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MEMORANDUM

TO: Special Counsel Robert K. Hur

FROM: Bob Bauer
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Jennifer Grace Miller
Hemenway & Barnes

DATE: February 20, 2023

Any case involving a sitting President of the United States is subject—by law, policy, and practice—to special concerns and considerations. This submission addresses one of those considerations: the appropriate treatment of President Joseph R. Biden, Jr.'s personal, handwritten notes, removed by the Department of Justice ("DOJ" or "Department") during consent searches of the President's Wilmington residence and the Biden Institute of the University of Delaware.

The relevant history demonstrates that DOJ's seizure of the President's personal records is unprecedented. DOJ has never investigated or prosecuted a President for the removal or retention of his personal records, such as handwritten notes and diaries, even in circumstances where those records might contain classified information. The Department has also refrained from reviewing such records because it sought to avoid triggering significant constitutional questions, including Separation of Powers and Executive Privilege issues.

DOJ's past practices and policies govern, of course, the appropriate courses of action in this matter. *See* 28 C.F.R. § 600.7 ("[a] Special Counsel shall comply with the rules, regulations, procedures, practices and policies of the Department of Justice"). The President's attorneys are ready to discuss any resolutions that aid in the discharge of these responsibilities in a manner consistent with constitutional and legal constraints.

Factual Background

This inquiry originated as a result of a self-disclosure made by the President's attorneys to the National Archives and Records Administration ("NARA"). Since then, the President has directed his attorneys to cooperate fully with NARA and DOJ. Among other things, the President's personal attorneys have: identified locations where potential records and documents with classified markings could potentially be found; provided detail about what might be found at those locations; and provided the President's consent to search those places he owns or controls, including the unprecedented consent search of his personal residences.

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On January 15, 2023, President Biden, through his personal attorneys, offered and provided consent to a comprehensive, room-by-room search of his Wilmington residence. The search was scheduled for January 20, 2023, and a final version of the consent form was executed the same day. The scope of the President's consent was set forth in two governing documents: the Wilmington Residence Consent and the Email Modification.

The Wilmington Residence Consent included "the authority to seize any items that agents determine may be related to their investigation, including, but not limited to:"

1) [a] items ***with classification markings*** or

   [b] items ***containing potentially classified information*** along with any containers/boxes (including any other contents) in which such items are located,

   [c] as well as ***any other items that are collectively stored or found together*** with the aforementioned items and containers/boxes;

2) ***government records and/or Presidential Records created between January 20, 2009 and January 20, 2017***; and

3) ***information relevant to access and ownership of the areas searched.***

(Emphases added).[1]

The Wilmington Residence Consent was amended by an email, dated January 19, 2023, from U.S. Attorney John Lausch to the President's personal attorneys (the "Email Modification").[2] The modifications included:

1) **Scope:** The Department confirmed that the President's personal lawyers could "limit the consent of the search in a way that would prohibit the agents' ability to search specific, limited areas of the Wilmington Residence which you represent contain only personal property or otherwise do not contain items subject to seizure."

2) **Notebooks:** The Department acknowledged it "may discover notebooks containing handwritten notes that appear relevant to the investigation . . . and may contain potentially classified information (*e.g.*, classified information that is not marked as such) as well as government records and/or Presidential Records" that are otherwise covered. The Department also confirmed that: "You have indicated that you may seek to assert that the notes in these notebooks – in whole or in part – are not subject to Presidential Records Act." For review of such records and to allow for "analysis

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[1] (b) (6), (b) (7)(C) Wilmington, Delaware, Consent to Search Agreement (Jan. 20, 2023), attached at Exhibit A.

[2] Email from John Lausch to Bob Bauer, Jennifer Grace Miller, Richard Sauber, cc: (b) (6), (b) (7)(C) Steven Dollear, Melody Wells, (b) (6), (b) (7)(C) (January 19, 2023), attached at Exhibit B.

of the legal issues you have raised," the Email Modification established a separate procedure, which includes removing, securing, and segregating those items:

> "Once these items are removed from the Wilmington Residence and secured, **we will collectively and promptly decide upon an appropriate process to review these notebooks and to address the legal and privacy issues you have raised. Until that review process has been agreed upon, FBI personnel will not conduct further review of those notebooks.**"

(Emphasis added.) In a subsequent communication between the President's personal attorney and U.S. Attorney Lausch, the parties clarified that the Email Modification also covered other handwritten notes, such as note cards.

Thus, the President's modified consent permitted an initial search and seizure of notebooks and other materials containing the President's handwritten notes and other personal information but anticipated a second consent agreement before any DOJ review of the contents of the notes. The process for retention of or, in the alternative, return of such materials is subject to further negotiation and agreement.

During the January 20, 2023, consent search of the Wilmington residence, DOJ seized a number of President Biden's handwritten notes, principally those contained in notebooks and on notecards.[3] As they contain the President's handwritten notes or other personal information, the seized items come within the scope of the Email Modification.

Similarly, on January 26, 2023, President Biden consented to a search of material maintained by the University of Delaware and the Biden Institute within the University of Delaware.[4] During that search, which took place on January 27, 2023, DOJ seized a binder containing the President's handwritten notes, and may have seized other handwritten notes.[5] DOJ and the President's personal attorneys agreed orally at the site to treat the binder and any other handwritten notes according to the Email Modification protocol. That is, the binder and notes would be removed, secured, and segregated, but would not be reviewed by DOJ until the parties had addressed the threshold legal issues and, as appropriate, agreed on a review process. President Biden's personal attorneys confirmed that oral agreement in writing, by email dated January 30, 2023.[6]

On January 31, 2023, President Biden consented to a search of the President's beach house located in Rehoboth Beach, Delaware. In an accompanying email from the President's personal attorneys, this consent was also conditioned on the reservation of any legal issues presented by

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[3] *See* "Detailed Inventory from January 20, 2023 Consensual Search of Wilmington Residence," attached at Exhibit C, Items #1, 5, 7-15.

[4] University of Delaware, Biden Institute, Consent to Search Agreement (Jan. 26, 2023), attached at Exhibit D.

[5] *See* Inventory from January 27, 2023, consent search, Item #1, attached as Exhibit E.

[6] *See* e-mail from Bob Bauer to John Lausch, cc: Jennifer Grace Miller (Jan. 30, 2023), attached at Exhibit F.

materials that DOJ might seize, such as personal records. On the day of the search, and on site, the President's personal attorney and DOJ confirmed orally that the Email Modification protocol would apply to handwritten materials seized at the beach house. The January 31, 2023, consent search resulted in the seizure of handwritten notes on notecards.

Discussion

I. Uniqueness of the Case.

Any investigation involving a sitting President of the United States involves unique considerations in light of the President's constitutional duties under Article II. The unique nature of such an investigation has been recognized over time in case law, Executive branch legal opinions, and DOJ Departmental policy and practice.

As a threshold matter, DOJ's Office of Legal Counsel ("OLC") has twice confirmed that criminal investigations and proceedings against an incumbent President are anything but normal. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 236 (Oct. 16, 2000) ("Because of the unique duties and demands of the Presidency . . . a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals"); *see also* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* at 30 (Sept. 24, 1973) ("To wound [the President] by a criminal proceeding is to hamstring the operation of the whole government apparatus, both in foreign and domestic affairs."). Indeed, any investigation of a sitting President raises other threshold and consequential legal issues, which implicate the well-established concern with avoiding unnecessary review of difficult constitutional questions.[7]

II. Handwritten Notes of a President or Vice President Are "Personal Records."

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[7] *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549, 568 (1947). Not all statutes enacted by Congress to define the duties of executive branch officers and impose criminal penalties for their violation apply to the President or the Vice President. Under the "clear statement rule," statutes that do not expressly reference the President or the Vice President typically do not apply to them. *Application of Consumer Credit Reporting Reform Act of 1996 to Presidential Nomination and Appointment Process*, 21 Op. O.L.C. 214, 214 (1997) ("It is a well settled principle of law, applied frequently by both the Supreme Court and the executive branch, that statutes that do not expressly apply to the President must be construed as not applying to him if such application would involve a possible conflict with his constitutional prerogatives"). This is to avoid interference with the ability of the President and Vice President to carry out their constitutionally assigned functions. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); Memorandum for Richard T. Burress from Deputy Attorney General Laurence H. Silberman, *Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 5 (Aug. 28, 1974) (finding a conflict of interest statute inapplicable to the President or Vice President where silent on the matter and stating, "This is not a situation like the bribery statute (18 U.S.C. 201), where from the nature of the offense charged, no one, however exalted his position, should safely feel that he is above the law."); *Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 352, 357 n.11 (1995) (finding 28 U.S.C. § 458 did not apply to the President and noting that the clear statement rule bribery statute exception noted in the 1974 OLC Opinion, *supra*, was a function of the crime's peculiar place in the text of the constitution) (internal citations omitted).

Handwritten notes are themselves a category of documents that Presidents and Vice Presidents have historically compiled to "communicate" with themselves about their time in office.[8] Indeed, Presidents have kept diaries and notes describing their official acts and decision-making since the Founding. President Washington kept a diary, as did Presidents Ronald Reagan and George H.W. Bush.[9] And those personal materials have always belonged to the relevant Presidents and Vice Presidents, not the government. Given the unique nature and use of such materials, they are exempted from the Presidential Records Act as "personal records."

In 1978, Congress enacted the Presidential Records Act ("PRA"), Pub. L. No. 95-591, 92 Stat. 2523 (1978), which defines "Presidential records" and "Vice Presidential records" as "documentary materials, or any reasonably segregable portion thereof, created or received by [individuals subject to the Act], in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(2). "Documentary materials" include:

> books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

Id. § 2201(1).

The PRA defines "personal records" as materials "of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(3). They are not presidential records or vice presidential records. *Id.* The PRA further specifies that personal records include "diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business." 44 U.S.C. § 2201(3)(A). It is not the content of these materials that renders them "personal records," but what a President or Vice President did with them that matters.[10] If they are for his personal use and not used for transacting government business through their circulation to or use by others, then such records are personal and exempt under the PRA.[11]

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[8] Memorandum in Support of Motion to Quash Subpoena to Archivist and Statement of Interest by The Department of Justice on Behalf of the United States Addressing Defendant's Subpoenas, *United States v. Poindexter*, Case No. 88-0080-01 (D.D.C. Dec. 6, 1989) (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)) (hereinafter "DOJ December 1989 Statement of Interest Regarding Poindexter").

[9] *See* THE DIARIES OF GEORGE WASHINGTON (Donald Jackson & Dorothy Twohig eds., 1979); Final Report of the Independent Counsel for Iran/Contra Matters, Volume I: Investigations and Prosecutions (1993) at 452 n. 45, 475 n.23 & 477 (hereinafter "Iran/Contra Report").

[10] *See Judicial Watch v. NARA*, 845 F. Supp. 2d 288, 301 n.9 (D.D.C. 2012) (stating that "the classification depends not upon what the tapes contain, but what the President prepared them for and what he did with them").

[11] *See* Memorandum for National Security Council Staff from William Itoh and Alan Kreczko, Subject: Recordkeeping Guidance, Tab A: Memorandum on Federal Records (May 8, 1993) ("certain 'personal papers' fall outside the scope of the Federal Records Act. . . . Examples include: . . . Materials that relate to a staff member's

The PRA also grants Presidents and Vice Presidents absolute discretion in designating material as "personal records" while in office.[12] Even if not expressly designated, personal notes (or any other documents) that the President or Vice President segregates from material sent to NARA upon departure from office are presumed to be personal records. *See* Letter from Deputy Archivist of the United States Adrienne C. Thomas to Michael Bekesha of Judicial Watch (Mar. 16, 2010), *available at Judicial Watch v. NARA*, Case No. 10-cv-01834, ECF# 6-5 (D.D.C. Jan. 3, 2011).[13]

The PRA thus exempts and protects the handwritten notes of a President or Vice President used to communicate with him or herself. Such personal materials—"personal" in the sense that they were intended for the executive's own use—are not presidential records and belong to the President or Vice President.[14]

III. DOJ Has Consistently Declined to Review "Personal Records."

For decades, it has been the Department's practice and policy to avoid direct seizure and review of a President's personal records, particularly where the President has been cooperative in the relevant investigation. *See* 28 C.F.R. § 600.7 (Special Counsel must comply with DOJ's practices and policies). This includes cases in which the personal records—diaries and notes created during the presidency and vice presidency and concerning official acts—have contained

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private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits. . . . Personal photographs . . . diaries, personal calendars, journal, and notes intended for an individual's personal use (memory aids and personal observations on work-related matters)") (appended to *Armstrong v. Executive Office of the President*, 877 F. Supp. 690, 711-15 (D.D.C. 1995), *rev'd on other grounds,* 90 F.3d 553 (D.C. Cir. 996). Legislative history indicates the PRA was meant to be read in tandem with the Federal Records Act's ("FRA") categorization of records. *See* H.R. Rep. No. 95-1487, at 10-11 (1978) ("To the extent that certain categories of documentary materials are not considered to be records under [federal records law], the same categories of materials generated or received by the President and his aides would generally fall outside the ambit of what constitutes a record [under the PRA]."); Reply Br. for the Federal Parties, *Kissinger v. Reporters Comm. for Freedom of the Press*, Nos. 78-1088 and 78-1217, 1979 U.S. S. Ct. Briefs LEXIS 1780 at *8 (where DOJ argued the PRA "follows 'the practice that has evolved in the administration of [the Federal Records Act]'") (brackets in original).

