

# The Real “Robert Hur Report” (Versus What You Read in the News)

How the Special Counsel report has been misinterpreted

by Andrew Weissmann and Ryan Goodman

*February 10, 2024*

The Special Counsel Robert Hur report has been grossly mischaracterized by the press. The report finds that the evidence of a knowing, willful violation of the criminal laws is wanting. Indeed, the report, on page 6, notes that there are “innocent explanations” that Hur “cannot refute.” That is but one of myriad examples we outline in great detail below of the report repeatedly finding a lack of proof. And those findings mean, in DOJ-speak, there is simply no case. Unrefuted innocent explanations is the sine qua non of not just a case that does not meet the standard for criminal prosecution – it means innocence. Or as former Attorney General Bill Barr and his former boss would have put it, a total vindication (but here, for real).

But even without the prompting of a misleading “summary” by Barr, the press has gotten the lede wrong. This may be because of a poorly worded (we’re being charitable) thesis sentence on page 1 of Hur’s executive summary. Hur writes at the outset: “Our investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen.” You have to wait for the later statements that what the report actually says is there is insufficient evidence of criminality, innocent explanations for the conduct, and affirmative evidence that Biden did not willfully withhold classified documents. Put another way, that same sentence about “our investigation uncovered evidence” could equally apply to Mike Pence, who had classified documents at his home, which is similarly some “evidence” of a crime, but also plainly insufficient to remotely establish criminality.

The press incorrectly and repeatedly blast out that the Hur report found Biden willfully retained classified documents, in other words, that Biden committed a felony; with some

in the news media further trumpeting that the Special Counsel decided only as a matter of discretion not to recommend charges.

To clarify thinking about this topic, let's consider another way Hur could have represented his actual findings on page 1 of his executive summary:

**“We have concluded that there is not a prosecutable case against Biden. Although there was a basis to open the investigation based on the fact that classified documents were found in Biden’s homes and office space, that is insufficient to establish a crime was committed. The illegal retention or dissemination of national defense information requires that he knew of the existence of such documents and that he knew they contained national defense information. It is not a crime without those additional elements. Our investigation, after a thorough year-long review, concludes that there is an absence of such necessary proof. Indeed, we have found a number of innocent explanations as to which we found no contrary evidence to refute them and found affirmative evidence in support of them.”**

Below we first identify the relevant contents of the Hur report. We then provide a sampling of the erroneous press pronouncements.

## **I. What the Hur Report Actually Found**

We let the Hur report speak for itself. For ease of reference, we group the report's findings into several categories. However, we should emphasize one general finding at the outset. The Hur report states:

“In addition to this shortage of evidence, there are other innocent explanations for the documents that we cannot refute.” (p. 6)

Given the circumlocution in that statement, you may need to read it more than once. The statement alone is inconsistent with all the headlines below. Onto the more specific findings that are relevant to the elements of any potential criminal offenses. ...

### **1. Lack of Evidence of Knowledge that Information Was Classified**

- “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 the **evidence does not show that when Mr. Biden shared the specific passages with his ghostwriter, Mr. Biden knew the passages were classified and intended to share classified information.**” (p. 9-10)

Note: We note that this articulation is so reminiscent of James Comey’s embroidering of the facts: the bottom line is in the second sentence; the first sentence is irrelevant and serves no prosecutorial purpose, which leaves one to rightly wonder why it is included.

- “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 retaining the memo, he willfully retained national defense information.**” (p. 221)
- “**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. 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.” (p. 332-333)
- “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. Although “Confidential” is, in fact, a category of classified information enumerated in the governing executive order, **we would likely be unable to refute Mr. Biden’s claim that he did not know this.**” (p. 221-222)

## 2. Lack of Evidence of Willful Retention

- “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.”** (p. 170)
- “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.” (p. 177)
  - “[T]hree 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.**” (p. 326)
  - “**Several defenses are likely to create reasonable doubt** as to such charges. For example, Mr. Biden **could have found the classified Afghanistan documents at his Virginia home in 2017 and then forgotten about them** soon after. **This could convince some reasonable jurors that he did not retain them willfully ....** And the place where the Afghanistan documents were eventually found in Mr. Biden’s Delaware garage-in a badly damaged box surrounded by household detritus-**suggests the documents might have been forgotten.**” (p.4)
  - “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.**” (p. 205)
  - “There is some indication that Mr. Biden’s staff may have advised him that his notecards contained classified information and needed to be held in a secured location. **But the investigation did not determine what, if anything, Mr. Biden’s staffers actually told him on this subject.**” (p. 65)
  - “**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.” (p. 329)

