



THE WHITE HOUSE
WASHINGTON

February 5, 2024

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

Dear Special Counsel Hur and Deputy Special Counsel Krickbaum:

We are pleased to see that, after more than a year of investigating, you have determined that no criminal charges are warranted in this matter. Though we wholeheartedly agree with your conclusion, we are taking this opportunity, pursuant to our agreement, to address specific issues that we have identified in the report. We do so in the interest—which we believe that the Office of Special Counsel shares—of a final report that is both accurate and consistent with Department of Justice policy and practice.

We have been selective in the choice of issues for your consideration. We believe that each one presented below merits your careful review before finalizing your report.

1. We do not believe that the report's treatment of President Biden's memory is accurate or appropriate. The report uses highly prejudicial language to describe a commonplace occurrence among witnesses: a lack of recall of years-old events. Such comments have no place in a Department of Justice report, particularly one that in the first paragraph announces that no criminal charges are "warranted" and that "the *evidence* does not establish Mr. Biden's guilt." If the evidence does not establish guilt, then discussing the jury impact of President Biden's hypothetical testimony at a trial that will never occur is entirely superfluous.

In fact, there is ample evidence from your interview that the President did well in answering your questions about years-old events over the course of five hours. This is especially true under the circumstances, which you do not mention in your report, that his interview began the day after the October 7 attacks on Israel. In the lead up to the interview, the President was conducting calls with heads of state, Cabinet members, members of Congress, and meeting repeatedly with his national security team.

The Special Counsel recognized the extraordinary juxtaposition of these events when he "thank[ed]" the President "for being here and making this time for us" given that there were "a lot of other things in the world going on that demand your attention." Interview Transcript ("Tr."), Day I, at 3. Subsequently, far from being "hazy," Report at 208, the President proceeded to provide often detailed recollections across a wide range of questions, from staff management of paper flow in the West Wing to the events surrounding the creation of the 2009 memorandum on the Afghanistan surge. He engaged at length on theories you offered about the way materials were packed and moved during the transition out of the vice presidency and between residences. He pointed to flaws in the assumptions behind specific lines of questioning.

At the outset of the interview, you recognized that the questions you planned to ask “relate to events that happened years ago,” but nonetheless expressed your hope that the President would “put forth [his] best efforts and really try to get [his] best recollection in response to the questions we ask.” Tr., Day I, at 4. It is hardly fair to concede that the President would be asked about events years in the past, press him to give his “best” recollections, and then fault him for his limited memory.

The President’s inability to recall dates or details of events that happened years ago is neither surprising nor unusual, especially given that many questions asked him to recall the particulars of staff work to pack, ship, and store materials and furniture in the course of moves between residences. The same predictable memory loss occurred with other witnesses in this investigation. Yet, unlike your treatment of President Biden, your report accepts other witnesses’ memory loss as completely understandable given the passage of time. For example, you accepted without denigrating John McGrail’s failure to remember certain events while he served as then-Vice President Biden’s counsel: “McGrail’s memory of these events could well have faded over the course of more than 6 years.” Report at 238 n.923; *see also id.* at 67, 69 (noting Mr. McGrail’s failure to recall events despite emails that place him in the center of various discussions). So, too, you accept the memory lapse of one of the President’s personal lawyers who testified that in his initial search of the Penn Biden offices certain boxes were stored in a locked closet, noting only that “his memory was fuzzy on that point.” *Id.* at 265. And the events on which you found the lawyer’s memory to be “fuzzy” occurred only a few months before his interview. *Id.*; *see also id.* at 64, 66 (noting without comment the failures of recollection by numerous staffers).

Your treatment of President Biden stands in marked contrast to the lack of pejorative comments about other individuals. It is also in contrast to your own description of the President’s responses on other subjects as “clear forceful testimony” that would be “compelling” to a jury. *Id.* at 233.

Not only do you treat the President differently from other witnesses when discussing his limited recall of certain years-ago events, but you also do so on occasions in prejudicial and inflammatory terms. You refer to President Biden’s memory on at least nine occasions—a number that is itself gratuitous. But, even among those nine instances, your report varies. It is one thing to observe President Biden’s memory as being “significantly limited” on certain subjects. *Id.* at 5. It is quite another to use the more sweeping and highly prejudicial language employed later in the report. This language is not supported by the facts, nor is it appropriately used by a federal prosecutor in this context.

We request that you revisit your descriptions of President Biden’s memory and revise them so that they are stated in a manner that is within the bounds of your expertise and remit.

2. Your report criticizes President Biden’s “decision to keep his notebooks at home in unlocked and unauthorized containers” as “totally irresponsible,” applying to him the same criticism, in the same words, he had directed at former President Trump for keeping marked classified documents. *Id.* at 228. Setting aside the significant difference of law and facts between the two cases (which the report recognizes), this kind of criticism of an uncharged party violates “long-standing Department practice and protocol.” *See* Office of the Inspector General,

U.S. Department of Justice, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election (June 2018) (finding that former FBI Director James Comey violated this practice and protocol when criticizing as “extremely careless” former Secretary of State Hillary Clinton’s use of unclassified systems to transmit classified material). Using President Biden’s own words does not make the criticism compliant with Department practice.

3. In an audio recording with Mr. Zwonitzer, the President said: “I just found all the classified stuff downstairs. I wrote the President a handwritten forty-page memorandum arguing against deploying additional troops to Afghanistan on the grounds that it would not matter.” Yet your report appears to conclude that the President was referring to marked classified Afghanistan documents, rather than the precise document referred to in the actual recording: the President’s handwritten letter to President Obama about Afghanistan, which the President viewed as a sensitive and private communication. Indeed, the President testified in his interview that, although he didn’t remember the comment to Mr. Zwonitzer, the “only thing that [he] can think of” was this handwritten letter to President Obama. Tr., Day II, at 38. We believe that an accurate recitation of the evidence on this point would recognize the strong likelihood that the President was referring in the recording to his private handwritten letter to President Obama—the one mentioned on this recording immediately after the eight words that you are focused on—rather than the marked classified Afghanistan documents discovered in the Wilmington garage.