12 *Judicial Watch*, 845 F. Supp. 2d at 295 n.2 & 301.

13 Notably, the PRA also protects "political records," which include materials relating "to the political activities of the President or members of the President's staff" that do not "relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C.§ 2201(2)(A). "Political records" are also not "presidential" or "vice presidential" records are not required to be sent to and stored at the Archives. *See id.* (excluding political records from "Presidential records" definition); *id.* § 2203(g)(1) (requiring the Archivist only to take responsibility for "Presidential records").

14 The "personal records" of Presidents and Vice Presidents cannot be more generically characterized as "government records." Rather, such materials are subject only to the PRA and not to the more general Federal Records Act, 44 U.S.C. §§ 2101 et seq., 2901 et seq., 3101 et seq., 3301 et seq. ("FRA"). The FRA applies only to materials created by a "federal agency," and the offices of the President and Vice President are not federal agencies. 44 U.S.C. § 3301 (FRA definition of "record"). Thus, the PRA is the exclusive means of defining a "record" created by a President or Vice President. If material is not a record under the PRA, then it is not a "government record."

sensitive or even potentially classified information. Instead, Independent Counsels, Special Counsels, and DOJ have taken essential steps to minimize, if not avoid altogether, review of their content. For example:

- In the Iran/Contra investigation, Independent Counsel Lawrence Walsh sent a 1987 request to the White House seeking "personal and official records" of President Ronald Reagan and Vice President George H.W. Bush, including "relevant notes, diaries and audio tapes."[15] President Reagan kept diaries, which were responsive to the request. But the White House Counsel's Office ("WHCO") did not simply produce the President's diaries. Instead, White House Counsel Arthur Culvahouse reviewed them for potentially relevant material. Culvahouse then had relevant excerpts transcribed and made the typewritten excerpts available to Walsh, but only for inspection and review in Culvahouse's offices.[16] Moreover, Walsh agreed that neither the President nor his counsel had waived any privilege in producing the diary excerpts. He also agreed that Culvahouse would not be called as a witness as a result of his review of the diaries.

- Vice President Bush had "chron files" that were also responsive to the request. Those chron files contained correspondence, memoranda, calendars, phone logs and personal notes written or typed by Vice President Bush.[17] Walsh agreed to handle the files in a similar fashion to the Reagan diaries. C. Boyden Gray, Vice President Bush's counsel, reviewed the files, prepared "extracts" of relevant entries, and provided the Independent Counsel with "access" to them.[18]

- Like President Reagan, Vice President Bush kept a diary. Although potentially responsive to Walsh's request made while Reagan was President, the Reagan WHCO was not aware of the diaries and did not produce any portion of them. The existence of the diaries did not surface until five years later, toward the end of Bush's presidency. Once again, C. Boyden Gray reviewed the diaries for relevance.[19] However, given the obviously inexcusable delay, President Bush voluntarily produced the full contents of his diary, and not just the relevant excerpts.[20] A month later, President Bush publicly released a portion of the diaries, 31 double-spaced pages of excerpts related to the Iran/Contra affair.[21] According to

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15 Iran/Contra Report at 474-75.

16 *See id.* at 452 n. 45.

17 *Id.* at 475 n.23.

18 *See* Letter to John Q. Barret, Associate Counsel of the Office of Independent Counsel, from Chester Paul Beach, Jr. Associate Counsel to the President (Nov. 27, 1991).

19 *See* Iran/Contra Report at 477.

20 Former President George H.W. Bush's Response to Final Report of the Independent Counsel for Iran/Contra Matters (1993) at 26 (indicating production of full diary); Iran/Contra Report at 477 (indicating that only excerpts were relevant).

21 Michael Wines, *Bush makes public Iran-Contra diary*, NEW YORK TIMES (Jan. 16, 1993), https://www.nytimes.com/1993/01/16/us/bush-makes-public-iran-contra-diary.html.

President Bush's personal attorney, the 31 pages were released because they were produced five years late and thus were "the only ones that [Independent Counsel] Walsh contends were improperly withheld" from President Bush's production.[22]

- The Bush diaries were dictated. Vice President Bush directed his White House assistant to send tapes containing his dictated entries to his Houston office for transcription by his secretary there.[23] Although the tapes and the resulting diaries likely contained sensitive or even classified information—on Iran/Contra and other topics—DOJ did not investigate or prosecute Bush for the mishandling of government records or classified information.[24]

- A second Independent Counsel, Joseph diGenova, investigated President George H.W. Bush's role in the State Department's alleged tampering with Governor William Jefferson Clinton's passport files. Again, Independent Counsel diGenova sought access to President Bush's dictated diaries.[25] Ultimately, diGenova and outgoing Bush White House Counsel agreed that diGenova could "seek to review these materials," but that President Bush could "seek to preclude such review through legal means available to him."[26]

- After DOJ indicted Adm. Poindexter (following a referral from Walsh), the admiral – as a criminal defendant – served President Reagan and NARA with a Rule 17(c) subpoena for Reagan's personal diaries.[27] The White House, in turn, invoked executive privilege over the diaries.[28] Representing the White House's position, DOJ stated that the diaries were "presumptively privileged" because they were the President's communications with himself.[29] The court upheld the privilege and did not require the diaries to be produced to the defendant at trial. In defending the White House's assertion of Executive Privilege, DOJ expressly acknowledged that it knew the diaries included classified information.[30] DOJ did not seek to seize the diaries or review the classified information, let alone charge the former President.

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22 *Id.*

23 *See* Iran/Contra Report at 474.

24 *See* Iran/Contra Report.

25 Final Report of the Independent Counsel in Re: Janet G. Mullins, Volume I (1995) at 244 (noting that grand jury subpoena included Bush's diaries).

26 Letter to John P. Schmitz, Acting Counsel to the President, from Joseph diGenova, Independent Counsel Jan. 20, 1993) at 1; Final Report of the Independent Counsel in Re: Janet G. Mullins, Volume I (1995) at 244.

27 *United States v. Poindexter*, 727 F. Supp. 1501, 1503 (D.D.C. 1989).

28 *Poindexter*, Case No. 88-00080, 1990 U.S. Dist. LEXIS 2881, at *2, 9-13 (Mar. 21, 1990).

29 DOJ December 1989 Statement of Interest Regarding Poindexter Subpoena (citing *Nixon,* 418 U.S. at 708).

30 DOJ December 1989 Statement of Interest Regarding Poindexter Subpoena at 17 n.8.

IV. DOJ Has Never Charged a President for Removing or Retaining Alleged Classified Information in His Handwritten Notes.

History includes several examples of Presidents maintaining personal records, such as diaries with sensitive information, and Presidents misplacing or losing classified and sensitive information, without that conduct triggering enforcement action.[31] To our knowledge, DOJ has never in cases of this kind investigated a cooperative President or Vice President for the removal or retention of personal records, and it has never charged any such President or Vice President for removing or retaining any such personal records, regardless of whether they contained classified material.

DOJ has also declined to investigate or charge a number of former cabinet officials from the Reagan Administration who removed and retained classified material for years after their government service. *See* GAO, GAO/GGD-91-117, Federal Records: Document Removal by Agency Heads Needs Independent Oversight at 2, 4 & 22 (Aug. 1991) (describing former Secretary of Treasury Donald T. Regan's retention of "6 linear feet" of classified records found in Regan's personal business office two years after his time in the Executive Branch); *Id.* at 21-22 (describing the discovery of classified documents at former Secretary of State George P. Schultz's private repository at the Hoover Institution); *Id.* at 23 (describing former Secretary of Treasury James Baker III's removal of classified documents from Treasury); Steve Weinberg, *For Their Eyes Only: How Presidential Appointees Treat Public Documents as Personal Property*, THE CENTER FOR PUBLIC INTEGRITY, at 50 (1992) (describing former Secretary of State Dean Acheson's removal of classified papers that were then "presumably stored in his office or his home" following his departure from the Department); Kai Bird, *Disinterring Truth in a Dungeon*, NEW YORK TIMES (Dec. 5, 1998) (discussing Averell Harriman's retention of "tens of thousands of letters, telephone transcripts and top-secret" C.I.A. State Department, and White House documents, which he kept in his basement and shared with a historian); *id.* (describing a senior aide to National Security Advisor McGeorge Bundy's retention of classified documents that were

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[31] *See* Ronald G. Shafer, *Presidential papers have long been turning up in unexpected places,* WASH. POST (Feb. 4, 2023), https://www.washingtonpost.com/history/2023/02/04/presidential-papers-documents-misplaced/; NARA agreed to allow President George H.W. Bush's personal attorneys to take custody of his personal tapes, and when NARA found days of tapes missing from the Reagan and Bush White Houses, neither NARA nor DOJ investigated the former Presidents, or charged them because the tapes went missing. *See* John O'Neill, *Some Bush White House tapes lost, archivists say,* NEW YORK TIMES (Mar. 14, 1993), https://www.nytimes.com/1993/03/14/us/some-bush-white-house-tapes-lost-archivists-say.html; *see* Francis H. Heller, The Writing of the Truman Memoirs, 13 *Presidential Studies Quarterly* 81, 84 n.8 (1983) (discussing reports on former President Harry Truman's retention of "highly classified" documents in his personal office in Missouri); Barton J. Bernstein, "Who Owns History?" *Inquiry Magazine*, May 1, 1978. Reprinted in *Presidential Records Act: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives*, 95th Cong., 2d Sess. February 23, 28; March 2 and 7, 1978, at 791 (describing President Truman's trove of documents as including "approximately 50,000 documents (many of them on foreign policy and national security) that he deemed most valuable to an understanding of his administration"); Zeke Miller, Farnoush Amiri, Colleen Long & Jill Colvin, *Classified records pose conundrum stretching back to Carter*, AP (Jan. 24, 2023), https://apnews.com/article/biden-trump-classified-documents-president-33df0355c72e9ae8fa4cb6ead13f6521 (reporting former President Jimmy Carter's discovery of classified documents in his home in Georgia following his exit from the White House and his return of the documents to NARA); JIMMY CARTER, WHITE HOUSE DIARY xiii-xiv (2010) (discussing former President Carter's retention of his 5,000-page diary, in which the President "seldom exercised any restraint on what [he] dictated" and, with few exceptions, did not examine the transcriptions of the dictations).

then stored at his friend's home after the aide's death); Joseph Weber, *When State Secrets Land in the Hands of University Librarians*, WASH. POST (February 10, 2023) (describing the discovery of nearly 100 classified documents stored at Bates College following donation by Senator Edmund S. Muskie). In none of these prior cases did the former Cabinet officials self-report or consent to a DOJ search of all properties he owned or controlled.

V. Constitutional Avoidance Issues and Implications.

DOJ has previously avoided the review of a cooperative, sitting President's diaries, tapes, or handwritten notes to avoid raising constitutional questions.[32] One such question is the assertion and scope of Executive Privilege. While the courts and the Department have made clear that Executive Privilege cannot be applied without qualification to all presidential communications, the privilege is designed to protect a President's communications with himself about matters of national security, foreign affairs, and military affairs – precisely the subject matters that are classified.[33]

In the *Poindexter* case, for example, DOJ argued against the production of President Reagan's diaries to the defendant. As DOJ stated at the time, "[i]t is difficult to conceive of material that would better fit within the protections of the Presidential privilege." DOJ December 1989 Statement of Interest Regarding Poindexter Subpoena at 20 (citing *United States v. Nixon,* 418 U.S. 683, 708 (1974)). As DOJ explained, "many of the diary excerpts we have seen constitute the President's thoughts and deliberations regarding important domestic and foreign relations matters dealt with during his Administration. They reflect not only the President's own thinking, but also report advice given to him by some of his closest advisors, as well as statements made to him personally by Members of Congress and heads of foreign states." *Id.* Also, and aside from their specific nature, DOJ maintained that the diary entries were "presumptively privileged because of their status as Presidential papers." *Id.*

Conclusion

The President's attorneys appreciate this opportunity to set out our understanding of the law, policy, and practice that would govern the treatment of the personal notes that the President made during the period of his vice presidential service. We are ready to discuss any resolution of the issues in a manner consistent with constitutional and legal constraints. In keeping with the President's posture of full cooperation, we will be prepared at the meeting scheduled for next week

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[32] *See Poindexter*, 727 F. Supp. at 1505 ("a request for documents in the possession of a President involves the exercise of jurisdiction over the presidency and accordingly implicates the possibility of a conflict between the branches") (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)); *id.* ("because of the dignity and stature of the presidency, a court must exercise deference and restraint when asked to issue coercive orders against a President with respect to his person or papers . . . [and] executive privilege is fundamental to the operation of government, and it exists 'not for the benefit of the President as an individual, but for the benefit of the Republic.'") (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977)); *id.* ("the kinds of documents demanded by defendant in this case – the President's diary and his own notes – touch the core of the presidency as well as intimate and confidential communications by the President with himself.").