Box of Afghanistan documents found in Delaware home garage:

- “**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. And we do not know why Mr. Biden would have wanted to keep some of the other marked classified documents in 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." (pp. 215-216)

- **"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 .... And if Mr. Biden saw only the "Afganastan" folder and not the "Facts First" folder, which did contain national defense information, he did not willfully retain such national defense information."** (pp. 216-217)

Penn Biden Center and University of Delaware:

- **"The evidence suggests that the marked classified documents found at the Penn Biden Center were sent and kept there by mistake."** (p. 311)
- **"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."** (p. 312)
- **"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."** (p. 323)

- **“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. **There is also no record of Mr. Biden’s review of the documents before or after he donated them to the University.”** (p. 323)
- “For these reasons, it is **likely** that the few classified documents found in Mr. Biden’s Senate papers were **there by mistake.**” (p. 325)
- “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.” (p. 304)
- “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.**” (p. 307)
- “**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 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.” (p. 307-308)
- “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 .... 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.” (p. 309-310)

### 3. Lack of Evidence of Willful Disclosure

- “[W]e conclude that the **evidence does not establish that Mr. Biden willfully disclosed national defense information to Zwonitzer.**” (p. 248)
- “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.**” (p. 245)

#### 4. Lack of Evidence of Transportation of Documents

- “**We were unable to determine how the marked classified Afghanistan documents got from the White House, where Mr. Biden possessed them as vice president in 2009, to his Delaware home, where they were found in 2022 ....** Ultimately, we could not determine precisely when the box containing the Afghanistan documents got into the garage, **or who put the documents there.**” (p. 150)
- “**But there are alternative explanations for how the Afghanistan documents got into the garage** box that are also consistent with the evidence described above. As discussed in Chapter Eleven, **we find the evidence as a whole insufficient to meet the government’s burden of proving that Mr. Biden willfully retained the Afghanistan documents in the Virginia home in 2017.**” (p. 168-169)

#### 5. Lack of Evidence of Possession

The Hur report centers on one of the apparently most incriminating statements by Biden to his ghostwriter. While in his home in Virginia. Biden said he had “just found all the classified stuff downstairs.” The question is what he meant and whether there was any evidence the home in Virginia actually ever stored the relevant documents. The Hur report found an absence of evidence. His report states he found no evidence that “conclusively” places the relevant documents at the location, but it appears to be no evidence more generally if at all:

- “Given Mr. Biden’s limited precision and recall during his interviews with his ghostwriter and with our office, **jurors may hesitate to place too much evidentiary weight on a single eight-word utterance to his ghostwriter** about finding

classified documents in Virginia, in the absence of other, more direct evidence. **We searched for such additional evidence and found it wanting.** In particular, **no witness, photo, email, text message, or any other evidence conclusively places the Afghanistan documents at the Virginia home in 2017.**" (p. 5-6)

- "We were unable to determine whether **any** classified documents were inadvertently moved to the Virginia home when Mr. Biden moved out of the Naval Observatory." (p. 152-153)
- "**Another viable defense** is that Mr. Biden **might not have retained** the classified Afghanistan documents **in his Virginia home at all. They could have been stored, by mistake and without his knowledge,** at his Delaware home since the time he was vice president, as were other classified documents recovered during our investigation. **This would rebut charges that he willfully retained the documents in Virginia.**" (p. 5)
- "The second **potential defense argument is that Mr. Biden may not have retained the classified Afghanistan documents in 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 classified Afghanistan documents were stored in the Virginia home, **there is no definitive evidence putting them there.**" (p. 211)
- "Mr. Biden could have found only some of the classified Afghanistan documents in the Virginia home in 2017-the ones in the manila "Afghanistan" folder found in **it is unclear whether this folder contained national defense information.** This too would rebut charges that he willfully retained national defense information, as required by the criminal Statute." (pp. 204-05)
- "When Mr. Biden told his ghostwriter he "just found all the classified stuff downstairs," **he could have been referring to something other than the Afghanistan documents, and our report discusses these possibilities in detail.**" (p. 6)

## 6. Evidence of Intent to Return Classified Documents

Around the same time as the relevant period, Biden proactively returned other classified documents to government authorities that he discovered in his home. The report notes this evidence supports Biden's innocence.

