is that Mr. Biden returned the binder of classified material to the personal aide because, after leaving office, Mr. Biden did not intend to retain any marked classified documents. As Mr. Biden said in his interview with our office, if he had found marked classified documents after the vice presidency, “I would have gotten rid of them. I would have gotten them back to their source. . . . I had no purpose for them, and I think it would be inappropriate for me to keep clearly classified documents.”⁸³⁵ Some reasonable jurors may credit this statement and conclude that if Mr. Biden found the classified Afghanistan documents in the Virginia home, he forgot about them rather than willfully retaining them.

Mr. Biden’s own words to Zwonitzer provide some support for this conclusion. In the recorded conversation when Mr. Biden told Zwonitzer he had “just found all

⁸³⁴ See Chapter Seven.

⁸³⁵ Biden 10/9/23 Tr. at 41.

the classified stuff downstairs,” Mr. Biden’s tone was remarkably casual. His sole reference to this discovery of classified documents was this brief aside. Mr. Biden did not sound surprised or concerned by the documents he referenced. While reasonable jurors could draw different conclusions from Mr. Biden’s seeming nonchalance, one conclusion is that if Mr. Biden discovered classified documents, it simply was not significant to him and was something he could have quickly forgotten.

After all, the Afghanistan documents and the 2009 troop surge played no role in *Promise Me, Dad*, the book Mr. Biden wrote with Zwonitzer in early 2017.⁸³⁶ There is no reason to believe Mr. Biden intended to discuss the 2009 Afghanistan troop debate in his book, which, as explained in Chapter Five, covered his experiences in 2014 and 2015. In dozens of hours of recorded conversations with Zwonitzer in 2016 and 2017, when Mr. Biden talked about a vast array of topics, the Afghanistan documents never came up again.⁸³⁷ This may suggest that after February 16, 2017, the documents were simply not on Mr. Biden’s mind.

Mr. Biden’s memory also appeared to have significant limitations—both at the time he spoke to Zwonitzer in 2017, as evidenced by their recorded conversations, and today, as evidenced by his recorded interview with our office. Mr. Biden’s recorded conversations with Zwonitzer from 2017 are often painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries.⁸³⁸

⁸³⁶ See generally Biden, PROMISE ME, DAD; Chapter Five.

⁸³⁷ See generally FBI Serials 315, 335.

⁸³⁸ See generally *id.*

In his interview with our office, Mr. Biden's memory was worse. He did not remember when he was vice president, forgetting on the first day of the interview when his term ended ("if it was 2013 – when did I stop being Vice President?"), and forgetting on the second day of the interview when his term began ("in 2009, am I still Vice President?").⁸³⁹ He did not remember, even within several years, when his son Beau died.⁸⁴⁰ And his memory appeared hazy when describing the Afghanistan debate that was once so important to him. Among other things, he mistakenly said he "had a real difference" of opinion with General Karl Eikenberry, when, in fact, Eikenberry was an ally whom Mr. Biden cited approvingly in his Thanksgiving memo to President Obama.⁸⁴¹

In a case where the government must prove that Mr. Biden knew he had possession of the classified Afghanistan documents after the vice presidency and chose to keep those documents, knowing he was violating the law, we expect that at trial, his attorneys would emphasize these limitations in his recall.

We also expect many jurors to be struck by the place where the Afghanistan documents were ultimately found in Mr. Biden's Delaware home: in a badly damaged box in the garage, near a collapsed dog crate, a dog bed, a Zappos box, an empty bucket, a broken lamp wrapped with duct tape, potting soil, and synthetic firewood.⁸⁴²

⁸³⁹ Biden 10/8/23 Tr. at 146; 10/9/23 Tr. at 45.

⁸⁴⁰ Biden 10/8/23 Tr. at 82-83.

⁸⁴¹ Biden 10/9/23 Tr. at 17; Recovered document D20.

⁸⁴² See Chapter Six.



Garage box with classified Afghanistan documents as encountered by FBI (Dec. 21, 2022)⁸⁴³

A reasonable juror could conclude that this is not where a person intentionally stores what he supposedly considers to be important classified documents, critical to his legacy. Rather, it looks more like a place a person stores classified documents he has forgotten about or is unaware of. We have considered—and investigated—the possibility that the box was intentionally placed in the garage to make it appear to be there by mistake, but the evidence does not support that conclusion.

Finally, Mr. Biden's cooperation with our investigation will likely cause some jurors to conclude that the Afghanistan documents were in his Delaware home by mistake, which is consistent with him forgetting about the documents soon after he

⁸⁴³ *See id.*

discovered them in the Virginia home. Most significantly, Mr. Biden self-reported to the government that the Afghanistan documents were in his Delaware garage and consented to searches of his house to retrieve them and other classified materials. He also consented to searches of other locations, and later in the investigation, he participated in an interview with our office that lasted more than five hours and provided written answers to most of our additional written questions.

Many will conclude that a president who knew he was illegally storing classified documents in his home would not have allowed a search of his home to discover those documents and then answered the government's questions afterwards. While various parts of this argument are debatable, we expect the argument will carry real force for many reasonable jurors. These jurors will conclude that Mr. Biden—a powerful, sophisticated person with access to the best advice in the world—would not have handed the government classified documents from his own home on a silver platter if he had willfully retained those documents for years. Just as a person who destroys evidence and lies often proves his guilt, a person who produces evidence and cooperates will be seen by many to be innocent.

To prove that Mr. Biden willfully retained the Afghanistan documents, the government must establish that he acted “with a bad purpose either to disobey or to disregard the law.”⁸¹⁴ Reasonable jurors could conclude that Mr. Biden discovered the

⁸¹⁴ See Chapter Nine; *Morison*, 844 F.2d at 1071 (emphasis omitted); accord Court's Instructions to the Jury at 22, *Brown*, No. 21-cr-348, ECF No. 304; Government's Proposed Jury Instructions at 24, *Sterling*, No. 1:10-cr-485, ECF No. 258; Final Jury Instructions at 19, *Ford*, No. 05-cr-235.

Afghanistan documents in his Virginia home and then forgot about them almost immediately. Such jurors would likely acquit him.

B. The classified documents may never have been in the Virginia home

The second potential defense argument is that Mr. Biden may not have retained the classified Afghanistan documents in the Virginia home at all. While there is evidence that he did, most notably his recorded statement to Zwonitzer in February 2017, that evidence is not conclusive.

First, as discussed in Chapter Seven, while the evidence provides clues that the classified Afghanistan documents were stored in the Virginia home, there is no definitive evidence putting them there. Beyond the Zwonitzer recording, no witness, photo, e-mail, text message, or other evidence establishes that the documents were ever stored in Virginia. When considering charges that Mr. Biden willfully retained the classified documents in the Virginia home in February 2017, this absence of additional direct evidence that the documents were in the Virginia home in February 2017 is significant.

Second, the Zwonitzer recording itself is not conclusive. When writing *Promise Me, Dad*, Zwonitzer recorded dozens of hours of conversation with Mr. Biden, and those recordings show that Mr. Biden's statements were often imprecise and his meaning was not always clear.⁸⁴⁵ That was particularly true when Mr. Biden spoke elliptically or in asides, as he did when he briefly referenced finding "all the classified stuff downstairs." Given Mr. Biden's tendency towards loose talk with Zwonitzer—

⁸⁴⁵ See generally FBI Serials 315, 335.

and Mr. Biden's limited precision and recall during his interview with our office, discussed above—reasonable jurors may hesitate to place too much evidentiary weight on a single eight-word utterance to Zwonitzer from almost seven years ago, in the absence of other, more direct evidence.

Third, there are alternative explanations for Mr. Biden's statement to Zwonitzer that do not involve the classified Afghanistan documents later found in the Delaware garage. For example, Mr. Biden could have been referring to the collection of handwritten notebooks he kept when he was vice president. As discussed in Chapter Four, Mr. Biden retained more than a dozen such notebooks, which contained his handwritten notes from the President's Daily Brief and White House Situation Room meetings. Some of these notes were themselves classified. One of those notebooks was his Af/Pak 1 notebook, which contained his detailed notes about the 2009 Afghanistan policy review, and a copy of the handwritten Thanksgiving memo.⁸⁴⁶

Mr. Biden explained in his interview with our office that he believed he gathered his notebooks in the Virginia home after moving in, which was at around the same time he met with Zwonitzer in February 2017.⁸⁴⁷ And we know from his recorded conversations with Zwonitzer that Mr. Biden planned to, and did, refer to some of his notebooks regularly while writing his book.⁸⁴⁸

⁸⁴⁶ See Chapter Six.

⁸⁴⁷ Biden 10/9/23 Tr. at 30, 40-41.

⁸⁴⁸ See Chapter Five.

Thus, some evidence suggests that when Mr. Biden told Zwonitzer he had “just found all the classified stuff downstairs,” he could have been referring to his collection of notebooks, including his Af/Pak 1 notebook, which contained classified information. As explained in Chapter Twelve, we do not believe there are viable criminal charges against Mr. Biden for willfully retaining classified information in the notebooks.⁸⁴⁹ This would make the notebook explanation a potentially successful defense.

Another possible explanation is that Mr. Biden could have been referring to the slim binder of classified documents he found at the Virginia home shortly after leaving office and gave to his personal aide to return to the White House.⁸⁵⁰ As discussed above, this appears to have happened several weeks before Mr. Biden’s recorded statement to Zwonitzer in February 2017.

This explanation seems improbable, as Mr. Biden said he “just” found the classified material, which typically suggests more recency—a matter of hours or days, rather than several weeks. And the personal aide recalled that Mr. Biden handed him a single slim binder or folder of material, which the aide believed related to calls with foreign leaders in the last week of the administration.⁸⁵¹ It is unlikely Mr. Biden was referring to such a small amount of material when he said he just found “*all* the classified stuff,” and it would have been a non sequitur during a conversation about his decision-making on Afghanistan in 2009.⁸⁵² But our assessment that this

⁸⁴⁹ See Chapter Twelve for an analysis of the evidence pertaining to the classified notebooks.

⁸⁵⁰ See Chapter Seven.

⁸⁵¹ Personal Aide 3 3/28/23 Tr. at 197-212.

⁸⁵² See Chapter Five.

explanation seems unlikely does not make it unreasonable, and reasonable jurors could conclude that Mr. Biden's statement to Zwonitzer referred to classified information Mr. Biden had already found and returned.

Mr. Biden could also point to the possibility that the classified Afghanistan documents were never in Virginia but were stored elsewhere without his knowledge: for example, tucked away in his Delaware home since the time he was vice president. We cannot rule out that possibility. As discussed in Chapter Seven, if the documents were somewhere in the Delaware home for many years, someone must have moved them to the garage box after the move from the Virginia home to the Delaware home in July 2019, because that is likely when the garage box arrived in Delaware. But it is possible Mr. Biden or others moved the Afghanistan documents to the garage box without carefully reviewing the files or realizing they contained marked classified documents. As explained in Chapters Fourteen, Fifteen, and Sixteen, our investigation has revealed several other instances of Mr. Biden and others making similar filing mistakes.

Unlike most defendants in classified mishandling cases, Mr. Biden was allowed to have classified documents in his home for eight years as vice president. He also had layers of staff who were responsible for assembling, carrying, storing, and retrieving the types of classified briefing materials found among the Afghanistan documents.⁸⁵³ Even if Mr. Biden intended to keep the Afghanistan documents for some time while he was vice president—to help him write the 2009 Thanksgiving

⁸⁵³ See Chapter Three.

memo, for example, or as reference material for the Afghanistan policy debates to come in the later years of the Obama administration—it remains possible that Mr. Biden lost track of the documents in the nearly eight years that followed, and that he did not know he still had them after leaving office.

Mr. Biden's house was also filled with paperwork and other materials from almost five decades in government service. He kept boxes of files from nearly every political campaign he ran between 1972 and 2012; files documenting his more than thirty years in the Senate; files from his eight years as vice president; and files relating to his family, his house, his car, and his pets.⁸⁵⁴ It is possible the Afghanistan documents, which were in ordinary folders that were not packaged or marked as containing classified information, were needles in the haystack of Mr. Biden's papers.

While it is natural to assume that Mr. Biden put the Afghanistan documents in the box on purpose and that he knew they were there, there is in fact a shortage of evidence on these points. We do not know why, how, or by whom the documents were placed in the box. We do not know whether or when Mr. Biden carefully reviewed the box's contents. We do not know why only some of Mr. Biden's classified Afghanistan memos to President Obama from the fall of 2009 were found in the box, but several other memos he wrote during that time were not.⁸⁵⁵ And we do not know why Mr. Biden would have wanted to keep some of the other marked classified documents in

⁸⁵⁴ See generally FBI Serial 512, 1A614, FBI Serial 77, 1A86.

⁸⁵⁵ During the fall 2009 Afghanistan review, Mr. Biden wrote President Obama multiple additional classified memos opposing the troop surge. None of these memos were in the garage box with the other classified Afghanistan documents, and none of the memos were recovered during this investigation, though we obtained copies of the memos from the current White House. See Classified memos on file with Special Counsel's Office.

the box—in particular, a classified document relating to President Obama’s second-term foreign policy goals, which was kept in a folder right next to the Afghanistan documents, and which served no particular purpose of Mr. Biden’s of which we are aware.⁸⁵⁶

The location of the box containing Afghanistan documents in a seemingly random place in the Delaware garage, and Mr. Biden’s cooperation with our investigation—both discussed above—could provide additional reasons for jurors to conclude that the Afghanistan documents were stored in the Delaware home without Mr. Biden’s knowledge, and were not in Virginia in 2017.

C. Mr. Biden may not have found the “Facts First” folder containing national defense information

A reasonable juror could also conclude that, even if Mr. Biden found classified documents about Afghanistan in his Virginia home in February 2017, and even if he remembered he had them after that day, and even if they were the same documents found in his garage six years later and one hundred miles away in Delaware, there is a shortage of evidence that he found *both* the “Afganastan” folder and the “Facts First” folder. This is important because even though the “Afganastan” folder contained documents that were marked classified in 2009, there are serious questions about whether those particular documents remain sensitive today, or when Mr. Biden met with Zwonitzer in 2017. Thus, the “Afganastan” folder alone is not a strong basis upon which to prosecute Mr. Biden for willfully retaining national defense information. And if Mr. Biden saw only the “Afganastan” folder and not the “Facts

⁸⁵⁶ FBI Serial 512, 1A614: B4, B5.

First” folder, which did contain national defense information, he did not willfully retain such national defense information.

This “only one folder” defense is not very strong, but it does find some support in the evidence. Mr. Biden spoke of finding “all the classified stuff downstairs” in the context of telling Zwonitzer about the 2009 handwritten Thanksgiving memo.⁸⁵⁷ And the folder most closely associated with that memo is the “Afganastan” folder, which held the raw materials that we know Mr. Biden must have relied on when writing the Thanksgiving memo. The “Afganastan” folder contained previous handwritten and typewritten drafts of the Thanksgiving memo, some of which were incorporated nearly word-for-word into the final document.⁸⁵⁸ The folder also held a November 2009 memo from Mr. Biden’s communications director, and Mr. Biden incorporated portions of this memo, again nearly word-for-word, into the final Thanksgiving memo.⁸⁵⁹ Thus, the evidence establishes that Mr. Biden used the documents in the “Afganastan” folder to write the 2009 Thanksgiving memo to President Obama.

Mr. Biden probably also used the documents in the “Facts First” folder when writing the Thanksgiving memo, but the connection between that folder and the memo is not as strong. The “Facts First” folder contains numerous documents relevant to the memo, but none of them are documents Mr. Biden *must* have used. And most of the materials in the “Facts First” folder were from September 2009, two months before Mr. Biden wrote the Thanksgiving memo.⁸⁶⁰

⁸⁵⁷ See Chapter Five.

⁸⁵⁸ See Chapter Six.

⁸⁵⁹ 11/27/09 e-mail from Blinken to Klain, SCOH-000230.

⁸⁶⁰ FBI Serials 35 1A42, 512 1A614, 683 1A772; Recovered documents B6-B24.

Based on this difference between the two folders, some reasonable jurors may conclude that when Mr. Biden told Zwonitzer he “just found all the classified stuff downstairs,” he may have been referring only to the “Afganastan” folder, which reminded him of his Thanksgiving memo. The “Afganastan” folder contained roughly a dozen marked classified documents, which could correspond to Mr. Biden’s reference to “all the classified stuff” he found. And if Mr. Biden found the “Afganastan” folder, it is possible he did not continue looking through the contents of the separate “Facts First” folder, whose cover had no label or other indication that the materials inside related to Afghanistan.

None of these possibilities are particularly plausible. There is no reason to think, for example, that after identifying the contents of the “Afganastan” folder, Mr. Biden stopped looking through folders that were nearby, including the “Facts First” folder, *and* that he never returned to these materials.

But reasonable jurors who are unwilling to read too much into Mr. Biden’s brief aside to Zwonitzer—“I just found all the classified stuff downstairs”—may find a shortage of evidence to establish that Mr. Biden looked through the “Facts First” folder, which is the only folder known to contain national defense information. These jurors would acquit Mr. Biden of willfully retaining national defense information from the “Facts First” folder.

D. For other reasons, a jury will be unlikely to unanimously convict Mr. Biden

Several additional facts would make it difficult for the government to present a case that reasonable jurors would unanimously find compelling.

First, the Afghanistan documents are now almost fifteen years old. While there is evidence that some contain national defense information, in general, they concern a conflict that is now over, in a country where there are no longer any American troops, about a subject (the 2009 troop surge) that has already been widely discussed in books and media reports. At a trial, we expect the defense would strongly challenge whether the documents still contain sensitive national defense information.

Second, Mr. Biden was allowed to have the Afghanistan documents in his home for eight years as vice president. And when the documents were discovered in his home in December 2022, he was again allowed to have them there as president. To prevail, the government must convince a jury to convict him for having the documents in his home in between, in February 2017, about a month after he left the White House. Because of the possibility that, even if Mr. Biden discovered the Afghanistan documents, he might have forgotten about them soon after, any criminal charges would likely be limited to the days or perhaps weeks surrounding his conversation with Zwonitzer in February 2017. It may be difficult to convince a jury they should care about Mr. Biden's brief illicit possession of documents from 2009, particularly since he was allowed to possess the same documents both before February 2017 (as vice president) and after (as president).

Third, as discussed to some extent above, Mr. Biden will likely present himself to the jury, as he did during his interview with our office, as a sympathetic, well-meaning, elderly man with a poor memory. While he is and must be accountable for his actions—he is, after all, the President of the United States—based on our direct

observations of him, Mr. Biden is someone for whom many jurors will want to search for reasonable doubt. It would be difficult to convince a jury they should convict him—by then a former president who will be at least well into his eighties—of a serious felony that requires a mental state of willfulness.

Finally, while jurors might not find reasonable doubt in any one of the evidentiary shortcomings identified above, some jurors may find reasonable doubt because of the cumulative effect of some or all of these shortcomings.

E. There is also insufficient evidence that Mr. Biden willfully retained the handwritten Thanksgiving memo

As explained in Chapter Six, inside the office of Mr. Biden's Delaware home, agents found his Af/Pak 1 notebook, which contained his handwritten notes about the 2009 Afghanistan troop reviews. In the front of the notebook, binder-clipped together, were the pages of the handwritten 2009 Thanksgiving memo in which Mr. Biden made his final argument to President Obama opposing the Afghanistan troop surge. The Thanksgiving memo discussed a November 2009 State Department cable, and the cable itself, which is marked as Confidential, is clipped to the memo.⁸⁶¹ In Mr. Biden's interview with our office, he said he "guess[ed]" he "wanted to hang onto [the Thanksgiving memo] for posterity's sake" because "this was my position on Afghanistan."⁸⁶² The handwritten memo, though unmarked, contains information that remains classified up to the Secret level.⁸⁶³ The State Department cable shows a

⁸⁶¹ FBI Serials 77 1A86, 682, 683 1A772; Evidence item 1B66; Recovered document D20.

⁸⁶² Biden 10/9/23 Tr. at 21.

⁸⁶³ FBI Serial 676.

declassification date of November 2019, but the State Department has been unable to tell us if it has been formally declassified.⁸⁶⁴

Though the handwritten Thanksgiving memo has been determined to be currently classified, we cannot prove that Mr. Biden believed it was classified after leaving office in 2017. The memo was derived from at least one document that was marked as classified in 2009, but during his interview with our office, Mr. Biden said he did not consider the memo classified when he discussed it with his ghostwriter, Zwonitzer, in 2017.⁸⁶⁵ The memo concerned deliberations from more than seven years earlier about the Afghanistan troop surge, and in the intervening years those deliberations had been widely discussed in public, so Mr. Biden could have reasonably expected that the memo's contents became less sensitive over time. Because we cannot prove that he knew the memo was classified when he left office, we cannot prove that by retaining the memo, he willfully retained national defense information.

As for the State Department cable, it does not appear to contain national defense information today, and there is no reason to believe it did in 2017. Therefore, the cable cannot be the subject of a willful retention charge under Section 793(e). In addition, Mr. Biden told us in his interview that he does not recognize the marking "Confidential" as a classification marking. To him, the marking means the document should be held in confidence, but not necessarily that it is classified.⁸⁶⁶ Although "Confidential" is, in fact, a category of classified information enumerated in the

⁸⁶⁴ *Id.*

⁸⁶⁵ See Chapter Six; Biden 10/9/23 Tr. at 31-33, 38 (explaining that the memo "wasn't a Top Secret thing," and was "not confidential in the classification sense").

⁸⁶⁶ Biden 10/9/23 Tr. at 24-25.

governing executive order, we would likely be unable to refute Mr. Biden's claim that he did not know this.

* * *

We conclude that the evidence is insufficient to meet the government's burden. In accordance with the Justice Manual, because we do not believe the government is likely to obtain a conviction at trial, we decline prosecution.

CHAPTER TWELVE

ANALYSIS OF THE EVIDENCE – CLASSIFIED NOTEBOOKS

There is evidence that when Mr. Biden left office in 2017, he willfully retained his classified notebooks—that is, he knew he kept classified information in notebooks stored in his house and he knew he was not allowed to do so. There is also evidence that Mr. Biden willfully disclosed classified information in his notebooks to his ghostwriter by reading it aloud to him. We conclude that this evidence does not establish Mr. Biden’s guilt beyond a reasonable doubt. We therefore decline prosecution of Mr. Biden based on his retention of his notebooks and disclosure of information in them.

I. WILLFUL INTENT

A. There is evidence that Mr. Biden retained the classified notebooks, knowing he was not allowed to do so

As with the classified Afghanistan documents, there is evidence that Mr. Biden kept his notebooks after his vice presidency knowing they were classified and he was not allowed to have them.

The evidence shows convincingly that Mr. Biden knew the notebooks, as a whole, contained classified information. For eight years, he wrote in his notebooks about classified information during classified meetings in the White House Situation Room and elsewhere.⁸⁶⁷ He was familiar with the notebooks’ contents, which included obviously classified information. When reviewing the notebooks with Zwonitzer, Mr. Biden sometimes read aloud classified notes verbatim, but he also sometimes

⁸⁶⁷ See Chapter Four.

appeared to skip over classified information, and he warned Zwonitzer that the material in the notebooks could be classified.⁸⁶⁸ Mr. Biden also stored the notebooks in a classified safe in the White House for a time as vice president because the notebooks were classified.⁸⁶⁹

In Mr. Biden's written answers to questions from our office, he called into question whether he knew the information in his notebooks was classified. In those answers, Mr. Biden explained that when he described material in his notebooks to Zwonitzer as "classified" he did not actually mean "classified." According to Mr. Biden, "I may have used the word 'classified' with Mr. Zwonitzer in a generic sense, to refer not to the formal classification of national security information, but to sensitive or private topics to ensure that Mr. Zwonitzer would not write about them."⁸⁷⁰ Mr. Biden qualified this answer by explaining, "I do not recall the specific conversations you reference with Mr. Zwonitzer, which took place more than six years ago."⁸⁷¹

This explanation—that "classified" does not mean "classified"—is not credible. At the time Mr. Biden met with Zwonitzer, Mr. Biden had nearly fifty years of experience dealing with classified information, including as a member of the Senate Select Committee on Intelligence, a member and Chairman of the Senate Committee on the Judiciary, a member and Chairman of the Senate Committee on Foreign

⁸⁶⁸ Zwonitzer recordings 170424_0091, Carved_000556, Carved_000571.

⁸⁶⁹ See Chapter Four.

⁸⁷⁰ Biden 10/1/23 written responses at 1. Mr. Biden said something similar during our in-person interview of him. Biden 10/9/23 Tr. at 32-33.

⁸⁷¹ Biden 10/1/23 written responses at 1.

Relations, and Vice President of the United States.⁸⁷² It is not plausible that a person of his knowledge and experience used the term “classified” in this context as a euphemism for “private.”

Mr. Biden’s explanation is even less credible in light of his actual words to Zwonitzer. As described below, among the times Mr. Biden spoke to Zwonitzer about classified information was when Mr. Biden handed Zwonitzer a notebook entry about a National Security Council meeting in the Situation Room and asked if Zwonitzer could read Mr. Biden’s handwriting.⁸⁷³ Mr. Biden warned Zwonitzer, “Some of this may be classified, so be careful,” and added, “I’m not sure. It isn’t marked classified, but”⁸⁷⁴

This is not a reference to merely private material. In this context, when a former official of Mr. Biden’s stature and experience warns someone without a security clearance to “be careful” because some information “may be classified,” and then refers to “marked classified” material, the former official is talking about classified national security information.⁸⁷⁵ The evidence shows that Mr. Biden knew his notebooks contained such information.

There is also evidence that Mr. Biden knew he could not keep classified handwritten notes unsecured at home after his time as vice president.

⁸⁷² NARA_SCAN_00000904; Biden, Joseph Robinette (Joe), Jr., Biographical Directory of the United States Congress, <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=b000444> (last visited Jan. 30, 2024).

⁸⁷³ Zwonitzer recording 170424_0091; 170424_0091 Tr. at 13-14; Evidence item 1B80.

⁸⁷⁴ Zwonitzer recording 170424_0091; 170424_0091 Tr. at 13-14; Evidence item 1B80.

⁸⁷⁵ Zwonitzer recording 170424_0091; 170424_0091 Tr. at 13-14; Evidence item 1B80.

1. **Mr. Biden knew the purpose of classified handling rules: to prevent unauthorized disclosure of our nation's secrets**

The basic principles of the system that protects classified information should be clear to anyone who understands why it is necessary to protect such material in the first place. Information is classified only if its unauthorized disclosure “reasonably could be expected to cause . . . damage to the national security.”⁸⁷⁶ To prevent such disclosure, people who access classified information must store it in authorized, secure places.⁸⁷⁷ And if classified information is disclosed, for example to a foreign adversary, it can damage national security whether it is typewritten or handwritten.⁸⁷⁸

These principles are familiar, even obvious, to anyone with experience handling classified information. And they have long been enshrined in the legal and policy regime used to safeguard our nation's secrets. That regime requires classified information to be safeguarded properly whether it is written by hand or typed on a keyboard.⁸⁷⁹

As noted above, when Mr. Biden left office in 2017, he had nearly fifty years of experience with classified information, including eight years in the second-highest position in the Executive Branch. He was deeply familiar with the measures taken to

⁸⁷⁶ Executive Order 13526 § 1.2.

⁸⁷⁷ *Id.* § 4.1(g); 32 C.F.R. §§ 2001.43(b)(1) and (2), 2001.53 (2024); Office of the Director of National Intelligence, Intelligence Community Directive 705 (2010).

⁸⁷⁸ Under Executive Order 13526, information is classified only if “its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security,” § 1.4, and “information” refers to “any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics.” § 6.1(t).

⁸⁷⁹ *See id.* §§ 2.1, 6.1(i), 6.1(o), 6.1(p), 6.1(t).

safeguard classified information and the reasons for them. As Ron Klain, one of Mr. Biden's closest aides, explained, Mr. Biden "had traveled the world. He knew the risks that men and women were taking to gather this information and . . . felt a great deal of responsibility about it."⁸⁸⁰ And John McGrail, Mr. Biden's top lawyer at the end of the Obama administration, said he would be "surprise[d]" if Mr. Biden intentionally took classified materials home because he well knew, from extensive government experience, that disclosure "can harm sources and methods and the national security interests of the United States."⁸⁸¹

2. Mr. Biden's public statements show he knew the restrictions on handling classified information after leaving office

Mr. Biden's public statements show he knew classified information must be safeguarded to protect intelligence sources and methods. As Mr. Biden has put it, "People know I take classified documents and classified information seriously."⁸⁸² In a September 2022 interview with CBS, Mr. Biden said the following in response to a question about the marked classified documents allegedly found in Mr. Trump's private home:

Reporter: When you saw the photograph of the top secret documents laid out on the floor at Mar-a-Lago, what did you think to yourself? Looking at that image.

Mr. Biden: How that could possibly happen. How one—anyone could be that irresponsible. And I thought, what data was in

⁸⁸⁰ Klain Tr. at 52-53.

⁸⁸¹ McGrail 1/22/24 Tr. at 100-01, 111.

⁸⁸² Carol E. Lee, Ken Dilanian, Kristen Welker, and Zoë Richards, *Biden says he was "surprised" to learn government docs were found at his former office*, NBC NEWS (Jan. 10, 2023), <https://www.nbcnews.com/politics/white-house/less-dozen-classified-documents-found-biden-office-sources-say-rcna65179> (last visited Feb. 2, 2024).

there that **may compromise sources and methods?** By that I mean names of people who helped or th-- et cetera. And it just-- **totally irresponsible.**⁸⁸³

Mr. Biden's emphatic and unqualified conclusion that keeping marked classified documents unsecured in one's home is "totally irresponsible" because it "may compromise sources and methods" applies equally to his own decision to keep his notebooks at home in unlocked and unauthorized containers. The notebooks, like the marked documents, contained classified information, the unauthorized disclosure of which could compromise intelligence sources and methods and damage national security.⁸⁸⁴ And Mr. Biden's public statements, during his vice presidency and after, demonstrate that he understands "classified information," not merely marked classified documents, is what must be protected.⁸⁸⁵ These statements undercut his purported belief that he could lawfully retain the classified information in his notebooks.

⁸⁸³ *President Joe Biden: The 2022 60 Minutes Interview*, CBS NEWS, at 12:09 (Sept. 12, 2022), <https://www.youtube.com/watch?v=u1UC89H4Swc> (last visited Feb. 2, 2024) (emphasis added).

⁸⁸⁴ See Chapter Four.

⁸⁸⁵ Carol E. Lee, Ken Dilanian, Kristen Welker, and Zoë Richards, *Biden says he was "surprised" to learn government docs were found at his former office*, NBC NEWS (Jan. 10, 2023), <https://www.nbcnews.com/politics/white-house/less-dozen-classified-documents-found-biden-office-sources-say-rcna65179> (last visited Jan. 30, 2024); *Transcript And Audio: Vice Presidential Debate*, NPR NEWS (Oct. 11, 2012), <https://www.npr.org/2012/10/11/162754053/transcript-biden-ryan-vice-presidential-debate> (last visited Jan. 30, 2024) (during a vice presidential debate in October 2012, Mr. Biden asserted that he had to be careful about safeguarding classified information when he said, "with regard to the ability of the United States to take action militarily, it is — it is not in my purview to talk about classified information").

Mr. Biden has also publicly acknowledged limits on how he may properly handle classified information in his home, even as a sitting president. In August 2022, he told reporters:

Reporter: Mr. President, in simple terms, is it ever appropriate for a President to take home with them classified and top secret documents?

Mr. Biden: Depending on the circumstance. For example, I have in my home, a cabined-off space that is completely secure. I'm taking home with me today's PDB. It's locked. I have a person with me—military with me. I read it, I lock it back up, and give it to the military.

Reporter: Without a specialized area in which you can declassify documents, is it ever appropriate for a president to bring classified and top secret documents home with them?

Mr. Biden: It depends on the document, and it depends on how secure the room is.⁸⁸⁶

If Mr. Biden thought in 2022 that he was obligated to keep the PDB—the President's Daily Brief—secured in his home as a sitting president, he should have known in 2017 that as a former vice president and a private citizen he was not permitted to keep handwritten notes about the President's Daily Brief and other classified information in unlocked drawers in his home.

⁸⁸⁶ Remarks by President Biden Before Marine One Departure, The White House (Aug. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/26/remarks-by-president-biden-before-marine-one-departure-18/> (last visited Jan. 30, 2024).

3. As vice president, Mr. Biden received advice from staff about the need to secure classified notes properly

Mr. Biden received advice from his staff about the need to secure classified information in the form of notes. In 2011, his first Counsel to the Vice President, Cynthia Hogan, advised him in writing that classified notes generated in the context of discussions with a historian “must be maintained in secure safes” and “stored in a secure facility.”⁸⁸⁷ And as vice president, Mr. Biden stored his classified notebooks in a safe, at least for a time, in contrast with his decision after leaving office to keep the notebooks at home in unlocked and unauthorized drawers.⁸⁸⁸

4. After his vice presidency, Mr. Biden stored his classified notecards in a SCIF, but kept his classified notebooks in unlocked drawers at home

When Mr. Biden left office, he knew his staff decided to keep his classified *notecards* in a SCIF at the National Archives, and he knew his *notebooks* contained the same type of classified information. As he told his ghostwriter during a recorded interview in October 2016, the same staff who eventually arranged for careful storage of his classified notecards in an Archives SCIF “didn’t even know” he also had possession of his notebooks, which he simply took home without informing his staff.⁸⁸⁹

After his vice presidency, Mr. Biden was reminded twice more that his classified notes should be secured in a SCIF: on each of the two days in 2017 when he visited the Archives SCIF to review his notecards in writing his book.⁸⁹⁰ The form he

⁸⁸⁷ 4/28/11 e-mail from Hogan to OVP staff, 1B001_02881349; 4/27/11 Briefing Memo from Hogan, 1B001_02881350.

⁸⁸⁸ See Chapter Four.

⁸⁸⁹ See *id.*

⁸⁹⁰ See *id.*

was required to sign at the Archives made clear he was accessing classified information that could not leave the SCIF, and that he had an ongoing obligation to protect this information.⁸⁹¹ And at the end of his first visit, Archives staff asked to see the notes he had taken during his review of the notecards, to ensure he was not removing and mishandling classified information.⁸⁹² It should have been clear to Mr. Biden that not only were his classified notecards required to be in a SCIF, he also could not take classified notes about those notecards home with him—and, by extension, he could not keep any classified notes at home at all.

5. Mr. Biden had strong motivations to ignore proper procedures for safeguarding his classified notebooks

Finally, Mr. Biden had strong motivations to ignore the proper procedures for safeguarding the classified information in his notebooks. He decided months before leaving office to write a book and began meeting with his ghostwriter while still vice president.⁸⁹³ After his vice presidency, the notebooks continued to be an invaluable resource that he consulted liberally.⁸⁹⁴ During hours of recorded interviews in which he read aloud from his notebooks in his private home, Mr. Biden provided raw material to his ghostwriter detailing meetings and events that would be of interest to prospective readers and buyers of his book.⁸⁹⁵ He also likely viewed the notebooks, like the marked classified documents related to Afghanistan recovered from his garage, as an irreplaceable contemporaneous record of some of the most important

⁸⁹¹ *See id.*

⁸⁹² *See id.*; NARA Archivist 1 Tr. at 56-59, 77-78, 81-82, 93-94, 122-23.

⁸⁹³ *See* Chapter Five.

⁸⁹⁴ *See* Chapter Four.

⁸⁹⁵ *See id.*

moments of his vice presidency. This record was valuable to him for many reasons, including to help defend his record and buttress his legacy as a world leader.

B. The evidence does not prove beyond a reasonable doubt that Mr. Biden willfully retained the notebooks

We do not believe this evidence would meet the government's burden at trial to prove Mr. Biden knew his handling of the notebooks broke the law. We expect Mr. Biden's defense would be that he thought his notebooks were his personal property and that he was allowed to take them home after his vice presidency, even if they contained classified information. Enough evidence supports this defense to establish reasonable doubt.

