

May 14, 2024

Ms. Karen Gorman
Acting Principal Deputy Special Counsel
U.S. Office of Special Counsel
1730 M Street NW, Suite 218
Washington, D.C.

Dear Principal Deputy Special Counsel Gorman:

We write regarding strong concerns that the U.S. Office of Special Counsel (“OSC”) has been used as a tool to retaliate against our client, Internal Revenue Service (“IRS”) Supervisory Special Agent (“SSA”) Gary Shapley, and his fellow whistleblower, IRS Special Agent (“SA”) Joseph Ziegler.

Both SSA Shapley and SA Ziegler have filed whistleblower retaliation claims with OSC, and we understand OSC has requested related documents as part of an investigation into the retaliation claims. Specifically, SSA Shapley has alleged that now-Special Counsel David Weiss began retaliating against Shapley in November 2022 when Weiss learned Shapley had been making protected whistleblower disclosures about Weiss’s office to his IRS chain of command.¹ Those disclosures included allegations Weiss’s office (the U.S. Attorney’s Office for the District of Delaware) engaged in prosecutorial misconduct in the Hunter Biden case by treating Mr. Biden more leniently than similarly situated taxpayers who were not politically connected.

Two months ago Special Counsel Weiss filed a document in one of the criminal prosecutions of Hunter Biden drafted and redacted carefully to lead the public to believe SSA Shapley and SA Ziegler were under investigation for potential misconduct.² That March 11, 2024 filing opened by stating: “[T]wo IRS agents, Gary Shapley and Joseph Ziegler, . . . have made unsubstantiated claims that prosecutors’ decision-making in this investigation was infected by politics.”³ The filing continued later: “[A]s described in the attached declaration, Exhibit 2 (filed under seal), the IRS has taken responsible steps to address Shapley’s and Ziegler’s conduct.”⁴ Over half of the next page was also redacted.⁵ The referenced Exhibit 2

¹ See letter from Tristan Leavitt to U.S. Office of Special Counsel (May 17, 2023), available at <https://empowr.us/wp-content/uploads/2024/04/2023-05-22-Letter-to-Congress-re-retaliation.pdf>.

² *United States v. Biden*, No. 23-00599-MCS (C.D.Ca. Mar. 11, 2024) (Govt. Opp. to Def. Mot. to Dismiss (“Opposition”) 10-12) [ECF Doc. 42].

³ *Id.* at 1.

⁴ *Id.* at 10.

⁵ *Id.* at 11.

stated the redactions were “to a potential ongoing investigation . . . and the government has filed three exhibits [under seal] that reference a potential ongoing investigation[.]”⁶ It continued:

The justification for the redaction and the sealed exhibits is that the redacted information contained in the filing and the sealed exhibits relates to a potential ongoing investigation(s) and the investigating agency(cies) specifically requested that the government request that the court seal the exhibits, as well as any accompanying reference in the pleading, in order to protect the integrity of the potential ongoing investigation(s). Here, the potential investigation(s) ***may involve allegations of wrongdoing***, and the potential investigation(s) could be frustrated, not served, if the public were allowed access to these materials in the midst of the potential investigation(s). *To be clear, the aforementioned potential ongoing investigations are not references to any investigation of the defendant conducted by the U.S. Department of Justice.*⁷

The unmistakable implication that SSA Shapley and SA Ziegler were under investigation did not go unnoticed and was the subject of significant press attention.⁸

Yesterday we contacted OSC staff to inform them of a filing from the Justice Department last Friday, May 10, 2024. It acknowledged unequivocally for the first time that SSA Shapley and SA Ziegler had not violated the taxpayer privacy laws, as Hunter Biden had falsely alleged.⁹ In a subsequent phone call, OSC staff stated that because it had been contacted by the IRS regarding various exhibits the IRS wanted to include in Special Counsel Weiss’s March 11, 2024 filing, OSC was the “investigating agency” that “specifically requested that the government request that the court seal the exhibits . . . in order to protect the integrity of the potential ongoing investigation(s).”

This information was shocking.

It means the IRS and Special Counsel Weiss’s office hid and twisted the significance of OSC’s investigation *into the whistleblowers’ own allegations* that the IRS and Special Counsel Weiss retaliated against them. Rather than acknowledging the truth that OSC is investigating *the reprisal against* the whistleblowers, the DOJ filing falsely suggested to the public that some unnamed agency was investigating *the conduct of* the whistleblowers themselves.

⁶ Exhibit 2, at 1-2.

⁷ *Id.* at 2-3 (citation omitted) (emphasis added).