- “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.” **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.**” (p. 206)
- “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.” (p. 210)

## 7. Evidence of Belief that Documents Were Permissibly Retained, e.g., as “Personal Records”

One of the central issues is whether Biden believed his handwritten notebooks counted as “personal records” under the Presidential Records Act ([§ 2201\(3\)\(A\)](#)), which could provide a defense. The Hur report finds evidence that Biden did hold this belief, including a contemporaneously recorded conversation with Biden in 2017.

- “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. 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:

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.

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."** (p. 236).

Note: This excerpt above includes the statement that Biden "certainly did not know that by failing to do so he committed a crime." That is a misstatement of the law. The offense requires [knowledge and willfulness](#). The wording in the report may mislead readers.

- "During our interview of him, **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 classified materials after leaving office. **He also cited the diaries that President Reagan kept in his private home after leaving office, noting that they included classified information."** (p. 8)
- "**Contemporaneous evidence** suggests that when Mr. Biden left office in 2017, **he believed he was allowed to keep the notebooks in his home.** In a recorded conversation with his ghostwriter in April 2017, Mr. Biden explained that, despite his staff's views to the contrary, he did not think he was required to turn in his notecards to the National Archives—where they were stored in a SCIF—and he had not wanted to do so. **At trial, he would argue plausibly that he thought the same about his notebooks."** (p. 8-9)

- “In Mr. Biden’s interview with our office, he explained that **he took his notebooks with him after his vice presidency because “[t]hey are mine,” and explained that “every President before me has done the same exact thing.”** He also specifically referenced President Reagan, who, after leaving office, kept handwritten diaries containing classified information at his private home, as discussed in Chapter Ten. In later written answers, **Mr. Biden wrote that, “[l]ike presidents and vice presidents before me, I understand these notes to be my personal property.”** (p. 94)
  - “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 information) as personal property, but no agency took action to recover the classified materials or to investigate or prosecute the former president .... The Department of Justice also repeatedly described the diaries in public court filings as Mr. Reagan’s personal records.**” (p. 193-195)
  - “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*, Mr. Reagan’s autobiography published in 1990; (2) *Dutch*, a biography authored by Edmund Morris and published in 1999; and (3) *The Reagan Diaries*, a collection of the diaries themselves first published in 2007 after Mr. Reagan’s death.” (p. 197)
- “**Contemporaneous evidence** suggests that when Mr. Biden left office in 2017, **he believed he was allowed to keep the notebooks in his home.** In a recorded conversation with his ghostwriter in April 2017, Mr. Biden explained that, despite his staff’s views to the contrary, he did not think he was required to turn in his notecards to the National Archives—where they were stored in a SCIF—and he had not wanted to do so. **At trial, he would argue plausibly that he thought the same about his notebooks.**” (p. 8-9)
- “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.” (p. 239)

## 8. Evidence of Retention By Mistake

- “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.**” (p. 209)
- “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.** For a person of his position, the presence of classified documents might not have been noteworthy, and **it may have seemed natural that someone else would inevitably take care of it, because, for Mr. Biden, that is how it had nearly always worked.**” (p. 205-06)
- “FBI agents found one document with classification markings in the third-level den area .... 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.**” (p. 333)
- “For other recovered classified documents, after a thorough investigation the decision to decline criminal charges was straightforward. The FBI recovered additional marked classified documents at the Penn Biden Center, elsewhere in Mr. Biden’s Delaware home, and in collections of his Senate papers at the University of Delaware, but the evidence suggests that **Mr. Biden did not willfully retain these documents and that they could plausibly have been brought to these locations by mistake.** We also investigated whether persons other than Mr. Biden knowingly mishandled these classified documents, and our investigation showed that they did not. **In reaching these conclusions, we note the numerous previous instances in which marked classified documents have been discovered intermixed with the personal papers of former Executive Branch officials and members of Congress.**” (p. 12)

## II. What the Media Reported

The headlines below are also reflected in the content of news reports (see, e.g., this [example](#) by the *New York Times*.)

Just In...