[33] *See Nixon*, 418 U.S. at 706 (implying that "need to protect military, diplomatic, or sensitive national security secrets" would weigh in favor of upholding Executive Privilege); *Poindexter*, 727 F. Supp. at 1505 (same).

to suggest options that would allow for those constraints to be observed without introducing delay into the progress of the inquiry.

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VIA ELECTRONIC MAIL

Special Counsel Robert K. Hur
Deputy Special Counsel Marc Krickbaum
Department of Justice
145 N Street Northeast
Washington, D.C., 20503

Re: Constitutional Status of the Vice Presidency and Its Implications

Dear Special Counsel Hur and Deputy Special Counsel Krickbaum:

In our recent conversations, questions have arisen about the constitutional status of the Vice Presidency and the implications of that status for your investigation. We submit this letter to address those questions. After providing a general account of the Vice President's constitutional position, we consider constitutional issues that *would* arise in any criminal investigation into the official conduct of the Vice President. Next, we address constitutional issues that *could* arise in a criminal investigation into a former Vice President's conduct after leaving office, depending on the nature and scope of the investigation.[1]

As we elaborate below, the Vice Presidency is a unique office in the government, with connections to both the Legislative and Executive Branches. The Vice President is the only executive official not removable or otherwise answerable to the President. At the same time, especially in recent decades, the Vice President has become an essential partner to the President in pursuing the President's policy aims and fulfilling the President's constitutional responsibilities. For that reason, among others, courts and the Department of Justice have long treated the President and Vice President similarly under a host of statutes and regulations. In so doing, they have also treated the President and Vice President differently than everyone else in the Executive Branch. In particular, Presidents and Vice Presidents are exempted from a broad range of legal restrictions that apply to all other executive officials. The constitutional and practical interests served by those exemptions have implications not only for any attempt to regulate the Vice President while in office, but also for certain kinds of inquiries into a former Vice President's conduct after leaving office.

I. The Unique Constitutional Status of the Vice President

[1] Of course, it is well settled that a sitting President is not subject to criminal indictment or prosecution *while in office*, whether for acts undertaken in office or before entering office. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000) (concluding that "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions" in violation of "the constitutional separation of powers"); Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) (same). As you know, the Office of Legal Counsel's longstanding position on that issue binds the Department.

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"The Vice President . . . occupies a unique position under the Constitution." Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, for Edward L. Morgan, Deputy Counsel to the President, *Re: Advisory Commission on Intergovernmental Relations*, at 2 (Feb. 7, 1969). The powers and functions of the Vice Presidency are a combination of those conferred directly by the Constitution and those delegated by Congress or the President.[2] Those powers and functions relate both to the Legislative Branch and to the Executive Branch, such that the Vice President has connections to both.[3]

The Vice President is constitutionally unique not only because he straddles the Executive and Legislative Branches, but also because, as the only executive official other than the President who is elected rather than appointed, "[t]he Vice President is the only senior official totally protected from the President's removal power." *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (Silberman, J.).[4] And because the President cannot remove him, the Vice President is "in no way answerable or subordinate to the president." *Participation of the Vice President in the Affairs of the Executive Branch*, 1 Op. O.L.C. Supp. 214, 221 (1961).[5] Thus, the President "may

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[2] The Constitution provides that the Vice President shall succeed the President in the event of death, resignation, or inability to serve (U.S. Const. amend. XXV, §§ 1, 3, 4); that she shall have the power to make, together with either a majority of the Cabinet or such other body as Congress may designate, a declaration of the President's inability to serve (*id.* amend. XXV, § 3); and that she shall be President of the Senate and may cast tie votes there (*id.* art. I, § 3). Statutory assignments of responsibility include the fact that the Vice President is a statutory member of the National Security Council. *See* 50 U.S.C. § 3021(c)(1).

[3] As then-Assistant Attorney General Rehnquist put it, "the Vice President has now assumed a particular place in Government in which his status may be characterized as Legislative or Executive depending on the context." *Advisory Commission on Intergovernmental Relations* at 2; *see also Participation of the Vice President in the Affairs of the Executive Branch*, 1 Op. O.L.C. Supp. 214, 222 (1961) ("[T]he Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter."); Letter from Laurence H. Silberman, Acting U.S. Att'y Gen., to the Hon. Howard W. Cannon, Chairman, Senate Comm. on Rules and Administration, at 6 (Sept. 20, 1974) (noting that "the Vice President is not a Member of Congress as that term is used in the Constitution," but that, "for certain purposes [the Vice President] can be regarded as being in the legislative branch.").

[4] *See also* DICK CHENEY (WITH LIZ CHENEY), IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 305 (2011) ("In addition to being the oldest guy in the West Wing, I was also the only one the president couldn't fire. As vice president, having been elected and sworn in, I carried my own duties as a constitutional officer."); MICHAEL TURNER, THE VICE PRESIDENT AND POLICY MAKER: ROCKEFELLER IN THE FORD WHITE HOUSE 21 (1982) ("[T]he vice president (because of his elected status) is beyond [the president's] power of dismissal."); MILTON S. EISENHOWER, THE PRESIDENT IS CALLING 540 (1974) ("Most important of all, the President cannot discharge the elected Vice-President. This point is critical.").

[5] To take one concrete example, although the Constitution explicitly contemplates that the President may require the written opinions of members of his Cabinet "upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. I, § 2, cl. 1, it does not grant the President that authority with respect to the Vice President. *See* Roy E. Brownell II, *The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 297, 314 (2014) ("The Opinion Clause does not apply to the Vice President.").

not dictate [the Vice President's] standards of conduct." Memorandum from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, for Kenneth A. Lazarus, Assoc. Counsel to the President, *Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President*, at 3 (Dec. 16, 1974).

To be sure, a President who has assigned certain policymaking or other duties to the Vice President can rescind those assignments if the Vice President does not act as the President wishes.[6] The President can also direct his subordinates not to include the Vice President in certain meetings and not to share with him certain information. But the President has no legal authority to command the Vice President himself to act in any particular way, or to visit any legal consequence on the Vice President for his official actions.[7]

These dimensions of the Vice Presidency inform any consideration of whether or how to regulate or otherwise restrict or inquire into the activities of the Vice President.

II. Constitutional Considerations Raised by Regulating or Investigating the Official Activities of the Vice President

The particular constitutional considerations that go into any possible regulation or other limitation of the official activities of the Vice President depend in the first instance on whether the Vice President is acting in his executive or legislative capacity. In this submission, we focus on the former.[8]

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[6] *See* Brownell, *supra*, at 364 (noting that "the President can discipline the Vice President in a host of ways short of outright removal," including "by rescinding or narrowing any delegations he has made to the Vice President").

[7] Michael Nelson, *Background Paper*, *in* A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY 64 (Michael Nelson ed., 1988) ("The vice presidency . . . is constitutionally independent . . . . [T]he president cannot command the vice president to do or not do anything . . . ."); PAUL C. LIGHT, VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE 119 (1984) ("[T]he President cannot compel activity" on the part of the Vice President); Brownell, *supra*, at 301 n.6 ("[N]o official can instruct the Vice President how to cast his tie-breaking vote, exercise his Twenty-Fifth Amendment duties *or opine on public policy matters*.") (emphasis added).

[8] We are aware that the Special Counsel's Office has expressed interest in then-Vice President Biden's communications with certain United States Senators about sensitive national security matters. Although we do not focus on it here, we note that inquiry into those communications could implicate the Vice President's immunity, as President of the Senate, under the Speech or Debate Clause. *See* U.S. Const. art. I, § 6, cl. 1 (providing that, for "any Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place"). That Clause protects against any "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972). The immunity it confers extends to all "legislative acts" that a covered person might engage in, including activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Department has repeatedly affirmed that the Vice President is entitled to the protections of the Speech or Debate Clause for his legislative acts. *See, e.g.*, Defendant's Response to Plaintiff's Emergency Motion

As noted above, Vice Presidents perform a variety of executive functions. Given the close working relationship between modern Presidents and their Vice Presidents, and given the central role that Vice Presidents typically play in helping Presidents perform their own constitutional roles, the Supreme Court has treated attempts to regulate or restrict the Vice President as implicating the same separation-of-powers concerns that would be raised by attempts to regulate the President.

Cheney v. United States District Court for the District of Columbia, 542 U.S. 367 (2004), is instructive. The case involved a challenge to the practices of the National Energy Policy Development Group (NEPDG), which was established by the President and chaired by the Vice President. The suit claimed that the NEPDG was subject to the requirements of the Federal Advisory Committee Act and had failed to comply with them. After the district court entered orders permitting discovery against the Vice President and other members of the NEPDG, those defendants petitioned the D.C. Circuit for a writ of mandamus to bar discovery. When the case arrived at the Supreme Court, it held that the D.C. Circuit was required, in deciding whether to grant the mandamus petition, to consider the special separation-of-powers concerns presented by the fact that the case involved the Vice President. "*Were the Vice President not a party in the case*," the Court reasoned, the discovery order and the mandamus petition challenging it "might present different considerations." *Id.* at 381 (emphasis added). But because the discovery order threatened "substantial intrusions on the process by which those in closest operational proximity to the President advise the President" (*viz.*, the Vice President), the separation-of-powers principles protecting the confidentiality of presidential communications were implicated. *Id.* As the Court put it, "[t]hese separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President *or the Vice President*." *Id.* at 382 (emphasis added).

In other words, although the President was not a party to the lawsuit in *Cheney*, the involvement of the Vice President implicated the same core separation-of-powers concerns that would have been implicated had the President been a party. And if the case had involved only other senior executive officials and not the Vice President, the Court suggested that those concerns would not have arisen in the same way or to the same extent. *See id.* at 381.

a. The Clear Statement Rule

Because any statutory restriction of the Vice President in his official duties raises separation-of-powers concerns similar to any such restriction of the President, the same rules of

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for Expedited Declaratory Judgement and Emergency Injunctive Relief at 4 n.1, *Gohmert v. Pence*, Case No. 6:20-cv-00660 (E.D. Tex. Dec. 31, 2020); Memorandum in Support of Executive and Senate Defendants' Motion to Dismiss the Amended Complaint at 10-12 & n.11, *Castanon v. United States*, Case No. 1:18-cv-2545 (D.D.C. Apr. 1, 2019). Earlier this year, Judge Boasberg agreed that, indeed, "the Clause does apply to the Vice President." Memorandum Opinion, *In re Grand Jury Subpoena*, at 1 (Mar. 27, 2023), *available at* https://s3.documentcloud.org/documents/23840379/penceruling1.pdf.

statutory construction apply in both circumstances. Of particular relevance here is the well-recognized rule that federal statutes should not be construed to apply to the official conduct of the President unless they expressly so provide. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (Court "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed" under the Administrative Procedure Act).[9]

The Department has applied this clear statement rule on numerous occasions. *See, e.g., Application of Consumer Credit Reporting Reform Act of 1996 to Presidential Nomination and Appointment Process*, 21 Op. O.L.C. 214, 214 (1997) ("It is a well settled principle of law, applied frequently by both the Supreme Court and the executive branch, that statutes that do not expressly apply to the President must be construed as not applying to him if such application would involve a possible conflict with his constitutional prerogatives."); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351, 359 (1995) (noting "the well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives," and concluding that this "clear statement rule settles the meaning of [the consanguinity limitations in] § 458. Section 458 does not apply to presidential appointments of federal judges"); Memorandum from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, for Egil Krogh, Staff Assistant to the Counsel to the President, *Re: Closing of Government Offices in Memory of Former President Eisenhower*, at 3 (Apr. 1, 1969) ("Generally, statutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive.").

Reflecting the especially close relationship between the Vice Presidency and Presidency in modern times, courts have applied the clear statement rule to the Vice President as well. *See, e.g., Judicial Watch, Inc. v. National Energy Policy Development Group,* 219 F.Supp.2d 20, 55 (D.D.C. 2002) (citing authorities establishing that the President and his staff are not "agencies" within the meaning of the Freedom of Information Act (FOIA), and then holding that, likewise, "the Vice President and his staff are not 'agencies' for purposes of FOIA"); *Wilson v. Libby*, 535

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[9] *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), took a similar approach, although the question was not whether a statute applied directly to the President. In that case, the Court construed the Federal Advisory Committee Act to apply only to the use of advisory committees established by the government, and thus did not cover the American Bar Association's advice about federal judicial candidates. *See id.* at 462-67. The Court adopted that reading in part because a broader interpretation could "infring[e] unduly on the President's Article II power to nominate federal judges and violat[e] the doctrine of separation of powers." *Id.* at 466-67. More broadly, the *Franklin* clear statement rule supports and is supported by the well-established principle that statutes should be construed to avoid constitutional concerns. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

F.3d 697, 707-08 (D.C. Cir. 2008) (citing *Judicial Watch* in support of its conclusion that the Privacy Act does not apply to the President *or Vice President*).

