**From:** "Sauber, Richard A. EOP/WHO" [redacted]

**To:** "Marc Krickbaum - Special Counsel (Deputy)" [redacted], "RKHSC (JHPT)" [redacted]

**Cc:** "Sauber, Richard A. EOP/WHO" [redacted], "Cotton, Rachel F. EOP/WHO" [redacted], Bob Bauer [redacted], [redacted]

**Subject:** [EXTERNAL] See attached letter

**Date:** Wed, 18 Oct 2023 11:50:59 -0400

**Importance:** Normal

**Attachments:** 2023.10.18.Sauber-Bauer_to_Hur-Krickbaum_re_Overview_and_Report_(signed).pdf

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Gentlemen: see the attached letter re our discussion last Friday.

Dick

**Richard Sauber**
**Special Counsel to the President**
**Office of the White House Counsel**
[redacted]

**Privileged and Confidential**

THE WHITE HOUSE
WASHINGTON

October 18, 2023

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:

At our meeting last Friday, we requested that you provide an overview of where matters stand in this case, particularly any remaining questions or concerns we should address. We also asked for the opportunity to discuss your expected report to the Attorney General at the conclusion of the investigation, including time to review it prior to its submission to the Attorney General. You advised us that you were not prepared to engage with these requests at that time but would take them under consideration.

We believe that our requests are well-founded and in the interests of all in the exceptional circumstances of this case. We briefly reviewed our reasons at the meeting and set them in out in more detail below.

*Meeting Regarding Overview of Case*

When counsel for the subject of an investigation seeks to engage with prosecutors, it is standard Department of Justice (DOJ) practice to permit defense counsel an opportunity to be heard and to address unresolved issues toward the conclusion of the investigation. This is especially true where there has been a record of cooperation, as we have in this case. President Biden directed his counsel from the start to inform the authorities immediately upon the discovery of documents that should have been in the National Archives, and his cooperation has continued undiminished since then. He has taken steps that no previous occupant of the office has undertaken. President Biden has agreed to three consent searches of his personal residence, waived his right under the Presidential Records Act to prior review of records produced from the Archives, permitted a classification review of his personal notebooks, and sat for five hours of a voluntary interview. President Biden has consistently directed and supported cooperation at every juncture. This history of cooperation should weigh decisively in favor of our request.

The DOJ practice we ask be followed here is partially based on fairness to the subject but it is also seen as a benefit to prosecutors and to the public interest because such a discussion can avoid reliance by the prosecutors on assumptions that may be inaccurate or otherwise misguided.

The lawyers for the President have many decades of experience and none can recall a single case in which prosecutors have declined a request for such a discussion.

As part of that process, and so the meeting is productive, it is customary that the prosecutors provide counsel with at least some information about the prosecutors' general remaining legal and factual questions and concerns. That way counsel can focus their presentation on the issues of greatest interest to the prosecutors rather than relying on guesses about the statutes, legal theories, or factual conclusions at issue. A meeting affords the subject of the investigation an opportunity to be heard on these central issues and provides the prosecutors an opportunity to identify any avoidable error of law or fact.

That this case involves the President of the United States and the discharge of core constitutional functions heightens the need for standard process of the kind we are requesting. The President's cooperation reflects not only the President's personal commitment to supporting, in all appropriate ways, this law enforcement inquiry, but also a belief that this matter implicates institutional interests of importance to future presidencies. As such, the President seeks to ensure that, in matters of both process and substance, the resolution reached will stand the test of time.

The discussions we have had to date have enabled us, among other subjects, to address any uncertainty about the law and practice governing Presidents and Vice President keeping and retention of notes, including those that contain classified information. We have also been able to supply detailed legal analysis confirming the independent constitutional standing of Vice Presidents in managing classified information in the conduct of their official duties. In these and other instances, we have extended our cooperation to the critical mission of assuring that the resolution of this cases rests on firm legal as well as factual ground. Our request for a meeting to hear about other questions you may have is offered to the same end, as it is not in the interest of DOJ, the White House, or the public for there to develop any gaps, omissions, or misunderstandings involving questions we could address with appropriate notice.

*Discussion and Review of the Report to the Attorney General*

Attorney General Garland has committed to making public as much as possible of the "confidential report" you are required to provide under the special counsel regulations. 28 C.F.R. § 600.8(c); *see* Dep't of Justice, "Attorney General Merrick Garland Delivers a Statement" (Aug. 11, 2023) ("*As with each Special Counsel who has served since I have taken office*, I am committed to making as much of [Weiss's] report public as possible, consistent with legal requirements and Department policy" (emphasis added)). Depending on the nature and scope of the report you prepare and submit, its release could have a major impact in the first instance on public understanding of the case. Accordingly, this release underscores the importance of avoiding any unidentified factual or legal defects that might surface in the course of a focused meeting between your office and the President's counsel.

Moreover, to the extent that your report touches in any way upon procedures in this or prior administrations for the handling of sensitive national security information, your report will

also be read with intense interest in every foreign capital. It could affect the national security interests of the United States in ways that none of us can anticipate.

We certainly do not seek to "edit" your report—nor could we—but this process would allow for the identification of factual or legal inaccuracies, or other issues in the report involving national security matters that would be of clear and compelling concern to a president. We would provide all such comments in writing to establish a clear record of the process followed for this purpose.

We will submit additional views on issues relating to the report. At this time, we ask that you favorably consider the requests we made at the Friday meeting and that we renew here.

Respectfully,

Richard Sauber
*Special Counsel to the President*

Bob Bauer
*Personal Counsel to Joseph R. Biden, Jr.*

**From:** "Sauber, Richard A. EOP/WHO" [redacted]

**To:** "RKHSC (JHPT)" [redacted], "Marc Krickbaum - Special Counsel (Deputy)" <[redacted]

**Cc:** "Sauber, Richard A. EOP/WHO" [redacted], "Cotton, Rachel F. EOP/WHO" [redacted] >, "Siskel, Ed N. EOP/WHO" [redacted], Bob Bauer [redacted] >, [redacted] EOP/WHO" [redacted]

**Subject:** [EXTERNAL] See attached letter

**Date:** Tue, 31 Oct 2023 16:32:16 -0400

**Importance:** Normal

**Attachments:** 2023.10.31.Letter_to_Hur-Krickbaum_re_Regulations_(signed).pdf

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Rob and Marc:

Attached is a letter regarding the report that is contemplated by the Special Counsel regulations. We previously mentioned that we would be providing this to you. As you will see, based on the issues addressed in the letter, we are also reiterating our request to have the opportunity to review a draft of your report before it becomes public.

We look forward to discussing these issues with you.

Dick

**Richard Sauber**
**Special Counsel to the President**
**Office of the White House Counsel**
[redacted]

**Privileged and Confidential**

THE WHITE HOUSE
WASHINGTON

October 31, 2023

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:

In our October 18 letter to you, we asked to have the opportunity to review and comment on a draft of the "confidential" report that you are required to write under the Special Counsel regulations. We also noted that we would follow up on the subject of the Special Counsel's "final report" requirement more broadly.

This letter is that follow up. It offers a detailed history of the evolution of the final report requirement from the Independent Counsel Act to the current regulatory framework. That history makes clear that the Special Counsel regulations reflect the Department's express rejection of the drafting and publication of long, detailed reports of the type that were issued at the conclusion of investigations under the Act. Such reports departed from the Department's traditions by including extensive analysis and criticism of unindicted individuals. The Special Counsel regulations, which the Department issued after Congress refused to reauthorize the Act, were explicitly designed to eliminate these exhaustive reports. The regulations were instead intended as a return to the fundamental principle that the Department of Justice speaks through charges—which provide a forum for individuals to contest the evidence and defend themselves—or not at all.

In any event, Attorney General Garland has committed to publishing your report, and we are aware, of course, that the Department has published the reports of each of the prior three Special Counsels as well. But we do wish to underscore how important it is under these circumstances to allow the President's lawyers the opportunity to review a draft of your report to address potential inaccuracies or unfair characterizations and conclusions. Given that the President, through counsel, has no opportunity to test any of the evidence discussed in the report, the President's lawyers should have a meaningful opportunity to review and provide comment on the report before it becomes public. As we detail below, commentators from across the political spectrum have been troubled by the practice of public reports by prosecutors. It seems only fair, and a benefit to all, to allow the President's counsel this opportunity.

