From: "Klapper, Matthew B. (OAG)" (b) (6)
To: "Hinojosa, Xochitl (PAO)" (b) (6)
Cc: "Brogger, Marissa J. (PAO)" (b) (6), "Iverson, Dena (PAO)" (b) (6)
Subject: Re: AG Quote for Fox
Date: Thu, 06 Jun 2024 15:55:41 -0400
Importance: Normal

Some edits. The following is good to go:

"As I have said before, I have complete confidence in the President. As a member of the President's cabinet and the National Security Council, I have consistently seen firsthand his ability to navigate issues of extraordinary complexity that are of the utmost importance to our national security. I have also seen him tackle domestic policy issues, clearly and decisively guiding us through complicated questions to reach results that benefit the American people."

Get Outlook for iOS

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Thursday, June 6, 2024 3:46:07 PM
To: Klapper, Matthew B. (OAG) (b) (6)
Cc: Brogger, Marissa J. (PAO) (b) (6); Iverson, Dena (PAO) (b) (6)
Subject: FW: AG Quote for Fox

Updated since the last quote was outside of what he said in his testimony.
Draft AG quote for Fox piece:
(b) (5)

From: Hinojosa, Xochitl (PAO)
Sent: Thursday, June 6, 2024 3:23 PM
To: Klapper, Matthew B. (OAG) (b) (6)
Cc: Brogger, Marissa J. (PAO) (b) (6); Iverson, Dena (PAO) (b) (6)
Subject: AG Quote for Fox

Inquiry below. Draft AG quote for Fox piece:
(b) (5)

From approps hearing:
GARLAND: Look, I'm start by thanking you for recognizing that I can't comment and won't comment about the Special Counsel's report at all. But if you're asking me about my own observations as a member of the National Security Council and a member of the President's cabinet, I have complete confidence in the President. I have watched him expertly guide meetings of staff and cabinet members on issues of foreign affairs and military strategy and policy in an incredibly complex world, in which we now face, and in which he has been decisive in instructions to the staff and decisive in making the decisions necessary to protect the country. Likewise, with respect to domestic policy discussions, these are intricate,

complicated questions that he has guided all of us through in order to reach results that are helpful and important and beneficial to the American people. I could not have more confidence in the President.

From: Richter, Matthew <matthew.richter@fox.com>
Sent: Thursday, June 6, 2024 3:02 PM
To: Hinojosa, Xochitl (PAO) (b) (6)
Cc: Dulaney, Emma (PAO) (b) (6) ; Iverson, Dena (PAO) (b) (6)
Subject: RE: [EXTERNAL] Webform submission from: Media Inquiries

Correct. Looking for refutation that the President is in a state of mental decline.

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Thursday, June 6, 2024 2:43 PM
To: Richter, Matthew <matthew.richter@fox.com>
Cc: Dulaney, Emma (PAO) (b) (6) ; Iverson, Dena (PAO) (b) (6)
Subject: RE: [EXTERNAL] Webform submission from: Media Inquiries

And what's the story? Just a reaction to the WSJ piece?

From: Richter, Matthew <matthew.richter@fox.com>
Sent: Thursday, June 6, 2024 2:42 PM
To: Hinojosa, Xochitl (PAO) (b) (6)
Cc: Dulaney, Emma (PAO) (b) (6) ; Iverson, Dena (PAO) (b) (6)
Subject: RE: [EXTERNAL] Webform submission from: Media Inquiries

Hi Xochitl, my deadline is 4pm. If you can't meet that but are sure you'll get a statement, I'll write around the quote and drop it into the story later. I'm pretty certain of what the essence of the Attorney General's statement will be.
Thanks!
Matt

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Thursday, June 6, 2024 2:36 PM
To: Richter, Matthew <matthew.richter@fox.com>
Cc: Dulaney, Emma (PAO) (b) (6) ; Iverson, Dena (PAO) (b) (6)
Subject: FW: [EXTERNAL] Webform submission from: Media Inquiries

Hi Matt-

I'm just getting your request. I'm assuming you're looking for a statement from the Attorney General. What's your deadline? I can get back to you shortly if you could hold.

Xochitl

From: United States Department of Justice <no-reply@usdoj.gov>
Sent: Thursday, June 6, 2024 10:49 AM
To: Press (b) (6)
Subject: [EXTERNAL] Webform submission from: Media Inquiries

Date:Thursday, June 6, 2024 - 10:48AM EDT

Name: Matthew Richter

Email: matthew.richter@fox.com

Topic:Other (please specify at the top of your message)

Media Outlet:Fox news Digital

Deadline:2:00pm June 6th

Inquiry:

Hello. I would like to get a statement from the secretary regarding the recent WSJ article purporting that President Biden's mental acuity is in decline. I can be reached at this email or at (b) (6) Thank you.
Matt Richter
News/Politics editor, Fox News Digital

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From: "Klapper, Matthew B. (OAG)" (b) (6)
To: "Miller, Marshall (ODAG)" (b) (6), "Weinsheimer, Bradley (ODAG)" (b) (6), "Atkinson, Lawrence (ODAG)" (b) (6)
Subject: Fwd: [EXTERNAL] Letter for AG Garland
Date: Wed, 07 Feb 2024 17:27:46 -0500
Importance: Normal
Attachments: 2024-02-07_Letter_to_AG_Garland_(with_enclosures).pdf

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Sent from my iPhone

Begin forwarded message:

From: "Cotton, Rachel F. EOP/WHO" (b) (6)
Date: February 7, 2024 at 5:03:09 PM EST
To: "Klapper, Matthew B. (OAG)" (b) (6)
Subject: [EXTERNAL] Letter for AG Garland

Please see attached a letter for Attorney General Garland from Ed Siskel and Bob Bauer.

Many thanks.

Rachel Cotton
Special Assistant to the President & Senior Counsel
Office of the White House Counsel
(b) (6)
(b) (6)

THE WHITE HOUSE
WASHINGTON

February 7, 2024

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Attorney General Garland:

We wrote to Special Counsel Robert Hur on February 5, 2024 to object to certain aspects of his draft report that violate Department of Justice policy and practice by pejoratively characterizing uncharged conduct. The comments in question mirror past prosecutor comments that have been roundly criticized and uniformly condemned, including by the Department's Inspector General. The current Special Counsel regulations were promulgated as a reaction against—and a correction for—the publication of lengthy reports containing prejudicial statements about uncharged conduct under the Independent Counsel Act.[1]

First, we object to Mr. Hur's characterization of President Biden's practice of retaining his personal diaries in his home after he left the Vice Presidency. Despite the fact, which we explained repeatedly to Mr. Hur, that prior Presidents have done exactly the same thing, the report describes this uncharged conduct as "totally irresponsible," applying to President Biden the phrase he used to describe former President Trump's conduct in keeping more than 300 marked classified documents and refusing to turn them over to the authorities. *See* Hur Report at 228.

[1] As former Republican Solicitor General Ted Olson testified in opposition to the reauthorization of the Independent Counsel Act: "the final report has turned into an excuse to file long exhaustive expositions which rationalize the investigation," as well as "offer opinions regarding and/or pronounce judgments on the individuals investigated, and generally make the Independent Counsel look good." *The Future of the Independent Counsel Act: Hearings before the S. Comm. on Governmental Affairs*, 106th Cong. 231 (1999) (prepared statement of Theodore B. Olson). Former Attorney General Janet Reno similarly testified and strongly criticized the final report requirement, asserting that "the report requirement cuts against many of the most basic traditions and practices of American law enforcement." *Id.* at 252 (prepared statement of Janet Reno, Att'y General of the United States).

For your convenience, we enclose a copy of the White House Counsel's Office's detailed history and explanation about the bipartisan efforts to alter the rules governing the appropriate content for these kind of reports. *See* Letter from Richard Sauber, Special Counsel to the President, to Special Counsel Robert K. Hur (Oct. 31, 2023).

We have provided to Mr. Hur detailed history of the practice of former Presidents and Vice Presidents keeping personal materials in their homes, including the Department of Justice's explicit acknowledgment of this practice without initiating law enforcement interest.[2] So, to criticize President Biden for a practice that his predecessors openly engaged in, a practice that the Justice Department has in the past acknowledged and declined to investigate, a practice that is not charged conduct, exemplifies the reasons why a bipartisan consensus arose to change the prior report writing function.

Even more striking is the fact that Mr. Hur's criticism of President Biden mirrors one of the most widely-recognized examples in recent history of inappropriate prosecutor criticism of uncharged conduct. The FBI and DOJ personnel's criticism of uncharged conduct during investigations in connection with the 2016 election was found to violate "long-standing Department practice and protocol." *See* Office of the Inspector General, U.S. Department of Justice, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election vi (June 2018) (finding that former FBI Director James Comey violated this practice and protocol when criticizing as "extremely careless" former Secretary of State Hillary Clinton's use of unclassified systems to transmit classified material); *see also id.* at 245 (noting that it "violat[es] longstanding Department practice" to "trash[] people we're not charging"); Letter to Chairman Charles Grassley, Senate Committee on the Judiciary, from Rod. J. Rosenstein, Deputy Attorney General, at 8-9 (June 27, 2018) ("In fact, disclosing uncharged allegations against American citizens with a law-enforcement need is considered to be a violation of a prosecutor's trust.").

Second, we object to the multiple denigrating statements about President Biden's memory which violate longstanding DOJ practice and policy. The Special Counsel can certainly and properly note that the President lacked memory of a specific fact or series of events. But his report goes further to include allegations that the President has a failing memory in a general sense, an allegation that has no law enforcement purpose. The Special Counsel offers this sweeping set of allegations after an experience with the President limited to a 5-hour interview during which the Special Counsel told the President he planned to ask questions that "relate to events that happened years ago," and then expressed his hope that the President would "put forth [his] best efforts and really try to get [his] best recollection in response to the questions we ask." *Id.* A global and pejorative judgment on the President's powers of recollection in general is uncalled for and unfounded.

Mr. Hur comments at least nine times in the report about his opinion of the president's memory. These critical comments about the President's memory stand in stark contrast to Mr. Hur's treatment of multiple other witnesses who seemed to display similar memory lapses about events from previous years. For example, the report accepts without negative comment John McGrail's failure to remember certain events while he served as then-Vice President Biden's counsel: "McGrail's memory of these events could well have faded over the course of more than 6 years." Hur Report at 238 n.923; *see also id.* at 67, 69 (noting Mr. McGrail's failure to recall events despite emails that place him in the center of various discussions). So, too, the report

[2] For your convenience, we enclose a copy of the White House Counsel's Office's letter to Mr. Hur on those subjects. Letter from Richard Sauber, Special Counsel to the President, to Special Counsel Robert K. Hur (Sept. 11, 2023).

accepts without criticism the memory lapse of one of the President's personal lawyers who testified that in his initial search of the Penn Biden offices certain boxes were stored in a locked closet, noting only that "his memory was fuzzy on that point." *Id.* at 265. And the events on which Mr. Hur found the lawyer's memory to be "fuzzy" occurred only a few months before his interview. *Id.*; *see also id.* at 64, 66 (noting without comment the failures of recollection by numerous staffers).[3]

Not only does Mr. Hur treat the President differently than others with understandable memory lapses, he even praises Mr. Biden's memory and clear state of mind on other occasions when it seems to advance Mr. Hur's conclusions. At one point, Mr. Hur describes anticipated testimony by the President (in a hypothetical trial, we assume) and opines that the President would give "clear forceful testimony" that would be "compelling" to a jury. *Id.* at 233. This is hardly the picture of a man struggling to recall events as Mr. Hur unfairly paints.

The report also leaves out crucial context: the five-hour interview of the President took place while he was enmeshed in a grave international crisis occurring as it did on the day after the October 7 attacks on Israel. Indeed Mr. Hur himself acknowledged the difficult circumstances, noting that he understood there were "a lot of other things in the world going on that demand your attention." Interview Transcript ("Tr."), Day I, at 3.

We are happy to discuss these issues should you wish to do so, but we would be remiss if we did not forcefully object to aspects of Mr. Hur's report that openly, obviously, and blatantly violate Department policy and practice as well as the bipartisan consensus on the appropriate limitations on Special Counsel reports. I also ask that you include a copy of this letter in the Department's files related to the investigation.

Respectfully,

Edward N. Siskel
Assistant to the President and White House Counsel

Bob Bauer
Personal Counsel to Joseph R. Biden, Jr.

Enclosures

[3] And, of course, not recalling the answer to a federal prosecutor's questions is entirely common. *See, e.g.*, Peter Baker, 'I Do Not Remember': Trump Gave a Familiar Reply to the Special Counsel's Queries, N.Y. TIMES (Apr. 20, 2019) (noting that, in his written questions, President Trump stated "he did not remember" or "do not recall" more than thirty times).

From: "Dulaney, Emma (PAO)" (b) (6)
To: "Klapper, Matthew B. (OAG)" (b) (6)
Cc: "Uriarte, Carlos F. (OLA)" (b) (6), "Bond, Slade (OLA)" (b) (6), "Ulin, Sophie (PAO)" (b) (6)
Subject: Tweet Scan - Inherent Contempt
Date: Thu, 08 Aug 2024 16:39:43 -0400
Importance: Normal

Hi all,

Sophie has kindly been monitoring Luna's twitter accounts for inherent contempt mentions. She pulled the below bullets as the most relevant:

- Focused on campaign, has beefed up tweets on Walz and Harris
- Endorsed Vern Buchanan because he supported "holding the AG accountable."
- Lots of information on the Hurricane and resources
- Door knocking, talking to constituents, campaigning with Vance.
- Not this week, but she has previously pushed the narrative that VP is covering up POTUS decline.

The only AG/inherent contempt mention she has seen is the tweet endorsing Buchanan for his support in holding the AG accountable.

Thank you!

From: "Klapper, Matthew B. (OAG)" (b) (6)
To: "Miller, Marshall (ODAG)" <(b) (6)
Subject: Fwd: Letter for Mr. Weinsheimer
Date: Mon, 12 Feb 2024 18:35:46 -0500
Importance: Normal
Attachments: 2024.02.12.Letter_to_DOJ-Weinsheimer.pdf

Sent from my iPhone

Begin forwarded message:

From: "Weinsheimer, Bradley (ODAG)" <(b) (6)
Date: February 12, 2024 at 6:18:39 PM EST
To: "Evers, Austin (ODAG)" (b) (6), "Klapper, Matthew B. (OAG)" (b) (6)
Cc: "Benson, Adrienne (ODAG)" (b) (6)
Subject: FW: Letter for Mr. Weinsheimer

This basically repeats the same arguments, citing public comments of former officials as well. I don't think there is (b) (5) I stand by my prior assessment.

Thanks, Brad.

From: (b) (6) EOP/WHO (b) (6)
Sent: Monday, February 12, 2024 5:54 PM
To: Weinsheimer, Bradley (ODAG) (b) (6)
Subject: [EXTERNAL] Letter for Mr. Weinsheimer

Hello,

On behalf of Dick Sauber and Bob Bauer, please see the attached letter.

Thank you,
Cameron

(b) (6)
Senior Legal Assistant | White House Counsel's Office
(b) (6)
(c) (b) (6)

THE WHITE HOUSE
WASHINGTON

February 12, 2024

Mr. Bradley Weinsheimer
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Mr. Weinsheimer:

We write regarding your response to our February 7 letter addressed to the Attorney General. We fundamentally disagree with your assessment that the comments contained in Special Counsel Hur's report were consistent with Department policy and practice. They surely were not.

Your letter seeks to distinguish Special Counsel Hur's prejudicial and extraneous comments about President Biden from then-FBI Director James Comey's public criticism of then-Secretary Hillary Clinton. These formalistic distinctions are a plainly inaccurate statement of Department policy and the Department's Office of the Inspector General (OIG)'s application of such policy in the Comey matter.

First, you claim that references to former Director Comey are "inapt" because, in that matter, "Former Director Comey was not a Special Counsel, prosecutor, or Department official charged or approved to announce a declination decision." This distinction ignores our serious concerns and is squarely rebutted by the Inspector General's own words in its review of former Director Comey's public comments, that "neither the FBI *nor Department prosecutors* are permitted to insinuate or allege that an individual who has not been charged with a crime is nevertheless guilty of some wrongdoing."[1] Justifying Special Counsel Hur's conduct by telling us that he held a different position than former Director Comey not only flies in the face of the Department's own principles, it reflects a disturbing lack of concern about the harm that the policy seeks to avoid. An uncharged person, in this case the President of the United States, cares not about the particular title or role of the Department official who publicly excoriates him with critical comments about uncharged conduct. The unfairness is equally profound. Moreover, it was widely understood that former Director Comey was fulfilling a prosecutorial function at the time: he was making a recommendation to Attorney General Lynch about whether charges

[1] Office of the Inspector General, U.S. Dep't of Just., A REVIEW OF THE VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 247 (2018) (emphasis added).

should be brought, and the Attorney General publicly stated that she would rely on that recommendation in making a decision on prosecution or declination.[2]

Second, your letter proceeds to state that former Director Comey's criticism of Secretary Clinton's uncharged conduct as "extremely careless" was "not a comment offered in explanation of the evidence and its application to the law." Of course it was. Former Director Comey's comments were not somehow disconnected from his judgment on liability in that case—they were part of his broader explanation of why, "[a]lthough there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case."[3]

Former Director Comey told the Justice Department's OIG that he believed his public explanation was necessary "because 'unusual transparency…was necessary for an unprecedented situation,' and that such transparency 'was the best chance we had of having the American people have confidence that the justice system works[.]'"[4] Former Director Comey made it clear that he thought a full and transparent explanation of the *reasons for his recommendation* would serve this interest in "confidence that the justice system works."[5] His derogatory comment was precisely, "a comment offered in explanation of the evidence and its application to law," contrary to your assertion that it was not. His entire point was that he believed that the conduct was "extremely careless" but did not cross the line into chargeable conduct.

Nevertheless, OIG rightly rejected former Director Comey's rationale for these critical comments on uncharged conduct: "We recognize that this investigation was subject to scrutiny not typical of the average criminal case, *but that does not provide a basis for violating well-established Department norms and, essentially, 'trashing' the subject of an investigation with uncharged misconduct*. . . ."[6] OIG likewise rejected the argument that "informing the American people about the facts of the investigation" "provided legitimate reasons to depart from normal and appropriate Department practice."[7]

So too here. Legal experts, including a former Attorney General as well as a number of other well-respected former prosecutors and Department officials, have recognized that Special Counsel Hur's report violated Department tradition and policy. For example:

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[2] *See*, *e.g.*, Michael D. Shear, *Attorney General Accepts Recommendation Not to Charge Hillary Clinton*, N.Y. TIMES (July 6, 2016) ("Ms. Lynch had promised to accept the F.B.I. recommendations after creating a political furor by meeting on her airplane last week for 30 minutes with former President Bill Clinton.").

[3] Press Release, Federal Bureau of Investigation, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016).

[4] Office of the Inspector General, *supra* note 1, at iv (ellipsis and alteration in original).

[5] *Id.*

[6] *Id.* at 247 (emphasis added).

[7] *Id.* at 247-48; *see also*, *e.g.*, *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981) ("[N]o legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights.").

- Former Attorney General Eric Holder: "Special Counsel Hur report on Biden classified documents issues contains way too many gratuitous remarks and is flatly inconsistent with long standing DOJ traditions."[8]

- Former Deputy Attorney General Jamie Gorelick: "The language that Hur used, I thought, was remarkable and unfortunate."[9] "I think he could have listed his reasons for not recommending a charge or not charging without that kind of gratuitous slam."[10]

- Former US Attorney for the Southern District of New York Preet Bharara: "What I don't think is correct, and I think the vast majority of legal experts agree with me on this, is the gratuitous, superfluous statements about his memory, not as it relates to the particular case or the facts relating to the handling of the classified documents, but as it relates to other things, including memory about the particular date and precise date of his son's death. That had no place in this document. It makes no sense for that to be in this document."[11]

And how could they think otherwise? With respect to his comments on the President's memory, Special Counsel Hur included *nine* separate references, including ones that characterize the quality of the President's memory in sweeping, quasi-medical terms. How could nine separate references to this topic be consistent with Department practice, let alone fundamental fairness, particularly as experts have noted that Special Counsel Hur lacked the expertise to make such assertions?[12] This is the very definition of a derogatory comment that violates DOJ policy: unsupported personal opinion criticism on uncharged conduct that is outside the Special Counsel's expertise and remit.

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[8] Kierra Frazier, *Obama AG Eric Holder Blasts Special Counsel's Report*, POLITICO (Feb. 9, 2024).

[9] Betsy Woodruff Swan et al., *'Confidential' in Name Only: Merrick Garland's Delicate Decision to Release the Hur Report*, POLITICO (Feb. 9, 2024).

[10] *Id.*

[11] *Preet Bharara: Details in Hur Report About Biden's Memory 'Gratuitous, Superfluous'*, ABC NEWS (Feb. 11, 2024) (timestamp 3:29), https://abcnews.go.com/ThisWeek/video/preet-bharara-details-hur-report-bidens-memory-gratuitous-107139415; *see also*, *e.g.*, Josh Meyer, *Did Special Counsel Cross the Line in Bashing Biden's Memory? Even Some Republicans Think So*, USA TODAY (Feb. 10, 2024) (quoting one former Department prosecutor calling the description of the President's memory "outrageous" and saying, "I'm no fan of President Biden, but he's not charged with a crime and now he's out there having to defend himself. And how can he defend himself when there's no jury or judge to decide whether those allegations are true?").

[12] *See* Gina Kolata, *Memory Loss Requires Careful Diagnosis, Scientists Say*, N.Y. TIMES (Feb. 9, 2024) ("But while the report disparaged Mr. Biden's mental health, medical experts on Friday noted that its judgments were not based on science and that its methods bore no resemblance to those that doctors use to assess possible cognitive impairment.").

