



April 17, 2023

Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dr. Brett M. Baker
Inspector General
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Request for Investigation Regarding Unlawful Abuse of Executive Branch Authority

Dear Inspectors General Horowitz and Baker:

America First Legal Foundation (“AFL”) is a national, nonprofit legal foundation working to protect the rule of law, due process, and equal protection for all Americans. Whether the President and the agencies he directs—including the Department of Justice and the National Archives and Records Administration—faithfully execute and comply with the laws passed by Congress are core AFL concerns. Accordingly, we write to request that you initiate a review to examine whether the Department of Justice and the National Archives, respectively, complied with applicable laws and procedures regarding the April 11, 2022 “special access request” by the Biden White House for the Presidential records of former President Trump. We further request that you initiate a review to determine whether their conduct with respect to such records, including but not limited to the Federal Bureau of Investigation’s raid of Mar-a-Lago on August 8, 2022, and the Archive’s subsequent representations to Congress, was based on improper considerations.

I. Background

According to Acting Archivist Wall, the Biden Department of Justice “ask[ed] the President to request that NARA provide the FBI with access to the [fifteen] boxes,” and “[o]n April 11, 2022, the White House Counsel’s Office—affirming a request from the Department of Justice supported by an FBI letterhead memorandum—formally transmitted a request that NARA provide the FBI access to the 15 boxes for its review

within seven days.”¹ In particular, “[t]he Executive Branch here [was] seeking access to records ... not only in order to investigate whether those records were handled in an unlawful manner but also, as the National Security Division explained, ‘to conduct an assessment[.]’”²

On August 8, 2022, the Biden Department of Justice raided former President Trump’s residence to search for classified information.³

On August 24, 2022, Acting Archivist Wall emailed her staff that:

At issue was the request of the White House, on behalf of the Department of Justice (DOJ), that NARA provide the FBI with access to the 15 boxes, so that the FBI and others in the Intelligence Community could examine them. When NARA receives such requests, we follow the formal process established by the PRA, our regulations at 36 C.F.R. Part 1270, and Executive Order 13489, to provide the former President an opportunity to review the responsive records for constitutionally based privileges.⁴

The day before this email, on August 23, 2022, Gary Stern, the Archives’ General Counsel, had advised Wall that “the Justice Department, via the Biden White House, had made the [special access] request.”⁵

II. The evidence of unlawful agency conduct and concealment

On April 12, 2023, the National Archives responded to the evidence that it has been “untruthful” with Congress regarding its role in helping the Biden Administration gain access to the former President’s records. It stated, “[t]hese allegations confuse NARA’s statutory role in providing access to records under the Presidential Records Act (PRA) with the DOJ investigation and the FBI’s subsequent search of Mar-a-Lago.”⁶ However, at all times relevant, the Department of Justice, the White House, and the National Archives knew or should have known that the special access statute, 44 U.S.C. § 2205(2)(B), authorized the Archives to grant the Biden Administration with special access to President Trump’s records *only* if those records contained

¹ Letter from Debra Steidel Wall, Acting Archivist of the United States, to Evan Corcoran (May 10, 2022), <https://bit.ly/3UllTL2>.

² *Id.*

³ Marc Caputo and Ryan J. Reilly, FBI search at Trump’s Mar-a-Lago home tied to classified material, sources say, NBC News (Aug. 9, 2022, 4:09 AM), <https://bit.ly/3KGZ3J8>.

⁴ E-mail from Debra Steidel Wall, Acting Archivist of the United States, to All Employees (Aug. 24, 2022, 3:34 PM) (Bates 15B001043-44), <https://bit.ly/3mjVHDR>.

⁵ E-mail from Gary M. Stern, Gen. Counsel, NARA, to Debra Wall et al. (Aug. 23, 2022, 9:53 PM) (Bates 15B001016), <https://bit.ly/3mjVHDR>. *See also* E-mail from Gary M. Stern, Gen. Counsel, NARA, to Debra Wall et al. (Aug. 23, 2022, 9:08 PM) (Bates 15B001012), <https://bit.ly/3mjVHDR>.

⁶ National Archives, Statement on PRA Special Access Requests (April 12, 2023), <https://www.archives.gov/press/press-releases/2023/nr23-013>.

information needed “for the conduct of current [White House] business” and were “not otherwise available.”