The Department has also applied the clear statement rule to the Vice President, and has construed statutes to mean the same thing for the Vice President and the President. In *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), for example, the court noted (and did not dispute) the government's contention that, "[b]ecause of his constitutional position, . . . we must treat the Vice President and his staff in the same manner as the President and his staff" for purposes of FOIA. *Id.* at 1295. Almost twenty years earlier, then-Deputy Attorney General Silberman concluded that the criminal conflict-of-interest statute, 18 U.S.C. § 208, does not apply to the President or Vice President because (1) applying the statute to the President would raise serious constitutional questions; (2) applying the statute to the Vice President might also raise serious constitutional questions; and (3) "[i]n any event, whether or not application of [the statute] to the Vice President is constitutionally questionable, it would seem that *any reasonable construction of the statute would treat the President and the Vice President alike.*" Memorandum from Laurence H. Silberman, Dep. Att'y Gen., for Richard T. Burress, Office of the President, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution*, at 5 (Aug. 28, 1974) (emphasis added).[10]

As the authorities cited above reflect, when applying the clear statement rule to the Vice President, courts and the Department have relied on either or both of two related, mutually reinforcing rationales. The first is that, because the modern Vice President's role implicates the separation of powers, applying a given statute to him could raise many of the same concerns as if the statute were applied to the President. *See, e.g., Cheney*, 542 U.S. at 381-82; *Meyer*, 981 F.2d at 1295. The second rationale is that, even if application of the statute to the Vice President would not necessarily raise the same constitutional concerns as for the President, it makes practical sense to read a statute the same way for the Vice President and the President. *See, e.g.*, Silberman Memorandum, *Conflict of Interest Problems*, at 5. The underlying premise of both rationales is that the President and Vice President are closely affiliated and categorically different than everyone else in the Executive Branch, and should therefore be treated differently than all the rest.[11]

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[10] *See also* Memorandum from Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel, for Kenneth A. Lazarus, Assoc. Counsel to the President, *Re: Applicability of 3 C.F.R. Part 100 to the President and Vice President*, at 2-3 (Dec. 16, 1974) (noting that "the Department of Justice [has] consistently . . . interpret[ed] the word ["officer"] in other documents as not including the President *or Vice President* unless otherwise specifically stated," and therefore concluding that "the word 'officer' in Section 705 of Executive Order No. 11222 [does not] include[e] the President *or Vice President*") (emphasis added).

[11] In his 1974 memorandum on the criminal conflict-of-interest statute, then-Deputy Attorney General Silberman quoted extensively and approvingly from a Report of the Association of the Bar of the City of New York, which argued that "the conflict of interest problems of the President and the Vice President . . . must inevitably be treated *separately from the rest of the executive branch.*" Silberman Memo, *Conflict of Interest Problems*, at 3-4 (quoting *Conflict of Interest and Federal Service* 16-17 (1960)) (emphasis added). And he went on to conclude that

To be sure, the Office of Legal Counsel's most recent articulations of the clear statement rule provide that it does not apply if subjecting the President to the statute in question would not "involve a possible conflict with his constitutional prerogatives." *Application of Consumer Credit Reporting Reform Act of 1996*, 21 Op. O.L.C. at 214 (1997); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. at 357 n.11 (clear statement rule does not apply to a statute "that raises no separation of powers questions were it to be applied to the President").

In the context of the present investigation, however, it is clear that applying the criminal statutes regarding the handling of classified information to official presidential or vice presidential conduct would raise major constitutional concerns. The Constitution grants to "the President as the head of the Executive Branch and as Commander in Chief" the "authority to classify and control access to information bearing on national security." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, the Constitution requires that the President "have *ultimate* and *unimpeded* authority over the collection, retention, and dissemination of intelligence and other national security information in the Executive Branch." *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (quoting Brief for the Appellees at 42, *American Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)) (emphasis added); *see also Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. 159, 172 (1997) ("The Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including the collection and dissemination of national security information."). Applying any of the criminal statutes regarding the handling of classified information to the President's official conduct would inevitably second-guess and unconstitutionally infringe his plenary authority in this area. Thus, the clear statement rule applies and those statutes must be construed not to cover the President.

The same is true of the Vice President. As noted above, the Department has long taken the position that if a statute would raise constitutional concerns if applied to the *President*, it should be construed not to apply to the President *or Vice President*. That is the case here. To reiterate, this parallel treatment is warranted for two reasons: (1) application of such a statute to the Vice President is likely to raise constitutional concerns of its own (given the important responsibilities that modern Presidents have assigned to their Vice Presidents);[12] and (2) the

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Congress, in enacting the conflict-of-interest statute, likely agreed that the President and Vice President should be so treated. *Id.* at 17.

[12] It is undisputed that President Obama granted Vice President Biden virtually unlimited access to classified information in order to fulfill his official responsibilities. And of course, it was within President Obama's sole discretion to do so. As the Department explained in its Eleventh Circuit brief last year in *Trump v. United States*, "the incumbent President has *sole* authority to control access to national security information," and decisions about "which Executive branch personnel (if any) can review records marked classified and on what terms" rests with the incumbent President. Appellant's Br. at 36-37, *Trump v. United States*, No. 22-13005 (11th Cir. Oct. 14, 2022) (emphasis added).

similarity of the Offices of the President and Vice President—and their distinctness from all other executive offices—justifies treating those two offices differently than the rest of the Executive Branch. For these mutually reinforcing reasons, the mishandling statutes do not apply to President Biden's conduct while he was Vice President.

b. Personal Diaries and Notebooks

From the Founding to the present,[13] Presidents and Vice Presidents have used handwritten notes to "communicate" with themselves regarding their time in office.[14] Those practices have not been subjected to legal restriction, without regard to whether the diaries or notes contained classified or other sensitive information. Wholly apart from the clear statement rule, therefore, this history weighs powerfully against any impugning of President Biden's notetaking or related practices while he was Vice President.

The White House Counsel's Office has already provided you with a comprehensive analysis of the history of presidential and vice-presidential personal diaries and notebooks, focusing especially on the period from the Reagan Presidency until now.[15] We endorse that analysis and will not repeat all of it here, but we will underscore a few key points.

For the purposes of this submission, the key threshold principle, recognized by Judge Greene in *United States v. Poindexter*, is that a President's "diary and his own notes . . . touch the core of the presidency as well as intimate and confidential communications by the President with himself." 727 F. Supp. 1501, 1505 (D.D.C. 1989). The same is true of a Vice President's diaries and notebooks; the principles cited above all militate strongly in favor of treating vice-presidential diaries and notebooks the same as presidential diaries and notebooks.

As the White House Counsel's Office has detailed in their earlier submission to you:

> "Presidents and [V]ice [P]residents have long relied on their private notes and journals to introspect, deliberate, reflect, remember, or simply record, including on official matters," and chilling this ability "could have a long lasting impact on the Presidency and the

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[13] *See* THE DIARIES OF GEORGE WASHINGTON (Donald Jackson & Dorothy Twohig eds., 1979) (describing President George Washington's use of a diary).

[14] *See* Memorandum in Support of Motion to Quash Subpoena to Archivist and Statement of Interest by The Department of Justice on Behalf of the United States Addressing Defendant's Subpoenas, *United States v. Poindexter*, Case No. 88-0080-01 (D.D.C. Dec. 6, 1989) (citing *United States v. Nixon*, 418 U.S. 683, 708 (1974)); Final Report of the Independent Counsel for Iran/Contra Matters, Volume I: Investigations and Prosecutions (1993) at 452 n. 45, 475 n.23 & 477 (discussing the personal diaries of President Ronald Reagan and then-Vice-President George H.W. Bush).

[15] The White House Counsel's most recent submission on this topic also provides a detailed account of the history of past Presidents and Vice Presidents keeping possession of their personal diaries and notebooks after leaving office, even if they contain classified information. We take up that history below, in Part III.

> manner in which future Chief Executives carry out their functions." Accordingly, the Department of Justice has never raised any questions about, much less investigated, the practices of a sitting President or Vice President with respect to their personal notetaking practices. . . . Indeed, Presidents and Vice Presidents have long depended on the ability to take notes and the constitutional entitlement to the confidentiality of those notes. To intrude into the confidentiality of such notes by subjecting them to scrutiny in a criminal inquiry would inevitably chill Presidents' and Vice Presidents' ability and willingness to write their notes freely, to the detriment of their Article II functions.

Letter from Richard Sauber, Special Counsel to the President, to Robert K. Hur, Special Counsel, and Mark Krickbaum, Deputy Special Counsel, *Re: Presidential and Vice-Presidential Writings*, at 2 (Sept. 11, 2023) ("Sauber Letter re Presidential and Vice-Presidential Writings") (quoting Letter from Stuart F. Delery, Counsel to the President, to Robert K. Hur, Special Counsel (Feb. 27, 2023)). Plainly, there are important constitutional values at stake in permitting Presidents and Vice Presidents to take and retain personal notes and other reflections relating to their work. There is no history of the Department questioning those practices in a criminal investigation or any other context, whether or not the notes contain classified information and without regard to the manner of their storage or use during a given President's or Vice President's time in office.

Given the consistent and longstanding position of the Department on this issue, there is no basis for the present investigation to impugn in any way the President's practice of taking and retaining personal notes during his time as Vice President.

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The foregoing discussion establishes that serious constitutional concerns would arise if this investigation were to attempt to apply the criminal statutes relating to the handling of classified information to the President's conduct while he was Vice President. The clear statement rule, which serves important constitutional values, dictates that those statutes do not apply to the Vice President's official conduct. Moreover, given the longstanding, recognized practice of allowing sitting Presidents and Vice Presidents to generate and maintain personal control over diaries and notebooks even if they contain classified information, there is no basis for subjecting then-Vice President Biden's practices on that front to any kind of legal inspection, let alone criminal investigation.

III. Constitutional Considerations Raised by Using Evidence of the Vice President's Conduct in Office to Support Criminal Charges Relating to Post-Office Conduct

We move now to the period between when President Biden left the Vice Presidency and when he assumed the Presidency. Of course, the clear statement rule does not apply to his conduct while out of office. Still, as we elaborate below, an inquiry into the President's actions during that period could implicate some of the same constitutional principles discussed above.

a. The President's Retention of Personal Diaries and Notebooks from His Time as Vice President

The Presidential Records Act (PRA) provides that certain documents classified as "Presidential records" and "Vice Presidential records" must be preserved as government records. 44 U.S.C. § 2202. In contrast, the PRA defines "personal records" to include "diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business." 44 U.S.C. § 2201(3). Such "personal records" are not Presidential records or Vice-Presidential records and are not subject to the PRA's preservation requirements. *Id.*

Moreover, as the White House Counsel's Office explained in its recent submission to you on the PRA, which we endorse, uncirculated notes that Presidents or Vice Presidents take for their personal use have been treated as "nonrecords," outside the purview of the PRA. *See* Letter from Richard Sauber, Special Counsel to the President, to Robert K. Hur, Special Counsel, and Mark Krickbaum, Deputy Special Counsel, *Re: Presidential Records Act* (Sept. 11, 2023). As the Counsel to President Reagan put it in a memorandum to White House staff, "[e]xamples of nonrecord materials include . . . notes of meetings taken solely for your convenience." Memorandum for White House Staff from Arthur B. Culvahouse Jr., Counsel to the President, *Re: Presidential Records Act Obligations of Departing White House Staff* at 2 (Dec. 1, 1988).

Personal records have been deemed to belong to the relevant President or Vice President themselves. *See* Government's Memorandum Concerning Presidential and Vice-Presidential Documents that are Not in the Possession of Independent Counsel, *United States v. Poindexter*, Case No. 88-0080-01, at 5 (D.D.C. Sept. 18, 1989) ("a President's personal records are private property and do not implicate the operative provisions of the [PRA]"). Presidents and Vice Presidents have sole discretion to separate such personal materials from records subject to the PRA. *See Judicial Watch v. NARA*, 845 F. Supp. 2d 288, 295 n.2 (D.D.C. 2012) ("[T]he decision to segregate personal materials from Presidential records is made by the President, during the President's term and *in his sole discretion.*") (emphasis added).

In its submissions to you regarding the history of Presidents and Vice Presidents keeping personal diaries while in office, the White House Counsel's Office also documented the history of Presidents and Vice Presidents taking those personal materials with them when leaving office, and keeping them and sharing them with others, *even if they contained classified information.* This practice is consistent with the PRA's distinction between "Presidential (or Vice Presidential)" records, on the one hand, and "nonrecords" and "personal records," on the other. Most critically, as the White House Counsel's Office explained at length in its submission, the Department has long known about these practices, has acknowledged them in court filings, and, to our knowledge, has *never* before questioned their legality.

Again, we endorse the White House Counsel's discussion of this issue and will not repeat it all here. Its conclusion bears emphasis, however:

> For at least 30 years, the Government—including specifically the Department [of Justice]—has been aware that former Presidents and Vice Presidents frequently have possessed diaries, notes, draft manuscripts, and other writings that contained classified information. At no time has the Government sought to ensure that such material was maintained in a location certified to store classified material, much less initiated a criminal investigation into the failure to do so.

Sauber Letter re Presidential and Vice-Presidential Writings at 8.

