

United States Senate  
WASHINGTON, DC 20510

December 6, 2022

**VIA ELECTRONIC TRANSMISSION**

The Honorable Merrick Garland  
Attorney General  
Department of Justice

Dear Attorney General Garland:

We write today to raise concerns about your appointment of Jack Smith to serve as Special Counsel to oversee the ongoing criminal investigations into former President Donald Trump. According to your November 18, 2022, press release, the first investigation relates to “whether any person or entity unlawfully interfered with the transfer of power following the 2020 presidential election or the certification of the Electoral College vote...”<sup>1</sup> The second investigation relates to former President Trump’s potential mishandling of classified information.<sup>2</sup>

With respect to the first investigation, as Senator Grassley noted to you in his July 18, 2022 letter, former Assistant Special Agent in Charge Timothy Thibault and former Justice Department Election Crimes Branch Director, Richard Pilger, were deeply involved in the decisions to open and pursue election-related investigations against President Trump.<sup>3</sup> Based on the description of the matters within your press release, the Thibault-Pilger investigation is a part of the Special Counsel’s investigation.

Senator Grassley’s July 18, 2022, letter noted that whistleblowers informed his office that the Thibault-Pilger investigation’s predicated document is based in substantial part on January 2022 CNN news articles which relied on information derived from a liberal non-profit, American Oversight, and referenced a Boris Epshteyn interview on MSNBC.<sup>4</sup> As you know, a high-profile investigation such as this would require the Attorney General and FBI Director to be briefed on the full factual predication which they would then review and approve. Based on allegations provided to Senator Grassley’s office, the opening memo that you approved included selective

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<sup>1</sup> Press Release, Department of Justice, Appointment of a Special Counsel (Nov. 18, 2022), <https://www.justice.gov/opa/pr/appointment-special-counsel-0>.

<sup>2</sup> See *id.*

<sup>3</sup> See Letter from Sen. Charles Grassley to Merrick Garland, Attorney General, and Christopher Wray, Director, Federal Bureau of Investigation (July 18, 2022), [https://www.grassley.senate.gov/download/grassley-to-justice-dept-fbi\\_-political-bias](https://www.grassley.senate.gov/download/grassley-to-justice-dept-fbi_-political-bias).

<sup>4</sup> Marshall Cohen et al., *Trump campaign officials, led by Rudy Giuliani, oversaw fake electors plot in 7 states*, CNN (Jan. 20, 2022), <https://www.cnn.com/2022/01/20/politics/trump-campaign-officials-rudy-giuliani-fake-electors/index.html>; Sonnet Swire, *Former Trump campaign adviser acknowledges being part of 2020 'alternate electors' plot*, CNN (Jan. 22, 2022), <https://www.cnn.com/2022/01/22/politics/boris-epshteyn-trump-campaign-fake-electors/index.html>; Zachary Cohen & Marshall Cohen, *Trump allies' fake Electoral College certificates offer fresh insights about plot to overturn Biden's victory*, CNN (Jan. 12, 2022), <https://www.cnn.com/2022/01/12/politics/trump-overturn-2020-election-fake-electoral-college/index.html>.

assertions created in large part by Thibault and either removed or watered-down material connected to the aforementioned left-wing entities that existed in previous versions and recommended that a full investigation – not a preliminary investigation – be approved. As you know, a full investigation requires a heightened factual basis as compared to a preliminary investigation. The Justice Department and FBI have failed to address these whistleblower concerns.

If a politically charged investigation is to be opened, the Justice Department and FBI have an obligation to ensure that it's done the right way. Based on the allegations, that does not appear to have happened.

Notably, when Mr. Smith was in charge of the Justice Department's Public Integrity Unit, Mr. Pilger was in charge of the Election Crimes Branch. Accordingly, Mr. Smith is now overseeing an investigation that was allegedly defective in its initial steps and an investigation which his former subordinate was involved in opening.

This is not the only overlap between Mr. Smith and Mr. Pilger. According to a May 22, 2014, letter from then-Chairman Darrell Issa to then-Attorney General Eric Holder regarding the Obama administration's targeting of conservative nonprofit groups, "[t]he Committee's transcribed interview of Richard Pilger presents further troubling information about the Department's contemplated prosecution of nonprofit groups for false statements."<sup>5</sup> The letter further noted, "[i]t is apparent that the Department's leadership, including Public Integrity Section chief Jack Smith, was closely involved in engaging with the IRS in the wake of *Citizens United* and political pressure from prominent Democrats to address perceived problems with the decision."<sup>6</sup> The letter also notes, "We now know from Mr. Pilger that the Justice Department contributed to this pressure" and "Mr. Pilger's testimony further confirmed that the Justice Department reengaged with the IRS in 2013 as a result of pressure from United States Senator Sheldon Whitehouse."<sup>7</sup>