The Acting Archivist has represented that at the request of the Biden White House, the National Archives provided the Biden Department of Justice with special access to the former President’s records “so that the FBI and others in the Intelligence Community could examine them.”⁷ However, there is absolutely no suggestion that the White House, the Department of Justice, or the Acting Archivist herself ever believed that the subject records contained information needed “for the conduct of [White House] business” as the law requires.⁸ Furthermore, if the real party in interest was the National Security Division of the Department of Justice or the Federal Bureau of Investigation, and the real purpose of the Biden White House’s special access request was a review regarding allegedly improperly handled classified records, then, as a matter of law, the Archives should have turned over former President Trump’s records only “pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding” subject to any rights, defenses, or privileges, including Executive Privilege, that the former President might lawfully invoke.⁹

Of additional concern is that the Federal Bureau of Investigation’s Special Agent’s affidavit in support of the Biden Department of Justice’s application for a search warrant appears to conceal the Biden White House’s material role in the matter.¹⁰ To establish probable cause, the affidavit states that:

NARA’s Office of Inspector General sent the NARA Referral via email to DOJ. The NARA Referral stated that according to NARA’s White House Liaison Division Director, a preliminary review of the FIFTEEN BOXES indicated that they contained “newspapers, magazines, printed news articles, photos, miscellaneous print-outs, notes, presidential correspondence, personal and post-presidential records, and ‘a lot of classified records.’ Of most significant concern was that highly classified records were unfolded, intermixed with other records, and otherwise improperly [*sic*] identified.¹¹

The affidavit further states that “FBI agents conducted a preliminary review of the FIFTEEN BOXES provided to NARA” from “May 16-28, 2022.”¹² Notably, however, the government’s redacted probable cause affidavit fails to mention the special access

⁷ See note 3.

⁸ 44 U.S.C. § 2205(2)(B).

⁹ 44 U.S.C. § 2205(2)(A).

¹⁰ See Notice of Filing of Redacted Search Warrant Affidavit and Redacted *Ex Parte* Memorandum of Law Concerning Proposed Redactions, ECF No. 102, *In re Sealed Search Warrant*, No. 22-MJ-8332-BER (S.D. Fla. Aug. 26, 2022), <https://bit.ly/3o5WvNb>.

¹¹ *Id.* at ECF No. 102-2 ¶ 24 (alteration in original).

¹² *Id.* at ECF No. 102-1 ¶ 47.

request. Perhaps the Biden Department of Justice determined that the Biden White House's invocation of § 2205(2)(A)'s narrow authorization of special access to a former President's records "for the conduct of current business of the incumbent President's office" was actually an "investigative avenue[] or technique[]" that must remain redacted. However, this seems unlikely.¹³

III. Request for initiation of review

The Biden White House claims that the Biden Department of Justice acted independently with respect to former President Trump's records.¹⁴ The evidence disclosed by the Archives strongly suggests otherwise. Furthermore, the special access request's omission from the probable cause affidavit raises obvious concerns that the government concealed a material fact from the court. Finally, the evidence is that the White House, the Department of Justice, and the Archives knew, or should have known, that the Archives lacked the legal authority to turn over former President Trump's records absent a subpoena issued by a court for the purposes of a civil or criminal investigation or proceeding, and even then, strictly subject to any rights, defenses, or privileges, including Executive privilege, that the former President could lawfully invoke. Plainly, the National Archives ignored the statutory limits on its authority. Therefore, we believe that a review of your respective agency's conduct concerning the records at issue in this case, including the possibility that such conduct was based upon improper partisan considerations, should be initiated.

Thank you in advance for your attention. Please feel free to contact us if you have any questions.

Sincerely,

/s/ Reed Rubinstein
America First Legal Foundation

¹³ Only five categories of information are redacted in the unsealed version of the affidavit: "(1) information from a broad range of civilian witnesses who may be subject to 'witness intimidation or retaliation,' ... (2) information regarding investigative avenues and techniques that could provide a roadmap for potential ways to obstruct the investigation ... (3) information whose disclosure is prohibited under Rule 6(e) of the Federal Rules of Criminal Procedure ... such as grand jury subpoenas, testimony, and related material ... (4) information whose disclosure could risk the safety of law enforcement personnel ... and (5) information whose disclosure could harm 'legitimate privacy interests' of third parties." *Id.* at ECF No. 102-2 at 4.

¹⁴ Press Briefing by Press Secretary Karine Jean-Pierre, White House (Aug. 9, 2022), <http://bit.ly/3KwB7Zb>.