## I. The Special Counsel Regulations Were Specifically Intended to End the Independent Counsel Act's Practice of Unfair Detailed Public Reports.

The Department issued the current Special Counsel regulations, 28 C.F.R. §§ 600.1-600.10, on July 9, 1999, in the wake of the debate over the reauthorization of the Independent Counsel Act. *See* Office of Special Counsel, 64 Fed. Reg. 37038-44. At the time, that Act directed Independent Counsels to produce a final report "setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought." 28 U.S.C. § 594(h)(1)(B).

The Independent Counsel Act engendered widespread and bipartisan criticism, in large measure because the final "reports" required by the Act often served as "an unfair opportunity to publicly castigate, and to level criticisms and judgments against the targets of [the Independent Counsel's] investigation, even if the Independent Counsel was unable or unwilling to indict such persons." *See* CONG. RESEARCH SERV., RL31246, INDEPENDENT COUNSEL LAW EXPIRATION AND THE APPOINTMENT OF "SPECIAL COUNSELS" CRS-14 (2002). The Special Counsel regulations, which were published days after the Act lapsed, were explicitly promulgated "to replace the procedures set out" in the Act, 64 Fed. Reg. at 37038, and must be understood against this backdrop.

The Department and its leaders opposed the Independent Counsel Act's reauthorization, extensively criticizing the law's structure and procedures and, particularly, the final report requirement. In congressional hearings addressing the reauthorization of the Act, Attorney General Janet Reno strongly criticized these final reports, asserting that "the report requirement cuts against many of the most basic traditions and practices of American law enforcement." *The Future of the Independent Counsel Act: Hearings before the S. Comm. On Governmental Affairs*, 106th Cong. 252 (1999) (prepared statement) (Senate Hearings). She continued:

> Under our system, we presume innocence and we value privacy. We believe that information obtained during a criminal investigation should, in most all cases, be made public only if there is an indictment and prosecution, not in lengthy and detailed reports filed after a decision has been made *not* to prosecute.

*Id.* (emphasis in original). On balance, she concluded, "We have come to believe that the price of the final report is often too high." *Id.*

Deputy Attorney General Eric Holder echoed these concerns in his own testimony:

> Although there is a legitimate concern that the American people have a right to know the outcome of an investigation of their highest officials, the reporting requirement goes directly against most traditions and practices of law enforcement and American ideals.

*Reauthorization of the Independent Counsel Statute, Part I: Hearings Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 79 (1999) (prepared statement) (House Hearings). He said, among other things, that it is contrary to a

presumption of innocence, the right to privacy, "and our Departmental tradition that we reveal offenses in the courtroom during a criminal trial, not by filing a document that is never filed when we decline to prosecute ordinary criminal cases." *Id.* And he likewise noted that the final report requirement "provides an incentive for Independent Counsel to over-investigate every detail in order to avoid criticism that their final reports missed something." *Id.*

The congressional record establishes that these concerns were broadly held—including by those previously charged with responsibilities under the Independent Counsel Act. As Judge Kenneth Starr said, "The witnesses before this Committee have been virtually unanimous in their opposition to final reports. I concur." Senate Hearings at 430 (prepared statement). Judge David Sentelle, the Presiding Judge of the Special Division for the Purpose of Appointing Independent Counsels, testified that the Independent Counsel Act's final report requirement "has no counterpart in Federal criminal law outside the Act and exposes the subjects of investigation to derogatory information that has never been tested by a trial process and was apparently not sufficient to be the foundation for an indictment." Senate Hearings at 481 (prepared statement). Judge Starr similarly argued that the reports create a "very unfortunate dynamic" by forcing Independent Counsels to say "'I have got to go an extra mile in order to have a report that will withstand the most searing scrutiny by individuals who would want to be quite critical of it and call the professionalism of the report into question.'" Senate Hearings at 471-72; *see also*, *e.g.*, Senate Hearings at 33 (prepared statement of former Attorney General Griffin B. Bell arguing that a final report "can be another example of lack of due process by suggesting guilt although there was no indictment"); House Hearings at 152-53 (prepared statement of former Attorney General Benjamin Civiletti characterizing the final report as the "sort of prosecutorial behavior [that] would never be tolerated in the course of the usual criminal process" and noting that the Act was meant "to ensure that high-ranking officials did not get special treatment, not to subject them to unfair and unequal treatment").

## II. The Special Counsel Regulations Call for a Confidential and Limited Report.

As a result of the widespread criticism of the Independent Counsel Act, it was not reauthorized. Instead, the Department promulgated the Special Counsel regulations, which remain in effect today.[1]

[1] In letting the Independent Counsel Act lapse, Congress understood how the Department intended to fill the gap. As part of the debate over reauthorizing the Act, Congress asked the Department to provide "a detailed plan addressing how the Department of Justice would handle matters that currently are addressed pursuant to the Independent Counsel Act . . . were the Act to be allowed to lapse as of June 30, 1999." *See* Letter from Acting Assistant Attorney General Dennis K. Burke to Chairman George W. Gekas (April 13, 1999), *reprinted at* Senate Hearings at 315-322. The Department informed Congress via letter that "a replacement set of procedures is being prepared to take effect should the Independent Counsel Act be allowed to lapse by Congress, as we believe it should." *Id.* at 316. The Department's letter described the "general principles" that would animate these procedures, which hewed closely to the language of the ultimate Special Counsel regulations.

Rather than requiring a final report "setting forth fully and completely a description of the work of the independent counsel," 28 U.S.C. § 594(h)(1)(B), the new Special Counsel regulations specified that, at the conclusion of their work, Special Counsels should issue only a "confidential report" to the Attorney General that would simply "explain[] the prosecution or declination decisions reached by the Special Counsel," 28 C.F.R. § 600.8(c).

These two hallmarks of the report—confidentiality and its summary nature—were intended to remedy the concerns with the final reports issued by Independent Counsel.

A. Confidentiality

The Department noted that the "principal source" of the problems with the Independent Counsel Act's Final Report requirement was "the fact that the Report typically has been made public, unlike the closing documentation of any other criminal investigation." 64 Fed. Reg. at 37040-41. In the Department's view, this "single fact both provides an incentive to over-investigate, in order to avoid potential public criticism for not having turned over every stone, and creates potential harm to individual privacy interests." *Id.* As a result, the Department decided, under the new regulations, the Special Counsel would submit a "summary final report" to be "handled as a confidential document, as are internal documents relating to any federal criminal investigation." *Id.*

Though the regulation provides that the Special Counsel's report is to be confidential, the Department took steps to "help ensure congressional public confidence in the integrity of the process," by requiring the Attorney General to report to Congress:

> These reports will occur on three occasions: on the appointment of a Special Counsel, on the Attorney General's decision to remove a Special Counsel, and on the completion of the Special Counsel's work. These reports will be brief notifications, with an outline of the actions and the reasons for them.

64 Fed. Reg. at 37041; *see also* 28 C.F.R. § 600.9(a) (relevant regulatory provision). It is *these* reports—i.e., the Attorney General's "brief notifications" to Congress—that are to serve "[t]he interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel." 64 Fed. Reg. at 37041.

The Attorney General "may determine that public release" of the Attorney General's reports to Congress "would be in the public interest, to the extent that release would comply with applicable legal restrictions." 28 C.F.R. § 600.9(c).[2] But "[a]ll other releases of information by

[2] In isolation, the phrase "these reports," as used in subsection 600.9(c) could be seen as ambiguous. But, in context, it is clear that the phrase refers only to the Attorney General's reports to Congress, which are discussed immediately beforehand in subsections 600.9(a) and (b). Indeed Section 600.9 as a whole is entitled "Notification and reports by the Attorney General." The Special Counsel's confidential report is set forth in a different section, "Notification and reports by the Special Counsel." 28 C.F.R. § 600.8. The conclusion that the Special Counsel's report is not among the reports that subsection 600.9(c) empowers the

any Department of Justice employee, including the Special Counsel and staff, concerning matters handled by Special Counsels shall be governed by the generally applicable Departmental guidelines concerning public comment with respect to any criminal investigation, and relevant law." 64 Fed. Reg. at 37041. As Deputy Attorney General Rod Rosenstein wrote:

> Criminal *prosecutions* should be relatively transparent—because the public should know the grounds for finding a citizen guilty of criminal offenses and imposing punishment—but criminal *investigations* emphatically are not supposed to be transparent. In fact, disclosing uncharged allegations against American citizens without a law-enforcement need is considered to be a violation of a prosecutor's trust.

