

# YES, TRUMP WAS MAKING NOTES ON CLASSIFIED DOCUMENTS

When the Trump search warrant was initially unsealed, many commentators focused on the description of documents bearing Trump's notes.

From May 16-18, 2022, FBI agents conducted a preliminary review of the FIFTEEN BOXES provided to NARA and identified documents with classification markings in fourteen of the FIFTEEN BOXES. A preliminary triage of the documents with classification markings revealed the following approximate numbers: 184 unique documents bearing classification markings, including 67 documents marked as CONFIDENTIAL, 92 documents marked as SECRET, and 25 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following compartments/dissemination controls: HCS, FISA, ORCON, NOFORN, and SI. Based on my training and experience, I know that documents classified at these levels typically contain NDI. Several of the documents also contained what appears to be FPOTUS 's handwritten notes. [my emphasis]

At the time, I thought that was an overreading of the passage. After all, that paragraph is a description of the contents of fifteen boxes, of which just 184 documents have classification markings. Given the context, I believed it was *possible* this described other documents in the boxes, hand-written documents that also might also contain classified information. Trump's notes from calls with foreign leaders, for example, might include classified information or be otherwise particularly sensitive.

But one of the newly unsealed passages from the affidavit released yesterday describes Trump's handwritten notes on the documents on June 3, as well. (As noted, this passage also revealed that at least one of the documents bore a FISA marking, as the first did.)

A preliminary review of the documents contained in the Redweld envelope produced pursuant to the grand jury subpoena revealed the following approximate numbers: 38 unique documents bearing classification markings, including 5 documents marked as CONFIDENTIAL, 16 documents marked as SECRET, and 17 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following caveats/compartments, among others: HCS, SI, and FISA. [redacted] Multiple documents also contained what appears to be FPOTUS's handwritten notes. [my emphasis]

In this case, there cannot be any doubt: the notes are *on documents* bearing classification marks. That's because the *only* things Evan Corcoran handed over on June 3 were documents bearing classified markings.

In fact, of all the sets of documents turned over or seized, that set includes the highest concentration of Top Secret documents. Almost half those documents turned over were marked Top Secret.

	TS	Secret	Confidential	Total	%TS	%Secret	%Confidential	Empty CLASS	Empty Aide
January 2022	25	92	67	184	14%	50%	36%		
June 2022	17	16	5	38	45%	42%	13%		
August 2002	18	54	31	103	17%	52%	30%	48	42
	60	162	103	325	18%	50%	32%		
Leatherbound	7	15	2	24	29%	63%	8%	43	28

(This table includes the contents of the leatherbound box in the total of classified documents seized on August 8, but also breaks it out, which shows the leatherbound box stored the second highest concentration of Top Secret documents.)

So, yeah, at least some of these documents –

multiple, not just several – reflect Trump *writing on* classified documents.

We don't yet know what that means. Nor is it clear *when* he wrote those notes. In fact, FBI might be able to use those notes to prove that Trump has gone back and referred to (and written on) these documents since he left the White House, after such time as the current President decided that the former President no longer had a need to know America's most sensitive secrets.

The confirmation that Trump took notes *on documents bearing classification markings* is important background to Trump's attempt to claim that documents marked classified might be his own personal documents, as he made hints of doing in these passages of his response to the government's motion for a stay.

Yet, the Government apparently contends that President Trump, who had full authority to declassify documents, "willfully" retained classified information in violation of the law. See 18 U.S.C. § 793(e); [ECF No. 69 at 9].<sup>7</sup>

<sup>7</sup> Of course, classified or declassified, the documents remain either Presidential records or personal records under the PRA.

[snip]

To the extent President Trump may have categorized certain of the seized materials as personal during his presidency, any disagreement as to that categorization is to be resolved under the PRA and cannot possibly form the basis for any criminal prosecution. [my emphasis]

That is, in an attempt to forestall an Espionage Act prosecution (the only time Trump has named the statute), he seems to be entertaining a claim that he first declassified these documents and then, by dint of writing on them, made them

his own personal property.

Such an argument raises the stakes on the timing of his notes. If he only wrote on these documents after he left the White House, they would have been declassified government (often, Agency) documents on January 20, 2021, not personal documents. But if he wrote on these as *President*, then his notations would have been made, “in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President,” clearly making them Presidential Records under the Act. Either way, the documents belong in government custody.

The government scoffed at the possibility that Trump could have made classified documents personal records (it does not raise his notes on them).

Plaintiff’s suggestion that he “may have categorized certain of the seized materials as personal [records] during his presidency” pursuant to the PRA, D.E. 84 at 15, if true, would only supply another reason that he cannot assert executive privilege with regard to those records. If Plaintiff truly means to suggest that, while President, he chose to categorize records with markings such as “SECRET” and “TOP SECRET” as his *personal* records for purposes of the PRA, then he cannot assert that the very same records are protected by executive privilege—i.e., that they are “Presidential communications” made in furtherance of the “performance of his official duties.” *Nixon v. GSA*, 433 U.S. at 447, 456; see 44 U.S.C. § 2201(3) (defining “personal records” as records “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”). In any event, whether Plaintiff declared documents with classification markings to be his “personal” records for purposes of the PRA has no bearing on the government’s compelling need to review them, both for national security purposes and as part of its investigation into the potentially unlawful retention of national defense information.<sup>2</sup>

<sup>2</sup> Plaintiff’s characterization of the discretion the PRA provides the President to categorize records as “Presidential” or “personal,” D.E. 84 at 14-15 (citing *Judicial Watch v. National Archives and Records Administration*, 845 F. Supp. 2d 288 (D.D.C. 2012)), is thus irrelevant here. In any event, the district court decision on which Plaintiff relies did not concern classified records and does not support his assertion that a court must accept a former President’s claim that records that indisputably qualify as Presidential records under the PRA are instead personal records. Instead, the court in *Judicial Watch* concluded that it could not compel the National Archives and Records Administration to revisit a President’s decision about such a categorization. 845 F. Supp. 2d at 300-301. More fundamentally, the district court’s analysis in *Judicial Watch* has no bearing on the application of criminal law regarding unauthorized retention of national defense information, unauthorized removal of government documents, or obstruction of justice. 18 U.S.C. §§ 793, 2071, 1519.

If Trump claims to have made these classified documents his own personal documents while President (by writing on them), it would more clearly amount to theft, because otherwise any

notes he wrote would be part of his official business, as noted above. But that's currently what Trump is offering up as his defense.

Because he is suggesting that classified documents were declassified *and* made personal, the notes make it more likely that Trump used America's secrets for his own private gain either during or after he left the Presidency. In fact, that appears to be the argument he's offering in his defense!

Update: Tried to clarify my logic in the final two paragraphs per observations from Ariel817.

*Go to emptywheel resource page on Trump Espionage Investigation.*