First, we expect Mr. Biden to offer direct evidence that he believed he was entitled to take the notebooks home. During his interview with the Special Counsel's Office, Mr. Biden was emphatic, declaring that his notebooks are "my property," and that "every president before me has done the exact same thing," that is, kept handwritten materials after his term in office, even if they contain classified material.⁸⁹⁶ He also specifically cited the diaries President Reagan kept while in office, noting that they included classified information.⁸⁹⁷ Mr. Biden repeated this theme in his written answers to our questions, writing that, "[l]ike presidents and vice presidents before me, I understand these notes to be my personal property."⁸⁹⁸

At trial, we expect Mr. Biden to offer similar evidence of his subjective understanding. Such evidence would be admissible as to the element of willfulness,

⁸⁹⁶ Biden 10/9/23 Tr. at 41-43; Biden 10/8/23 Tr. at 111-12.

⁸⁹⁷ Biden 10/8/23 Tr. at 111-12.

⁸⁹⁸ Biden 12/1/23 written responses at 1.

which requires proof that Mr. Biden acted with intent to do something the law forbids.⁸⁹⁹ And we expect the evidence of Mr. Biden's state of mind to be compelling—clear, forceful testimony that he did, in fact, believe he was allowed to have the notebooks. While the government could question this testimony's veracity as a convenient answer perhaps suggested by his attorneys after the discovery of his classified notebooks, such a suggestion lacks evidentiary support and Mr. Biden's testimony will likely carry significant weight with many jurors.

The government could also question the veracity of Mr. Biden's testimony by introducing evidence that he appears to have come to and acted on the belief that he could take home classified notes entirely on his own, without the advice or knowledge of any of his staff, including the Counsel to the Vice President, John McGrail.⁹⁰⁰ Based on the evidence we found, Mr. Biden appears to have consulted no one on this significant question. None of the witnesses we interviewed recalled Mr. Biden mentioning that he intended to take his classified notebooks home or that he believed he was permitted to do so, even during conversations in which McGrail told Mr. Biden that *all* of Mr. Biden's records—including all his notes—would be sent to the National

⁸⁹⁹ A broad array of defense evidence is admissible at criminal trials for willfulness crimes that would not be admissible for crimes that require a less culpable mental state. *United States v. Lankford*, 955 F.2d 1545, 1550 (11th Cir. 1992) (when willfulness is at issue, a defendant is entitled to “wide latitude in the introduction of evidence tending to show lack of intent”) (quoting *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979) (en banc)); see also *Cheek v. United States*, 498 U.S. 192, 203 (1991) (reversible error to instruct the jury to disregard evidence of defendant's belief that he was not required to pay taxes “as incredible as such misunderstandings of and beliefs about the law might be”). Indeed, the Supreme Court has admonished, in the context of a tax crime requiring proof of willfulness, “forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.” *Cheek*, 498 U.S. at 203.

⁹⁰⁰ McGrail 1/22/24 Tr. at 84-87, 97-119.

Archives.⁹⁰¹ When interviewed, McGrail recalled that Mr. Biden “understood why his documents were going to [the National Archives.] . . . He understood it and accepted it.”⁹⁰² McGrail also told us the following:

- Mr. Biden never told McGrail that he was retaining any notes he took while vice president.⁹⁰³ McGrail said Mr. Biden understood the approach of sending all his records to the National Archives so that archivists could separate presidential records from the rest.⁹⁰⁴
- Mr. Biden never told McGrail that he was retaining any classified notes.⁹⁰⁵ McGrail said he would have expected that to be part of the conversation he had with Mr. Biden about the handling of his notes.⁹⁰⁶
- McGrail never advised Mr. Biden that he could bring home classified material of any kind.⁹⁰⁷ Indeed, McGrail said he would be surprised to learn that Mr. Biden took classified materials home—even personal notes—knowing they were classified because (1) that would have been “inconsistent with everything that we were killing ourselves trying to accomplish,”⁹⁰⁸ (2) he knows his home is not a SCIF,⁹⁰⁹ and (3) as former chairman of the Senate Foreign Relations Committee, Mr. Biden knew that classified information cannot be stored outside a secure facility because its disclosure can harm national security and compromise intelligence sources and methods.⁹¹⁰
- McGrail never spoke to Mr. Biden or anyone else about the Reagan diaries, or historical practices of presidents taking home classified diaries or other materials.⁹¹¹

⁹⁰¹ See Chapter Four.

⁹⁰² McGrail 1/22/24 Tr. at 115.

⁹⁰³ *Id.* at 84, 117.

⁹⁰⁴ *Id.* at 86-87, 115.

⁹⁰⁵ *Id.* at 98-99.

⁹⁰⁶ *Id.* at 117.

⁹⁰⁷ *Id.* at 107, 111-12.

⁹⁰⁸ *Id.* at 112.

⁹⁰⁹ *Id.* at 101.

⁹¹⁰ *Id.* at 100-01, 111.

⁹¹¹ *Id.* at 73-74, 119.

All that said, we expect Mr. Biden's defense at trial to remain fairly simple. According to McGrail, the only thing he recalls telling Mr. Biden about the disposition of his records was that all his records would go to the National Archives after the administration to separate personal from presidential records.⁹¹² McGrail says he never spoke to Mr. Biden about classified notes or how they should be stored.⁹¹³

From this, Mr. Biden will likely claim that McGrail outlined a cautious arrangement—not a legal requirement—to treat all his records as presidential records until the Archives could sort out what was personal. But, Mr. Biden will likely say, he never believed his notebooks, which he thought of as his personal diaries, fell within that arrangement. He treated the notebooks markedly differently from the rest of his notes and other presidential records throughout his vice presidency, for example, allowing staff to store and review his notecards, but not his notebooks.⁹¹⁴ This treatment, he will argue, and the extremely personal content of some of the notebooks, shows that he considered them to be his personal property. Mr. Biden's notebooks included gut-wrenching passages about his son's death and other highly personal material.⁹¹⁵ His claim that he believed he did not need to send what he considered to be his personal diary to be stored at a government facility will likely appeal to some jurors.⁹¹⁶

⁹¹² See Chapter Four.

⁹¹³ See *id.*

⁹¹⁴ See *id.*

⁹¹⁵ *E.g.*, Notebook entries 1B57-0051, 54.

⁹¹⁶ The government could respond that many of the notebooks are unlike diaries because they contain work notes, including minutes of meetings of the National Security Council and other classified briefings. See Chapter Four. These notebooks do not meet the

We expect Mr. Biden also to contend that the presence of classified information in what he viewed as his diary did not change his thinking. As a member of the exclusive club of former presidents and vice presidents, Mr. Biden will claim that he knew such officials kept diaries, and he knew or expected that those diaries—like Mr. Reagan’s—contained classified information.⁹¹⁷ He also understood that former presidents and vice presidents took their diaries home upon leaving office, without being investigated or prosecuted for it. Thus, whatever McGrail now thinks of the matter, Mr. Biden will claim that it did not occur to him to store what he thought of as his personal diaries—which he held close for eight years—at the National Archives, and he certainly did not know that by failing to do so he committed a crime.

Contemporaneous evidence from immediately after the vice presidency supports this defense. In a recorded conversation with Zwonitzer on April 26, 2017, three months after leaving office, Mr. Biden said the following:

Mr. Biden: I’m told by [a personal aide], I guess he checked with you, in order for me to get my, uh, get all those presidential notes I had for lunch, the luncheon meetings, I have to go to McGrail?

Assistant: Yes, McGrail has them. We were supposed to turn it in and that is the last person who had them.

definition of “personal records” under the Presidential Records Act because they “relate to or have an effect upon the carrying out of” the duties of the vice president, and they are not “of a purely private or nonpublic character.” 44 U.S.C. § 2201(3). But Mr. Biden will likely present a compelling case that he viewed the notebooks as his personal diaries or the rough equivalent. Indeed, in a recorded conversation with Zwonitzer, while reviewing a notebook entry about a national security meeting, Mr. Biden twice referred to the passage as a “diary entry.” Carved_000556. And, as discussed extensively in Chapter Ten, Mr. Reagan’s diaries contained several instances of classified information, the Department of Justice described them as his “personal records,” and Mr. Reagan brought them home after his presidency without repercussion.

⁹¹⁷ See Chapter Ten.

Mr. Biden: OK. Uh. See if you can get me McGrail on the line while I have you now. OK? And stay on okay?

Assistant: Got it sir. Hold on.

Zwonitzer: **This is probably something that goes to the presidential papers.**

Mr. Biden: **I don't think so. It was in between. I didn't want to turn them in.**

Zwonitzer: **Right so, it's the gray area.**⁹¹⁸

This exchange concerned Mr. Biden's handwritten notecards, which, like his notebooks, addressed both personal and official matters, and which also contained classified information.⁹¹⁹ The evidence suggests, as explained above, that McGrail decided the classified notecards should be stored at the National Archives after the administration, with Mr. Biden telling Zwonitzer he did not want to do so.⁹²⁰ But when Zwonitzer suggested that the notecards might be "presidential papers"—that is, presidential records that are required by law to be stored at the National Archives—Mr. Biden disagreed. Mr. Biden explained that he did not think he was required to turn in the notecards and that he had not wanted to do so.

One interpretation of this exchange that the evidence permits is that, while Mr. Biden followed McGrail's advice to store the classified notecards in a SCIF at the Archives, he did not believe he was required to, and he thought that, at most, the notecards fell into an "in between" or "gray area." Indeed, when interviewed, McGrail

⁹¹⁸ Zwonitzer recording Carved_000599 (emphasis added); Carved_000599 Tr. at 3-4; FBI Serials 315, 335.

⁹¹⁹ See Chapter Four.

⁹²⁰ See *id.*

recalled that he advised Mr. Biden to turn over all his records, “whether personal or not,” to the National Archives.⁹²¹ McGrail’s advice was premised on a desire to avoid taking a constrained view of the Presidential Records Act’s requirements, as McGrail believed former vice president Dick Cheney had, and the understanding that archivists would review Mr. Biden’s notes and separate presidential records from the rest.⁹²² McGrail also said he believed that the notes were to be stored in a SCIF at the Archives due to their general sensitivity, not because they were classified.⁹²³

At trial, Mr. Biden would argue that the 2017 Zwonitzer recording is the best evidence of what he believed after the vice presidency, and it shows he did not believe he was legally required to store his notecards at the Archives, and that he thought the same about his notebooks. In this way, the Zwonitzer recording dovetails with Mr. Biden’s expected defense at trial that the Presidential Records Act defined his notebooks as his personal property, and that the Act authorized him to keep these

⁹²¹ McGrail 1/22/24 Tr. at 83.

⁹²² *Id.* at 83.

⁹²³ *Id.* at 114. McGrail’s recollection on this point is inconsistent with e-mails and other documents that suggest he knew the notecards contained classified information in late 2016 and early 2017. 10/7/16 e-mails between Ratner, Associate Counsel, McGrail, and others, NARAWH-00017698, NARAWH-00017743, NARAWH-00019307; 10/18/16 e-mails between Associate Counsel, McGrail, and others, NARAWH-00017820; 10/20/16 e-mail from Ratner to Ricchetti, McGrail, Kahl et al., 1B001_03798594; 11/14/16 e-mail from McGrail, SCOH-000340; 1/05/17 e-mail from Associate Counsel to McGrail, SCOH-000339; 1/5/17 and 1/6/17 e-mails between Associate Counsel, McGrail, and NARA Archivist 1. SCOH-000326, SCOH-000330, SCOH-000332, SCOH-000334; 1/6/17 Handwritten Note re: VP diary/notecards. It is also at odds with the recollection of the NARA archivist that McGrail told him the notecards contained classified information, NARA Archivist 1 Tr. at 56, 62, and the understanding of the associate counsel who helped McGrail arrange for the notecards to be stored at the Archives. In an interview with our office, she said that “it was the safest decision to have [the notecards] be in a SCIF *since there w[ere] likely classified documents.*” Associate Counsel 8/29/23 Tr. at 9-10, 76 (emphasis added). McGrail’s memory of these events could well have faded over the course of more than six years.

notebooks in his home, even if they contained classified information. That Mr. Biden was mistaken in his legal judgment is not enough to prove he acted willfully, which requires intent to do something the law forbids.⁹²⁴

The defense will buttress these claims by contending that other credible authorities, including at least one former president and the Department of Justice, also have concluded that a former president may keep handwritten notes even if they contain classified information. As discussed in Chapter Ten, the clearest historical example is President Reagan, who left the White House in 1989 with eight years' worth of handwritten diaries, which he kept at his private home in California. The Reagan diaries contained classified information, such as entries recounting National Security Council meetings and referencing highly sensitive intelligence sources and methods, including human sources and signals intelligence.⁹²⁵ Some entries that addressed sensitive subjects included descriptions such as "top secret" and "very hush hush," and some entries remained classified Top Secret as of 2007, decades after Mr. Reagan wrote them.

As we also describe in Chapter Ten, during the *Poindexter* litigation in 1989 and 1990, after Mr. Reagan's presidency, the Department of Justice took the position in public court filings that the diaries were both "currently classified" and Mr. Reagan's "personal records" that were not in the Archives' possession.⁹²⁶ In a later

⁹²⁴ See Chapter Nine and n.899 above.

⁹²⁵ See Chapter Ten.

⁹²⁶ Memorandum in Support of Motion to Quash Subpoena to Archivist and Statement of Interest by the Department of Justice at 2-3, 6-7, 17 n.8, 20, *United States v. Poindexter*, Crim No. 88-0080-01 (HHG).

written order, the district court, after conducting an *in camera* review of diary excerpts, described the diaries as containing “classified and highly sensitive information” including an entry about “a certain top-secret and extremely sensitive activity.”⁹²⁷

After these legal declarations by the Department and the court, the classified diaries remained in Mr. Reagan’s private home for another fifteen years, until he died in 2004. And even though the Department of Justice publicly acknowledged that Mr. Reagan treated the diaries as his personal records and they were not in possession of the National Archives, to our knowledge neither the Department nor anyone else sought the diaries’ return or initiated a criminal investigation.⁹²⁸

In short, there will be evidence at trial that at least one former president did what Mr. Biden now claims it was proper for him to do too: take his diaries home after leaving the White House, even though the diaries contained classified information. As indicated by letters we have received from the White House Counsel’s Office and Mr. Biden’s personal attorneys, the defense will argue that the Department of Justice blessed this view in Mr. Reagan’s case by stating in public filings that the diaries were both classified and Mr. Reagan’s personal records and by taking no recovery or enforcement action. Most jurors would likely find this precedent

⁹²⁷ *United States v. Poindexter*, 732 F. Supp. 135, 138 n.5, 141 (D.D.C. Jan. 30, 1990).

⁹²⁸ See Chapter Ten.

and Mr. Biden's claimed reliance on it, evidence of which we expect would be admitted at trial,⁹²⁹ to be compelling evidence that Mr. Biden did not act willfully.

The government could reply that, whatever the reasons for the Department of Justice's inaction in Mr. Reagan's case—including, perhaps, that former presidents have Secret Service protection indefinitely after leaving office, or simply that officials at the Department did not realize Mr. Reagan stored his diaries at home—the relevant executive order and controlling regulations require former presidents and vice presidents to store classified information in a secured location after their time in office.⁹³⁰

While we agree with this statement of the law, and we recognize that the Reagan precedent is from a different era with a different legal landscape, we think jurors assessing Mr. Biden's guilt and intent will be persuaded less by what the government says in executive orders and agency regulations, and more by what the government actually has done (or not done) by way of enforcement among the small

⁹²⁹ Admissible evidence concerning a lack of willfulness can include legal materials upon which the defendant claims to have relied in forming the view that his conduct was not forbidden by law, so long as the defendant lays a proper foundation. *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991); *see also United States v. Harris*, 942 F.2d 1125, 1132 n.6 (7th Cir. 1991) (noting that, in the context of tax crimes requiring proof of willfulness, defendants can introduce expert testimony about case law “to the extent that the defendant claims actual reliance on that case law”); *United States v. Willie*, 941 F.2d 1384, 1392-98 (10th Cir. 1991) (to show lack of willfulness in a tax case, defendant can introduce evidence to prove his “descriptive” belief that the law *does not* apply to him, but not his “normative” belief that the law *should not* apply to him).

⁹³⁰ *See* Executive Order 13526 §§ 4.1, 4.4; Superseding Indictment ¶¶ 18-19, *United States v. Trump*, No. 23-CR-80101-AMC, ECF No. 85. It is not clear that the presence of Secret Service agents materially enhances the level of protection afforded to classified materials. Agents we interviewed said they focus on the protection of persons, not documents, and they do not monitor the movement of or access to documents. Secret Service Supervisor Tr. at 12-13; Secret Service Special Agent 1 8/24/23 Tr. at 27-29, 87-88; Secret Service Special Agent 2 Tr. at 31-33.

group of former presidents and vice presidents. Many jurors would conclude that, given the Department's treatment of Mr. Reagan, who kept his classified diaries for more than a decade before his death, it would have been plausible for Mr. Biden to believe he could properly keep his classified notebooks. Citing the relevant sources of law likely would not sway such jurors from this conclusion.

We also believe some of the same evidence that supports reasonable doubt for the classified Afghanistan documents also supports reasonable doubt for the notebooks, including Mr. Biden's cooperation with the investigation, his diminished faculties in advancing age, and his sympathetic demeanor. These factors will likely make it difficult for jurors to conclude he had criminal intent.

Finally, the two main sets of evidence summarized above, suggesting that Mr. Biden knew he was not allowed to keep classified notebooks, do not suffice to prove his willfulness beyond a reasonable doubt. The first set of evidence is that Mr. Biden, at his staff's insistence, stored his classified notecards in a SCIF at the Archives, and several months earlier in the fall of 2016 he told Zwonitzer "they didn't even know I have this [notebook]."⁹³¹ This could suggest that Mr. Biden concealed his notebooks from staff to avoid restrictions on his access to or use of them.

But the defense will argue that this treatment of the notecards and notebooks is also consistent with an innocent explanation: Mr. Biden may have simply acquiesced to his staff's decision to store his notecards in the Archives SCIF, even though, as he suggested to his ghostwriter on April 26, 2017, he (like Mr. Reagan and

⁹³¹ See Chapter Four.

the Department of Justice before him) did not think he was required to do so. If that is what happened, Mr. Biden was not required to inform his staff that their (in his view) unnecessary advice could also apply to his notebooks. His failure to flag the notebooks for what he believed to be his staff's overly cautious treatment is not compelling evidence of willfulness. In the same vein, Mr. Biden could have concluded that the forms he signed about safeguarding classified information in the Archives SCIF were boilerplate paperwork that applied in most cases, but not to the handwritten materials of a former president or vice president, which historically have been treated as the former officeholder's personal property. And he could point to McGrail's current understanding that the notecards were stored in a SCIF simply to keep them secure, not because they were classified.⁹³²

The second set of evidence concerns the guidance on "best practices" that Counsel Cynthia Hogan gave Mr. Biden in 2010 and 2011 about handling classified information, and his decision after receiving this guidance to store the notebooks in a safe in the White House.⁹³³ This evidence, too, is consistent with innocence. By the time Mr. Biden left the White House in 2017, Hogan's guidance about storage in a safe was six years old, and Mr. Biden had long since stopped following it. The evidence suggests that he did not store his notebooks in a safe for the last several years of his administration, and no one in the White House raised concerns.⁹³⁴

⁹³² McGrail 1/22/24 Tr. at 69-70, 113-14, 129-30.

⁹³³ See Chapters Three and Four.

⁹³⁴ See *id.*

While Mr. Biden *may* have recalled Hogan's advice and concluded that it meant he should not bring the notebooks home with him when he left the White House, there is no evidence he did so recall. And there would have been good reason for him not to think this way, especially since Hogan gave her 2010 advice seven years earlier during a meeting scheduled to last ten minutes, and Mr. Biden had long since stopped following her advice, which Hogan told us would have reflected best practices rather than legal requirements.⁹³⁵

For these reasons, we do not believe the government could prove beyond a reasonable doubt that Mr. Biden knew it was unlawful to retain his notebooks at his home after the vice presidency.

C. The evidence does not prove beyond a reasonable doubt that Mr. Biden willfully disclosed national defense information in the notebooks to his ghostwriter

We have also considered whether Mr. Biden willfully disclosed national defense information to Zwonitzer by reading certain passages of his notes, aloud and nearly verbatim, from national security meetings.⁹³⁶ Mr. Biden should have known that by reading his unfiltered notes about classified meetings in the Situation Room, he risked sharing classified information with his ghostwriter. But we do not believe the evidence supports charges of willful disclosure beyond a reasonable doubt.

At least three times, Mr. Biden read classified notes from national security meetings to Zwonitzer nearly verbatim. The first two incidents involved the same

⁹³⁵ *See id.*

⁹³⁶ *See* 18 U.S.C. § 793(e) (prohibiting the willful transmission of national defense information).

notebook passage.⁹³⁷ On February 16, 2017, Mr. Biden appeared to explain to Zwonitzer that a notebook entry related to “a long meeting on the Security Council on – it probably was classified.”⁹³⁸ Mr. Biden had skipped over this entry entirely during a recorded conversation with Zwonitzer several months earlier in October 2016.⁹³⁹ But during the February 16, 2017 recorded conversation, Mr. Biden read aloud to Zwonitzer portions of the notebook entry that contained classified information.⁹⁴⁰

Two months later, on April 10, 2017, during another recorded conversation with Zwonitzer, Mr. Biden turned to the same notebook entry and read additional classified portions aloud, again nearly verbatim.⁹⁴¹ He did so immediately after reviewing aloud highly emotional notebook entries about the death of his son Beau and other personal topics, which appeared on the pages right before the classified entry.⁹⁴²

This evidence shows that Mr. Biden disclosed classified information to Zwonitzer, who was not authorized to receive it. But the evidence falls short of proving that Mr. Biden did so willfully—that is, that he knew these notebook passages were classified and that he intended to share classified information with Zwonitzer. During the February 16, 2017 conversation, Mr. Biden appeared to say

⁹³⁷ See Chapter Five.

⁹³⁸ Zwonitzer recording Carved_000556; Carved_000556 Tr. at 4; Notebook entry 1B57-0062-65; FBI Serials 315, 335; Evidence item 1B79; Evidence item 1B81.

⁹³⁹ See Chapter Five.

⁹⁴⁰ See *id.*

⁹⁴¹ See *id.*

⁹⁴² See *id.*

that the meeting his notes summarized—not his notes themselves—“probably” was classified.⁹⁴³ Though it was foreseeable that Mr. Biden’s notes about a classified meeting would themselves be classified (which they were), the evidence does not prove definitively that Mr. Biden actually knew that, or that he intended to share classified information.

And during the April 10, 2017 meeting, jurors could well conclude that Mr. Biden read from the same classified entry without pausing to consider that it was classified, given his discussion of highly emotional topics with Zwonitzer just before he read the classified passage, and the lack of any pause before Mr. Biden launched into reading the classified entry.⁹⁴⁴ Though it would require jurors to find that Mr. Biden ignored or missed clear warning signs that he was sharing classified information with Zwonitzer in February and April 2017, we believe some reasonable jurors would likely reach that conclusion.

The third incident happened on April 24, 2017, when Mr. Biden read aloud to Zwonitzer portions of a different entry of classified notes from a National Security Council meeting, also nearly verbatim.⁹⁴⁵ When Mr. Biden could not read a particular word in the entry, he showed the entry to Zwonitzer but warned him, “Some of this may be classified, so be careful . . . I’m not sure. It isn’t marked classified, but...”⁹⁴⁶

⁹⁴³ *See id.*

⁹⁴⁴ *See id.*

⁹⁴⁵ *See id.*

⁹⁴⁶ *See id.*

Mr. Biden nonetheless continued to read aloud and nearly verbatim portions of the same passage of his notes, some of which remain classified at the Secret level.⁹⁴⁷

Mr. Biden's decision to read notes nearly verbatim to Zwonitzer that Mr. Biden had just identified as potentially classified cannot be justified. But the evidence does not prove beyond a reasonable doubt that he intended to share classified information. Mr. Biden told Zwonitzer he was "not sure" the notebook passage he read was classified. That is enough to create reasonable doubt about whether Mr. Biden acted willfully.

There is also evidence that Mr. Biden took some steps to avoid sharing classified information with Zwonitzer. As explained in Chapter Five, Mr. Biden sometimes skipped over notebook passages to avoid reading classified information. And if called as a witness at trial, Zwonitzer would testify that Mr. Biden mentioned the need to be careful "because he was worried that there was a possibility that . . . some of this stuff [handwritten entries in the notebooks] could be classified," and, "there were things he couldn't tell me, lines he couldn't cross."⁹⁴⁸

Given the intelligence and military officials present and the topics discussed at the meetings Mr. Biden recounted for Zwonitzer, Mr. Biden should have realized that his notes did or were likely to contain classified information. But taken as a whole, the evidence will likely leave jurors with reasonable doubts about whether Mr. Biden knew he was sharing classified information with Zwonitzer and intended to do so. For these jurors, Mr. Biden's apparent lapses and failures in February and April

⁹⁴⁷ *See id.*

⁹⁴⁸ Zwonitzer 7/31/23 Tr. at 83.

2017 will likely appear consistent with the diminished faculties and faulty memory he showed in Zwonitzer's interview recordings and in our interview of him.⁹⁴⁹ Therefore, we conclude that the evidence does not establish that Mr. Biden willfully disclosed national defense information to Zwonitzer.

⁹⁴⁹ See Chapter Eleven.

CHAPTER THIRTEEN

ANALYSIS OF PRINCIPLES OF FEDERAL PROSECUTION FACTORS

In addition to considering the sufficiency of the evidence, we have also evaluated “all relevant considerations” in aggravation and mitigation and determined that on balance, for both the marked classified Afghanistan documents and the classified notebooks, these factors do not warrant criminal charges.⁹⁵⁰

I. HISTORICAL PRACTICE

While in office, the president and vice president, like members of Congress and federal judges, are exempt from the ordinary rules governing classified information that apply to almost everyone else.⁹⁵¹ As discussed in Chapter Nine, presidents and vice presidents are constitutional officers whose handling of classified information supports their Article II functions of conducting foreign affairs and providing for the national defense.⁹⁵² After their time in office, for much of our nation’s history, it appears that many former presidents and vice presidents knowingly retained information concerning national security without being subject to criminal investigations or charges.⁹⁵³ This historical record is important context for judging

⁹⁵⁰ Memorandum for All Federal Prosecutors: General Department Policies Regarding Charging, Pleas, and Sentencing, Office of the Att’y Gen. (Dec. 16, 2022) at 1-2 (even if a prosecutor is able to obtain and sustain a conviction, “a prosecutor should not commence a prosecution if the prosecution would not serve a substantial federal interest,” and in determining whether a substantial federal interest exists, the prosecutor should “weigh all relevant considerations,” including nine enumerated factors); U.S. Dep’t of Just., Just. Manual §§ 9-27.001, 9-27.230 (2023).

⁹⁵¹ See Chapter One.

⁹⁵² See nn.768-70 above.

⁹⁵³ See Chapter Ten.

whether and why to charge a former vice president (and president) such as Mr. Biden for the same acts taken by several of his predecessors.

With one exception, there is no record of the Department of Justice prosecuting a former president or vice president for mishandling classified documents from his own administration. The exception is former President Trump. It is not our role to assess the criminal charges pending against Mr. Trump, but several material distinctions between Mr. Trump's case and Mr. Biden's are clear. Unlike the evidence involving Mr. Biden, the allegations set forth in the indictment of Mr. Trump, if proven, would clearly establish not only Mr. Trump's willfulness but also serious aggravating facts.

Most notably, after being given multiple chances to return classified documents and avoid prosecution, Mr. Trump allegedly did the opposite.⁹⁵⁴ According to the indictment, he not only refused to return the documents for months, but he also obstructed justice by enlisting others to destroy evidence and then to lie about it.⁹⁵⁵ In contrast, Mr. Biden alerted authorities, turned in classified documents to the National Archives and the Department of Justice in 2022 and 2023, consented to the search of multiple locations including his homes, permitted the seizure and review of handwritten notebooks he believed to be his personal property, and in numerous other ways cooperated with the investigation.⁹⁵⁶

⁹⁵⁴ Superseding Indictment ¶¶ 7-8, *United States v. Trump*, No. 23-CR-80101-AMC, ECF No. 85.

⁹⁵⁵ *Id.*

⁹⁵⁶ See Chapter Two; see also U.S. Dep't of Just., Just. Manual § 9-27.230 (2023) (a person's willingness to cooperate is a relevant factor in determining whether prosecution is warranted).

With respect to Mr. Biden's notebooks, the Reagan precedent provides an additional reason to forgo criminal charges. The Department of Justice previously informed a court in public filings that Mr. Reagan's diaries were both "currently classified" and Mr. Reagan's "personal records."⁹⁵⁷ This should give the Department pause before now concluding that Mr. Biden will be charged with a crime for retaining his own classified writings. Such an about-face, without previous public warning that is sharper than the relevant executive order and regulations, would be seen by many to violate basic principles of notice and fairness.⁹⁵⁸ And even though it is possible the Department lacked knowledge of all the facts about how Mr. Reagan stored his diaries, officials knew they contained classified information and that Mr. Reagan was treating them as his personal records, and it appears no one ever asked how the diaries were stored or made efforts to recover them.⁹⁵⁹

⁹⁵⁷ See Chapter Ten.

⁹⁵⁸ Other officials have been prosecuted for the retention of classified notes—most notably, David Petraeus, who served as a four-star general in the Army and later Director of the Central Intelligence Agency. See Plea Agreement at ¶ 1, *United States v. Petraeus*, 3:15-cr-00047 (W.D.N.C. Mar. 3, 2015), ECF No. 2. There are significant similarities between Petraeus's case and Mr. Biden's, but the differences are more significant. First, Petraeus's retention of notebooks violated numerous nondisclosure agreements he signed as an employee of the Department of Defense. By contrast, by virtue of his unique constitutional role as vice president, Mr. Biden signed no such nondisclosure agreements or attestations. Second, Petraeus lied when questioned by FBI agents, telling them he had not provided classified information to his biographer. See *id.* at ¶ 32. Mr. Biden's case began with a proactive self-disclosure, and he has cooperated with the Department of Justice and special counsel by consenting to multiple searches of his personal residence and offices. Third, there was stronger evidence of willfulness in Petraeus's case, in light of his lies and obfuscations, whereas Mr. Biden has asserted his rightful ownership of his notebooks based on a long history of former presidents and vice presidents retaining diaries, notes, and other writings that contained classified information. Despite these important differences, Petraeus was charged only with a misdemeanor violation of 18 U.S.C. § 1924, a statute that, as discussed in Chapter Nine, is not applicable to the facts of this case.

⁹⁵⁹ See Chapter Ten.

In the past forty years, twelve men and women have served as president and vice president. At least two—Mr. Reagan and Mr. Biden—have kept handwritten notes containing classified material at their homes after leaving office. It is quite possible that others had or presently have such handwritten notes in their personal possession to this day. We have not identified aggravating facts that compel bringing the first prosecution of such actions here.

In reaching our decision, we did not consider every circumstance in which criminal charges against a former president or vice president for mishandling classified information may be warranted. But on the facts of this case, given the historical practices we have discussed, the evidence revealed in our investigation, and the extent of Mr. Biden's cooperation, criminal charges are not warranted.⁹⁶⁰

II. OTHER FACTORS

We have also considered other factors the Department traditionally applies when considering charges for mishandling classified information. Those factors are:

- (1) The volume of classified information and the manner in which it is stored;
- (2) The sensitivity of the information, including the level of classification and whether it is dated or recent;
- (3) Reasons the person retained the information;
- (4) Whether the information was disclosed to someone else, and under what circumstances;
- (5) Whether there is a potential foreign nexus;
- (6) Whether the person made false statements related to the retention; and

⁹⁶⁰ See 28 C.F.R. § 600.7 (explaining that “[a] Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice.”).

(7) Other relevant aggravating and mitigating factors.

While these factors cut in different directions, on balance, they favor declination of charges against Mr. Biden.

The volume of classified information is not small, and while it could support a decision to bring criminal charges, it does not require such charges. As for the sensitivity and recency of the information, the Afghanistan documents are relatively old and concern a conflict that is now over. The notebook entries contain some highly sensitive information that is more recent, dating as late as 2017. But Mr. Reagan also kept classified information at home in his diaries after his presidency.

If Mr. Biden retained the classified documents intentionally, he appears to have done so to defend his record and burnish his credentials to run for president. This factor counts against him. It is difficult to conceive of good reasons to risk the nation's security by mishandling classified information, and bolstering one's reputation is not one.

There is no evidence that Mr. Biden shared classified information with any foreign person. As discussed in Chapter Twelve, though, he did share classified information with Zwonitzer by reading from classified notebook entries to Zwonitzer nearly verbatim. These entries included entries concerning human intelligence sources, as well as entries that Mr. Biden had previously identified as classified or potentially classified.⁹⁶¹ Mr. Biden's decision to take home notebooks knowing that as a whole they contained classified information, and then read verbatim notes from

⁹⁶¹ See Chapter 5.

national security meetings to his ghostwriter—recognizing those notes were at least potentially classified—counts squarely in aggravation.

We cannot prove that Mr. Biden made any false statements related to his retention of classified information. As noted in Chapter Twelve, he provided one answer to our written questions that was not credible—that when he described his notebook entries to Zwonitzer as classified or potentially classified, he did not really mean “classified,” he merely meant “private.”⁹⁶² But, while incredible, we cannot prove this statement was false. Mr. Biden prefaced it by explaining that he did not remember the specific conversations in question, which occurred more than six years ago.⁹⁶³ And even if this written answer is a strike against Mr. Biden, the other instances of his cooperation with our investigation weigh heavily in his favor.

Other aggravating and mitigating facts addressed in the Justice Manual also counsel against prosecution. At the time of any trial or sentencing, Mr. Biden would be well into his eighties, an age when relatively few people are prosecuted.⁹⁶⁴ He has no criminal record.⁹⁶⁵ He is highly unlikely to be sentenced to prison or assessed a significant fine.⁹⁶⁶ Any deterrent effect of prosecution would likely be slight.⁹⁶⁷ We are not concerned with specific deterrence, as we see little risk he will reoffend. As for general deterrence, future presidents and vice presidents are already likely to be deterred by the multiple recent criminal investigations, and one prosecution, of

⁹⁶² Biden 12/1/23 written responses at 1.

⁹⁶³ *Id.*

⁹⁶⁴ *See* U.S. Dep’t of Just., Just. Manual § 9-27.230(7) (2023).

⁹⁶⁵ *See id.* § 9-27.230(5) (2023).

⁹⁶⁶ *See id.* § 9-27.230(9) (2023).

⁹⁶⁷ *See id.* § 9-27.230(3) (2023).

current and former presidents and vice presidents for mishandling classified documents.⁹⁶⁸ Mr. Biden has served the nation for nearly fifty years as President and Vice President of the United States and United States Senator.⁹⁶⁹ On balance, his record of service also supports a decision to forgo criminal charges.

* * *

The practice of retaining classified material in unsecured locations poses serious risks to national security, given the vulnerability of extraordinarily sensitive information to loss or compromise to America's adversaries. The Department routinely highlights such risks when pursuing classified mishandling prosecutions. But addressing those risks through the criminal law, the only means available to this office, is not the proper remedy here.

For the classified Afghanistan documents and the classified notebooks, we believe the evidence falls short of supporting criminal charges. And other factors that inform our decision under the Principles of Federal Prosecution lead us to conclude that "the fundamental interests of society" do not "require" such charges.⁹⁷⁰ For these reasons, we decline prosecution.

⁹⁶⁸ *See id.* § 9-27.230(3) (2023).

⁹⁶⁹ *See id.* § 9-27.230(7) (2023).

⁹⁷⁰ *See id.* §§ 9-27.001, 9-27.220 (2023).