Letter to Chairman Charles Grassley, Senate Committee on the Judiciary, from Rod J. Rosenstein, Deputy Attorney General at 8-9 (June 27, 2018) (Rosenstein Letter) (emphasis in original).[3]

Thus, under the Special Counsel regulations, the Special Counsel "must follow Department policies and procedures. Under those policies and procedures, the Department should reveal information about a criminal investigation only when it is necessary to assist the criminal investigation or to protect public safety." Rosenstein Letter at 5.

B. Limited Scope

The Special Counsel regulations also contemplate only a summary final report. As noted above, at the time of its expiration, the Independent Counsel Act provided that independent counsels were to "file a final report . . . *setting forth fully and completely a description of the work of the independent counsel*." 28 U.S.C. § 594(h)(1)(B) (emphasis added). By contrast,

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Attorney General to make public is only reinforced by the Department's statement when promulgating the regulations that the Special Counsel's report "will be handled as a confidential document, as are internal documents relating to any federal criminal investigation. The interests of the public in being informed of and understanding the reasons for the actions of the Special Counsel will be addressed in the final set of reporting requirements, discussed below." 64 Fed. Reg. at 37041. The discussion then immediately moves to the Attorney General's reporting requirements. *Id.*

[3] *See also*, *e.g.*, 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 vi (2018) (concluding that a 2016 public statement by then-FBI Director James Comey "violated long-standing Department practice and protocol by, among other things, criticizing [Hillary] Clinton's uncharged conduct"); Memorandum for the Attorney General from Rod J. Rosenstein, Deputy Attorney General, *Re: Restoring Public Confidence in the FBI* (May 9, 2017) (stating that Mr. Comey "ignored another longstanding principle: we do not hold press conferences to release derogatory information about the subject of a declined criminal investigation" and that the Department "never" releases derogatory information gratuitously).

under the Special Counsel regulations, the final report is meant only to "explain[] the prosecution or declination decisions reached by the Special Counsel." 28 C.F.R. § 600.8(c). The Special Counsel's final report is intended to be akin to how, "[i]n major cases, federal prosecutors commonly document their decisions not to pursue a case, explaining the factual and legal reasons for the conclusions they have reached." 64 Fed. Reg. at 37041; *see also* Justice Manual 9-27.270. As opposed to the Independent Counsel's "full" and "complete" description of their work, the Department explained that the Special Counsel's final report is a "limited reporting requirement" in the form of a "summary" final report. 64 Fed. Reg. at 37041.

The Department's decision to impose such a limited scope for the final report was presumably in response to the sharp criticism of the broad ambit of the Independent Counsel Act's final report requirement. Theodore Olson, for instance, criticized the reporting requirement as "an excuse to file long exhaustive expositions which rationalize the investigation, describe every fact investigated, witnesses interviewed and document examined, offer opinions regarding and/or pronounce judgments on the individuals investigated, and generally make the Independent Counsel look good." Senate Hearings at 231 (prepared statement); *see also id.* at 233 ("these reports have become lengthy, government-financed, self-congratulatory tomes"). Professor Ken Gormley testified that the provision "requires (in effect) that every special prosecutor, prior to leaving office, must fully explain the work history of his or her operation, and justify his or her actions." Senate Hearings at 383. He called it a "daunting, costly, and time-consuming task," noting that "[m]ost independent counsels will tend to err on the side of over-completeness, preparing vast reports that leave no stone unturned, in order to justify their work and defend their reputations in politically-charged investigations." *Id.* He argued that "Congress should dramatically shrink the scope of information that must be provided at the conclusion of the independent counsel's work," instead arguing in favor of a "short and pithy" report. *Id.* Attorney General Reno herself testified that the "unique expectations placed upon a Counsel," including "that he or she will prepare a comprehensive final report," "is a very expensive way to do business." Senate Hearings at 249.

And so, perhaps unsurprisingly, in issuing the Special Counsel regulations, the Department established only a "limited reporting requirement," transitioning from what Attorney General Reno called a "comprehensive final report" to what the Department called a "summary final report." 64 Fed. Reg. at 37041; *see also* Ken Starr*, Mueller Cannot Seek an Indictment. And He Must Remain Silent*, THE ATLANTIC (Mar. 22, 2019) (stating that the drafters of the Special Counsel regulations "set themselves firmly against the revolutionary principle of factually rich prosecutorial reports. It might seem strange for me to say, but they were right to do so.").

In creating the reporting requirement, the Department explained that "it is appropriate for any federal official to provide a written record upon completion of assignment, both for historical purposes and to enhance accountability—particularly a federal official who has functioned with substantial independence and little supervision." 64 Fed. Reg. at 37041. In other words, the Department established the Special Counsel's final report to the Attorney General as a vehicle to provide accountability *for the Special Counsel*. It is emphatically *not* meant as a vehicle to provide accountability for the subject of the investigation.

## III. The Attorney General's Commitment to Publishing the Final Report Requires Attention to the Department's Regulations, Principles, and Traditions.

Notwithstanding the history of the Special Counsel regulations, Attorney General Garland has expressed his commitment to making public as much as possible of your "confidential report." *See* Dep't of Justice, "Attorney General Merrick Garland Delivers a Statement" (Aug. 11, 2023) ("*As with each Special Counsel who has served since I have taken office*, I am committed to making as much of [Special Counsel Weiss's] report public as possible, consistent with legal requirements and Department policy." (emphasis added)).

We recognize that his commitment along these lines follows on decisions made for other special counsels in recent years. However, the Department's decision to publicly release the confidential report is in tension with the history of the Special Counsel regulations and means the report cannot be written as though it would be kept confidential. *Cf. Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)* 45 Op. O.L.C. __ (July 30, 2021), slip op. 26 ("The Executive Branch, like the Judiciary, need not 'blind' itself to 'what [a]ll others can see and understand.'").

Accordingly, that report must endeavor to be consistent with the intent of the Special Counsel regulations, the Department's longstanding policies, and principles of fundamental fairness—including the Department's "duty to prevent the disclosure of information that would unfairly tarnish people who are not charged with crimes." Rosenstein Letter at 7; *see also Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996) ("prosecutors must not be allowed to file sweeping statements of fact alleging violations of various laws by unindicted individuals"); Justice Manual 9-27.760 ("federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third parties"); 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 247 (2018) ("We recognize that this investigation was subject to scrutiny not typical of the average criminal case, but that does not provide a basis for violating well-established Department norms and, essentially, 'trashing' the subject of an investigation with uncharged misconduct.").

We believe that these principles of the Department—as well as basic notions of fairness—should shape both what is included in the report as well as the process of drafting it.

At a minimum, the report should adhere to the kind of product contemplated by the Special Counsel regulations. As discussed, in contrast to the detailed independent counsel reports setting forth a "full and complete" description of their work, the Special Counsel regulations contemplate only that the Special Counsel will "explain[] the prosecution or declination decisions." 28 C.F.R. § 600.8(c). We support your faithful fulfillment of this requirement. But, consistent with the Department's description of a "limited" and "summary" product, 64 Fed. Reg. at 37041, the report should be economical. It should include the factual information necessary to the charging decision, but facts or events that are not essential to the decision have no place. *See* Senate Hearings at 236 (letter from Whitewater Special Counsel Robert B. Fiske, Jr. arguing to eliminate the Independent Counsel Act's final report requirement and noting that "a report which discusses the evidence at length may be unfair to the extent that it

may, even implicitly, incriminate subjects who were nevertheless not indicted").

In the same vein, the report should stay within the bounds of the Special Counsel's limited jurisdiction. The regulations provide that "the Special Counsel's jurisdiction will cover *only the criminal aspects* of the matters within his or her jurisdiction, unless other jurisdiction is specifically granted by the Attorney General." 64 Fed. Reg. at 37039 (emphasis added); *see also* 28 C.F.R. § 600.4(c) ("A Special Counsel shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General."). The regulations make abundantly clear that the Special Counsel is a criminal prosecutor, not a supercharged inspector general. It would be inappropriate, for instance, for the report to undertake a compliance review of the procedures for handling classified information in the executive branch, or make policy recommendations for improvements to such procedures.