This history is yet another reflection of the fact that the law and settled government practice distinguish between Presidents and Vice Presidents, on the one hand, and other executive branch officials, on the other. Whereas Presidents and Vice Presidents are granted the discretion to make and retain "personal records" during their time in office and to take them when they leave, without any legal requirement of any inspection or review by any third party, officials departing from other Executive Branch positions are required to sign agreements expressly acknowledging their legal obligation not to make any unauthorized disclosure of classified information and to return all materials containing such information before leaving office. *See, e.g.*, Factual Basis, *United States v. Petraeus*, No. 3:15 CR 47, at 6-8 (W.D.N.C. Mar. 3, 2015).

President Biden's personal notetaking during his time as Vice President—and his retention of those notebooks after leaving office—is in line with the practices of numerous of his predecessors in office, practices that the Department has acknowledged and never before questioned as a legal matter. Any attempt now, in a criminal investigation, to change the distinction between "Presidential (and Vice Presidential) records" and "personal records," or to impose new requirements for personal records containing classified information, would raise multiple serious concerns.

First, any action taken by the Department with respect to the President's retention of notebooks from his time as Vice President would have the effect of reversing (and potentially criminalizing) his decision, as Vice President, that the notebooks were personal records. But he had the "sole discretion" to make that decision. *Judicial Watch*, 845 F. Supp. 2d at 295 n.2. The Department has no authority, in a criminal investigation or otherwise, to countermand that decision.

Second, imposing new legal restrictions on a President's or Vice President's ability to ensure the continuing privacy of their personal records (by personally retaining them after leaving office) could imperil the constitutional values served by allowing them to keep diaries and personal notes in the first place. Presidential and vice presidential diaries and personal notes "touch the core of the presidency," and a President or Vice President must be able to have

confidence in the continuing confidentiality of his "communications . . . with himself." *Poindexter*, 727 F. Supp. at 1505. Undermining that confidence could harm the Presidency and Vice Presidency themselves. Respect for those offices presumably explains why the Department has never before suggested that past Presidents and Vice Presidents who retained classified information in their personal papers might face any criminal legal jeopardy for doing so.[16]

b. The Role of Staff Advice from the President's Time as Vice President

In a letter we submitted to you on September 12, 2023, we addressed some questions relating to the weight that should attach to the advice that staff members provided to the Vice President on the handling of classified information. In doing so, we pointed to a number of practical complications that would arise if such advice were given any legal weight in an investigation like this one. Here, we will add some further observations to underscore the constitutional values at stake.

It is well understood that Presidents and Vice Presidents depend upon the advice of numerous staff members to do their jobs. Their staffs include legal counsel, whose advice may sometimes be strictly legal and may at other times be more prudential. But in all events, the President's and Vice President's ability to receive honest and unvarnished advice from their legal and other advisers, free from concerns about post hoc scrutiny, is vital to the discharge of their constitutional responsibilities. That was the basis for the Supreme Court's recognition in *United States v. Nixon* of "a presumptive privilege for Presidential communications." 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way may would be unwilling to express except privately.").

To be clear, we do not cite *Nixon* to signal any assertion of executive privilege at this time. Instead, we refer to the underlying constitutional interest in ensuring that Presidents and Vice Presidents receive the candid, objective, and unvarnished advice of their staff, an interest that extends beyond any assertion of privilege in any particular situation. *See id.* at 706 (noting, without limitation to situations involving an appropriate invocation of privilege, "[t]he President's need for complete candor and objectivity from advisers").

The core concern here is with avoiding arrangements that might *chill* or otherwise *distort* the advice that a President (or Vice President) receives from his staff in the course of conducting

[16] Beyond the constitutional issues discussed above, any attempt to use a criminal investigation to change the prevailing legal understanding in this area would raise serious concerns sounding in the due process requirement of fair warning. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.") (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)). We may have more to say about such concerns in future submissions, but for now we emphasize that a criminal investigation is not an appropriate occasion for changing the law.

core Article II responsibilities. There is a serious risk along those lines if a staff member's prudential advice with respect to those responsibilities can become a basis for assessing the criminality of the Vice President's conduct after leaving office. If, for example, a staff member knows that her recommendations about potential changes to an administration's classified information protocols might later be used as evidence in evaluating a President's or Vice President's liability in the handling of classified information after leaving office, that staff member is likely to withhold or adjust her advice in the first place. That would work serious harm to important constitutional values. As the courts and the Department have repeatedly emphasized, Presidents and Vice Presidents need to receive staff advice based only on their staff members' very best thinking, not on how third parties might later judge or use that advice.

We do not mean to suggest that staff advice can never bear on a former President's or Vice President's *mens rea* after leaving office. The situation would be different if, for example, the President's or Vice President's legal counsel were to advise him in the final weeks of the administration about laws on the handling of classified information that would apply to him *once he left office*, making clear that those restrictions differed from the protocols in place while in office. But when the President or Vice President receives recommendations from a staff member about how best to manage classified information *during their administration*, at a time when the criminal mishandling statutes do not apply (as discussed above in Part II), the advice cannot reasonably be regarded as legal advice in the first place. To accord such prudential advice legal weight after the fact would be to collide with constitutional interests that are "fundamental to the operation of Government, and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708.

* * *

We hope this letter helps clarify the constitutional considerations that we believe are inextricably entwined with your investigation, and we look forward to continuing our productive conversations with you.

Respectfully submitted,

Bob Bauer
Bob Bauer PLLC

JM | BB
Jennifer Miller,
Hemenway& Barnes, LLC

TM | BB
Trevor Morrison
New York University School of Law

BOB BAUER
BOB BAUER PLLC

October 6, 2023

Via Electronic Mail

Special Counsel Robert K. Hur
Deputy Special Counsel Marc L. Krickbaum
United States Department of Justice
(b)(6), (b)(7)(C) - Robert Hur Email Address
(b)(6), (b)(7)(C) - Marc Krickbaum Email Address

Gentlemen:

Two days ago, the White House Counsel's Office (WHCO) sent you a letter explaining that President Biden's possession of his notebooks could not be considered "unauthorized" for purposes of the mishandling statutes. As that letter describes, because the notebooks were his personal property under the Presidential Records Act (PRA), his possession of the notebooks was lawful, regardless of whether they contained classified information. The WHCO set out in detail how this view accorded with both law and history.

(b)(3), (b)(6), (b)(7)(C)

ncludes an email dated October 18, 2016, entitled "For The Record," which we have attached to this letter.

The email demonstrates that relevant staff in then-Vice President Biden's office contemporaneously arrived at the same conclusion as expressed in WHCO's letter, and for the same reason. As the author of the email notes, her superior concluded that the Vice President's notes "belong to the Vice President" because they are "personal notes" under the PRA. Thus, "the Vice President can keep these notes, including the classified portions (without redaction), after the administration has ended." Relevant staff reached this conclusion with full contemporaneous knowledge that these notes would later be used in President Biden's book-writing process—a practice which, as WHCO and personal counsel have illustrated in prior submissions, has been common among former presidents and vice presidents.

As you are aware, the Office of Legal Counsel has concluded that your office is "obligated" to be sensitive to the President's constitutionally-rooted confidentiality concerns. Response from the Office of Legal Counsel (July 7, 2023). As stated in the WHCO's most recent

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(b) (6)

letter and in prior submissions and discussions with your office, and as reflected in longstanding presidential and vice presidential practice as well as the relevant legal authorities, President Biden's personal notes "touch the core of the presidency as well as intimate and confidential communications by the President with himself." *United States v. Poindexter*, 727 F. Supp. 1501, 1505-06 (D.D.C. 1989).

From the outset of this investigation, we have raised concerns about the risk that an investigative focus on the President's notes from his time as Vice President could entail an "unnecessary intrusion into the operation of the Office of the President" and Vice President, *Cheney v. United States Dist. Court*, 542 U.S. 367, 387 (2004). We expressed this concern when the notebooks and notecards were first seized. We argued for limiting any seizure of the notebooks to those that contained classified documents, on the basis that at least in that instance, the notebook entries might help explain how the documents came to be inserted into them. Subsequently, you took the position that your investigation required submission of the entire handwritten contents of the notebooks for classification review.

Both of those actions are without precedent—and, as we explained at the time, without legal basis—in the history of the Presidency and Vice Presidency. You then advised that you needed to expand the investigative examination and classification review to include all notebooks removed from Wilmington—to include notebooks without any inserted marked classified documents. In the end, while continuing to express legal reservations, we reluctantly consented to these extraordinary investigative steps in order to avoid delay and to promote the public interest in the resolution of this matter.

The October 18, 2016 "For the Record" email only underscores the absence of justification for any intrusion into the President's note-taking and retention practices. It shows that senior staff reached the conclusion that the then-Vice President's notes "belong[ed] to the Vice President and should be made available to him without restriction," and that "the Vice President can keep these notes, including the classified portions (without redaction), after the administration has ended." As previous submissions by our office and the WHCO have explained, those conclusions are legally correct.

For these reasons, we respectfully request that, in your interview with the President, you significantly limit any inquiry into his note-taking practices during his time as Vice President, and into his retention of those notes after he left office. There is a critical distinction between questions directed at note-taking and the retention of those notes, on the one hand, and questions relating to the discovery of marked classified documents at the Penn Biden Center or the President's Wilmington residence, on the other. As to the former, it is now clear that the President's retention of his vice presidential notes was examined and endorsed by his staff at the time. Their conclusion was consistent with the law and longstanding practice, including the Department of Justice's consistent history of not investigating (let alone prosecuting) former Presidents' and Vice Presidents' retention of personal notes upon leaving office, without regard to classified content.

Accordingly, we do not think that any further intrusion into the President's note-taking and retention practices is justified, and we ask that your interview of the President proceed with appropriate attention to this concern.

Respectfully submitted,

Bob Bauer
Bob Bauer PLLC

Jennifer Grace Miller
Hemenway & Barnes, LLP

Enclosure

THE WHITE HOUSE
WASHINGTON

December 1, 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:

Below please find our responses to the questions in your letter dated November 17, 2023. We appreciate the opportunity to address these issues. We look forward to our meeting on December 6, in which we hope to continue to discuss these issues and engage with you about any other questions that you have concerning any remaining issues in your investigation.

1. *Concerning the prepublication review of Presidential and Vice-Presidential writings, all communications between the National Security Council (and/or other government entities/officials) and* [redacted], *Reagan,* [redacted] *Please also provide any materials directly related to such communications or otherwise relied upon by the White House for any assertions in the September 11 letter's discussion of prepublication review of works by those former Presidents and Vice Presidents.*

We are making a classified production to you of materials from the National Security Council ("NSC") concerning the prepublication review of the following books:

- [redacted]

We note that we cannot confirm that these files are complete and, indeed, they do not appear to be. Additional records relating to these books may be available from the National Archives. The NSC has informed us that they have no records of prepublication review related to the following books:

- Joseph Biden, PROMISE ME, DAD (2017)
- [redacted]

- [redacted]
- Ronald Reagan, AN AMERICAN LIFE (1990)[1]
- [redacted]

Regarding President Reagan, as the September 11, 2023 letter explains, staff at the Reagan Foundation transcribed the diaries and, in 2006, flagged 200 to 300 potentially classified excerpts to the NSC for review. The NSC provided redactions, and the diaries as a whole were ultimately classified as Top Secret/Sensitive Compartmented Information. A redacted version of the diaries was eventually published. The White House Counsel's Office obtained this information from conversations with [redacted]

We are also producing to you approximately fifteen pages from the copies of President Reagan's diaries that were sent to the NSC for review, as examples of entries which appear to contain material that was likely highly classified at the time the diaries were written. We have the full volumes of the diaries that were sent to the NSC, and would be happy to make them available for your review at the White House, but due to the number of original post-it notes, it would be difficult to create a full copy to transmit to you.

2. *All references that support the following assertion: "At the conclusion of his second term, Mr. Reagan brought the diaries to his Los Angeles home and kept them there until his death in 2004."*

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[1] Although the NSC has no communications concerning any prepublication review of the draft manuscript of President Reagan's autobiography, his ghostwriter stated that such a review occurred. *See* Robert Lindsey, GHOST SCRIBBLER: SEARCHING FOR REAGAN, BRANDO, AND THE KING OF POP 169 (2d. ed., 2014, Kindle Version) ("His lawyers, George Schultz and the National Security Council had already vetted the manuscript for errors, improper disclosure of classified materials or verbal landmines that could cause Reagan trouble in the ongoing Iran-Contra hearings").

[2] As the September 11 letter notes, this information is consistent with the introduction to the published version of President Reagan's diaries, which states that the NSC "read all five diary volumes" and redacted "about six pages of material for national security reasons." Ronald Reagan, THE REAGAN DIARIES xiii (Douglas Brinkley ed., 2007). It is also consistent with the book's acknowledgements, highlighted in the letter, which note that Ms. Drake worked to "iron out" "questions pertaining to NSC concerns," and Mr. Duggan "deal[t] with the national security classification redactions." *Id.* at 694-95. This story is also reflected in contemporaneous accounts. *See* Mike Allen, *Ronald Reagan Unvarnished*, POLITICO (May 18, 2007) (explaining that, "[t]o get the books ready for Brinkley," they were typed, proofread, and "the National Security Council took about two months to determine how much had to remain classified"); David Montgomery, *Straight From the Gipper's Pen*, WASH. POST (Apr. 27, 2005) (announcing the intended publication of the diaries and noting a representative saying that the diaries "may be subject to a national security review for inadvertent mentions of classified information").