Protecting the subjects of Special Counsel investigations from being smeared with criticisms of uncharged conduct is embedded in the applicable Special Counsel regulations both by requiring Special Counsels to abide by Department practice[13] and providing only for a confidential and summary final report to the Attorney General. The Department's regulations provide that the Special Counsel "shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions."[14] The Department further explained that the Special Counsel's report "will be handled as a confidential document, as are internal documents relating to any federal criminal investigation."[15] Of course, as your letter notes, Attorney General Garland has been clear that he planned to publish Special Counsel Hur's report. This point makes Special Counsel Hur's inclusion of extraneous and prejudicial commentary only more problematic. Rather than the "limited" and "summary" report the Department's regulations contemplated,[16] Special Counsel Hur took nearly 400 pages to explain that no charges were warranted. Throughout these pages, the Special Counsel returned to pejorative characterizations of President Biden again and again, tacking them on even as he explained that he could not prove his case for other reasons. [17]

The choice to include these repeated unnecessary, inflammatory, and prejudicial statements—and it was undoubtedly a choice—is inconsistent with a good-faith attempt to comply with the Special Counsel regulations or to live up to the Department's tradition of refraining from criticism of uncharged conduct.

Finally, your letter also defends Special Counsel Hur's comments by describing Department policy that, in your words, "provides that when considering a statement about uncharged individuals, deciding officials should consider whether public disclosure may advance a significant law enforcement interest, including upholding the integrity of the investigation, and whether the public has a significant need to know the information." You did not provide a citation for this reference, and we were puzzled at its use as a defense of Special Counsel Hur's conduct since we were unfamiliar with this language. Our uncertainty about the provenance of this reference and its applicability in this case was justified when we discovered that it appears to stem from a recent addition to the Justice Manual that has nothing to do with prosecutorial comments about uncharged conduct. That provision, Justice Manual 9-27.760, addresses

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[13] 28 C.F.R. § 600.7(a).

[14] 28 C.F.R. § 600.8(c). We note that the word "confidential" was missing in your letter's recitation of the relevant provision. *See* Letter from Associate Deputy General Bradley Weinsheimer, Dep't of Just., to Edward N. Siskel, Asst. to the President and White House Counsel, and Bob Bauer, Personal Counsel to Joseph R. Biden, Jr., 2 (Feb. 8, 2024) ("The Special Counsel regulations specifically require the Special Counsel to prepare a report for the Attorney General that explains the Special Counsel's prosecution and declination decisions. *See* 28 C.F.R. § 600.8(c).").

[15] Office of Special Counsel, 64 Fed. Reg. 37038, 37041 (July 9, 1999).

[16] *Id.*

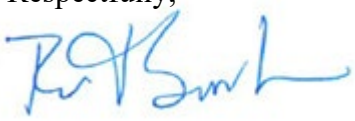
[17] *See, e.g.*, Special Counsel Robert K. Hur, U.S. Dep't of Just., Report on the Investigation into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr. 5-6, 207-08, 211-12, 219-20, 247-48 (Feb. 2024).

whether it is appropriate to *identify* "by name or unnecessarily specific description" an uncharged party. It does not speak to appropriate "statements about uncharged individuals," as you state.

We reiterate our objections to Special Counsel Hur's inclusion of these unnecessary and unwarranted comments in the strongest possible terms.

Please keep this letter in any files in which your February 8, 2024 letter is maintained.

Respectfully,



Richard Sauber
Special Counsel to the President



Bob Bauer
Personal Counsel to Joseph R. Biden, Jr.

From: "Klapper, Matthew B. (OAG)" (b) (6)
To: "Walker, Rhea (JMD)" (b) (6)
Subject: FW: PI motion filed
Date: Fri, 12 Jul 2024 16:55:40 -0400
Importance: Normal
Attachments: 11.pdf

For my binder.

From: Evers, Austin (ODAG) (b) (6)
Sent: Friday, July 12, 2024 1:55 PM
To: Klapper, Matthew B. (OAG) (b) (6) ; Berger, Christine (OAG) (b) (6) ; Benson, Adrienne (ODAG) (b) (6)
Subject: PI motion filed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States,

Defendant.

Case No. 1:24-cv-1911-ABJ

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, FOR E PEDITED SUMMARY JUDGMENT

Plaintiff moves for a preliminary injunction, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56(a), on the preliminary injunction schedule, *see* LCvR 65.1(c), (d), or on an otherwise expedited schedule ordered by the Court, to require Defendant Merrick Garland to produce to the Committee on the Judiciary of the United States House of Representatives the audio recordings of Special Counsel Robert Hur's interviews with President Joseph Biden and Mr. Mark Zwonitzer. Plaintiff's motion is based on the attached memorandum of law, the Declaration of Stephen Castor, the Declaration of Todd B. Tatelman, the statement of material facts as to which Plaintiff contends there is no genuine issue, *see* LCvR 7(h)(1), and any oral argument presented at the hearing on Plaintiff's motion.

Respectfully submitted,

/s/ Matthew B. Berry
Matthew B. Berry (D.C. Bar No. 1002470)
General Counsel
Todd B. Tatelman (VA Bar No. 66008)
Deputy General Counsel
Brooks M. Hanner (D.C. Bar No. 1005346)
Associate General Counsel
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July 12, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States,

Defendant.

Case No. 1:24-cv-1911

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, FOR E PEDITED SUMMARY JUDGMENT

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INTRODUCTION

The Executive Branch is refusing to comply with a lawful Congressional subpoena because it claims that the President's voice—but not the substance of what he said, which is publicly available—is privileged. In response to a subpoena issued by the Committee on the Judiciary of the U.S. House of Representatives (Committee or Judiciary Committee), Attorney General Merrick Garland produced the written transcript of Special Counsel Robert Hur's interview with President Joseph Biden. And the Executive Branch released it to the press. But the President now, at Garland's request, asserts a common-law privilege (that he calls executive privilege) over the audio of this interview. This claim falls flat. The Executive Branch waived any privilege by releasing the interview transcript. Indeed, the Department of Justice (DOJ) has not pointed to a single example where it claimed privilege only over nuances in an audio recording, like voice inflection, tone, emphasis, and hesitation, that are not captured by a written transcript. And the Executive Branch's claim that producing the audio recording to Congress would have a chilling effect on future investigations—even after the written transcript of the same interview has already been produced—defies common sense.

The Committee is conducting oversight of DOJ's commitment to impartial justice—including the Special Counsel's conclusions. The Special Counsel recommended that President Biden not be charged with unlawfully retaining and disclosing classified information, in part, because of how he believed a jury would view the President's mental state and memory. That belief, in turn, was informed by the entire manner in which the President presented himself when he was interviewed by the Special Counsel. The Committee thus requires the best evidence of how the President presented himself during that interview, which is the audio recording.

The Court should reject the Executive Branch's novel privilege claim and order Garland to produce this audio recording along with the audio recording of the Special Counsel's

interview with Mark Zwonitzer, the ghostwriter of the President's memoir. With the clock on the 118th Congress ticking, the Committee urges the Court to quickly grant its motion.

BAC GROUND

I. The Committee's investigation into DOJ's commitment to impartial justice and oversight of the Special Counsel's investigation into President Biden

A. In late 2022 and early 2023, President Biden's personal counsel discovered classified documents from his time as Vice President in his former office at the Penn Biden Center for Diplomacy and Global Engagement and in the garage and basement den of the President's Delaware home.[1] On January 12, 2023, Garland appointed Hur as Special Counsel to investigate President Biden's possible unauthorized removal, retention, and disclosure of classified material. *See generally* Decl. of Todd B. Tatelman (Tatelman Decl.), Ex. C. During the Special Counsel's investigation, the FBI located additional classified documents in the President's home and in his Senate papers at the University of Delaware. Report at 26-28.

Throughout the course of its investigation, the Special Counsel's team interviewed 147 witnesses, including President Biden and Mark Zwonitzer, the ghostwriter of his 2017 memoir. *Id.* at 29, 98, 336. The team also listened to the audio recordings of Zwonitzer's 2017 interviews with the President—recordings that had been deleted following the Special Counsel's appointment but were recovered by investigators because they "had significant evidentiary value." *Id.* at 103, 334. During these interviews with Zwonitzer, the President openly disclosed classified information by reading aloud classified passages from his notebook nearly verbatim multiple times. *Id.* at 9, 103. And in a February 2017 interview with Zwonitzer, President

[1] Robert K. Hur, *Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.* 19-26 (Feb. 2024) (Report), https://perma.cc/X5MV-RU8J.

Biden, when living at a rented home in Virginia, said he had "just found all the classified stuff downstairs." *Id.* at 3-4, 110-15. The Special Counsel concluded this likely referred to the classified documents the FBI later found in his garage in 2022. *Id.* at 4, 114-15, 201-03.

Special Counsel Hur publicly released his Report about his investigation on February 8, 2024. The Report concluded that while the "investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen," "no criminal charges [were] warranted." *Id.* at 1. Hur's explanation for declining to recommend criminal charges was based, in part, on his belief that "jurors would likely find reasonable doubt" that the President willfully retained and disclosed classified information because some jurors would likely believe the President "made an innocent mistake, rather than acting willfully." *Id.* at 4-5. The Report explained that President Biden "would likely present himself to a jury, as he did during [Hur's] interview of him, as a sympathetic, well-meaning, elderly man with a poor memory." *Id.* at 6. In coming to his conclusion, Hur considered "not just the words from the cold record of the transcript, but the entire manner in living color in real time of how the President presented himself" and the President's overall demeanor. Decl. of Stephen Castor (Castor Decl.), Ex. D at 50. Thus, the Special Counsel's conclusion that the President lacked the requisite mens rea rested on his analysis of how the President appeared and presented.

But not everyone agreed with the Special Counsel's conclusions. Leading up to the Report's release, the White House Counsel wrote to Garland, arguing that Hur made a "global and pejorative judgment on the President's powers of recollection" and pointing to a portion of the Report that he believed undermined Hur's conclusions about President Biden's memory. Castor Decl., Ex. G at 2-3. Four days after the Report's release, the President's attorneys sent

another letter to DOJ criticizing the Report for its "repeated unnecessary, inflammatory, and prejudicial statements" about "the quality of the President's memory in sweeping, quasi-medical terms" and "unsupported personal opinion." Castor Decl., Ex. H at 3-4.

B. Early in 2023, the Committee began conducting oversight of DOJ to ensure it was acting consistently with its commitment to impartial justice. Castor Decl. ¶ 5. The Committee had become increasingly concerned that DOJ's investigation into President Biden's alleged mishandling and disclosure of classified materials was not being treated the same way as DOJ's investigation into President Donald Trump's alleged mishandling of classified materials. *Id.* The Committee thus began its own oversight of the Special Counsel's investigation. *Id.* After the release of the Report declining to recommend charges against the President, the Committee ramped up its investigation to focus on assessing whether Hur's recommendations were consistent with a commitment to impartial justice on the part of DOJ. *Id.* ¶ 6.

Most notably, on February 12, 2024, the Committee, along with the House Committees on Oversight and Accountability and Ways and Means (respectively, Oversight Committee and Ways and Means Committee), asked DOJ to voluntarily produce the following materials: all documents and communications, "including audio and video recordings," related to the Special Counsel's interviews of President Biden and Zwonitzer; two Ukraine-related classified documents identified in the appendix to the Special Counsel's Report; and all communications between or among DOJ, the White House, and the President's personal counsel regarding the Special Counsel's Report. Castor Decl., Ex. K at 3. While DOJ responded to inform the Committee that several of these records required review to assess "classification," "national defense information," and "confidentiality interests," it neither offered a timeframe by which it

expected to produce responsive records nor committed to producing all the material requested. Castor Decl., Ex. L at 2.

Accordingly, on February 27, the Committee subpoenaed Garland to produce those same records. Castor Decl., Ex. A at Schedule A. The Committee explained that the subpoenaed materials would further its "ongoing oversight of [DOJ's] commitment to impartial justice" and inform consideration of "potential legislative reforms to [DOJ] and its use of a special counsel to conduct investigations of current and former Presidents of the United States." Castor Decl., Ex. M at 2. The materials, the Committee noted, were also directly relevant to the ongoing impeachment inquiry into the President. *Id.* To that end, the Committee is investigating whether President Biden may have committed an impeachable offense by, among other things, abusing his position of public trust to enrich himself or his family. *See* Castor Decl. ¶¶ 11-12 & Ex. B.

DOJ did not produce the audio recordings or any other records related to the Special Counsel's interviews with President Biden and Zwonitzer by the return date; nor did it provide a privilege log, despite the Subpoena's requirement to provide one for any information withheld based on privilege. *See* Castor Decl., Ex. A at Instructions (page 4, number 17). Instead, DOJ agreed to allow the Committee to review the subpoenaed classified documents *in camera* and produced six communications responsive to the demand for communications involving DOJ and the White House. *See* Castor Decl. ¶ 13 & Ex. N at 1. DOJ claimed that the remaining responsive materials, including the transcripts and audio recordings, may be subject to other privileges and noted that it needed more time to review those materials. Castor Decl., Ex. N at 2-3. To accommodate DOJ, the Committee extended the production deadline to March 11, the day before its scheduled public hearing with Special Counsel Hur. Castor Decl., Ex. P at 1.

Barely two hours before the Committee's March 12 hearing with Special Counsel Hur began, DOJ finally provided the Committee transcripts of the Special Counsel's interviews with President Biden—after they had already been given to reporters—but it continued to withhold the audio recordings. *See* Castor Decl., Ex. Q at 2.[2] Next, on March 25, after approximately two more weeks during which DOJ continued to withhold records, the Committee again extended the deadline for a complete production of subpoenaed materials to April 8. *Id*.

DOJ subsequently produced only the transcript of the Special Counsel's interview with Zwonitzer. Castor Decl. ¶ 18 & Ex. S at 1. While DOJ acknowledged that President Biden had not asserted privilege over the Report or transcript of his interview, it made clear it would not produce the audio recording of either interview. Castor Decl., Ex. S at 4, 5. DOJ claimed the Subpoena sought "cumulative" information and argued that withholding the audio recordings was necessary to promote voluntary witness cooperation with future special counsel investigations. *Id.* at 3-4, 5.

II. The critical importance of the audio recordings to the Committee's investigation

Although the Committee has received the cold transcripts of the Special Counsel's interviews with President Biden and Zwonitzer, it needs, for investigatory purposes, the best available evidence of those interviews: the audio recordings. The transcripts of these interviews are not carbon copies of the audio recordings; they do not reflect nuances like tone and hesitation. Nor does President Biden's interview transcript show every word he spoke.

[2] It has been reported that DOJ later released a redacted transcript of Special Counsel Hur's interview with Zwonitzer to a reporter, pursuant to a Freedom of Information Act (FOIA) request. Castor Decl. ¶ 15 & Ex. R at 2. (For exhibits (like this one) that do not include internal pagination, the numbers in our pincites still reflect the internal pages of the exhibit.)

A. The cold transcripts are incomplete accounts of the Special Counsel's interviews and fall short of the audio recordings in two ways. *First*, the transcripts do not capture either verbal context (tone, emphasis, inflection, volume, and pace) or nonverbal context (hesitating and pausing). This matters because speakers convey unique information with these verbal and nonverbal nuances. *See, e.g.*, Rebecca White Berch, *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 Fordham L. Rev. 347, 347 (1990) ("Whenever spoken words are transcribed, some part of the communication is lost, because speakers use more than words to communicate …."). Listeners then rely on these nuances to judge a speaker's credibility, and they "can be even better predictors of deception than … visual cues." *See id.* at 365. The Committee does not have access to these nuances, and, as we explain below, it cannot fully evaluate the Special Counsel's recommendations without them.

Second, DOJ has admitted that these transcripts do not reflect every word that was spoken: President Biden's interview transcript does not always include "filler words (such as 'um' or 'uh')" or repeated words. *See* Castor Decl., Ex. Z at 5, ¶ 14. But these words are important because they can bear on a witness's credibility. *See* Berch, *supra*, at 365 ("Hesitation cues such as 'um,' 'ah' or 'uh' are particularly indicative of deception."). They can also shed light on a witness's state of mind and memory. *See* Tatelman Decl., Ex. FF at 38 ("Verbal disfluency comprises several major subcategories: *false starts*, *repetitions*, *filled pauses* (e.g., 'uh,' 'um,' etc.), and *sentence corrections* …. Studies have found that verbal fluency is an effective indicator of cognitive decline …."). Separately, the transcript of President Biden's interview with the Special Counsel notes that some words are "indiscernible." *See* Transcript of Special Counsel Interview with President Biden at 42, 43, 46, 47, 57, 58, 72, 73, 79, 84, 85, 104,

119, 130, 132, 143, 145, 147, 149 (Oct. 8, 2023), https://perma.cc/FN87-B2XK. Although a DOJ official has attested that those words are, in fact, indiscernible, *see* Castor Decl., Ex. Z at 5, ¶ 13, public reporting has revealed that transcripts of other remarks made by President Biden sometimes indicate that words were indiscernible when they were not, *see* ECF No. 1, ¶ 65 & nn. 132-34. The Committee thus needs the unedited audio recordings.

B. The Special Counsel relied on the way that President Biden presented himself during their interview—not simply the words he spoke—in reaching his conclusion that President Biden should not be charged for unlawfully retaining or disclosing classified material. Castor Decl. ¶ 16 & Ex. D at 50. The Special Counsel's subjective view of the President's state of mind, including his memory, affected his recommendation in at least four ways.

First, the Special Counsel concluded that President Biden may have forgotten about the classified materials in his Virginia home, rather than willfully retained them, after telling Zwonitzer that he had just found classified materials downstairs. Report at 204-05. The Special Counsel conceded that "such a swift and permanent bout of forgetfulness may seem implausible." *Id.* at 205. Yet he found that President Biden's memory, which "appeared to have significant limitations," supported this possibility. *See id.* at 205, 207. For example, according to the Special Counsel, President Biden "did not remember when he was vice president, forgetting on the first day of the interview when his term ended ('if it was 2013 — when did I stop being Vice President?'), and forgetting on the second day of the interview when his term began ('in 2009, am I still Vice President?')." *Id.* at 208. And in the Special Counsel's view, the President's "memory appeared hazy when describing" the policy debate to which the classified materials about Afghanistan related. *Id.*

Second, the Special Counsel relied on President Biden's inability to recognize documents found at the Penn Biden Center to support his conclusion that it is possible the President mistakenly, not willfully, retained those materials. *See id.* at 304, 306-07.

Third, the Special Counsel believed that President Biden's "diminished faculties in advancing age[] and his sympathetic demeanor" would make it difficult for jurors to conclude that he willfully retained his notebooks that included classified material. *See id.* at 242. The Special Counsel also relied on President Biden's "emphatic" tone—which is not captured by the transcript—to support his view that President Biden may not have intended to break the law by retaining the notebooks because he thought they were his personal property. *Id.* at 232.

Fourth, the Special Counsel noted that President Biden should have realized that he was likely disclosing classified information when he read his classified notes "nearly verbatim to Zwonitzer" but concluded that this failure "will likely appear consistent with the diminished faculties and faulty memory he showed in … our interview of him." *Id.* at 247-48. He thus found that jurors would likely have reasonable doubts about whether the President willfully disclosed that material. *Id.* at 247.

These examples confirm that the Special Counsel relied on the way that President Biden presented, not simply the words he spoke. Castor Decl., Ex. D at 50. Therefore, to fully assess the Special Counsel's conclusion, the Committee needs the audio recording, which provides a more complete picture of how the President presented himself during the interview.

The same goes for the audio recording of the Special Counsel's interview with Zwonitzer. The audio will allow the Committee to better assess the Special Counsel's view of Zwonitzer's credibility, *see* Report at 336 (calling Zwonitzer "forthright"); *id.* at 341 (calling his explanation "plausible[and] innocent"), which may shed light on President Biden's credibility. Zwonitzer's

credibility also factored into the Special Counsel's conclusion that charges should not be brought against Zwonitzer for destroying evidence. *See id.* at 343-44. The Committee thus needs the audio of that interview—which captures nuances that the transcript does not and every spoken word—to fully assess his conclusions.

C. The audio recordings are critically important to the Committee's oversight of DOJ and the Special Counsel. It must have access to the best available evidence of the Special Counsel's interviews with President Biden and Zwonitzer to fully assess whether the outcome here is consistent with impartial justice. After all, the Special Counsel's conclusions are open to interpretation: a White House lawyer called the Special Counsel's statements about the President's memory "unsupported personal opinion," Castor Decl., Ex. H at 3, and the President himself disputed the Special Counsel's view when he said at a press conference that his "memory is fine." *Remarks in the Diplomatic Reception Room*, White House (Feb. 8, 2024), https://perma.cc/X6KC-Z4WL.

The Committee's need is heightened because a different special counsel is currently prosecuting President Trump for allegedly mishandling classified information. *Special Counsel Jack Smith Delivers Statement*, DOJ (June 9, 2023), https://perma.cc/74NK-LQ6U. The Committee therefore must assess whether Special Counsel Hur's divergent conclusion is consistent with DOJ's commitment to following the facts and the law wherever they lead.

The Committee's oversight will help it determine whether legislative reforms of DOJ and its use of special counsels are necessary. If the Committee concludes that the Special Counsel's investigation did not deliver impartial justice, it may decide that reforms are necessary to promote actual justice and the appearance of justice. To that end, the Committee could consider proposals such as readopting (in full or in part) the Ethics in Government Act. The Act, among

other things, created a mechanism for a three-judge panel to appoint an independent counsel when the Attorney General received specific information that certain persons, including the President, had committed a federal crime. *See* 28 U.S.C. §§ 591-98 (sunset 1999); *see also* ECF No. 1, ¶ 94 (explaining other proposals). The Committee instead may decide that legislative reforms are unnecessary, but it cannot make that decision until after it fully assesses the Special Counsel's recommendations. And it needs the audio recordings to do that.

D. The audio recordings will also advance the Committee's impeachment inquiry. *First*, they will shed light on whether President Biden willfully retained classified information to assist his family's business dealings. The Special Counsel found that he retained two documents related to a December 2015 call he had with the Ukrainian Prime Minister (one with talking points for a call and the other with a transcript of the call). *See* Report at 281, 310, A-2. That call came shortly after the President's son—who sat on the board of a Ukrainian company whose owner was being investigated by Ukrainian prosecutors, *see* Castor Decl., Exs. GG & HH—"called his dad" after the company's owner asked him to get help from "D.C." Castor Decl. ¶ 11 & Ex. DD at 34-37. Days after his son called (but before his call with the Ukrainian Prime Minister), Vice President Biden, according to one source, made a unilateral decision to condition a loan from the United States on the firing of the Ukrainian Prosecutor General. *See* Castor Decl. ¶ 11 & Ex. GG. Given his son's connection to the Ukrainian company, the Committee needs to know if President Biden willfully took the classified information to benefit his family's business dealings in Ukraine, which remained active at the time he left the vice presidency.