The President should also be afforded the opportunity to review a draft of the report so that he has some ability to respond to any inaccurate allegations before they become public. "[A] man should not be subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum." *United States v. Briggs*, 514 F.2d 794, 802 (5th Cir. 1975) (quoting *Application of United Electrical, Radio & Mach. Workers*, 111 F. Supp. 858, 867 (S.D.N.Y. 1953)). President Biden should be able to raise concerns about inaccurate or incomplete information before the report is finalized rather than having to correct the record after it has been released to the public. Courts have recognized that such situations unjustly inflict injuries that "may never be healed." *Briggs*, 514 F.2d at 803 (quoting *People v. McCabe*, 148 Misc. 330, 334 (1933)). Since President Biden will lack the opportunity to respond to any potential criticisms before an "authoritative forum," he at least deserves the chance to respond to you.

## IV. Conclusion

We understand and affirm the importance of maintaining public confidence in the integrity of your investigation. Appropriate transparency bolsters this confidence, which is vital to the rule of law.

At the same time, "no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights." *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981). We recognize that the President will not have a "forum" of the type contemplated by the previous quote, and as a consequence the opportunity to address issues in a draft report will be his only opportunity to advocate for accuracy and fairness.

We stand ready to discuss these issues at your convenience.

Respectfully,

Richard Sauber
*Special Counsel to the President*

**From:** Bob Bauer [redacted]
**To:** "MLK (JHPT)" [redacted], "RKHSC (JHPT)" [redacted]
**Cc:** "Cotton, Rachel F. EOP/WHO" [redacted], Jennifer Grace Miller [redacted], "Sauber, Richard A. EOP/WHO" [redacted], "Siskel, Ed N. EOP/WHO" [redacted]
**Subject:** [EXTERNAL] Topics for tomorrow's meeting
**Date:** Tue, 05 Dec 2023 11:24:19 -0500
**Importance:** Normal

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Hi, Rob and Marc:

We look forward to the meeting tomorrow. We view this as an opportunity for a full discussion of any outstanding substantive questions or issues you believe have not been adequately addressed to this point. We are particularly interested in any remaining questions you may have following review of our responses to your letter of November 17.

In addition to these questions of substance, we would also like to discuss the process, and in particular the nature of the report that you are preparing for the Attorney General in a case that does not, and cannot, involve matters of liability. The report's treatment of the issues in this case—the handling of marked classified materials and the legal status of presidential notes – – are ones of legitimate interest to the President not only as the subject of the inquiry but also in his official capacity. Accordingly, we would like your views on what we might expect, and, in that connection, we would like to renew and discuss our request to review the draft report for purposes of flagging any concerns or questions we may have.

Given your emphasis throughout on the importance of thoroughness and rigor in your investigation, we think the discussion tomorrow of these issues is an essential step as the inquiry nears its conclusion. We look forward to that discussion.

Best,
Bob

**From:** "Sauber, Richard A. EOP/WHO" [redacted]
**To:** "RKHSC (JHPT)" [redacted] "Marc Krickbaum - Special Counsel (Deputy)" [redacted]
**Cc:** "Sauber, Richard A. EOP/WHO" [redacted] "Cotton, Rachel F. EOP/WHO" [redacted], Bob Bauer [redacted], [redacted] EOP/WHO" [redacted]
**Subject:** [EXTERNAL] Joint Letter to the Special Counsel
**Date:** Fri, 15 Dec 2023 10:32:12 -0500
**Importance:** Normal
**Attachments:** 2023.12.15.Letter_to_Hur-Krickbaum.pdf

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Marc and Rob-

Please see the attached letter from the White House and from the President's personal counsel as well.

Dick

**Richard Sauber**
**Special Counsel to the President**
**Office of the White House Counsel**
[redacted]
**Privileged and Confidential**

THE WHITE HOUSE
WASHINGTON

December 15, 2023

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:

Thank you for taking the time to meet last week.

We appreciated your confirmation that you do not have any questions with respect to the President's cooperation in this matter. As noted in the meeting, the President has cooperated extensively in your inquiry, well beyond what is normally understood to be full cooperation, in this year-long investigation initiated upon the President's self-report. We wanted no possible question on that score. We further welcomed your confirmation that you will be guided by the Department of Justice precedent, policies, and practices in the resolution of this matter and the manner in which you will prepare the eventual confidential report to the Attorney General.[1]

It was also helpful for us to hear that you currently have no questions about substantive legal issues other than those we have already answered in response to your November 7 letter. It was and remains especially important that you raise any outstanding legal question or concern you have so that we may address it. Particularly given the record of cooperation in this case, it would be deeply unfair and prejudicial for us to learn in your final report that you disagreed with our analysis on a material point without giving us the opportunity to provide a more comprehensive presentation on that particular point.

In our meeting, you also have maintained that your obligation under the Special Counsel regulations to provide the Attorney General with a "confidential" report prevents you from addressing with us your views of the law or facts in this case. We respectfully disagree. In every criminal investigation, the prosecutors must submit a confidential report at the conclusion of the case to their supervisors, but that requirement does not prevent substantive discussions with defense counsel about law and facts. We cannot find a basis in the regulations governing Special Counsels that would justify a different outcome here. Indeed, under those rules, the confidentiality requirement is meant only to ensure that the Special Counsel's report is handled like "internal documents relating to *any* federal criminal investigation." Office of Special Counsel, 64 Fed. Reg. 37038, 37041 (Jul. 9, 1999) (emphasis added). In no way does it create some *sui generis* prohibition on discussions with counsel.

[1] *See* 28 C.F.R. 600.7(a) ("A Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice.").

This kind of discussion is especially important in the context of our shared commitment to a thorough and rigorous investigation, which we all recognize will be the subject of keen public interest. It is in everyone's interest for there to be clarity on the legal as well as factual issues in this case. We believe that our previous exchanges have been fruitful, as in the discussions of the law, policy and practice governing presidents' and vice presidents' retention of their notes and notebooks, the constitutional status of the vice presidency, and the various ways that the Executive Branch procedures binding on other senior staff do not bind presidents and vice presidents. We hope upon reflection you will reconsider your position with regard to discussing the factual and legal issues in the case before you finalize your report to the Attorney General.

We turn now to our request to review the report before it is made public. We make that request yet again. While we believe that review would be most productive before the report is submitted by your office to the Attorney General, we should at least have the opportunity to review it after its submission to the Attorney General. We understand that some review has been afforded in the past to both White House Counsel's Office and personal counsel to the President.

As to the White House Counsel's Office, we believe our global privilege agreement dated April 26, 2023, with your Office *requires* that we be provided the opportunity to review the report before any information covered by our agreement is disclosed outside of the Executive Branch. As we noted at the meeting, Attorney General Garland has already committed to making public as much of your eventual report as possible, "consistent with legal requirements and Department policy." *See* Dep't of Justice, "Attorney General Merrick Garland Delivers a Statement" (Aug. 11, 2023). This raises the probability that information covered by the agreement—including documents and/or witness testimony—will be released to the public. Consequently, we believe that our agreement mandates giving our Office a sufficient opportunity to review your report, including for the well-established purpose of reviewing for executive privilege concerns. If you disagree with this assessment, please let us know.

Additionally, as we have stated on numerous occasions, both the White House and personal counsel seek to review the report to identify and seek correction of any potential errors or omissions. The importance of our ability to conduct this review is made plain by the fact that, as in any complex investigation, the prosecution will at times make inaccurate, unsupported, or inadvertently mistaken statements. The publication of a report with any such statements could have grave consequences, particularly given the heightened national security context of this case, focusing as it does on the highly sensitive subject of the management of classified information. The Special Counsel's report when made public will be read closely and with consequence both in the United States and abroad. Given these important national security concerns, and given the extent of the President's cooperation, this opportunity for review would seem both appropriate and fair.

We understand that this request may require consultation with the Attorney General, and we ask that you share this letter with his office. In addition, if you have concerns about this request or if the Attorney General's Office disagrees with our position, we would respectfully seek a meeting with the interested parties.

Finally, as we discussed in the meeting, we reiterate our request for access to the classification review performed by the Office of the Director of National Intelligence and for the return of President Biden's personal notebooks and notecards.