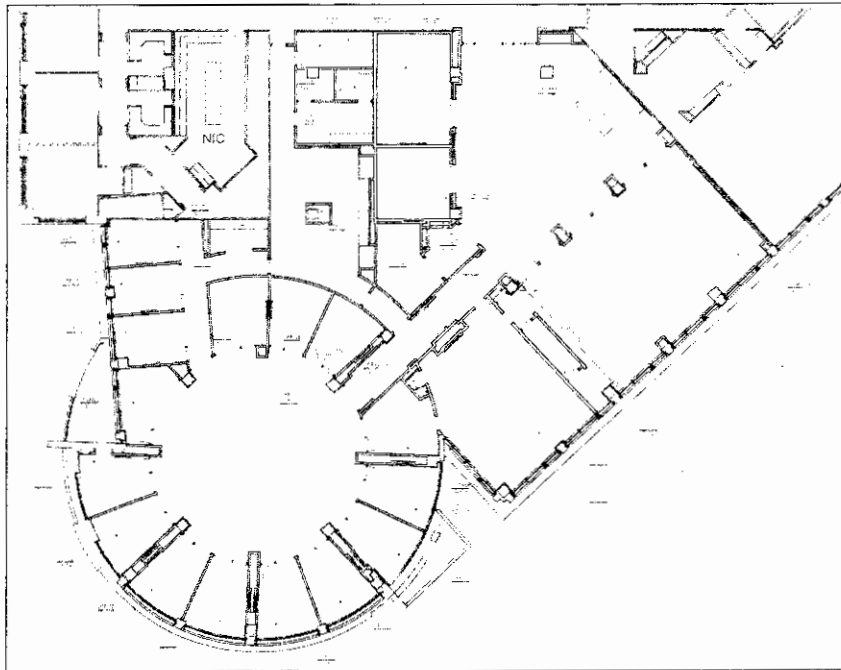
CHAPTER FOURTEEN

CLASSIFIED DOCUMENTS FOUND AT THE PENN BIDEN CENTER

I. FACTS

A. Description of the Penn Biden Center

The Penn Biden Center is housed in an office space leased by the University of Pennsylvania on the sixth floor of a commercial office building near the United States Capitol in Washington, D.C. The office space includes a reception area, conference rooms, a kitchen and pantry, a copy room, a large office for Mr. Biden designed to resemble the vice president's West Wing office, and roughly a dozen smaller offices and workrooms arrayed in a circle around a central, open office space. Mr. Biden's office adjoins one of the smaller workrooms—sometimes called the “outer office”—where Mr. Biden's personal assistant, scheduler, and trip director sat.⁹⁷¹



*Penn Biden Center floor plan*⁹⁷²

⁹⁷¹ PBC Scheduler Tr. at 63-64.

⁹⁷² SCOH-000451; FBI Serial 344 1A415.

B. Events leading up to the discovery of classified documents at the Penn Biden Center

In March 2021, Mr. Biden’s director of Oval Office operations visited the Penn Biden Center at Mr. Biden’s request.⁹⁷³ She described the purposes of the visit as: (1) to look for personal items such as family photographs and awards that Mr. Biden might want to display in the Oval Office, and (2) to “get a sense of what was there” more generally.⁹⁷⁴ The director of Oval Office operations took photographs to document her visit and compiled an inventory with the help of an assistant.⁹⁷⁵ In addition to personal items such as framed photographs, flags, awards, books, and challenge coins located in Mr. Biden’s office, she noted the presence of “40 boxes” in a “hallway closet.”⁹⁷⁶ She took photographs of the boxes.⁹⁷⁷ After the visit, she reported back to Mr. Biden what she had found. According to the director of Oval Office operations, the conversation was “very fast” and “pretty informal,” and Mr. Biden did not provide any further direction about the Penn Biden Center.⁹⁷⁸

In May 2022, White House Counsel Dana Remus undertook an effort to retrieve Mr. Biden’s files from the Penn Biden Center.⁹⁷⁹ Remus described the original purpose of that effort as gathering materials to prepare for potential congressional inquiries about the Biden family’s activities during the period from

⁹⁷³ Director of Oval Office Operations Tr. at 12-13.

⁹⁷⁴ *Id.* at 12-14, 19, 25.

⁹⁷⁵ *Id.* at 19-21; FBI Serial 348 1A419; WH-SCH-000000003 at 17.

⁹⁷⁶ FBI Serial 348 1A419; Penn Center Inventory, WH-SCH-000000003.

⁹⁷⁷ FBI Serial 348 1A419; WH-SCH-000000007 at 10-11; Director of Oval Office Operations Tr. at 19-20.

⁹⁷⁸ Director of Oval Office Operations Tr. at 27-28.

⁹⁷⁹ Remus Tr. at 64-66; Moore 11/18/22, FBI Serial 16.

2017 through 2019, when Mr. Biden was actively engaged with the Center.⁹⁸⁰ Through later conversations, Remus learned that the Penn Biden Center's offices contained a mix of Mr. Biden's materials—including personal material—that was not limited to records of his activities from 2017 through 2019.⁹⁸¹ Eventually, the goal of Mr. Biden's staff became to clear out all of his material from the Penn Biden Center.⁹⁸²

Remus decided to ship material that could be relevant to future congressional inquiries to Patrick Moore, one of Mr. Biden's personal counsel in Boston, Massachusetts, for further review by Moore and Bob Bauer.⁹⁸³ Moore's office had become a repository for some of Mr. Biden's political materials, such as awards and copies of speeches.⁹⁸⁴ Bauer and Moore planned to inform the White House Counsel's Office of what they found.⁹⁸⁵ Strictly personal items would be shipped to Mr. Biden's Delaware home.⁹⁸⁶

Remus initially coordinated with the executive assistant, who had worked for Mr. Biden both during his second term as vice president and at the Penn Biden Center.⁹⁸⁷ The executive assistant offered to pack up Mr. Biden's files at the Penn

⁹⁸⁰ Remus Tr. at 65, 75-76, 80; Moore 11/18/22, FBI Serial 16; Personal Attorney 1 12/8/22, FBI Serial 40.

⁹⁸¹ Remus Tr. at 67, 80.

⁹⁸² *Id.* at 67; Dr. Biden Staffer 2 Tr. at 36-37.

⁹⁸³ Remus Tr. at 82-83.

⁹⁸⁴ Moore 11/18/22, FBI Serial 16 at 2, 4.

⁹⁸⁵ Remus Tr. at 82.

⁹⁸⁶ *Id.* at 83.

⁹⁸⁷ *Id.* at 66, 74-75; Executive Assistant Tr. 1/4/23 at 3-4, 66, 95; FBI Serial 350 1A421; 5/24/22 e-mail from Remus, SCOH-000747.

Biden Center.⁹⁸⁸ Remus understood the executive assistant was going to segregate personal files—such as photographs and handwritten letters to Mr. Biden—from files related to his work.⁹⁸⁹ As the executive assistant later told investigators, “[a] lot of the stuff was already packed up.”⁹⁹⁰

On June 28, 2022, the executive assistant came to pack up the remaining unpacked files.⁹⁹¹ She completed the packing in about a half-hour.⁹⁹² Her packing involved simply transferring files from office drawers into Home Depot boxes she had picked up earlier.⁹⁹³ In doing so, she did not review individual files or documents.⁹⁹⁴

Most of the packing involved boxing up files the executive assistant stored for Mr. Biden in the outer office she formerly occupied along with Mr. Biden’s former scheduler and trip director at the Penn Biden Center.⁹⁹⁵ The outer office was accessible on one end from Mr. Biden’s office.⁹⁹⁶ At the other end, the outer office had a door to the Center’s larger office area.⁹⁹⁷ Mr. Biden’s office and the outer office are depicted in the photographs below.

⁹⁸⁸ Executive Assistant Tr. 1/4/23 at 97; Remus Tr. at 81-82; FBI Serial 350 1A421; 6/21/22 e-mail from Executive Assistant to Remus, SCOH-000748; 6/23/22 e-mail from Former Executive Assistant to Remus, SCOH-000753.

⁹⁸⁹ Remus Tr. at 89-90.

⁹⁹⁰ Executive Assistant 1/4/23 Tr. at 98-99; Executive Assistant 9/28/2023 Tr. at 142.

⁹⁹¹ FBI Serial 350 1A421; 6/21/22 e-mail from Former Executive Assistant, SCOH-000750; 6/23/22 e-mail from Former Executive Assistant to Remus, SCOH-000753.

⁹⁹² Executive Assistant 9/28/23 Tr. at 138-39.

⁹⁹³ Executive Assistant 1/4/23 Tr. at 98-99.

⁹⁹⁴ *Id.* at 99.

⁹⁹⁵ *Id.* at 100-01; PBC Scheduler Tr. at 64.

⁹⁹⁶ Moore 11/18/22, FBI Serial 16 at 2-3, 6; Personal Attorney 1 12/8/22, FBI Serial 40 at 2.

⁹⁹⁷ Penn Biden Center Layout, SCOH-000452; FBI Serial 344 1A415.



Mr. Biden's office at the Penn Biden Center (Nov. 28, 2022)⁹⁹⁸



Mr. Biden's office at the Penn Biden Center (Nov. 28, 2022)⁹⁹⁹

⁹⁹⁸ 20221128_ERT_0068; FBI Serial 14 1A14.

⁹⁹⁹ 20221128_ERT_0060; FBI Serial 14 1A14.



The outer office at the Penn Biden Center (Nov. 28, 2022)¹⁰⁰⁰



The outer office at the Penn Biden Center (Nov. 28, 2022)¹⁰⁰¹

¹⁰⁰⁰ 20221128_ERT_0074; FBI Serial 14 1A14.

¹⁰⁰¹ 20221128_ERT_0075; FBI Serial 14 1A14.

The executive assistant also looked for files in Mr. Biden's office and other staff offices but found none.¹⁰⁰² She e-mailed Remus that evening: "13 boxes. There are clearly marked boxes with correspondence throughout 4 years."¹⁰⁰³ As the executive assistant later told investigators, many of the 13 boxes she referred to were boxes of correspondence files that had already been packed up and stored in a storage closet at the Penn Biden Center.¹⁰⁰⁴ The others were the boxes she packed with files from the outer office.¹⁰⁰⁵

Remus visited the Penn Biden Center two days later, on June 30, 2022, with a member of her staff and a top advisor to the First Lady.¹⁰⁰⁶ They expected to retrieve the 13 boxes mentioned by the executive assistant.¹⁰⁰⁷ Remus planned to ship some of the boxes to Moore.¹⁰⁰⁸ The member of her staff and the advisor to the First Lady would drive the rest to the Delaware residence.¹⁰⁰⁹ Upon arriving at the Penn Biden Center, though, Remus discovered that there was much more than 13 boxes of material belonging to Mr. Biden, and some of it was not even packed.¹⁰¹⁰ The project of going through the volume of material and figuring out where things should go "was a much bigger task" than Remus had expected.¹⁰¹¹ Remus and her colleagues left the

¹⁰⁰² Executive Assistant 1/4/23 Tr. at 100-01.

¹⁰⁰³ FBI Serial 350 1A421; 6/28/23 e-mail to Remus, SCOH-000755.

¹⁰⁰⁴ Executive Assistant 9/28/23 Tr. at 140-44.

¹⁰⁰⁵ *Id.* at 144.

¹⁰⁰⁶ FBI Serial 364 1A429; Remus Tr. at 90, 93-94, 143-46; WHC Special Assistant Tr. at 19.

¹⁰⁰⁷ Remus Tr. at 138-39.

¹⁰⁰⁸ *Id.* at 90-91.

¹⁰⁰⁹ Remus Tr. at 90; WHC Special Assistant Tr. at 16-17.

¹⁰¹⁰ Remus Tr. at 68, 138-39.

¹⁰¹¹ *Id.* at 68; *see also* Dr. Biden Personal Aide Tr. at 142.

Penn Biden Center that day without removing anything.¹⁰¹² The photographs taken by the director of Oval Office operations in March 2021 corroborated Remus's statements about the quantity and variety of Mr. Biden's items stored at the Penn Biden Center:¹⁰¹³



*Photos of a storage closet at the Penn Biden Center (March 2021)*¹⁰¹⁴

Remus later contacted Moore and asked him to review and properly dispose of the material stored at the Penn Biden Center.¹⁰¹⁵ Moore visited the Center months later, on October 12, 2022, along with one of Mr. Biden's Oval Office aides.¹⁰¹⁶ Moore's

¹⁰¹² Remus Tr. at 68; WHC Special Assistant Tr. at 21.

¹⁰¹³ FBI Serial 348 1A419; Director of Oval Office Operations Tr. at 19-26; Penn Office Inventory, WH-SCH-000000003; *see also* 3/17/21 e-mails between Oval Office Aides, WH-SCH-000000002.

¹⁰¹⁴ Penn Office Inventory, WH-SCH-000000003 at 10; WH-SCH-000001234; FBI Serial 348 1A419.

¹⁰¹⁵ Moore 01/12/23, FBI Serial 96 at 7; Moore 11/18/22, FBI Serial 16 at 4; Remus Tr. at 68-69, 148.

¹⁰¹⁶ Moore 11/18/22, FBI Serial 16 at 5; Dr. Biden Staffer 2 Tr. at 40.

goal was to take stock of what was stored there, determine how much needed to be reviewed, and create a plan for moving everything out.¹⁰¹⁷ According to Moore, conducting the review was not a high priority because nobody expected to find classified documents or presidential records there.¹⁰¹⁸

The Oval Office aide accompanied Moore to facilitate his access to the Penn Biden Center and his initial review of material.¹⁰¹⁹ While at the Penn Biden Center, the aide also searched for and found items that could be used at the White House, such as gifts for visitors and Mr. Biden's personal stationery and personal items.¹⁰²⁰

Moore first inspected material in a back storage closet—pictured above—located off the mail room/kitchenette.¹⁰²¹ He found a variety of items including gifts, memorabilia, books, and condolence correspondence related to the 2015 death of Mr. Biden's son, Beau Biden.¹⁰²²

Moore then inspected Mr. Biden's office space.¹⁰²³ That space included Mr. Biden's office, a small closet in that office, and the outer office.¹⁰²⁴

Moore identified six or seven boxes containing documents to review.¹⁰²⁵ He recalled finding at least some of those boxes in the small closet in Mr. Biden's office

¹⁰¹⁷ Moore 11/18/22, FBI Serial 16 at 5.

¹⁰¹⁸ *Id.* at 4.

¹⁰¹⁹ Dr. Biden Staffer 2 Tr. at 36, 45; 80; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

¹⁰²⁰ Dr. Biden Staffer 2 Tr. at 71, 75-77; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

¹⁰²¹ Moore 11/18/22, FBI Serial 16 at 5; Moore 1/12/23, FBI Serial 96 at 8; FBI Serial 348 1A419; Penn Office Inventory, WH-SCH-000000003, at 10; WH-SCH-000001216.

¹⁰²² Moore 11/18/22, FBI Serial 16 at 5-6; Moore 1/12/23, FBI Serial 96 at 8.

¹⁰²³ Moore 11/18/22, FBI Serial 16 at 6.

¹⁰²⁴ *Id.*

¹⁰²⁵ *Id.*; Moore 1/12/23, FBI Serial 96 at 9.

and moving them to the outer office for review.¹⁰²⁶ When interviewed by FBI agents, Moore believed the small closet was initially locked and that a Penn Biden Center staff member provided a key to unlock it, but his memory was fuzzy on that point.¹⁰²⁷ He found the other boxes in the outer office, where he conducted his first cursory review of the material in the boxes.¹⁰²⁸ During that initial, quick review, Moore saw copies of speeches, political documents, and campaign materials.¹⁰²⁹ He also noticed documents dating from Mr. Biden's time as vice president; the format of these documents led him to believe they were from the White House.¹⁰³⁰ Moore knew such documents were potentially presidential records under the Presidential Records Act, which must be stored at the National Archives.¹⁰³¹ He did not see any documents with classification markings at the time.¹⁰³² Moore left that day intending to return later and, among other things, conduct a more detailed review of the material and determine whether any of it included presidential records.¹⁰³³

Moore returned to the Penn Biden Center several weeks later on November 2, 2022, with an associate from his law firm.¹⁰³⁴ They planned to review the materials

¹⁰²⁶ See Moore 1/12/23, FBI Serial 96 at 9-10; Moore 11/18/22, FBI Serial 16 at 6.

¹⁰²⁷ Moore 11/18/22, FBI Serial 16 at 6. The executive assistant stated that the Home Depot boxes she packed up during her June 2022 visit were left in the Outer Office. Executive Assistant 1/4/23 Tr. at 98-99, 106-08; Executive Assistant 9/28/23 Tr. at 147. She did not move these boxes into the closet in Mr. Biden's office. Executive Assistant 1/4/23 Tr. at 107-08; Executive Assistant 9/28/23 Tr. at 148-49.

¹⁰²⁸ FBI Serial 96 at 9-10; FBI Serial 16 at 6.

¹⁰²⁹ FBI Serial 16 at 6.

¹⁰³⁰ Moore 11/18/22, FBI Serial 16 at 6; Moore 1/12/23, FBI Serial 96 at 8.

¹⁰³¹ See Moore 11/18/22, FBI Serial 16 at 6.

¹⁰³² Moore 11/18/22, FBI Serial 16 at 6; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

¹⁰³³ Moore 11/18/22, FBI Serial 16 at 6; Moore 1/12/23, FBI Serial 96 at 8-9.

¹⁰³⁴ Moore 11/18/22, FBI Serial 16 at 7; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

and send records that were not presidential records to their firm office in Boston.¹⁰³⁵ Moore brought FedEx boxes, and the two packed up and eventually shipped some materials they determined were clearly not presidential records, such as material dated after Mr. Biden's vice presidency.¹⁰³⁶ They set aside for further review four Home Depot boxes containing folders labeled with dates from 2009 to 2017, years during which Mr. Biden served as vice president.¹⁰³⁷

Moore began reviewing the material in one of the Home Depot boxes.¹⁰³⁸ About a third of the way through the box, he found a manila envelope marked "EYES ONLY" for the Vice President.¹⁰³⁹ "IRAN" was handwritten on the envelope.¹⁰⁴⁰ Inside the envelope, Moore found documents with classification markings.¹⁰⁴¹ He took the box into the adjoining room and contacted Bauer, who in turn contacted the White House Counsel.¹⁰⁴² Members of the White House Counsel's Office then notified the National Archives' general counsel.¹⁰⁴³ Moore added Post-It notes to designate where he found

¹⁰³⁵ Moore 11/18/22, FBI Serial 16 at 7; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

¹⁰³⁶ Moore 11/18/22, FBI Serial 16 at 7-9; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 2.

¹⁰³⁷ Moore 11/18/22, FBI Serial 16 at 7, 9.

¹⁰³⁸ *Id.* at 7-9.

¹⁰³⁹ *Id.* at 7-9.

¹⁰⁴⁰ *Id.* at 8.

¹⁰⁴¹ *Id.*

¹⁰⁴² Moore 11/18/22, FBI Serial 96 at 8; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 3.

¹⁰⁴³ FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 3; Moore 11/18/22, FBI Serial 16 at 8.

documents with classification markings.¹⁰⁴⁴ He photographed the files in the box, which an archivist from the National Archives later labeled “Box 3.”¹⁰⁴⁵



*Photo of Box 3 taken by Moore on or about Nov. 2, 2022*¹⁰⁴⁶

Moore’s associate also discovered material with classification markings in another box of files, which he had been reviewing page by page.¹⁰⁴⁷ That box also

¹⁰⁴⁴ Moore 1/12/23, FBI Serial 96 at 11.

¹⁰⁴⁵ Moore 11/18/22, FBI Serial 16 at 10-11; FBI Serials 17 1A19, 173 1A182; NARA Archivist 2 12/2/22, FBI Serial 26 at 1-2.

¹⁰⁴⁶ Bates-000016; FBI Serial 17 1A19.

¹⁰⁴⁷ Moore 11/18/22, FBI Serial 96 at 8; Personal Attorney 1 12/8/22, FBI Serial 40 at 3-4.

contained other records that Moore thought could qualify as presidential records.¹⁰⁴⁸ The associate used Post-It notes to flag documents he wanted Moore to look at and to keep track of documents he removed to review.¹⁰⁴⁹ Moore photographed the files in the box, which his associate labeled “Box 1.”¹⁰⁵⁰



*Photo of Box 1 taken by Moore on or about Nov. 2, 2022*¹⁰⁵¹

¹⁰⁴⁸ Moore 11/18/22, FBI Serial 16 at 7-9.

¹⁰⁴⁹ Personal Attorney 1 12/8/22, FBI Serial 40 at 4-5.

¹⁰⁵⁰ Moore 11/18/22, FBI Serial 16 at 10-11; FBI Serial 17 1A19; Personal Attorney 1 12/8/22, FBI Serial 40 at 5; NARA Archivist 2 12/1/22, FBI Serial 26 at 1.

¹⁰⁵¹ Bates-000028; Moore 11/18/22, FBI Serial 16 at 10; FBI Serial 17 1A19.

Moore and his associate identified one other of the four boxes that potentially contained presidential records but found no documents with classification markings in that box.¹⁰⁵² The National Archives later labeled the box as “Box 2.”¹⁰⁵³



*Photo of Box 2 taken by Moore on or about Nov. 2, 2022*¹⁰⁵⁴

¹⁰⁵² Moore 11/18/22, FBI Serial 16 at 9.

¹⁰⁵³ *Id.*; NARA Archivist 2 12/1/22, FBI Serial 26 at 1; FBI Serial 26 1A31; 20221201_WFO_13.

¹⁰⁵⁴ Bates-000030; Moore 11/18/22, FBI Serial 16 at 10; FBI Serial 17 1A19.

The fourth box did not appear to contain any presidential records but was in the same style Home Depot box as the other three.¹⁰⁵⁵ Moore and the associate repackaged the material in the fourth box into a new FedEx box because the Home Depot box was in relatively poor condition.¹⁰⁵⁶ Pursuant to instructions from the White House Counsel's Office, Moore locked the three boxes containing documents with classification markings or potential presidential records in the small closet off of Mr. Biden's office.¹⁰⁵⁷ He photographed the interior of the closet:



*Photo of the interior of the small closet off of Mr. Biden's office taken by Moore (Nov. 3, 2022)*¹⁰⁵⁸

¹⁰⁵⁵ Moore 11/18/22, FBI Serial 16 at 9.

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ See Moore 1/12/23, FBI Serial 96 at 10; Moore 11/18/22, FBI Serial 16 at 9; FBI Serial 8 1A5, 11/16/22 Narrative from Bauer at 3.

¹⁰⁵⁸ Bates-000035; Moore 11/18/22, FBI Serial 16 at 10; 17 1A19.

The next day, November 3, 2022, two archivists from the National Archives met Moore and an Associate White House Counsel at the Penn Biden Center.¹⁰⁵⁹ Moore took the three Home Depot boxes out of the locked closet and put them in the outer office.¹⁰⁶⁰ He offered for the archivists to take the fourth (FedEx) box, but they said the National Archives had instructed them to take only the three.¹⁰⁶¹ The archivists returned a few days later on November 8, 2022, however, and took the fourth box along with 28 Federal Records Center boxes from the Penn Biden Center.¹⁰⁶² Moore told the archivists that the 28 boxes contained letters expressing condolences related to the death of Beau Biden.¹⁰⁶³

Upon reviewing the contents of the three boxes in a SCIF at the National Archives, an archivist determined that they included nine documents with classification markings totaling 44 pages.¹⁰⁶⁴ Those documents were in Box 1 and Box 3.¹⁰⁶⁵ She estimated that about 90 percent of the documents in Boxes 1, 2, and 3 were personal in nature and related to financial matters, correspondence, and pictures.¹⁰⁶⁶ No other documents with classification markings were found in any of the material the National Archives took from the Penn Biden Center.¹⁰⁶⁷ Box 4 contained an

¹⁰⁵⁹ Moore 11/18/22, FBI Serial 16 at 10; NARA Archivist 2 11/10/22, FBI Serial 3 at 2; NARA COS 11/21/22, FBI Serial 6 at 1-2.

¹⁰⁶⁰ Moore 11/18/22, FBI Serial 16 at 10.

¹⁰⁶¹ Moore 11/18/22, FBI Serial 16 at 9-10.

¹⁰⁶² *Id.* at 11; NARA Archivist 2 11/10/2022, FBI Serial 3 at 3.

¹⁰⁶³ NARA Archivist 2 11/10/22, FBI Serial 3 at 3.

¹⁰⁶⁴ *Id.* at 2.

¹⁰⁶⁵ NARA Archivist 2 12/1/22, FBI Serial 26 at 2.

¹⁰⁶⁶ NARA Archivist 2 11/10/22, FBI Serial 3 at 2.

¹⁰⁶⁷ NARA Archivist 2 12/1/22, FBI Serial 26 at 2.

otherwise blank page with a classification marking.¹⁰⁶⁸ The page appeared to be the last page of bound briefing material that had likely been removed from a classified briefing book.¹⁰⁶⁹

FBI agents visited a SCIF at the National Archives on December 1 and 2, 2022, to review and photograph the four boxes and their contents.¹⁰⁷⁰



*The PBC boxes in a SCIF at the National Archives for FBI review (Dec. 1, 2022)*¹⁰⁷¹

The National Archives later transferred custody of the marked classified documents in Boxes 1 and 3 to the FBI.¹⁰⁷²

¹⁰⁶⁸ NARA Archivist 2 11/10/22, FBI Serial 3 at 3.

¹⁰⁶⁹ *Id.*

¹⁰⁷⁰ FBI Serial 26.

¹⁰⁷¹ 20221201_WFO_0012; FBI Serial 26 1A31.

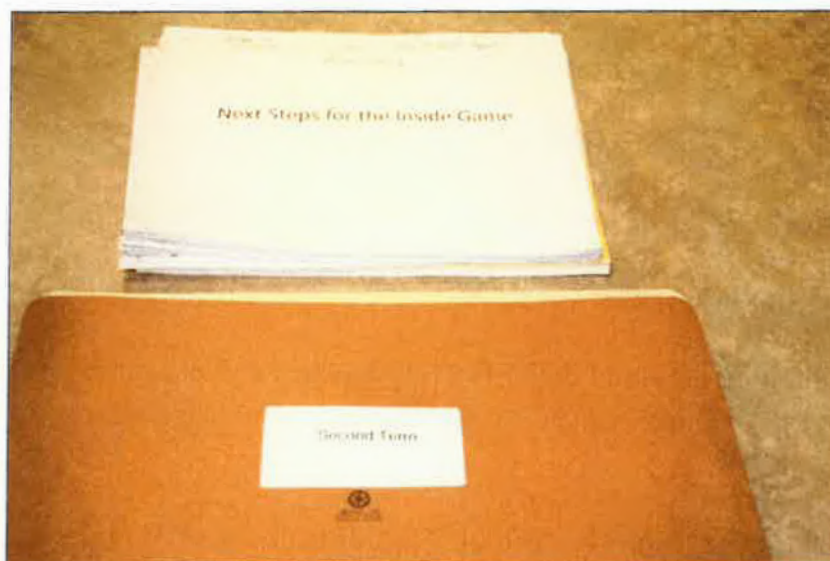
¹⁰⁷² FBI Serial 173.

C. Description of the documents recovered from the Penn Biden Center

The FBI identified ten documents recovered from the Penn Biden Center as classified or potentially classified and designated those documents as A1 through A10.¹⁰⁷³ In addition to the nine documents with classification markings that the National Archives had identified, FBI designated a set of handwritten notes as potentially classified.¹⁰⁷⁴ The handwritten notes were found in an envelope with marked classified documents and related to the same topic as those documents.¹⁰⁷⁵

1. Marked classified documents found in Box 1

The FBI located the marked classified document designated A1 among unclassified documents in a folder labeled “Second Term,” pictured below.¹⁰⁷⁶



“Second Term” folder and contents from Box 1¹⁰⁷⁷

¹⁰⁷³ FBI Serials 26, 238, 683 1A772.

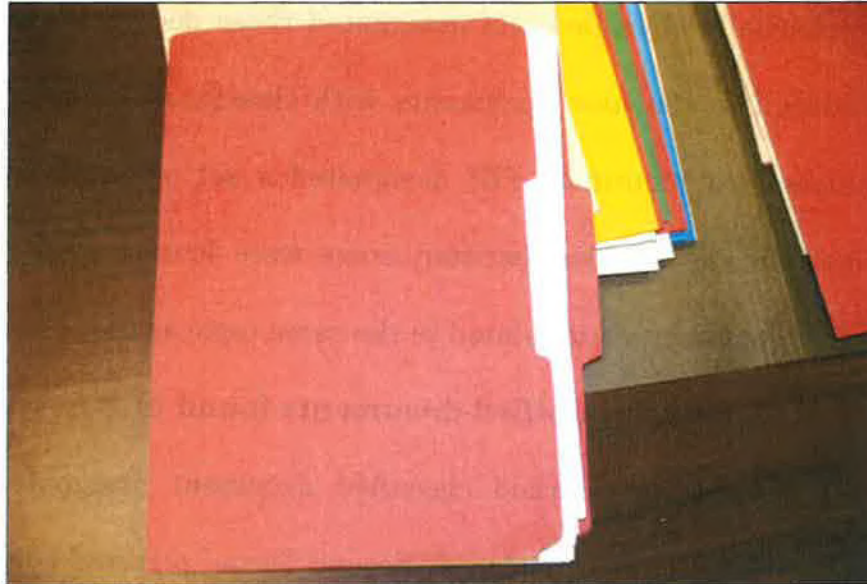
¹⁰⁷⁴ See Evidence item 1B48; FBI Serials 173, 177, 683 1A772.

¹⁰⁷⁵ Evidence item 1B48; FBI Serials 26, 173, 177, 683.

¹⁰⁷⁶ Evidence item 1B49.

¹⁰⁷⁷ FBI Serial 26 1A31, 20221201_WFO_0026.

The FBI located the marked classified document designated A2 among unclassified documents in a red file folder with a handwritten label “Filing 10-10-16.”¹⁰⁷⁸



“Filing 10-10-16” folder from PBC Box 1¹⁰⁷⁹

Appendix A includes unclassified descriptions of documents A1 and A2.

2. Unclassified contents of Box 1

Box 1 includes a variety of unclassified files of personal and professional significance to Mr. Biden. These include:

- A file folder labeled “POTUS 21st Century Policing 2015” with a copy of the May 2015 final report of the President’s Task Force on 21st Century Policing.¹⁰⁸⁰
- A file folder labeled “Biden Foundation” that included a 2017 Annual Report for the Biden Foundation.¹⁰⁸¹

¹⁰⁷⁸ Evidence item 1B49.

¹⁰⁷⁹ FBI Serial 26 1A31, 20221201_WFO_0066.

¹⁰⁸⁰ NARA_SCAN_00000067-68; NARA Archivist 2 11/10/22, FBI Serial 3.

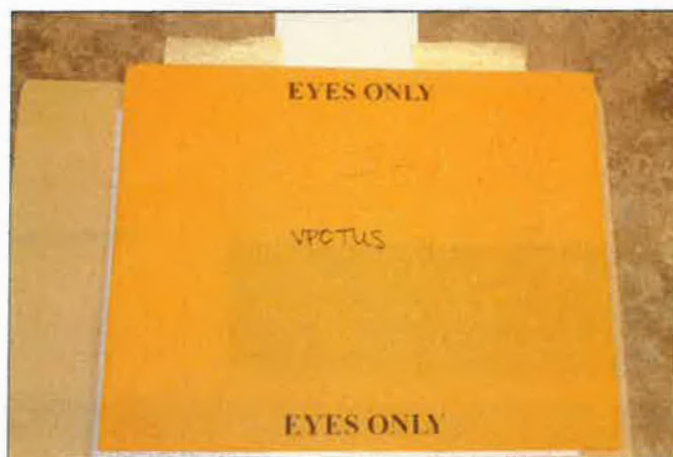
¹⁰⁸¹ NARA_SCAN_00000059, at 61; NARA Archivist 2 11/10/22, FBI Serial 3.

- A file folder labeled “VP Headshots” with photographs of Mr. Biden and President Obama.¹⁰⁸²
- A file folder labeled “American Possibilities” with event memoranda for Mr. Biden dated February 1, 2018.¹⁰⁸³
- A file labeled “Colorado Ski” with information from 2011 related to a ski trip.¹⁰⁸⁴

3. Classified documents found in Box 3

a. “EYES ONLY VPOTUS” manila envelope

The FBI located the marked classified documents designated A3 through A6 and a set of potentially classified handwritten notes designated A7 in a manila envelope stamped “EYES ONLY” on the top and bottom with “VPOTUS” handwritten in the middle.¹⁰⁸⁵ The envelope was also labeled with Mr. Biden's handwriting: “IRAN 1/30/15.”¹⁰⁸⁶



The VP Eyes Only envelope from PBC Box 3¹⁰⁸⁷

¹⁰⁸² FBI Serial 26 1A31, 20221201_WFO_0024, 20221201_WFO_0146.

¹⁰⁸³ NARA_SCAN_00000063-65; NARA Archivist 2 11/10/22, FBI Serial 3.

¹⁰⁸⁴ NARA_SCAN_00000426-35; NARA Archivist 2 11/10/22, FBI Serial 3.

¹⁰⁸⁵ Evidence item 1B48.

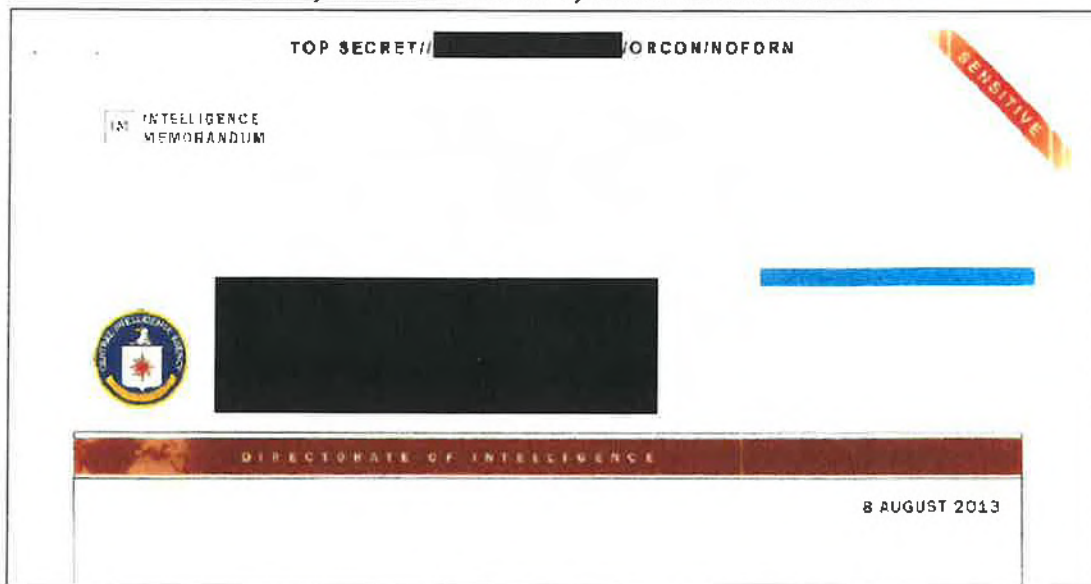
¹⁰⁸⁶ Evidence item 1B48; Executive Assistant 1/4/23 Tr. at 156-57; FBI Serial 64 1A74; Staff Assistant 3 10/4/23 Tr. at 80.

¹⁰⁸⁷ FBI Serial 26 1A31, 20221201_WFO_0006.

Appendix A includes unclassified descriptions of documents A3 through A7. Portions of redacted cover pages of some of the documents in the “EYES ONLY” envelope are below:



Portion of the redacted cover of recovered document A5¹⁰⁸⁸



Portion of redacted cover of recovered document A6¹⁰⁸⁹

¹⁰⁸⁸ Recovered document A5.

¹⁰⁸⁹ Recovered document A6.

Notably, document A7 is ten pages of Mr. Biden's unmarked, handwritten notes, three of which are dated January 28, 2015.¹⁰⁹⁰ All but one page of the notes relate to the Obama administration's efforts to negotiate the Joint Comprehensive Plan of Action, otherwise known as the Iran nuclear deal. For example, five pages of the handwritten notes reference the four pathways to an Iranian nuclear weapon the Obama administration believed the nuclear deal would block:



Graphic from Obama White House information page on the Iran nuclear deal¹⁰⁹¹

¹⁰⁹⁰ Evidence item 1B48, A7 at 3, 5, 9; Executive Assistant Tr. 9/28/23 at 128-30 (handwriting identification), FBI Serial 515 1A618.

¹⁰⁹¹ The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon, The White House, <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> (last visited Jan. 31, 2024).