Notwithstanding the Justice Department's failure to appoint a special counsel in the Hunter Biden criminal matter in the face of overwhelming evidence of conflicts and the public interest requiring it, your decision to appoint Mr. Smith in light of legitimate questions with respect to his objectivity is yet another political decision by the Biden Justice Department, not the absence of one. Instead of appointing a special counsel devoid of overtly political connections and professional connections to the very individuals that were involved in opening the criminal matters that apparently he is now directly overseeing, you chose a special counsel that is wrapped-up into both. As you are aware, 5 C.F.R. § 2635.502 advises that a government employee should seek clearance before participating in any matter that could cause his or her impartiality to be questioned. Moreover, Executive Order 12674 notes that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."

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<sup>5</sup> Press Release, H. Comm. on Oversight and Reform, Testimony: In 2010, Justice Department Sought Lois Lerner's Help to Prosecute Tax Exempt Groups Engaging in Politics (May 22, 2014), <https://republicans-oversight.house.gov/release/testimony-2010-justice-department-sought-lois-lerners-help-prosecute-tax-exempt-groups-engaging-politics/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

The Justice Department’s track record with respect to informing Congress and the public that it has prevented potential or actual conflicts from infecting investigations leaves much to be desired. For example, since February 3, 2021, we have written several letters to you requesting to know whether Nicholas McQuaid, then-Principal Deputy Assistant Attorney General for the Criminal Division, was recused from the Hunter Biden criminal matter in light of his conflicts of interest.<sup>8</sup> To date, the Department has failed to answer that simple question. The Department’s past failure to comply with legitimate congressional oversight requests with respect to compliance with ethical standards does not engender trust in the Department’s decision-making process in appointing Mr. Smith.

With respect to the second investigation, on May 17, 2016, Senator Grassley wrote to then-Director Comey with respect to the need for a special counsel in the Hillary Clinton criminal investigation in light of the appearance of a conflict of interest by Justice Department officials.<sup>9</sup> Secretary Clinton was a former cabinet official being investigated under the authority of the Obama/Biden administration and the criminal investigation was underway during a presidential election year in which Secretary Clinton was her party’s front-runner. As you are aware, a special counsel was not appointed.

For important context, on October 5, 2016, Senator Grassley wrote to then-Attorney General Lynch about Secretary Clinton and her staff receiving kid-gloves treatment relating to her mishandling of highly classified information. The October 5, 2016, letter, discussed the infamous “Wilkinson letters.”<sup>10</sup> The Wilkinson letters—both dated June 10, 2016—were incorporated by reference into the immunity agreements for attorney Beth Wilkinson’s clients – Cheryl Mills and Heather Samuelson – and related to the FBI’s criminal investigation into Secretary Clinton. The letters set out the precise manner in which the Department and the FBI would access and use federal records and other information stored on .PST and .OST email archives from Ms. Mills’ and Ms. Samuelson’s laptops. Ms. Wilkinson and lawyers from the Justice Department drafted the Wilkinson letters jointly before Ms. Wilkinson sent them to DOJ.

The October 5, 2016, letter expressed concerns about the process by which Congress was allowed to view the Wilkinson letters, that the letters inappropriately restricted the scope of the FBI’s investigation, and that the FBI inexplicably agreed to destroy these individuals’ laptops knowing that the contents were the subject of congressional subpoenas and preservation letters.

According to additional information released by Senator Grassley, Secretary Clinton’s mishandling of highly classified information resulted in 91 valid security violations committed by 38 individuals, some of whom “deliberately transmitted” classified information via Secretary

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<sup>8</sup> See Press Release, Sen. Charles Grassley, After Justice Dept. Dodges Conflicts Inquiry On Biden Investigation, Grassley, Johnson Seek Transparency From Delaware U.S. Attorney (May 10, 2022), <https://www.grassley.senate.gov/news/news-releases/after-justice-dept-dodges-conflicts-inquiry-on-biden-investigation-grassley-johnson-seek-transparency-from-delaware-us-attorney>; Senator Charles Grassley, Hunter Biden Investigation Continues To Get Swept Under The Rug (July 11, 2022), <https://www.grassley.senate.gov/news/remarks/grassley-hunter-biden-investigation-continues-to-get-swept-under-the-rug>.

<sup>9</sup> See Letter from Chairman Charles E. Grassley, S. Judiciary Comm., to Director James Comey, FBI (May 17, 2016), [https://www.grassley.senate.gov/imo/media/doc/grassley\\_to\\_fbi\\_-\\_clinton\\_investigation\\_special\\_counsel.pdf](https://www.grassley.senate.gov/imo/media/doc/grassley_to_fbi_-_clinton_investigation_special_counsel.pdf).