Respectfully,

Richard Sauber
*Special Counsel to the President*

Bob Bauer
*Personal Counsel to Joseph R. Biden Jr.*

WHITE HOUSE COUNSEL'S OFFICE
1650 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20502
WHITEHOUSE.GOV

**From:** "Sauber, Richard A. EOP/WHO" [redacted]
**To:** "RKHSC (JHPT)" [redacted], "Marc Krickbaum - Special Counsel (Deputy)" [redacted]
**Cc:** "Siskel, Ed N. EOP/WHO" [redacted], "Sauber, Richard A. EOP/WHO" [redacted], Jennifer Miller [redacted], "Cotton, Rachel F. EOP/WHO" [redacted]
**Subject:** [EXTERNAL] Letter re pending request
**Date:** Wed, 03 Jan 2024 17:08:29 -0500
**Importance:** Normal
**Attachments:** 2024.01.03.Sauber-Bauer_Letter_to_Hur-Krickbaum_(with_enclosure).pdf

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Rob and Marc-

Please see the attached letter (with attachment) regarding our request that we discussed in our call yesterday.

Dick

**Richard Sauber**
**Special Counsel to the President**
**Office of the White House Counsel**
[redacted]
**Privileged and Confidential**

THE WHITE HOUSE
WASHINGTON

January 3, 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 write to reiterate our pending request which we discussed yesterday during our call, and which we have made in previous submissions to you—including those dated October 18, 2023 and October 31, 2023—and during our discussions over the last several months. Personal counsel to the President and the White House Counsel's Office seek the opportunity to review a draft of your report prior to its submission to the Attorney General. We would provide you with prompt written comment on any factual and legal issues in the report, and contemporaneously the White House Counsel's Office would raise any executive privilege or confidentiality concerns, including pursuant to the April 26, 2023 agreement between the Special Counsel and the White House Counsel (attached). We would ask that you provide our written submission to the Attorney General when you submit your report to him.

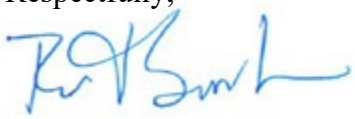
The subject matter of your report—national security and the sensitive subject of the handling of national security information—is uniquely within the President's constitutional duties. Its contents may impact the national security or foreign policy interests of the United States. It may also affect understandings and public discussion of long-standing White House practices and procedures in the management of classified information. Among the issues in this investigation are presidents' and vice presidents' note-taking practices and their reliance on staff in achieving prompt and secure access to the information they need. The appropriate public presentation of these and other issues in the Special Counsel's report is unquestionably a legitimate concern for the President. Under these circumstances, the President has a responsibility to help ensure that the report is fair and entirely accurate.

Another reason we seek this opportunity to review and comment on your draft report is one of basic fairness. Critical or derogatory comment about an uncharged party who lacks a forum to respond is patently unfair, and the President should be afforded the opportunity to review a draft of the report so that he has some ability to address for your consideration any inaccurate or materially misleading legal and factual representations. The decision whether to make any changes in response to those concerns will ultimately be yours, but particularly given President Biden's extensive cooperation, he should be able to raise concerns about inaccurate or incomplete information.

The Special Counsel regulations do not bar you from permitting the President a final step of review and comment. The "confidential" nature of the report to the Attorney General is for the protection of subjects and third parties. It is not reasonably read to deny the Special Counsel the authority to provide a review of the draft for the benefit of both the President and the Government—and for the benefit overall of a thorough, accurate, and fair accounting of a Special Counsel inquiry involving national security practices, systems, and processes.

We appreciate your consideration of this request.

Respectfully,



Richard Sauber
*Special Counsel to the President*

Bob Bauer
*Personal Counsel to Joseph R. Biden, Jr.*

Enclosure

CC: Matthew B. Klapper
Chief of Staff and Counselor to the Attorney General

**From:** "RKHSC (JHPT)" [redacted] >
**To:** "Siskel, Ed N. EOP/WHO" [redacted] >, [redacted], "Cotton, Rachel F. EOP/WHO" [redacted], "Bob Bauer" [redacted]
**Cc:** "MLK (JHPT)" [redacted] >
**Subject:** Nondisclosure agreement and certification
**Date:** Fri, 05 Jan 2024 14:26:30 -0500
**Importance:** Normal
**Attachments:** Nondisclosure_Agreement_01052024.pdf

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All,

Good to speak with you earlier. Attached please find the nondisclosure agreement and certification we discussed.

Thank you,
Rob

---

**From:** RKHSC (JHPT)
**Sent:** Thursday, January 4, 2024 9:07 PM
**To:** Bob Bauer [redacted]
**Cc:** Cotton, Rachel F. EOP/WHO [redacted]; MLK (JHPT) [redacted]; Siskel, Ed N. EOP/WHO [redacted]
**Subject:** RE: [EXTERNAL] Re: Call tomorrow?

Thank you, Bob. 1:30 pm tomorrow works for us. We'll await a Zoom invite.

Thanks,
Rob

---

**From:** Bob Bauer [redacted] >
**Sent:** Thursday, January 4, 2024 8:17 PM
**To:** RKHSC (JHPT) [redacted] >
**Cc:** Cotton, Rachel F. EOP/WHO [redacted] MLK (JHPT) [redacted]; Siskel, Ed N. EOP/WHO < [redacted]
**Subject:** [EXTERNAL] Re: Call tomorrow?

Hello, Rob:

We are coordinating schedules, with one complication being that I will be traveling tomorrow. Would 1:30 be possible?

Best,
Bob

On Thu, Jan 4, 2024 at 6:06 PM RKHSC (JHPT) [redacted] wrote:

> All,

Could we please convene a follow-up call tomorrow? Please let me know when you'd be available.

Thanks,
Rob

Robert K. Hur
Special Counsel
(b) (6), (b) (7)(C)
(b) (6), (b) (7)(C)

**NON-DISCLOSURE AGREEMENT**

1. This agreement applies to the review by members of the White House Counsel's Office and personal counsel of the report of the Special Counsel's Office.

2. Review will be limited to the following people: Ed Siskel (White House Counsel), Richard Sauber (Special Counsel to the President), Rachel Cotton (Senior Counsel to the President), Robert Bauer (personal counsel), and Jennifer Miller (personal counsel). This agreement refers to this group collectively as "counsel."

3. Counsel will review the report for the sole purpose of determining whether to assert any claims under the April 26, 2023, agreement and otherwise providing comments to the Special Counsel's Office.

4. Before the report is made public, counsel will not disclose any part of the report or the content or substance of the report in any form to anyone other than President Joseph R. Biden, Jr.

5. Counsel will review the report at offices of the Department of Justice. During their review, counsel may not have access to any electronic device. Any work product created by counsel during the review, including notes, must be handwritten.

6. Counsel will have a maximum of four days to review the report and provide the Special Counsel's Office with a written submission.

7. Any leaks about the content of the report during counsel's review period will result in immediate termination of counsel's access and review privileges. Any leaks originating from counsel at any time before the report becomes public would violate this agreement and prompt appropriate responses, both investigative and public, from the Department of Justice.

8. At the conclusion of counsel's review of the report, each counsel will sign the attached certification affirming that he/she has and will continue to adhere to the terms of this agreement. This statement will be subject to the provisions of Title 18, United States Code, Section 1001.

I agree to the terms set forth above.

_____
NAME

_____
SIGNATURE

_____
DATE

## CERTIFICATION

By this certification, I affirm to the Department of Justice that I have and will continue to adhere to the terms of the attached non-disclosure agreement, including but not limited to paragraph 4, which prohibits me from disclosing any part of the Special Counsel's report or the content or substance of the report in any form to anyone other than President Joseph R. Biden, Jr., before the report is made public.

I understand that Title 18, United States Code, Section 1001, makes it a felony to knowingly and willfully make a materially false statement in any matter within the jurisdiction of the executive branch of the Government of the United States.

_____

NAME

_____

SIGNATURE

_____

DATE

**From:** Bob Bauer [redacted]
**To:** "MLK (JHPT)" <[redacted]>
**Cc:** "Sauber, Richard A. EOP/WHO" [redacted], "RKHSC (JHPT)" [redacted], "Siskel, Ed N. EOP/WHO" [redacted], "Cotton, Rachel F. EOP/WHO" [redacted], [redacted]
**Subject:** [EXTERNAL] Re: Nondisclosure agreement and certification
**Date:** Tue, 09 Jan 2024 19:17:39 -0500
**Importance:** Normal
**Attachments:** BauerNDA.pdf; JGM_Executed_NDA_1-9-23.pdf

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And attached are the executed NDAs from Jennifer and me.