Four pathways

1. It's a bad deal -
 "Thousands of centrifuges?!?!"

→ 1. Fordon / Qom
 → 2. Arak / Heavy Water
 → 3. Natanz
 → 4. Covert

Portion of Page 2 of recovered document A7¹⁰⁹²

1/25

1. Fordon / Qom
 2. Arak / Heavy Water
 3. Natanz
 4. Covert

Portion of page 3 of recovered document A7¹⁰⁹³

1/28 15

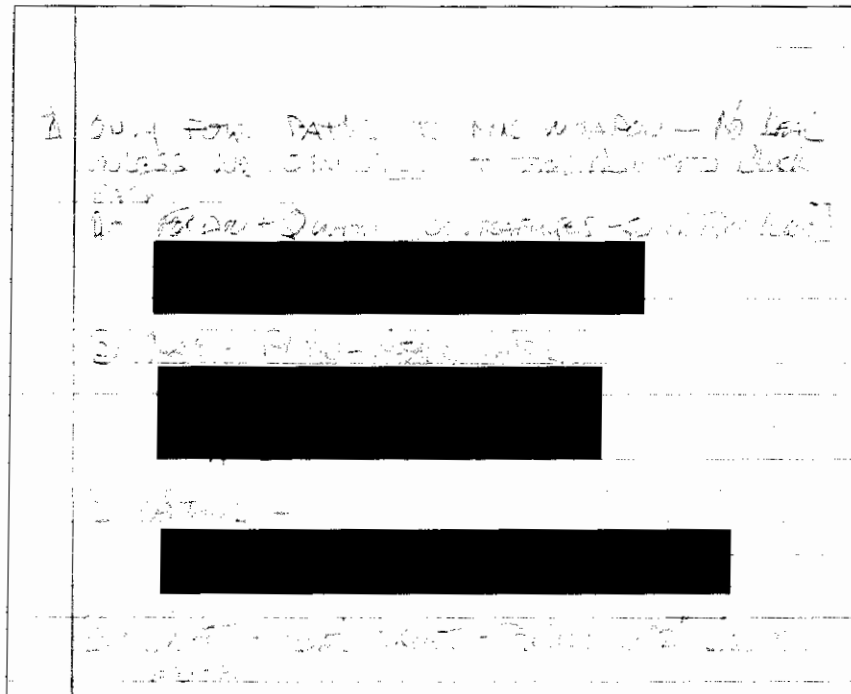
1. Fordon / Qom
 2. Arak / Heavy Water
 3. Natanz
 4. Covert

Portion of page 5 of recovered document A7¹⁰⁹⁴

1092 Recovered document A7.

1093 *Id.*

1094 *Id.*



Portion of page 7 of recovered document A7¹⁰⁹⁵

The handwritten references to blocking “Arak” and “heavy water” correspond to the Obama White House’s reference to blocking weapons-grade plutonium.¹⁰⁹⁶

b. “Ukraine 02/09/15” and “VP Personal” file folders

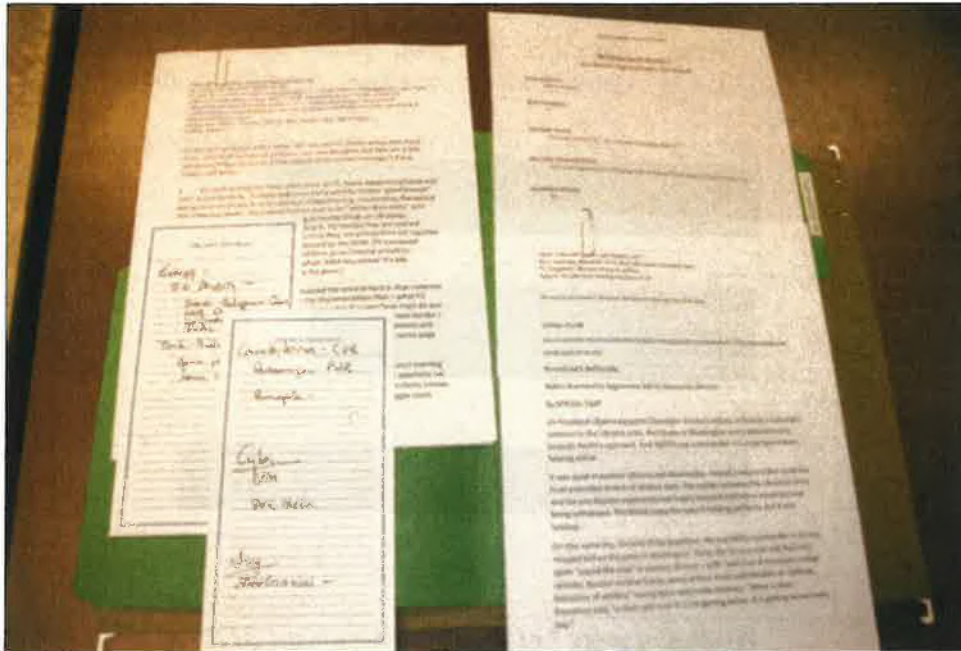
The FBI located the marked classified document designated A8 among unclassified documents in a green file folder labeled “Ukraine 02/09/15” within an unlabeled green hanging folder.¹⁰⁹⁷ Agents located documents designated A9 and A10 among unclassified documents in a red file folder labeled “VP Personal” within an

¹⁰⁹⁵ *Id.*

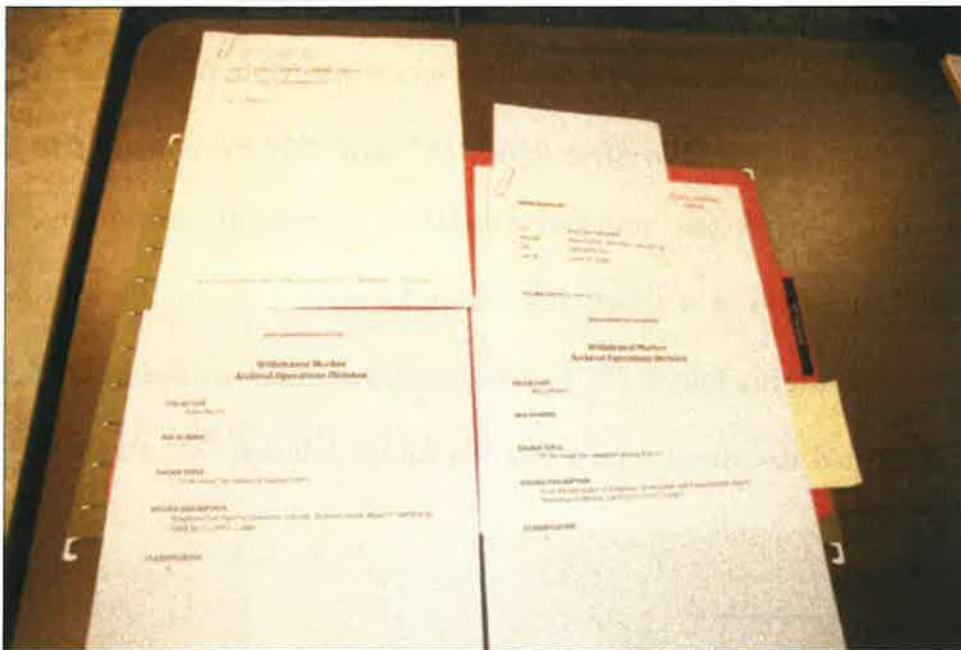
¹⁰⁹⁶ The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon, The White House, <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> (last visited Jan. 31, 2023); The White House, <https://obamawhitehouse.archives.gov/issues/foreign-policy/iran-deal> (last visited Jan. 31, 2023) (“The third way Iran could build a nuclear weapon is by using weapons-grade plutonium. The only site where Iran could accomplish this is the Arak reactor, a heavy-water nuclear reactor.”).

¹⁰⁹⁷ Recovered document A8; Evidence item 1B49.

unlabeled green hanging folder.¹⁰⁹⁸



“Ukraine 02/09/15” folder and unclassified contents¹⁰⁹⁹



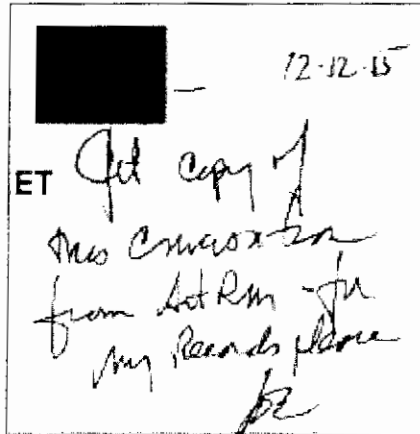
“VP Personal” folder and unclassified contents¹¹⁰⁰

¹⁰⁹⁸ Recovered documents A9 and A10; Evidence item 1B49.

¹⁰⁹⁹ 20221201_WFO_0113. The document titled “Withdrawal Marker” is a placeholder for the classified document A8. See FBI Serials 683 1A772, 26 1A31.

¹¹⁰⁰ FBI Serial 26 1A31, 20221201_WFO_0117. The documents titled “Withdrawal Marker” are placeholders for the classified documents A9 and A10. See FBI Serial 683 1A772.

Appendix A includes unclassified descriptions of documents A8 through A10. Document A9 is a telephone call sheet setting forth the purpose and talking points for a call between Mr. Biden and the Ukrainian Prime Minister. Mr. Biden wrote a note to his executive assistant on the sheet: “Get [a] copy of this conversation from Sit Rm for my Records please” and signed it “Joe.”

A rectangular box containing a handwritten note. At the top left, there is a solid black redaction box. To its right, the date "12-12-15" is written in cursive. Below the redaction, the word "ET" is printed in a bold, sans-serif font. The main body of the note is written in cursive and reads: "Get copy of this conversation from Sit Rm for my Records please". At the bottom right, there is a signature that appears to be "Joe".

Handwritten note from Mr. Biden on recovered document A9¹¹⁰¹

c. Unclassified contents of Penn Biden Center Box 3

Like Box 1, Box 3 included a wide variety of unclassified files of personal and professional significance to Mr. Biden. To name a few:

- A file folder labeled “Genealogy” with information about the ancestors of Mr. Biden and Biden family history.¹¹⁰²
- Various file folders with documents related to Mr. Biden’s “Cancer Moonshot” initiative.¹¹⁰³
- A file folder labeled “Economy” with documents from 2015 related to economic policy and meetings with officials such as the Secretary of the Treasury.¹¹⁰⁴

¹¹⁰¹ Recovered document A9.

¹¹⁰² NARA_SCAN_00001390-98; NARA Archivist 2 11/10/2022, FBI Serial 3.

¹¹⁰³ *E.g.*, NARA_SCAN_00001505-16, NARA_SCAN_00001641-51; NARA Archivist 2 11/10/2022, FBI Serial 3.

¹¹⁰⁴ NARA_SCAN_00001581-91; NARA Archivist 2 11/10/2022, FBI Serial 3.

- A file folder labeled “Notable Stories on the Life of Beau Biden” with compiled news clippings about Mr. Biden’s son.¹¹⁰⁵

D. Security and access controls at the Penn Biden Center

To access the Penn Biden Center, employees used a key fob, which they had to scan at the building’s front door, the elevator, and the Center suite’s front door.¹¹⁰⁶ The Center did not allow visitors inside unless someone with a key fob escorted them.¹¹⁰⁷ The Center required the logging of visitors through a third-party security-management system, and visitors had to check in with building security upon arrival in the building lobby.¹¹⁰⁸

Despite those controls, we cannot account for all visitors to the Center. In practice, employees with key fobs could and sometimes did bring guests with them to the Center without logging them with security.¹¹⁰⁹ The Center’s office manager did not maintain a visitor log.¹¹¹⁰ The third-party vendor retained its visitor logs for only one year, so logs for the years 2017 through 2021, when Mr. Biden was a private citizen, were not available to investigators.¹¹¹¹

The Center hosted visitors from its inception until the recovery of marked classified documents in November 2022. In keeping with its stated purpose to

¹¹⁰⁵ NARA_SCAN_00001716-17; NARA Archivist 2 11/10/2022, FBI Serial 3.

¹¹⁰⁶ Executive Assistant 1/4/23 Tr. at 103-104; PBC Director of Programs Tr. at 48-49; PBC Scheduler Tr. at 63; Speechwriter Tr. at 92-93; OVP Intern Tr. at 41-42; Prescott Tr. at 85-86.

¹¹⁰⁷ PBC Employee 2 Tr. at 24; Prescott Tr. at 86.

¹¹⁰⁸ Legislative Affairs Staff 1 Tr. at 26; PBC Employee 2 1/16/23 Tr. at 16-18; Personal Aide 3 3/28/23 Tr. at 147; PBC Employee 1 1/16/23 Tr. at 71; PBC Scheduler Tr. at 9, 100.

¹¹⁰⁹ PBC Director of Programs Tr. at 60; PBC Scheduler Tr. at 100; PBC Employee 2 1/16/23 Tr. at 46.

¹¹¹⁰ PBC Employee 2 1/16/23 Tr. at 16.

¹¹¹¹ FBI Serial 345 1A416, SCOH-000448.

“convene world leaders,”¹¹¹² the Center hosted foreign dignitaries for roundtable events or to meet with Mr. Biden in his personal office. Center staff recalled events and meetings with the former President of Mexico, the President of Costa Rica, the former Secretary General of NATO, the Prime Minister of Estonia, members of the Ukrainian Orthodox Church, and Israeli officials.¹¹¹³ The Center also hosted more than a dozen classes for University of Pennsylvania faculty, students, and interns over a period of years. For instance, a course on “Business Strategies for Engaging with Government” in March 2022 featured guest speakers from the U.S. Department of Commerce, General Electric, and Google.¹¹¹⁴ In addition, a cleaning crew came through the Center every night to clean the offices.¹¹¹⁵

As a general matter, the administrative staff at the Center tried to keep the offices locked or closed off during classes or events.¹¹¹⁶ However, Mr. Biden’s office did not lock, and the adjoining outer office where Mr. Biden’s executive assistant

¹¹¹² Penn Biden Center, *Our Mission Statement*, Penn Biden Center, <https://global.upenn.edu/penn-biden-center/our-mission-statement> (last visited Feb. 2, 2024).

¹¹¹³ Speechwriter Tr. at 101-02; PBC Employee 1 1/16/23 Tr. at 68; OVP NSA Staffer 2 Tr. at 109; Legislative Affairs Staff 1 Tr. at 30; Prescott Tr. at 82-83; Personal Aide 3 3/28/23 Tr. at 145; OVP Intern Tr. at 47-48. Mr. Biden also met with the former Prime Minister of Ukraine in May 2017 when the Penn Biden Center was housed in a temporary office space located at 701 Pennsylvania Avenue Northwest in Washington, DC. 5/14/17 e-mail from Penn Biden Center Business Manager, SCOH-000453.

¹¹¹⁴ FBI Serial 346 1A417; 2/9/23 Penn Biden Center List of Classes and Seminars, SCOH-000734.

¹¹¹⁵ PBC Employee 1 1/16/23 Tr. at 30.

¹¹¹⁶ *Id.* at 30-34; PBC Scheduler Tr. at 71-72.

maintained his files was always accessible through Mr. Biden's office.¹¹¹⁷ Other employees' habits varied as to whether they kept their offices locked.¹¹¹⁸

The Center relaxed security measures after Mr. Biden stopped working there in April 2019.¹¹¹⁹ It still required visitors to check in with security in the building lobby, but they did not need a key fob or an escort in order to access the sixth floor of the building.¹¹²⁰ The Center also permitted University of Pennsylvania students who took classes at the Center to work in the office space during the day.¹¹²¹ The Center was locked down for about two years due to the COVID-19 pandemic.¹¹²²

E. Investigation of the classified documents recovered from the Penn Biden Center

As described further below, Mr. Biden's now-former executive assistant maintained the files in the four relevant boxes recovered by FBI agents from the Penn Biden Center, two of which included marked classified documents. The executive assistant originally maintained those files in her office space outside Mr. Biden's West Wing office and moved them—through two temporary spaces—to the Penn Biden Center, where she continued to add to the files.

¹¹¹⁷ Executive Assistant 1/4/23 Tr. at 103-04; PBC Employee 1 1/16/23 Tr. at 29-32, 76-77; PBC Employee 2 1/16/23 Tr. at 22-23, 60-61. For security reasons, the Vice President's office could only be locked from the inside using a panic button. PBC Employee 2 1/16/23 Tr. at 22-23; PBC Employee 1 1/16/23 Tr. at 76-77.

¹¹¹⁸ PBC Director of Programs Tr. at 49; OVP Intern Tr. at 42-43.

¹¹¹⁹ Legislative Affairs Staff 1 Tr. at 42-43.

¹¹²⁰ *Id.*

¹¹²¹ *Id.*

¹¹²² PBC Employee 1 1/16/23 Tr. at 11-13; PBC Director of Programs Tr. at 111; PBC Employee 2 1/16/23 Tr. at 42; Ricchetti Tr. at 151.

We set forth in particular detail what we learned about these documents and their path to the Penn Biden Center because they are the most highly classified, sensitive, and compartmented materials recovered during our investigation.

1. Document handling and filing in Mr. Biden's vice presidential office in the West Wing

Mr. Biden's office suite in the West Wing of the White House during his vice presidency consisted primarily of his office and a connected front office.¹¹²³ During his vice presidency, Mr. Biden's first executive assistant and staff assistant worked in his front office from the start of the Obama administration through mid-2012.¹¹²⁴ The assistants who staffed the front office at the end of the administration—the executive assistant and Staff Assistant 3—started in mid-2012 and mid-2014, respectively.¹¹²⁵

The front office staff collected and organized Mr. Biden's records.¹¹²⁶ Classified records were retrieved by members of Mr. Biden's National Security Affairs team or sent to the White House Situation Room.¹¹²⁷ The majority of unclassified records were regularly sent to the National Archives as presidential records.¹¹²⁸ Given the volume of paper that passed through his office every day, if staff did not constantly collect,

¹¹²³ 12/21/22 Staff Assistant 3 Interview, FBI Serial 36 at 2; Executive Assistant 1/4/23 Tr. at 17-19.

¹¹²⁴ Staff Assistant 1 Tr. at 4-5, 33-34; Executive Assistant 1/4/23 Tr. at 3-4, 10.

¹¹²⁵ FBI Serial 36 at 1; Executive Assistant Tr. 1/4/23 at 3-4.

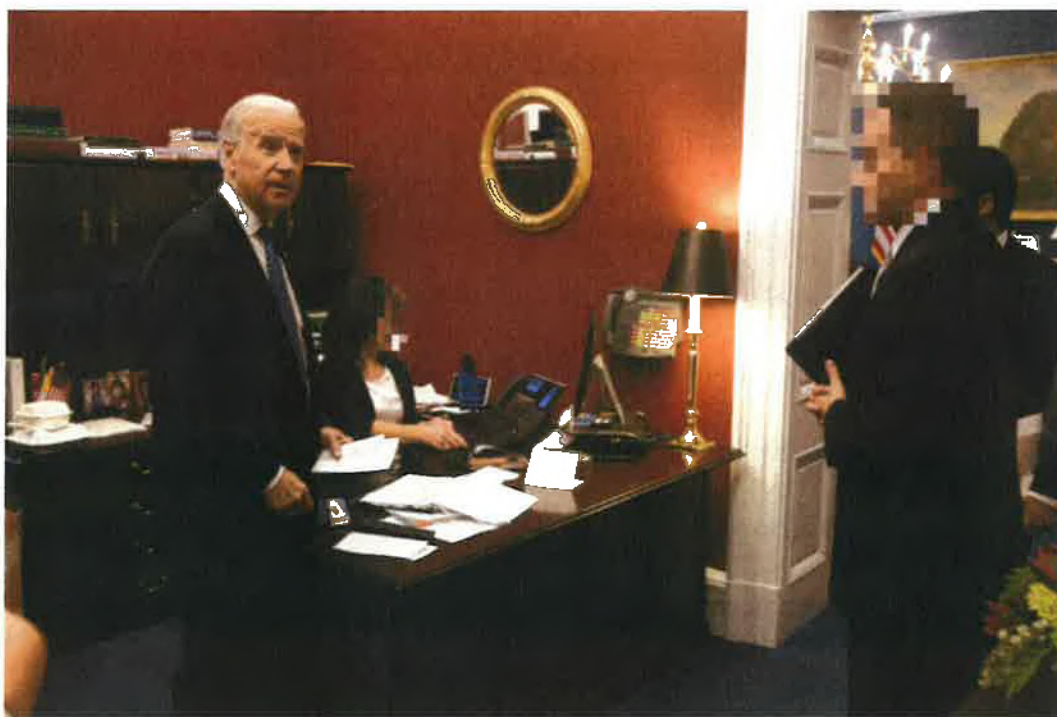
¹¹²⁶ Executive Assistant 1/4/23 Tr. at 22-24, 30-31, 178-80; Staff Assistant 3 10/4/23 Tr. at 15-17; Staff Assistant 2 Tr. at 19; August 2015 West Wing Guide, SCOH-000427 at 3, 6.

¹¹²⁷ FBI Serial 36 at 3-4; Staff Assistant 3 10/4/23 Tr. at 16-17; Executive Assistant 1/4/23 Tr. at 23-24; Staff Assistant 2 Tr. at 20-21.

¹¹²⁸ FBI Serial 36 at 2-3; Executive Assistant 1/4/23 Tr. at 22-23; Staff Assistant 2 Tr. at 19-20.

organize, and archive his records, paper would have piled up quickly and become unmanageable.¹¹²⁹

In addition to records that were regularly archived, Mr. Biden's front office staff kept a relatively small number of files for him in their desk drawers and a credenza located behind the executive assistant.¹¹³⁰ Those files were generally materials, including briefing materials, policy papers, and other official documents, that he wanted to keep outside of the normal archiving process, at least temporarily.¹¹³¹



*View of the front office and the executive assistant's desk and the rear file cabinet (Dec. 2016)*¹¹³²

¹¹²⁹ See Executive Assistant 1/4/23 Tr. at 31-32, 179-80.

¹¹³⁰ 1/4/2023 Staff Assistant 3 Interview, FBI Serial 36 at 2-3; Executive Assistant 1/4/2023 Tr. at 40-41; Staff Assistant 3 10/4/23 Tr. at 6-7.

¹¹³¹ Executive Assistant 1/4/23 Tr. at 77-80, 148-49; Executive Assistant 9/28/23 at 20; August 2016 West Wing Guide, SCOH-000427 at 6; Staff Assistant 3 10/4/23 Tr. at 77-80; FBI Serial 36 at 2-3.

¹¹³² 1B001_00754774.



*View of the front office toward the staff assistant's desk (Dec. 2016)*¹¹³³

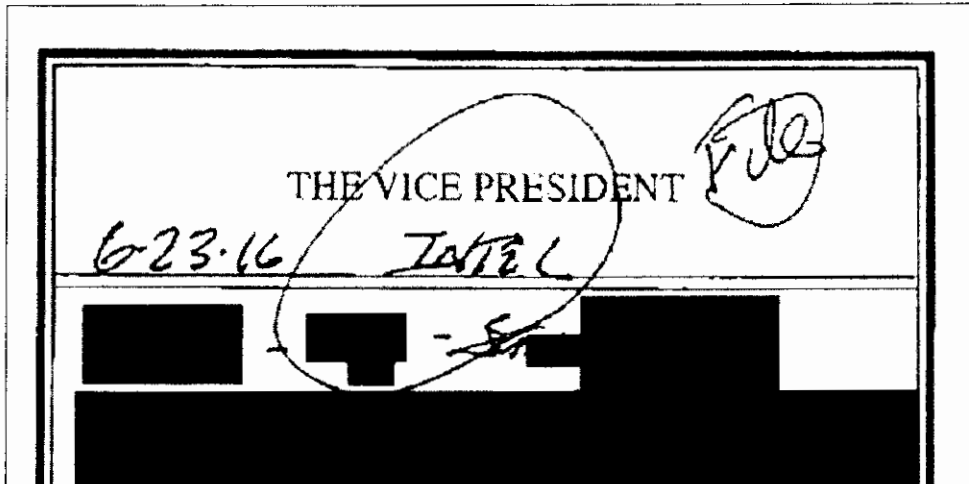
Mr. Biden sometimes wrote a note on material he wanted to save.¹¹³⁴ For example, he might write “save,” “save in office, or “file.”¹¹³⁵ In at least one instance, Mr. Biden wrote a note on a classified call-sheet instructing his executive assistant to retrieve the transcript of a call with a foreign leader for “my [r]ecords.”¹¹³⁶

¹¹³³ 1B001_00766834.

¹¹³⁴ *See, e.g.*, August 2016 West Wing Guide, SCOH-000427 at 6; Executive Assistant 1/4/23 Tr. at 141, 200.

¹¹³⁵ August 2016 West Wing Guide, SCOH-000427 at 6; Executive Assistant 1/4/23 Tr. at 141, 200.

¹¹³⁶ Evidence item 1B49; Recovered Document A9.



Portion of a redacted vice presidential notecard with “File” written on top¹¹³⁷

The files kept in the front office also included some of Mr. Biden’s personal documents.¹¹³⁸ For example, Mr. Biden sometimes asked his front office assistants to save poems he liked or retrieve Biden-family genealogy information stored in the files.¹¹³⁹

The front office assistants occasionally reviewed their files, selected material they determined Mr. Biden no longer needed or wanted, and sent it to be archived.¹¹⁴⁰ Based on the documents recovered from the Penn Biden Center, however, the occasional review of files stored in the front office was imperfect or not exhaustive. Many of the files stored in the front office—both personal and official—were old.¹¹⁴¹

¹¹³⁷ NARA-Bx2_VP Notecards_2016-0090; FBI Serial 281.

¹¹³⁸ 12/21/22 Staff Assistant 3 Interview, FBI Serial 36 at 2; Executive Assistant 1/4/23 Tr. at 76-77; August 2016 West Wing Guide, SCOH-000427 at 6.

¹¹³⁹ Executive Assistant 1/4/23 Tr. at 79-80; Executive Assistant 9/28/23 Tr. at 25.

¹¹⁴⁰ 12/21/22 Staff Assistant 3 Interview, FBI Serial 36 at 2-3.

¹¹⁴¹ Executive Assistant 1/4/23 Tr. at 41, 193; Executive Assistant 9/28/23 Tr. at 20, 69-70.

Some dated back to Mr. Biden's first term as vice president or even his Senate days.¹¹⁴²

2. Mr. Biden's move out of the vice president's West Wing office

At the end of the Obama administration, Mr. Biden's staff prepared to pack up and move out of his West Wing office and into a transition office in Washington, D.C.¹¹⁴³ Mr. Biden's front office staff, led by his executive assistant, packed up his West Wing office.¹¹⁴⁴ Packing the office was a challenge: Staff had to pack up and move out by Inauguration Day while continuing operations until the very end of the administration.¹¹⁴⁵ The executive assistant recalled packing everything up in "maybe a couple of days" in January 2017.¹¹⁴⁶

The front office staff packed up both Mr. Biden's office and the front office.¹¹⁴⁷ The front office contained the bulk of the files to be packed. The executive assistant recalled packing hanging file folders from the front office into boxes provided by the General Services Administration.¹¹⁴⁸ The staff assistant packed up the contents of Mr. Biden's desk in his West Wing Office.¹¹⁴⁹ The desk contained some files, most of

¹¹⁴² Executive Assistant 1/4/23 Tr. at 41, 193; Executive Assistant 9/28/23 Tr. at 20, 69-70.

¹¹⁴³ 11/17/16 Memorandum for the Vice President and Dr. Biden from Staff, SCOH-000305-SCOH-000306; FBI Serial 81 1A91 FBI_00000477.

¹¹⁴⁴ Executive Assistant 1/4/23 Tr. at 36-39.

¹¹⁴⁵ *Id.* at 36-39; Staff Assistant 3 12/21/22 Interview, FBI Serial 36 at 7.

¹¹⁴⁶ Executive Assistant 1/4/23 Tr. at 38-39. Most of the files in the front office had not been packed up as of January 11 or 12, 2017. Staff Assistant 4 Tr. at 114-15, 120-21.

¹¹⁴⁷ Executive Assistant 1/4/23 Tr. at 37-39.

¹¹⁴⁸ Executive Assistant 1/4/23 Tr. at 37.

¹¹⁴⁹ Staff Assistant 3 12/21/22 Interview, FBI Serial 36 at 5; Staff Assistant 3 10/4/23 Tr. at 92-93.

which were personal—for instance, quotes and speeches that Mr. Biden referred to often and notes from family members.¹¹⁵⁰

Mr. Biden's staff did not recall him packing any of his own boxes in the West Wing Office.¹¹⁵¹ Nor did they recall him directing them to bring specific files as they were moving out of the White House.¹¹⁵² However, there were a number of types of files that the executive assistant believed Mr. Biden would want to keep with him, such as mementos relating to Beau Biden's death, the genealogy of the Bidens, news articles, policy papers, and copies of his schedules and speeches.¹¹⁵³ She described the packing process as somewhat "random."¹¹⁵⁴ She explained that "we knew that he was going to write a book" and "do some speaking engagements," but "none of us knew what we were going to need."¹¹⁵⁵

The executive assistant did not believe the files they packed contained classified documents.¹¹⁵⁶ The front office staff's practice was to return classified documents to their originating office or to the White House Situation Room, either daily or whenever Mr. Biden was finished with them.¹¹⁵⁷ Staff lacked the time when

¹¹⁵⁰ Staff Assistant 3 12/21/22 Interview, FBI Serial 36 at 5; Staff Assistant 3 10/4/23 Tr. at 92-93.

¹¹⁵¹ Executive Assistant 1/4/23 Tr. at 38; Executive Assistant 9/28/23 Tr. at 113-14.

¹¹⁵² Executive Assistant 1/4/23 Tr. at 82; Executive Assistant 9/28/23 Tr. at 113-14; Staff Assistant 3 Tr. at 93.

¹¹⁵³ Executive Assistant 1/4/23 Tr. at 83-87.

¹¹⁵⁴ *Id.* at 87.

¹¹⁵⁵ *Id.*

¹¹⁵⁶ *See* Executive Assistant 1/4/23 Tr. at 173-75, 177-79; Executive Assistant 9/28/2023 Tr. at 81.

¹¹⁵⁷ Executive Assistant 1/4/23 Tr. at 23-27; Executive Assistant 9/28/23 Tr. at 81; Staff Assistant 3 12/21/22 Interview, FBI Serial 36 at 4-5; Staff Assistant 3 10/4/23 Tr. at 16-18; 9/1/16 West Wing Guide, SCOH-000434 at 7. Occasionally Staff Assistant 3 would store classified material in the safe in the Vice President's Office on a temporary basis until she

packing to review files methodically to ensure everything was disposed of correctly.¹¹⁵⁸

A total of roughly fifteen boxes were moved from the West Wing Office to the transition office in the administration's final days.¹¹⁵⁹ Once at the transition office, Mr. Biden's staff did not unpack many of the boxes of files from the West Wing Office.¹¹⁶⁰ Mr. Biden was not there daily but did come by occasionally for meetings.¹¹⁶¹

In late June 2017, Mr. Biden and a core group of staff moved from the transition office to the Penn Biden Center's temporary office in Washington, D.C.¹¹⁶² They stayed in this office for several months while the Penn Biden Center's permanent office was under construction.¹¹⁶³ Because Mr. Biden's staff knew they would not be at the temporary office for long, they did not fully unpack, and material remained in boxes there.¹¹⁶⁴

could return it to the appropriate National Security personnel. Staff Assistant 3 10/4/23 Tr. at 18-20.

¹¹⁵⁸ See Executive Assistant 1/4/23 Tr. at 39; Staff Assistant 3 12/21/23 Interview, FBI Serial 36 at 7.

¹¹⁵⁹ 1/17/17 e-mail from Executive Assistant to Associate Director of Admin., et al., SCOH-000238; 1/17/17 e-mail from Associate Director of Admin. to GSA Employee 1, et al., SCOH-000216; 1/19/17 e-mail from Executive Assistant to OVP Purchase Manager, et al., SCOH-000217; 1/9/17 e-mail from Staff Assistant 4 to Associate Director of Admin. et al., SCOH-000574; 1/5/17 e-mail from OVP Operations Staffer to Staff Assistant 3 et al., SCOH-000445; Staff Assistant 4 Tr. at 119-20.

¹¹⁶⁰ Executive Assistant 1/4/23 Tr. at 51; Personal Aide 3 3/28/23 Tr. at 102-03.

¹¹⁶¹ Executive Assistant 1/4/23 Tr. at 48-49; Personal Aide 3 3/28/23 Tr. at 107.

¹¹⁶² FBI Serial 72 1A78; 6/12/17 e-mail from OVP Purchase Manager to PBC Scheduler, SCOH-000716; 6/19/17 e-mail from OVP Purchase Manager to PBC Employee 2, SCOH-000716; GSA Employee 2 Tr. at 53.

¹¹⁶³ 12/8/22 PBC Employee 2 Interview, FBI Serial 20 at 1; PBC Scheduler Tr. at 33; Executive Assistant 1/4/23 Tr. at 55-56.

¹¹⁶⁴ Executive Assistant 1/4/23 Tr. at 54; PBC Scheduler Tr. at 57-58.

In October 2017, Mr. Biden and his staff moved into the Penn Biden Center's permanent office.¹¹⁶⁵ Once there, the executive assistant recalled unpacking some boxes but not all of them "because there was just no need."¹¹⁶⁶ She unpacked some of Mr. Biden's files into file drawers in the outer office adjoining Mr. Biden's office.¹¹⁶⁷ In particular, she stored some files in a three-drawer filing cabinet adjacent to the door to Mr. Biden's office.¹¹⁶⁸ The executive assistant could not recall how they determined what to unpack versus what to leave in boxes.¹¹⁶⁹

When shown copies of the files in Boxes 1 through 3 recovered from the Penn Biden Center, the executive assistant recognized many of them as files she maintained for Mr. Biden in the West Wing.¹¹⁷⁰ For instance, with respect to a manila envelope at the front of Box 3 labeled "Layout of Beau's House," she explained that this file "was very important" to Mr. Biden and "he wanted to have access to it."¹¹⁷¹ She stated that the file "came from the White House," where she had stored it in her desk in the front office or in the credenza behind her; she then brought it to the Penn Biden Center, where she stored it in the outer office.¹¹⁷² The executive assistant also identified her handwriting on many file folders in Boxes 1 and 3.¹¹⁷³ She noted that

¹¹⁶⁵ 12/8/22 PBC Employee 2 Interview, FBI Serial 20 at 1; PBC Employee 2 Tr. at 14; FBI Serial 344 1A415; 10/27/17 e-mail from PBC Employee 2 to Scott Hoffman, et al., SCOH-000777.

¹¹⁶⁶ Executive Assistant 1/4/23 Tr. at 65.

¹¹⁶⁷ *Id.* at 72.

¹¹⁶⁸ *Id.* at 72, 76.

¹¹⁶⁹ *Id.* at 65-66.

¹¹⁷⁰ *Id.* at 128-33, 147-48; *see generally* Executive Assistant 1/4/23 Tr. at 128-203.

¹¹⁷¹ Executive Assistant 1/4/23 Tr. at 153-54; FBI Serial 17 1A19, Bates-000016.

¹¹⁷² Executive Assistant 1/4/23 Tr. at 153-54.

¹¹⁷³ *See, e.g.,* Executive Assistant 1/4/23 Tr. at 133, 151, 155; FBI Serial 26 1A31, 20221201_WFO_0052; FBI Serial 17 1A19, Bates-000019.

some of the files in Boxes 1 through 3 predated her time in the White House and she likely inherited many of them from her predecessor.¹¹⁷⁴

The executive assistant did not specifically recall any of the folders containing classified documents, although she acknowledged that they could have been files she maintained for Mr. Biden in the West Wing. She identified other files that postdated the Obama administration as ones she likely maintained for Mr. Biden at the transition office or the Penn Biden Center.¹¹⁷⁵

Numerous unclassified files in Boxes 1 through 4 contained handwritten notes from Mr. Biden directing that the contents be “saved” or “filed.” The executive assistant explained that these notes meant Mr. Biden wanted the files saved and kept in the office rather than archived in case he wanted them later. During the administration she did not have an expectation of where the files would go after Mr. Biden’s term as vice president.¹¹⁷⁶ But when she packed the files to move out, she expected the files from the West Wing Office would travel with Mr. Biden to his new office.¹¹⁷⁷

3. Origin of marked classified documents in the “EYES ONLY” envelope

In January 2015—around the date handwritten on the “EYES ONLY” envelope recovered from the Penn Biden Center—the Obama administration was negotiating

¹¹⁷⁴ Executive Assistant 1/4/23 Tr. at 128-29, 146-47, 193.

¹¹⁷⁵ *Id.* at 206-12; FBI Serial 26 1A32, 20221202_WFO_0292-94; 20221202_WFO_0336; 20221202_WFO_0415-18.