Second, the Committee is investigating whether President Biden retained and disclosed sensitive information to enrich himself through a book deal. *See* Report at 231-32 (observing the President had "strong motivations" to flout the rules for properly handling classified materials in

light of the book deal); *id.* at 141 (noting the book deal netted the President "an advance of $8 million"). The classified materials were an "invaluable resource that [President Biden] consulted liberally" while writing his book. *See id.* at 231. If President Biden willfully retained classified information to carry out a multimillion-dollar book deal, that may also be an abuse of his office of public trust meriting impeachment.

Listening to the audio recordings—which capture tone, pace, hesitation, reluctance, and every spoken word—will help the Committee determine whether President Biden retained classified material to benefit his family's business dealings or to enrich himself.

III. The Committee's efforts to obtain the audio recordings reach an impasse given the privilege assertion

The Committee made one last-ditch attempt to obtain the subpoenaed records without resorting to a lawsuit or contempt proceedings on April 15, when it wrote to DOJ to explain its need for the materials and to address DOJ's waiver of any privilege over the audio recordings of the interviews. Castor Decl., Ex. T. In a final accommodation, the Committee extended the deadline for a complete production—for a third time—to April 25. *Id.* at 4.

DOJ responded on April 25 with a letter explaining why it would not produce any additional records to the Committee. Castor Decl., Ex. U. In short, DOJ quibbled with the Committee's reasons for seeking the materials and theorized that producing the audio recordings could pose a generalized risk of harm to prosecutorial decision-making and the privacy interests of witnesses and uncharged parties. *Id.* at 4-5. DOJ expressed concern that producing the audio recordings could "undermin[e] confidence in [DOJ's] ability to protect sensitive law enforcement information." *Id.* at 6. Specifically, DOJ relied on the vocal tone, inflections, and other idiosyncrasies in the audio recordings as a basis to withhold them from the Committee, arguing

that "the privacy interest in one's voice—including tone, pauses[,] emotional reactions, and cues—is distinct from the privacy interest in a written transcript of one's conversation." *Id.* at 7.

After the Committee's repeated efforts to give Garland more time to complete his production of the subpoenaed materials had failed, the Committee scheduled a public business meeting for May 16 to consider recommending that Garland be held in contempt of Congress. Less than two hours before the meeting was scheduled to begin, the Committee received a letter from DOJ conveying the President's assertion of executive privilege over the subpoenaed audio recordings, at Garland's request. Castor Decl., Ex. W at 1.[3] Garland argued that disclosing the audio "would have a chilling effect on future cooperation in similar investigations." *Id.* (attached letter at 7). He also claimed that the prior disclosure of the interview transcripts did not waive the privilege because "audio recordings have distinct features and law enforcement uses, which implicate privacy interests and risks of misuse to a greater degree than transcripts." *Id.*

On June 12, consistent with the Committee's recommendation, the House found Garland in contempt of Congress.[4] The House considered the Committee's Report, which rejected the executive privilege claim as untimely and having been waived when the President released the transcripts to the public and media. *See generally* Castor Decl., Ex. X at 14. And while DOJ could have taken steps to attempt to protect the confidentiality of the transcripts when it

[3] At Garland's behest, President Biden also asserted a protective claim of executive privilege over any other materials responsive to the Subpoena that had not been produced. Castor Decl., Ex. W at 1.

[4] 170 Cong. Rec. H3970-71 (daily ed. June 12, 2024) (adopting House Resolution 1292, which found Garland in contempt of Congress in violation of 2 U.S.C. § 192), https://perma.cc/ZM69-EA7D. The same day, the House adopted House Resolution 1293, which found Garland in contempt for failing to comply with an identical subpoena from the Oversight Committee. H. Res. 1293, 118th Cong. (2024), https://perma.cc/P6WT-U866; H. Res. 1287 § 6, 118th Cong. (2024) (adopting House Resolution 1293 upon adoption of House Resolution 1292), https://perma.cc/J2X7-UDVM.

produced them to Congress, the Committee noted that DOJ chose not to do so. *Id.* Finally, even if the privilege claim had been timely and valid, the Committee determined that it had been overcome because the audio recordings are necessary to evaluate potential reforms to DOJ. *Id.* at 14-15. On June 14, DOJ informed Speaker of the House Mike Johnson that it would not bring the Congressional contempt citation before a grand jury or take any other action to prosecute Garland. Castor Decl., Ex. Y.

On June 26, the Speaker called Garland to see if they could resolve this dispute. But Garland explained that the matter was out of his hands because he had received a direct order from the President. When the Speaker's Office then reached out to the White House, its effort to find a solution was rebuffed. Having reached an impasse, the Committee is left with no other option but to seek judicial enforcement of its Subpoena.

IV. The Committee's constitutional authority to conduct investigations, as part of and including an impeachment inquiry, and to issue subpoenas to advance its investigations

The Committee's authority to conduct this investigation—and to issue subpoenas to execute it—comes from Article I of the Constitution. The Committee's ability to investigate the Special Counsel's recommendations rests on two independent constitutional bases.

Article I of the Constitution vests Congress with "[a]ll legislative Powers." U.S. Const. art. I, § 1, cl. 1. Those powers include the authority to investigate matters relating to subjects within its broad legislative purview; conduct oversight of Executive Branch agencies; examine whether agencies are faithfully, effectively, and efficiently executing the laws; and determine whether changes to federal law are necessary and proper. DOJ is one of the agencies over which the Committee has oversight authority. Castor Decl. ¶ 4; *see also* Rule X.1(*l*)(1), (7), Rules of the House of Representatives, 118th Cong. (2023) (House Rules), https://perma.cc/3UX4-

2YG5.[5] For nearly a century, the Supreme Court has recognized that the Constitution vests the House with the "power of inquiry—with process to enforce it"—commensurate with the House's Article I legislative authority to investigate any subject on which "legislation could be had." *McGrain v. Daugherty*, 273 U.S. 135, 174, 177 (1927). This power has been delegated to the Committee. *See, e.g.*, House Rule XI.2(m) (delegating subpoena power).

Separate from the Committee's legislative oversight authority, the impeachment power is textually committed by the Constitution to the House and the House alone. U.S. Const. art. I, § 2, cl. 5. This power is far-reaching. Even prior presidents have admitted that an impeachment inquiry "penetrate[s] into the most secret recesses of the Executive Department" and includes the authority to "command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge." 4 J. Richardson, *A Compilation of the Messages and Papers of the Presidents*, H. Misc. Doc. 53-210, at 434 (1897) (statement of President James K. Polk), https://perma.cc/82XR-DWJ2.

The Committee's jurisdiction includes impeachment. *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States*, H. Doc. 117-161, § 605, at 329 (2023), https://perma.cc/3HCB-WYMP. In September 2023, the Committee launched its impeachment inquiry along with the Oversight and Ways and Means Committees. *See* Castor Decl. ¶ 13. This inquiry seeks to assess whether President Biden has abused his office of public trust to enrich himself or his family, including in connection with his family's business dealings with foreign parties. Castor Decl. ¶ 10 & Ex. B at 27-28. The full House formalized that inquiry

[5] The House Rules establish various standing committees, including the Judiciary Committee, and delegate to each committee "jurisdiction and related functions." *See generally* House Rule X.1.

in December 2023, *see generally* H. Res. 918, 118th Cong. (2023), https://perma.cc/69QX-U332, and confirmed that the Committee has the authority to issue subpoenas as part of its investigation, *see id.* § 6 (adopting House Resolution 917); H. Res. 917, 118th Cong. § 2 (2023), https://perma.cc/57G5-C54Y.

In sum, the Judiciary Committee has plenary authority—under its constitutional authority to conduct legislative oversight and from its solemn power of impeachment—to investigate the Special Counsel's recommendations and to compel Garland to produce the audio recordings.

ARGUMENT

Garland has violated his legal duty to comply with the Committee's lawfully issued Subpoena, and his defiance is obstructing the Committee's investigation. President Biden's assertion of executive privilege over the audio recordings of the Special Counsel's interviews with him and Zwonitzer has no merit. Any privilege over those interviews has been waived. DOJ has released transcripts of both interviews to the public (and the Committee), and neither the President nor DOJ invoked executive privilege before the Subpoena's return date. Additionally, as three Judges of this Court have found, this is the type of case the Court has the power to resolve, and the Committee's requested relief—which will protect its legal right to the audio recordings—is within the Court's authority to grant.

Given the gravity of the Committee's duties and the irreparable harm it is suffering, a preliminary injunction ordering Garland to comply with its Subpoena is justified and appropriate. Alternatively, the Committee moves for summary judgment, and permanent relief, on the issue of whether the audio recordings are covered by executive privilege. That and any related questions (like waiver) are "strictly … legal issue[s]," *see Comm. on Judiciary v. Miers*, 558 F.

Supp. 2d 53, 97 (D.D.C. 2008) (*Miers I*), and are appropriately addressed on summary judgment, *see Swan v. Clinton*, 100 F.3d 973, 976 (D.C. Cir. 1996).

In either case, the Committee with this motion seeks an injunction, preliminary or permanent, ordering Garland to comply with the Committee's Subpoena, and a declaration that his failure to do so due to the President's claim of executive privilege is unlawful. The standards for preliminary and permanent injunctions are "essentially the same," *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (citation omitted), and either would provide the Committee with the same relief here. As to declaratory relief, *Miers I*, which involved another dispute where the Executive Branch refused to comply with a subpoena based on a claim of executive privilege, explains why this Court should exercise its discretion under the Declaratory Judgment Act in favor of review. *See* 558 F. Supp. 2d at 94-99. Perhaps most importantly, "entertaining this case will reinforce" the constitutional "separation of powers." *See id.* at 99.

As we explain below, this Court has jurisdiction (Part I), the Committee prevails on the merits (Part II), and it has satisfied the other requirements for injunctive relief (Part III).

I. This Court has authority to resolve this case

A. The Committee has standing under binding D.C. Circuit precedent

Binding D.C. Circuit precedent holds that the Committee has Article III standing to sue to enforce a subpoena for records, including audio recordings. *See Comm. on Judiciary v. McGahn*, 968 F.3d 755, 763 (D.C. Cir. 2020) (en banc) (*McGahn En Banc*) ("[W]e hold that the Committee has Article III standing to protect against the denial of that to which it alleges it is entitled, namely McGahn's testimony in response to its duly issued subpoena."). The failure of Garland to comply with his Subpoena has injured the Committee; that injury is directly traceable to him; and this Court can remedy it. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F.

Supp. 2d 1, 20 (D.D.C. 2013) ("[I]t [is] well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." (alterations in original) (citation omitted)).

B. The Court has subject matter jurisdiction under U.S.C.

The Committee brought this suit to enforce the Subpoena that it issued as part of its Article I authority. The case thus arises under the Constitution, and the Court has subject matter jurisdiction under § 1331. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution.").

Here, the Committee seeks to enforce a subpoena for audio recordings that are relevant to its ongoing legislative oversight investigation and impeachment inquiry. Because the Committee's "subpoena power derives implicitly from Article I of the Constitution, the case ar[ises] under the Constitution for purposes of section 1331." *Holder*, 979 F. Supp. 2d at 17; *accord Miers I*, 558 F. Supp. 2d at 64-65; *see also United States v. AT&T*, 551 F.2d 384, 388-89 (D.C. Cir. 1976) (*AT&T I*).

Congress did not impliedly withdraw federal courts' jurisdiction to hear House subpoena-enforcement cases under § 1331 when it enacted a statute that explicitly provides jurisdiction over Senate subpoena-enforcement cases without mentioning the House at all. *See generally* 28 U.S.C. § 1365. Two Judges of this Court have considered whether the Senate statute prevents courts from exercising jurisdiction over a House subpoena-enforcement case, and both concluded that it does not. *See Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148,

175-76 (D.D.C. 2019);[6] *Holder*, 979 F. Supp. 2d at 17-20.[7] Indeed, "jurisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent legislation.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (citation omitted); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643 (2002) ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." (citation omitted)).

C. The Committee may bring this action to enforce its Subpoena

The Committee has a constitutional right—under Article I—to the audio recordings. This Court may remedy the constitutional violation here by requiring Garland to produce them. The Court does not need statutory authorization to do so because we are dealing with a constitutional right, not a statutory one. And regardless, the Declaratory Judgment Act provides any necessary authorization.

. The Committee has an equitable cause of action

Just as Article I gives the Committee the power to investigate—and to compel testimony by subpoena as part of that investigative authority—it confers on the Committee the corollary power to sue to enforce a subpoena. *See Quinn v. United States*, 349 U.S. 155, 160-61 (1955) (noting that Congress has "the authority to compel testimony, either through its own processes or

[6] The *McGahn* decision was reversed on Article III standing grounds by a D.C. Circuit panel. *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020). The en banc Court reversed the panel, holding that the Committee did have standing, and remanded the case back to the panel, *McGahn En Banc*, 968 F.3d at 778, which then held that the Committee lacked a cause of action, *Comm. on Judiciary v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020) (*McGahn Vacated Panel*). The en banc Court again vacated the panel decision, but the parties settled, and the appeal was dismissed before the Court could rehear the case en banc.

[7] The defendants in *Miers I* conceded that the Court had jurisdiction under § 1331. *Miers I*, 558 F. Supp. 2d at 64.

through judicial trial" (footnote omitted)); *McGrain*, 273 U.S. at 174 ("We are of [the] opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."). Indeed, two Judges of this Court have expressly found that a House committee has a cause of action under the Constitution to enforce a subpoena.

a. The Committee filed this suit to vindicate a constitutional right, and courts regularly protect constitutional rights by preventing Executive Branch officials from violating them. This case is no different. The Committee has a legal right—one that flows directly from its Article I authority—to the audio recordings. *See, e.g.*, *Miers I*, 558 F. Supp. 2d at 91 ("[B]y utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a *legal right* to the responsive information that those subpoenas will yield."). By refusing to comply with the Subpoena, Garland is depriving the Committee of information to which it is entitled and thus is interfering with its Article I legislative oversight authority and impeachment power. *Cf. McGahn En Banc*, 968 F.3d at 765 ("The House … has a long-recognized right, based in the Constitution, to have McGahn appear to testify and produce documents. … By refusing to testify in response to the Committee's concededly valid subpoena, McGahn has denied the Committee something to which it alleges it is entitled by law.").

This Court has the equitable authority to prevent Garland from violating the Committee's constitutional rights by enjoining him to produce the audio recordings. *See, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("[I]n a proper case, relief may be given in a court of equity ... to prevent an injurious act by a public officer." (second alteration in original) (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845))); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution …."). Indeed, the

Supreme Court has noted that "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 575 U.S. at 327.

Finally, the Supreme Court has allowed plaintiffs to bring suits to vindicate constitutional rights directly under the Constitution, just as the Committee has done here. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (rejecting the government's argument that faulted the plaintiffs for not pointing to any Supreme Court case that recognized "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles"); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (permitting plaintiff to bring suit directly under the Fifth Amendment based on allegations that the United States had taken his property for public use without just compensation). Thus, the Committee may bring this suit to enforce the Subpoena.

b. Two Judges of the Court have expressly recognized the House can sue under Article I to enforce a subpoena. In *Miers I*, this Court "conclude[d] that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power." 558 F. Supp. 2d at 94. This conclusion flowed from Supreme Court precedent "constru[ing] Article I … to find an implied right of investigation, and … an implied right to compel compliance with that investigative power, accruing to Congress." *Id.* at 90. The Court recognized that the Committee has other ways to try to compel compliance with subpoenas and concluded that those alternative remedies did not preclude the Committee from bringing a civil suit under Article I. *See id.* at 91-92 (discussing the inherent contempt authority). Finally, the Court explained why recognizing the Committee's implied cause of action does not raise the same concerns that recognizing an implied cause of action for damages might. *See id.* at 94

(explaining that the Court's decision allows only the House and its committees to sue, and thus would not "lead[] to a deluge of additional litigation" to enforce subpoenas and would not negatively impact government employees or operations the way suits for damages might).[8]

More recently, this Court in *McGahn* reached the same conclusion. 415 F. Supp. 3d at 193 ("[A]s Judge Bates recognized in *Miers [I]*, Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry."). Its decision found that this result flowed directly from Supreme Court precedent. *See id.* at 193-94. The Court also rejected the claim that recognizing a House committee's ability to file a civil lawsuit to enforce a subpoena contradicts Supreme Court precedent related to implied causes of action. *Id.* at 194. Rather, the Court emphasized that the power to enforce subpoenas is just as much a part of the Article I power as the authority to conduct investigations. *See id.*

This makes sense. As Supreme Court precedent recognizes, when the Constitution grants a power, it also grants auxiliary powers that are necessary to exercising it. *Id.* ("There is not in the whole of [the Constitution], a grant of powers which does not draw after it others, not expressed, but vital to their exercise …." (alteration in original) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225-26 (1821))). And the ability to enforce subpoenas is necessary to the House's ability to execute investigations by obtaining records and documents. Because the House Committee in the *McGahn* litigation had the constitutional right to enforce its subpoena,

[8] The Court in *Holder* "d[id] not take issue" with the *Miers I* Court's conclusion that the House has an implied cause of action under Article I, but the Court in *Holder* found it unnecessary to reach that issue after it found that the Declaratory Judgment Act provides a cause of action. *See* 979 F. Supp. 2d at 23 n.11.

and because "the judiciary is clearly discernible as the primary means through which constitutional rights may be enforced," the Court concluded that the Committee had a cause of action to bring its suit. *See id.* (citation omitted).

While a divided D.C. Circuit panel later held during the *McGahn* litigation that the House does not have a cause of action to enforce subpoenas, *see McGahn Vacated Panel*, 973 F.3d at 123, that decision was incorrect for several reasons, which is presumably why the full D.C. Circuit ultimately vacated it and agreed to rehear the case en banc. *See* Order, *Comm. on Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Oct. 15, 2020) (granting petition for rehearing en banc and vacating the panel decision).[9]

First, the panel's majority opinion improperly conflated recognition of a House committee's implied right to sue under the Constitution for injunctive relief to enforce a subpoena, with recognition of an implied right to sue under a statute or to sue for damages. Indeed, the majority's analysis started from the premise that courts should "hesitate before finding implied causes of action." *See McGahn Vacated Panel*, 973 F.3d at 123. But the cases it relied on to support that proposition dealt with recognizing implied causes of action either pursuant to a Congressional statute, *see id.* (citing *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 333-34 (2020); *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 262-63 (2018); and *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)), or for damages against federal officials, *see id.* (citing *Hernandez v. Mesa*, 589 U.S. 93, 99-102 (2020); and *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017)). While courts should hesitate before recognizing a cause of action in these scenarios, there is no reason for the Court to hesitate here.

[9] Before the D.C. Circuit could rehear the case en banc, the parties settled, and McGahn's appeal was dismissed as moot. *See* Order, *Comm. on Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. July 13, 2021).

That is because a House committee's right to sue to enforce a subpoena involves a constitutional right and recognizing that right does not create the same separation-of-powers issues that recognizing an implied right to sue under a Congressional statute might. "It is the judiciary, rather than Congress, that is traditionally regarded as the arbiter of constitutional rights and it is self-evident why courts do not look to congressional intent when construing the Constitution." *Miers I*, 558 F. Supp. 2d at 88. But Congressionally conferred statutory rights are meaningfully different. Courts should hesitate before recognizing an implied right to sue under a statute because it is Congress, not the Judiciary, that determines whether to allow a private person to sue to enforce a right that Congress itself has provided. *See id.* ("Numerous Supreme Court decisions … establish that plaintiffs seeking to imply a cause of action from a federal statute bear the heavy burden of proving that Congress clearly meant for the statute to provide a private *right* to a class of individuals and that Congress also intended the statute to create a private federal *remedy*.").

Relatedly, recognizing a right to sue federal officials for damages raises concerns that recognizing a House committee's right to sue to enforce a subpoena does not, just as this Court explained in *Miers I*. *See id.* at 94; *see also McGahn*, 415 F. Supp. 3d at 208 ("Nor can DOJ reasonably rely on the well-established body of case law that applies to the very different circumstance of immunity from civil damages."). Indeed, given the Judiciary's long history of preventing federal officials from violating constitutional rights, the Supreme Court has explained that cases seeking redress "designed to halt or prevent [a] constitutional violation rather than the award of money damages … 'd[o] not ask the Court to imply a new kind of cause of action.'" *United States v. Stanley*, 483 U.S. 669, 683 (1987) (citation omitted).

Second, the majority opinion in *McGahn* wrongly assumed that Congress must authorize the House's right to enforce a subpoena, even though that right comes directly from Article I. Working from this flawed premise, the majority opinion concluded that Congress had declined to do so by authorizing the Senate, but not the House, to bring subpoena-enforcement actions. *See McGahn Vacated Panel*, 973 F.3d at 123 (citing 2 U.S.C. § 288d and 28 U.S.C. § 1365(b)). But this analysis misunderstands the nature of the right: the House's ability to sue to enforce a subpoena comes directly from Article I, and it does not require any Congressional authorization. The Senate-specific statutes are thus beside the point. And if the House did need Congressional authorization, as we explain below, the Declaratory Judgment Act provides it. *See, e.g.*, *McGahn*, 415 F. Supp. 3d at 195.

Third, when considering whether courts have traditionally provided the equitable relief that the House Committee sought, the majority opinion considered only whether there were historical examples that involved the same facts. *See McGahn Vacated Panel*, 973 F.3d at 372 ("The Committee cannot point to a single example in which a chamber of Congress brought suit for injunctive relief against the Executive Branch prior to the 1970s."). But when considering whether a litigant is asking for relief that courts of equity have traditionally provided, it makes more sense to focus on the type of relief, not the specific facts at issue. The House Committee in *McGahn* was simply asking the court to remedy the Executive Branch's unconstitutional action. *See McGahn*, 415 F. Supp. 3d at 194 n.23. Courts have long provided that relief as part of their equitable authority. *See, e.g.*, *Armstrong*, 575 U.S. at 325.

c. Finally, there are no special cause-of-action rules for cases that pit two government branches against each other. In *Free Enterprise Fund*, the Supreme Court found no barrier to an "implied private right of action directly under the Constitution to challenge governmental action

under … separation-of-powers principles." 561 U.S. at 491 n.2 (citation omitted). And in other cases involving Congressional subpoenas, both the D.C. Circuit and the Supreme Court have permitted the Executive Branch as well as the President in his personal capacity to seek equitable relief to vindicate their constitutional prerogatives. *See United States v. AT&T*, 567 F.2d 121, 130-31 (D.C. Cir. 1977) (*AT&T II*); *Trump v. Mazars USA, LLP*, 591 U.S. 848 (2020). It cannot be the case that the Executive Branch may pursue equitable relief when its constitutional interests are impacted, but the House cannot.

