

Biden classified documents make Trump prosecution much less likely

Over almost a two-year period, the National Archives and the Department of Justice have engaged with Donald Trump and his team of lieutenants and lawyers through several rounds of confrontation over the issue of classified documents. These entanglements culminated in a judicially ordered search of Mar-a-Lago, the former president's home and private social club. The specter of potential criminal charges arising from the possession of classified documents (and possible obstruction of justice) resulted in Attorney General Merrick Garland naming a special counsel to direct the Mar-a-Lago investigation and other unrelated federal criminal inquiries of Donald Trump.

Now, the attorney general has named yet another special counsel to investigate the recent discovery (or the recently announced discovery) of classified documents from the time of the Obama administration at an office previously used by President Joe Biden as a private citizen and the subsequent finding of a classified document from the Obama administration at Biden's home in Delaware.

The two narratives are colliding, at least in the political arena. They may not cross in the legal world, but both investigations will remain bound together by the same chain that either can yank without warning.

The ongoing Biden classified document fiasco makes it much less likely the feds will charge Trump in the Mar-a-Lago investigation. The difficulty for the special counsels is two-fold — the matters share some basic facts, but they are unique when compared to any other classified documents caper. The two special counsel investigations involve the possession of classified documents by a former president and former vice president (who is now president). No other former president or former vice president has been charged (possibly never even been subject to a criminal investigation) over mishandling classified documents.

Of course, the taking and improper handling of classified documents potentially is a crime. For example, in 2015, retired Gen. David Petraeus pleaded guilty to the unauthorized removal and retention of classified documents, a misdemeanor offense in his situation. But retired military generals, and members of the intelligence community, are not the same as the former principals of the federal government. Only two positions exist at the top of the executive branch chain of command. Because Trump and Biden held the positions, and the classified documents are tied to those very



By
**Michael
McAuliffe**

roles, it puts the two investigations in an exclusive pair.

A completely unaddressed issue is the Justice Department's policy of not charging a sitting president. That policy boxed in former special counsel Robert Mueller in his probe of then-President Trump for alleged misconduct relating to the 2016 presidential election. How special counsel Robert Hur, now tasked with investigating currently serving President Biden for potential criminal misconduct, will navigate that closed gate remains an open and important question.

While aggravating circumstances like obstruction usually make the critical difference in whether a classified documents matter is charged — the cover-up is often worse than the initial misconduct — that may become less relevant as these matters move forward. Maybe those distinctions should make a difference, but the investigations now are buffeted by dueling narratives of political leaders and their legions of followers.

While the circumstances of the Biden and the Trump classified documents investigations could well turn out to be very different — Biden's lawyers found the classified documents and proactively turned them over to the government while Trump and/or his team may have obstructed the government's attempts to identify and retrieve classified documents — thematically, the situations are similar.

And, of course, Trump and Biden share the reality that they are political enemies.

The rule of law is paramount, but the criminal justice system doesn't operate in a vacuum. If the Biden investigation ends with a conclusion of incompetence, not criminality, then it is less likely that Trump is charged with improperly retaining classified/government documents. The only exception to that assertion is if the special counsel develops overwhelming evidence of Trump's direct and repeated obstruction of both the Archive's attempts to identify and retrieve important classified documents and the Justice Department's official demands to accomplish the same. Without provable obstruction beyond any doubt (not just reasonable doubt), the current president's classified-document fiasco has inadvertently aided the former president in his own classified-document debacle.

Michael McAuliffe is a former federal prosecutor. He also served as the elected state attorney for Palm Beach County. Currently, he is a practicing lawyer, an adjunct professor at William & Mary's Law School and a senior lecturing fellow at Duke University's School of Law.