¹¹⁷⁶ Executive Assistant 9/28/23 Tr. at 27-28.

¹¹⁷⁷ *Id.* at 27-29.

the Iran nuclear deal.¹¹⁷⁸ The administration sought to obtain concessions from the Iranian government that would limit its ability to develop nuclear weapons.¹¹⁷⁹ In exchange, the United States and other countries would ease economic and trade sanctions on Iran.¹¹⁸⁰

During those negotiations, the administration worked both to gain congressional support for the Iran nuclear deal and to ensure Congress did not take action that would interfere with negotiations, in particular, by imposing additional sanctions on Iran.¹¹⁸¹ Additional sanctions, in the administration's view, would cause Iran to walk away from a deal and toward further development of nuclear weapons.¹¹⁸² The administration also opposed legislation that would purport to give the Senate an up-or-down vote on the final Iran nuclear deal.¹¹⁸³

¹¹⁷⁸ Evidence item 1B48; Colin Kahl, Iran Timeline, SCOH-000287 at 10-11.

¹¹⁷⁹ See, e.g., Key Points on the Joint Comprehensive Plan of Action with Iran, 1B001_00009530; The White House, The Iran Nuclear Deal: What You Need to Know about the JCPOA, SCOH-000456 at 4-5.

¹¹⁸⁰ See Legislative Affairs Staff 2 Tr. at 8-9; The White House, The Iran Nuclear Deal: What You Need to Know about the JCPOA, SCOH-000456 at 8; Top Lines Points – Sanctions, 1B001_01913030; Sanctions Relief – Countering Iran's Regional Activities, 1B001_01913035; Sanctions FAQ's, 1B001_02226166.

¹¹⁸¹ See 7/20/14 Memorandum for the President, Legislative Report for the Week of July 21, 2014, 1B001_02436788 at 1-2; Legislative Affairs Staff 2 Tr. at 8-9; 2/8/15 Memorandum for the President, Legislative Report for the Week of February 9, 2015, 1B001_01903477.

¹¹⁸² 1/28/15 Briefing Memo from OVP-NSA, Background and Points for Breakfast with Senators on Iran Legislation, 1B001_02256623 at 5.

¹¹⁸³ See 1/20/15 Memo re Telephone Call with Senator from White House Legislative Affairs Staff, NARA_SCAN_00001464; FBI Serial 3; Memorandum for the Vice President, Corker Iran Legislation: Policy and Precedent Issues, NARAWH_00016231.

The administration sought to engage members of Congress to advance these goals. Given his lengthy service in the Senate and longstanding relationships with members of Congress, Mr. Biden assisted in that effort as vice president.¹¹⁸⁴

As part of that effort, Mr. Biden scheduled a breakfast with six senators on January 29, 2015.¹¹⁸⁵ Colin Kahl, Mr. Biden's National Security Advisor, e-mailed staff on January 24, 2015, stating that the "VP wants to do a breakfast next week" with the aforementioned senators "to discuss Iran sanctions."¹¹⁸⁶ Kahl noted, "this is the group that travelled together to Israel and other spots in the Middle East – and many came back in support of the Corker-Graham Iran legislation we oppose."¹¹⁸⁷

The day before the breakfast, Mr. Biden's national security staff gave him a briefing memo stating that the six invited Senators "returned from their recent trip to Israel more skeptical of imposing new sanctions on Iran (along the lines of the Kirk-Menendez legislation) but more sympathetic to Corker-Graham legislation that would give Congress [an] up-or-down vote on a final nuclear deal."¹¹⁸⁸ The memo also stated that "[a]dditional classified paper will be provided separately."¹¹⁸⁹ Soon after

¹¹⁸⁴ Legislative Affairs Staff 2 Tr. at 7-11; Legislative Affairs Staff 1 Tr. at 12-13; OVP NSA Staffer 1 Tr. at 44-45.

¹¹⁸⁵ 1/29/15 Schedule for Vice President Joe Biden, NARAWH_00000571.

¹¹⁸⁶ 1/24/15 e-mail from Kahl, 1B001_02612074. Senator McCain was on the initial list of Senators proposed by Mr. Biden, but not the final list of Senators invited to the breakfast because he had a conflict on his schedule. See 1/27/15 e-mail from Mr. Biden's Director of Legislative Affairs, 1B001_02611625.

¹¹⁸⁷ 1/24/15 e-mail from Kahl, 1B001_02255821.

¹¹⁸⁸ 1/28/15 Briefing Memo from OVP-NSA, Background and Points for Breakfast with Senators on Iran Legislation, 1B001_02256623.

¹¹⁸⁹ *Id.*

e-mailing the memo, a staff member sent another message stating, “[t]here’ll be more classified material later.”¹¹⁹⁰

The evening before the breakfast with Senators, the White House and intelligence community staff prepared a set of classified intelligence products for Mr. Biden—documents designated A3 through A6 by the FBI—which was delivered to him the next morning in an envelope marked for his eyes only. That night, Mr. Biden’s deputy national security advisor Jeff Prescott e-mailed Mr. Biden’s staff:

There are IC products that are being generated per high side traffic for the VP in advance of his breakfast tomorrow. VP has indicated that he would like them delivered to him as soon as possible anytime after 6:30am tomorrow morning so that he can absorb before the breakfast meeting.¹¹⁹¹

An NSC staff member responded in the e-mail’s reply thread: “Just to clarify, these are compartmented materials that can only be delivered in hardcopy.”¹¹⁹² The NSC staffer said she had “connected our CIA briefing team” with the person who delivered Mr. Biden’s copy of the President’s Daily Brief every morning—his briefer—“so hopefully she can facilitate the physical transfer to the appropriate folks.” Mr. Biden’s briefer replied, “I will drop everything at NavObs by 0630.”¹¹⁹³ Mr. Biden’s briefer stated it was possible she packaged the documents in an envelope marked “EYES

¹¹⁹⁰ 1/28/15 e-mail from OVP NSA Staffer 1, 1B001_02122583; 1/28/15 e-mail from OVP NSA Staffer 1, 1B001_02256622; 1/28/15 Briefing Memo from OVP-NSA, Background and Points for Breakfast with Senators on Iran Legislation, 1B001_02256623.

¹¹⁹¹ 1/28/15 e-mail from Prescott, 1B001_02973019.

¹¹⁹² *Id.*

¹¹⁹³ 1/28/15 e-mail from PDB Briefer 2, 1B001_02973019.

ONLY” because such envelopes might have been the only ones available in her office at the time.¹¹⁹⁴

Prescott responded, asking Mr. Biden’s briefer, “can you please specifically indicate the products that are responsive to this request and highlight them separately for Milaide to deliver to VP?”¹¹⁹⁵ The briefer responded she would do so.¹¹⁹⁶ Prescott replied telling her to “[p]lease bring one for VP and a separate copy for [Kahl] both to NavObs.”¹¹⁹⁷ Mr. Biden’s on-duty military aide responded on the thread, “I will be in the kitchen at 0630 to take delivery. I will hold [Kahl]’s with me and send the VP’s up with the morning traffic.”¹¹⁹⁸

At 6:28 a.m. the next morning, the military aide notified the recipients of the e-mail thread that he had the sensitive materials:

I have the PDBs and the other document for the VP and [Kahl] that [the briefer] dropped off. The VP’s will be delivered with his morning traffic unless he contacts me or any of you and wants them earlier. I will hold [Kahl]’s until he arrives.¹¹⁹⁹

Mr. Biden’s executive assistant asked, “can you pls put note on the docs he was asking about to highlight it.”¹²⁰⁰ The military aide replied, “they just went up and the document said for VP eyes only.”¹²⁰¹ A National Security Council staffer replied in the e-mail chain that afternoon: “Hope the VP was satisfied with the materials/found

¹¹⁹⁴ PDB Briefer 2 Tr. at 72.

¹¹⁹⁵ 1/28/15 e-mail from Prescott, 1B001_02973019.

¹¹⁹⁶ 1/28/15 e-mail from PDB Briefer 2, 1B001_02973019.

¹¹⁹⁷ 1/28/15 e-mail from Prescott, 1B001_02973019.

¹¹⁹⁸ 1/28/15 e-mail from Military Aide 6, 1B001_02973019.

¹¹⁹⁹ *Id.*

¹²⁰⁰ 1/29/15 e-mail from Executive Assistant, 1B001_02973019.

¹²⁰¹ 1/29/15 e-mail from Military Aide 6, 1B001_02973019.

them helpful prior to the breakfast – it was a solid compilation.”¹²⁰² Classified e-mails within the intelligence community confirmed that the documents provided to Mr. Biden were those recovered from the Penn Biden Center and designated by the FBI as documents A3 through A6.¹²⁰³

Mr. Biden hosted the breakfast with senators the morning of January 29, 2015, as shown in the photograph below:



*Mr. Biden's breakfast with senators (Jan. 29, 2015)*¹²⁰⁴

As shown in the photographs below, Mr. Biden had a manila envelope with him at the breakfast.

¹²⁰² 1/29/15 e-mail from National Security Council Staffer, 1B001_03963559.

¹²⁰³ An Intelligence Community agency provided responsive documents pursuant to a prudential search request from the Special Counsel's Office. Investigators reviewed documents responsive to that request on July 24, 2023 at the agency.

¹²⁰⁴ 1B001_01223086.



*Mr. Biden with a manila envelope at the breakfast with senators
(Jan. 29, 2015)¹²⁰⁵*

4. Origin of the handwritten notes in the EYES ONLY envelope

The handwritten notes in the EYES ONLY envelope recovered from the Penn Biden Center appear to be Mr. Biden's own handwritten notes that he created in preparation for his breakfast with senators. Many of the notes are repetitive and appear to be from the same day: January 28, 2015, the day before the breakfast. The notes all appear to be written in the same hand and a former executive assistant to Mr. Biden identified the handwriting throughout as Mr. Biden's.¹²⁰⁶ And the photograph below shows Mr. Biden at the January 29 breakfast with one of the pages of handwritten notes later found in the EYES ONLY envelope in front of him, in one of his notebooks. The title of the page is, "Basic Premise JRB Operating From."

¹²⁰⁵ 1B001_01223072; 1B001_01223164.

¹²⁰⁶ Executive Assistant 9/28/23 Tr. at 129-30.



Mr. Biden at the January 29, 2015 breakfast with a page of the handwritten notes (A7) found in the EYES ONLY envelope¹²⁰⁷

A former executive assistant to Mr. Biden confirmed that at times Mr. Biden committed talking points to memory by writing them down, sometimes multiple times.¹²⁰⁸

We considered but ultimately rejected the possibility that Mr. Biden or his staff collected the handwritten notes designated A7 from different people after a meeting involving discussions and notetaking about the highly compartmented information also found in the EYES ONLY envelope. The handwritten notes did not address the same information as the other documents. No witness recalled an instance or practice

¹²⁰⁷ SCOH-000776.

¹²⁰⁸ Executive Assistant 9/28/23 Tr. at 130-32.

of collecting participants' notes after a sensitive meeting in the White House.¹²⁰⁹ And that theory is inconsistent with the evidence that the relevant handwriting in A7 appears to be a single person's: Mr. Biden's.

The special counsel asked Mr. Biden about the January 29, 2015 breakfast with Senators and the handwritten notes in the EYES ONLY envelope during Mr. Biden's interview.¹²¹⁰ Mr. Biden had no recollection of the breakfast or the handwritten notes.¹²¹¹

5. Mr. Biden's continuing interest in the Iran deal after receiving the EYES ONLY envelope

Mr. Biden's efforts to persuade members of Congress continued after the breakfast with Senators. Other examples included:

- a telephone call with a senator on February 4, 2015,¹²¹²
- a telephone call with a representative on April 11, 2015,¹²¹³
- a telephone call with a representative on April 14, 2015,¹²¹⁴
- a meeting with Senate Foreign Relations Committee Democrats on July 16, 2015,¹²¹⁵
- a telephone call with a senator on July 29, 2015,¹²¹⁶

¹²⁰⁹ See, e.g., Kahl Class. Tr. at 27-28; Executive Secretary Staffer 4 Tr. at 30; Legislative Affairs Staff 2 Tr. at 22-23.

¹²¹⁰ Biden 10/9/23 Tr. at 85-86.

¹²¹¹ Biden 10/9/23 Tr. at 85-86.

¹²¹² 2/3/15-2/4/15 -e-mail thread re Call Request, 1B001_02039129

¹²¹³ 4/11/15-4/12/15 e-mail thread among staff re Readout of VP Calls, 1B001_03791348.

¹²¹⁴ 4/14/16 e-mail among staff re call with Congress rep., 1B001_03464705.

¹²¹⁵ 7/16/15 Event Memo from Staff, Meeting with Senate Foreign Relations Committee Democrats to Discuss Joint Comprehensive Plan of Action (JCPOA), 1B001_00009537.

¹²¹⁶ 7/29/15 Telephone Call Sheet, Telephone Call with Senator Regarding Iran Nuclear Deal, 1B001_02227386.

- breakfast with members of the House Democratic members on July 30, 2015,¹²¹⁷ and
- a meeting with House Democrats on July 15, 2015.¹²¹⁸

Mr. Biden's interest in the Iran deal potentially extended beyond his official duties and his time serving as vice president. In May 2016, Zwonitzer, the ghostwriter for *Promise Me, Dad*—then in the planning phase—e-mailed Mr. Biden and his staff a “one-page description of the book we have been talking about.”¹²¹⁹ The description proposed a “recounting of a small window of time . . . in the spring and summer of 2015,” which “may be the most momentous epoch of the eight-year administration.”¹²²⁰ The description listed a number of administration activities during that time, starting with the “negotiation of the framework of the Iran nuclear deal and the effort to convince Congress to sign off on the pact.”¹²²¹ Ultimately, however, *Promise Me, Dad* did not recount the negotiation of the Iran deal or Mr. Biden's role in it. The book's sole mention of the Iran deal is in a brief description of a call with a senator in early 2015, whom Mr. Biden called “to touch base with him on the Iran deal and on the Northern Triangle, and to bring him up to date on the effort to get money set aside for the Army Corps of Engineers to deepen the Delaware River channel.”¹²²²

¹²¹⁷ 7/29/15 Event Memo, Breakfast with House Democratic Members on Iran Nuclear Deal. 1B001_00009428.

¹²¹⁸ 7/15/15 Event Memo, Meeting with House Democrats to Discuss the Joint Comprehensive Plan of Action (JCPOA), 1B001_00009547; 7/15/2015 Schedule for Vice President Joe Biden, 1B001_00014068.

¹²¹⁹ 5/21/16 e-mail from Zwonitzer, Zwonitzer-00007399; 5/23/16 e-mail from Personal Aide, 1B001_02171054.

¹²²⁰ JRB-Book-Idea.doc, 1B001_02171055.

¹²²¹ *Id.*

¹²²² Biden, PROMISE ME, DAD 86.

Mr. Biden and his advisors—several of whom were affiliated with the Penn Biden Center and were former senior officials in the Obama administration¹²²³—had a continuing interest in the Iran deal as a matter of foreign policy after his time as vice president. In October 2017, for example, his Penn Biden Center team provided him seven notecards’ worth of updates on the “Iran Nuclear Deal” and the Trump administration’s stance on it.¹²²⁴ His staff also prepared remarks for him to give at the Brzezinski Annual Prize Lecture at the Center for Strategic and International Studies;¹²²⁵ roughly a full page of the remarks defended the Iran deal and criticized the Trump administration’s threats to pull out of it.¹²²⁶ His staff later drafted a “Decision Memo” with the subject “Statement Should President Trump Announce that He is Decertifying Iran’s Compliance with the [Iran deal].”¹²²⁷ The decision memo set forth a proposed statement for staff to post to Mr. Biden’s Facebook account shortly after then-President Trump’s expected announcement that he would not recertify the Iran deal.¹²²⁸

In February 2018, Kahl sent Mr. Biden an Event Memo for a “Meeting with Israeli Leaders.”¹²²⁹ Kahl described actions taken by the Trump administration on

¹²²³ See, e.g., Penn Biden Center-Affiliated University Employees – Preliminary List, SCOH-000779; 3/19/17 e-mail from PBC Employee 2, SCOH-000780.

¹²²⁴ 10/6/17 e-mail to Staff re 10-06 Foreign Policy Cards, SCOH-000351, Key Facts, Iran Nuclear Deal – 10/5/17, SCOH-000352 (attachment 3 of 3).

¹²²⁵ 10/1/17 Draft, Remarks for Vice President Joe Biden, Brzezinski Annual Prize Lecture at CSIS, SCOH-000341.

¹²²⁶ *Id.* at 6.

¹²²⁷ 10/12/17 Decision Memo, Statement Should President Trump Announce that He is Decertifying Iran’s Compliance with the JCPOA, SCOH-000359.

¹²²⁸ *Id.*

¹²²⁹ 2/28/18 Event Memo, Meeting with Israeli Leaders, SCOH-000361.

the Iran deal and set forth talking points for Mr. Biden to advocate for the deal with Israeli leaders, including Prime Minister Netanyahu.¹²³⁰ And a Penn Biden Center staffer proposed “Iran deal post UNGA and fight with allies” as one of several topics for members of his team—including Kahl and Blinken—to brief Mr. Biden on in October 2018.¹²³¹

II. ANALYSIS

A. Insufficient evidence exists to prove Mr. Biden willfully retained the classified information in the EYES ONLY envelope

There is insufficient evidence to prove beyond a reasonable doubt that Mr. Biden intentionally retained the classified documents in the EYES ONLY envelope after his term as vice president or caused his staff to do so. Instead, the evidence supports an innocent explanation for the unauthorized retention of those documents. Mr. Biden may have expected to need the material for further discussions with members of Congress about the Iran deal, which he continued to have after his breakfast with Senators on January 29, 2015. Given his practice of having his front office staff store files he wanted to keep close at hand, Mr. Biden likely gave the EYES ONLY envelope to his executive assistant to keep within reach for future engagement with members of Congress. He and his staff appear to have eventually forgotten about it—along with other older files in the front-office collection—and staff members unwittingly moved it out of the West Wing at the end of the administration.

¹²³⁰ *Id.* at 1, 10-13.

¹²³¹ 10/1/18 e-mail from PBC Staffer, SCOH-000001; FBI Serial 344 1A415.

Mr. Biden's front office staff kept files in the front office that he wanted to keep close at hand for reference.¹²³² The files recovered from the Penn Biden Center—including those in the EYES ONLY envelope—were files his executive assistant kept in the front office and eventually moved to the Penn Biden Center.¹²³³ One member of the front office staff periodically went through her files to identify material Mr. Biden no longer needed,¹²³⁴ but the executive assistant does not appear to have done the same.¹²³⁵ The age of many of the files recovered from the Penn Biden Center—some of which dated back to Mr. Biden's first term as vice president—is consistent with the possibility that the executive assistant and Mr. Biden simply forgot about them, having never purged or archived them. Some files remained in the front office in January 2017 that Mr. Biden likely no longer needed, wanted, or remembered.

Moreover, the EYES ONLY materials were stored in an envelope that was not marked classified; Mr. Biden's executive assistant said the "EYES ONLY" designation did not necessarily signify classified contents.¹²³⁶ She typically identified classified material by the cover sheets, which she said were "usually always" included.¹²³⁷ She also said she would have respected the instruction that it was for Mr. Biden's eyes only and would not have looked inside.¹²³⁸ When interviewed, the executive assistant did not recall seeing the EYES ONLY envelope while packing up

¹²³² Executive Assistant 1/4/23 Tr. at 78-81, 85-86; Staff Assistant 3 12/21/22, FBI Serial 36 at 2-3; Executive Assistant 9/28/2023 Tr. at 133-34.

¹²³³ Executive Assistant 9/28/23 Tr. at 7-10.

¹²³⁴ FBI Serial 36 at 2-3.

¹²³⁵ Executive Assistant 1/4/23 Tr. at 39, 187-188.

¹²³⁶ Executive Assistant 1/4/23 Tr. at 147-48, 156-64.

¹²³⁷ Executive Assistant 1/4/23 Tr. at 35.

¹²³⁸ Executive Assistant 1/4/23 Tr. at 168-69.

the West Wing Office or unpacking at the Penn Biden Center.¹²³⁹ Even if she had seen the envelope, it is reasonable to believe she did not know the contents were classified and would not have looked inside to check because of the EYES ONLY stamp.

Some evidence suggests Mr. Biden had a motive to retain the documents in the EYES ONLY envelope after he left office, but that evidence is weak. He did have a continuing interest in the Iran deal, both as a matter of foreign policy and as a potential topic Zwonitzer considered for Mr. Biden's book. But there is no evidence that he ever accessed or requested the EYES ONLY envelope after leaving office, or that he knew his staff had moved it to the Penn Biden Center. None of his advisors at the Penn Biden Center remembered the documents. The materials they prepared for Mr. Biden on the Iran deal do not reference the type of classified information in the EYES ONLY envelope. The executive assistant stated she had no knowledge of the envelope's contents and no memory of him ever asking about it. And Mr. Biden did not appear to recognize the documents during his interview with the special counsel. He barely mentioned his role with the Iran deal in *Promise Me, Dad* and does not appear to have thought it an important part of his legacy. Some former advisors stated Mr. Biden was pessimistic about negotiating with Iran but supported the negotiations anyway in support of the president.¹²⁴⁰

¹²³⁹ Executive Assistant 1/4/23 Tr. at 159, 173-74; Executive Assistant 9/28/23 Tr. at 120, 135-36.

¹²⁴⁰ Kahl Class. Tr. at 3-6; Donilon Tr. at 30.

Finally, several of the files in the box where the EYES ONLY envelope was found appear to have been forgotten files of little value to Mr. Biden, such as the file about a 2011 ski trip. The files, therefore, do not appear to be a set that Mr. Biden personally curated. Nor do they appear to be the type of files people keep close as a matter of course in their everyday lives.

In summary, the innocent explanation for the retention of the classified documents in the EYES ONLY envelope at the Penn Biden Center is not only plausible, it is a better explanation than one of willful retention. There is thus insufficient evidence to support charging Mr. Biden or anyone else with willful retention of the documents in the EYES ONLY envelope at the Penn Biden Center.

B. There is insufficient evidence to support charging Mr. Biden for the retention of the other marked classified documents recovered from the Penn Biden Center

1. There is insufficient evidence to charge Mr. Biden with willful retention of marked classified documents A1 and A2

The evidence does not suggest that Mr. Biden willfully retained documents A1 or A2, which related to engagement with China in President Obama's second term and a summary of meetings with foreign leaders during a United Nations General Assembly Week. The FBI found these documents among unclassified documents in folders that Mr. Biden's executive assistant maintained for him. Mr. Biden occasionally asked his executive assistant to retrieve material for him from the files she maintained, but she did not remember Mr. Biden ever going through the files himself to retrieve documents. And Mr. Biden did not move the files himself at the end of the Obama administration.

The more plausible explanation for the unauthorized retention of documents A1 and A2 is that the executive assistant stored and moved documents A1 and A2 to the Penn Biden Center unwittingly. In her interview with the Special Counsel's Office, she credibly stated that she did not know the files she maintained included marked classified documents. Documents A1 and A2 did not have classified cover sheets intended to draw attention to the classified nature of the contents, nor were the folders containing the documents marked to designate classified contents.

The evidence also suggests the executive assistant was not familiar with the contents of the folders because she likely did not create them. The handwritten label on the "Filing 10-10-16" folder (containing document A2) does not appear to be the executive assistant's handwriting.¹²⁴¹ And the printed label on the "Second Term" folder (containing document A1) is large and on the cover of the folder, unlike most of the other printed labels, which appear on the file-folder tabs.

It is also unlikely a jury would find that, after the end of the Obama administration, documents A1 and A2 contained national defense information. Document A1 is a memorandum to Mr. Biden from his then-deputy national security advisor, Jeff Prescott, discussing general, high-level suggestions for the administration's engagement with China in the second term. Document A2 is a memo from Mr. Biden to President Obama describing meetings he had with foreign leaders during General Assembly Week at the United Nations. Unauthorized disclosure of

¹²⁴¹ Compare 1B004-MARK Z 2-16-17-000002 (handwriting sample); Executive Assistant 9/28/23 Tr. at 84 (identifying handwriting) *with* NARA_SCAN_00000097, FBI Serial 3 ("Filing 10-10-16" folder).

such material could have revealed private, sensitive diplomatic considerations and discussions within the Obama administration. But any prosecution involving those documents would have to meet the defense that the Obama administration's foreign-policy and diplomatic considerations, while historically important, had become far less sensitive by the time the documents were moved to the Penn Biden Center.

There are reasons why Obama-era diplomatic and foreign policy information, such as that in documents A1 and A2, should retain its classification status after the administration ends. But those reasons are nuanced compared to the large-scale and well-known changes to policy, governance, and leadership style that occurred in the White House from the Obama administration to the Trump administration. It is unlikely a jury would conclude that, upon the onset of the Trump administration, the foreign-policy views of the Obama-era vice president and his advisors expressed in documents A1 and A2 remained information relating to the national defense that would warrant a felony criminal charge.

2. There is insufficient evidence to charge Mr. Biden with retention of marked classified document A8

There is insufficient evidence to show Mr. Biden willfully retained document A8 for many of the same reasons as documents A1 and A2. Document A8 is a background memo for a meeting with a foreign leader. The FBI found document A8 among unclassified documents in a folder that Mr. Biden's executive assistant maintained for him and that he did not go through or move himself.

For many of the same reasons as stated for documents A1 and A2, the more plausible explanation for the unauthorized retention of document A8 is that the

executive assistant stored and moved it to the Penn Biden Center unwittingly. The executive assistant did not intend to store classified documents in the files she maintained. And the document and folder did not contain the cover sheets she relied on to flag the presence of classified information.

3. There is insufficient evidence to charge Mr. Biden with retention of marked classified documents A9 and A10

Recovered document A9 is a telephone call sheet setting forth the purpose of a call between the Ukrainian Prime Minister and Mr. Biden and talking points for the call, which occurred on December 11, 2015. It is marked “SECRET.” A handwritten note dated December 12, 2015, from Mr. Biden in the upper-right corner of the sheet asks his executive assistant to “[g]et copy of this conversation from Sit Rm for my Records please.” Document A10 documents the substance of that call in the format of a non-verbatim transcript. It is labeled “CONFIDENTIAL” and “EYES ONLY DO NOT COPY.”

Given Mr. Biden’s handwritten note, documents A9 and A10 have additional indicia of willful retention by Mr. Biden as compared to the other marked classified documents recovered from the Penn Biden Center. On a document bearing “SECRET” classification markings with talking points for a call, Mr. Biden asked his executive assistant to get a copy of the transcript of the actual call from the Situation Room for “my [r]ecords.” The executive assistant stored both the call sheet and the transcript in a folder labeled “VP Personal.” And a witness familiar with foreign-leader calls stated that the content of such calls is typically classified by default.¹²⁴²

¹²⁴² McKeon Tr. at 98-99.

Nonetheless, there is reasonable doubt that Mr. Biden willfully retained documents A9 and A10. Mr. Biden's handwritten note does not request that his executive assistant save the classified call sheet containing talking points for the call (A9) in his records: rather, he only requested the transcript of the phone call itself. And no jury could reasonably find that the substance of the call between Mr. Biden and the Ukrainian Prime Minister was national defense information. The two exchanged pleasantries and the Prime Minister heaped praise upon Mr. Biden for his December 9, 2015 speech to Ukraine's parliament. They did not engage in a substantive policy discussion. There may be technical or nuanced reasons to maintain the classification of the call, but no reasonable jury could conclude the call or its contents were national defense information after the end of the Obama administration, or that by asking for a transcript of the call Mr. Biden intended to retain national defense information.

The evidence suggests that the marked classified documents found at the Penn Biden Center were sent and kept there by mistake. Therefore, we decline any criminal charges related to those documents.

CHAPTER FIFTEEN

CLASSIFIED DOCUMENTS FOUND AT THE UNIVERSITY OF DELAWARE

In January, February, and June 2023, FBI agents identified and recovered just over a dozen marked classified documents in Mr. Biden's Senate-era papers housed at the University of Delaware. Almost all of these documents predate the Senate's establishment of rules for the tracking and handling of classified information. The evidence does not suggest that Mr. Biden willfully retained these documents. Rather, they appear to have been included in his large collection of Senate papers by mistake.

I. FACTS

A. Mr. Biden donated hundreds of boxes of senatorial records to the University of Delaware library

As a senator, Mr. Biden accumulated hundreds of bankers boxes of records. During his time as vice president, his staff shipped these records on a rolling basis to the National Archives storage facility in Maryland, where they were stored for Mr. Biden as a courtesy. The Senate records consisted of his personal senatorial files, those of his staffers, and campaign materials.¹²⁴³ While the records were not supposed to include committee records, which belong to the Senate, senators' staff commonly intermingled committee documents with their senators' personal papers.¹²⁴⁴ By the time Mr. Biden became vice president, the National Archives had over 2,000 boxes and 415 gigabytes of electronic data in courtesy storage for him.¹²⁴⁵

¹²⁴³ 3/10/10 Memo from OVP Counsel, 1B001_00038717.

¹²⁴⁴ *Id.* at 4; Senate Staffer 1 Tr. at 25-26, 43.

¹²⁴⁵ 3/10/10 Memo from OVP Counsel, 1B001_00038717.

Within the first year of his vice presidency, Mr. Biden's staff began preparations to donate his senatorial papers to the University of Delaware.¹²⁴⁶ In spring 2011, Mr. Biden asked two of his former longtime Senate staffers to review his boxes in courtesy storage.¹²⁴⁷ These former staffers reviewed and catalogued the boxes and recommended to him which papers to donate.¹²⁴⁸ During the review, neither staffer expected to or did find any marked classified documents.¹²⁴⁹

In fall 2011, Mr. Biden formally agreed to donate his Senate papers and other records to the University of Delaware.¹²⁵⁰ Between 2012 and 2015, the University's Morris Library received over 2,000 boxes of Mr. Biden's senatorial papers shipped from the National Archives, the Russell Senate Office Building, and Mr. Biden's Delaware home.¹²⁵¹ Upon their arrival at the University of Delaware, the boxes were

¹²⁴⁶ FBI Serial 349 1A420; *See, e.g.*, July 2009 e-mails between University of Delaware general counsel and Mr. Biden's Chief of Staff, SCOH-000712.

¹²⁴⁷ Senate Staffer 1 Tr. at 30-31. Senate Staffer 2 3/14/23 Tr. at 25. The staffers were paid by the University of Delaware to perform the pre-gift review. Senate Staffer 2 3/14/23 Tr. at 65.

¹²⁴⁸ Senate Staffer 1 Tr. at 35. Senate Staffer 2 3/14/23 Tr. at 25-26.

¹²⁴⁹ Senate Staffer 1 Tr. at 43; Senate Staffer 2 11/3/23 Tr. at 13, 26.

¹²⁵⁰ FBI Serials 282 1A302, 349 1A420; *See* 2/12/14 Letter from Mr. Biden to the National Archives, SCOH-000011. The "Ceremonial Agreement to Gift" was signed in a ceremony at the University of Delaware on September 16, 2011, while the actual deed of gift was not fully executed until July 2016. *See, e.g.*, July 2011 and September 2011 e-mails amongst University of Delaware staff, OVP Counsel, and personal counsel to the Vice President, SCOH-000783, SCOH-000706; 7/15/16 Deed of gift, SCOH-000578.

¹²⁵¹ FBI Serials 79 1A89, 282 1A301, 349 1A420; 5/30/12-6/5/12 e-mails between former Senate staffer, current Senate staffer, and the University of Delaware, SCOH-000005, SCOH-000007, SCOH-000008, SCOH-000010; 10/23/11 e-mail from former Senate staffer to Mr. Biden, 1B001_02683701 ("However, I have not forgotten about the boxes and files at your house. I am looking to start on those just after Thanksgiving. However, I know that you want to get them out of there sooner rather than later."); 1/31/13 e-mail from Archivist to UDel Morris Librarian and UDel library employee, SCOH-000714 (former Senate staffer was "looking though about 20-25 boxes in the garage From that group, he has about 2 boxes of Senate material so far.") When interviewed, the former Senate staffer did not recall

placed in a secure storage area, and the materials were reviewed over time by archivists and other university staff.¹²⁵²

B. Marked classified documents discovered at the Morris Library

In fall 2014, the Morris Library hired an intern to organize the Biden Senate papers, separate out documents belonging to the Foreign Relations Committee, and re-file the remainder.¹²⁵³ In late 2015 or early 2016, the intern discovered, among committee records, one document that was marked classified.¹²⁵⁴ She placed a sticky note on the document indicating the number of the box in which she found it and the fact it was marked “Secret.”¹²⁵⁵

In February 2023, an archivist reviewed the box the intern had flagged, discovered the marked classified document within the box, secured the document in a vault, and reported it to the FBI.¹²⁵⁶ Agents retrieved the document that same day.¹²⁵⁷ The classified document is a two-page State Department cable from 1987, marked Secret concerning the NATO alliance.¹²⁵⁸ A classification review by the State Department determined that the document was declassified in 2012.¹²⁵⁹

reviewing Senate-era boxes at Mr. Biden’s Delaware residence and transporting them to the University of Delaware. Senate Staffer 2 11/3/23 Tr. at 9-10, 18-20.

¹²⁵² Archivist Tr. 2/27/23 at 32.

¹²⁵³ Intern Tr. at 6-9.

¹²⁵⁴ *Id.* at 10, 12-13.

¹²⁵⁵ *Id.* at 21-22. The intern expressed confidence that she advised her supervisor of this discovery. *Id.* at 16-18. We were unable to determine why this issue went unaddressed at that time.

¹²⁵⁶ Archivist Tr. at 84; Report of Archivist interview, FBI Serial 79.

¹²⁵⁷ FBI Serials 79, 71.

¹²⁵⁸ Recovered document F1.

¹²⁵⁹ FBI Serial 676.

After this discovery, and with Mr. Biden's consent, in June 2023, the FBI searched the contents of approximately 105 boxes at the Morris Library, the subset of boxes that contained Senate Foreign Relations Committee materials.¹²⁶⁰ Two of those boxes contained the following five marked classified documents:

1. Two-page letter to Richard G. Lugar, Committee on Foreign Relations, regarding Conventional Armed Forces in Europe Treaty, dated November 20, 1991 (signature block missing), marked Secret.¹²⁶¹ According to a classification review, this document is currently classified as Secret.¹²⁶²
2. Three-page document titled "Summary of March 11, 1977 Executive Meeting of Full Committee," dated Mar. 11, 1977, marked Secret and "CLASSIFIED COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE."¹²⁶³ A classification review of this document is pending.¹²⁶⁴
3. Five-page document titled "Mutual Balanced Force Reductions (MBFR)," dated July 1977, and marked Confidential.¹²⁶⁵ According to a classification review, this document is currently classified as Confidential.¹²⁶⁶
4. Six-page Staff Memorandum titled, "National Security Interests in a Law of the Sea Treaty, March 6, 1979 Hearings," dated March 2, 1979, marked Confidential and "For Committee Use Only."¹²⁶⁷ According to a classification review, this document is currently classified as Confidential.¹²⁶⁸
5. Three-page Action Memorandum from Senate Staffer 3 to nine senators, including Mr. Biden, with subject, "Proposed 1980 Committee Budget – For Discussion During Meeting of Democrats in S-201 at 2:00 p.m., Wednesday, January 23," dated January 23, 1980,

¹²⁶⁰ FBI Serials 290, 292.

¹²⁶¹ Recovered document G5.

¹²⁶² FBI Serial 676.

¹²⁶³ Recovered document G1.

¹²⁶⁴ FBI Serial 676.

¹²⁶⁵ Recovered document G2.

¹²⁶⁶ FBI Serial 676.

¹²⁶⁷ Recovered document G3.

¹²⁶⁸ FBI Serial 676.

marked Confidential.¹²⁶⁹ The State Department did not provide a classification determination for this document.¹²⁷⁰

C. Marked classified documents at the Biden Institute

1. Storage of Mr. Biden's records at the Biden Institute

In addition to the thousands of boxes of Senate papers Mr. Biden donated to the University of Delaware, there was a smaller collection of mostly Senate-era material that remained stored at the Russell Senate Office Building and the National Archives. During the vice presidency, Mr. Biden's former Senate staffers reviewed the material to help him decide what, if any, he might donate to the University of Delaware. Mr. Biden wanted to identify and keep materials that may be "politically sensitive," speeches (from both the Senate era and vice presidency), photographs, contact information, and personal (and campaign) materials.¹²⁷¹ The staffers found no marked classified documents during this review.