. **The Committee has a cause of action under the Declaratory Judgment Act**

Three Judges of this Court have concluded that a House committee may sue under the Declaratory Judgment Act to enforce a subpoena. *See Miers I*, 558 F. Supp. 2d at 88; *Holder*, 979 F. Supp. 2d at 23-24; *McGahn*, 415 F. Supp. 3d at 195. This Court should do the same.

The analysis is straightforward. The Act empowers courts to declare parties' "rights" and "legal relations" where there is (1) an actual case or controversy and (2) federal jurisdiction. 28 U.S.C. § 2201(a). Both these requirements are met here. *First*, because, as explained above, the Committee has standing, it necessarily follows that there is an actual case or controversy. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy."). *Second*, also as explained above, the Court has jurisdiction under 28 U.S.C. § 1331. There are no other requirements under the Declaratory Judgment Act, and it thus authorizes the Committee to seek a judicial declaration of its right to compliance with its issued Subpoenas.

To be sure, the Act "presupposes the existence of a judicially remediable right." *C&E Servs., Inc. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (citation omitted). But that judicially remediable right exists: "[t]he Constitution itself is the source of the right of

compulsory process that the Committee seeks to vindicate here." *McGahn Vacated Panel*, 973 F.3d at 127-29 (Rogers, J., dissenting); *see also Miers I*, 558 F. Supp. 2d at 88 ("It is the Constitution, and not any independent cause of action, that supplies the basis for Congress's right to invoke the DJA here."); *Holder*, 979 F. Supp. 2d at 23 (explaining that the House committee "has alleged an actual injury to rights derived from the Constitution"). Relying on its mistaken conclusion that the Constitution does not give the House a right to sue to enforce a subpoena, the majority opinion in *McGahn Vacated Panel* wrongfully concluded that the House Committee could not sue under the Act. *See* 973 F.3d at 124-25. This Court should instead follow the logic of *Miers I* and *Holder* and conclude that the Committee may bring its suit under the Act.

D. This case is otherwise justiciable

There is no other reason that prevents the Court from hearing this case. As outlined above, the Committee repeatedly extended the Subpoena's return date to accommodate the Executive Branch's purported needs. But now that the President has invoked executive privilege, the parties are at an impasse. With further negotiations now futile, and the damage to the Committee growing every day, this Court's speedy intervention is warranted. *See Holder*, 979 F. Supp. 2d at 25 ("It is sufficient that [the Court] finds the conclusion that there is an impasse to be inescapable, and that under those circumstances, it does not appear that there would be any point to sending this matter back.").

Moreover, the "mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." *AT&T I*, 551 F.2d at 390. Courts have found justiciable numerous separation-of-powers disputes between the Executive and Congress. *See, e.g.*, *McGahn*, 415 F. Supp. 3d at 177; *Holder*, 979 F. Supp. 2d at 4; *Miers I*, 558 F. Supp. 2d at 84-85; *AT&T II*, 567 F.2d at 125-130; *Senate Select*

Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 728 (D.C. Cir. 1974) (en banc). And when it comes to cases about subpoena enforcement, courts have been clear that they

> can identify no reason why that right cannot be vindicated by recourse to the federal courts …. After all, courts routinely enforce subpoenas in favor of parties with rights to information. The mere fact that this case involves a dispute between the political branches—or that such disputes are normally settled through negotiation and accommodation—is not sufficient to render the Committee's right non-judicially remedial. That argument is foreclosed by precedent ….

Miers I, 558 F. Supp. 2d at 84-85.

Given that the parties are at an impasse, and that judicial review is particularly appropriate where, as here, "the narrow legal question posed by the complaint is precisely the sort of crisp legal issue that courts are well-equipped to address and routinely called upon to resolve," *Holder*, 979 F. Supp. 2d at 4, this Court should hear the case.

II. President Biden's privilege assertion lacks merit

A. Garland has a legal duty to comply with the Subpoena

The Supreme Court has consistently held that the "[i]ssuance of subpoenas … has long been held to be a legitimate use by Congress of its power to investigate." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975). Exercising its power to determine its "Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, the House has delegated investigatory and subpoena powers to various committees. The House Rules empower all standing committees, including the Judiciary Committee, to "conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities" over matters within its jurisdiction. House Rule XI.1(b)(1). To aid these inquiries, the Judiciary Committee—like all standing committees—is authorized to issue subpoenas. *See* House Rule XI.2(m)(1)(B), (3)(A)(i); *see also* Rule IV(a), Rules of the Committee on the Judiciary of the U.S. House of Representatives, 118th Cong. (2023), https://perma.cc/6UUS-LYEH. Additionally, the full

House has confirmed that the Committee has the "authority to issue subpoenas" for purposes of the impeachment inquiry. *See* H. Res. 917, § 2. Thus, the Committee, in connection with both its oversight investigation into DOJ's commitment to impartial justice and its consideration of whether to recommend articles of impeachment against President Biden, has issued a legally valid Subpoena to Garland, who has not identified any procedural defect with the Subpoena itself.

Having received a lawfully issued Subpoena, Garland had an "unremitting obligation to respond … to respect the dignity of the Congress and its committees … with respect to matters within the province of proper investigations." *Watkins v. United States*, 354 U.S. 178, 187-88 (1957); *see also Mazars*, 591 U.S. at 871 ("When Congress seeks information …, it 'unquestionably' remains 'the duty of *all* citizens to cooperate.'" (quoting *Watkins*, 354 U.S. at 187)); *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("We have often iterated the importance of this public duty [to comply with Congressional subpoenas], which every person within the jurisdiction of the Government is bound to perform ….").

By withholding the audio recordings called for by the Subpoena, Garland violated his legal obligation to comply with the Subpoena and has unlawfully deprived the Committee of its constitutional right to information. *See, e.g.*, *Miers I*, 558 F. Supp. 2d. at 99 ("The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement.").

B. The privilege claim here, which relies on a purported common law privilege, lacks merit

President Biden's claim of executive privilege over the audio recordings lacks any basis in law. His unfounded assertion represents the latest step in the Executive Branch's continuing effort to expand the breadth and scope of executive privilege by repackaging common-law

privileges—such as the law enforcement privilege asserted here—as constitutionally based claims. The fact that DOJ has already produced to the Committee and publicly released written transcripts of the interviews in question renders the assertion of executive privilege here to be, at best, over inflection, pace, emphasis, pauses, and other verbal and non-verbal indicators that would reveal themselves only on the audio recordings. To the Committee's knowledge, such a broad privilege assertion is novel, and it reflects an unreasonably expansive view of executive privilege with no limiting principles.

As discussed below, the President's assertion of privilege over the audio recordings fails for three independent reasons. *First*, any privilege has been waived both by the release and publication of the transcripts and because it was not timely asserted. *Second*, the assertion of privilege fails because it is actually a common-law privilege not required to be recognized by Congress. *Finally*, even assuming a valid privilege assertion, which this is not, the Committee's demonstrated need for the audio recordings outweighs any interest in maintaining the privilege.

. The privilege has been waived

aived via public release. Any claim of privilege over the audio recordings sought by the Committee was waived both when the White House disclosed the transcripts of those interviews to the Committee and when it released them to the public. Indeed, the transcripts of President Biden's interviews were released to the news media by the Executive Branch *before* DOJ produced them in response to the Committee's subpoena. *See* Castor Decl. ¶ 15 & Ex. Q at 2. The audio recordings of those interviews thus cannot be privileged.

This Court has previously encountered a nearly identical fact pattern. In 1974, when President Nixon caused transcripts of subpoenaed audio recordings to be published, this Court held that his subsequent claim of executive privilege over the audio recordings of those same

conversations had been relinquished. *See United States v. Mitchell*, 377 F. Supp. 1326, 1330 (D.D.C. 1974). According to this Court, "the privilege claimed [was] non-existent since the conversations are ... no longer confidential." *Id.* (citing *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973)). The same is true in this case. Here, the President did not assert executive privilege over any portion of the interview transcripts prior to their disclosure to the Committee. Additionally, no conditions were placed on the provision of the transcripts before DOJ turned them over to the Committee. No agreement was reached in advance between the parties that the transcripts were not to be disclosed. No restrictions were placed on Special Counsel Hur's testimony before the Committee regarding the very interviews at issue here. Accordingly, as the D.C. Circuit has recognized, the substantive content of the audio recordings cannot possibly be privileged at this point, after the content has been made public. *See Sirica*, 487 F.2d at 718 ("[T]he public testimony given … substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. Where it is proper to testify about oral conversations, taped recordings of those conversations are … as probative and corroborative of the truth concerning the testimony.").

Mitchell is consistent with the way similar privileges are treated in other contexts. "Courts frequently deem otherwise valid privileges waived when information is disclosed to third parties." *Di Lapi v. City of New York*, Nos. 06–CV–3101, 06–CV–2864, 2012 WL 37576, at *4 (E.D.N.Y. Jan. 6, 2012) (citing *Hobley v. Chi. Police Commander Burge*, 445 F. Supp. 2d 990, 999 (N.D. Ill. 2006) (finding waiver of privilege to protect a governor's thought processes after public disclosure to a talk show host)); *see also Clark v. Falls*, 124 F.R.D. 91, 94 (E.D. Pa.

1988) (finding executive privilege waived due to disclosure of information to a newspaper and district justice).

The D.C. Circuit's admonition that "waiver should not be lightly inferred," *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (*Espy*) (citation omitted), notwithstanding, the case for finding a waiver of privilege here is strong. Waiver is not being inferred at all; in fact, it could not be more express. The Executive Branch is attempting with one hand to release information by written transcript, presumably because it is favorable to its political position, but at the same time to assert privilege over that same information, albeit in a different format (audio recording) because it presumably deems that medium unfavorable to its political position. Indeed, DOJ has not pointed to a single example where executive privilege was invoked only over aspects of an oral interview that are not reflected in a transcript—things like a witness's voice inflection, tone, pauses, and the like. The apparent lack of any precedent shows how novel this privilege claim is. This Court should see this charade for what it is and find that the release of the written transcripts constitutes an express waiver of any privilege over these audio recordings.

aived via failure to timely assert. The privilege claim here has also been waived because it was untimely and did not comply with the terms of the Subpoena. The Subpoena contained an explicit return date of March 7, 2024, and required Garland to provide a privilege log if he withheld material based on a privilege. *See* Castor Decl., Ex. A at Instructions (page 4, number 17). Garland ignored these instructions by failing to either produce the audio recordings or provide a privilege log by the original March 7 return date (or the later deadlines provided by the Committee), instead waiting nearly ten weeks, until May 16, 2024, to assert any privilege over the audio recordings.

Supreme Court precedent is clear; the law requires timely assertions of privilege:

> [I]f [a] respondent [to a Committee's subpoena] ha[s] legitimate reasons for failing to produce the records … a decent respect for the House of Representatives, by whose authority the subpoenas issued, … require[s] that []he state h[is] reasons for noncompliance upon the return of the writ.

Bryan, 339 U.S. at 332.[10]

Belated privilege assertions, like the one at issue here, effectively undermine Congress's ability to carry out its constitutional responsibilities.[11] Conversely, timely privilege assertions are necessary to enable committees to promptly (i) assess the policy considerations that favor or disfavor honoring a privilege claim in a given situation; (ii) evaluate the importance of the information at issue and whether that information can be obtained from other sources; and (iii) determine whether some accommodation is possible, all in the interest of moving the investigation along. *See generally* Alissa M. Dolan & Todd Garvey, Cong. Rsch. Serv., R42811, *Cong. Investigations of the Dep't of Just. 1920-2012: Hist., Law, Prac.* 10-14 (2012) ("CRS Report"), https://perma.cc/N5JE-B6CP. Historically, privilege assertions to Congressional subpoenas, including those by the Executive Branch, have been registered by the subpoena

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[10] *See also Bryan*, 339 U.S. at 332-33 (rejecting, in context of contempt of Congress prosecution, objection to Congressional subpoena lodged after return date); *cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) ("If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege *on the return of the subpoena*." (emphasis added)); *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (Marshall, J.) (claims of presidential privilege "will have [their] due consideration on the return of the subpoena").

[11] *See, e.g.*, *Exxon Corp. v. FTC*, 589 F.2d 582, 588 (D.C. Cir. 1978) ("[E]nforced delay [of ten days] on the legitimate investigations of Congress … could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality."); *id.* at 594 (noting "clear public interest in maximizing the effectiveness of the investigatory powers of Congress"); *AT&T II*, 567 F.2d at 133 n.40 (noting, in context of Congressional subpoena, "there is a plain duty on both the executive and judicial branches to advance any problems for prompt consideration"); *FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980) ("[C]ourts may not require [subpoena recipient] to delay surrendering documents to Congress [pending advance notification of] affected parties …, for the judiciary must refrain from slowing or otherwise interfering with the legitimate investigatory functions of Congress.").

return date or, at the latest, soon thereafter.[12]

For the constitutionally mandated authority of Congress to issue compulsory process to mean anything, it must mean that subpoena recipients—including the Attorney General—cannot blithely ignore the terms of a Congressional subpoena without consequence. Thus, the Court should hold that the privilege was waived because it was not timely asserted.[13]

. The law enforcement privilege which is rooted in the common law is not enforceable against Congress

Permitting the Executive Branch to assert the common law-based law enforcement privilege against the Committee effectively elevates judge-made common law above the constitutional authority of Congress, a coordinate branch of government.

The underlying information sought by the Committee does not implicate presidential decision-making, involve communications with close presidential advisors, involve national security, or otherwise intrude into any other areas traditionally held to be within the narrow

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[12] *See, e.g.*, *Senate Select Comm.*, 498 F.2d at 727 (privileges timely asserted in response to Congressional subpoena); *Miers I*, 558 F. Supp. 2d at 61-62 (presidential communications privilege asserted on or before subpoena return dates); *United States v. House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983) (same); H. Rep. No. 108-414, at 129-30, 134-35 (2004) (same), https://perma.cc/Z9XB-AMJN; Tatelman Decl., Ex. II at 25-29 (House hearing showing the same); *see also Investigation into Allegations of Justice Department Misconduct in New England: Hearings Before the H. Comm. on Gov't Reform*, vol. I, 107th Cong. 520-56 (2002) (statement of Prof. Charles Tiefer) (chronicling such instances), https://perma.cc/RQ85-X9TT; *cf. Nixon*, 418 U.S. at 687-88, 713 (privilege asserted by return date of criminal discovery subpoena); *United States v. Poindexter*, 727 F. Supp. 1501, 1503 (D.D.C. 1989) (same).

[13] *Cf.* Fed. R. Civ. P. 45(d)(2)(B), 45(e)(2) (persons objecting to subpoena under claim of privilege must lodge objection within "the earlier of the time specified for compliance or 14 days after the subpoena is served" and must provide information sufficient to "enable the parties to assess the claim"); *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 579-82 (Fed. Cl. 2012) (finding that privilege assertions are "subject to a timeliness requirement … and there is no basis to refrain from extending the waiver to instances of indiligence, indolence, or dawdling"; holding that Executive Branch waived privilege by untimely assertion (citing cases)); *Fonville v. District of Columbia*, 230 F.R.D. 38, 42 (D.D.C. 2005) (Executive Branch waived qualified, common-law deliberative process privilege by untimely assertion).

confines of the Constitutionally based executive privilege. *See Espy*, 121 F.3d at 745 (distinguishing between the constitutionally based presidential communications privilege and other common-law privileges that may be asserted by the Executive Branch). Rather, the Committee seeks information related to a *closed* criminal investigation, making it, at most, subject to the common-law privilege afforded to law enforcement investigatory materials. *See, e.g.*, *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977) (explaining that interests implicated by the law enforcement privilege do "not have the constitutional dimension indicated in *Nixon* and *Reynolds*," but rather "are rooted in common sense as well as common law"); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984) (recognizing law enforcement privilege as "a qualified common law privilege").

In stark contrast, the Committee's investigation has two independent constitutional bases: Congress's general Article I legislative authority and the impeachment power. The House cannot effectively exercise either its legislative authority or its impeachment power without access to all the relevant facts. *See Eastland*, 421 U.S. at 504; *see also In re Rep. & Recommendation of June 5, 1972*, 370 F. Supp. 1219, 1230 (D.D.C. 1974). Withholding relevant information from the Committee therefore hinders its ability to carry out its constitutional functions.

Nothing in the Constitution requires Congress to respect common-law privileges. Rather, it is inherent in Congress's Article I investigatory power that it "mak[e] its own determination[]" whether its need for legislative evidence should yield to the interests served by non-constitutional privileges asserted in a legislative proceeding. *See, e.g.*, *In re Provident Life & Accident Ins.*, No. 90-cv-219, 1990 U.S. Dist. LEXIS 21067, at *6 (E.D. Tenn. June 13, 1990). This authority is strongly rooted in history. The Framers were familiar with the British Parliament's longstanding practice of neither recognizing common-law privileges nor accepting

general claims of confidentiality.[14] Furthermore, Congress has consistently exercised its authority to reject witnesses' assertions of common-law privileges whenever it has deemed appropriate.[15] This unbroken history confirms Congress's exclusive Article I power to decide whether and when to recognize non-constitutional privileges in legislative proceedings.

The Supreme Court's dictum in *Mazars* that subpoena "recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as … governmental communications protected by executive privilege," 591 U.S. at 863, does not compel a different result. At most, the *Mazars* passage stands for the proposition that, consistent with the ordinary meaning of the word "retain,"[16] parties do not automatically waive

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[14] *See, e.g.*, Thomas Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 746-47 (20th ed. 1983); Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* § 983 (1856); *cf. Watkins*, 354 U.S. at 188 (looking to "the pages of English history" to understand the scope of Congress's power); *Marshall v. Gordon*, 243 U.S. 521, 533 (1917) ("Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions.").

[15] In 1857, Congress debated whether common-law privileges should apply to Congressional proceedings. *See* Cong. Globe, 34th Cong., 3d Sess. 431 (1857) (statement of Rep. Orr) ("With reference to communications made to counsel, … the common law of England does not exempt a witness from testifying …. Either the House of Commons or House of Lords can extract such communication."). The Senate defeated an amendment to the bill that would have explicitly recognized common-law evidentiary privileges. *See id.* at 439 (proposal of Sen. Seward); *id.* at 443 (amendment defeated). In 1977, a House subcommittee expressly rejected a witness's attorney-client privilege claim. *See* Tatelman Decl., Ex. JJ at 46, 123. Chairman John Moss observed that "the commonwealth precedents, customs of both the Commons and the House, fully sustain rejecting a claim of attorney-client privilege if it impedes in any manner whatsoever the necessary inquiries of the Congress in determining whether a law of the United States may have been violated or whether that law accords sufficient protection to the American people." *Id.* at 123.

[16] *Retain*, *Black's Law Dictionary* (12th ed. 2024) ("To hold in possession or under control; to keep and not lose, part with, or dismiss.").

common-law privileges when they comply with a Congressional subpoena. It thus remains up to Congress to decide whether to accept a common-law privilege.

. **Even if the privilege did apply, it is qualified, and the Committee's need for the recordings outweighs DOJ's interest in secrecy**

Because the privilege asserted here is qualified, *see Friedman*, 738 F.2d at 1341, even if it applies, the Court must balance the Committee's need for disclosure against the Executive Branch's need for confidentiality. *See, e.g.*, *Nixon*, 418 U.S. at 706-07 (rejecting a claim of "absolute, unqualified Presidential privilege"); *Espy*, 121 F.3d at 746 (noting "courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence"). Here, the Committee's need for the audio recordings significantly outweighs any Executive Branch interest in confidentiality.

a. As discussed above, the Committee cannot complete its oversight investigation without the audio recordings: it must have the evidence that best captures the way that President Biden presented himself during his interview with the Special Counsel. *See supra* at 6-11. Only after it reviews that evidence can the Committee fully assess whether the Special Counsel's recommendations are consistent with a commitment to impartial justice. The cold transcripts—which do not fully capture the way the President presented himself or even every word he uttered—do not allow the Committee to make its own informed assessment of the Special Counsel's conclusions. The Special Counsel himself confirmed that he did not rely solely on the words that President Biden spoke but also on the entire manner of how he presented himself. And as we explained above, the Special Counsel's subjective view of the President's mental state, including his memory, affected several of his conclusions.

The Committee cannot take the Special Counsel's characterizations of the President's mental state at face value. As statements from the President and his lawyers show, the Special Counsel's views are up for debate. Nor can the Committee compare this Special Counsel's decision not to bring charges with Special Counsel Jack Smith's decision to bring charges unless it has access to the same nuances and information on which this Special Counsel relied.

The Committee likewise needs the audio recording of the Special Counsel's interview with Zwonitzer. The Special Counsel drew from this recording conclusions about Zwonitzer's credibility that factored into his conclusion that charges should not be brought against Zwonitzer for destroying evidence. Conclusions about credibility may be informed by a witness's speaking pace and hesitation, but the transcripts do not contain that information. The Committee thus cannot properly evaluate the Special Counsel's views about Zwonitzer's credibility or his ultimate conclusion not to bring charges against Zwonitzer without the audio recording.