The White House Counsel's Office obtained this information from (b) (6), (b) (7)(C). As (b) (6), (b) has also explained, the diaries were "considered part of Ronald Reagan's personal paper collection." *The Reagan Diaries*, C-SPAN2, at 2:28-3:00; *see also* Anna Bakalis, *Library Gets First Look at Reagan Diaries*, VENTURA COUNTY STAR (May 20, 2007) (stating that the "Reagan library took possession of [the diaries] in 2005, when Nancy Reagan made them available to be transcribed"); *but see* David Montgomery, *Straight From the Gipper's Pen*, WASH. POST (Apr. 27, 2005) ("Reagan gave the diary to the foundation about a decade ago, with instructions to dispose of it as the foundation thought best."). Their statements are consistent with the fact, noted in our letter, that "[f]or several years after their return to California, the Reagans would often sit together in their den after dinner, reading aloud from their diaries and reminiscing about their White House years." Ronald Reagan, THE REAGAN DIARIES x (Douglas Brinkley ed., 2007).

3. *All references that support the following assertion: "At the time that the Department acknowledged that the diaries contained classified information, the diaries were being kept in the Reagan home in California."*

It is clear from litigation filings that, at the time the Department acknowledged that the diaries contained classified information, they were in President Reagan's personal possession. The Department of Justice acknowledged that the diaries contained classified information in a December 6, 1989 filing opposing a Rule 17 subpoena for President Reagan's diaries. *See* Mem. in Support of Mot. to Quash Subpoena to Archivist and Statement of Interest by the DOJ on Behalf of the U.S. Addressing Defendant's Subpoena at 17 n.8, *United States v. Poindexter*, No. 88-00080-01 (HHG) (D.D.C. Dec. 6, 1989) ("DOJ Poindexter Statement of Interest"). And it was likewise known to the broader public that the diaries contained classified information, including through reporting on whether the Department would elect to invoke the Classified Information Procedures Act to protect the classified information in the diaries. *See, e.g.*, David Johnston, *Reagan is Ordered to Provide Diaries in Poindexter Case*, N.Y. TIMES (Jan. 31, 1990) ("But if Mr. Reagan fails to keep Mr. Poindexter from obtaining the diary excerpts, the former national security adviser may still face difficulties in trying to use the diary entries in court because the material is classified."); David Johnston, *Reagan Nears Center Stage of Iran-Contra Affair*, N.Y. TIMES (Feb. 7, 1990) ("Attorney General Dick Thornburgh could still block the disclosure of the classified diary excerpts by exercising his right, under the Classified Information Procedures Act, to prohibit the disclosure on the ground of national security"). The subpoena was addressed to President Reagan, rather than the government, because the government had previously denied a request for production of the diaries in Rule 16 discovery because "these materials were not in its possession." *United States v. Poindexter*, 727 F. Supp. 1501, 1502-03 (D.D.C. Dec. 21, 1989). It is clear from the Rule 17 litigation that the government did not possess the diaries, and if the diaries had not been in former President Reagan's custody, the litigation would have been moot.

As to their precise location, earlier the same year the district court described the diaries as "President Reagan's personal diary now under his possession and control in California." Order at 2, *United States v. North*, No. 88-00080-02 (GAG) (D.D.C. Jan. 30, 1989). Consistent with that statement, and as noted above, (b) (6), (b) (7)(C) informed the White House Counsel's Office that

the diaries were brought to President Reagan's home at the conclusion of his second term. They remained in President Reagan's personal possession after the Department's filings. *See*, *e.g.*, Edmund Morris, DUTCH: A MEMOIR OF RONALD REAGAN 662 (1999) (biographer describing himself, apparently in 1993, reading the diary "in the conference room at Fox Plaza while [President Reagan] sat next door"); THE REAGAN DIARIES at x ("For several years after their return to California, the Reagans would often sit together in their den after dinner, reading aloud from their diaries").

4. *All references that support the following assertion: "The staff at the Reagan Foundation transcribed the handwritten diaries working in offices that were not certified for the storage or handling of classified information."*

(b) (6), (b) (7)(C) who personally participated in the transcription process and classification review, told the White House Counsel's Office that he generated transcripts for some volumes in a SCIF and one of former President Reagan's secretaries generated transcripts for the other volumes, which he believed was probably done from her home or another non-secure location. He then conducted a quality review of the transcripts with (b) (6), (b) (7)(C) in his office, which is not a SCIF. (b) (6), (b) (7)(C) account to us tracks the contemporaneous public record. *See* Allen, *Ronald Reagan Unvarnished* ("Duggan . . . typed one volume into a computer in the library's vault. Kathy Osborne, who had been Reagan's private assistant, did the other four. Proofreading took three months.").

5. *All other references or materials relied upon in preparing the September 11 letter or that you otherwise believe would be helpful for us to consider.*

Separately from the publication of Reagan diaries discussed above, the historical record makes clear that several private citizens were given access to President Reagan's diaries. For instance, President Reagan relied on his diaries extensively to write his autobiography—which he wrote with the assistance of a ghost writer, Robert Lindsey, and others.

President Reagan called his diary "in many ways the core of my recollections of the presidency that are contained in" his book. Ronald Reagan, AN AMERICAN LIFE 250 (1990); *see also* Montgomery, *Straight From the Gipper's Pen* ("Reagan drew on the diary for his 1990 memoir, 'An American Life: The Autobiography,' and certain scholars have had access to it over the years."); University of Virginia Miller Center, "Frederick J. Ryan, Jr. Oral History" (interviewed May 25, 2004), https://millercenter.org/the-presidency/presidential-oral-histories/frederick-j-ryan-jr-oral-history (post-presidential chief of staff describing President Reagan's memoir-writing process, including how "we'd take his calendars for each year and put those in front of him so he could recall what was happening on each of those days," and how his "handwritten diary" "was used for him to refresh his memory"). Indeed, the book quotes from the diary on dozens of occasions, including many on national security and foreign affairs topics. *See, e.g.*, AN AMERICAN LIFE at 303 (NSC meeting regarding Soviet Union and Eastern Europe); *id.* at 413 (reaction to Israeli attack on Iraqi nuclear reactor); *id.* at 445-47 ("several entries pertaining to the worsening crisis in Lebanon"); 493-98 (quoting over fifteen diary entries related to the hijacking of TWA Flight 847); 509-510 (entries describing "'the complex plan which could return our five hostages and help some officials in Iran who want to turn that country from

its present course . . . . It calls for Israel selling some weapons to Iran.'"); *id.* at 518 ("'A full—in fact, two full NSC meetings planning targets for retaliation against Qaddafi. Our evidence is complete that he was behind the disco bombing . . . . We have five specific military targets in mind.'").

President Reagan's biography was written with assistance from Lindsey, who conducted a series of audiorecorded interviews with President Reagan, "sometimes at his home but usually at his post-presidential office in the Fox Plaza building overlooking the 20th Century Fox movie studio in Los Angeles' Century City." Robert Lindsey, GHOST SCRIBBLER: SEARCHING FOR REAGAN, BRANDO, AND THE KING OF POP 169 (2d. ed., 2014, Kindle Version). Lindsey used the diaries to "refresh [President Reagan's] memory," and more generally called the diaries "an invaluable source in writing his autobiography." *Id.* at 161. Although Reagan labeled some diary entries as "top secret,"[3] and years later the NSC deemed numerous other entries to be still classified, we are aware of no evidence that any entries were withheld from Lindsey or that the diaries were handled only in rooms approved for the storage and discussion of classified information.

Lindsey then had the recordings transcribed. He initially used a "free lance typist in Monterey" to transcribe the recordings, but "soon realized" this was a mistake—"embarrassing remarks or even national security secrets might end up leaking to the tabloid press if I continued." *Id.* at 152-53. Lindsey's wife volunteered to transcribe the recordings instead, "beginning what we joked was a year and a half 'mom and pop business.'" *Id.* at 153. President Reagan himself was apparently aware of the arrangement, writing in his memoir's acknowledgments that he was grateful to "Bob's wife, Sandra, for her tireless work in typing Bob's notes." AN AMERICAN LIFE at 7. Presumably neither Lindsey's wife nor the unidentified "free lance typist" possessed the security clearances required for "national security secrets," including those at the TS/SCI level—the level at which the diaries were ultimately classified. Notably, President Reagan published his autobiography in 1990, a year after the Department acknowledged that the diaries contained classified information and more than fifteen years before the diaries were submitted for prepublication review.

In addition to Lindsey, President Reagan gave access to his diaries to his authorized biographer, Edmund Morris. DUTCH at dustjacket, https://search.worldcat.org/title/39633448 ("President Reagan granted Morris full access to his personal papers, including early autobiographical stories and a handwritten White House diary."). Morris explained that he read the diaries in a conference room at President Reagan's Fox Plaza office—which we have no reason to believe was a secure room cleared for the handling of classified information. *Id.* at 662; *see also* Andy Lewis, *Inside Ronald Reagan's Century City 'Die Hard' Office*,

[3] For instance, in his entry for May 26, 1987, President Reagan wrote: "Top Secret—We've tapped a line that gives us access to much of Libya's (Quadaffi's) communications." REAGAN DIARIES at 500. His December 21, 1988, entry includes a paragraph that states: "Top Secret the Chfs. of Staff have drawn up a plan for taking out the Libya poison gas plant if we should decide to go that route. We have sent a cable in my name to P.M. Shamir reaffirming our continued support for Israel." *Id.* at 681.

HOLLYWOOD REPORTER (Sept. 26, 2013) ("Reagan was breaking tradition by choosing private office space over a federal building").[4]

6. *Do these same arguments permit a former president or vice president to retain marked classified documents from their administration? Note that footnote 7 of your October 4 letter argues that language from former Executive Orders has "historically not been understood to bind former presidents and vice presidents with respect to their own documents."*

We are not arguing that a former president or vice president may knowingly or intentionally retain government records bearing classification markings. Our October 4, 2023 letter argued that a former president or vice president may retain as their personal property materials that do not constitute "presidential records" under the Presidential Records Act of 1978 (PRA), such as personal notes and diaries. Government records bearing classification markings would generally be "presidential records" under the PRA.

The PRA provides that the United States "shall reserve and retain *complete ownership, possession, and control* of Presidential records." 44 U.S.C. § 2202 (emphasis added); *see also* 44 U.S.C. § 2207 (vice-presidential records). Thus, following the PRA's passage, a former president or vice president's knowing or intentional retention of presidential or vice-presidential records—including any such records bearing classification markings—would generally be unauthorized.

On the other hand, presidents and vice presidents are entitled to retain possession of their own materials, such as diaries and notes,[5] which do not fall within the PRA's definition of "presidential records."[6] And, former presidents and vice presidents' entitlement to personal possession of such diaries and notes is not affected by the presence of classified information.

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[4] We have no reason to believe that Morris possessed a security clearance at the time. *See* Robert D. Schulzinger et al., *Where's the Rest of Him? Edmund Morris's Portrait of Ronald Reagan*¸ 30 PRES. STUD. QUART. 388 (2000) ("The biographer, Edmund Morris, became the fly on the wall, *sitting in as he wished on all but classified meetings*, visiting privately with the president, reading Reagan's daily diary, and interviewing several hundred people who knew him." (emphasis added)).

[5] Consistent with our September 11, 2023 letter explaining that President Biden's notebooks are not vice-presidential records under the PRA, we would further point you to the public comments of Jason R. Baron, the former director of litigation at the National Archives, who said that "[h]andwritten personal notes of a former president or vice president are only considered presidential records if they were shared or communicated with other White House or federal agency personnel for use in transacting government business," and that "[a] former president or vice president has the right to take out of the White House personal notes—they are not official records that come into the legal custody of the National Archives at the end of an administration." The article described Baron as saying such handwritten notes would be President Biden's personal property regardless of whether he "jotted a note to himself about buying a birthday president for his wife or wrote about a meeting with a foreign leader." Carol E. Lee et al., *Biden's Notebooks Among Items Seized by FBI in Delaware Home Search*, NBC NEWS (Jan. 27, 2023).

[6] Of course, under 18 U.S.C. § 793(d), even those with lawful possession of national defense materials cannot willfully retain it following a demand for it from an appropriate authority.

For instance, as discussed above, President Reagan kept his diary upon his departure from office, including at his home. His diary contained classified information—as the Department of Justice acknowledged in court in 1989, DOJ Poindexter Statement of Interest at 17 n.8, and as was known to the broader public. And, obviously, the Department never prosecuted President Reagan—and, indeed, apparently did not ever even seek to recover the diaries.[7]

Our October 4 discussion of former executive orders was intended to demonstrate that restrictions governing the handling of classified information have not been understood to prohibit former presidents and vice presidents from personally retaining materials that would otherwise properly be theirs.[8] But, again, since the passage of the PRA, presidential records, including those that bear classification markings, are *not* properly theirs.