Several months after the vice presidency, in July 2017, these materials, which filled about 263 boxes, were shipped to the Biden Institute at the University of Delaware, a domestic policy think tank established in 2017.¹²⁷² The Biden Institute

¹²⁶⁹ Recovered document G4. This document is a duplicate of Recovered document E1, a document recovered from the Biden Institute, discussed later in this section.

¹²⁷⁰ FBI Serial 676. *See also* Section C.3 below.

¹²⁷¹ May 2017 e-mails between transition staffer and Executive Director, SCOH-000697, SCOH-000014; 12/15/16 meeting notes belonging to Senate Staffer 1, SCOH-000012; May 2017 e-mails between transition staffer and Senate Staffer 1, SCOH-000027, SCOH-000015.

¹²⁷² 7/7/17 e-mail between transition staffer and Executive Director, SCOH-000701; *see also* 7/7/17-7/14/17 e-mails between transition staffer and Executive Director, SCOH-000703.

was a space that Mr. Biden could use for free, where someone could continue to sort through the materials.¹²⁷³

2. Biden Institute reviews the boxes

In late 2018 or early 2019, the Biden Institute hired the daughter of one of Mr. Biden's personal attorneys as a part-time employee to review Mr. Biden's boxes.¹²⁷⁴ Over several months, she conducted what she described as a cursory review of the boxes and inventoried their contents.¹²⁷⁵ She did not alert anyone to the presence of classified information.¹²⁷⁶ When interviewed, she stated that she never saw any documents with classification markings.¹²⁷⁷

Several others also reviewed these materials. Former Senator and Mr. Biden's Senate Chief of Staff Ted Kaufman reviewed several boxes in 2019 to determine whether they contained any of his own papers.¹²⁷⁸ Mr. Biden's sister, Valerie Biden Owens, also reviewed some of these boxes and recalled seeing speeches and

¹²⁷³ 5/10/17 e-mail from transition staffer to Biden Owens and Senate Staffer 1, SCOH-000014; 5/17/17 e-mail from transition staffer to Senate Staffer 1 SCOH-000015.

¹²⁷⁴ June 2017 and January 2019 e-mails between Executive Director and employee, SCOH-000693, SCOH-000696.

¹²⁷⁵ Inventory attachment, SCOH-000677; FBI Serial 110.

¹²⁷⁶ FBI Serials 89, 110.

¹²⁷⁷ *Id.*

¹²⁷⁸ 7/19/19 e-mail from Executive Director to Kaufman, SCOH-000715; Executive Director Serial 74 at 3-4; Biden Owens Tr. at 58. In January 2009, Mr. Kaufman was appointed to serve the remainder of Mr. Biden's term as Senator when Mr. Biden resigned from the Senate to become vice president. Edward E. (Ted) Kaufman: United States Senator from Delaware and Chief of Staff to Senator Joe Biden, 1973-2010, Oral History Interviews, August 17 to September 27, 2012, Senate Historical Office, Washington, D.C., <https://www.senate.gov/about/oral-history/kaufman-edward-e-oral-history.htm> (last visited Jan. 31, 2024).

schedules.¹²⁷⁹ One Institute staff member recalled looking in some of these boxes and seeing framed photographs and gifts.¹²⁸⁰

3. Discovery of marked classified documents at the Biden Institute

After the discovery of classified information at the Penn Biden Center in November 2022, the Biden Institute's Executive Director notified Mr. Biden's personal counsel, Bob Bauer, that the institute had done its own inventory of the boxes in its possession and believed that four contained "VP Speeches & Transcripts."¹²⁸¹

In January and February 2023, FBI agents searched all 263 boxes stored at the institute and determined that one contained seven marked classified documents dated between November 1979 and June 1980.¹²⁸² Mr. Biden's former Senate staffers had reviewed this box before it was sent to the Biden Institute and omitted it from the gift to the University of Delaware because the box contained campaign materials from 1978.¹²⁸³

¹²⁷⁹ Executive Director FBI Serial 74 at 4; Biden Owens Tr. at 59-60.

¹²⁸⁰ OVP Intern Tr. at 33-34.

¹²⁸¹ 1/19/23 e-mail from Executive Director to Bauer with attached inventory, SCOH-000661, SCOH-000662. *See also* 5/18/17 e-mail from OVP Purchase Manager to Senate Staffer 1 regarding Senate Records, SCOH-000027.

¹²⁸² FBI Serials 66, 67; Recovered documents E1-E7.

¹²⁸³ Senate Staffer 1 spreadsheet, SCOH-000056; June 2017, SCOH-000041 (listing boxes to send to the Biden Institute from the National Archives). The four documents were found in a box with the requisition number 329-94-341, #58. The Biden Institute employee had performed a review of the box and added her own number, 252, to the box. The employee inventorying the box had described it as containing "misc. news clips – some correspondence" from "c. mid-1970s." Inventory attachment, SCOH-000677.

Two documents were marked Secret and five documents were marked Confidential. The two Secret documents and one Confidential document were found in a folder labeled "Foreign Relations Committee." The other four Confidential documents were in a folder labeled "Europe."

Below is a description of the documents recovered from the Biden Institute:

1. Three-page Action Memorandum from Senate Staffer 3 to nine senators, including Mr. Biden, with subject, "Proposed 1980 Committee Budget – For Discussion During Meeting of Democrats in S-201 at 2:00 p.m., Wednesday, January 23," dated January 23, 1980, marked Confidential.¹²⁸⁴
2. Two-page letter to Edmund S. Muskie, Secretary of State, from Ted Kaufman/Senator Biden, dated June 4, 1980, marked Confidential.¹²⁸⁵
3. One page Action Memorandum, addressed to Senators Church, Pell, and Biden, with subject "Letter to Secretary Muskie on Consultations with the Allies on SALT and TNF," dated May 29, 1980, marked Confidential.¹²⁸⁶
4. One page Action Memorandum, addressed to Senator Biden, with subject "Re: Letter to Secretary Muskie on Consultations with the Allies on SALT and TNF," dated May 29, 1980, marked Confidential.¹²⁸⁷
5. Three page letter from Edmund S. Muskie, Secretary of State, to Senators Church, Pell, and Biden, dated May 30, 1980, marked Confidential.¹²⁸⁸
6. One page Action Memorandum, addressed to Senator Biden ("The attached memo from Senate Staffer 4 on TNF Modernization is both

¹²⁸⁴ Recovered document E1. This document is a duplicate of Document #5 (G4) discussed above in Section 1B.

¹²⁸⁵ Recovered document E2.

¹²⁸⁶ Recovered document E3.

¹²⁸⁷ Recovered document E4.

¹²⁸⁸ Recovered document E5.

interesting and disturbing”) from Senate Staffer 3 through Ted Kaufman, dated November 28, 1979, marked Secret.¹²⁸⁹

7. Two page Information Memorandum, addressed to Senate Staffer 3 from Senate Staffer 4, titled “TNF Modernization and Arms Control,” dated November 26, 1979, marked Secret.¹²⁹⁰

For Documents 1 through 5, the State Department could not provide a classification level in response to our request, though it noted that “[t]he details contained in some of these documents appear to have been highly sensitive at the time that these documents were created and included information that appeared to originate at executive branch federal agencies.”¹²⁹¹ According to the State Department, these documents may or may not still be sensitive today.¹²⁹² The State Department was unable to render an opinion as to Document 6.¹²⁹³ The State Department could not provide a classification level for Document 7 but advised that certain pages of this document may be classified if they had been included in an executive branch document, as the legislative branch does not have the authority to classify documents.¹²⁹⁴

4. U.S. Senate rules on handling of classified information during the timeframe of the recovered documents

The documents recovered at the University of Delaware all appear to have

¹²⁸⁹ Recovered document E6.

¹²⁹⁰ Recovered document E7.

¹²⁹¹ U.S. Department of State, Classification Review Results for State Department Equities, at 2 (Dec. 1, 2023); FBI Serial 676.

¹²⁹² U.S. Department of State, Classification Review Results for State Department Equities, at 2 (Dec. 1, 2023); FBI Serial 676.

¹²⁹³ U.S. Department of State, Classification Review Results for State Department Equities, at 2 (Dec. 1, 2023); FBI Serial 676.

¹²⁹⁴ U.S. Department of State, Classification Review Results for State Department Equities, at 2 (Dec. 1, 2023); FBI Serial 676.

originated from Mr. Biden's service on the Senate Foreign Relations Committee. Mr. Biden served on the Committee from 1975 to 2009.¹²⁹⁵ He became Ranking Minority Member in 1997 and chaired the Committee in January 2001, from June 2001 to 2003, and again from 2007 to 2009.¹²⁹⁶ As a Committee member, Mr. Biden had access to classified information relating to diplomatic nominees, treaties, and oversight responsibilities for the Department of State.

In the mid- to late-1980s, several factors led to growing concern within the Senate about the handling of classified information.¹²⁹⁷ Among other things, each Senate office handled classified information differently.¹²⁹⁸ Also, there was no central recordkeeping system to track which Senate employees held a security clearance.¹²⁹⁹ As a result, then-Minority Leader Robert Dole described the Senate's handling of classified information as "a disaster, waiting to happen."¹³⁰⁰

In response, in 1987, the Senate established the Office of Senate Security and charged it with protecting classified information in Senate offices and committees.¹³⁰¹ The Office's Senate Security Manual established rules for the handling of classified

¹²⁹⁵ COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, MILLENIUM EDITION 1816-2000, S Rep. No. 105-28, at 101, www.foreign.senate.gov/imo/media/doc/CDOC-105sdoc281.pdf (senate.gov) (last visited Jan. 23, 2024).

¹²⁹⁶ Garrison Nelson and Charles Stewart III, COMMITTEES IN THE U.S. CONGRESS 1993-2010 585 (CQ Press 2010).

¹²⁹⁷ 133 CONG. REC. 9371 (Apr. 23, 1987) (statement of Sen. Dole).

¹²⁹⁸ *Id.*

¹²⁹⁹ *Id.*

¹³⁰⁰ *Id.*

¹³⁰¹ S. RES. 243 (100th Congress, 1st Session, July 1, 1987) (on file with Office of Special Counsel); *see also* Offices of the Secretary, United States Senate, <https://www.senate.gov/about/officers-staff/secretary-of-the-senate/offices-of-the-secretary.htm#:~:text=The%20Office%20of%20Senate%20Security,in%20Senate%20offices%20and%20committees> (last visited Jan. 18, 2024).

information.¹³⁰² Senators could not store Top Secret or Special Access material in their personal offices.¹³⁰³ Information at lower classification levels could be stored in a senator's personal office, but only in an appropriate storage facility that the Office of Senate Security had certified.¹³⁰⁴ And senators could not remove classified information from approved spaces or take it home with them.¹³⁰⁵

In 1997—after all of the documents recovered at the University of Delaware were created—the Office of Senate Security began tracking classified information using a computerized system.¹³⁰⁶ Under this system, which exists to this day, each copy of a classified document coming into the Office is logged and given a unique, physical barcode.¹³⁰⁷ The system catalogues each document with an unclassified title, subject, page count, document origin, document destination, and any codewords.¹³⁰⁸ This way, if a classified document was found in an unauthorized location, the Office of Senate Security could identify the person who is responsible for that document.

¹³⁰² *Id.* 3(a).

¹³⁰³ Security Manual, Office of Senate Security, Section II.A.7(a) note (Apr. 2007). The manual's discussion of "Special Access" appears to be a shorthand reference to Special Access Programs, a term defined in its glossary as "[a]ny program imposing need-to-know access controls beyond those normally prescribed for access to Confidential[,] Secret, or Top Secret information." *Id.* Special access programs are a subset of Sensitive Compartmented Information. See Executive Order 13526 § 4.3.

¹³⁰⁴ Security Manual, Office of Senate Security, Section II.A.7 (Apr. 2007).

¹³⁰⁵ *Id.*, Section II.A.12.

¹³⁰⁶ See Senate Employee 1 Tr. at 29.

¹³⁰⁷ Senate Employee 2 Tr. at 29. While these records are stored electronically, records of a senator's physical access to classified document at the Office, as well as most other types of records maintained by the Office, were kept manually using handwritten logs. Senate Employee 1 Tr. at 35.

¹³⁰⁸ Senate Employee 1 Tr. at 33-34.

II. ANALYSIS

The evidence does not establish that Mr. Biden or anyone else knowingly removed or retained the classified documents found at the University of Delaware. These documents appear to have been included in his Senate papers by mistake.

First, Mr. Biden depended on staffers to maintain his Senate files, organize and pack them, transport them to the proper place of storage, and review them before they were sent to the University of Delaware. No evidence suggests he knew these classified documents were within his massive collection of Senate papers. Further, given the age of the documents, we found no evidence that Mr. Biden personally viewed any of them while he was a member of the Senate. Mr. Biden sat on the committee that generated these documents, but it is entirely plausible they were handled by a staff member and that Mr. Biden never handled the documents himself before they were filed among his papers.¹³⁰⁹ There is also no record of Mr. Biden's review of the documents before or after he donated them to the University. As a matter of historical context, there have been numerous previous incidents in which marked classified documents have been discovered intermixed with the personal papers of former executive branch officials and members of Congress.¹³¹⁰

¹³⁰⁹ The 1991 letter addressed to Senator Lugar (then a Foreign Relations Committee member) found within Mr. Biden's papers does not contain a signature block. Therefore, we could not determine who sent the letter, or whether Mr. Biden ever viewed (or ever received) the letter.

¹³¹⁰ Joseph Weber, *When state secrets land in the hands of university librarians*, WASH. POST (Feb. 10, 2023, updated Feb. 19, 2023), <https://www.washingtonpost.com/education/2023/02/10/classified-documents-university-library-trump-biden-pence/> (last visited Jan. 31, 2024); Ronald G. Schafer, *Presidential papers have long been turning up in unexpected places*, WASH. POST (Feb. 4, 2023), <https://www.washingtonpost.com/history/2023/02/04/presidential>

Second, before the Senate papers arrived at the University, Mr. Biden asked two experienced staffers to review them. The staffers knew to segregate documents that were appropriate for the Morris Library gift. They did not identify any classified documents within these materials.

The staffers' failure to do so is likely due, in part, to the small number of classified documents found within a large collection of the Senate papers. Another possible reason is that several of the documents use markings that do not clearly convey their classified nature. Some of the documents are marked "CONFIDENTIAL." While that is a valid marking for classified information, the term "CONFIDENTIAL" is also used in other contexts not involving classified information. Senate staffers could have understood these to be internal committee documents or simply sensitive documents created by authors who wanted to limit the number of people who viewed them.

Third, the classified documents were found in collections of papers Mr. Biden had either already donated or planned to donate after his staff removed personal and political materials. This suggests neither he nor his staff knew about or wanted to keep the small number of classified documents later found there.

l-papers-documents-misplaced/; Zeke Miller et al., *Classified records pose conundrum stretching back to Carter*, ASSOCIATED PRESS NEWS (Jan. 24, 2023), <https://apnews.com/article/biden-trump-classified-documents-president-33df0355c72e9ae8fa4cb6ead13f6521>; U.S. GEN. ACCOUNTING OFF., GAO/GDD-91-117, REPORT TO CONGRESSIONAL REQUESTORS: DOCUMENT REMOVAL BY AGENCY HEADS NEEDS INDEPENDENT OVERSIGHT 17-23 (Aug. 1991), <https://www.gao.gov/assets/ggd-91-117.pdf> (last visited Jan. 31, 2024).

Finally, none of these decades-old documents contains information so obviously sensitive that a jury would find it compelling enough to convict a former president and vice president of mishandling classified information.

For these reasons, it is likely that the few classified documents found in Mr. Biden's Senate papers were there by mistake. The documents found at the University of Delaware are not a basis for criminal charges.

CHAPTER SIXTEEN

OTHER CLASSIFIED DOCUMENTS FOUND IN MR. BIDEN'S DELAWARE HOME

I. MARKED CLASSIFIED DOCUMENTS IN NOTEBOOKS

As discussed in Chapters Two and Four, three notebooks found in Mr. Biden's Delaware home had marked classified documents placed inside them. One of these notebooks, labeled "Af/Pak 1," is discussed in Chapter Six. For the other two, the evidence does not suggest either that Mr. Biden retained the classified documents inside them willfully, or that the documents contain national defense information. Thus, these documents do not warrant criminal charges.

A. Documents found within notebook labeled "1/6/12 #2 Foreign Policy"

The notebook labeled "1/6/12 #2 Foreign Policy" recovered from Mr. Biden's basement den contained two marked classified documents.¹³¹¹ One was three pages of what appear to be PowerPoint slides, each of which was marked Secret/NOFORN/Pre-Decisional.¹³¹² The slides are dated May 22, 2013, and discuss various options for U.S. troop levels in Afghanistan after 2014.¹³¹³

The notebook contains a corresponding handwritten entry dated May 24, 2013, when Mr. Biden took notes during a National Security Council meeting that he attended through a secure video teleconference from his Delaware home.¹³¹⁴ While we do not know exactly where inside the notebook the classified PowerPoint slides

¹³¹¹ Notebook 1B15.

¹³¹² Recovered documents C1, C2, C3.

¹³¹³ *Id.*

¹³¹⁴ Notebook entry 1B15-0039; 5/24/13 Final Schedule for Vice President Joe Biden, NARAWH_00000422.

were located (because the slides were found by a member of the White House Counsel's Office rather than the FBI),¹³¹⁵ it is likely that Mr. Biden had the slides at his home during the National Security Council meeting, then placed the slides in the notebook after the meeting, where they remained until discovered in 2023.

The second marked classified document in the notebook was a briefing memorandum for Mr. Biden from his National Security Affairs team dated November 1, 2013, and marked Top Secret/Sensitive Compartmented Information.¹³¹⁶ The memorandum briefed Mr. Biden in advance of a meeting with the Prime Minister of Iraq.¹³¹⁷ The document corresponds to an entry in the notebook where Mr. Biden made handwritten entries about the Prime Minister's visit, indicating that Mr. Biden placed the memorandum in his notebook during or soon after that event.¹³¹⁸

For both marked classified documents found in this notebook, we investigated whether Mr. Biden had reason to keep the documents, including by interviewing Mr. Biden and relevant staff members, reviewing Mr. Biden's notebook entries, and examining the public record. The evidence does not suggest that he intended to keep these documents, and it is possible he put them in his notebook after meetings and forgot about them. While one of the documents concerned troop levels in Afghanistan

¹³¹⁵ FBI Serial 44.

¹³¹⁶ Recovered document C4. The document was classified by OVP National Security Affairs as Top Secret//SCI. The intelligence community has indicated that was an invalid marking and should be marked TS//HCS-O//SI//ORCON/NOFORN; FBI Serial 676; Notebook 1B15.

¹³¹⁷ Recovered document C4.

¹³¹⁸ FBI Serial 44.

as of 2013,¹³¹⁹ an issue that remained of great interest to Mr. Biden,¹³²⁰ because it was a single document from years after the Afghanistan 2009 policy review, it is plausible that Mr. Biden left it in the notebook by mistake rather than storing it there intentionally.

We investigated whether Mr. Biden encountered these classified documents in his notebook after the vice presidency, but we did not find evidence that he did. There is no evidence he used this notebook when writing *Promise Me, Dad*, and the classified documents were not relevant to the book, and were not referenced in Mr. Biden's recorded conversations with Zwonitzer. While it is natural to assume Mr. Biden may have reviewed this notebook at some point after leaving office and found the classified documents inside, we did not find evidence to establish this.

B. Notebook labeled "DAILY/MEMO"

Mr. Biden's notebook labeled "DAILY/MEMO," which agents found in his office/library on the main floor of his Delaware home, contained one page of a PowerPoint slide marked Secret/NOFORN about national security priorities for the second term of the Obama administration.¹³²¹ The slide's subject matter suggests it may have been distributed at, or in preparation for, a National Security Council meeting. While the intelligence community has informed us that this document is properly marked, it does not appear to us to contain national defense information.¹³²² The investigation also did not reveal evidence that Mr. Biden intentionally kept the

¹³¹⁹ Recovered documents C1, C2, C3.

¹³²⁰ See Chapter Six.

¹³²¹ Notebook 1B25; Recovered document D21.

¹³²² Serial 676.

document after the Obama administration, or that he knew the document was in his home.

For each of the marked classified documents found in Mr. Biden's notebooks, we cannot prove that Mr. Biden knew about or intended to keep the document after he was vice president, or we cannot prove the document contains national defense information, or both. These documents do not support criminal charges against Mr. Biden.

II. "WEEKEND WITH CHARLIE ROSE" BINDERS

During their search of Mr. Biden's Delaware home in December 2022 and January 2023, FBI agents found two nearly identical binders containing marked classified documents: one in a box in the garage, and the other in a paper bag in the office next to Mr. Biden's primary bedroom.¹³²³ The evidence does not show that Mr. Biden knew the classified documents were in his home, and it is plausible that they were stored there by mistake.

Mr. Biden's staff assembled the binders to prepare him for an event in September 2014, entitled "Weekend With Charlie Rose" in Aspen, Colorado.¹³²⁴ He flew to Aspen on Friday, September 19, 2014, and back to Delaware the next day.¹³²⁵ The guest list included leaders in government and business.¹³²⁶

¹³²³ Evidence items 1B5, 1B31, 1B77.

¹³²⁴ 9/17/14 e-mails amongst OVP National Security Affairs staff, NARAWH_00011307 ("Poroshenko paper, including background (classified)").

¹³²⁵ 9/17/14 e-mail from Director of Programs, NARAWH_00010985 (attaching Mr. Biden's schedule from September 19, 2014); 9/18/14 e-mail from Director of Programs, NARAWH_00010943 (attaching Mr. Biden's schedule from September 20, 2014).

¹³²⁶ 9/18/14 Event Memo, Weekend with Charlie Rose Dinner, NARA_SCAN_00001636.

The binders included materials on foreign policy topics to prepare Mr. Biden for an interview with Charlie Rose on September 20, 2014.¹³²⁷ A staff member who compiled the binder e-mailed his colleagues proposing its contents, stating that one document would be classified and another might be.¹³²⁸ The recovered binders' contents generally track this e-mail.¹³²⁹ The marked classified documents in the binders include the following:

- An Event Memo, marked Secret, from a National Security Affairs advisor preparing Mr. Biden for a lunch on September 17, 2014 at the Naval Observatory with a foreign leader.¹³³⁰ This memo was in both the binder in the garage (as a two-page document) and the binder in the upstairs office (as a three-page document).
- A ten-page document labeled in part, "Background," marked Secret/NOFORN, which appears to be an attachment to the Event Memo referenced immediately above.¹³³¹ This document also was in both recovered binders.¹³³²
- A five-page document titled in part, "Scenesetter for National Security Advisor Susan Rice." It lacks classified headers or footers but does have portion markings indicating it contains Secret information.¹³³³ This document was in both binders and corresponds to the staffer's e-mail describing one paper as potentially classified.¹³³⁴

¹³²⁷ Communications Director Tr. at 16; 9/9/14 Interview Memo, 1B001_00034947 (memo preparing Mr. Biden with an "off-the-record interview with Charlie Rose" on September 20).

¹³²⁸ 9/17/14 e-mails amongst OVP National Security Affairs staff, NARAWH_00011307.

¹³²⁹ Compare 9/17/14 e-mails amongst OVP National Security Affairs staff, NARAWH_00011307, with 1B005-CHARLIE ROSE BACKGROUND MATERIAL.

¹³³⁰ Classified documents B1, D23; 9/18/14 White House Press Release, 1B001_02563406 (describing lunch with Mr. Biden and foreign leader at the Naval Observatory).

¹³³¹ Classified documents B2, D24.

¹³³² 9/17/14 e-mails amongst OVP National Security Affairs staff, NARAWH_00011307 ("Poroshenko paper, including background (classified)").

¹³³³ Classified documents B3, D25.

¹³³⁴ 9/17/14 e-mails amongst OVP National Security Affairs staff, NARAWH_00011307 ("Poroshenko paper, including background (classified)").

Mr. Biden's staff appear to have mislabeled one of the binders as unclassified despite its classified contents. The binder found in the garage had a cover page with the words "UNCLASSIFIED DOCUMENT" in all capital letters, while the binder from the second-floor bedroom office had no cover page:¹³³⁵



The Charlie Rose binder found in Garage Box 2¹³³⁶



The second version of the Charlie Rose binder¹³³⁷

¹³³⁵ Evidence items 1B5, 1B31.

¹³³⁶ FBI Serial 195 1A212, 20230103_DSC_0035. The FBI added the yellow Post-It note to track items that contain documents with classification markings.

¹³³⁷ FBI Serial 77 1A 86, 20230120_FBI_0243.

In one of the boxes recovered by the National Archives from the Penn Biden Center was a copy of one unclassified document that was in both of these binders—the dinner seating chart—in a folder labeled “Aspen, CO.”¹³³⁸ This folder at the Penn Biden Center contained no marked classified documents.¹³³⁹

In searching the contents of the box in the garage where they found one of the “Weekend With Charlie Rose” binders, agents found binders from other trips Mr. Biden took as vice president in the same box.¹³⁴⁰ A naval enlisted aide recalled that Mr. Biden kept such binders after returning from his trips.¹³⁴¹

Within the paper bag in the upstairs office adjoining Mr. Biden’s primary bedroom, where agents found the other “Weekend With Charlie Rose” binder, they also found personal documents that predate January 2017, when Mr. Biden left the vice presidency.¹³⁴² We could not determine when or how the bag—and the binder within it containing marked classified documents—arrived at the location where agents found it in January 2023.

These facts do not support a conclusion that Mr. Biden willfully retained the marked classified documents in these binders. The cover of one binder was marked unclassified, the other had no classification marking, and we cannot show that Mr.

¹³³⁸ FBI Serial 3; “Aspen CO” folder, NARA_SCAN_00001634. Seating Chart, NARA_SCAN_00001635, 9/18/14 Event Memo, Weekend with Charlie Rose Dinner, NARA_SCAN_00001636.

¹³³⁹ FBI Serial 3.

¹³⁴⁰ FBI Serial 701.

¹³⁴¹ NEA 1 Tr. at 126-27.

¹³⁴² FBI Serial 518.

Biden reviewed the binders after his vice presidency or knew the classified documents were inside. It is plausible that he retained these documents by mistake.

III. MARKED CLASSIFIED DOCUMENT IN THIRD-LEVEL DEN

FBI agents found one document with classification markings in the third-level den area. Agents found the document inside a blue file folder with the handwritten label “AMPUTATIONS Feb ’11,” which was in a pile of miscellaneous materials on the bottom shelf of a bookcase.¹³⁴³ The document was marked Secret/NOFORN and related to events in Egypt.¹³⁴⁴ This document’s subject matter does not relate to the label on the folder or the documents surrounding it. We cannot show that Mr. Biden knew this document was in his home, and the location of this document with unrelated materials makes it plausible that it was filed in error and that Mr. Biden kept this document by mistake.

¹³⁴³ Recovered document D22; FBI Serial 77.

¹³⁴⁴ *Id.*

CHAPTER SEVENTEEN

DELETION OF AUDIO RECORDINGS BY MARK ZWONITZER, MR. BIDEN'S GHOSTWRITER

At some point after learning of Special Counsel Hur's appointment, Mr. Biden's ghostwriter, Mark Zwonitzer, deleted digital audio recordings of his conversations with Mr. Biden during the writing of the book, *Promise Me, Dad*.¹³⁴⁵ The recordings had significant evidentiary value. But Zwonitzer turned over his laptop computer and external hard drive and gave consent for investigators to search the devices. As a result, FBI technicians were able to recover deleted recordings relating to *Promise Me, Dad*. Zwonitzer kept, and did not delete or attempt to delete, near-verbatim transcripts he made of some of the recordings.¹³⁴⁶ He also produced those detailed notes to investigators.

After reviewing available facts, analyzing governing law, and considering the Principles of Federal Prosecution, we decline to bring charges against Zwonitzer related to his deletion of the audio recordings. Charges against Zwonitzer are not appropriate both because the available evidence is insufficient to obtain and sustain a conviction, and because, even if the evidence were sufficient, the Principles of Federal Prosecution do not support any charge in these circumstances.

¹³⁴⁵ “[T]o ensure a full and thorough investigation,” the Attorney General’s appointment order authorized us to investigate and prosecute “federal crimes committed in the course of, and with the intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.” 28 C.F.R. § 600.4(a).

¹³⁴⁶ Most of these files were essentially transcripts of the conversations, and Zwonitzer intended and viewed them as such. Zwonitzer 7/31/23 Tr. 74, 96. But in some instances, the files included portions that were more akin to Zwonitzer’s notes of conversations rather than near-verbatim transcripts. For simplicity’s sake, we refer to these files as transcripts.

I. FACTUAL BACKGROUND

FBI agents contacted Zwonitzer to request an interview and to seek records related to his work ghostwriting two of Mr. Biden's memoirs, *Promise Me, Dad* and *Promises to Keep*. Zwonitzer provided investigators records that included near-verbatim transcripts and some audio recordings. When reviewing these materials, investigators noticed that there were some transcripts for which there was no corresponding audio recording. They then learned from Zwonitzer's attorneys that, before the FBI contacted Zwonitzer, he deleted the recordings of his conversations with Mr. Biden. Zwonitzer then provided all electronic devices that contained or were used to create the recordings and transcripts related to *Promise Me, Dad*.

Zwonitzer stated that at some point he deleted the audio files subfolder from his laptop and external hard drive.¹³⁴⁷ No relevant deleted files were recovered from the laptop. Deleted audio files were recovered from a subfolder on the external hard drive labeled "Audio." Based on the available evidence from the forensic review, we assess that all deleted audio files were recovered from that subfolder.¹³⁴⁸ For three of the recovered files, portions of the audio appeared to be missing, and a fourth file appeared to have portions overwritten with a separate recording.¹³⁴⁹ These results are possible when forensic tools are used to recover deleted files.¹³⁵⁰ For each of these

¹³⁴⁷ Zwonitzer 7/31/23 Tr. 14-15.

¹³⁴⁸ FBI Operational Technology Division Report, FBI Serial 700.

¹³⁴⁹ FBI Serial 684.

¹³⁵⁰ File carving is a digital forensic process of extracting data from a storage device by scanning the entire storage device at the byte level, including areas not assigned to the file system. Carving can retrieve files that are no longer known to the file system, such as those a user has deleted.

four incomplete or overwritten files, Zwonitzer produced his corresponding transcripts to investigators.¹³⁵¹ These notes summarized the content of the conversations, two of which were with Mr. Biden and two of which were with Beau Biden's doctor.¹³⁵²

After producing the materials to investigators, Zwonitzer gave two consensual interviews during which he provided relevant information without seeking immunity or any protections or assurances (such as a proffer agreement). Zwonitzer was forthright that he had deleted recordings.¹³⁵³ In his words, "I simply took the audio files subfolder from both the G drive and my laptop and slid them into the trash. I saved all the transcripts . . ."¹³⁵⁴ Zwonitzer believed he did this at some point during the period between the end of January 2023 and the end of February 2023.¹³⁵⁵ He took this action before the FBI contacted him about the investigation and requested that he produce evidence.¹³⁵⁶ Zwonitzer explained that at the time he did so, he was "aware" of the Department of Justice investigation of Mr. Biden's potential mishandling of classified materials.¹³⁵⁷ As for why he deleted the audio recordings, Zwonitzer gave the following reasons:

- As a practice, while he saved transcripts of recorded conversations indefinitely, he deleted audio recordings after completing a written work to

¹³⁵¹ FBI Serials 315, 336; JRB-07; JRB_02_16_2017; Doctor-02-16-2017; Doctor-03-16-2017.

¹³⁵² FBI Serials 315, 336; JRB-07; JRB_02_16_2017; Doctor-02-16-2017; Doctor-03-16-2017.

¹³⁵³ Zwonitzer 7/31/23 Tr. at 14-15.

¹³⁵⁴ *Id.*

¹³⁵⁵ *Id.* at 15.

¹³⁵⁶ *Id.* at 15-16.

¹³⁵⁷ *Id.* at 16.

protect his interviewee's privacy.¹³⁵⁸ Zwonitzer explained that he did not have an established practice as to when he deleted audio recordings; rather, he would do so at convenient points in time, such as when he moved to a new residence or when he happened to notice that he still had audio recordings from past interviews.¹³⁵⁹

- Zwonitzer had received vague but threatening e-mails from groups hostile to Mr. Biden, and private conversations that included Zwonitzer had been published on the Internet.¹³⁶⁰ Accordingly, Zwonitzer was concerned that his computer could be hacked and the audio recordings of his conversations with Mr. Biden published online.¹³⁶¹ Those recordings contained personal information, including Mr. Biden's reflections on the death of his son Beau.¹³⁶²
- In January 2023, Zwonitzer had finished working on a book about the capabilities of a cyber-surveillance system called Pegasus.¹³⁶³ Zwonitzer stated that he had a "heightened sense of awareness" of the capabilities of Pegasus, which he described as "the most . . . frightful cybersurveillance tool . . . on the market out there right now."¹³⁶⁴ The book discussed how Pegasus was used to spy on people around the world—including heads of state, diplomats, and journalists.¹³⁶⁵ The Pegasus tool could be used to "capture all videos, photos, emails, texts, and passwords – encrypted or not."¹³⁶⁶

Investigators asked Zwonitzer if he had deleted the recordings because of the special counsel's investigation. Zwonitzer replied that he "was aware that there was an investigation" when he deleted the recordings and continued, "I'm not going to say

¹³⁵⁸ *Id.* at 15.

¹³⁵⁹ Zwonitzer 7/31/23 Tr. at 22.

¹³⁶⁰ *Id.* at 14.

¹³⁶¹ *Id.*

¹³⁶² *Id.*

¹³⁶³ Zwonitzer 1/4/24 Tr. at 77; Laurent Richard & Sandrine Rigaud, PEGASUS: THE STORY OF THE WORLD'S MOST DANGEROUS SPYWARE (2023) (e-book), <https://us.macmillan.com/books/9781250858696/pegasus> (last visited Jan. 31, 2024).

¹³⁶⁴ Zwonitzer 1/4/24 Tr. at 77.

¹³⁶⁵ Laurent Richard & Sandrine Rigaud, PEGASUS: THE STORY OF THE WORLD'S MOST DANGEROUS SPYWARE (2023) (e-book), <https://us.macmillan.com/books/9781250858696/pegasus> (last visited Jan. 31, 2024).

¹³⁶⁶ *Id.*

how much of the percentage it was of my motivation.”¹³⁶⁷ When asked whether he deleted the recordings to try and prevent investigators from obtaining them, Zwonitzer said that he did not and further explained, “when I got the subpoena and when I realized that I still had audio that I did not know I had on the laptop, I made sure to preserve that for this investigation.”¹³⁶⁸ Zwonitzer also explained that at the time he deleted the recordings, he did not expect the investigation to involve him¹³⁶⁹ and that he did not think the audio recordings contained information relevant to classified information.¹³⁷⁰

According to Zwonitzer, he decided to delete the recordings on his own; no one told him to do so.¹³⁷¹ Nor had he been in contact with anyone from Mr. Biden’s circle of staff, friends, and confidants about his participation in an interview with the Special Counsel’s Office.¹³⁷² Our investigation—which included witness interviews and review of phone and e-mail records—did not uncover any evidence that Zwonitzer had been in contact with anyone about his decision to delete the recordings.

II. THE EVIDENCE IS INSUFFICIENT TO OBTAIN A CONVICTION FOR OBSTRUCTION OF JUSTICE

A. Legal Standard

The two relevant statutory provisions that criminalize the destruction of evidence are 18 U.S.C. § 1512(c)(1) and 18 U.S.C. § 1519. While in practice the proof

¹³⁶⁷ Zwonitzer 7/31/23 Tr. at 17.

¹³⁶⁸ Zwonitzer 1/4/24 Tr. at 68.

¹³⁶⁹ Zwonitzer 7/31/23 Tr. at 16.

¹³⁷⁰ Zwonitzer 1/4/24 Tr. at 66.

¹³⁷¹ Zwonitzer 7/31/23 Tr. at 17-22.