⁸ See, e.g., Margot Cleveland, “Is Biden’s IRS Meddling In The IG Investigation Of Hunter Biden Whistleblowers?,” *The Federalist* (Apr. 22, 2024), <https://thefederalist.com/2024/04/22/is-bidens-irs-meddling-in-the-ig-investigation-of-hunter-biden-whistleblowers> (“The government’s accompanying motion to seal the exhibits strongly suggested Shapley and Ziegler were under investigation. . . . The clear import from these filings, then, was that either one or both Shapley and Ziegler were under investigation.”)

⁹ *Biden v. Internal Revenue Service*, No. 23-02711-TJK (D.D.C. May 10, 2024) (Reply in Support of the United States’ Partial Motion to Dismiss (“Reply”)) [ECF Doc. 21] (“[T]he United States disputes that the IRS employees’ alleged disclosures violated [Internal Revenue Code] § 6103[.]”).

This raises serious questions about whether Special Counsel Weiss's office engaged in sanctionable misconduct by intentionally misleading the public or the court with its filing merely to generate a false public relations narrative as further reprisal for the protected whistleblower disclosures about his office.

What's more, it also raises serious questions about why OSC would stay silent as the IRS and Special Counsel Weiss mischaracterize its inquiry as a tool of retaliation to falsely suggest the whistleblower may have engaged in misconduct. OSC has had two months to determine what "potential investigation(s)" Weiss was referring to. If OSC's investigation was the only basis for the statements in Weiss's filings, not only should OSC have requested that Weiss correct his filing, it should be investigating how Weiss used the language of the filing for reprisal against SSA Shapley and SA Ziegler. Even if there is another investigation besides OSC's, OSC still should have objected to OSC's own request being cited in Weiss's filing with the impression OSC was investigating SSA Shapley and SA Ziegler, rather than alleged misconduct by *the IRS and Weiss himself*.

It is clear Weiss's office harbors animus towards the whistleblowers. For example, in the March 27, 2024 hearing on the filing above, one prosecutor in Weiss's office improperly and unprofessionally referred in open court to SSA Shapley and SA Ziegler as "hyenas, baying at the moon[.]"¹⁰

Accordingly, Empower Oversight copied Special Counsel Dellinger a month ago on its April 4, 2024 letter to Attorney General Garland expressing concerns that Weiss's revelation of a supposed investigation was retaliatory.¹¹ Specifically, that letter stated:

[N]either SSA Shapley nor SA Ziegler have been informed of any investigation into their conduct, which consisted of exercising lawful channels to blow the whistle to Congress. If such an investigation exists, it goes to the heart of Congress's reason for adopting the whistleblower disclosure provision at 26 U.S.C. § 6103(f)(5), which was *precisely* because of concerns about the IRS retaliating against its employees who blew the whistle to Congress.

Here, the whistleblower disclosures to Congress relate not only to IRS conduct, but to the conduct of *Mr. Weiss* himself, and his office's preferential treatment involving Mr. Biden. Mr. Weiss is the subject of an open whistleblower retaliation complaint with the U.S. Office of Special Counsel that has been pending since May 17, 2023. Accordingly, for Special Counsel Weiss's office to have any communications with the IRS Chief Counsel's office regarding SSA Shapley's and SA Ziegler's whistleblowing *on Mr. Weiss* is highly improper. And once inappropriately informed of a potential investigation—assuming Mr. Weiss didn't play a role in initiating such an investigation at the request of Mr. Biden

¹⁰ March 27, 2024 motion hearing, *United States v. Biden*, No. 23-00599-MCS (C.D.Ca.) [ECF Entry 64].

¹¹ Letter from Tristan Leavitt to Atty. Gen. Merrick Garland (Apr. 4, 2024), available at <https://empowr.us/wp-content/uploads/2024/04/2024-04-04-TL-to-DOJ-Garland-conflicts-of-interest.pdf>.

and his counsel—for Special Counsel Weiss’s office to make its existence public was simply gratuitous.¹²

Letters from various members of Congress have also raised concerns about a “potential” retaliatory investigation¹³ as well as the need for Weiss to provide Congress with an unredacted version of his filing.¹⁴ When the IRS insisted in response that *it* had “no such IRS investigation” and that it was “not aware of any Department of Justice investigation” into the whistleblowers,¹⁵ public commentators speculated on which agency was conducting the “potential investigation(s)” and whether that agency’s contacts with the IRS were appropriate.¹⁶ To discover Weiss’s filing was at least partially in reference to OSC, but that OSC has done nothing to correct the misimpression left by Weiss’s letter two months ago, is extremely disconcerting.