Although we are clear in our position that no officials may knowingly or intentionally retain presidential records, including those bearing classification markings, after leaving office, it is also the case that recent history is replete with instances of officials at all levels inadvertently leaving office with marked classified documents intermixed in their files. The reliance on staff by departing members of Congress and Executive Branch officials, combined with the extreme proliferation of the numbers of marked documents that have become part of the routine duties of these officials, often results in mistakes. For example:

- Senior National Archives and Records Administration (NARA) officials testified before Congress that the Archives has received 80 calls since 2010 from libraries and universities that had discovered classified materials amidst the papers donated to them by former members of Congress and senior officials. *See Closed Hearing with National Archives Before the H. Perm. Select Comm. on Intel.* 12 (March 1, 2023) ("HPSCI NARA Hearing"). 98 documents, for instance, were found in the materials that former Senator Ed Muskie donated to Bates College. *Id.*

- Classified documents have also been found in the papers of other recently-deceased senators, such as Richard Lugar and Frank Lautenberg. *See* National Archives, *Classified Outside of Government Control Status Sheet* (March 2023), https://www.archives.gov/files/foia/cogc-project-status-sheet.pdf (listing multiple episodes between 2019-2021 where classified and potentially classified materials were discovered in Indiana University's Lugar collection, and an episode where an appraiser notified NARA's Information Security Oversight Office (ISOO) after a classified document was found in Senator Lautenberg's field office).

[7] President Reagan included classified information across dozens of his diary entries. We note that we have produced to you pages from President Reagan's diaries demonstrating the highly classified nature of some of the entries. As discussed above, it appears that he shared the contents of his diary with third parties, including at least his wife, a biographer, a freelance typist, a ghostwriter, and the ghostwriter's wife.

[8] We address this issue further in our discussion of *Nixon v. United States* and *Griffin v. United States* at pages 9-12.

- The NARA officials likewise acknowledged to Congress that NARA has found in every administration since Reagan—that is, every administration since the PRA took effect—that compliance with the rules for handling classified records had been imperfect. Press Release, H. Perm. Select Comm. on Intel., *House Intelligence Committee Releases Transcript from Closed National Archives Hearing* (May 17, 2023). Of course, it is public that both former Vice President Pence and, reportedly, former President Carter discovered classified documents in their homes. Zeke Miller et al. *Classified Records Pose Conundrum Stretching Back to Carter*, ASSOCIATED PRESS (Jan. 24, 2023).

- The issue is common enough that ISOO has long offered guidance to private archivists who have discovered potentially classified information in their collections. *See* ISOO, *Frequently Asked Questions on Identifying and Handling Classified Records in Private Papers* (updated Mar. 8, 2013), https://web.archive.org/web/20140420064315/http://www.archives.gov/isoo/faqs/identifying-handling-classified-records.html ("It is not uncommon for non-governmental repositories to discover classified records among their manuscript collections."); ISOO, *Frequently Asked Questions* (last reviewed or updated Aug. 16, 2023), https://www.archives.gov/isoo/faqs#. ISOO recently issued a notice in the same vein, stating that former officials "have been known to retain papers related to their time in public service that may inadvertently contain classified national security information" and that "[o]ften, it is not until these records are donated to private archives or other institutions and formally processed that archivists and others processing these papers realize a collection contains classified information." ISOO, *Notice 2023-001: Classified Records Found Outside Government Control,* (June 21, 2023), https://www.archives.gov/files/isoo/notices/cogc-isoo-notice-final-06-21-2023.pdf.

- The General Accounting Office (GAO) examined the documents removed by eight Reagan Administration cabinet officers. General Accounting Office, *Document Removal by Agency Heads Needs Independent Oversight* (Aug. 1991), https://www.gao.gov/assets/ggd-91-117.pdf ("GAO Report"). While GAO was permitted access to only five of the eight collections, its "tests of [the] five collections revealed that two former officials removed classified documents that the agencies were unaware of." *Id.* at 4; *see also id.* at 23 (former Treasury Secretary and White House Chief of Staff James Baker removing classified documents without Treasury's awareness); *id.* at 21-22 (describing papers removed by former Secretary of State George Shultz and stating that "[a]lthough State certified the nonrecord materials before removal as being unclassified, some of the documents we reviewed at the Hoover Institution had classified markings"). While former Treasury Secretary and White House Chief of Staff Donald Regan did not permit GAO to inspect his materials, as a result of GAO's inquiry it was discovered that he had personally retained 6 linear feet—likely totaling over

10,000 pages[9]—of classified information at his business office. *Id.* at 4, 17, 22.[10]

7. *In a recent criminal case, the Department of Justice has taken a contrary position. See United States v. Trump, et al., No. 23-CR-80101-CANNON, SDFLA, Docket 85, Superseding Indictment. Please explain the position taken in your October 4 letter and describe whether and how it is consistent with the government's position outlined in the superseding indictment in that matter. Please consider the following in your explanation.*

8.

a. The superseding indictment charges former President Trump with unauthorized possession of documents relating to the national defense under 18 U.S.C. § 793(e), listing documents with dates during former President Trump's administration. Paragraphs 18 and 19 of the superseding indictment explicitly refer to the waiver process outlined in Executive Order 13526 § 4.4 as a basis for concluding that former President Trump was not authorized to possess or retain classified information. Your October 4 letter suggested that provisions of Executive Order 13526 § 4.4 do not apply when a former president or vice president seeks access to documents from their own administration.

b. The October 4 letter also argues that Executive Order 13526 § 4.1, which precludes the removal of classified information from official premises without proper authorization, does not apply to a former president or a former vice president.

We will not comment on the litigation you reference in your questions. However, the position articulated in our October 4 letter is that, as a historical and legal matter, until the 1970s, former presidents and vice presidents "exercised complete dominion and control over their presidential papers," with a "long and unbroken history" relating to their "use, control, and disposition." *Nixon v. United States*, 978 F.2d 1269, 1270, 1277 (D.C. Cir. 1992); *see also* Final Report of the National Study Commission on Records and Documents of Federal Officials 16 (Mar. 31, 1977) (vice presidential papers "have traditionally been disposed of in the same manner as Presidential papers; that is, Vice Presidents have removed them when they left

[9] *See Historical Materials in the Dwight D. Eisenhower Library* 1 (1980), https://books.google.com/books?id=Rhpa7jrvxGQC&pg=PA1&source=gbs_toc_r&cad=2#v=onepage&q&f=false ("Size is expressed in linear feet . . . with about two thousand pages of material comprising one foot").

[10] GAO's inspection also revealed other discrepancies regarding the Cabinet officers' document removal. For instance, Attorney General Meese reportedly removed 278 boxes of paper documents from the Justice Department, along with 170 reels of microfilm. GAO Report at 20. Of the 278 boxes, the Justice Department said that 140 boxes were delivered to the Attorney General's personal residence, 128 boxes were picked up by NARA, and the remaining ten were sent to the Heritage Foundation or picked up by Attorney General Meese's attorney. *Id.* When GAO visited NARA, however, NARA reported that it had picked up only 64 boxes of materials—not 128—and had picked those boxes up directly from Attorney General Meese's personal residence. *Id.* GAO stated that "[b]ecause Justice and NARA had provided their best available information, we did not attempt to reconcile the discrepancy in the number of boxes and where they were picked up." *Id.*

office.").[11] As a result, the D.C. Circuit found that President Nixon owned even classified White House documents for purposes of the Fifth Amendment's takings clause. *Griffin v. United States*, 935 F. Supp. 1, 9 (D.D.C. 1995) (district court on remand noting that the *Nixon* court "held" that the "national security council files" and "other classified materials" "were 'taken' under the [Presidential Recordings and Materials Preservation Act of 1974]").[12]

Attorney General Saxbe likewise expressly determined, in 1974, that even presidential documents containing national security information were the president's property. Letter from Attorney General Saxbe to the President (September 6, 1974) reprinted in Presidential Records Act: Hearings Before H. Comm. on Gov. Ops., 95th Cong. 51 (Feb. 23, 28, 1978; Mar. 2, 7, 1978). While the Attorney General contended that the "portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when they are within the possession of the former President," *id.* at 53, the phrase "even when they are within the possession of the former President," of course, recognizes that former presidents may lawfully possess such materials.[13]

The PRA narrowed what rightfully could be considered a president's own "presidential materials" by establishing that materials that fall within the definition of "presidential records" or "vice-presidential records" would no longer be treated as the president's personal property upon departure and instead would remain the property of the United States. Thus, following the PRA's passage, the knowing and intentional retention of government documents, classified or otherwise, would generally be unauthorized.[14] But the PRA did not disturb the existing understanding that former presidents and vice presidents exercised "complete dominion and control" over the materials that are not presidential records, including their own uncirculated notes.

Our October 4 letter set forth why no executive order (or other authority) has been understood to restrict the ability of former presidents and vice presidents to exercise this "dominion and control" over their own notes, even if such notes contain classified information.

Regarding your questions about the provisions of Executive Order 13526, we reiterate our point from the October 4 letter that it would be difficult to read these provisions to apply to a former president's possession of their own notes from their own administration. We believe this position is confirmed by *Griffin*. 935 F. Supp. 1 (D.D.C. 1995). There, the government argued that President Nixon could not receive compensation for the government's taking of national-security classified documents via the Presidential Recordings and Materials Preservation Act of

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[11] Given their shared history, we refer to both presidential and vice-presidential materials as "presidential materials" for convenience.

[12] Following President Nixon's death, the executors of his estate were substituted as parties. *Griffin*, 935 F. Supp. at 1 n.1.

[13] In its letter of November 8, personal counsel addressed the applicability of the other provisions of Section 793 to the facts of this case.

[14] *Cf.* Josh Meyer, *Biden and Trump Documents Expose Wider Problem: Missing Classified Records Not Uncommon*, USA TODAY (quoting national security lawyer Mark Zaid as saying, "Before the Presidential Records Act was enacted during the Carter administration, these guys brought classified records home all the time").

1974 (PRMPA). The government argued that the relevant executive orders governing classified documents "would have barred Mr. Nixon from selling classified materials or selling access to them," and thus the documents had no fair market value as a matter of law. *Id.* at 9. The relevant provisions of those executive orders are worth quoting in full, because of how closely analogous they are to the provisions in Executive Order 13526:

> Section 6(A) of Executive Order 11,652 specifies that no person may be given access to classified material unless that person "has been determined to be trustworthy," and unless access to the material "is necessary for the performance of his duties." Section 6(C) provides that classified material "shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons." Section 12 provides that persons outside the Executive Branch who are engaged in historical research projects, or who have previously occupied policy-making positions to which they were appointed by the President, may be granted access to classified material only if the head of the government department in which the information or material originated determines that access is "clearly consistent with the interests of national security," and takes appropriate steps to assure that "classified information or material is not published or otherwise compromised." Section 2 of Executive Order 10,865 similarly provides that only the head of a department or his designee may authorize access to classified material.

Id. at 9. The court agreed with the government, finding that at the relevant time, "the national security materials were classified and subject to executive orders which would not allow a President to transfer ownership of them to a member of the public without violating the law." *Id.* Yet nowhere did the court even hint that the executive orders' provisions—starkly analogous to the provisions in the current Executive Order 13526—affected President Nixon's own possession and control of the classified documents. Indeed, despite these provisions, the court affirmatively acknowledged that the D.C. Circuit held in *Nixon* that PRMPA had nevertheless "taken" the classified documents from President Nixon. *Id.*

When *Nixon* and the subsequent district court decision in *Griffin* are read together, the ultimate position closely resembles the view adopted by the Justice Department in the Saxbe Opinion. In other words, the presence of classified information does not bar a president from retaining possession and control of materials that would otherwise be his.[15] However, following the PRA, presidents and vice presidents may only retain materials not considered "presidential records," such as personal notes. Put differently, if a document is a "presidential record" under

[15] *Compare Nixon*, 978 F.2d at 1275 ("The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded *to support a claim of entitlement*." (emphasis added)), *with* 1 Modern Federal Jury Instructions-Criminal § 29.04, Instruction 29-22 (for purposes of 18 U.S.C. § 793(e), "A person has unauthorized possession of something if he is *not entitled to have it*" (emphasis added)).

the PRA—as government records bearing classification markings almost certainly would be—we do not argue that a former president or vice president is entitled to retain such a record.

9. *What is the basis for asserting that the provisions of section 4.4 of the Executive Order do not apply to a former vice president? Your October 4 letter cites 44 U.S.C. § 2205(3), a provision of the Presidential Records Act ("PRA") that refers only to a former president or the former president's designated representative.*

The PRA treats former vice presidents in the same manner as former presidents with respect to access to, and disposition of, their records. Section 2207 says that "Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records" and that the vice president's duties and responsibilities with respect to vice-presidential records "shall be the same as the duties and responsibilities of the President under this chapter, except section 2208, with respect to Presidential records."[16] Thus, just as presidential records "shall be made available to such former President or the former President's designated representative," under section 2205(3), vice-presidential records shall be made available to the former vice president or their designated representatives in the same fashion.