¹³⁷² *Id.*

needed to sustain a conviction under either statute is often very similar, the two provisions differ in their elements.¹³⁷³

Section 1512(c)(1), like most federal obstruction statutes, requires proof of a “nexus” or “link” to a specified pending or foreseeable official proceeding.¹³⁷⁴ What constitutes an “official proceeding” is enumerated in a statutory list and includes proceedings before (1) a federal judge or federal court, (2) a federal grand jury, or (3) the United States Congress.¹³⁷⁵ Section 1512(c)(1) also requires proof that the defendant acted “corruptly.” And while courts have given slightly different definitions to that term, it generally requires proof that the defendant acted with the purpose of wrongfully impeding the due administration of justice.¹³⁷⁶ Under any formulation, “corruptly” is a heightened *mens rea*.¹³⁷⁷

¹³⁷³ Compare 18 U.S.C. § 1512(c)(1); with 18 U.S.C. § 1519.

¹³⁷⁴ *United States v. White Horse*, 35 F.4th 1119, 1121-23 (8th Cir. 2022) (“§ 1512(c)(1) requires proof of a nexus between the defendant’s action and an official proceeding”); *United States v. Matthews*, 505 F.3d 698, 707-08 (7th Cir. 2007) (applying the nexus requirement to § 1512(c)(1)).

¹³⁷⁵ 18 U.S.C. § 1515(a)(1); see, e.g., *United States v. Young*, 916 F.3d 368, 384-85 (4th Cir. 2019) (applying § 1512(c)(1) to federal grand jury proceeding).

¹³⁷⁶ See *United States v. Akiti*, 701 F.3d 883, 887-88 (8th Cir. 2012); *Matthews*, 505 F.3d at 704-06; Leonard B. Sand & John S. Siffert, MODERN FEDERAL JURY INSTRUCTIONS - CRIMINAL ¶ 46.10 (Matthew Bender & Company, Inc., Release No. 83B 2023).

¹³⁷⁷ The Supreme Court has held that the word is “normally associated with wrongful, immoral, depraved, or evil.” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005). The various formulations of corruptly amount to the same general requirement of proving a bad purpose. See, e.g., *United States v. Robertson*, 86 F.4th 355, 359-63 (D.C. Cir. 2023) (affirming jury instruction for § 1512(c)(2) charge that defined corruptly as requiring “unlawful means, or act[ing] with an unlawful purpose, or both” and “consciousness of wrongdoing”); *Matthews*, 505 F.3d at 704-06 (purposefully and wrongfully impeding the due administration of justice); *United States v. Delgado*, 984 F.3d 435, 452 (5th Cir. 2021) (“knowingly and dishonestly, with specific intent to subvert or undermine the due administration of justice”); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (“with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct”).

By contrast, Section 1519 permits prosecutions in broader circumstances. For a Section 1519 prosecution, the government need not show a link to a specified proceeding, it need only show the commission of an obstructive act with the intent to impede, obstruct, or influence an investigation that is within the federal government's jurisdiction.¹³⁷⁸ Additionally, Section 1519 does not require proof of corrupt intent, and instead requires proving that the defendant acted “knowingly . . . with the intent to impede, obstruct, or influence.” While a defendant must commit the obstructive act knowingly, the defendant does not need to know whether the investigation he intends to obstruct falls under the jurisdiction of the federal government.¹³⁷⁹

Thus, Section 1519 criminalizes (1) knowingly; (2) altering, falsifying, destroying, mutilating, concealing, covering up, or making a false entry in any record, document, or tangible object; (3) with the intent to impede, obstruct, or influence the investigation or the proper administration of any matter within the jurisdiction of a department or agency of the United States.¹³⁸⁰

¹³⁷⁸ *United States v. Moyer*, 674 F.3d 192, 209-10 (3d Cir. 2012) (government only required to prove an intent to impede an investigation into “any matter” that is “ultimately proven to be within the federal government’s jurisdiction”); *United States v. Gray*, 692 F.3d 514, 519 (6th Cir. 2012) (“[T]he plain language of the statute only requires the Government to prove that [the defendant] intended to obstruct the investigation of *any* matter that happens to be within the federal government’s jurisdiction.” (alteration in original)); *United States v. Gray*, 642 F.3d 371, 376-377 (2d Cir. 2011) (“[I]n enacting § 1519, Congress rejected any requirement that the government prove a link between a defendant’s conduct and an imminent or pending official proceeding.”).

¹³⁷⁹ *United States v. Hassler*, 992 F.3d 243, 246-47 (4th Cir. 2021) (so holding and collecting cases).

¹³⁸⁰ See *Hassler*, 992 F.3d at 246-47; *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008); *United States v. Kernell*, 667 F.3d 746, 756-57 (6th Cir. 2012); Sand & Siffert, above, at ¶ 46.13.

Given that Section 1519 is less burdensome because it does not require proving a nexus requirement or a corrupt intent, we evaluated Zwonitzer's conduct under that provision. A prosecution under Section 1512(c)(1) would fail for the same reasons.

B. The evidence does not support a charge under Section 1519

Zwonitzer admitted, in a consensual, recorded interview, "I simply took the audio files subfolder from both the [external hard] drive and my laptop and slid them into the trash."¹³⁸¹ Therefore, Zwonitzer knowingly deleted audio files,¹³⁸² but the available evidence cannot establish beyond a reasonable doubt that Zwonitzer did so with the intent to impede, obstruct, or influence this federal investigation.

In his interviews, Zwonitzer offered plausible, innocent reasons for why he deleted the recordings. First, out of concern for privacy, he had a practice of deleting all audio recordings of interviewees in his possession and had done so previously. Second, Zwonitzer was concerned that the materials could be hacked and published online. This concern was increased by his recent work on a book discussing a powerful cyber-surveillance system known to target journalists, among other groups. While Zwonitzer admitted to being aware of the special counsel investigation, he did not say that his goal was to keep evidence from being uncovered by that investigation. Instead, Zwonitzer explained that "when I got the subpoena and when I realized that

¹³⁸¹ Zwonitzer 7/31/23 Tr. at 14-15.

¹³⁸² See *Kernell*, 667 F.3d at 756-57 (affirming sufficiency of evidence in Section 1519 conviction where defendant deleted files from his computer and ran a defragmentation program); *United States v. Wortman*, 488 F.3d 752, 753-55 (7th Cir. 2007) (affirming sufficiency of evidence in Section 1519 conviction where woman destroyed a CD containing child pornography that belonged to her boyfriend).

I still had audio that I did not know I had on the laptop, I made sure to preserve that for this investigation.”¹³⁸³

Zwonitzer’s later actions—including the production to the special counsel of transcripts that mention classified information—suggest that his decision to delete the recordings was not aimed at concealing those materials from investigators. Significantly, Zwonitzer voluntarily consented to two interviews and could have, but did not, invoke the Fifth Amendment to decline to produce the transcripts, his laptop, and the external hard drive. And when FBI agents contacted Zwonitzer, they were unaware that audio recordings existed or where Zwonitzer’s electronic devices were located.

Therefore, agents did not have probable cause for a warrant to search those devices and recover the recordings. Investigators only learned of the evidence because Zwonitzer was forthright, explained his actions, produced the relevant electronic devices, and consented to the search of those devices. Zwonitzer’s own consensual statement is the only evidence of when he deleted the recordings; without it, investigators would not have learned whether he did so before or after learning of the special counsel’s appointment and federal criminal investigation. And while Zwonitzer admitted to being aware of the investigation at the time he deleted the files, the context in which this statement was made—during a consensual and voluntary interview—supports the conclusion that Zwonitzer acted with good faith and did not intend to impede, obstruct, or influence this investigation.

¹³⁸³ Zwonitzer 1/4/24 Tr. at 68.

Perhaps most significantly, Zwonitzer preserved near-verbatim transcripts that contain incriminating information about Mr. Biden, including transcripts of the February 16, 2017 conversation where Mr. Biden said he “just found all the classified stuff downstairs.” Preserving these transcripts was inconsistent with a motive aimed at impeding the investigation. While there is unique evidentiary value in a subject’s own voice as captured on an audio recording, we would expect a person intending to obstruct justice to also conceal or delete the notes that memorialized the same probative information. Zwonitzer could have just as easily “slid” the files containing the notes into the trash as he had done with the audio recordings. Instead, he preserved the transcripts and produced them to investigators. And he later produced the devices on which the recordings had been stored and consented to a search of those devices. None of this is consistent with intent to obstruct justice or the investigation.

For these reasons, we believe that the admissible evidence would not suffice to obtain and sustain a conviction of Mark Zwonitzer for obstruction of justice.

III. DECLINATION IS ALSO APPROPRIATE BECAUSE ON BALANCE, RELEVANT AGGRAVATING AND MITIGATING FACTORS DO NOT SUPPORT ZWONITZER’S PROSECUTION

Even if the evidence available were sufficient to obtain and sustain Zwonitzer’s conviction for obstruction of justice, we would decline prosecution because on balance, relevant aggravating and mitigating factors do not support his prosecution.¹³⁸⁴ Zwonitzer willingly provided significant cooperation to the investigation without

¹³⁸⁴ U.S. Dep’t of Just., Just. Manual § 9-27.230 (2023).

seeking or receiving any protections or assurances. He was forthright in describing his conduct and working with investigators to obtain all relevant evidence in his possession. And his cooperation was uniquely valuable as the evidence that he provided was highly probative and not otherwise obtainable. Finally, prosecuting Zwonitzer under these circumstances would deter others from cooperating as he did.

CONCLUSION

For the foregoing reasons, we conclude that no criminal charges are warranted in this matter.

Appendix A: Recovered Documents¹

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
A1	"Second Term" file folder	3/8/13	4	A Memorandum for the Vice President from Jeff Prescott with the subject "China Engagement in the Second Term."	SECRET	Declassification date has passed, declassification review required before public release.
A2	"Filing 10-10-16" file folder	9/26/16	7	A Memorandum for the President from the Vice President with the subject "Leader Meetings and Events During UN General Assembly (UNGA) Week."	TOP SECRET//SCI	TOP SECRET//SCI**
A3	VPOTUS EYES ONLY envelope	1/16/15	2	A Memorandum for the National Security Advisor to the Vice President.	TOP SECRET//SPECIAL HANDLING REQUIRED	TOP SECRET// [3 SCI Control System Markings]// ORCON/NOFORN
A4	VPOTUS EYES ONLY envelope	January 2015 (est.)	2	Classified information in the form of a table.	TOP SECRET// [5 SCI Control System Markings]// [1 SCI Control System Marking]// ORCON/NOFORN	TOP SECRET// [5 SCI Control System Markings]// [1 SCI Control System Marking]// ORCON/NOFORN
A5	VPOTUS EYES ONLY envelope	6/23/14	11	An Intelligence Assessment from the CIA's Directorate of Intelligence.	TOP SECRET// [8 SCI Control System Markings]// [2 SCI Control System Markings]// ORCON/NOFORN and a SENSITIVE stripe across the top right-hand corner of each page	TOP SECRET// [8 SCI Control System Markings]// [2 SCI Control System Marking]// ORCON/NOFORN
A6	VPOTUS EYES ONLY envelope	8/8/12	5	An Intelligence Memorandum from the CIA's Directorate of Intelligence.	TOP SECRET// [4 SCI Control System Markings]// ORCON/NOFORN and a SENSITIVE stripe across the top right-hand corner of each page	TOP SECRET// [4 SCI Control System Markings]// ORCON/NOFORN

¹ FBI Serial 676.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
A7	VPOTUS EYES ONLY envelope	1/28/15	10	Handwritten notes, all but one page of which relate to the Obama Administration's efforts to negotiate the Joint Comprehensive Plan of Action ("JCPOA").	None	SECRET//ORCON/NOFORN
A8	"Ukraine 02/09/15" file folder	3/9/15	7	A memorandum titled "Background for Meeting with President Tusk." There is no indication of an author, but the classification-authority block states that Jeff Prescott classified the document.	SECRET and TOP SECRET	TOP SECRET
A9	"VP Personal" file folder	12/12/15 (est.)	1	A Telephone Call Sheet setting forth the purpose of and talking points for a call with Ukrainian Prime Minister Yatsenyuk. There is a handwritten note addressed to Mr. Biden's executive assistant: "Get copy of this conversation from Sit Rm for my Records please" that is signed "Joe." Document A10 is attached to the document.	SECRET	SECRET**
A10	"VP Personal" file folder	12/11/15	5	A document in the format of a transcript documenting the substance of a December 11, 2015 call between Mr. Biden and Ukrainian Prime Minister Yatsenyuk. The document is attached to document A9.	CONFIDENTIAL and EYES ONLY DO NOT COPY	CONFIDENTIAL**
B1	"Weekend With Charlie Rose" binder (in garage); behind "Russia" tab	9/17/14	2	An Event Memo from an OVP national security staffer titled "Lunch with Ukrainian President Poroshenko" for a lunch at the Naval Observatory on September 18, 2014. The memo describes the purpose of the lunch, the participants, the press plan, and the sequence of events.	SECRET	SECRET**

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B2	"Weekend With Charlie Rose" binder (in garage); behind "Russia" tab	Undated	10	A paper attachment to B1 titled "Tab B – BACKGROUND" discussing issues related to Russian aggression toward Ukraine. There is no indication of an author.	SECRET//NOFORN	TOP SECRET//NOFORN
B2-1	"Weekend With Charlie Rose" binder (in garage); behind "Russia" tab	9/17/14	5	A Memorandum for the Vice President from staff members, with subject "U.S. Energy Assistance to Ukraine."	None	CONFIDENTIAL*
B3	"Weekend With Charlie Rose" binder (in garage); behind "Russia" tab	8/29/14	5	A paper with subject "Scenesetter for National Security Advisor Susan Rice's Visit to China." There is no indication of an author.	No classification header or footer; portion markings indicate an overall classification of SECRET.	SECRET**
B4	"Foreign Policy: 2nd Term" file folder	Undated	1	A paper titled "Second Term National Security Narrative" describing goals the Obama Administration could seek to achieve in its second term. There is no indication of an author.	SECRET//NOFORN	SECRET//NOFORN**
B4-1	"Foreign Policy: 2nd Term" file folder	Undated	1	A Memorandum for the President from The Vice President with the subject "Engagement with China in the Second Term." The paper suggests activities Vice President Biden could do in his second term to "build on my work last year by engaging with China's leaders in the second term."	No Classification Marking	CONFIDENTIAL**
B4-2	"Foreign Policy: 2nd Term" file folder	Undated	1	A document containing three lists: "Foreign Policy Must Do," "Foreign Policy – Want to Do," and "Management Administrative." There is no indication of an author.	No Classification Marking	CONFIDENTIAL**

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B5	"Foreign Policy: 2nd Term" file folder	Undated	9	A PowerPoint presentation with "National Security Council Meeting: Defining a Second Term Agenda" and "Prepared by National Security Staff," on the title slide.	TOP SECRET//NOFORN//Pre-decisional (first and second slides only)	CONFIDENTIAL**
B6	"FACTS FIRST" file folder	9/29/09	5	A Memorandum for the President from the National Security Advisor with the subject "Meeting on Afghanistan and Pakistan." The memo states its purpose as to prepare President Obama for "a meeting with [his] senior national security team on September 30, 2009."	TOP SECRET WITH TOP SECRET//NOFORN//CODEWORD ATTACHMENTS	TOP SECRET//NOFORN*
B7	"FACTS FIRST" file folder	9/27/09	4	A report from the Office of the Director of National Intelligence addressing topics related to the U.S. war in Afghanistan. The report is an attachment to B6.	TOP SECRET//HUMINT//COMINT//ORCON//NOFORN//FISA	TOP SECRET//HCS-P//SI//ORCON//NOFORN//FISA*
B8	"FACTS FIRST" file folder	Undated	1	A photocopy of an infographic related to Afghanistan and Al-Qa'ida that is partially cut off on the top, bottom, and right-hand side. The original and complete infographic—obtained from the National Archives—is labeled as a product of the National Counterterrorism Center. The original infographic was an attachment to B6.	No marking in the header or footer of the photocopy, but the original document—obtained from the National Archives—was marked TOP SECRET//HCS//SI//FGI//ORCON//NOFORN	SECRET//NOFORN
B9	"FACTS FIRST" file folder	9/27/09	2	A report from the Office of the Director of National Intelligence addressing topics related to the U.S. war in Afghanistan. The report is an attachment to B6.	TOP SECRET//HCS//SI//ORCON//NOFORN	TOP SECRET//HCS-P//SI//ORCON//NOFORN
B10	"FACTS FIRST" file folder	9/27/09	4	A report from the Office of the Director of National Intelligence addressing topics related to the U.S. war in Afghanistan. The report is an attachment to B6.	SECRET//NOFORN	SECRET//NOFORN

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B11	"FACTS FIRST" file folder	9/27/09	2	A report from the Office of the Director of National Intelligence addressing topics related to the U.S. war in Afghanistan. The report is an attachment to B6.	SECRET//NOFORN	SECRET//NOFORN
B12	"FACTS FIRST" file folder	9/23/09	3	A State Department cable from Ambassador Anne Patterson at the U.S. Embassy in Islamabad, Pakistan, with the subject "Reviewing Our Afghanistan - Pakistan Strategy." The cable is an attachment to B6.	SECRET//NOFORN	SECRET**
B13	"FACTS FIRST" file folder	Undated	4	A paper titled "Afghanistan/Pakistan Minimal Conditions Necessary to Achieve Our Core Goal." The State Department authored the document. The paper is an attachment to B6.	SECRET//REL TO USA, GBR	SECRET**
B13-1	"FACTS FIRST" file folder	9/22/09	2	A letter from the president of a foreign country to President Obama that addresses "the ongoing situation in Afghanistan" and sets forth the foreign country's views on the war. The document does not include classification markings, but states in the header that it is "Confidential . . . For President Obama." Document B15 references the letter as an attachment.	None	CONFIDENTIAL**
B13-2	"FACTS FIRST" file folder	9/29/09	1	A quarter-page of typewritten text titled "Notes from Meeting on September 29, 2009: 1:30-3:30 "Small Group Meeting: Afghanistan/Pakistan." The text quotes a question asked by then-Director of the Central Intelligence Agency Leon Panetta of then-Secretary of Defense Robert Gates and provides the yes-or-no answer to that question given by "Intelligence, State and Defense."	None	SECRET//NOFORN**

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B14	"FACTS FIRST" file folder	9/25/09	3	An e-mail copying the text of a September 25, 2009, State Department cable from the U.S. Embassy in Kabul, Afghanistan, authored by Ambassador Karl Eikenberry with the subject "KARZAI: MY OBSERVATIONS." The subject of the e-mail and text of the cable include a designation and each paragraph is portion-marked "(S)," which stands for Secret.	SECRET	SECRET
B14-1	"FACTS FIRST" file folder	Undated	4	A paper titled "Counterinsurgency (COIN) vs. Counterterrorism (CT) Strategies" that has no indications of author.	None	TOP SECRET//NOFORN*
B15	"FACTS FIRST" file folder	Undated	2	A paper titled "Some Facts and Considerations" that addresses topics related to al-Qa'ida, the Taliban, and Intelligence Community resources. The document appears to have been authored within the White House because it is critical of Intelligence Community assessments. The document references Document B13-1 as an attachment.	TOP SECRET//HSC//NOFORN	TOP SECRET//HCS-O// [4 SCI CONTROL SYSTEM MARKINGS]// ORCON/NOFORN*
B16	"FACTS FIRST" file folder	Undated	1	A PowerPoint slide titled "Pathway to COMISAF Initial Assessment" that does not indicate an author.	SECRET/NOFORN	SECRET//NOFORN
B17	"FACTS FIRST" file folder	10/13/09	1	A Power Point slide with the partial title "CJCS Update."	SECRET	SECRET
B18	"FACTS FIRST" file folder	Undated ²	1	A large-format infographic in the form of a table. The table addresses the capabilities of the Afghan government.	SECRET//NOFORN	SECRET//NOFORN

² Investigators located the document on the conference table in the Situation Room in White House photographs dated October 14, 2009.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B18-1	"FACTS FIRST" file folder	10/18/09	3	An unsigned, handwritten letter with the salutation "Mr. President." The letter appears to be in draft format and discusses COIN strategy in Afghanistan.	None	SECRET//NOFORN
B19	"FACTS FIRST" file folder	9/13/09	7	A PowerPoint presentation regarding Afghanistan titled "Sunday Small Group."	SECRET//NOFORN	SECRET//NOFORN
B20	"FACTS FIRST" file folder	8/31/09	3	A Memorandum for the President from the National Security Advisor with the subject "Weekly Update on Afghanistan and Pakistan." The memo included two attachments, labeled "Tab 1" and "Tab 2," that are documents B21 and B22, respectively.	TOP SECRET//SCI	TOP SECRET//HCS-O-P//ORCON/NOFORN*
B21	"FACTS FIRST" file folder	8/26/09	8	A one-page Memorandum for the President from then-Secretary of State Hillary Rodham Clinton dated August 26, 2009, attaching a seven-page Memorandum to the President from Special Representative Holbrooke dated August 28, 2009, with subject "Afghanistan/Pakistan Weekly Report August 22-August 28, 2009."	Cover memo: SECRET//NOFORN//NODIS (UNCLASSIFIED when separate from attachment) Holbrooke Memo: SECRET//NOFORN//NODIS	SECRET//NOFORN//NODIS

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B22	"FACTS FIRST" file folder	8/24/09	18 ³	A one-page, unclassified Memorandum for Assistant to the President and National Security Advisor from then-Defense Secretary Robert Gates attaching a five-page Central Command ("CENTCOM") weekly update for August 17-23, 2009, from General David Petraeus. The Gates memo also attaches a six-page Multi-National Force - Iraq ("MNF-I") weekly update for the same week from General Raymond Odierno. There are two copies of the cover memo from Gates and the CENTCOM update. The CENTCOM update includes an update on Afghanistan.	CENTCOM Update: SECRET//NOFORN MNF-I Update: SECRET // NOFORN // 2001190221	SECRET//NOFORN

³ B22 also includes a copy of the last eight pages of the first copy of General McChrystal's assessment, otherwise designated as part of Document B23. Those pages are not counted in this entry.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B23	"FACTS FIRST" file folder	8/30/09	126 ⁴	<p>A one-page, unclassified letter from General Stanley McChrystal, Commander, United States Forces – Afghanistan / International Security Assistance Force, Afghanistan, attaching a document titled "Commander's Initial Assessment" dated August 30, 2009, and authored by General McChrystal (only the first 58 pages included in B23).</p> <p>B23 then includes another copy of the letter from McChrystal, with the full 66-page assessment attached. The second copy of the assessment contains handwritten markings and notes.</p>	CONFIDENTIAL REL NATO/ISAF	CONFIDENTIAL//REL TO USA, ISAF, NATO
B24	"FACTS FIRST" file folder	9/10/09	9	<p>A one-page Memorandum for the President from the Vice President with the subject "Afghanistan" with "DRAFT" handwritten at the top. The memo attaches a nine-page paper titled "Afghanistan Discussion Paper: A 'Counter Terrorism Plus' Strategy." The paper does not specify an author, but the classification-authority block indicates it was classified by Antony Blinken.</p> <p>The last two pages of B23 are a printout of an article in <i>Newsweek</i> titled "The Geopolitics of Golf," by Richard N. Haass published on September 3, 2009.</p>	TOP SECRET	TOP SECRET//NOFORN*

⁴ The last three pages of B23 are a printout of an opinion piece from the *New York Times* dated August 20, 2009, titled "In Afghanistan, the Choice is Ours" by Richard N. Haass. Those pages are not counted in this entry.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B25	"AFGANASTAN 2009" file folder	11/25/09	3	A Memorandum for the President from the Vice President that includes handwritten notes, edits, and markings. It also includes partially cut-off fax-machine markings for November 25, 2009, at around 2:43 pm. The memo begins, "[h]ere are some final thoughts on Afghanistan and Pakistan, which may help shape the argument you make to the American people." The memo supports Mr. Biden's belief "that we should not increase our forces" in Afghanistan. Mr. Biden sought to "relay the highlights of a conversation with Karl Eikenberry and recommend that you call him." A handwritten note next to that sentence states, "[h]e is a stand up guy will take risks."	TOP SECRET	SECRET**
B25-1	"AFGANASTAN 2009" file folder	11/27/09	27	Handwritten Letter to President Obama and Drafts. See full description in text of report.	None	TOP SECRET//NOFORN*
B26	"AFGANASTAN 2009" file folder	11/12/08	5	A Memorandum for Principals from the National Security Advisor with subject "Afghanistan-Pakistan: Following up on November 11 Meeting." The memo begins: "Based on our meeting with the President on November 11, we have developed revised implementation guidance to achieve our national core goal in Afghanistan and frame a variant of 'Force Option 2A.'" There are handwritten notes and markings on the first and last page of the memo. The memo includes a list of six questions on pages 3 through 4.	SECRET//NOFORN	Declassification date passed on 11/9/2019; handle as marked until official declassification review.**

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B27	"AFGANASTAN 2009" file folder	11/13/09	5	A memorandum that is nearly identical to the memo designated as B26, except that this memo is dated November 13, 2009, includes a red "TOP SECRET" stamp at the top and bottom of each page (in addition to the "SECRET/NOFORN" marking), and has a list of seven questions.	TOP SECRET and SECRET/NOFORN	Declassification date passed on 11/9/2019; handle as marked until official declassification review.**
B28	"AFGANASTAN 2009" file folder	11/15/09	4	A Memorandum for the National Security Advisor from the Vice President. The memo begins: "Jim - You requested comments on a proposed paper to the President, following up on our November 11 meeting on Afghanistan-Pakistan, with a focus on the Afghanistan strategy. Here are mine:"	TOP SECRET	Declassification date passed on 11/15/2019; handle as marked until official declassification review.**
B29	"AFGANASTAN 2009" file folder	11/11/09	3	A document titled "Talking Points" with the handwritten date "11/11/09" in the upper-right corner of the first page. The talking points appear to be for Mr. Biden to deliver to President Obama on the topic of the Afghanistan Strategic Review.	TOP SECRET	Declassification date passed on 11/11/2019; handle as marked until official declassification review.**
B30	"AFGANASTAN 2009" file folder	10/29/09	3	A paper titled "Alternative Mission for Afghanistan" with no author indicated and the handwritten date "Oct 29" in the upper-right corner. It "describes an alternative mission to properly resourced counterinsurgency in Afghanistan."	SECRET	SECRET
B31	"AFGANASTAN 2009" file folder	Undated	1	A document titled "Talking Points for call to Secretary Gates" addressing the strategic review in Afghanistan..	CONFIDENTIAL and SECRET	SECRET
B31-1	"AFGANASTAN 2009" file folder	Undated	1	A typewritten portion of the draft memo included as part of documents B25 and B25-1.	None	TOP SECRET//NOFORN*

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B32	"AFGANASTAN 2009" file folder	11/11/09	12	A PowerPoint Presentation titled "CJCS Brief to the President." Among other topics, the slides describe and assess three different force options for Afghanistan.	SECRET//REL USA, ISAF, NATO	SECRET//NOFORN
B33	"AFGANASTAN 2009" file folder	11/11/09 (est.)	3	PowerPoint slides numbered 13-15 that are likely part of the same presentation as B32. The first slide is titled "Progression of Full-Spectrum COIN." The second slide is titled "Importance of Full-Spectrum COIN." The third slide includes a chart and is titled "Force Level Decision Points."	Slides labeled 13, 14: CONFIDENTIAL REL/NATO/ISAF Slide labeled 15: SECRET//REL USA, ISAF, NATO	CONFIDENTIAL//REL TO USA, ISAF, NATO
B34	"AFGANASTAN 2009" file folder	11/11/09 (est.)	5	Five PowerPoint slides numbered 16-20 that are likely part of the same presentation as B32 and B33. The first slide is a chart titled "Alternative Mission in Afghanistan." The last slide is titled "Projected ANSF Growth Decision Points."	Slides labeled 16: SECRET Slides labeled 17-19: SECRET//REL USA, ISAF, NATO Slide labeled 20: None	SECRET
B35	"AFGANASTAN 2009" file folder	Undated	1	A PowerPoint slide titled "Securing Additional Allied/Partner Contributions."	SECRET//NOFORN	Agency could not determine classification.
B36	"AFGANASTAN 2009" file folder	10/30/09	1	A Memorandum for the President from then-Defense Secretary Robert Gates, responding to a request from the National Security Council. The memo attaches the document designated as B37.	SECRET//NOFORN	SECRET//NOFORN
B37	"AFGANASTAN 2009" file folder	Undated	11	A Memorandum for Principals from the National Security Advisor with the handwritten date "11-8" in the upper right corner regarding the strategy for Afghanistan. The attachments are listed as: (1) Tab A: Secretary Gates's Memorandum and "Alternative Mission for Afghanistan" Paper and (2) Tab B Ambassador Eikenberry's Cable, "COIN Strategy: Civilian Concerns."	SECRET WITH SECRET//NOFORN ATTACHMENT	SECRET//NOFORN*

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
B38	"AFGANASTAN 2009" file folder	11/6/09	4	A State Department cable from the U.S. Embassy in Kabul, Afghanistan authored by Ambassador Karl Eikenberry with subject "COIN STRATEGY: CIVILIAN CONCERNS."	SECRET with a NODIS banner	SECRET**
C1	"1/6/12 #2 Foreign Policy" Notebook	5/22/13	1	A PowerPoint slide describing an "Option C" for the distribution and composition of U.S. forces in Afghanistan after 2014. There is no indication of an author.	SECRET//NOFORN//PRE-DECISIONAL	SECRET//NOFORN
C2	"1/6/12 #2 Foreign Policy" Notebook	5/22/13	1	A PowerPoint slide describing an "Option D" for the distribution and composition of U.S. forces in Afghanistan after 2014. There is no indication of an author.	SECRET//NOFORN//PRE-DECISIONAL	SECRET//NOFORN
C3	"1/6/12 #2 Foreign Policy" Notebook	5/22/13	1	A PowerPoint slide describing an "Option C+" for the distribution and composition of U.S. forces in Afghanistan after 2014. There is no indication of an author.	SECRET//NOFORN//PRE-DECISIONAL	SECRET//NOFORN
C4	"1/6/12 #2 Foreign Policy" Notebook	11/1/13	3	A Memorandum for the Vice President from the Office of the Vice President National Security Affairs regarding a meeting with Iraqi Prime Minister Maliki. The memo sets forth "[a] few things to note in advance of your Maliki meeting" and provides "a concise distillation of the issues with Iraq that may be helpful."	TOP SECRET//SCI	TOP SECRET//HCS-O//SI//ORCON//NOFORN*
D1	"[INTL] TERRORISM" file folder	6/30/76	5	A Staff Memorandum to Members of the Committee on Foreign Relations on "Terrorism: Protection and Policy" that "discusses the security of American embassies and diplomats abroad in the wake of the killing of Ambassador Meloy and Mr. Waring in Beirut."	CONFIDENTIAL with red tag stapled to the cover memo CLASSIFIED COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE	Undetermined: Legislative Branch document without indications of information derived from classified Executive Branch information. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.**

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D2	"Biden Meeting w/Chancellor Schmidt 6/10/80-6/12/80" file folder	6/13/80	6	A Memorandum for the Record from a Senate staffer with subject "Senator Biden's Meeting with Helmut Schmidt" that recounts the discussion at a meeting between Mr. Biden and German Chancellor Helmut Schmidt on June 11, 1980.	CONFIDENTIAL with tag stapled to the cover memo CLASSIFIED COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE	Undetermined: Legislative Branch document without indications of information derived from classified Executive Branch information. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.**
D3	"GREECE" file folder	3/1/80	Total: 9 Marked: 2	Three separate memoranda: • a 2-page memo titled "US-GREEK RELATIONS" marked "LIMITED OFFICIAL USE" • a 2-page memo titled "STATUS OF NEGOTIATIONS ON CYPRUS" marked "CONFIDENTIAL" on the first page • a 5-page memo titled "REINTEGRATION OF GREEK FORCES INTO MATO MILITARY COMMAND STRUCTURE" marked "CONFIDENTIAL" on the second page	CONFIDENTIAL	Undetermined: Legislative Branch document without indications of information derived from classified Executive Branch information. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.**
D4	"YUGOSLAVIA" file folder	7/13/78	Total: 6 Marked: 1	A 5-page State Department memo with subject "Visit to the United States by Dragoslav MARKOVIC, President of the Assembly of the Socialist Federal Republic of Yugoslavia, and delegation." The memo attaches "[b]iographic information on Markovic and other members of the delegation." Page 6 is a one-page biography of Markovic marked "CONFIDENTIAL." There are two copies of the memo and attachment, which FBI separately designated D4 and D5.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D5	"YUGOSLAVIA" file folder	7/13/78	Total: 6 Marked: 1	<p>A 5-page State Department memo with subject "Visit to the United States by Dragoslav MARKOVIC, President of the Assembly of the Socialist Federal Republic of Yugoslavia, and delegation." The memo attaches "[b]iographic information on Markovic and other members of the delegation." Page 6 is a one-page biography of Markovic marked "CONFIDENTIAL."</p> <p>There are two copies of the memo and attachment, which FBI separately designated D4 and D5.</p>	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D6	"YUGOSLAVIA" file folder	Undated	5	A memorandum titled "EDVARD KARDELJ: A PRIMER ON HIS THINKING."	SECRET	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D7	"SALT III" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	Undated	3	A memorandum titled "SALT III" that discusses predictions regarding negotiations for a Strategic Arms Limitations Talk III.	CONFIDENTIAL	Likely UNCLASSIFIED, subject to formal declassification review.**
D8	"Other Arms Control" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	Undated	Total: 6 Marked: 4	<p>A 6-page memorandum titled "MBFR" that discusses the "Mutual and Balanced Force Reduction negotiations" that "began in November 1973 in Vienna."</p> <p>The last two pages are not marked Confidential and set out "Anticipated Soviet Points" and "Suggested US Points."</p>	CONFIDENTIAL	CONFIDENTIAL//FORMERLY RESTRICTED DATA

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D9	"Other Arms Control" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	Undated	2	A memorandum titled "Comprehensive Test Ban" that discusses issues expected to arise upon the resumption of the "trilateral CTB talks in Geneva" that "recessed in late July and are expected to resume again in September."	CONFIDENTIAL	Likely UNCLASSIFIED, subject to formal declassification review.**
D10	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	Undated	2	A memorandum titled "CODEL BIDEN" that sets forth "a tentative draft outline of the manner in which the delegation might want to make its first presentation on SALT at the Plenary session with the Supreme Soviet."	CONFIDENTIAL	Likely UNCLASSIFIED, subject to formal declassification review.**
D11	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	5/25/79	1	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D12	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	8/16/79	2	A biography of a member of a foreign delegation.	NOFORN at the top (confidential marking appears cut off) and CONFIDENTIAL at the bottom	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D13	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	8/10/79	2	A biography of a member of a foreign delegation.	CONFIDENTIAL NOFORN	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D14	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	8/10/79	2	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D15	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	5/29/79	1	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D16	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	Undated	1	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D17	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	3/22/79	1	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D17-1	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	7/23/79	1	A biography of a member of a foreign delegation.	None	SECRET//NOFORN

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D18	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	5/29/79	1	A biography of a member of a foreign delegation.	CONFIDENTIAL	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D19	"Senator Biden" file folder in a Redweld folder labeled "CODEL BIDEN August 1979"	8/13/79	1	A biography of a member of a foreign delegation.	CONFIDENTIAL NOFORN	SECRET//NOFORN Classification upgraded in accordance with current classification guidelines.
D20	"Af/Pak 1" Notebook	11/21/09	5	A State Department cable from the U.S. Embassy in Kabul with subject "HELMAND VIEWS ON U.S. TROOP LEVELS IN AFGHANISTAN." The cable "was drafted by the State Representative to the 2d Marine Expeditionary Brigade, and its Commanding General, Brigadier General Lawrence Nicholson . . . reviewed [the] cable."	CONFIDENTIAL	Declassification date passed on 11/11/2019; handle as marked until official declassification review.**
D21	"DAILY/MEMO" Notebook	Undated	2	Two PowerPoint slides. The first slide is titled "Scoping Key Priorities for the Second Term" and sets out "Key Products to Prepare for the January NSC meeting on Priorities." The slide is marked "SECRET//NOFORN." The second slide is unmarked and depicts a flow chart for a National Security Council process.	SECRET//NOFORN (first slide only)	SECRET//NOFORN** State Department noted that the document may be overclassified.
D22	"APUTATIONS Feb '11" file folder	2/11/11 (est.)	1	A document titled "CJCS 12-Hour Egypt Update for 11 Feb 0600" that provides an update on events related to the 2011 revolution in Egypt and the resignation of Hosni Mubarak from the presidency in Egypt.	SECRET//NOFORN	SECRET//NOFORN

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
D23	"Weekend With Charlie Rose" binder (in bedroom office); behind "Russia" tab	9/17/14	3	An Event Memo from an OVP national security staffer titled "Lunch with Ukrainian President Poroshenko" for a lunch at the Naval Observatory on September 18, 2014. The memo describes the purpose of the lunch, the participants, the press plan, and the sequence of events.	SECRET	SECRET**
D24	"Weekend With Charlie Rose" binder (in bedroom office); behind "Russia" tab	9/17/15 (est.)	10	A paper attachment to D23 titled "Tab B BACKGROUND" discussing issues related to Russian aggression toward Ukraine. There is no indication of an author.	SECRET//NOFORN	TOP SECRET//NOFORN*
D25	"Weekend With Charlie Rose" binder (in bedroom office); behind "Russia" tab	8/29/14	5	A Paper titled "Scenesetter for National Security Advisor Susan Rice's Visit to China" with no indication of an author.	No classification header or footer; portion markings indicate an overall classification of SECRET.	SECRET**
E1	"FOREIGN RELATIONS COMMITTEE" file folder	1/23/80	3	An Action Memorandum from a Senate staffer to nine Senators, including Mr. Biden, with subject "Proposed 1980 Committee Budget -- For Discussion During Meeting of Democrats in S-201 at 2:00 p.m., Wednesday, January 23." The document is identical to G4.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**
E2	"EUROPE" file folder	6/4/80	2	A letter from three Senators on the Committee on Foreign Relations, including Mr. Biden, to Secretary of State Edmund S. Muskie intended to express concerns about delays in SALT and TNF arms negotiations. There are stapled unclassified notes and correspondence attached to the letter.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
E3	"EUROPE" file folder	5/29/80	2	An Action Memorandum addressed to Senators three Senators including Mr. Biden regarding the letter to Secretary of State Edmund S. Muskie recommending "[t]hat you each sign the attached letter.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**
E4	"EUROPE" file folder	5/29/80	2	Another copy of the Action Memorandum designated E3 with an unclassified note from Senate Staffer 3 to Mr. Biden attached to the front of memo recommending Mr. Biden sign the letter.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**
E5	"EUROPE" file folder	5/30/80	2	An earlier version of the letter from three Senators on the Committee on Foreign Relations, including Mr. Biden, to Secretary of State Edmund S. Muskie intended to express concerns about delays in SALT and TNF arms negotiations. There are stapled unclassified notes and correspondence attached to the letter.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**
E6	"FOREIGN RELATIONS COMMITTEE" file folder	11/28/79	2	Two copies of a one-page Action Memorandum from a Senate staffer, thru Ted Kaufman, to Mr. Biden attaching a memo from another Senate staffer (designated by FBI as E7) on TNF modernization.	SECRET	UNCLASSIFIED**

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** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
E7	"FOREIGN RELATIONS COMMITTEE" file folder	11/26/79	2	An Information Memorandum from a Senate Staffer to another Senate staffer regarding "TNF Modernization and Arms Control."	SECRET	Undetermined: Legislative Branch document that may contain sensitive Executive Branch information, which may have been declassified given age of the document. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.**
F1	"With the Compliments of the American Embassy, Bonn" and "Senator Joseph R. Biden, Jr." file folder	12/17/87	2	A State Department cable from Ambassador Burt at the American Embassy in Bonn with subject "Proposal for a NATO Wise Men's Study."	SECRET with a brown strip around the document labeled "Restricted."	Cable automatically declassified on December 31, 2012**
G1	"GREECE" file folder	3/11/77	3	A Senate Committee on Foreign Relations "SUMMARY OF MARCH 11, 1977 EXECUTIVE MEETING OF FULL COMMITTEE (Closed S-116, 10:30 - 12:15pm) regarding the testimony of Ambassador Clark M. Clifford.	SECRET with a cover sheet labeled CLASSIFIED COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE	Undetermined: Legislative Branch document that may contain sensitive Executive Branch information. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.** Includes Foreign Government Information
G2	"MUTUAL BALANCED FORCE REDUCTION MBFR" file folder	July 1977	5	A paper titled "Mutual and Balanced Force Reduction (MBFR)."	CONFIDENTIAL	CONFIDENTIAL//FORMERLY RESTRICTED DATA

* Agency with highest recommended classification would need to consult with other U.S. government agencies before settling on a final classification.