Best,
Bob

On Tue, Jan 9, 2024 at 4:19 PM MLK (JHPT) [redacted] wrote:

> Received, thank you.
>
> ---
>
> **From:** Sauber, Richard A. EOP/WHO [redacted]
> **Sent:** Tuesday, January 9, 2024 3:18 PM
> **To:** RKHSC (JHPT) [redacted]; Siskel, Ed N. EOP/WHO [redacted]; Cotton, Rachel F. EOP/WHO [redacted]; Bob Bauer [redacted]
> **Cc:** MLK (JHPT) [redacted]; Sauber, Richard A. EOP/WHO [redacted]
> **Subject:** [EXTERNAL] RE: Nondisclosure agreement and certification
>
> Attached please find the executed NDAs from Ed, Rachel, and me.
>
> Thanks,
>
> Dick
>
> ---
>
> **From:** RKHSC (JHPT) <[redacted]>
> **Sent:** Friday, January 5, 2024 2:27 PM
> **To:** Siskel, Ed N. EOP/WHO [redacted]; Sauber, Richard A. EOP/WHO [redacted]; Cotton, Rachel F. EOP/WHO [redacted]; Bob Bauer [redacted]

**Cc:** MLK (JHPT) (b) (6), (b) (7)(C) >
**Subject:** Nondisclosure agreement and certification

Duplicative Material

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7. Any leaks about the content of the report during counsel's review period will result in immediate termination of counsel's access and review privileges. Any leaks originating from counsel at any time before the report becomes public would violate this agreement and prompt appropriate responses, both investigative and public, from the Department of Justice.

8. At the conclusion of counsel's review of the report, each counsel will sign the attached certification affirming that he/she has and will continue to adhere to the terms of this agreement. This statement will be subject to the provisions of Title 18, United States Code, Section 1001.

I agree to the terms set forth above.

BOB BAUER
NAME

SIGNATURE

1-9-24
DATE

## CERTIFICATION

By this certification, I affirm to the Department of Justice that I have and will continue to adhere to the terms of the attached non-disclosure agreement, including but not limited to paragraph 4, which prohibits me from disclosing any part of the Special Counsel's report or the content or substance of the report in any form to anyone other than President Joseph R. Biden, Jr., before the report is made public.

I understand that Title 18, United States Code, Section 1001, makes it a felony to knowingly and willfully make a materially false statement in any matter within the jurisdiction of the executive branch of the Government of the United States.

BOB BAUER

NAME

SIGNATURE

1-9-24

DATE

## NON-DISCLOSURE AGREEMENT

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4. Before the report is made public, counsel will not disclose any part of the report or the content or substance of the report in any form to anyone other than President Joseph R. Biden, Jr.

5. Counsel will review the report at offices of the Department of Justice. During their review, counsel may not have access to any electronic device. Any work product created by counsel during the review, including notes, must be handwritten.

6. Counsel will have a maximum of four days to review the report and provide the Special Counsel's Office with a written submission.

7. Any leaks about the content of the report during counsel's review period will result in immediate termination of counsel's access and review privileges. Any leaks originating from counsel at any time before the report becomes public would violate this agreement and prompt appropriate responses, both investigative and public, from the Department of Justice.

8. At the conclusion of counsel's review of the report, each counsel will sign the attached certification affirming that he/she has and will continue to adhere to the terms of this agreement. This statement will be subject to the provisions of Title 18, United States Code, Section 1001.

I agree to the terms set forth above.

Jennifer Grace Miller
NAME

SIGNATURE

1/9/23
DATE

**From:** Bob Bauer [redacted]
**To:** "RKHSC (JHPT)" [redacted]
**Cc:** "MLK (JHPT)" [redacted] "Miller, Jennifer Grace" [redacted]
**Subject:** [EXTERNAL] Re: Personal Counsel Letter
**Date:** Thu, 25 Jan 2024 16:34:21 -0500
**Importance:** Normal

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Gentlemen:

Thank you for your quick reply. We want to clarify our position in response to the question you raise.

We did ask early on, and we recall more than once, for the return of the notebooks and notes. We certainly assumed that they would be returned "eventually: They are the President's and there would be no basis for the Department to retain them indefinitely or forever. Perhaps any confusion here is the result of our having made this request in the first instance of John Lausch, as indicated in our notes—and our having not been as clear as we remember in later meetings with you.

But to the point you raise—that you would not return them before the conclusion of the investigation—we are asking for them precisely because your inquiry is concluding and we will be preparing for the review of the draft Report. If it would help to address the concern that the return occur only at the time that the investigation has clearly and definitely concluded with the immediately pending submission of the Report to the Attorney General, we would modify our request for access to the notes and notebooks so that it is provided only 24 hours in advance of and for the duration of that 4-day period. At the conclusion of the review, we would discuss with you the manner in which the permanent return would be accomplished.

We hope this clarifies the issue and offers a path forward. We would appreciate the opportunity to schedule a call for a brief discussion and, we hope, resolution. We commit to "brief." So please let us know if you will accommodate this request.

Best,
Bob

On Thu, Jan 25, 2024 at 10:22 AM RKHSC (JHPT) <[redacted] wrote:

> Bob and Jennifer,
>
> Thank you for your letter of January 24.
>
> We understand you to be requesting the return of "the President's personal notes and notebooks" immediately, rather than after the conclusion of our investigation. As we stated during our last in-person meeting with you and members of the White House Counsel's Office, before that point we understood you to have expressed, in an aside to another conversation, your desire for the *eventual* return of the materials. To the extent you're now seeking the

materials' *immediate* return before the conclusion of our investigation, we do not understand that to be a "reassert[ion]" of a prior request.

With respect to your current request, we do not agree to return the materials before the conclusion of our investigation.

Thank you,

Rob

---

**From:** Miller, Jennifer Grace [redacted (b) (6)]
**Sent:** Wednesday, January 24, 2024 3:24 PM
**To:** RKHSC (JHPT) [redacted (b) (6), (b) (7)(C)]; MLK (JHPT) [redacted (b) (6), (b) (7)(C)]
**Cc:** Bob Bauer [redacted (b) (6)]
**Subject:** [EXTERNAL] Personal Counsel Letter

Gentlemen:

Please see the attached letter.

Jennifer

Jennifer Grace Miller

Hemenway & Barnes LLP | 75 State Street | Boston, MA 02109 | (617) 557-9746 | e-mail

Website | Hemenway Trust Company

**From:** "Sauber, Richard A. EOP/WHO" <(b) (6)
**To:** "MLK (JHPT)" (b) (6), (b) (7)(C) >
**Cc:** "Atkinson, Lawrence (ODAG)" (b) (6) >, "RKHSC (JHPT)" (b) (6), (b) (7)(C)
**Subject:** [EXTERNAL] RE: Logistics for counsel review of SCO report
**Date:** Wed, 31 Jan 2024 10:11:57 -0500
**Importance:** Normal

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Thanks. Rush give me a call when you have info about our requests.

---

**From:** MLK (JHPT) (b) (6), (b) (7)(C)
**Sent:** Wednesday, January 31, 2024 10:07 AM
**To:** Sauber, Richard A. EOP/WHO (b) (6)
**Cc:** Atkinson, Lawrence (ODAG) (b) (6) ; RKHSC (JHPT) (b) (6), (b) (7)(C)
**Subject:** Logistics for counsel review of SCO report

Dick,

Rush Atkinson in the DAG's office is working on the logistics for your review of the report. I passed along to Rush the issues you and I have discussed. I'm connecting you with Rush directly here, and he will be your main point of contact on logistics.

Thank you.

Marc

Marc Krickbaum
Deputy Special Counsel
(b) (6), (b) (7)(C)
(b) (6), (b) (7)(C)

**From:** Bob Bauer [redacted]
**To:** "MLK (JHPT)" [redacted], "RKHSC (JHPT)" [redacted]
**Cc:** "Cotton, Rachel F. EOP/WHO" [redacted], Jennifer Grace Miller [redacted], "Sauber, Richard A. EOP/WHO" [redacted] "Siskel, Ed N. EOP/WHO" [redacted]
**Subject:** [EXTERNAL] Axios Story
**Date:** Sun, 04 Feb 2024 11:22:31 -0500
**Importance:** Normal

---

Hello, Rob and Marc:

No doubt you saw the Axios story today about the pending Report. In light of our commitments and obligations during the review process, and to be absolutely clear, we did not speak with the reporter and were not in any other way sources for this story.