5 takeaways from the Nevada, Virgin Islands caucuses

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ADMINISTRATION

# Special counsel finds Biden 'willfully' retained classified documents, no charges filed

<https://thehill.com/homenews/administration/4456524-special-counsel-biden-classified-documents-probe-no-charges/>

WHITE HOUSE

## No charges for Biden after Special Counsel probe into improper handling of classified documents

Special Counsel Robert Hur collected evidence Biden 'willfully retained and disclosed classified materials'

<https://www.foxnews.com/politics/no-charges-biden-classified-records-special-counsel-robert-hur>

## Special counsel report concludes Biden willfully retained classified information but will not face charges

<https://edition.cnn.com/2024/02/08/politics/white-house-special-counsels-report-response/index.html>



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# Biden willfully withheld classified docs but will not be charged, special counsel says

Feb 8, 2024 6:55 PM EST

<https://www.pbs.org/newshour/show/biden-willfully-withheld-classified-docs-but-will-not-be-charged-special-counsel-says>

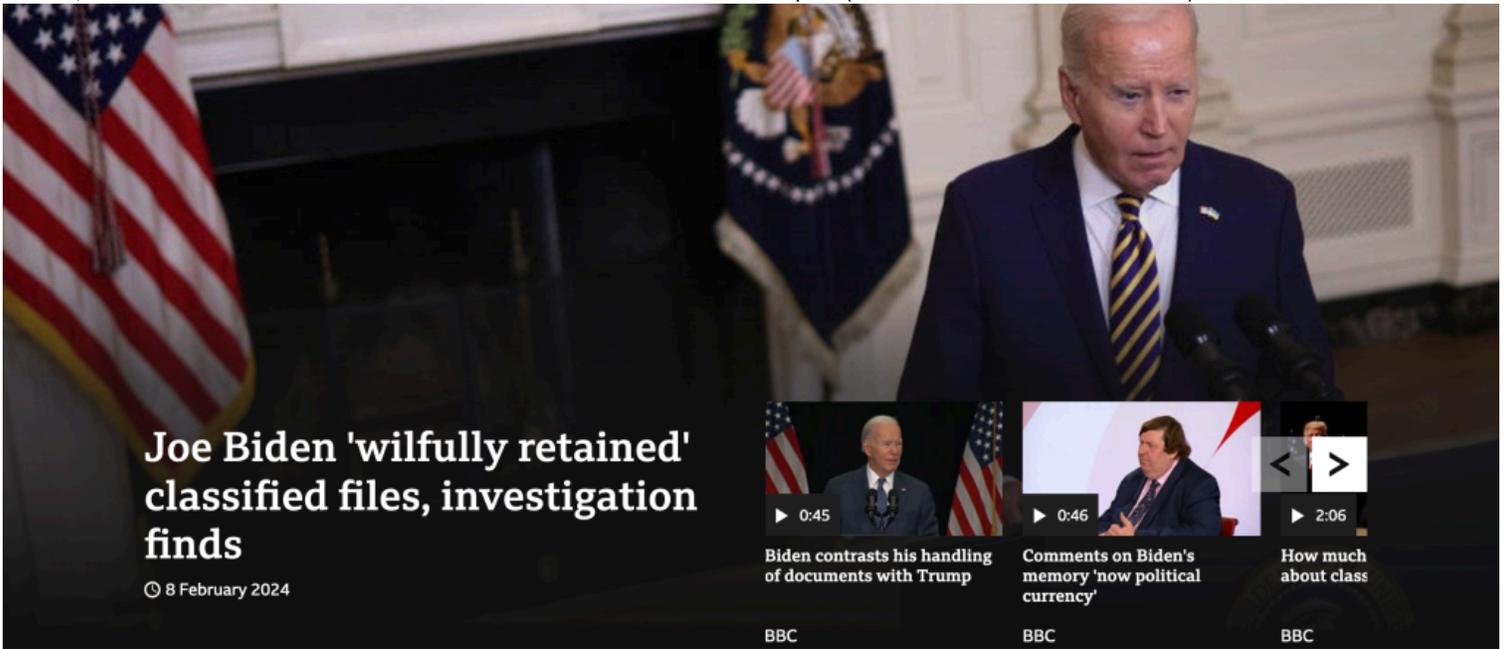


**POLITICS**

# Biden 'willfully' kept classified materials, had 'poor memory': Special counsel

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<https://www.cnbc.com/2024/02/08/biden-docs-probe-final-report-issued-by-special-counsel-robot-hur-.html>



<https://www.bbc.com/news/live/world-us-canada-68247337>



<https://www.cbsnews.com/news/biden-special-counsel-report-handling-classified-documents/>

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