Finally, determining whether the Special Counsel's recommendations are consistent with a commitment to impartial justice will, in turn, help the Committee to decide whether legislative reforms related to special counsels are necessary (and, if so, what those reforms should look like).

b. As discussed earlier, the Committee also needs the audio recordings to advance its impeachment inquiry. *See supra* at 11-12. The Special Counsel found that President Biden retained two classified documents related to Ukraine. Report at 281, 310, A-2. Given his family's business dealings in Ukraine—which were ongoing when he left the vice presidency—the Committee must determine whether President Biden retained those documents to enrich his family. The nuances that the audio recordings capture will help it do that. They will also help the Committee determine whether the President retained classified material to help him execute a

multimillion-dollar book deal. The Committee needs all the available evidence because "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair [impeachment] inquiry based on all the pertinent information." *In re Rep. & Recommendation*, 370 F. Supp. at 1230.

c. The Executive Branch's argument that its purported need to keep the audio recordings confidential outweighs the Committee's need to obtain them fails. For instance, Garland's argument that release of the tapes will have a "chilling effect" on DOJ's ability to obtain information in unspecified and undefined future investigations does not withstand scrutiny. *See* Castor Decl., Ex. W (attached letter at 4). Any possible "chilling" effect would more properly flow from the public release of the content of the interview, not the format the release takes.

In particular, DOJ's assertion that if witnesses knew that audio recordings of their interviews could become public, the "ability to obtain vital cooperation in high-profile criminal investigations" might be impeded is without merit. *See id.* at 5. The assertion that witnesses will be any less likely to participate in an interview with a future special counsel if the audio recordings of the interviews in question are produced to Congress strains credulity, considering that the transcripts of the underlying interviews have already been released without any assertions of privilege, and made subject to scrutiny in the public sphere. Additionally, there is always a risk that such information, even if not voluntarily released by DOJ, could eventually become public through FOIA, a risk known to any individual with sophisticated counsel participating in a high-profile investigation such as the present one. *See Citizens for Resp. & Ethics in Wash. v. DOJ*, 658 F. Supp. 2d 217, 240-41 (D.D.C. 2009) (*CREW*) (ordering the release of documents relating to a special counsel interview of former Vice President Dick Cheney over which DOJ had previously asserted law enforcement privilege). If Garland's stated

concern were a serious one, privilege would have been asserted over the transcripts and other related investigatory materials in the first instance, and the transcripts would not have been released to the media.

Furthermore, the Executive Branch's reliance on the voluntary cooperation of witnesses entirely ignores other, far more powerful, investigative tools available to them, such as grand jury subpoenas, other forms of compulsory process (search warrants, Stored Communications Act warrants, etc.), and the ability to prosecute individuals for noncompliance therewith. Indeed, DOJ "doesn't rely on strangers' munificence or let witnesses dictate the terms of its investigations" but instead "relies on compulsory process." *See* Tatelman Decl., Ex. EE at 2. For all of these reasons, any suggestion that DOJ's investigative efforts would be hampered by release of the audio recordings here is frivolous at best.

Moreover, DOJ's argument regarding such an abstract and amorphous future chilling effect has already been rejected by this Court in a FOIA case as insufficient. *See CREW*, 658 F. Supp. 2d at 225-31. Of critical importance to this dispute, DOJ conceded, in the context of the *CREW* litigation, that the common-law privilege over law enforcement documents was "co-extensive" with FOIA Exemption 7(A). *See id.* at 232. Consequently, the common-law privilege, whatever it does cover, cannot encompass more than that FOIA exemption permits. Exemption 7(A) allows an agency to withhold documents that were compiled for law enforcement purposes if disclosing them "could reasonably be expected to interfere with enforcement proceedings." *Id.* at 225 (citation omitted). DOJ argued there, just as Garland argues here, that "there are likely to be future law enforcement investigations requiring the participation of senior White House officials, and … disclosure of [the record at issue] could have a chilling effect and deter such officials from voluntarily cooperating in those

investigations." *Compare id.*, *with* Castor Decl., Ex. W (attached letter at 3-4) ("Production of these recordings to the Committees would raise an unacceptable risk of undermining [DOJ]'s ability to conduct similar high-profile criminal investigations—in particular, investigations where the voluntary cooperation of White House officials is exceedingly important.").

This Court rejected DOJ's argument because it, like Garland here, failed to adequately describe the category of future law enforcement proceedings that might be interfered with. *See CREW*, 658 F. Supp. 2d at 229 ("[T]he category of [law enforcement] proceedings must be more narrowly defined than simply any investigation that might benefit from the cooperation of some senior White House official at some undetermined future point regarding some undefined subject."). Indeed, because DOJ failed to identify a category of enforcement proceedings, the Court could not even assess whether disclosing the record at issue would likely interfere with future law enforcement proceedings. *See id.* at 230-31.

Because a risk to abstract and undefined future "high-profile criminal investigations" is all that Garland has used to justify the withholding of the audio recordings from the Committee here, Castor Decl., Ex. W (attached letter at 3-5), his reasoning fails, and the audio recordings must be produced. Congress's ability to access information in the performance of its constitutional oversight and impeachment functions must be greater than the access afforded the general public based on the statutory right granted by FOIA.

III. The Committee's ability to exercise its Article I powers is impeded, and it is entitled to injunctive relief

The very nature of the Committee's investigation speaks to its urgency: it is both assessing whether the Special Counsel's recommendations are consistent with a commitment to impartial justice and considering whether there are sufficient grounds to impeach a sitting President. The audio recordings are critical to the Committee's investigation, and the President's

purported privilege claim is impeding the Committee's work. For the reasons stated below, the Committee will suffer irreparable injury without injunctive relief, and the balance of the equities and the public interest are in its favor. Under these circumstances, this Court should issue an injunction requiring Garland to produce the audio recordings.

A. Garland's refusal to produce the audio recordings is causing the Committee irreparable harm

The audio recordings are the best available evidence of how the President and Zwonitzer presented during their interviews with the Special Counsel. And the Special Counsel expressly said that he did not rely solely on the words the President spoke when deciding whether criminal charges would be appropriate; he also relied on the way the President presented himself. The Committee cannot get the information it seeks from any other source, including the transcripts, which do not capture verbal and non-verbal context and do not reflect every spoken word. Thus, without the audio recordings, the Committee would be deprived of the information to which it is constitutionally entitled. That alone constitutes irreparable harm because "where an obligation to disclose exists, plaintiffs may suffer irreparable harm if they are denied access to information that is highly relevant to an ongoing public debate." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F. Supp. 3d 96, 110 (D.D.C. 2017).

Courts have also recognized that analogous invasions of constitutional prerogatives cause irreparable harm. For example, "suits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (alteration and citation omitted). In addition, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration

and citation omitted). Here, Garland's disregard of a lawful Congressional subpoena is hindering the Committee's performance of its constitutionally mandated duties. That constitutional injury is no less irreparable than those suffered by a private litigant enforcing a personal right or a state prevented from implementing a statute.

But the Committee's injury is temporal, too. And the harm caused by the deprivation of information, compounded by the ticking clock, is particularly acute. For starters, because the House of Representatives is not a "continuing body," *Eastland*, 421 U.S. at 512, the Committee is diligently working to wrap up its investigation by the end of the year. But Garland, by refusing to produce the audio recordings, is interfering with the Committee's Article I authority to conduct oversight of DOJ and determine whether legislative reforms to special counsel investigations are necessary. The Committee "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Id.* at 504 (citation omitted). The Committee must assess for itself whether the Special Counsel's conclusions here are consistent with a commitment to impartial justice. That, in turn, will help the Committee decide if legislative reforms are necessary to promote impartial justice in the future. The audio recordings are key to that assessment.

By refusing to produce the audio recordings, Garland is also interfering with the House's urgent impeachment inquiry. On the one hand, impeachment serves as a mechanism to remove the President before his term is over. As James Madison explained, "[t]he limitation of the period of [the President's] service[] was not a sufficient security" against incapacity or corruption, which could be "fatal to the Republic." *See* 2 *The Records of the Federal Convention of 1787*, at 65-66 (Max Farrand ed., 1911). Thus, "the Framers themselves" recognized "the public interest in immediately removing a sitting President whose continuation

in office poses a threat to the Nation's welfare." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 2000 WL 33711291, at * 27 (Oct. 16, 2000). On the other hand, the Committee is engaged in a thoughtful and time-intensive consideration of the facts needed to determine whether to exercise its solemn impeachment power.

Thus, each day that Garland refuses to produce the audio recordings—based on a privilege assertion from the very official who is the subject of the impeachment inquiry—he obstructs the Committee from deciding whether to recommend that the President be impeached, heightens the risk that crucial information relevant to this investigation will be lost or forgotten, and moves the President one day closer to running out the clock on the 118th Congress. "Indeed, the D.C. Circuit has held that 'stale information is of little value' and that the harm in delaying disclosure is not necessarily redressed even if the information is provided at some later date." *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C. 2017) (alterations and citations omitted).

Here, Garland's refusal to produce the audio recordings is undermining the Committee's ability to complete its investigation with the urgency the Constitution requires, and that certainly suffices to constitute irreparable harm to the Committee. *See Comm. on Judiciary v. Miers*, 575 F. Supp. 2d 201, 207 (D.D.C. 2008) (*Miers II*) ("The Committee has demonstrated that it will suffer substantial harm … [because] [the Executive would be able to] 'run out the clock on this Congress.' 'That outcome … would be extremely damaging to the Committee, as it seeks closure to this important [i]nvestigation prior to the end of the current Congress and Administration.'" (citations omitted)).

B. Allowing the Committee's investigation to proceed with the audio recordings serves equity and advances the public interest

The balance of equities and the public interest are in the Committee's favor. The Committee has subpoenaed audio recordings that are key to its investigation, and there is a "clear public interest in maximizing the effectiveness of the investigatory powers of Congress." *Exxon Corp.*, 589 F.2d at 594.

Garland, on the other hand, has no valid interest in defying the Committee's Subpoena, as it is his "unremitting obligation" to respond to it. *See Watkins*, 354 U.S. at 187. Indeed, DOJ has no more valid an interest in unlawfully preventing the Committee from accessing the audio recordings than it would have in the "enforcement of an unconstitutional law," which "is always contrary to the public interest." *Gordon*, 721 F.3d at 653. While DOJ claims an interest in purportedly privileged material, as we explained above, the privilege assertion here (over vocal, as opposed to substantive, elements of the interviews) is baseless.

At bottom, the audio recordings are important evidence as the Committee discharges its legislative oversight responsibility and investigates whether to recommend articles of impeachment against the President.

CONCLUSION

For all these reasons, this Court should enter a preliminary injunction ordering Garland to comply with the Judiciary Committee's Subpoena. Alternatively, the Court should grant summary judgment to the Committee on the issue of executive privilege, declare that Garland's refusal to produce the audio recordings is unlawful, and order Garland to produce the audio recordings to the Committee.

Respectfully submitted,

/s/ Matthew B. Berry
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Counsel for Plaintiff Committee on the Judiciary of the U.S. House of Representatives

July 12, 2024

From: "Weinsheimer, Bradley (ODAG)" (b) (6)
To: "Hinojosa, Xochitl (PAO)" (b) (6), "Klapper, Matthew B. (OAG)" (b) (6), "Atkinson, Lawrence (ODAG)" (b) (6) (b) (6)
Cc: "Hornbuckle, Wyn (PAO)" (b) (6)
Subject: RE: Seeking comment for a story
Date: Fri, 09 Feb 2024 14:38:59 -0500
Importance: Normal

Fine with me.

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Friday, February 9, 2024 2:37 PM
To: Weinsheimer, Bradley (ODAG) (b) (6); Klapper, Matthew B. (OAG) (b) (6); Atkinson, Lawrence (ODAG) (b) (6)
Cc: Hornbuckle, Wyn (PAO) (b) (6)
Subject: RE: Seeking comment for a story

Can the four of us huddle when Matt is out of his meeting?

From: Weinsheimer, Bradley (ODAG) (b) (6)
Sent: Friday, February 9, 2024 1:08 PM
To: Hinojosa, Xochitl (PAO) (b) (6); Klapper, Matthew B. (OAG) (b) (6); Atkinson, Lawrence (ODAG) (b) (6)
Subject: RE: Seeking comment for a story

I would be comfortable saying something like: (b) (5)

The last clause comes from the AG's letter to the Hill.

I would consider if (b) (5)

Attached is the letter I sent to counsel, which is not public but will become public eventually I assume (it would be released in FOIA upon a request at least).

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Friday, February 9, 2024 12:22 PM
To: Klapper, Matthew B. (OAG) (b) (6) Weinsheimer, Bradley (ODAG) (b) (6) Atkinson, Lawrence (ODAG) (b) (6)
Subject: FW: Seeking comment for a story

FYI

From: Tucker, Eric <etucker@ap.org>
Sent: Friday, February 9, 2024 12:18 PM
To: Hinojosa, Xochitl (PAO) (b) (6) ; Hornbuckle, Wyn (PAO) (b) (6)
Subject: [EXTERNAL] Seeking comment for a story

Hi Xochitl and Wyn,

I am writing a story about the public pushback to the report, in particular the inclusion of characterizations of Biden's memory. Some, including former AG Holder, have said that had this report gone through "normal" review, such arguably gratuitous observations would not have been included. Just wanted to see if there was any response to that. Thanks so much.

Eric

The information contained in this communication is intended for the use of the designated recipients named above. If the reader of this communication is not the intended recipient, you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify The Associated Press immediately by telephone at (b) (6) and delete this email. Thank you.

From: "Ulin, Sophie (PAO)" [redacted]
To: "Hinojosa, Xochitl (PAO)" [redacted], "Iverson, Dena (PAO)" [redacted], "Hornbuckle, Wyn (PAO)" [redacted] "Dulaney, Emma (PAO)" [redacted], "Klapper, Matthew B. (OAG)" [redacted], "Miller, Marshall (ODAG)" [redacted] "Evers, Austin (ODAG)" [redacted], "Benson, Adrienne (ODAG)" [redacted] >, "Uriarte, Carlos F. (OLA)" [redacted] "Weinsheimer, Bradley (ODAG)" [redacted], "Morris, Catherine (PAO)" [redacted]
Subject: Off Topic Question at 3.21 Press Conference
Date: Thu, 21 Mar 2024 12:15:07 -0400
Importance: Normal

KEN: On the Special Counsel Robert Hur's report you've personally come in for a lot of criticism in particular from the White House. Anonymous officials who say that you should have acted to keep him from characterizing the President's memory in that report, that you should have stepped in. What's your response to that.

AG: I haven't – No one from the White House has said that to me. When the President announced my nomination, he said to me directly and then to the American public that he intended to restore the independence and the integrity of the Justice Department. And that he wanted me to serve as the lawyer for the American people not the lawyer for the President. I sincerely believe that that's what he intended then and I sincerely believe that that's what he intends now.

KEN: But did you think that was appropriate the language that he used to characterize the President's mental state?

AG: Look, they – I said from the very beginning that I would make public the report of the Special – of all the Special Counsels appointed during the period of my service. That is consistent with the regulation which requires a Special Counsel to explain what the Special Counsel's decisions are. It is consistent with the precedence, the full disclosure of all special counsel reports in the entire 25 years in which the regulation has been in effect. It's consistent with the common practice during the previous period of the independent counsel statute. The idea that an attorney general would edit or redact or censor the Special Counsel's explanation for why the Special Counsel reached the decision the Special Counsel did – that's absurd.

Sophie Ulin
Press Assistant, Office of Public Affairs
U.S. Department of Justice
(m) [redacted]
[redacted]

From: "Ulin, Sophie (PAO)" (b) (6)

To: "Benson, Adrienne (ODAG)" (b) (6), "Bond, Slade (OLA)" (b) (6), "Brennan, Shea (OLA)" (b) (6), "Morris, Catherine (PAO)" (b) (6), "Cocklin, Katherine P. (OLA)" (b) (6), "Iverson, Dena (PAO)" (b) (6), "Tran, Emily (PAO)" (b) (6), "Dulaney, Emma (PAO)" (b) (6), "Evers, Austin (ODAG)" (b) (6), "Gao, Greta G. (OLA)" (b) (6), "Hanson, Matthew B. (OLA)" (b) (6), "Hartnett, Julia (PAO)" (b) (6), "Hinojosa, Xochitl (PAO)" (b) (6), "Pietranton, Kelsey (PAO)" (b) (6), "Kohlman, Abby K. (OLA)" (b) (6), "Klapper, Matthew B. (OAG)" (b) (6), "Miller, Marshall (ODAG)" (b) (6) "Mogil, Joshua (ODAG)" (b) (6), "Rubio, Christian (OLA)" (b) (6), "Schroeder, Ted (OLA)" (b) (6), "Shevlin, Shannon (OPA)" (b) (6), "Ulin, Sophie (PAO)" (b) (6), "Uriarte, Carlos F. (OLA)" (b) (6) "Wagner, Rose (JMD)" (b) (6) "Hornbuckle, Wyn (PAO)" (b) (6), "Zdeb, Sara (OLA)" (b) (6)

Subject: House Republican Leadership Press Conference - Feb. 14

Date: Wed, 14 Feb 2024 12:13:57 -0500

Importance: Normal

Speaker Mike Johnson (R-LA)

- "First of all, regarding this fitness for Office of the President, Americans have been speaking out about the President's mental acuity and the double standards within his Justice Department. On Thursday, as you know, the Special Counsel confirmed that President Biden mishandled classified materials in a way that presented serious risk to national security. He broke the law, but he's not gonna be charged. Why is that? Well, the Special Counsel said that it decided not to indict the President, in part because there are significant limitations on his memory and a jury wouldn't convict him because he would be presented as "an elderly man with poor memory." That did not inspire confidence among the American people. It's a great concern to us. Ultimately, they're indicting – remember now, the DOJ is indicting one president with politically motivated charges and they're now carrying the water for another amid very similar allegations. A man too incapable of being held accountable for mishandling classified information is certainly unfit for the Oval Office, and everyone in this room – if you just ask yourself that question, you will come to the same conclusion…"
- "Last night, the House voted to approve articles of impeachment against Secretary Mayorkas. Desperate times call for desperate measures. We had to do that. He has abdicated his responsibility, he's breached the public trust, and he's disregarded the laws Congress has passed. But much more has to be done, of course, to secure the border and what the Senate produced this week is silent on that issue. Senator McConnell and I have spoken about this in frank sessions and let me be clear here again this morning: the Republican-led House will not be jammed or forced into passing a foreign aid bill that was opposed by most Republican Senators, and does nothing to secure our own border. It's time for Washington to start showing some love to Americans. On Valentine's Day, this is a good day to point this out. We need to listen to the American people and their needs and take action. And that's why House leadership will continue to govern with Americans' interests at heart."
- *You've challenged the President's cognitive abilities. You've said he is not fit to be President and to do the job. Why do you think a one-on-one meeting with the President of the United Stated would solve all of these problems?:* "Well, that's a very good question, but I have to do everything that I can. He is the Commander in Chief right now, as uncomfortable as that makes most of this country, but I have to work with what I have. I have to do my job, and I'm gonna insist to continue to do that. The House Republicans are gonna continue to do our job. We're gonna continue to move the ball forward. We're gonna continue to demand that before we take care of issues all around the world, we take care of our own first. And I'm telling you, that is not a campaign message;

that is the truth, and that is what resonates in the hearts of the American people. We are on their side, and it's the side of common sense. It's the side of security. It's the side of stability. It's the side of sanity. And the President of the United States will not acknowledge that, and it is of great alarm to us."

Rep. Stefanik (R-NY)

- "Before we talk about the week ahead, I want to touch on the bombshell report last week from the Special Counsel, confirming that President Biden retained and mishandled classified documents for years in an unsecure location. Special Counsel Hur's decision to not prosecute Biden because of his deteriorating mental state further demonstrates the unamerican, two-tiered justice system that exists in Joe Biden's America. There cannot be one set of rules if your last name is Biden and another set of rules for the rest of America. And the American people know that if someone is mentally unfit to stand trial, they are unfit to serve as Commander in Chief."
- "Turning to our agenda of this week, House Republicans will continue to deliver on our promises. Yesterday, after a year-long investigation led by the House Homeland Security Committee led by the leadership of Chairman Mark Green, we executed our Constitutional duty impeaching Secretary Mayorkas for violating his oath to support and defend the Constitution, subvert the rule of law, and breach the American public's trust. Impeachment is just one step; the Senate must pass House Republicans' Secure the Border Act, the strongest border security bill in history, to stop the invasion at our borders, which we are seeing under Joe Biden's policies."

Rep. Ronny Jackson (R-TX)

- "What I want to talk about is in regards to the Hur report that just came out, and I think this is on the mind of a lot of Americans right now. I want to just state the obvious: if you're not cognitively fit to stand trial or answer accusations against you, you're obviously not cognitively fit to be the President and our Commander in Chief and our Head of State. I think that at this particular point, we have to start asking the hard questions. I'm glad to see that some of the press is starting to do that. I've been saying individually for a long time, since he was a candidate – Joe Biden – that this man is not cognitively fit to be our Head of State and our Commander in Chief. We've had lots of evidence of that since then; a lot of people are starting to see that, and now we have the Hur report coming out which is a completely different angle on this, an objective report from an appointee from his own DOJ, his own administration, that's saying that he's not cognitively fit to do his job. I think that when the President got up the other day and tried to speak to the nation, he just reiterated and reinforced the idea that we are in trouble in this country right now from a leadership standpoint…"
- "I just want everybody to know that we are going to continue to make this an issue. I will be introducing another letter today – this will be the fifth letter that I've sent to the President. This will go directly to President Biden and will CC every member of his cabinet, and it will insist that he come forward and be honest with us about his physical and mental capabilities in his exam. He's supposed to be getting a physical exam done here in just a few months – his annual physical. They've already indicated that there will not be a cognitive test associated with that. I think if there was ever, ever a time that we need a cognitive test for a sitting President of the United States, it's right now. As you remember, President Trump got one. I think he set the precedent in large part because of the press' insistence that he have that as part of his physical exam. I would like to see that same type of enthusiasm from the press right now, that President Biden submit to us a cognitive exam as part of his physical exam. If he thinks he's fit to lead this country, prove it to us with some objective data that says so."

Chairman Mark Green (R-TN)

- Last night, the House of Representatives voted to impeach DHS Secretary Alejandro Mayorkas for high crimes and misdemeanors, specifically for his willful and systemic refusal to comply with the laws and his breach of the public trust. This action is the culmination of nearly a year's worth of investigations and hearings. It was necessary to deal with the rogue DHS Secretary, whose lawless actions have caused and perpetuated one of the worst – *the* worst – border crisis in American history, a border crisis that has devastated communities all across our country. Secretary Mayorkas has shown throughout his tenure that he will defy, he will ignore, and he will replace the laws enacted by this Congress. His actions have not only shown a disdain for the Constitution, but for the Congress, the law, and the American people. The Constitutional case against Secretary Mayorkas is sound; the historical record is unambiguous; the framers were united in their belief that the executive branch officials must defend the Constitution, respect the separation of powers, and enforce the laws passed by this body. If they fail to do, they should no longer hold office. If we're all being honest here, we all intuitively understand this.