Best,
Bob

**From:** Bob Bauer [redacted]
**To:** "MLK (JHPT)" [redacted] >, "RKHSC (JHPT)" [redacted]
**Cc:** Jennifer Grace Miller [redacted]
**Subject:** [EXTERNAL] Letter to Special Counsel
**Date:** Mon, 05 Feb 2024 11:51:54 -0500
**Importance:** Normal
**Attachments:** 2024-02-05_Counsel_Letter_to_SCO_Hur_re_Report.docx

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Gentlemen:

Please see the attached letter raising for your consideration factual issues in the Report. We are submitting it pursuant to the agreement governing our review of the Report, but on the changed schedule for review and submission that we discussed yesterday. Our agreement also provides that, following your review, you will transmit the letter along with the Final Report to the Attorney General.

Thank you,

Best,

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:

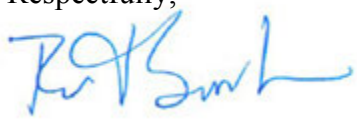
- "We considered the possibility that Mr. Biden alerted his counsel that classified documents were in the garage but our investigation revealed no evidence of such a discussion because if it happened, it would be protected by the attorney-client privilege." Report at 22. In fact, your investigation revealed 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.

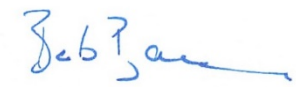
- In connection with its discussion of the Reagan diaries, the report states that the Special Counsel's Office "viewed the materials that were deemed to be classified at the Top Secret/SCI" level from the Reagan diaries, citing a December 1, 2023 production from the National Security Council. *Id.* at 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.*

**From:** "MLK (JHPT)" [redacted]
**To:** Bob Bauer [redacted] "RKHSC (JHPT)" [redacted]
**Cc:** Jennifer Grace Miller [redacted]
**Subject:** RE: [EXTERNAL] Re: Letter to Special Counsel
**Date:** Mon, 05 Feb 2024 12:30:28 -0500
**Importance:** Normal

---

Received. Thank you, Bob.

---

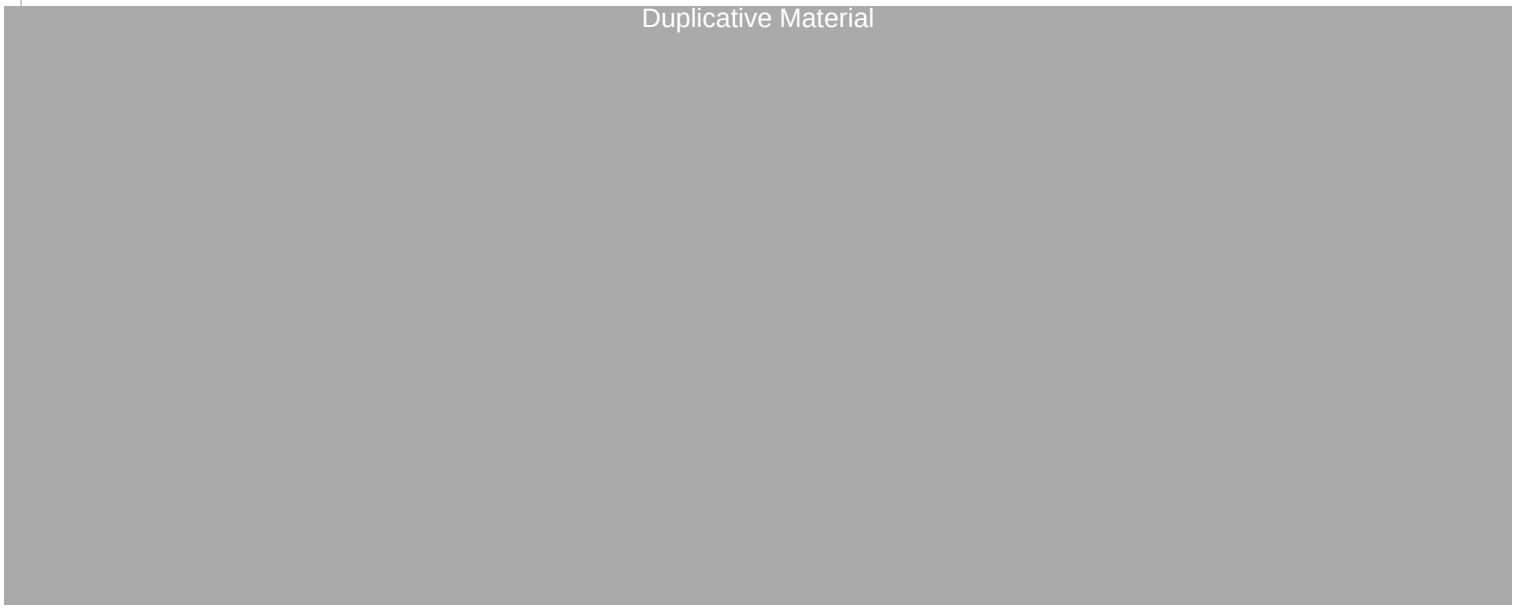
**From:** Bob Bauer [redacted]
**Sent:** Monday, February 5, 2024 12:28 PM
**To:** MLK (JHPT) [redacted] (JHPT) [redacted]
**Cc:** Jennifer Grace Miller [redacted]
**Subject:** [EXTERNAL] Re: Letter to Special Counsel

My apologies—I meant to add the request that you confirm receipt.

Thank you,

Best,
Bob

On Mon, Feb 5, 2024 at 11:51 AM Bob Bauer [redacted] > wrote:



**From:** "Klapper, Matthew B. (OAG)" [redacted]
**To:** "Siskel, Ed N. EOP/WHO" [redacted]
**Subject:** RE: [EXTERNAL] RE: Executive privilege review
**Date:** Wed, 07 Feb 2024 18:00:56 -0500
**Importance:** Normal
**Attachments:** Attorney_General_Letter_to_Chair_Durbin,_Chairman_Jordan,_Ranking_Member_Graham,_and_Ranking_Member_Nadler.pdf

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The Attorney General has received your letter. Please see the attached, which was just transmitted to the chairs and ranking members of the judiciary committees.

-----Original Message-----
From: Siskel, Ed N. EOP/WHO [redacted]
Sent: Wednesday, February 7, 2024 4:53 PM
To: Klapper, Matthew B. (OAG) [redacted]
Subject: RE: [EXTERNAL] RE: Executive privilege review

Understood. We are going to be sending a letter to the Attorney General soon from me and the President's personal counsel, Bob Bauer. I don't have an answer for you yet on the President's executive privilege determinations, but I am confident I will be able to give you an answer first thing tomorrow morning -- likely by 9am.

-----Original Message-----
From: Klapper, Matthew B. (OAG) [redacted]
Sent: Wednesday, February 7, 2024 4:35 PM
To: Siskel, Ed N. EOP/WHO [redacted]
Subject: RE: [EXTERNAL] RE: Executive privilege review

Checking in to see if there have been any developments re: the completion of your executive privilege determinations. We are going to make the notifications as soon as 5:30pm today consistent with the below, and our strong preference is for the notification to be accompanied by the report, to the extent possible. Please let me know.

-----Original Message-----
From: Klapper, Matthew B. (OAG)
Sent: Tuesday, February 6, 2024 10:09 PM
To: [redacted]
Subject: Re: [EXTERNAL] RE: Executive privilege review

Thanks. As I'm sure you're tracking, the Attorney General has an obligation under the regulation to notify the chairman and ranking of the judiciary committees upon conclusion of the special counsel's investigation. He will do this tomorrow, noting that the report is done, and if we're unable to produce the report, that it's pending White House executive privilege review.

Sent from my iPhone

> On Feb 6, 2024, at 8:29 PM, Siskel, Ed N. EOP/WHO [redacted] wrote:
>
> Not yet. Will let you know as soon as I do.
>

>
> -----Original Message-----
> From: Klapper, Matthew B. (OAG) [redacted]
> Sent: Tuesday, February 6, 2024 7:23 PM
> To: Siskel, Ed N. EOP/WHO [redacted]
> Subject: Executive privilege review
>
> Ed,
> Do you have any updates with regard to the status of the executive privilege review?
> Thanks,
> Matt
>
> Sent from my iPhone

# Office of the Attorney General
## Washington, D. C. 20530

February 7, 2024

The Honorable Richard Durbin
Chair, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Lindsey Graham
Ranking Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chair Durbin, Chairman Jordan, Ranking Member Graham, and Ranking Member Nadler:

In accordance with 28 C.F.R. § 600.9(a)(3), I write to inform you that Special Counsel Robert K. Hur has concluded his investigation. *See* Attorney General Order 5588-2023 (January 12, 2023).