That the Act makes vice-presidential records available to former vice presidents and their designees is consistent with the statute's broader schema, which gives vice presidents a significant measure of independent control over their vice-presidential records. For instance, the PRA enables vice presidents to "ease" restrictions on the public disclosure of their vice-presidential records on a different timetable than the former president's easing of corresponding presidential records. *See* 44 U.S.C. § 2207 (granting vice presidents the same "duties and responsibilities" for vice-presidential records, including any easing of restrictions under 44 U.S.C. § 2204(a)-(b)); *see also*, *e.g.*, National Archives and Records Administration, *Guidance on Presidential Records* 7 (2020), https://www.archives.gov/files/guidance-on-presidential-records-from-the-national-archives-and-records-administration-2020.pdf (stating that the president must decide whether to apply the Act's optional restrictions before the end of their administration, and stating that "[t]he Vice President must also apply these restrictions before the conclusion of the term of office"). And, as a matter of practice, we are not aware of former vice presidents requiring authorization to access their records—including via a favorable determination of eligibility pursuant to Section 4.1(a)(1) of the executive order.

10. *On pages 7 and 8, your October 4 letter argues that because Mr. Biden's notebooks are personal records or non-records under the PRA "he is an authorized possessor, and so Sections 793(e) and 1924 do not apply." Given that the PRA applies to other White House officials, is it your position that any White House official who retains a diary or rough meeting notes containing national defense information in locations unapproved for the storage of classified information—either during or after their federal service—nonetheless has authorized possession of his handwritten notes? If that is not your position, please explain why Mr. Biden's possession of his notebooks was authorized but similar possession of handwritten materials containing national defense information by White House officials would be unauthorized.*

[16] Section 2208 addresses claims of constitutionally-based privilege against public disclosure of presidential records.

No; our arguments apply only to presidents' and vice presidents' notes, not to other White House officials' notes.

As we have detailed, presidents and vice presidents have a unique historical relationship with their papers that other White House officials do not have.[17] But even bracketing this history, White House officials other than the president and vice president sign the SF-312 as a condition of access to classified information. SF-312 signatories agree that classified information "is now and will remain the property of, or under the control of, the United States Government." Para. 7. And signatories further agree to return all classified materials at the conclusion of their service. *Id.* Signatories are thus not authorized to retain classified materials following their employment, including in the form of diaries or nonrecord notes.

Other provisions of law are relevant as well. Perhaps most obviously, White House officials are expressly forbidden from removing classified materials once they conclude their government service. Section 4.1(c) of Executive Order 13526 states that "An official or employee leaving agency service may not remove classified information from the agency's control." *See also id.* § 6.1(b) (defining "agency"). But, as noted in our October 4 letter, this provision does not apply to the president and vice president, who are neither "officials" nor "employees."

While in government service, federal officials other than the president and vice president are required to handle and store classified materials consistent with the usual rules and regulations. As Special Counsel Hur has acknowledged, however, these regulations do not apply to the incumbent president and vice president.

Our position is thus cabined to the notes retained by former presidents and vice presidents, which is consistent with the constitutional positions that they occupy and the historical treatment of their materials—including by the courts and the Department itself.

11. *What legal conclusions did Office of the Vice President ("OVP") staff reach about Mr. Biden's retention of notes and notebooks after the end of the Obama Administration?*

As reflected in (b) (6), (b) (7)(C) October 18, 2016 email, OVP staff concluded that Vice President Biden's notes—regardless of classified content—were "personal notes" not subject to the requirements of the PRA, and therefore "the Vice President can keep these notes, including the classified portions (without redaction), after the administration has ended."[18] The email ascribes this conclusion to Executive Secretary Kristen Bakotic, whose judgement in this matter deserves particular weight given that she was the OVP National Security Affairs (NSA) official responsible for "oversee[ing] stewardship of the Presidential Records Act," served as

[17] In its letter of September 26, personal counsel to the President discussed the constitutional status of the vice presidency and discussed the ways in which, and reasons why, the law in general treats presidents and vice presidents differently than all other Executive Branch officials.

[18] Email to and from (b) (6), (b) (7)(C) (Oct. 18, 2016, 12:05 p.m.) (Subject: "For the Record").

the OVP NSA Security Manager, and "manage[d] classified paper . . . for the VP."[19] An email in the SCO's possession also suggests that Col. Bakotic's conclusion regarding the PRA status and handling of Vice President Biden's notes occurred after consultations with Counsel to the Vice President John McGrail, OVP Associate Counsel (b) (6), (b) (7)(C), Deputy National Security Advisor to the Vice President Ely Ratner, an official from NSC Records, and possibly others.[20]

The conclusion memorialized in (b) (6), (b) (7)(C)'s email appears to be about "notes" (possibly on notecards) that were at the time "being stored in the EEOB room 291," rather than the Vice President's notebooks.[21] However, there is no principled reason that OVP staff's conclusions regarding the Vice President's notebooks would differ from his notecards.

As the SCO knows, a subset of Vice President Biden's notecards was ultimately stored at NARA under a deposit agreement. Apparently aware that the notecards contained potentially classified information, OVP Counsel drafted an agreement that expressly stated that the items would remain President Biden's personal property, the items would be maintained confidentially, and President Biden would have "free access to examine, *remove*, or replace any items of personal Property during regular working hours."[22, 23]

The conclusion that Vice President Biden's handwritten notes were not vice-presidential records under the PRA was in line with the governing White House Counsel's Office's guidance on the PRA. As we explained in our September 11, 2023 letter, that guidance stated that non-record materials encompass "[n]otes, drafts, and similar documents that were not created or saved for the purpose of accurately documenting the activities or deliberations of the Administration, and were not circulated or shown to others."[24] The guidance expressly specified that "rough meeting notes" were non-records.[25] This

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[19] *See* Email from Faisal Amin to "FN-WHO-TransitionBriefings" (Jan. 18, 2017, 2:32 AM) (Subject: "In-Person Briefing Request: OVP National Security Affairs") (attaching OVP National Security Affairs Bios and Portfolios as part of transition briefing materials to incoming Administration on the OVP Office of National Security Affairs).

[20] *See* Email from (b) (6), (b) (7)(C) to John McGrail, Ely Ratner, (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) and DL-OVP-NSA-EXECSEC (Oct. 17, 2016, 5:38 PM) (Subject: "VP Documents").

[21] Email to and from (b) (6), (b) (7)(C) (Oct. 18, 2016, 12:05 p.m.) (Subject: "For the Record").

[22] Deposit Agreement Regarding the Administration of Personal Materials of Vice President Joseph R. Biden (emphasis added); *see also* Email from John McGrail, Counsel to the Vice President, to (b) (6), (b) (7)(C), NARA Director of Presidential Materials Division (Jan. 18, 2017, 1:05 p.m.) (Subject: "Deposit agreement") (attaching version of deposit agreement reflecting final edits as well as version with the Vice President's signature).

[23] Emails suggest that the agreement may have been drafted after possible conversations between NARA, McGrail, then-Deputy Counsel to the President Dana Remus, and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). *See* Emails Between John McGrail, Dana Remus, (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) (Jan. 5-7, 2017) (Subject: "call tomorrow").

[24] Mem. from (b) (6), (b) (7)(C), Counsel to the President, to All White House Office Staff *Re: The Presidential Records Act* at 5 (Dec. 3, 2014).

[25] *Id.*

understanding of non-records dated back to the Reagan Administration,[26] and was included in a September 2016 memorandum addressed to the Vice President's staff.[27] Therefore, even if Vice President Biden's notes and notebooks were not personal records under the PRA, they would be non-records that did not need to be transferred to NARA at the end of the Obama Administration.

OVP staff's conclusion that Vice President Biden could retain his notes after leaving office was not only consistent with the position articulated in our October 4 letter but also the Department's past positions concerning presidential and vice-presidential writings and papers. Mirroring the conclusion of OVP staff in this instance, the Department argued in *United States v. Poindexter* that President Reagan's diaries were personal records under the PRA even as it acknowledged that diary excerpts included classified information. DOJ Poindexter Statement of Interest at 17 n.8. Emails indicate that OVP Counsel considered the *Poindexter* case as Vice President Biden prepared to transition out of office.[28] The Department has also stated that "*[t]he Vice President alone may determine what constitutes vice presidential records or personal records*, how his records will be created, maintained, managed and disposed, . . . all actions that are committed to his discretion by law."[29]

12. *Which members of the OVP staff were involved in reaching these legal conclusions?*

As we state in response to #11 above, emails indicate that Kristen Bakotic, John McGrail, (b) (6), (b) (7)(C), and Ely Ratner were involved in reaching the conclusion that Vice President Biden's notes were not vice-presidential records under the PRA and could be retained by him at the end of the Obama Administration. (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) also appear to have been involved in those discussions under their supervisor Kristen Bakotic. Other OVP staff may also have been involved in reaching this conclusion.

13. *How were these legal conclusions, and the bases and reasons for the conclusions, memorialized? Please provide copies of any documents memorializing the conclusions.*

As a preliminary matter, this question appears to assume that legal conclusions would be memorialized in normal course. Given the volume and fast pace of decisions in the White House, many legal decisions—including significant ones—are made in oral discussions and never formally memorialized.

In this instance, the decision that Vice President Biden's notes were his personal records appears to have been memorialized, at least, in (b) (6), (b) (7)(C) email (recounting the legal conclusion of her superior) and the deposit agreement executed with NARA to house

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[26] *See* Letter from Richard Sauber, Special Counsel to the President, to Robert K. Hur, Special Counsel, and Mark Krickbaum, Deputy Special Counsel at 2-3 (Sept. 11, 2023).

[27] *See* Briefing Memo from OVP Counsel to OVP Staff, *Re: Records* at 2 (Sept. 23, 2016).

[28] Email from (b) (6), (b) (7)(C) to John McGrail (Jan. 5, 2017, 4:43 PM) (Subject: "Per our discussions today").

[29] Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Citizens for Responsibility & Ethics in Wash. v. Cheney*, No. 08-Civ-1548-CKK, 2008 U.S. Dist. Ct. Motions LEXIS 53578 at *45 (D.D.C. Dec. 8, 2008) (emphasis added).

those notes.[30] The agreement's language permitting President Biden to "remove" the records at any time presumably reflected the parties' conclusion that he was under no legal obligation to store his notes at NARA—regardless of their classification status.[31]

As to whether this conclusion was memorialized elsewhere, we do not know.

14. *When, how, and by whom were these conclusions communicated to Mr. Biden? If communicated in writing, please provide copies.*

As explained in response to #11 and #13, conclusions regarding the storage of Vice President's handwritten notes were contained within the NARA deposit agreement (which he executed). We do not know whether these conclusions were communicated to Vice President Biden on other occasions or by other means. President Biden does not recall anyone telling him he could not take his notes home with him.

15. *Was anyone else in the White House, including members of the White House Counsel's Office, involved in offering advice about Mr. Biden's retention of notes and notebooks? Were any discussions involving the White House Counsel's Office memorialized? If so, please provide copies of any documents memorializing the discussions.*

Emails suggest that OVP Counsel may have consulted then-Deputy Counsel to the President Dana Remus and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). We do not know whether there are any documents memorializing Obama White House Counsel's Office discussions on this issue. However, internal OVP emails make clear that "general PRA guidance will come from OVP Counsel," and although the White House Counsel's Office was "[b]ackup," "OVP Counsel gets to determine what is a VP record under [the] PRA."[32]

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Finally, we note that it was not until October 5, 2023, that we became aware of (b) (6), (b) email, (b)(3), (b)(6), (b)(7)(C). In the seven months prior, we had explained across multiple submissions why the President's notes were lawfully retained by him at the end his vice presidency. As we have reiterated here, that conclusion is supported by the practices of his predecessors, longstanding interpretation of the

[30] *See* Deposit Agreement Regarding the Administration of Personal Materials of Vice President Joseph R. Biden; Email from John McGrail, Counsel to the Vice President, to (b) (6), (b) (7)(C), NARA Director of Presidential Materials Division (Jan. 18, 2017, 1:05 p.m.) (Subject: "Deposit agreement") (attaching version of deposit agreement reflecting final edits as well as version with the Vice President's signature).

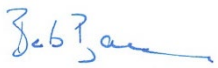
[31] *Id.*

[32] Email from Faisal Amin to (b) (6), (b) (7)(C) (July 6, 2016 7:34 PM) (Subject: "Filing Questions"). *See also* Letter from Richard Sauber, Special Counsel to the President, to Robert K. Hur, Special Counsel, and Marc Krickbaum, Deputy Special Counsel at 6-7 (Sept. 11, 2023) (noting that both the Department and courts similarly reached the conclusion that the Vice President was solely responsible for categorizing vice presidential records under the PRA).

PRA, and the publicly articulated position of the Department in relation to the Reagan diaries. (b) (6), (b) (7)(C) email demonstrates the fact that OVP independently arrived at the same conclusion in 2016. But even if there were no such email, the conclusion would be just as correct. As we have repeatedly stated, President Biden's notes should be outside the scope of any law enforcement inquiry.

Respectfully,

Richard Sauber
Special Counsel to the President



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