When an executive branch official rejects -- unilaterally replaces -- the laws passed by this Congress, we have to act, and last night, we did. I want to thank Speaker Johnson for his support, his leadership; the entire leadership's team for their support over the months for my committee; and I want to thank the members of the Committee of Homeland Security and our staff, who has done a fantastic job. They, and this Congress – this Republican Congress – have worked to hold this lawless secretary accountable. It's now time for the Senate to do it's duty: to step up, hold a trial, and convict Secretary Mayorkas.

Rep. Tom Emmer (R-MN)

- The American people elected our House Republican majority to undo the damage the Democrats have done and to hold the Biden administration accountable. Thanks to our members and the diligent work of Chairman Green and his Homeland Security Committee, we are once again living up to that mandate this week. Under Secretary Mayorkas' leadership, Americans have experienced the worst border crisis we've ever seen, and yesterday, House Republicans said "enough." We did not take our impeachment vote lightly. It was the product of a very thoughtful, fair, and deliberate investigation lasting nearly a year. The evidence was clear, as you've heard the Chairman say this morning. Secretary Mayorkas willfully refused to enforce federal law, repeatedly lied to Congress, and breached the American people's trust. Because he failed to do the honorable thing by resigning, House Republicans fulfilled our Constitutional duty by voting to impeach. I can only hope my colleagues in the Senate will step up and do the same on behalf of the American people.
- At the end of last week, we also all read what was a very alarming report about President Joe Biden. You heard Dr. Jackson, our colleague from Texas, talk about this this morning. Not only did it conclude that he, "willfully retained and disclosed classified materials," it also did not recommend criminal charges because his memory has such "significant limitations." There were two takeaways from the Special Counsel's report. A man unfit to be held responsible for mishandling classified information has zero business occupying the Oval Office. And it exposed the two-tier justice system that indicted one president with politically motivated charges, while carrying water for another over similar allegations. House Republicans will ensure Americans get answers they deserve on both of these issues.

Rep. Scalise (R-LA):

- We brought back up the impeachment of Secretary Mayorkas. I want to thank Blake Moore for giving us the opportunity to reconsider the vote, and his procedurally making sure we had that opportunity so that we could send a statement once again that we, this House Republican majority, care about border security, in a town where everybody should be concerned about what is one of the biggest crises facing our country: the fact that we've had millions of people come across our border illegally, including people on the terrorist watch list, drug dealers from Mexico – the cartels having operational control of our southern border, *our* Southern border – to the point where they're killing 150 young people in America every single day. That should matter to everybody, especially the President of the United States and especially the Secretary of Homeland Security, who as Chairman Green's committee did a methodical job of pointing out over months and months of building this case, that this Secretary has failed to do his job. He's let down the American people, and the American people want a secure border. And the people have asked, you know, what's the point of impeaching the Secretary if the Senate is just gonna discard it? I don't know what the Senate's gonna do. I gave up predicting what the Senate might do, but I will tell you this: if the Senate just discards this like they do so many other important issues, like HR2 that we sent over six months ago, where we came together as a Republican majority and passed the toughest border security package that we've ever seen come out of Congress, at least since the 1980s, and the Senate won't even take that bill up. The Senate can't even pass their own bill. And if they ignore this and just throw it in the trash can without taking it as seriously as the American people do, then there will be accountability and consequences to that action. So it's on the Senate. They have to do their job, but the good news is, this House Republican majority – as razor thin as it is – once again did our job. We are gonna fight to secure the border. We've got a Speaker who continues to call on President Biden -- and I'm sure he's gonna talk about this -- to just sit down and meet to talk about this major crisis. You know, the President care about all these other major things going on around the world, as we do, too, but if you don't care about one of the biggest crises facing our country, to the point where the President won't even sit down with the Speaker of the House to talk about ways to solve this problem, when we've laid out a number of different options – not just laid them out, we passed them, which is not easy to do. We're gonna take this seriously, as we have for months and months, and continue to focus on those needs of the American people, even if this President and his administration refuses to.

Sophie Ulin
Press Assistant, Office of Public Affairs
U.S. Department of Justice
(m) (b) (6)
(b) (6)

From: "Hinojosa, Xochitl (PAO)" (b) (6)
To: "Klapper, Matthew B. (OAG)" (b) (6)
Subject: FW: Reuters - Hur follow up
Date: Fri, 09 Feb 2024 16:32:17 -0500
Importance: Normal

From: Goudsward, Andrew (Reuters) <Andrew.Goudsward@thomsonreuters.com>
Sent: Friday, February 9, 2024 4:27 PM
To: Hinojosa, Xochitl (PAO) (b) (6) ; Iverson, Dena (PAO) (b) (6)
Cc: Sullivan, Andy R. (Reuters) <andy.sullivan@thomsonreuters.com>
Subject: [EXTERNAL] Reuters - Hur follow up

Hi Xochitl and Dena,

I hope you're doing well. We're working on a story following up on Special Counsel Hur's report about Attorney General Garland's handling of the report and some of the criticisms that have been leveled by the White House and others about characterizations in the report about President Biden's age and memory. As you have noted, the Attorney General released the report to the public and Congress without redactions. His approach stands in contrast to his predecessor Attorney General Barr's handling of the Mueller report and other matters with political implications.

We wanted to ask the following questions:

- Why did the Attorney General believe a public report was important in this circumstance?
- Were there any internal debates about the release Special Counsel Hur's report and if so what can you say about them?
- The White House and President Biden's lawyers have criticized the descriptions of President Biden's memory and mental acuity as "gratuitous and inappropriate." What is your response? Did those comments violate DOJ guidelines? Were they appropriate for a prosecutor to make?
- Is the Department concerned about the White House's comments impacting public trust in the Department?
- The Department normally does not discuss individuals who aren't charged with crimes, but special counsel regulations allow for a public report in those circumstances. Why are special counsels allowed to publicly discuss certain topics in ways that would normally violate Justice Department practice?
- Does the Attorney General at all regret appointing special counsels related to President Biden's classified documents and conduct by his son Hunter? Has it been difficult for the Attorney General to balance restoring the political independence and norms of the Department with his service to the president?

Please let me know if you have any questions and happy to engage with all further. We're looking to publish this story on Monday.

Thank you,
Andrew

. . . . . .

Andrew Goudsward
Washington Legal Reporter (Level 1 Journalist)

Thomson Reuters

Work Mobile: (b) (6)
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From: "Dulaney, Emma (PAO)" (b) (6)
To: "Hinojosa, Xochitl (PAO)" <(b) (6)>, "Klapper, Matthew B. (OAG)" (b) (6)>, "Iverson, Dena (PAO)" (b) (6)
Subject: RE: CBS NEWS Inquiry: 25th Amendment
Date: Tue, 09 Jul 2024 16:03:52 -0400
Importance: Normal

I think the AG's House Appropriations testimony is the strongest of his comments: *"Look, I'm start by thanking you for recognizing that I can't comment and won't comment about the Special Counsel's report at all. But if you're asking me about my own observations as a member of the National Security Council and a member of the President's cabinet, I have complete confidence in the President. I have watched him expertly guide meetings of staff and cabinet members on issues of foreign affairs and military strategy and policy in an incredibly complex world, in which we now face, and in which he has been decisive in instructions to the staff and decisive in making the decisions necessary to protect the country. Likewise, with respect to domestic policy discussions, these are intricate, complicated questions that he has guided all of us through in order to reach results that are helpful and important and beneficial to the American people. I could not have more confidence in the President."*

From: Hinojosa, Xochitl (PAO) (b) (6)
Sent: Tuesday, July 9, 2024 2:33 PM
To: Klapper, Matthew B. (OAG) (b) (6)>; Iverson, Dena (PAO) <(b) (6)>; Dulaney, Emma (PAO) <(b) (6)>
Subject: FW: CBS NEWS Inquiry: 25th Amendment

I think we should say (b) (5) and point them to the AG's previous comments on working with the president.

From: Jiang, Weijia <jiangw@cbsnews.com>
Sent: Tuesday, July 9, 2024 2:16 PM
To: Hinojosa, Xochitl (PAO) <(b) (6)
Cc: @Wash Booth <WashBooth@cbs.mail.onmicrosoft.com>
Subject: [EXTERNAL] CBS NEWS Inquiry: 25th Amendment

Good afternoon Xochitl,

Today, House Speaker Johnson said, "There's a time to every purpose under heaven; desperate times call for desperate measures. **I think the 25th Amendment is appropriate here."**

Given recent concerns about the president's debate performance and demeanor in public and private, and given that there is increased talk about whether the vice president and Cabinet secretaries should make use of the 25th Amendment, CBS News wants to know:

Has Attorney General Garland noticed a decline in the president's mental acuity or behavior in the past year?

Has the AG ever witnessed an episode like the one we saw during the debate, in which the President freezes up and loses his train of thought?

Has the AG ever proposed invoking the 25th Amendment to remove the president from office, or has he been a part of a conversation discussing the possibility?

Is the AG aware of any other Cabinet members suggesting such steps be taken?

We are hoping for an answer as soon as possible.

Many thanks in advance,

Weijia Jiang
CBS News Senior White House Correspondent
WHCA Vice President
(b) (6)
@weijia

From: "Weinsheimer, Bradley (ODAG)" [redacted]
To: "Klapper, Matthew B. (OAG)" [redacted], "Atkinson, Lawrence (ODAG)" [redacted]
Cc: "Miller, Marshall (ODAG)" [redacted]
Subject: RE: Call from Ed
Date: Tue, 06 Feb 2024 18:05:22 -0500
Importance: Normal

SC Hur's report is appropriate for delivery to Congressional Committees and public release as written. The issues raised by White House Counsel previously have been considered and are without merit. Rush Atkinson, Peter Winn, and I all reviewed the report and concluded the language contained in the report is consistent with Department policy and the law. Separately, Peter has prepared a memo for the Attorney General discussing the Privacy Act, FOIA principles, and the application of 28 CFR 50.2 (involving the release of information in a criminal case). For the reasons set forth in Peter's memo, the SC Hur report is appropriate for public release.

The language White House Counsel has highlighted relates to the President's memory and a comment the President made calling former President Trump's possession of classified material "totally irresponsible," and the saying the same could be said of President Biden's possession of classified information. All of these references are in the report in a context which explain SC Hur's declination decision. They are neither gratuitous nor unduly prejudicial because they are not offered to criticize or demean the President; rather, they are offered to explain SC Hur's conclusions about the President's knowledge of and willfulness (or lack of willfulness) in possessing and retaining classified or national defense information.

Justice Manul Section 9-27.760, which provides limitations on identifying uncharged parties, requires prosecutors to be sensitive to statements about uncharged parties. And other provisions, like 28 CFR Section 50.2 and Justice Manual Section 1-77.000 et. seq. impose standards for what the Department may permissibly say. None of those provisions are violated by the language used in the report. Indeed, Section 9-27-760 specifically provides that when considering approval to make a statement about uncharged individuals, deciding officials should consider not only the privacy of the individual but also whether public disclosure may advance a significant law enforcement interest, including upholding the integrity of the investigation. An additional factor is whether the public has a significant need to know the information.

SC Hur's report provides significant detail on the basis of his declination decisions. This includes factors that allowed SC Hur to decide whether the President knew he possessed classified information and whether he acted willfully in possessing and retaining it. The language to which White House Counsel objects goes directly to these issues.

For these reasons, inclusion of the language in the report and the report itself falls well within the Department's standards for public release. The report relates to whether the President, as a private citizen, mishandled classified information in violation of criminal laws. This sits near the apex of public interest. For that reason, releasing the report, including the language described above, does not constitute an unwarranted invasion of personal privacy and is entirely consistent with Department policies and practice.

White House Counsel's reference to then-FBI Director Comey's statement concerning the FBI's charging recommendation relating to Secretary Clinton's use of a private server, and the resulting OIG report, is inapt. Then Director Comey was not a Special Counsel or Department official charged or approved to announce a declination decision. His explanation was incomplete and did not carefully assess and apply all of the facts to the applicable law in announcing his the FBI's charging recommendation. His reference to Secretary Clinton being extremely careless explicitly was a comment on her uncharged conduct -- it was not a comment offered in explanation of the evidence and its application to the law. For these reasons, the OIG concluded Director Comey acted outside of his authority and in violation of Department policy. In contrast, SC Hur is specifically charged

by the Special Counsel regulations and his appointment order with making charging decisions. He then is required to furnish a report to the Attorney General explaining those decisions. That is what his report does. And as explained above, public release is appropriate. Accordingly there is no violation of Department policy or practice.

Thanks, Brad.

Brad Weinsheimer
Associate Deputy Attorney General
Department of Justice
950 Pennsylvania Ave., NW, Rm. 4113
Washington, DC 20530
(b) (6)
(b) (6)

-----Original Message-----
From: Klapper, Matthew B. (OAG) (b) (6)
Sent: Tuesday, February 6, 2024 1:31 PM
To: Atkinson, Lawrence (ODAG) (b) (6) >; Weinsheimer, Bradley (ODAG) (b) (6)
Cc: Miller, Marshall (ODAG) (b) (6)
Subject: RE: Call from Ed

Ed called again. I missed it and called him back. Rush was present and heard my side of the conversation. Ed again asked if their concerns in points one and two of their letter were addressed by SC Hur following the WHCO/personal counsel's letter submission. I told them I had not personally made it to that point in the report, but even if I had I wouldn't be able to share that information with him prior to transmission of the report to Congress. I told him that if SC Hur felt it appropriate to share that information he could, as it was part of the process of exchange of information between the SCO and WHCO/personal counsel that they had been engaging in.

Ed reiterated that they felt the inclusion of the language they point to in their letter is a violation of department policy and if it's no longer in the report it's not an issue, but that they may need to appeal to the AG if it is still included. I reiterated that I was not in a position to share the contents of the final report. I also told him that the AG is well-versed in the rules and norms of the Department and that he has both the report and their letter to the SCO.

-----Original Message-----
From: Klapper, Matthew B. (OAG)
Sent: Tuesday, February 6, 2024 10:07 AM
To: Atkinson, Lawrence (ODAG) (b) (6) ; Weinsheimer, Bradley (ODAG) (b) (6)
Cc: Miller, Marshall (ODAG) (b) (6)
Subject: Call from Ed

I just got another call from Ed. Marshall heard my end of the call. Ed asked me to confirm that SC Hur transmitted the report to the AG and that he also transmitted to the AG WHCO/personal counsel's letter to SC Hur. I confirmed both. He pointed to items one and two in their letter and said that if they weren't changed by SC Hur prior to the submission of the report they would assert that these issues rise to the standard of review set by part 600. I explained that the AG has said he would treat SC reports as final upon submission to him, and the reasons for that. I also explained that SC Hur had not only afforded WHCO/President's personal counsel an

opportunity to raise issues like this to him for consideration, but that their letter affords them a vehicle for a contemporaneous opportunity to make their arguments, which they have done. The AG has yet to review the report in full so I did not completely shut down the prospect of the AG exercising his part 600 authorities, but I left Ed with the impression that I thought it would be highly unlikely. I took the opportunity to ask about the executive privilege review timeline and he told me that 5pm is still their goal but hedged, just as he did yesterday.

Sent from my iPhone

From: "Haddad, Soraya (OLA)" (b) (6)
To: Undisclosed recipients:;
Subject: OLA Correspondence 2/12/24
Date: Mon, 12 Feb 2024 18:57:34 -0500
Importance: Normal
Attachments: 2024-02-12-IN-OLA-Comer,_Jordan,_Smith-_POTUS_document_request.pdf; 2024-02-12-IN-OLA-Durbin-_DOJ_and_FDA_E-Cig_Enforcement_Briefing.pdf; 2024-02-12-IN-OLA-_Murkowski_-_VAWA_Funding_.pdf; 2024.02.12-OUT-Connolly-FITARA.pdf; 2024.02.12-OUT-Strickland-Racial_Disparity-ECATS-2023-183925.pdf; 2024.02.12-OUT-Gooden-Covenant_School_Shooting.pdf; 2024.02.12-OUT-Durbin-Postal_Service_Letter_Carriers.pdf

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Good evening,

Please find today's incoming and priority outgoing correspondence attached and summarized below.

Incoming:

1. **Letter from the House Committee on Oversight and Accountability Chairman James Comer, House Committee on the Judiciary Chairman Jim Jordan, and House Committee on Ways and Means Chairman Jason Smith to the Attorney General** requesting information to conduct an oversight investigation of whether sufficient grounds exist to draft articles of impeachment against President Biden for consideration by the full House; requesting answers no later than Monday, February 19, 2024.
2. **Letter from Senate Judiciary Committee Chairman Richard Durbin to Civil Division Principal Deputy Assistant Attorney General Brian Boynton and U.S. Food and Drug Administration (FDA) Center for Tobacco Products Director Brian King** regarding the Chairman's March 16, 2023, letter to the Attorney General and FDA Commissioner Robert Califf highlighting concerns about the interagency collaboration, stating it has resulted in ineffective enforcement of the *Tobacco Control Act,* further stating the Department and FDA's April 19, 2023, response was insufficient and requesting an in-person briefing no later than Friday, March 22, 2024.
3. **Letter from Senator Lisa Murkowski to the Attorney General** urging the Administration to include funding to implement Title VIII of the Violence Against Women Act of 2022, specifically Subtitle B, the Alaska Tribal Public Safety Empowerment pilot program, in the Department of Justice's Fiscal Year 2025 budget proposal.

Outgoing:

1. **Letter to Representative Gerald Connolly** responding to the Representative's August 16, 2023, letter regarding the Federal Information Technology Acquisition Reform Act Scorecard, the Modernization Government Technology Act Working Capital Fund, the Department's Chief Information Officer's reporting structure and authority, and the Department's data center and cloud computing capabilities.
2. **Letter to Representative Marilyn Strickland** responding to the Representative's March 12, 2023, letter regarding concerns about racial disparities in Washington State's contracting and procurement practices.
3. **Letter to Representatives Lance Gooden and Andy Ogles** responding to the Members' March 29, 2023, letter regarding the tragic shooting at the Covenant School in Nashville, Tennessee.
4. **Letter to Senator Richard Durbin** responding to the Senator's August 8, 2023, letter inquiring about actions the Department has taken to address violence against U.S. Postal Service letter carriers.

Best,

Soraya Haddad
Office of Legislative Affairs
U.S. Department of Justice

Congress of the United States

Washington, DC 20515

February 12, 2024

The Honorable Merrick Garland
Attorney General
Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Dear Attorney General Garland:

The Committee on Oversight and Accountability (the Oversight Committee), the Committee on the Judiciary, and the Committee on Ways and Means (collectively, the Committees) are investigating whether sufficient grounds exist to draft articles of impeachment against President Biden for consideration by the full House.[1] Since the beginning of the 118th Congress—and, subsequently, in furtherance of the impeachment inquiry as detailed in a memorandum released by the three Committees[2]—the Oversight Committee has investigated President Biden's mishandling of classified materials. To date, the Department of Justice (the Department) has rebuffed the Oversight Committee's requests for information under the justification of "protect[ing] the integrity of Special Counsel Hur's ongoing investigation[.]"[3] Mr. Hur's investigation—which included an interview with President Biden—has now concluded.[4] For our investigatory purposes, the Committees require certain records relating to Mr. Hur's investigation and report.

On October 16, 2023, the Oversight Committee wrote to Special Counsel Robert Hur requesting information related to its investigation.[5] The Oversight Committee has sought information regarding President Biden's mishandling of classified information in relation to its ongoing investigation into his participation in his family's international business dealings in, among other places, China and Ukraine.[6] As detailed in Mr. Hur's report, classified materials

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[1] *See* H. Res. 918, 118th Cong. (2023); Memorandum from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, & Hon. Jason Smith, Chairman, H. Comm. on Ways & Means, to H. Comm. on Oversight & Accountability, H. Comm. on the Judiciary, & H. Comm. on Ways & Means. Re: Impeachment Inquiry (Sept. 27, 2023) [hereinafter Impeachment Inquiry Memorandum].
[2] *See* Impeachment Inquiry Memorandum.
[3] Letter from Carlos Felipe Uriarte, Assistant Atty. Gen., U.S. Dep't of Just., to Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability (Oct. 31, 2023).
[4] Report of the Special Counsel on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr. (Feb. 5, 2024) [hereinafter Hur Report].
[5] Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Special Counsel Robert Hur, U.S. Dep't of Just. – Special Counsel's Office (Oct. 16, 2023).
[6] *See, e.g.*, Memorandum (Mar. 16, 2023), H. Comm. on Oversight & Accountability. From Maj. Comm. staff to Comm. Members. Re: New Evidence Resulting from the Oversight Committee's Investigation into the Biden Family's Influence Peddling and Business Schemes; Memorandum (May 10, 2023), H. Comm. on Oversight & Accountability. From Maj. Comm. staff to Comm. Members. Re: Second Bank Records Memorandum from the Oversight Committee's Investigation into the Biden Family's Influence Peddling and Business Schemes; Memorandum (Aug. 9, 2023), H. Comm. on Oversight & Accountability. From Maj. Comm. staff to Comm.

found at both President Biden's residence in Wilmington, Delaware and the Penn Biden Center for Diplomacy and Global Engagement include documents related to China and Ukraine.[7] On October 31, 2023, the Department responded to the Oversight Committee with a letter emphasizing it would not produce the requested information "to avoid even the appearance of undue political influence over law enforcement decisions" in relation to Mr. Hur's then-ongoing investigation.[8]

On February 8, 2024—the day Mr. Hur's report was made public—President Biden held a press conference in which he delivered remarks and answered questions from reporters.[9] The President stated, "I've seen the headlines since the report was released about my willful retention of documents. These assertions are not only misleading, they're just plain wrong."[10] In response to a question regarding sharing classified information with his ghostwriter, Mark Zwonitzer—a fact documented in Mr. Hur's report—the President claimed, "I did not share classified information, I did not share it."[11] This assertion appears to be false. Thus, mere hours after the release of Mr. Hur's report, the President appears to have inaccurately contradicted key facts about its contents.