The Special Counsel regulations provide that this notification is to include, consistent with applicable law, "a description and explanation of instances (if any) in which the Attorney General concluded that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.9(a)(3). There were no such instances during Special Counsel Hur's investigation.

On February 5, 2024, consistent with 28 C.F.R. § 600.8(c), Special Counsel Hur submitted to me his final report accompanied by appendices and a letter from counsel. Prior to submitting his report to me, Special Counsel Hur engaged with the White House Counsel's Office and the President's personal counsel to allow comments on the report. That included review by the White House Counsel's Office for executive privilege consistent with the President's constitutional prerogatives. The White House's privilege review has not yet concluded. As I have made clear regarding each Special Counsel who has served since I have taken office, I am committed to making as much of the Special Counsel's report public as possible, consistent with legal requirements and Department policy. I will produce to Congress the report, its appendices, and the letter from counsel following completion of the White House's privilege review.

Finally, consistent with 28 C.F.R. § 600.9(c), I will disclose this letter to the public after delivering it to you.

Sincerely,

Merrick B. Garland
Attorney General

**From:** "Siskel, Ed N. EOP/WHO" [redacted]
**To:** "Klapper, Matthew B. (OAG)" [redacted]
**Subject:** [EXTERNAL] Special Counsel Report
**Date:** Thu, 08 Feb 2024 09:07:12 -0500
**Importance:** Normal

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Matt—

I write to notify the Attorney General about the President's decision regarding asserting Executive Privilege over the Special Counsel's Report. While there are numerous portions of the Report for which the President would be well within established legal precedent to assert Executive Privilege, the President has decided not to assert Executive Privilege over any portions of the Report.

Please let me know if you have any questions.
Ed

**From:** "Siskel, Ed N. EOP/WHO" [redacted]
**To:** "Klapper, Matthew B. (OAG)" [redacted]
**Subject:** [EXTERNAL] RE: Special Counsel Report
**Date:** Thu, 08 Feb 2024 14:18:37 -0500
**Importance:** Normal

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Confirming receipt.

---

**From:** Klapper, Matthew B. (OAG) [redacted]
**Sent:** Thursday, February 8, 2024 2:15 PM
**To:** Siskel, Ed N. EOP/WHO [redacted]
**Subject:** Special Counsel Report

Ed,

The documents that were just provided to the chairs and ranking members of the House and Senate judiciary committees have been uploaded to the file upload link your team provided. These files consist of the Attorney General's transmittal letter to Congress, the Special Counsel's transmittal letter to the Attorney General, Counsel's letter to the Special Counsel, and a copy (with associated appendices) of "Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr." Please confirm receipt.

Thanks,

Matt

**From:** (b) (6) EOP/WHO" < (b) (6)
**To:** "Klapper, Matthew B. (OAG)" (b) (6)
**Subject:** [EXTERNAL] RE: Special Counsel Report
**Date:** Thu, 08 Feb 2024 14:20:15 -0500
**Importance:** Normal

---

Matt,

Confirming that we received a letter and a file named “Combined File…” Can you confirm those are the only files transmitted?

Thank you,
(b) (6)

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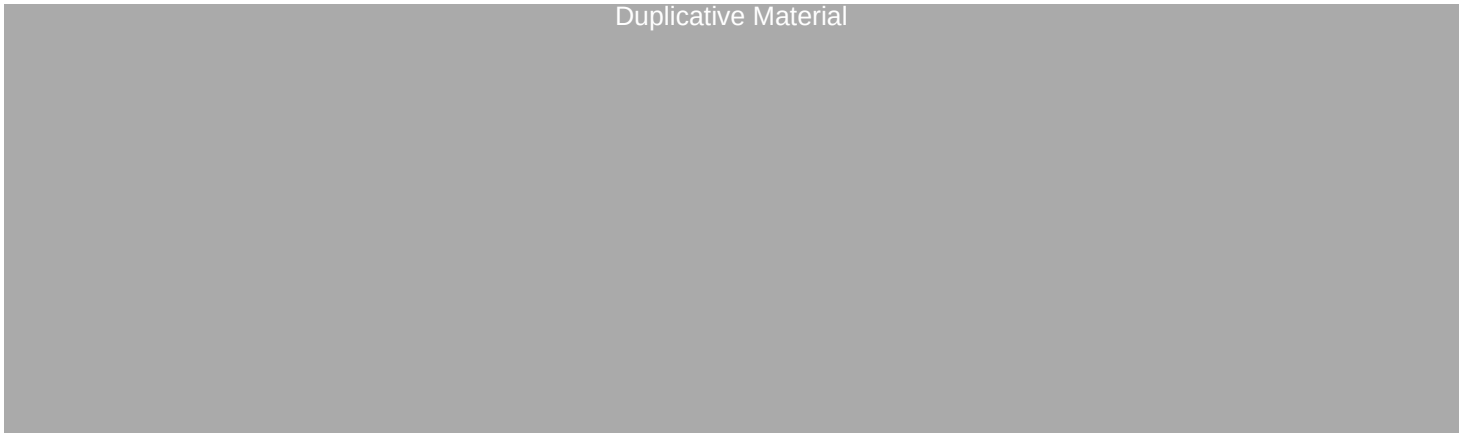
**From:** Klapper, Matthew B. (OAG) (b) (6)
**Sent:** Thursday, February 8, 2024 2:19 PM
**To:** (b) (6) . EOP/WHO (b) (6)
**Subject:** FW: Special Counsel Report

(b) (6) - Can you please confirm the below referenced uploads were successful?

---

**From:** Klapper, Matthew B. (OAG)
**Sent:** Thursday, February 8, 2024 2:15 PM
**To:** Siskel, Ed N. EOP/WHO < (b) (6)
**Subject:** Special Counsel Report



## **Event:** Meeting w/ WHCO and Bauer re review of report

**Start Date:** 2024-01-05 13:30:00 -0500

**End Date:** 2024-01-05 14:00:00 -0500

**Organizer:** Liljenwall, Grace G. EOP/WHO [redacted]

**Location:** Zoom; [redacted]

**Categories:** ,Meeting/VTC

**Class:** X-PERSONAL

**Date Created:** 2024-01-05 08:36:12 -0500

**Date Modified:** 2024-01-05 17:57:10 -0500

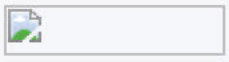
**Priority:** 5

**DTSTAMP:** 2024-01-05 08:35:55 -0500

**Attendee:** Siskel, Ed N. EOP/WHO [redacted]; Sauber, Richard A. EOP/WHO [redacted]; Cotton, Rachel F. EOP/WHO [redacted]; RKHSC (JHPT) [redacted]; MLK (JHPT) [redacted]

**Alarm:** Display the following message 15m before start

> Reminder



Hi there,

Grace Liljenwall is inviting you to a scheduled ZoomGov meeting.

Join Zoom Meeting

| | |
|---|---|
| One tap mobile: | US: +16692545252,,(b) (6) or +16469641167,,(b) (6) |
| Meeting URL: | https://pitc.zoomgov.com/(b) (6) pwd=Q1labmhSS0VxR3Y0cEs2aWx2SzlXdz09 |
| Meeting ID: | (b) (6) |
| Passcode: | (b) (6) |

## Join by Telephone

For higher quality, dial a number based on your current location.

| | |
|---|---|
| Dial: | +1 669 254 5252 US (San Jose) |
| | +1 646 964 1167 US (US Spanish Line) |
| | +1 646 828 7666 US (New York) |
| | +1 551 285 1373 US (New Jersey) |
| | +1 669 216 1590 US (San Jose) |
| | +1 415 449 4000 US (US Spanish Line) |
| Meeting ID: | (b) (6) |
| Passcode: | (b) (6) |

International numbers

## Join from an H.323/SIP room system

| | |
|---|---|
| H.323: | 161.199.138.10 (US West) |
| | 161.199.136.10 (US East) |
| Meeting ID: | (b) (6) |
| Passcode: | (b) (6) |
| SIP: | (b) (6) |
| Passcode: | (b) (6) |