4. Your report erroneously (and repeatedly) makes statements about the value of the marked classified Afghanistan documents to President Biden, such as President Biden had a “strong motive” to keep them and they were an “irreplaceable contemporaneous record,” like the notebooks. Report at 203, 231. These statements are contrary to the evidence and the documents themselves. First, the President forcefully testified that he “never thought about” writing a book about the 2009 Afghanistan policy review. Tr., Day II, at 22. Thus, the President had no need to retain the documents for that purpose. Second, the 2009 Afghanistan policy review was one of the most widely covered foreign policy decisions in history, documented in near real-time by public releases of government documents, leaks to newspapers, and publications by writers like Bob Woodward. The idea that the President needed to keep any classified documents related to these events, let alone the particular ones found in his garage, is implausible. This is particularly true given that the documents at issue primarily consist of drafts, duplicates, and a disorganized and incomplete assortment of briefing materials and presentations—nothing remotely resembling a consciously selected set of documents kept for historical value. Indeed, your report acknowledges that certain “important” documents are not in the folders, including documents that—if President Biden had sought to keep documents for history’s sake (which he did not)—one would expect to be included. However, your report fails to describe the haphazard and essentially random nature of the documents discovered. We believe that a fair and more accurate recitation of the evidence on this point would include a description of the documents that makes clear they do not appear to have been intentionally selected for retention.

5. Your characterization of the box in the garage as containing only matters of “great personal significance” to the President is inconsistent with the facts. The evidence shows that this tattered box contained a random assortment of documents, including plainly unimportant ones such as: a short-term vacation lease; a VP-era memorandum on furniture at the Naval

Observatory for purchase; talking points from speeches; campaign material; empty folders; a 1995 document commemorating Syracuse Law's 100-year anniversary; and other random materials. In his interview, President Biden commented regarding one of the folders, which read "Pete Rouse": "Christ, that goes back a way," confirming that he had not encountered that material in recent years. Tr., Day I, at 144. When asked how things like a binder labeled "Beau Iowa" got into the "beat-up" box, the President responded "Somebody must've, packing this up, just picked up all the stuff and put it in a box, because I didn't." *Id.* at 146. When asked about the later-dated material, the President responded: "[s]ee, that's what makes me think just people gathered up whatever they found, and whenever the last thing was being moved. So the stuff moving out of the Vice President's residence, at the end of the day, whatever they found, they put – they didn't separate it out, you know, Speakers Bureau and Penn or whatever the hell it is, or Beau. They just put it in a single box. That's the only thing I can think of." *Id.* at 147. Some of the documents in the box contain what appears to be staff handwriting—including a D.C. tax return and a W2—further indicating that the box was likely filled by staff. We believe that an accurate recitation of the evidence on this point would include a description of these facts.

6. In the course of his recorded conversations with his writing assistant, the President makes a comment—"they didn't even know I have these." Your report repeatedly cites the comment (*e.g.*, Report at 8, 64, 65, 230, 242) and, from these six words, asks the reader to conclude that President Biden was "distinguish[ing] between his notecards, which his staff was in the process of implementing protocols to safeguard, and his notebooks, which 'they didn't even know I have.'" *Id.* at 65. The President's comment does not support this unfounded conclusion. It is unclear who the President was referring to as "they" or what he was referring to as "these," let alone that he was somehow distinguishing between his notecards and his notebooks. We believe the report should not make such unsupported assumptions—or leave the erroneous impression that the fact of President Biden's notebooks was unknown, when the report itself shows that it was well known and even documented in photographs.

7. There are a number of inaccuracies and misleading statements that could be corrected with minor changes:

- "We considered the possibility that Mr. Biden alerted his counsel that classified documents were in the garage but our investigation revealed no evidence of such a discussion because if it happened, it would be protected by the attorney-client privilege." Report at 22. In fact, your investigation revealed no evidence of such a discussion because it did not happen—not because of any privilege. The President testified he was unaware that there were any classified documents in his possession. Tr., Day II, at 2, 41-42. You did not ask him in his interview or in the additional written questions if he had "alerted his counsel" about classified documents; if you had, he would have forcefully told you that he did not.
- The report states that the President Biden's book, *Promise Me, Dad*, "is not known to" contain classified information. Report at 97. The book does not contain classified information and there has never been any suggestion to the contrary.
- "*While it is natural to assume* that JRB put the documents in the box on purpose and knew they were there, in fact there is a shortage of evidence on these points."

Id. at 215 (emphasis added). We do not understand the basis for claiming this is a “natural” assumption.

- In connection with its discussion of the Reagan diaries, the report states that the Special Counsel’s Office “viewed the materials that were deemed to be classified at the Top Secret/SCI” level from the Reagan diaries, citing a December 1, 2023 production from the National Security Council. *Id.* at 199-200. This is not accurate; as was stated in the production letter, you viewed only a sample of such material. We offered to make the full volumes available for your review.
- The report claims that the Archives staff asked to see President Biden’s notes from one of his visits to the Archives in 2017, *id.* at 231, citing an earlier chapter, but such a proposition is not made in the earlier chapter, leaving us to raise the question of whether it is accurate.
- The header on page 333 refers to the discovery of a document in President Biden’s home in the second-floor office, but the text asserts that the document was found in the third-floor den. The header appears to be inaccurate.

We respectfully request your close attention to these issues before finalizing your report.

Respectfully,



Richard Sauber
Special Counsel to the President



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