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Appendix A: Recovered Documents

Doc. ID	Contained In	Date	Page Count	Summary	Classification Markings	Results of Classification Review
G3	"FOREIGN RELATIONS COMMITTEE" file folder	3/2/79	8	A Senate Committee on Foreign Relations Staff Memorandum titled "National Security Interests in a Law of the Sea Treaty March 6, 1979 Hearings."	CONFIDENTIAL	Undetermined: Legislative Branch document that may contain sensitive Executive Branch information. Marking is not a necessarily a national-security classification because this is a Legislative Branch document.**
G4	"FOREIGN RELATIONS COMMITTEE" file folder	1/23/80	3	An Action Memorandum to nine Senators, including Mr. Biden, with subject "Proposed 1980 Committee Budget -- For Discussion During Meeting of Democrats in S-201 at 2:00p.m., Wednesday, January 23." The document is identical to E1.	CONFIDENTIAL	Department of State did not identify any potentially sensitive Executive Branch information. The "CONFIDENTIAL" marking, therefore, does not appear to be a national security classification marking.**
G5	"CFE briefing book material" file folder	11/20/91	2	A letter to Richard G. Lugar, Chairman of the Committee on Foreign Relations, from an unspecified sender regarding foreign compliance with the CFE Treaty.	SECRET NOFORN	Undetermined

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Appendix B: Classification Review Results for Select Notebook Entries and Other Handwritten Material ¹

Handwritten Item Description	Entry Date	Entry Page Count	Entry Topic	Results of Classification Review
Unlabeled notebook (entries from 11/27/2008 - 7/15/2009)	5/29/09 (entry has typo indicating 2008)	1 page ²	A foreign adversary	TOP SECRET**
Unlabeled notebook (entries from 11/27/2008 - 7/15/2009)	Undated (likely 6/17/09 or 6/18/09)	1 page ³	Pakistan	CONFIDENTIAL**
"Af/Pak 1" notebook	11/28/09	20 loose pages inserted in notebook ⁴	Handwritten memorandum to POTUS regarding the Afghanistan strategy review	SECRET**
"Af/Pak 1" notebook	11/7/09	5 pages ⁵	Afghanistan / Pakistan	TOP SECRET//HCS-O// [4 SCI Control System Markings]// ORCON/NOFORN
"FOREIGN POLICY 10/13/09 - 1/13/12" notebook	4/16/10	2 pages ⁶	Afghanistan / Pakistan	TOP SECRET//SI//NOFORN**
"FOREIGN POLICY 10/13/09 - 1/13/12" notebook	Undated	2 pages ⁷	Pakistan	SECRET**
"FOREIGN POLICY 10/13/09 - 1/13/12" notebook	4/29/10	2 pages ⁸	Foreign adversary	TOP SECRET//HCS-O// [3 SCI Control System Markings]// [2 SCI Control System Markings]// ORCON/NOFORN

¹ FBI Serial 676.

² 1B64-0056.

³ 1B64-0065.

⁴ 1B66-0003-22.

⁵ 1B66-0082-84.

⁶ 1B51-0073.

⁷ 1B51-0074.

⁸ 1B51-0080-81.

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Appendix B: Classification Review Results for Select Notebook Entries and Other Handwritten Material

Handwritten Item Description	Entry Date	Entry Page Count	Entry Topic	Results of Classification Review
"FOREIGN POLICY 10/13/09 - 1/13/12" notebook	11/29/11	2 loose pages inserted in notebook ⁹	Foreign adversary	SECRET**
Unlabeled notebook (entries from 4/20/2009 - 12/4/2009)	Undated (likely 1/10/11)	1 page ¹⁰	Briefing on sensitive topics	TOP SECRET//HCS-O//ORCON/NOFORN**
Unlabeled notebook (entries from 4/20/2009 - 12/4/2009)	1/27/11	1 page ¹¹	Situation Room meeting with POTUS regarding Afghanistan and Pakistan	SECRET//HCS-O//ORCON/NOFORN
Unlabeled notebook (entries from 4/20/2009 - 12/4/2009)	4/25/11	6 pages ¹²	National Security Council meeting regarding Afghanistan and Pakistan	TOP SECRET//NOFORN**
"1-7-10 → 8-3-14" notebook	5/28/11	7 pages ¹³	Recollection of raid on Osama Bin Laden	TOP SECRET//HCS-O// [4 SCI Control System Markings]// ACCM [Program Name]// ORCON/NOFORN
"1-7-10 → 8-3-14" notebook	10/9/13	1 page ¹⁴	Notes from the President's Daily Brief	SECRET//NOFORN
"1-7-10 → 8-3-14" notebook	Undated	2 pages ¹⁵	Notes from the President's Daily Brief	SECRET**
"Miscellaneous 1/9/10 - 1/17/12" notebook	6/19/13	1 page ¹⁶	Brief from the National Security Agency	SECRET//REL

⁹ 1B51-0121-0122.

¹⁰ 1B63-0012.

¹¹ 1B63-0016.

¹² 1B63-0026-29.

¹³ 1B30-0030-33.

¹⁴ 1B30-0065.

¹⁵ 1B30-0093-94.

¹⁶ 1B52-0091.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix B: Classification Review Results for Select Notebook Entries and Other Handwritten Material

Handwritten Item Description	Entry Date	Entry Page Count	Entry Topic	Results of Classification Review
"1/6/12 #2 Foreign Policy" notebook	2/22/12	2 pages ¹⁷	Situation Room meeting with POTUS	TOP SECRET**
"Foreign Policy 11/2013 - 2014" notebook	1/1/14	1 page ¹⁸	Accumulated questions from President's Daily Briefs	SECRET**
"Foreign Policy 11/2013 - 2014" notebook	1/7/14	2 pages ¹⁹	Meeting in the Oval Office with national security advisors	SECRET**
"Foreign Policy 11/2013 - 2014" notebook	1/10/14	3 pages ²⁰	Meeting in the Situation Room with POTUS regarding a foreign adversary	SECRET**
"Foreign Policy 11/2013 - 2014" notebook	5/19/14	2 pages ²¹	Notes regarding Unmanned Aerial Systems with POTUS	SECRET**
"Foreign Policy 11/2013 - 2014" notebook	11/26/14	4 pages ²²	National Security Council meeting in the Situation Room	SECRET**
"Foreign Policy 11/2013 - 2014" notebook	3/11/15	1 page ²³	A meeting with John Kerry regarding a foreign adversary	SECRET//NOFORN
"Foreign Policy 11/2013 - 2014" notebook	4/1/15	1 page ²⁴	Notes from the President's Daily Brief	TOP SECRET**
Notecards Seized from Hearth Railing	9/17/13	1 notecard (front only) ²⁵	Notes from the President's Daily Brief	TOP SECRET**

¹⁷ 1B15-0012-13.

¹⁸ 1B67-0012.

¹⁹ 1B67-0013.

²⁰ 1B67-0019-20.

²¹ 1B67-0038.

²² 1B67-0063-65.

²³ 1B67-0075.

²⁴ 1B67-0076.

²⁵ 1B23-0012.

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Appendix B: Classification Review Results for Select Notebook Entries and Other Handwritten Material

Handwritten Item Description	Entry Date	Entry Page Count	Entry Topic	Results of Classification Review
Notecards Seized from Hearth Railing	10/15/13	1 notecard (front only) ²⁶	Notes from the President's Daily Brief	TOP SECRET**
Notecards Seized from Hearth Railing	8/19/14	1 notecard (front and back) ²⁷	Notes from the President's Daily Brief	SECRET**
"Foreign Policy" notebook	10/28/14	5 pages ²⁸	Situation Room Meeting with POTUS and the Joint Chiefs regarding military readiness	SECRET
"Foreign Policy" notebook	11/4/14	2 pages ²⁹	Meeting with POTUS, the Secretary of Defense, the Chairman of the Joint Chiefs, and other advisors	SECRET**
"Foreign Policy" notebook	12/14/15	7 pages ³⁰	Meeting with "POTUS+Brass+NSC" regarding Counter ISIL Strategy Review	SECRET//NOFORN
"Foreign Policy" notebook	11/24/16	1 page ³¹	Secure Video Teleconference regarding homeland threats	SECRET//NOFORN
"Daily AUGUST 2014 - SEPTEMBER 2016" notebook	Undated	2 pages ³²	Foreign policy meeting notes	SECRET//NOFORN
"Daily AUGUST 2014 - SEPTEMBER 2016" notebook	Undated (likely 6/18/15)	7 pages ³³	Meeting with POTUS and national security leaders	SECRET//HCS-O//ORCON/NOFORN

²⁶ 1B23-0015.

²⁷ 1B23-0006-7.

²⁸ 1B58-0029-31.

²⁹ 1B58-0033.

³⁰ 1B58-0079-82.

³¹ 1B58-0094.

³² 1B57-0014.

³³ 1B57-0061-65.

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Appendix B: Classification Review Results for Select Notebook Entries and Other Handwritten Material

Handwritten Item Description	Entry Date	Entry Page Count	Entry Topic	Results of Classification Review
"FOREIGN POLICY 6/10/15" notebook	9/3/15 (first two pages undated)	5 pages ³⁴	Foreign adversaries	CONFIDENTIAL**
"FOREIGN POLICY 6/10/15" notebook	5/14/16	2 pages ³⁵	Counterterrorism discussions, including on "Acela North Bound"	SECRET**
"FOREIGN POLICY 6/10/15" notebook	6/3/16	2 pages ³⁶	Situation Room meeting with POTUS regarding Afghanistan	SECRET//NOFORN
"FOREIGN POLICY 6/10/15" notebook	1/5/17	2 pages ³⁷	Sensitive Topic	TOP SECRET//HCS-O//ORCON/NOFORN
"DAILY 12/15/15 2026-2017-2018 " notebook	6/13/16	1 page ³⁸	National security meeting	SECRET//NOFORN

³⁴ 1B22-0013-15.

³⁵ 1B22-0023.

³⁶ 1B22-0024.

³⁷ 1B22-0026.

³⁸ 1B20-0034.

** Highest level of classification handling recommended by the State Department acting as a proxy for the National Security Council (including an assessment of State Department equities).

Appendix C: Evidence Items

Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B01 ¹	11/28/22	PBC	Hard drive found in box labeled: VP Records		
1B04 ²	12/21/22	Wilmington Residence	Box containing miscellaneous documents with classifications up to TOP SECRET. Collected from the garage.	B4-5, B25-38	Due to the content's higher classifications and sensitivities, the folder, "Facts First," was removed from 1B4 and entered as separate evidence, designated as 1B44.
1B44 ³	12/21/22	Wilmington Residence	Red Folder with handwritten "Facts First" containing documents with classifications up to TOP SECRET//HCS//NOFORN.	B6-B24	Originally contained within 1B4.
1B05 ⁴	12/21/22	Wilmington Residence	Box containing binders with classified documents up to SECRET//NOFORN. Collected from the garage.	B1-B3	
1B13 ⁵	1/12/23	Wilmington Residence	Three (3) pages with classification markings SECRET//NOFORN//Pre-decisional.	C1-C3	Documents were originally contained within notebook (1B15).
1B14 ⁶	1/12/23	Wilmington Residence	Three (3) pages with classification markings TS/SCI	C4	Documents were originally contained within notebook (1B15).
1B15 ⁷	1/14/23	Wilmington Residence	Black spiral notebook labeled: "1/6/12 #2 Foreign Policy"		

¹ FBI Serials 12, 14, 23.

² FBI Serials 29, 35, 134, 181, 195, 284, 322, 443, 512.

³ FBI Serials 29, 35, 195, 440, 443, 510, 512.

⁴ FBI Serials 29, 35, 195, 270, 284, 701.

⁵ FBI Serials 43, 44, 160, 682.

⁶ FBI Serials 43, 44, 160, 682.

⁷ FBI Serials 44, 46, 47, 134, 322, 682.

Appendix C: Evidence Items

Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B17 ⁸	1/20/23	Wilmington Residence	Box labeled: Save the Attic; Foreign Travel. Contained miscellaneous documents with classification markings up to CONFIDENTIAL.	D1-D3	
1B18 ⁹	1/20/23	Wilmington Residence	Box labeled: International Travel 1973-1979. Contained miscellaneous documents with classification markings up to SECRET	D4-D19	
1B20 ¹⁰	1/20/23	Wilmington Residence	Black spiral notebook labeled: "DAILY 12/15/15 and 2026-2017-2018."		
1B22 ¹¹	1/20/23	Wilmington Residence	Black spiral notebook labeled: "FOREIGN POLICY 6/10/15"		At the time of the search, three notebooks were found in the same location, seized and entered into evidence, collectively designated as 1B22. For evidence handling and review purposes, each notebook was given its own FBI evidentiary number: 1B22, 1B67 and 1B68.
1B67 ¹²	1/20/23	Wilmington Residence	Black spiral notebook labeled: "Foreign Policy 11/2013-2014"		Initially collected with 1B22.
1B68 ¹³	1/20/23	Wilmington Residence	Black spiral notebook labeled: "Obama/Biden 7-15-13 → 10-10-16"		Initially collected with 1B22.
1B23 ¹⁴	1/20/23	Wilmington Residence	Loose, miscellaneous papers with handwritten notes (notecards).		

⁸ FBI Serials 49, 77, 270, 284, 639.

⁹ FBI Serials 49, 77, 270, 284, 639.

¹⁰ FBI Serials 49, 77, 248, 322.

¹¹ FBI Serials 49, 77, 322.

¹² FBI Serials 49, 77, 322.

¹³ FBI Serials 49, 77, 322.

¹⁴ FBI Serials 49, 77, 322, 664.

Appendix C: Evidence Items

Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B25 ¹⁵	1/20/23	Wilmington Residence	Black spiral notebook labeled: "Daily/Memo"	D21	At the time of the search, eight notebooks were found in the same location, seized and entered into evidence, collectively, designated as 1B25. For evidence handling and review purposes, each notebook was given its own FBI evidentiary number: 1B25, 1B51, 1B52, 1B62, 1B63, 1B64, 1B65, and 1B66.
1B51 ¹⁶	1/20/23	Wilmington Residence	Black spiral notebook labeled: "FOREIGN POLICY 10/13/09 - 1/17/12"		Initially collected with 1B25.
1B52 ¹⁷	1/20/23	Wilmington Residence	Black spiral notebook labeled: "Miscellaneous from 1/9/10 - 1/17/12"		Initially collected with 1B25.
1B62 ¹⁸	1/20/23	Wilmington Residence	Black spiral unlabeled notebook with first interior page stating: "12-2-09, 11-15-10"		Initially collected with 1B25.
1B63 ¹⁹	1/20/23	Wilmington Residence	Black spiral unlabeled notebook with first interior page stating: "Afghanistan - Pakistan Review December 2010 Review"		Initially collected with 1B25.
1B64 ²⁰	1/20/23	Wilmington Residence	Black spiral unlabeled notebook with entry dates 11/27/08 to 7/15/09		Initially collected with 1B25.
1B65 ²¹	1/20/23	Wilmington Residence	Black spiral notebook labeled: "POST ELECTION"		Initially collected with 1B25.

¹⁵ FBI Serials 49, 77, 134, 322, 682.

¹⁶ FBI Serials 49, 77, 322, 682.

¹⁷ FBI Serials 49, 77, 322.

¹⁸ FBI Serials 49, 77, 322.

¹⁹ FBI Serials 49, 77, 322.

²⁰ FBI Serials 49, 77, 322.

²¹ FBI Serials 49, 77, 322.

Appendix C: Evidence Items

Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B66 ²²	1/20/23	Wilmington Residence	Black spiral notebook labeled: "Af/Pak 1"	D20	Initially collected with 1B25.
1B27 ²³	1/20/23	Wilmington Residence	Various documents in blue file folder labeled Amputations Feb '11. Contained document with classification markings up to SECRET//NOFORN.	D22	
1B30 ²⁴	1/20/23	Wilmington Residence	Black notebook labeled: "1/7/10 → 8/3/14"		At the time of the search, four notebooks were found in the same location, seized and entered into evidence, collectively designated as 1B30. For evidence handling and review purposes, each notebook was given its own FBI evidentiary number: 1B30, 1B57, 1B58, and 1B59.
1B57 ²⁵	1/20/23	Wilmington Residence	Black notebook labeled: "Daily AUGUST 2014 - SEPTEMBER 2016"		Initially collected with 1B30.
1B58 ²⁶	1/20/23	Wilmington Residence	Black notebook labeled: "Foreign Policy"		Initially collected with 1B30.
1B59 ²⁷	1/20/23	Wilmington Residence	Black notebook labeled: "DAILY 2016"		Initially collected with 1B30.
1B31 ²⁸	1/20/23	Wilmington Residence	Blue unlabeled binder contained documents with classification markings up to SECRET//NOFORN.	D23-D25	

²² FBI Serials 49, 77, 322, 682.

²³ FBI Serials 49, 77, 270, 284.

²⁴ FBI Serials 49, 77, 248, 322.

²⁵ FBI Serials 49, 77, 322.

²⁶ FBI Serials 49, 77, 322.

²⁷ FBI Serials 49, 77, 322.

²⁸ FBI Serials 49, 77, 270, 284, 701.

Appendix C: Evidence Items

Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B35 ²⁹	1/27/23	University of Delaware	Unmarked Box - 329-94-341 containing documents with classification markings up to SECRET.	E1-E7	
1B37 ³⁰	2/3/23	University of Delaware	Manila folder labeled: With the Compliments of the American Embassy, Bonn, Senator Joseph R. Biden, Jr. Contained documents with classification marking up to SECRET.	F1	
1B43 ³¹	3/3/23	PBC Scheduler	One laptop, with charging cable.		
1B48 ³²	4/13/23	NARA	Manila envelope labeled: Iran 1/30/15, Eyes Only VPOTUS. From Box 3 stored at NARA. The envelope contained documents with classification markings up to TS/SCI and handwritten notes.	A3-A7	
1B49 ³³	4/13/23	NARA	Documents from Box 1 stored at NARA with classification markings up to TS/SCI. Documents from Box 3 stored at NARA with classification markings up to TOP SECRET	A1-A2 (Box 1); A8-A10 (Box 3)	
1B77 ³⁴	5/23/23	Wilmington Residence	Brown paper bag labeled: Balducci's, containing various items.		1B31 was originally located inside this Balducci bag.
1B69 ³⁵	6/6/23	University of Delaware	Legal sized brown folder labeled: CFE Briefing Book Material, containing documents with classification marking up to SECRET//NOFORN.	G5	

²⁹ FBI Serials 67, 270, 284, 466.

³⁰ FBI Serials 71, 270, 284.

³¹ FBI Serial 108.

³² FBI Serial 173.

³³ FBI Serial 173.

³⁴ FBI Serials 287, 294, 591.

³⁵ FBI Serials 292, 441.

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Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B70 ³⁶	6/7/23	University of Delaware	Legal sized brown folder labeled: Foreign Relations Committee. containing documents with classification markings up to CONFIDENTIAL.	G3-G4	
1B71 ³⁷	6/7/23	University of Delaware	Legal sized brown folder labeled: Mutual Balanced Force Reduction MBFR. containing documents with classification marking up to CONFIDENTIAL.	G2	
1B72 ³⁸	6/7/23	University of Delaware	Legal sized brown folder labeled: Greece. containing documents with classification markings up to SECRET.	G1	
1B78 ³⁹	6/29/23	Zwonitzer	Silver Laptop (with power charging cord included)		
1B79 ⁴⁰	6/29/23	Zwonitzer	Silver G Drive (with USB connection cord and device case included)		
1B80 ⁴¹	7/5/23	Zwonitzer	Derivative Evidence – Digital copy that contains audio files and documents from 1B78 and 1B79		Derived from 1B78 and 1B79.
1B81 ⁴²	7/6/23	Zwonitzer	One (1) DVD containing digital copies of full length carved audio files from 1B79.		Derived from 1B79.

³⁶ FBI Serials 292, 441.

³⁷ FBI Serials 292, 441.

³⁸ FBI Serials 292, 441.

³⁹ FBI Serial 315.

⁴⁰ FBI Serial 315.

⁴¹ FBI Serial 320.

⁴² FBI Serial 320.

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Evidence Item #	Date Seized	Location Seized or Producing Party	Description	Recovered documents contained within Evidence item	Notes
1B87 ⁴³	1/22/24	Wilmington Residence	Empty, ripped cardboard box. One top flap labeled "Desk File" and the opposite flap labeled "Cabinet".		Original container of all 1B04 items which were repackaged as described in Chapter 7 Section II.

⁴³ FBI Serials 680, 681.



THE WHITE HOUSE
WASHINGTON

February 5, 2024

Special Counsel Robert K. Hur
Deputy Special Counsel Marc Krickbaum
Department of Justice
145 N Street Northeast
Washington, D.C. 20503

Dear Special Counsel Hur and Deputy Special Counsel Krickbaum:

We are pleased to see that, after more than a year of investigating, you have determined that no criminal charges are warranted in this matter. Though we wholeheartedly agree with your conclusion, we are taking this opportunity, pursuant to our agreement, to address specific issues that we have identified in the report. We do so in the interest—which we believe that the Office of Special Counsel shares—of a final report that is both accurate and consistent with Department of Justice policy and practice.

We have been selective in the choice of issues for your consideration. We believe that each one presented below merits your careful review before finalizing your report.

1. We do not believe that the report's treatment of President Biden's memory is accurate or appropriate. The report uses highly prejudicial language to describe a commonplace occurrence among witnesses: a lack of recall of years-old events. Such comments have no place in a Department of Justice report, particularly one that in the first paragraph announces that no criminal charges are "warranted" and that "the *evidence* does not establish Mr. Biden's guilt." If the evidence does not establish guilt, then discussing the jury impact of President Biden's hypothetical testimony at a trial that will never occur is entirely superfluous.

In fact, there is ample evidence from your interview that the President did well in answering your questions about years-old events over the course of five hours. This is especially true under the circumstances, which you do not mention in your report, that his interview began the day after the October 7 attacks on Israel. In the lead up to the interview, the President was conducting calls with heads of state, Cabinet members, members of Congress, and meeting repeatedly with his national security team.

The Special Counsel recognized the extraordinary juxtaposition of these events when he "thank[ed]" the President "for being here and making this time for us" given that there were "a lot of other things in the world going on that demand your attention." Interview Transcript ("Tr."), Day I, at 3. Subsequently, far from being "hazy," Report at 208, the President proceeded to provide often detailed recollections across a wide range of questions, from staff management of paper flow in the West Wing to the events surrounding the creation of the 2009 memorandum on the Afghanistan surge. He engaged at length on theories you offered about the way materials

were packed and moved during the transition out of the vice presidency and between residences. He pointed to flaws in the assumptions behind specific lines of questioning.

At the outset of the interview, you recognized that the questions you planned to ask “relate to events that happened years ago.” but nonetheless expressed your hope that the President would “put forth [his] best efforts and really try to get [his] best recollection in response to the questions we ask.” *Tr.*, Day I, at 4. It is hardly fair to concede that the President would be asked about events years in the past, press him to give his “best” recollections, and then fault him for his limited memory.

The President’s inability to recall dates or details of events that happened years ago is neither surprising nor unusual, especially given that many questions asked him to recall the particulars of staff work to pack, ship, and store materials and furniture in the course of moves between residences. The same predictable memory loss occurred with other witnesses in this investigation. Yet, unlike your treatment of President Biden, your report accepts other witnesses’ memory loss as completely understandable given the passage of time. For example, you accepted without denigrating John McGrail’s failure to remember certain events while he served as then-Vice President Biden’s counsel: “McGrail’s memory of these events could well have faded over the course of more than 6 years.” Report at 238 n.923; *see also id.* at 67, 69 (noting Mr. McGrail’s failure to recall events despite emails that place him in the center of various discussions). So, too, you accept the memory lapse of one of the President’s personal lawyers who testified that in his initial search of the Penn Biden offices certain boxes were stored in a locked closet, noting only that “his memory was fuzzy on that point.” *Id.* at 265. And the events on which you found the lawyer’s memory to be “fuzzy” occurred only a few months before his interview. *Id.*; *see also id.* at 64, 66 (noting without comment the failures of recollection by numerous staffers).

Your treatment of President Biden stands in marked contrast to the lack of pejorative comments about other individuals. It is also in contrast to your own description of the President’s responses on other subjects as “clear forceful testimony” that would be “compelling” to a jury. *Id.* at 233.

Not only do you treat the President differently from other witnesses when discussing his limited recall of certain years-ago events, but you also do so on occasions in prejudicial and inflammatory terms. You refer to President Biden’s memory on at least nine occasions—a number that is itself gratuitous. But, even among those nine instances, your report varies. It is one thing to observe President Biden’s memory as being “significantly limited” on certain subjects. *Id.* at 5. It is quite another to use the more sweeping and highly prejudicial language employed later in the report. This language is not supported by the facts, nor is it appropriately used by a federal prosecutor in this context.

We request that you revisit your descriptions of President Biden’s memory and revise them so that they are stated in a manner that is within the bounds of your expertise and remit.

2. Your report criticizes President Biden’s “decision to keep his notebooks at home in unlocked and unauthorized containers” as “totally irresponsible,” applying to him the same criticism, in the same words, he had directed at former President Trump for keeping marked

classified documents. *Id.* at 228. Setting aside the significant difference of law and facts between the two cases (which the report recognizes), this kind of criticism of an uncharged party violates “long-standing Department practice and protocol.” *See* Office of the Inspector General, U.S. Department of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (June 2018) (finding that former FBI Director James Comey violated this practice and protocol when criticizing as “extremely careless” former Secretary of State Hillary Clinton’s use of unclassified systems to transmit classified material). Using President Biden’s own words does not make the criticism compliant with Department practice.

3. In an audio recording with Mr. Zwonitzer, the President said: “I just found all the classified stuff downstairs. I wrote the President a handwritten forty-page memorandum arguing against deploying additional troops to Afghanistan on the grounds that it would not matter.” Yet your report appears to conclude that the President was referring to marked classified Afghanistan documents, rather than the precise document referred to in the actual recording: the President’s handwritten letter to President Obama about Afghanistan, which the President viewed as a sensitive and private communication. Indeed, the President testified in his interview that, although he didn’t remember the comment to Mr. Zwonitzer, the “only thing that [he] can think of” was this handwritten letter to President Obama. *Tr.*, Day II, at 38. We believe that an accurate recitation of the evidence on this point would recognize the strong likelihood that the President was referring in the recording to his private handwritten letter to President Obama—the one mentioned on this recording immediately after the eight words that you are focused on—rather than the marked classified Afghanistan documents discovered in the Wilmington garage.

4. Your report erroneously (and repeatedly) makes statements about the value of the marked classified Afghanistan documents to President Biden, such as President Biden had a “strong motive” to keep them and they were an “irreplaceable contemporaneous record,” like the notebooks. *Report* at 203, 231. These statements are contrary to the evidence and the documents themselves. First, the President forcefully testified that he “never thought about” writing a book about the 2009 Afghanistan policy review. *Tr.*, Day II, at 22. Thus, the President had no need to retain the documents for that purpose. Second, the 2009 Afghanistan policy review was one of the most widely covered foreign policy decisions in history, documented in near real-time by public releases of government documents, leaks to newspapers, and publications by writers like Bob Woodward. The idea that the President needed to keep any classified documents related to these events, let alone the particular ones found in his garage, is implausible. This is particularly true given that the documents at issue primarily consist of drafts, duplicates, and a disorganized and incomplete assortment of briefing materials and presentations—nothing remotely resembling a consciously selected set of documents kept for historical value. Indeed, your report acknowledges that certain “important” documents are not in the folders, including documents that—if President Biden had sought to keep documents for history’s sake (which he did not)—one would expect to be included. However, your report fails to describe the haphazard and essentially random nature of the documents discovered. We believe that a fair and more accurate recitation of the evidence on this point would include a description of the documents that makes clear they do not appear to have been intentionally selected for retention.

5. Your characterization of the box in the garage as containing only matters of “great personal significance” to the President is inconsistent with the facts. The evidence shows that this tattered box contained a random assortment of documents, including plainly unimportant ones such as: a short-term vacation lease; a VP-era memorandum on furniture at the Naval Observatory for purchase; talking points from speeches; campaign material; empty folders; a 1995 document commemorating Syracuse Law’s 100-year anniversary; and other random materials. In his interview, President Biden commented regarding one of the folders, which read “Pete Rouse”: “Christ, that goes back a way,” confirming that he had not encountered that material in recent years. Tr., Day I, at 144. When asked how things like a binder labeled “Beau Iowa” got into the “beat-up” box, the President responded “Somebody must’ve, packing this up, just picked up all the stuff and put it in a box, because I didn’t.” *Id.* at 146. When asked about the later-dated material, the President responded: “[s]ee, that’s what makes me think just people gathered up whatever they found, and whenever the last thing was being moved. So the stuff moving out of the Vice President’s residence, at the end of the day, whatever they found, they put – they didn’t separate it out, you know, Speakers Bureau and Penn or whatever the hell it is, or Beau. They just put it in a single box. That’s the only thing I can think of.” *Id.* at 147. Some of the documents in the box contain what appears to be staff handwriting— including a D.C. tax return and a W2—further indicating that the box was likely filled by staff. We believe that an accurate recitation of the evidence on this point would include a description of these facts.

6. In the course of his recorded conversations with his writing assistant, the President makes a comment—“they didn’t even know I have these.” Your report repeatedly cites the comment (*e.g.*, Report at 8, 64, 65, 230, 242) and, from these six words, asks the reader to conclude that President Biden was “distinguish[ing] between his notecards, which his staff was in the process of implementing protocols to safeguard, and his notebooks, which ‘they didn’t even know I have.’” *Id.* at 65. The President’s comment does not support this unfounded conclusion. It is unclear who the President was referring to as “they” or what he was referring to as “these,” let alone that he was somehow distinguishing between his notecards and his notebooks. We believe the report should not make such unsupported assumptions— or leave the erroneous impression that the fact of President Biden’s notebooks was unknown, when the report itself shows that it was well known and even documented in photographs.

7. There are a number of inaccuracies and misleading statements that could be corrected with minor changes:

- “We considered the possibility that Mr. Biden alerted his counsel that classified documents were in the garage but our investigation revealed no evidence of such a discussion because if it happened, it would be protected by the attorney-client privilege.” Report at 22. In fact, your investigation revealed no evidence of such a discussion because it did not happen—not because of any privilege. The President testified he was unaware that there were any classified documents in his possession. Tr., Day II, at 2, 41-42. You did not ask him in his interview or in the additional written questions if he had “alerted his counsel” about classified documents; if you had, he would have forcefully told you that he did not.
- The report states that the President Biden’s book, *Promise Me, Dad*, “is not known to” contain classified information. Report at 97. The book does not

contain classified information and there has never been any suggestion to the contrary.

- “*While it is natural to assume* that JRB put the documents in the box on purpose and knew they were there, in fact there is a shortage of evidence on these points.” *Id.* at 215 (emphasis added). We do not understand the basis for claiming this is a “natural” assumption.
- In connection with its discussion of the Reagan diaries, the report states that the Special Counsel’s Office “viewed the materials that were deemed to be classified at the Top Secret/SCI” level from the Reagan diaries, citing a December 1, 2023 production from the National Security Council. *Id.* at 199-200. This is not accurate; as was stated in the production letter, you viewed only a sample of such material. We offered to make the full volumes available for your review.
- The report claims that the Archives staff asked to see President Biden’s notes from one of his visits to the Archives in 2017, *id.* at 231, citing an earlier chapter, but such a proposition is not made in the earlier chapter, leaving us to raise the question of whether it is accurate.
- The header on page 333 refers to the discovery of a document in President Biden’s home in the second-floor office, but the text asserts that the document was found in the third-floor den. The header appears to be inaccurate.

We respectfully request your close attention to these issues before finalizing your report.

Respectfully,



Richard Sauber
Special Counsel to the President



Bob Bauer
Personal Counsel to Joseph R. Biden, Jr.