Throughout Mr. Hur's report, there is reference to a transcript of an interview conducted with President Biden on October 8 and October 9, 2023.[12] The Committees require this transcript and any other records of this interview, including, but not limited to, any recordings, notes, or summaries of the interview.

As explained to Mr. Hur in October, there is concern that President Biden may have retained sensitive documents related to specific countries involving his family's foreign business dealings. Further, we seek to understand whether the White House or President Biden's personal attorneys placed any limitations or scoping restrictions during the interview that would have precluded a line of inquiry regarding evidence (emails, text messages, or witness statements) directly linking the President to troublesome foreign payments.[13]

Additionally, the Committee on the Judiciary requires these documents for its ongoing oversight of the Department's commitment to impartial justice and its handling of the investigation and prosecution of President Biden's presumptive opponent, Donald J. Trump, in

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Members. Re: Third Bank Records Memorandum from the Oversight Committee's Investigation into the Biden Family's Influence Peddling and Business Schemes; Memorandum (Nov. 1, 2023), H. Comm. on Oversight & Accountability. From Maj. Comm. staff to Comm. Members. Re: Fourth Bank Records Memorandum from the Oversight Committee's Investigation into the Biden Family's Influence Peddling and Business Schemes.

[7] *See* Hur Report at Appendix A.

[8] *Supra*, n.3.

[9] White House, *President Biden delivers remarks at the White House*, YOUTUBE (Feb. 8, 2024), https://www.youtube.com/watch?v=hSckeFQ3zsA.

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, Hur Report at 52, n.180; 1109, n.460.

[13] Notably, text messages, email communications, and witness testimony are all admissible evidence during hearings and trials pursuant to the Federal Rules of Evidence.

the November 2024 presidential election.[14] Despite clear evidence the President willfully retained and transmitted classified materials willfully, Mr. Hur recommended "that no criminal charges are warranted in this matter."[15]Although Mr. Hur reasoned that President Biden's presentation "as a sympathetic, well-meaning, elderly man with a poor memory" who "did not remember when he was vice president" or "when his son Beau died" posed challenges to proving the President's guilt beyond a reasonable doubt, the report concluded that the Department's principles of prosecution weighed against prosecution because the Department has not prosecuted "a former president or vice president for mishandling classified documents from his own administration."[16] The one "exception" to the Department's principles of prosecution, as Mr. Hur noted, "is former President Trump."[17] This speaks volumes about the Department's commitment to evenhanded justice.[18]

In light of Mr. Hur's completion of his investigation, the Committees require material in the possession of the Department. Accordingly, please produce the following information:

1. All documents and communications, including audio and video recordings, related to the Special Counsel's interview of President Biden;

2. All documents and communications, including audio and video recordings, related to the Special Counsel's interview of Mark Zwonitzer;

3. The documents identified as "A9" and "A10" in Appendix A of Mr. Hur's report, which relate to President Biden's December 11, 2015 call with then-Ukrainian Prime Minister Arseniy Yatsenyuk; and

4. All communications between or among representatives of the Department of Justice, including the Office of the Special Counsel, the Executive Office of the President, and President Biden's personal counsel referring or relating to Mr. Hur's report.

Please produce this information as soon as possible, but no later than 5:00 p.m. on February 19, 2024. Given the seriousness of these matters, the Committees are prepared to compel the production of this material if necessary.

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[14] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Hon. Merrick B. Garland, Atty Gen., U.S. Dep't of Just. (June 1, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Hon. Merrick B. Garland, Atty Gen., U.S. Dep't of Just. (June 6, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Jack Smith, Special Couns., U.S. Dep't of Just. (Sept. 7, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Jack Smith, Special Couns., U.S. Dep't of Just. (Dec. 21, 2023).
[15] Hur Report at 1.
[16] *Id.* at 6, 208, 250.
[17] *Id.* at 250.
[18] *Cf.* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1086-1087 (1997) ("First, using the power of prosecution against particular disfavored [persons] creates or reinforces destructive divisions within society . . . . Second, improper selective prosecution undermines the authority, integrity, and stature of the justice system . . . . When justice is not even-handed or not perceived as even-handed, the integrity of the justice system is undermined, and confidence in its effectiveness dwindles.").

Thank you for your cooperation with the impeachment inquiry.

Sincerely,

James Comer
Chairman
Committee on Oversight and Accountability

Jim Jordan
Chairman
Committee on the Judiciary

Jason Smith
Chairman
Committee on Ways and Means

cc: The Honorable Jamie B. Raskin, Ranking Member
Committee on Oversight and Accountability

The Honorable Jerrold Nadler, Ranking Member
Committee on the Judiciary

The Honorable Richard E. Neal, Ranking Member
Committee on Ways and Means

From: "Berger, Christine (OAG)" (b) (6)
To: "Klapper, Matthew B. (OAG)" (b) (6)
Subject: Fwd: Biden Audio Recording FOIA -- Government MSJ Opposition & Reply (filing deadline July 18)
Date: Sun, 14 Jul 2024 16:53:33 -0400
Importance: Normal
Attachments: Gov't_Response_&_Reply,_Judicial_Watch_v_DOJ_(24-700),_v4.1.docx; 034-1_--_Def._Mem._ISO_MSJ.pdf; 034-2_--_Weinsheimer_Decl..pdf; 035_--_Judicial_Watch_Mem._in_Opp'n_to_Gov't_MSJ.pdf; 037-1_--_Press_Coalition_Mem._in_Opp'n_to_Gov't_MSJ.pdf; 039_--_Heritage_Mem._ISO_Cross-MSJ_&_Opp'n_to_Gov't_MSJ.pdf; 040-3_--_Mukasey_Decl..pdf

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From: Qian, Michael (OAG) (b) (6)
Sent: Sunday, July 14, 2024 4:51:17 PM
To: Berger, Christine (OAG) (b) (6)
Subject: Fwd: Biden Audio Recording FOIA -- Government MSJ Opposition & Reply (filing deadline July 18)

FYSA

From: Abbuhl, Joshua (CIV) (b) (6)
Sent: Sunday, July 14, 2024 4:25 PM
To: Benson, Adrienne (ODAG) (b) (6); Evers, Austin (ODAG) (b) (6); Weinsheimer, Bradley (ODAG) (b) (6); Qian, Michael (OAG) (b) (6); Kneedler, Edwin S (OSG) (b) (6); Fletcher, Brian H. (OSG) (b) (6); Wolfson, Paul (OASG) (b) (6); Reich, Mitchell (OASG) (b) (6); Moxley Beatty, Lauren (OASG) (b) (6); Greene, Jamal (OLC) (b) (6); Metzger, Gillian E. (OLC) (b) (6); Freeman, Mark (CIV) (b) (6); Sandberg, Jeffrey E. (CIV) (b) (6); Sinzdak, Gerard J (CIV) (b) (6); Smith, James M. (OIP) (b) (6); Brinkmann, Vanessa R (OIP) (b) (6) >
Cc: Boynton, Brian M. (CIV) (b) (6); Netter, Brian (CIV) (b) (6); Griffiths, John (CIV) (b) (6); Shapiro, Elizabeth (CIV) (b) (6); Berman, Marcia (CIV) (b) (6); McAbee, Scott (CIV) (b) (6)
Subject: Biden Audio Recording FOIA -- Government MSJ Opposition & Reply (filing deadline July 18)

All,

Please see attached a draft of our combined opposition and reply MSJ brief in the consolidated FOIA cases seeking the Biden audio recording (*Judicial Watch v. DOJ*, D.D.C. 24-700). I have also attached our previous brief and declaration, Plaintiffs' briefing, and a declaration from former AG Mukasey that Heritage attached to its motion. The brief is due on Thursday (7/18). Thank you all for your review.

Josh

Joshua C. Abbuhl
Trial Attorney
United States Department of Justice

Civil Division – Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(b) (6) | (b) (6)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HERITAGE FOUNDATION, *et al.* Plaintiffs, v. **U.S. DEPARTMENT OF JUSTICE,** Defendant.	
JUDICIAL WATCH, INC., Plaintiff, v. **U.S. DEPARTMENT OF JUSTICE,** Defendant.	Case No. 1:24-cv-700 (TJK) (Consolidated Cases)
CABLE NEWS NETWORK, INC., *et al.*, Plaintiff, v. **U.S. DEPARTMENT OF JUSTICE,** Defendant.	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Oral Argument Requested)

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INTRODUCTION

This is a simple case despite the efforts of the Government to complicate it. Plaintiffs—along with thirteen media co-plaintiffs—are entitled to the audio recordings of President Joseph R. Biden's interviews with Special Counsel Robert K. Hur, especially after the White House voluntarily released an incomplete transcript of the same interview that affirmatively did not contain transcribable indicia of demeanor. While the transcript discloses spoken *words* (the "lexical" portion of the interview), the audio recording is the only source of the "non-lexical" portion that depicts the tone, tenor, cadence, pauses, hesitations, and other demeanor evidence of the interview. As any junior trial lawyer can attest, a witness's live recording speaks volumes more than a cold transcript of the same testimony. Special Counsel Hur testified to Congress that he relied upon this "demeanor" evidence to reach his controversial decision to recommend against criminal charges. President Biden was not charged, in important part because, in Special Counsel Hur's seasoned prosecutorial judgment, the President's "diminished faculties and faulty memory" would cause a jury to see the President as "a sympathetic well-meaning elderly man with a poor memory." *Report of the Special Counsel on the Investigation into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr*. at 248, 6 (Feb. 2024) (ECF No. 1-5, No. 24-cv-960) ("Hur Report" or "Report"). It is beyond dispute that both Special Counsel Hur's decision—and the demeanor of President Biden—are subjects of great, intense public debate. So too is President Biden's current and future fitness for Office.

Unsurprisingly, the Government is desperate to hide these audio recordings from the American public, and it asserts numerous breath-takingly broad arguments to do so. But the Freedom of Information Act ("FOIA") permits no exemption to withhold information simply because it may be politically embarrassing. And the Government's arguments are squarely foreclosed by well-established law.

The Government's lead argument attempts to manufacture a new constitutional "executive privilege" based upon supposed law enforcement concerns. But the problems here are multiple, beginning with the fact that the argument is foreclosed by binding D.C. Circuit precedent. Further, the argument is preempted by the statutory framework of FOIA itself. Finally, the merits of the argument—the Government's parade of horribles that unknown future witnesses will shy away from audibly recorded voluntary interviews—falls apart under its own weight, as demonstrated in part by the Declaration of the Honorable Michael B. Mukasey, who served as the 81st Attorney General of the United States.

The Government asserts FOIA Exemption 7(A) for material that will supposedly impact pending law enforcement investigations, but then wildly expands the exemption. The fatal problem for the Government, however, is obvious—there is *no pending (or future) investigation* that can be impacted. The Hur Investigation has ended with no criminal charges. The Special Counsel's Office has been shut down. Special Counsel Hur has resigned from government service. Other than a throw-away line about potential future investigations—unnamed, undefined, and unaccounted—the Government offers no evidence of a future, *concrete* investigation impacted by release. Such a failure of proof is fatal to the Government's argument under controlling D.C. Circuit precedent. The Government's argument to the contrary sweeps so broadly that it would do violence to FOIA, and it lacks any limiting principle.

The Government's last-ditch argument relies upon FOIA Exemption 7(C) to claim that President Biden's privacy will be invaded by the audio release. This argument is eyebrow-raising in the extreme. For better or for worse, the President of the United States has little privacy, certainly less than the normal citizen. Moreover, the public already knows that President Biden was the subject of the Special Counsel Investigation. After all, President Biden's Justice Department appointed Special Counsel Hur, and the White House publicly advertised its involvement with the investigation. This alone is enough to defeat the Government's privacy argument. But the coup de grace comes from President Biden's own, voluntary decision to publicly release an incomplete transcript of the same interview. The President's voluntary political

decision to release the full substance of the words spoken during the interview wipes out the Government's remaining theoretical and hypothetical privacy arguments. At the same time, the public interest in resolving the burning controversy over the Hur Report, flamed by the White House itself, is overwhelming. So too is the interest in providing the electorate information about the salient electoral issue of President Biden's fitness for Office *before* the 2024 General Election.

Despite the Government's voluminous briefing, fanciful arguments, and noteworthy attempts to invent new legal authority, this remains a simple case. FOIA requires release of the audio recording of President Biden's interview with the Special Counsel. The Special Counsel's investigation is over. There is no evidence of concrete, pending or reasonably anticipated investigations to be impacted. Future witness cooperation will not be chilled. The President's privacy will not be invaded. And the President already released a transcript of the same interview. Now, the American people should be able to hear the words of their President—and come to their own conclusions about this raging national debate. This is the very reason for the existence of the Freedom of Information Act in the first place.

FACTUAL BACKGROUND

On February 5, 2024, the Department of Justice released the Hur Report. The Hur Report prompted immediate reactions from the White House, Congress, and the media for its conclusion that any prosecution of President Biden was unlikely to succeed in significant part because his defense would portray him to a jury as he presented to Special Counsel Hur—as "a sympathetic well-meaning elderly man with a poor memory." Hur Report at 5, 6, 207, 207, 219, 242, 247–48. This conclusion was central to the Special Counsel's decision not to prosecute President Biden—the Special Counsel believed the President's memory was a significant factor in concluding a prosecution would not be successful. *See* Hur Report at 5, 6, 207, 219, 242, 247–48.

Special Counsel Hur maintained this position despite withering criticism from President Biden, his Administration, Administration proxies, Congressional Democrats, and certain

members of the media. Special Counsel Hur's own words before the House Committee on the Judiciary ("Judiciary Committee") speak volumes:

> There has been a lot of attention paid to language in the report about the President's memory, so let me say a few words about that. My task was to determine whether the President retained or disclosed national defense information willfully. That means knowingly and with the intent to do something the law forbids. I could not make that determination without assessing the President's state of mind. For that reason, I had to consider the President's memory and overall mental state and how a jury likely would perceive his memory and mental state in a criminal trial. These are the types of issues that prosecutors analyze every day and because these issues were important to my ultimate decision, I had to include a discussion of them in my report to the Attorney General.
>
> The evidence and the President himself put his memory squarely at issue. We interviewed the President and asked him about his recorded statement "I just found all the classified stuff downstairs." He told us that he didn't remember saying that to his ghostwriter. He also said he didn't remember finding any classified material in his home after his Vice Presidency. He didn't remember anything about how classified documents about Afghanistan made their way into his garage.
>
> My assessment in the report about the relevance of the President's memory was necessary, accurate, and fair. Most importantly, what I wrote is what I believe the evidence shows and what I expect jurors would perceive and believe. I did not sanitize my explanation, nor did I disparage the President unfairly. I explained to the Attorney General my decision and the reasons for it. That is what I was required to do.

Second Declaration of Eric Neal Cornett (June 21, 2024) ("2d Cornett Decl.") at Ex. 1 ("Hur Hearing") at 8; *see also* Hur Report at 17, 38, 50, 65, 72.

1. The Hur Report is clear that despite its conclusion to decline prosecution, there is evidence that the President willfully retained and disclosed classified information. *See*, *e.g.* Hur Report at 1 ("Our investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen."); *id*. at 6–7 ("FBI agents recovered from unlocked drawers in the office and basement den of Mr. Biden's Delaware home a set of notebooks he used as vice president. Evidence shows that he knew the notebooks contained classified information."). Under immense criticism from the President himself on down, Special Counsel Hur stood by his conclusion in his testimony before the

Judiciary Committee that if the President was charged, there was sufficient evidence to send the case to the jury:

> Mr. HUR. As I said in the report, some reasonable jurors may have reached the inferences that the government would present in its case-in-chief.
> Mr. KILEY. So, a reasonable juror could have voted to convict, based on the facts that you—
> Mr. HUR. Correct.

Hur Hearing at 68.

2. Special Counsel Hur made clear he did not recommend charging President Biden because of, among other factors, his analysis of how the case would be viewed by a jury. Critical to Hur's analyses and conclusions was the issue of President Biden's "diminished faculties and faulty memory." Hur Report at 248. In his seasoned prosecutorial judgment, the Special Counsel felt those diminished faculties would cause a jury to see the President as "a sympathetic well-meaning elderly man with a poor memory." Hur Report at 6. The Report is replete with similar references:

- "Mr. Biden's memory was significantly limited both during his recorded interviews with the ghostwriter [Zwonitzer] in 2017, and in his interview with our office in 2023." Hur Report at 5.

- "Mr. Biden's memory also appeared to have significant limitations—both at the time he spoke to Zwonitzer in 2017, as evidenced by their recorded conversations, and today, as evidenced by his recorded interview with our office. Mr. Biden's recorded conversations with Zwonitzer from 2017 are often painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries." Hur Report at 207.

- "In his interview with our office, Mr. Biden's memory was worse. He did not remember when he was vice president, forgetting on the first day of the interview when his term ended ('if it was 2013—when did I stop being Vice President?'), and forgetting on the second day of the interview when his term began ('in 2009, am I still Vice President?'). He did not remember, even within several years, when his son Beau died. And his memory appeared hazy when describing the Afghanistan debate that was once so important to him." Hur Report at 208.

- "[A]s discussed to some extent above, Mr. Biden will likely present himself to the jury, as he did during his interview with our office, as a sympathetic, well-meaning, elderly man with a poor memory." Hur Report at 219.

- "We also believe some of the same evidence that supports reasonable doubt for the classified Afghanistan documents also supports reasonable doubt for the notebooks, including Mr. Biden's cooperation with the investigation, his diminished faculties in advancing age, and his sympathetic demeanor." Hur Report at 242.

- "For these jurors, Mr. Biden's apparent lapses and failures in February and April 2017 will likely appear consistent with the diminished faculties and faulty memory he showed in Zwonitzer's interview recordings and in our interview of him." Hur Report at 247–248.

3. The Special Counsel repeatedly explained to the Judiciary Committee that all available demeanor evidence informed his conclusions about President Biden's memory and faculties:

> Mr. HUR. The totality of the time that I spent with the President during his voluntary interview was something that I certainly considered in framing my assessment and articulating it in the report. That includes not only the words in the cold record of the transcript of the interview, but also the experience of being there in the room with him and frankly considering how he would present to a jury in a criminal trial if charges were brought.
> Chair JORDAN. I guess I'm asking specifically. I know you cite in the report the dates that he couldn't remember when he was Vice President, when he began, when his term ended. You cite that in your report. Is there anything else specifically that stands out from that interview with the President?
> Mr. HUR. A number of things stand out. Again, I'm aware that the transcript has now been made available. I do provide certain examples in my report of significant personally painful experiences about which the President was unable to recall certain information. I also took into account the President's overall demeanor in interacting with me during the five-plus hour voluntary interview. So, it was a wealth of details about being there in the moment with the President, including his inability to recall certain things. I'll also say, as reflected in the transcript, the fact that he was prompted on numerous occasions by the members of the White House Counsel's Office.

2d Cornett Decl. at Ex. 1 at 65.

The Special Counsel was explicit that the demeanor evidence included the very recordings at issue here:

> Chair JORDAN. Well, the Justice Department released the transcripts the day of the hearing. . . . It would be nice if we actually had the audiotapes too. Again, is there any reason why you can see why the American people and their representatives in the U.S. Congress should not have access to those tapes?

> Mr. HUR. Chair, what I can tell you is that my assessment that went into my conclusions that I described in my report was based not solely on the transcripts. *It was based on all the evidence, including the audio recordings.*
> Chair JORDAN. Great point. That is where I was going. So, this was valuable evidence for you, as the Special Counsel named to investigate this issue, valuable evidence for you to reach your conclusion and the statements you put in your report. All I am asking is shouldn't the U.S. Congress have access to that same information?
> Mr. HUR. Chair, again, it is not for me to weigh into what information Congress should or should not have. *What I will tell you is that the audio recordings were part of the evidence, of course, that I considered in coming to my conclusion*.

2d Cornett Decl. at Ex. 1 at 79 (emphasis added); *see also id*. at 50 ("It was based on a number of different sources . . . including various recordings . . . some from our interview with the President in October 2023"). The Government itself has stated in another case that Special Counsel Hur "relied on" the audio recording in drafting certain passages of the Report concerning the President's "memory" and "faculties." *See* Trans. of Status Conference at 3:2–4, *Heritage Foundation, et al. v. DOJ,* 24-cv-645 (June 10, 2024), Ex. 2 to 2d Cornett Decl. Critically, the written transcript published by the White House and Justice Department affirmatively omitted transcribable indicia of demeanor, "such as the use of filler words (such as 'um' and 'uh') when speaking that are not always reflected on the transcripts, or when words may have been repeated when spoken (such as 'I, I' or 'and, and') but sometimes was only listed a single time in the transcripts." Weinsheimer Decl. at ¶ 14.

4. The White House disputed some of the Hur Report's conclusions even before its public release on February 7, 2024. Both the White House Counsel and the President's private counsel jointly wrote to Special Counsel Hur on February 5, 2024, to ensure "a final report that is both accurate and consistent with Department of Justice policy and practice." Hur Report at 384. The White House requested Special Counsel Hur "revisit [his] descriptions of President Biden's memory and revise them so that they are stated in a manner that is within the bounds of your expertise and remit." Hur Report at 385. The White House took umbrage that Special Counsel Hur "refer[red] to President Biden's memory on at least nine occasions—a number that is itself gratuitous." Hur Report at 386. The letter also took issue with the Report's use of the phrase "totally irresponsible" to describe President Biden's document storage practices. Hur Report at

385. The letter added, "this kind of criticism of an uncharged party violates 'long-standing Department practice and protocol'. . . . Using President Biden's own words does not make the criticism compliant with Department practice." Hur Report at 385–86 (citation omitted). Special Counsel Hur provided no substantive response to the White House Counsel, but attached the White House Counsel's Letter to his Report along with an explanation of minor typographical and factual corrections. *See* Hur Report at 1–2.

Unable to move the Special Counsel off his evaluation of the evidence, both the White House Counsel and the President's private counsel went over Special Counsel Hur's head and subsequently wrote Attorney General Garland on February 7, 2024, objecting "to the multiple denigrating statements about President Biden's memory[.]" 2d Cornett Decl. at Ex. 3 at 2. The White House Counsel argued "[t]he Special Counsel can certainly and properly note that the President lacked memory of a specific fact or series of events. But his report goes further to include allegations that the President has a failing memory in a general sense, an allegation that has no law enforcement purpose." *Id.* at 2. The Department of Justice responded on February 8, 2024, writing "the Department concludes that the report as submitted to the Attorney General, and its release, are consistent with legal requirements and *Department policy.*" 2d Cornett Decl. at Ex. 4 at 2 (emphasis added).

