



**U.S. Department of Justice**  
**Office of Legal Counsel**

Washington, D.C. 20530

January 9, 2025

**MEMORANDUM**

TO: Merrick B. Garland, Attorney General

FROM: Christopher C. Fonzone, Assistant Attorney General

RE: January 6, 2025, Subpoena from the Chairman of the House Judiciary Committee for the Audio Recordings of Special Counsel Hur's Interviews

During the 118th Congress, the Committee on the Judiciary and the Committee on Oversight and Accountability of the U.S. House of Representatives issued you subpoenas for audio recordings of two interviews conducted in connection with Special Counsel Robert Hur's investigation and certain other materials related to that investigation. On May 15, 2024, you concluded, based on advice from this Office, that the President could assert executive privilege over those audio recordings and could make a protective assertion of executive privilege as to any other materials responsive to the subpoenas that had not already been produced, and you requested that the President do so. *See Assertion of Executive Privilege Over Audio Recordings of the Special Counsel's Interviews of the President and His Ghostwriter*, 48 Op. O.L.C. \_\_ (May 15, 2024) ("*Executive Privilege Over Audio Recordings*"). The President then asserted privilege over the subpoenaed audio recordings and instructed that they not be produced. The President also made a protective assertion of executive privilege with respect to any other materials responsive to the subpoenas that had not already been produced.

We subsequently advised you that, "[a]s a result of the President's directive, you [could] not produce the recordings to the Committees consistent with the responsibilities of your office." Memorandum for Merrick Garland, Attorney General, from Christopher Fonzone, Assistant Attorney General, Office of Legal Counsel, et al., *Re: The President's Executive Privilege Assertion and the Criminal Contempt of Congress Statute* at 1 (May 16, 2024) ("Fonzone Memorandum"). And we further advised you that, consistent with this Office's longstanding position that "it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility," *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 138 (1984) ("*Prosecution for Contempt of Congress*"), you could not be held in contempt of Congress for not producing these materials based on a presidential assertion of executive privilege, *see* Fonzone Memorandum at 1; *see also Whether Congress May Use Inherent Contempt to Punish Executive Branch Officials Who Withhold Subpoenaed Materials Based on a Presidential Assertion of Executive Privilege*, 48 Op. O.L.C. \_\_ (Dec. 20, 2024) ("*Inherent Contempt*").

On January 6, 2025, after the 119th Congress convened and the House adopted its new rules, the Chairman of the House Judiciary Committee issued you a new subpoena seeking the audio recordings of the Special Counsel’s interviews. *See* Letter for Merrick B. Garland, Attorney General, from Jim Jordan, Chairman, House Committee on the Judiciary (Jan. 6, 2025) (attachment) (“Jordan Letter”). You have asked us what effect, if any, this new subpoena has on your ability or any obligation to produce the audio recordings, in light of the President’s assertion of executive privilege. We conclude that the President’s privilege assertion and direction not to produce the recordings remain in effect and that you accordingly still may not produce the recordings consistent with the responsibilities of your office. And because we continue to adhere to the Office’s longstanding position that it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President’s assertion of executive privilege, declining to produce the recordings still cannot constitutionally be the basis of any contempt of Congress action.

## I.

The new subpoena from the Chairman of the House Judiciary Committee makes the same requests as the subpoena the Committee issued during the 118th Congress. *See id.* And in transmitting the subpoena to you, the Chairman did not advance any additional reasons why he needed access to these materials, including the audio recordings; to the contrary, the Chairman’s cover letter stated that his request “incorporate[s]” positions the Committee had taken previously. *Id.* Consequently, we are not aware of any material change in circumstance that would undermine the legal bases for the President’s executive privilege assertion. *See Executive Privilege Over Audio Recordings* at \*10–14.

Given these facts—that the new subpoena seeks the same audio recordings as the old subpoena and that we are not aware of any material change in circumstance that would undermine the legal bases for the President’s assertion of privilege—we think it clear that the President’s assertion of privilege over the audio recordings remains in effect. The President’s instruction thus continues to preclude you from producing the recordings.<sup>1</sup> Indeed, as we understand it, this position is consistent with the Executive Branch’s historical practice, which has treated a prior presidential assertion of privilege as remaining operative when a new subpoena for the same materials is issued in a new Congress.

We note that the January 6, 2025, subpoena, like the subpoena from the prior Congress, seeks certain additional materials, much of which the Department has already produced to the Committee. It is not clear under what authority the new subpoena is seeking these additional materials, since the subpoena authorization that the Chairman cites only allows him to issue a subpoena “[t]o Attorney General Merrick Garland related to the Special Counsel’s audio recordings of interviews with President Joseph R. Biden and his ghostwriter Mark Zwonitzer.” H. Res. 5, 119th Cong. (2025). Consistent with that limitation, the Chairman’s cover letter states only that he is seeking production of the audio recordings. *See* Jordan Letter at 1. In any event, even if the subpoena were construed to cover other, unspecified materials that the Department has not produced, as noted above, the President made a protective assertion of executive

---

<sup>1</sup> We have consulted with the White House Counsel’s Office, and that Office confirms that the President’s executive privilege assertion and direction not to produce the audio recordings remain operative.

privilege in order to allow for the opportunity to engage in the accommodation process with respect to any such materials, including to review them for possible privileged information. *See Executive Privilege Over Audio Recordings* at \*14–15. That assertion remains in effect as well.

## II.

Since we conclude that the President’s executive privilege assertion over the audio recordings of Special Counsel Hur’s interviews and direction not to produce them continue to apply and preclude you from producing the recordings in response to the January 6, 2025, subpoena, declining to produce the recordings still cannot constitutionally be the basis of any contempt of Congress action.

As noted above, our Office’s longstanding position is that “it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President’s exercise of a presumptively valid constitutional responsibility.” *Prosecution for Contempt of Congress*, 8 Op. O.L.C. at 138. That is because “[t]he Executive . . . must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance.” *Id.* at 140. Consistent with these foundational principles, we previously advised you that “the Executive Branch has long held the position that the criminal contempt of Congress statute does not apply to Executive Branch officials who do not comply with a congressional subpoena based on a presidential assertion of executive privilege.” Fonzone Memorandum at 1 (citation omitted). Thus, the contempt statute “does not apply where, as here, you do not produce the audio recordings to the Committee[] based on the instruction of the President following his assertion of executive privilege.” *Id.* Likewise, the House may not constitutionally use its inherent power of contempt to arrest, fine, or otherwise punish you for complying with the President’s assertion. *See Inherent Contempt* at \*1–2.