<sup>10</sup> See Letter from Chairman Charles E. Grassley, S. Judiciary Comm., to Att’y Gen. Loretta E. Lynch, Dep’t. of Justice (Oct. 5, 2016), <https://www.grassley.senate.gov/news/news-releases/chairmen-question-doj-agreement-limit-investigation-secretary-clintons-private>.

Clinton's unsecured server.<sup>11</sup> An additional 497 security violations occurred but culpability could not be established.

In his statements before Congress, then-Director Comey repeatedly assured Congress that the FBI investigated whether charges of obstruction of justice and intentional destruction of records were merited. As we now know, the FBI pulled its punches and Director Comey drafted an exoneration statement for Secretary Clinton *before* interviewing her and 16 other relevant witnesses.<sup>12</sup>

The kid-gloves treatment given to Secretary Clinton by the Justice Department is different than the apparent treatment given to former President Trump. The Department has failed to explain that discrepancy and that failure has cast doubt as to whether or not its actions are political in nature. If the Department opens an investigation, it must be done without regard to party, privilege or power. Given the incriminating circumstances on the part of the FBI, the Department must explain its actions.

In order for Congress to perform an independent and objective review of your appointment of Mr. Smith, please answer the following no later than December 20, 2022:

1. Did you perform a conflicts of interest analysis before appointing Mr. Smith? If so, please provide all records. If not, why not?
2. Did Mr. Smith seek any ethical guidance before accepting his appointment? If so, please provide all records.<sup>13</sup> If not, why not?
3. Were you aware of Mr. Smith's professional connections to Mr. Pilger? If so, did they factor into your decision to appoint Mr. Smith? If not, why not?
4. Were you aware of Mr. Smith's reported involvement in the Justice Department's engagement with the IRS in the wake of *Citizens United* to apply increased pressure against conservative nonprofits? If so, did that factor into your decision to appoint Mr. Smith? If not, why not?
5. Have you reviewed the predicated documents relating to the Trump investigation that Senator Grassley highlighted in his July 18, 2022, letter to you? If not, why not?

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<sup>11</sup> Letter from Sen. Charles Grassley to Mike Pompeo, U.S. Sec'y of State (Nov. 4, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-seeks-details-administrative-sanctions-deliberate-mishandling-classified>.

<sup>12</sup> See Press Release, Sen. Charles Grassley, Transcripts: Comey Drafted Conclusion In Clinton Probe Prior To Interviewing Key Witnesses (Aug. 31, 2017), <https://www.grassley.senate.gov/news/news-releases/transcripts-comey-drafted-conclusion-clinton-probe-prior-interviewing-key>; see also Josh Gerstein, *GOP senators: Comey drafted statement clearing Clinton before her interview*, POLITICO (Aug. 31, 2017), <https://www.politico.com/story/2017/08/31/fbi-comey-clinton-email-242213>.

<sup>13</sup> "Records" include any written, recorded, or graphic material of any kind, including letters, memoranda, reports, notes, electronic data (e-mails, email attachments, and any other electronically-created or stored information), calendar entries, inter-office communications, meeting minutes, phone/voice mail or recordings/records of verbal communications, and drafts (whether or not they resulted in final documents). This definition applies to all requests for records in the questions for the record.

6. Have you investigated Mr. Thibault's and Mr. Pilger's involvement in opening the Trump investigation that Senator Grassley highlighted in his July 18, 2022, letter to you? If not, why not?
7. Have you investigated the alleged breach of Justice Department and FBI process and procedure in opening the Trump investigation that Senator Grassley highlighted in his July 18, 2022, letter to you? If not, why not?
8. Was Mr. McQuaid recused from the Hunter Biden criminal investigation? If so, when? Please provide all records relating to Mr. McQuaid's recusal. If not, why not?
9. With respect to the 91 security violations committed by the 38 individuals relating to Secretary Clinton's mishandling of highly classified information, did the State Department refer any of them to the Justice Department or FBI? If so, what steps were taken to investigate them for those security violations and potential criminal conduct? If no steps were taken, please explain why not.

Sincerely,



Charles E. Grassley  
Ranking Member  
Committee on the Judiciary



Ron Johnson  
Ranking Member  
Permanent Subcommittee  
on Investigations

cc: The Honorable Richard Durbin  
Chairman  
Committee on the Judiciary

The Honorable Jon Ossoff  
Chairman  
Permanent Subcommittee on Investigations

The Honorable Michael Horowitz  
Inspector General  
Department of Justice