Your agency’s mission is to investigate whistleblower reprisal, and you should not allow the Justice Department to mischaracterize your work for the purposes of a retaliatory attack on the reputation of whistleblowers who have done nothing wrong.

When President Biden nominated Hampton Dellinger as Special Counsel, the media immediately seized upon his ties to Hunter Biden as a colleague at the same law firm.¹⁷ For that reason, six United States senators subsequently wrote to President Biden requesting he withdraw the nomination, writing:

¹² *Id.* at 24.

¹³ Letter from Chairman Jim Jordan, et al. to Comm’r Daniel Werfel (Apr. 2, 2024), *available at* <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-04-02%20JD%20JC%20JS%20to%20Werfel%20re%20Retaliation%20Against%20Whistleblowers.pdf> (“Given that the whistleblowers’ disclosures were lawful, if they are under investigation for their protected disclosures to Congress, the Committees are concerned that such an investigation is an attempt to seek retribution against these two brave whistleblowers.”).

¹⁴ Letter from Sen. Chuck Grassley to IRS Comm’r Danny Werfel (Apr. 4, 2024), *available at* <https://www.grassley.senate.gov/imo/media/doc/grassley-to-irs-whistleblowers.pdf> (“If this ‘potential ongoing investigation’ relates to Shapley and Ziegler, its reference in public and sealed court documents can only be viewed as a Justice Department and IRS tactic to dirty up the very whistleblowers that exposed Justice Department and IRS misconduct.”).

¹⁵ Letter from IRS Commissioner Daniel Werfel to Senator Chuck Grassley (Apr. 12, 2024), at 1, 1 fn.1, *available at* <https://www.scribd.com/document/725475085/Werfel-letter-to-Grassley>.

¹⁶ *See, e.g.*, Margot Cleveland, “Is Biden’s IRS Meddling In The IG Investigation Of Hunter Biden Whistleblowers?,” *The Federalist* (Apr. 22, 2024), <https://thefederalist.com/2024/04/22/is-bidens-irs-meddling-in-the-ig-investigation-of-hunter-biden-whistleblowers> (“Why . . . was the IRS, through its chief counsel’s office, speaking with both the ‘investigating entity’ . . . and the special counsel’s office, about the ‘potentially ongoing investigation?’”).

¹⁷ Joe Schoffstall and Cameron Cawthorne, *Joe Biden nominates former Hunter Biden law firm colleague as special counsel*, Fox News (Oct. 5, 2023), <https://www.foxnews.com/politics/joe-biden-nominates-former-hunter-biden-law-firm-colleague-as-special-counsel>; *see also* Editorial, *More stink from the Hunter saga*, Las Vegas Review-Journal (Oct. 7, 2023), <https://www.reviewjournal.com/opinion/editorials/editorial-more-stink-from-the-hunter-saga-2917643>.

It is important to note that Mr. Dellinger, as Special Counsel, would be charged with ensuring retaliation against whistleblowers—including the IRS whistleblowers in the Hunter Biden matter—is investigated and corrective or disciplinary action against retaliators is sought. In light of Mr. Dellinger’s reported connections to Mr. Biden, and the appearance of a conflict that it creates, we have serious doubts as to whether he could act impartially in fulfilling OSC’s obligations.¹⁸

We understand Special Counsel Dellinger has recused himself from this case. However, it would be entirely improper if the rest of OSC were to stay silent as the Biden Justice Department mischaracterizes OSC’s work probing the reprisal against the IRS whistleblowers in the Hunter Biden case.

Accordingly, we respectfully request that you correct the record as soon as possible.

Cordially,

[/Tristan L. Leavitt/](#)
Tristan L. Leavitt
President
Empower Oversight

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CC:

House Committee on the Judiciary (Chairman Jim Jordan & Ranking Member Jerrold Nadler)

Senate Committee on the Judiciary (Chairman Dick Durbin & Ranking Member Lindsey Graham)

House Committee on Oversight and Accountability (Chairman James Comer & Ranking Member Jamie Raskin)

Senate Committee on Homeland Security and Governmental Affairs (Chairman Gary Peters & Ranking Member Rand Paul)

House Committee on Ways and Means (Chairman Jason Smith & Ranking Member Richard Neal)

Senate Committee on Finance (Chairman Ron Wyden & Ranking Member Mike Crapo)

Senate Whistleblower Protection Caucus (Chairman Chuck Grassley)

¹⁸ Letter from Senator Marsha Blackburn, et al. to President Joseph Biden (Nov. 28, 2023), *available at* <https://www.blackburn.senate.gov/services/files/2575BBC5-2374-4DED-9E9A-348278868068>.