

ABOUT YOUR PENCE SPECIAL COUNSEL COMPLAINT: ON THE MISSING COVERAGE OF SECTION 600.2(B)

I'm seeing people ask why Merrick Garland hasn't appointed a Special Counsel yet to investigate Mike Pence when (the claim is) he did for President Biden.

The answer is ... that's not what happened.

DOJ learned about the documents at Pence's house no earlier than January 18 (probably on January 19), so seven or eight business days ago.

At this stage of the Biden review (seven days after DOJ learned about the documents from the Archives), Garland *hadn't* appointed US Attorney for Chicago John Lausch yet. As Attorney General Garland explained when he announced the appointment of Robert Hur, ten days after DOJ learned about the documents at Biden's office, he asked Lausch to investigate:

- November 4: DOJ learns of the Biden documents
- November 9: FBI starts an assessment
- November 14: Garland appoints John Lausch

More importantly, Lausch wasn't appointed as a full Special Counsel under 28 CFR 600.4, which is what Jack Smith was appointed under. Rather, Garland appointed Lausch under 600.2(b).

On November 14, pursuant to Section 600.2(b) of the Special Counsel regulations, I assigned U.S. Attorney Lausch to conduct an initial investigation to inform my decision

whether to appoint a Special Counsel.

Section 600.2(b) permits the Attorney General to appoint someone to conduct an “initial investigation” to better inform the decision whether to appoint a full-blown Special Counsel.

§ 600.2 Alternatives available to the Attorney General.

When matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may:

- (a) Appoint a Special Counsel;
- (b) Direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; or
- (c) Conclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.

Importantly, Garland didn’t reveal that he had appointed Lausch until the day he appointed Hur, this time under 600.4.

So Garland could well have appointed someone – could be Lausch, could be Hur, could be someone who wasn’t appointed under the Trump-Pence Administration, as both Lausch and Hur were – to conduct an initial assessment regarding Pence’s documents without telling the public, just as he did with Biden. If he followed the same approach he did with Biden, he might not reveal that step unless and until he appointed a full Special Counsel.

Check back on March 17 to see where DOJ is with a Pence review, which would be the same almost two months out as it took to appoint a Special Counsel with Biden.

Maybe by then someone will have been appointed to review the classified holdings of *all* former Presidents and Vice Presidents.

To anticipate one more complaint, about why Garland waited nine months after the discovery of classified documents in boxes that had been at Mar-a-Lago before appointing Jack Smith: DOJ started using a grand jury no later than May 11 in Trump’s case, which is when they sent a subpoena for all documents with classification markings (I believe the subpoena reflects a grand jury seated on April 27). The subpoena

came just over two months after FBI received the NARA referral on February 9. The timing of the Special Counsel appointment pivoted on the fact that Trump announced his his run for President, not the intensity of the investigation.

In fact, Garland might not appoint a Special Counsel if Pence doesn't formally announce (if even there's cause to do so).

It's not at all clear that these investigations should follow a parallel track. But even if they should, Pence has not yet been treated differently than Biden.