

THE TRUMP-BIDEN-PENCE DOCUMENTS STORY IS NOT (YET) ABOUT OVERCLASSIFICATION

It is my belief that had Eric Holder appointed a Special Counsel to investigate David Petraeus' hoarding of classified information, the retired General might have been charged with 18 USC 793(e) and maybe even 793(d).

That's true, first of all, because the facts he admitted to as part of his wrist-slap plea largely cover the elements of the offense. That's true, too, because everyone but Holder seemed to support charging Obama's CIA Director. Ultimately, the decision would have remained Holder's. Holder might have overruled a Special Counsel even still, as he is reported to have overruled prosecutors. Holder may have calculated that Petraeus' years-long cultivation of Congress would mitigate any blowback for overriding the recommendation to prosecute.

Certainly Holder paid no price for making the decision he did make: Congress believed that Petraeus could do no wrong.

Instead, Petraeus is (with Sandy Berger) one of the two poster children for the premise that the powerful will never be held accountable for mishandling classified information the way lower ranking personnel will be. That could change with at least two Special Counsels involved.

Yet even as powerful as he was during the period he was leaking to his biographer, David Petraeus is *still* differently situated than Trump, Biden, and Pence, starting with the fact that even in his case, DOJ relied on his clearance and nondisclosure agreements to prosecute him.

By comparison, all three of the men currently

under investigation were Original Classification Authorities under EO 13526, the Executive Order governing classification during the period in question. None of those men would ever have been required to get any security clearance beyond the courtesy clearance given to formers after their tenure (of which Trump was stripped). And so all of these men went from a status of near immunity while in office, instantly – at 12:00PM on January 20 – to having to sort through files in boxes to decide what he was permitted to take home and what he was obligated to turn over to the Archives.

That process was at least part of what went wrong in all three cases, even Biden's possession of documents from when he was a powerful Senate Chair. One minute, they were virtually immune from rules pertaining to classification, and literally the next minute – before they had finished that sorting process! – they were subject to the rule of law again.

Indeed, because all three are explicitly subject to the Presidential Records Act, the basis by which they lack authorization to possess the documents in question stems, in significant part, from an entirely different basis than it does for other people, which arises from the clearances they were never required to get.

And that's one reason why all the punditry (here, here, here, here) – almost all from people who haven't followed the details even of the Trump case, where we've got the most facts available – claiming that this is a problem with overclassification is, at best, wildly premature.

Indeed, with Trump, we can say with some certainty that this is not about overclassification. The classification markings from the subpoena DOJ served on him, understood to be based in part on what they had already found in the boxes he turned over, are not trivial. Nor are the likely contents of the documents we see in the FBI picture of his stolen documents. Even some of the documents

from the Russian investigation that Trump wanted to declassify and disseminate rely on either human source and/or intelligence collection targeting Russia's spy service, and the reporting was just five years old at the time (a brand new must read from the NYT also reveals the intelligence came from the Dutch, so it wasn't our intelligence to declassify).

These men were the President and Vice President. They had access to highly sensitive information, and Trump, at least, had a well-established history of releasing it with abandon.

Until we have evidence that the documents in question were simply materials that some agency was bigfooting (as was the case in most of the classification pertaining to Hillary's emails), we should not assume this is about overclassification. There's no evidence of that.

Chuck Rosenberg argues that it also should not matter.

One place we *might* see overclassification is in classification reviews of the hand-written notes that both Trump and Biden took, though even there, Trump was reportedly waving around his private love letters with a nuclear-armed dictator as a party trick, and that probably *did* have the ability to make it harder to manage a very difficult threat. But with Trump, at least, the possibility that some of his hand-written notes won't turn out to be as sensitive as the spooks will declare them doesn't mitigate that he had documents that are almost certainly unbelievably sensitive sitting in a beach resort known to be targeted by intelligence services.

Thus far, we have no evidence that this is about overclassification. We do have abundant evidence that these three specific compromises have to do with the wacky way Presidents and Vice Presidents (and to a lesser degree, Members of Congress) operate outside the system of clearances that leads virtually everyone else with access to classified information to exercise a great deal of caution when handling

it. One day they're immune, the next day they're sorting documents to try to sort out what needs to go to the Archives.

That's a different problem than overclassification.

Crazier still, most of the people who are out there claiming this about overclassification are using (at least partly) as their examples people who *sought out* documents that were not part of their work and then leaked those documents.

Those cases are *also* not about overclassification.

And amid all the talk of overclassification, none of the pundits have mentioned a case that is a far more apt example of overclassification and the way the Executive uses classification to punish people: Jeremy Brown, the Oath Keeper recently found guilty of unlawfully retaining – right next to some grenades for which he was also convicted – one document that Brown wrote himself in 2011, classified Secret, believed to be about the Bowe Bergdahl case.

COUNT	DOCUMENT	NDI CLASSIFICATION LEVEL
6	Threat Frequency Report – Combined Explosives Exploitation Cell (CEXC) – Afghanistan dated October 13, 2004	SECRET
7	IED Incident Report – CEXC and Addendum dated January 6, 2005	SECRET
8	Spider Device Testing Procedures and Results dated November 1, 2004	SECRET
9	Fragmentary Order dated January 14, 2005	SECRET
10	Trip Report dated September 1, 2011, and Attachments	SECRET

Brown was acquitted on 793 charges for four other documents, also classified Secret, that were even older.

Brown's case in many ways parallels Trump's. Like Trump, the Feds showed up and asked him to return the document and he lied to hide it. Like Trump, the FBI found the documents with a warrant.

But it's far more likely these documents, all of which were at least ten years old, are

overclassified.

Don't get me wrong: I think Brown is a dangerous shithole. I'm not unhappy he's going to prison.

I also think DOJ believed, correctly, they could use these classified documents (along with the grenades) as a way to neutralize a dangerous loose canon.

Want to make a case about overclassification? Jeremy Brown is the dangerous shithole you should be defending. Want to prevent the grave disparities in how powerful people are treated, as compared to dangerous shitholes like Jeremy Brown?

You need to address that magic process by which Presidents are treated with immunity and then – in an instant!! – purportedly subjected to the same rules as everyone else.