5. Following the Hur Report's public release on February 8, 2024, the Administration, from top to bottom, vigorously attacked Special Counsel Hur's characterizations and conclusions. On February 8, 2024, the President himself vehemently denied Special Counsel Hur's conclusion as to his mental state, insisting to reporters that "[m]y memory is fine."[1] *See* 2d Cornett Decl. at

[1] The President did not just contest the Special Counsel's assessment of his mental acuity. The President denied sharing classified information with his ghostwriter, a statement that is inconsistent with the Special Counsel's findings. *See* 2d Cornett Decl. at Ex. 5. The President's misstatements were corrected by the Special Counsel during the Hur Hearing.:

> Mr. GAETZ. February 8th the White House questioned, ''Mr. President, why did you share classified information with your ghost writer?'' The President: ''I did not share classified information. I did not share it. I guarantee I did not.'' That is not true, is it, Mr. Hur?

Ex. 5 at 3; *see also* 2d Cornett Decl. at Ex. 6 (collecting similar articles). Vice President Kamala Harris dismissed the Report's conclusions as to the President's memory as "inaccurate and inappropriate" and "clearly, politically motivated, gratuitous." *See* 2d Cornett Decl. at Ex. 7 at 2; *see also* 2d Cornett Decl. at Ex. 8 (collecting similar articles). Spokesman for the White House Counsel's Office, Ian Sams, told reporters the Report "left [one] to wonder why this Report spends time making gratuitous and inappropriate criticisms of the President." 2d Cornett Decl. at Ex. 9 at 6; *see also* 2d Cornett Decl. at Ex. 10 (collecting media coverage). White House Press Secretary Karine Jean-Pierre said those portions of the Report speaking to the President's memory "don't [] live[] in reality." 2d Cornett Decl. at Ex. 9 at 29; *see also* 2d Cornett Decl. at Ex. 10.

6. Attorney General Garland, in contrast, deferred to Special Counsel Hur's analyses and conclusions, stating "[t]he idea that an attorney general would edit or redact or censor the special counsel's explanation for why the special counsel reached the decision the special counsel did—that's absurd." *See* 2d Cornett Decl. at Ex. 11 at 2. In his testimony before the House Judiciary Committee on June 5, 2024, Attorney General Garland repeatedly deferred to the Report when questioned about the Special Counsel's conclusions. *See, e.g.*, 2d Cornett Decl. at Ex. 12 at *13 ("I have said it before, I'll say it again, I'm not going to comment . . . I'm not going to comment on Mr. Hur's [report]. Mr. Hur testified for five hours before this committee."); *id.* at *62 ("I would rest on Mr. Hur's report.").

7. White House proxies mirrored the Administration's response—with added energy. Senator John Fetterman called the Report "a smear and cheap shots and just taking things out of context, or even just inventing." *See* 2d Cornett Decl. at Ex. 13 at 2. Representative Dan Goldman said, "what I did understand from talking to folks at the White House is . . . part of the frustration with Special Counsel Hur, a Republican appointee, cherry-picking very few remarks from a five-hour interview[.]" *See* 2d Cornett Decl. at Ex. 14 at 2. Former General Counsel for the Federal Bureau of Investigation, Andrew Weissmann, bemoaned the Report as "a redux of what we saw

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Mr. HUR. That is inconsistent with the findings based on the evidence in my report.

See 2d Cornett Decl. at Ex. 1 at 30–31.

with respect to James Comey at the FBI with respect to Hillary Clinton, in terms of really not adhering to what I think are the highest ideals of the Department of Justice." *See* 2d Cornett Decl. at Ex. 15 at 3.

On social media, former Attorney General Eric Holder wrote: "Special Counsel Hur report on Biden classified documents issues contains way too many gratuitous remarks and is flatly inconsistent with long standing DOJ traditions. Had this report been subject to a normal DOJ review these remarks would undoubtedly have been excised." *See* 2d Cornett Decl. at Ex. 16. Jim Messina, a former Deputy Chief of Staff for President Barack Obama, wrote: "Let's be clear—the special counsel isn't a dummy and we should be very careful not to take the bait after Comey pulled this in 2016. Hur, a lifelong Republican and creature of DC, didn't have a case against Biden, but he knew exactly how his swipes could hurt Biden politically." *See* 2d Cornett Decl. at Ex. 17.

8. Special Counsel Hur testified before the House Judiciary Committee on March 12, 2024. The House Judiciary Committee and the House Oversight Committee had directed compliance with their subpoenas for the transcripts and audio recordings by 3:00 p.m. on March 11, 2024. The Department of Justice did not produce redacted copies until the day of Special Counsel Hur's testimony, March 12th, at approximately 7:45 a.m. *See* Letter from Hon. James Comer and Hon. Jim Jordan to Hon. Merrick B. Garland at 2 (Mar. 25, 2024) (ECF No. 29-1). However, in the early morning before Special Counsel Hur's testimony, the White House appears to have leaked redacted transcripts of the President's interview to what the White House perceived as "friendly" media outlets. *See* Letter from Hon. James Comer and Hon. Jim Jordan to Hon. Merrick B. Garland (Mar. 25, 2024) (ECF No. 29-2); ECF No.29-3.[2]

9. There was immense public pressure on President Biden from all quarters to release the transcript of his interview with Special Counsel Hur. This pressure commenced the day the Hur Report was released.

[2] The Government's release of the transcripts to media outlets prior to the House Committees occurred under both a subpoena and a warning of contempt proceedings. ECF No. 1-9, 24-cv-960.

At the February 9, 2024 Press Briefing with Karine Jean-Pierre and Ian Sams, the first following the release of the Hur Report, potential release of the transcripts of President Biden's interview with Special Counsel Hur was a central issue:

> Q: And just finally, does the President support the release of the entire transcript of his interview to put to rest some of these things that you think are being overlooked?
> MR. SAMS: And it's a reasonable question. I think that it's important to know that we're dealing with classified materials in this conversation. There are classification issues there. I don't have any announcement on, you know, releasing anything today. But it's a reasonable question, and there were classified stuff, and we'll have to work through all that.
> Q: So, but once you can work through, like, say, a redacted version, would the President support the release, as long as you can obviously keep what needs to be kept secret secret?
> MR. SAMS: Well, we'll take a look at that and—and make a determination.

2d Cornett Decl. at Ex. 9 at 7. Later, Mr. Sams was asked "with respect to the portion of the video and the transcript where he was asked about his time as Vice President and about Beau Biden's death, why not release those parts of the video?" *Id.* at 23. These questions continued at subsequent press conferences. *See, e.g.*, 2d Cornett Decl. at Ex. 18 at 23; 2d Cornett Decl. at Ex. 19 at 21; 2d Cornett Decl. at Ex. 20 at 10–11; 2d Cornett Decl. at Ex. 21 at 25.

A Harvard-Harris poll conducted February 21–22, 2024 found 76% of respondents thought the transcript should be released. *See* 2d Cornett Decl. at Ex. 22 at 39. *The Wall Street Journal* Editorial Board published an op-ed on February 13, 2024, titled "*Let's See the Biden-Hur Interview Transcript.*" *See* 2d Cornett Decl. at Ex. 23. The *Associated Press* reported "Republicans and Democrats alike are interested in more complete details about what went into the report. Biden and his allies say a full transcript would show the president is mentally sharp and will prove that Hur cherry-picked moments solely to make him seem feeble." 2d Cornett Decl. at Ex. 24 at 4.

10. Despite facing a very public pressure campaign from the President himself on down, during his March 12, 2024 House Judiciary Committee Hearing, Special Counsel Hur confirmed his assessments in his opening statement and maintained throughout questioning that he had sufficient evidence to present the case to a jury, but believed that Mr. Biden would prove a sympathetic defendant. Hur Hearing at 7, 8, 17, 68. Nevertheless, Democratic members of the

Judiciary Committee repeatedly denigrated the Special Counsel's investigation and Special Counsel Hur personally. *See, e.g.*, *id.* at 37 ("you used your report to trash and smear President Biden because he said in response to questions over a five-hour interview that he didn't recall how he got the documents. You knew that this would play into the Republicans' narrative that the President is unfit for office because he is senile. . . .You knew that this is what was going to happen, didn't you?"); *id.* at 40 ("You could have written your report with comments about his specific recollection as to documents, a set of documents, or a set of documents, but you chose a general, pejorative reference to the President. You understood when you made that decision, didn't you, Mr. Hur, that you would ignite a political firestorm with that language, didn't you?").

These attacks have continued to this day. Minority Members of the House Judiciary Committee mirrored the White House's position in Congressional contempt proceedings. Despite Special Counsel Hur's statements to the contrary, the Minority begins from the position that "[t]he Hur Report exonerates President Biden of any prosecutable charges[,]" and "President Biden's age was not a material aspect of Hur's decision to decline prosecution[.]" 2d Cornett Decl. at Ex. 25 at 32. Further, in the Minority's view, Special Counsel Hur's conclusions as to President Biden's memory are "superfluous dicta," "wildly inappropriate," and "unsupported by the actual record[,]" as "[t]he transcript shows that President Biden was in clear command of his cognitive functions[.]" *Id.* at 34.

11. On May 15, 2023, hours before the House Judiciary Committee was scheduled to mark up a contempt citation of Attorney General Garland, the President of the United States asserted executive privilege in response to subpoenas from the Committees for the audio recordings of Special Counsel Hur's interview with the President. ECF No. 34-8. Attached to the Assistant Attorney General for Legislative Affair's letter to the Committee Chairmen was an opinion from the Attorney General justifying the Attorney General's personal request that the President assert executive privilege. *See* ECF No. 34-7. The White House Counsel also drafted a letter conveying to the Committees the President's personal decision to assert executive privilege. *See* ECF No. 29-3. Later that day, rejecting the assertion of executive privilege, the

Committees both voted to recommend that the House of Representatives hold the Attorney General in contempt of Congress. 2d Cornett Decl. at Ex. 25 at 21; 2d Cornett Decl. at Ex. 26 at 26.

During his June 4, 2024 House Judiciary Committee hearing, Attorney General Garland repeatedly stated that the Government would not produce the audio recordings of the Special Counsel's interview with President Biden and explained why. *See, e.g.*, 2d Cornett Decl. at Ex. 12 at *3. Congressman Kelly Armstrong and Attorney General Garland engaged in a colloquy as to legislatively requiring all federal law enforcement interviews to be recorded.[3] Currently, most non-custodial interviews are not recorded. Attorney General Garland conceded "[p]ersonally, I think recording interviews is a very good thing to do". *Id.* at *122.

12. The Administration's refusal to release the audio recordings was met with considerable public controversy. Indeed, Democratic Senator Mark Warner of Virginia recognized the concerns of the Government about potential manipulation, but insisted "[y]ou've got to release the audio." *See* 2d Cornett Decl. at Ex. 27 at 3.

13. On June 12, 2024, the House of Representatives voted to hold Attorney General Garland in contempt for failing to comply the Judiciary Committee's subpoenas. *See* H. Res. 1292, 2d Cornett Decl. at Ex. 28. On June 14, 2024, the Assistant Attorney General for Legislative Affairs wrote to Speaker Johnson and informed him that "the Department has determined that the responses by Attorney General Garland . . . did not constitute a crime, and accordingly the Department will not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General." *See* 2d Cornett Decl. at Ex. 29 at 3.

14. The controversy surrounding the audio recording has been heighted by the reality that President Biden's physical and mental fitness was not only central to Special Counsel Hur's investigation and conclusions, but is also one of the central questions in the 2024 Presidential Election. In a recent poll, seventy-nine percent of voters consider the phrase "too old to be

[3] Representative Armstrong refers to the legislation as the Fifth Amendment Integrity Restoration Act, H.R. 1525, 118th Cong. ("FAIR Act"). However, it appears the Representative misspoke and referenced the George Floyd Justice in Policing Act, H.R. 7120, 116th Cong., which required body cameras for all Federal law enforcement officers. *See* H.R. 7120, 116th Cong. § 372(b).

president" to describe President Biden very or somewhat well. *See* 2d Cornett Decl. at Ex. 30 at 12. An April 2024 poll by Pew Research Center found sixty-two percent of voters were not too or not at all confident that President Biden has the mental fitness needed to be President. *See* 2d Cornett Decl. at Ex. 31 at 14. A June 2024 poll by CBS News found sixty-five percent of voters thought President Biden does not have mental and cognitive health to serve as President. *See* 2d Cornett Decl. at Ex. 32 at 3.

In early June, the *Wall Street Journal* released a long form article entitled "*Behind Closed Doors, Biden Shows Signs of Slipping*" that was "based on interviews with more than 45 people over several months." 2d Cornett Decl. at Ex. 33 at 2. *The Wall Street Journal's* story prompted a stern rebuke from the White House with Spokesman Andrew Bates telling *Axios* "it's a little surprising that The Wall Street Journal thought it was breaking news when congressional Republicans told them the same false claims they've spouted on Fox News for years, but it's also telling that the only individuals willing to smear the President in this story are political opponents afraid to use their names[.]" 2d Cornett Decl. at Ex. 34 at 2. Moreover, the White House apparently strong armed at least one prominent congressional Democrat into calling *The Wall Street Journal* back and sitting for a second interview because it was displeased with what he had to say. 2d Cornett Decl. at Ex. 33 at 3 ("The White House kept close tabs on some of The Wall Street Journal's interviews with Democratic lawmakers. After the offices of several Democrats shared with the White House either a recording of an interview or details about what was asked, some of those lawmakers spoke to the Journal a second time and once again emphasized Biden's strengths. 'They just, you know, said I should give you a call back,' said Rep. Gregory Meeks, a New York Democrat, referring to the White House.").

Allies of the President were quick to note that the absence of their statements in *The Wall Street Journal's* piece. On X.com, Senator Patty Murray wrote: "I made clear to the @wsj regarding the January meeting on Ukraine that the President was absolutely engaged & ran that meeting in a way that brought everyone together. I'm not quoted—I wonder why." 2d Cornett Decl. at Ex. 35. Representative Nancy Pelosi wrote: "Many of us spent time with @wsj to share

on the record our first-hand experiences with @POTUS, where we see his wisdom, experience, strength, and strategic thinking. Instead, the Journal ignored testimony by Democrats, focused on attacks by Republicans and printed a hit piece." 2d Cornett Decl. at Ex. 36. *The Hill* reported that Biden campaign manager Julie Chavez Rodriguez "brushed back the premise of the Journal story" and said of the President, "he is, you know, just one of the strongest leaders that I've been able to engage and to be able to work with and to advise." 2d Cornett Decl. at Ex. 37 at 3. White House communications director Ben LaBolt described the story as a "[c]omplete and utter editorial fail by the @wsj." 2d Cornett Decl. at Ex. 38. *MSNBC*'s Joe Scarborough said of the President, "[i]f you want to talk about international affairs, if you want to talk about how to get bipartisan legislation, Joe Biden is light-years ahead of all of them." 2d Cornett Decl. at Ex. 37 at 1. In short, the President's "memory" and "faculties" was an issue in the Hur Investigation, and it remains an issue that the White House has placed firmly before the electorate in the 2024 Election.

15. It should come as little surprise, then, that numerous parties have sought release of audio recordings of the Special Counsel's interview long before the most recent controversy with Congress came to a head. Heritage Plaintiffs submitted a FOIA Request on February 12, 2024, seeking "[a]ll recordings in any format whatsoever, of the interview of President Joseph R. Biden, Jr., referenced in [the Hur Report.]" ECF No. 1-2 at 1 24-cv-960. When that request was not granted, the Heritage Plaintiffs filed this lawsuit on April 3, 2024. *Id*. The Government moved to consolidate the three cases on April 18, 2024. *See* ECF No. 7. The other two cases included the original suit by Judicial Watch, *Judicial Watch v. DOJ*, 24-cv-0700 (TJK) (D.D.C.), and a conglomerate of media organizations, led by Cable News Network ("CNN") ("Media Plaintiffs"), *Cable News Network, Inc. v. DOJ*, No. 24- cv-961-RDM (D.D.C.). The Court granted the Government's Motion to Consolidate on May 3, 2024. *See* Minute Order, *Judicial Watch et al v. DOJ*, 24-cv-0700 (TJK) (filed May 3, 2024). While the Motion was pending, the Government notified all parties that it was withholding the audio recordings pursuant to FOIA Exemptions 6 and 7(C) and that no video recordings of the interview exist. *See* ECF No. 12 at 1 & n.1. The Court entered a summary judgment briefing schedule by Minute Order dated May 6, 2024.

Defendant submitted its Motion for Summary Judgment (ECF No. 34) ("Defendant's Motion" or "Def. Mot.") on May 31, 2024.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, a court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" only when it involves facts that "might affect the outcome of the suit under the governing law." *Id*.

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Ullah v. CIA.*, 435 F.Supp.3d 177, 181 (D.D.C. 2020) (internal quotation marks omitted). "In considering a motion for summary judgment for the Defendant, the court analyzes all underlying facts and inferences in the light most favorable to the FOIA requester." *Stein v. CIA*, 454 F.Supp.3d 1, 15 (D.D.C. 2020) (citing *Unrow Human Rights Impact Litig. Clinic v. U.S. Dep't of State*, 134 F.Supp.3d 263, 271 (D.D.C. 2015)).

ARGUMENT

I. EXEMPTION 7(A) DOES NOT APPLY.

The Government's argument under Exemption 7(A) boils down to its fear that release of the audio recordings "poses an unacceptable risk of impairing cooperation in future high-profile investigations." Def. Mot. at 30 (quoting Garland Ltr. at 6). The sweep of that submission is breathtaking. The Government implicitly admits this fact when it buries its Exemption 7(A) (law enforcement) argument in the back of its brief in a case that is about a (closed) law enforcement proceeding. The Government's argument is squarely foreclosed by D.C. Circuit precedent. Further, the Government's argument lacks any limiting principle. It would allow the Government to withhold any record in any proceeding the Government deems "high-profile" and would create a Mack-truck-sized exemption to the principle that Exemption 7(A) is temporarily limited. This

would eviscerate the careful statutory scheme drawn by Congress that balances the intent for maximum disclosure with the defined limited Exemption in 7(A).

The Government made a near identical argument concerning records of an interview of then-Vice President Richard Cheney in the Valerie Plame Special Counsel Investigation. That argument was rejected by Judge Sullivan's well-reasoned opinion in *CREW v. DOJ*, 658 F.Supp.2d 217 (D.D.C. 2009) ("*CREW I*"). The Government acknowledges Judge Sullivan's opinion is the "most analogous case" in one breath, but in the next, submits it was wrongly decided without any explanation. *See* Def. Mot. at 34. While Judge Sullivan's analysis is not technically binding, it is eminently correct. The Government's claim that releasing the audio would discourage senior officials from participating in similar high-profile investigations also rings hollow. After all, the Government made the same exact argument in *CREW I.* Yet, after the Government lost in *CREW I*, it chose *not* to appeal, but instead, settled the case. *See* Settlement Agreement and Release, *CREW v. DOJ*, 08-cv-1468 (EGS) (D.D.C. Nov. 16, 2009) (ECF No. 24). Thirty-eight pages of detailed notes of the Vice President's interview were released. *CREW I*, ECF No. 24 at 33–71. It has been more than 15 years since Judge Sullivan ordered the Government to release the details of Vice President Cheney's interview, and that decision appears to have had no impact on the fulsome voluntary cooperation with investigations offered by a wealth of senior officials from both parties ever since. This history does not just undercut the Government's proffered parade of horribles; it blows them out of the water.

Finally, the Government's basic theory of the case is flawed even on its own terms. Again, the Government loses under the plain application of statutory text and D.C. Circuit law, but even if all of that were wiped away, the Government would *still* lose on its own theory. No one would take the release of the audio recording here as indicative of any expected conduct by the Government in any other case. After all, this case is about audio of the sitting President of the United States, the unitary Executive Branch in physical form—not a garden-variety witness or investigation. He is the only individual in the Nation with complete control over whether he is interviewed, how he is interviewed, and whether his interview will be released. His interview

transcript cannot be released without his consent; no one else in the Nation has that absolute veto on release. And the President already released the transcript here for political reasons. It can have no real effect on any law enforcement proceedings outside of this case. For all these reasons, the Government's Exemption 7(A) withholding fails.

A. Standard of Review.

Exemption 7(A) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). There is no dispute that the audio recordings are law enforcement records—they occurred during a criminal investigation into the President's private conduct. Under longstanding precedent, the D.C. Circuit analyzes Exemption 7(A) claims under a three-part test: Whether the release "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (emphasis omitted). Importantly, "Exemption 7(A) is temporal in nature," *CREW v. DOJ*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) ("CREW *III*"), whereas the other law enforcement exemptions are not. *See, e.g.*, *Judicial Watch of Fla. v. DOJ*, 102 F.Supp.2d 6, 19 (D.D.C. 2000) (while 7(A) is temporal, 7(C) is not).

B. The Government Fails to Identify a Pending or Reasonably Anticipated Law Enforcement Proceeding.

Judge Sullivan's opinion in *CREW I* reviewed the same argument the Government makes here. Nothing has changed since 2009, and this Court should follow Judge Sullivan's analysis, which correctly rejected the Government's submissions as contrary to binding Circuit precedent.

1. The D.C. Circuit has long held that, to qualify under Exemption 7(A), the Government must show that disclosing the records at issue would reasonably be expected to interfere with a "*concrete* prospective law enforcement proceeding." *CREW III*, 746 F.3d at 1097 (quoting *Juarez v. DOJ*, 518 F.3d 54, 58 (D.C. Cir. 2008) (internal citation omitted) (emphasis added)); *accord N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); Def. Mot. at

30 (collecting D.C. Circuit authorities); *Leopold v. DOJ*, No. 17-cv-2819 (APM), 2022 WL 4598596, at *9 (D.D.C. Sept. 30, 2022) (Mehta, J.); *Shem-Tov v. DOJ*, No. 17-cv-2452 (JDM), 2020 WL 2735613, at *8 (D.D.C. May 25, 2020) (Moss, J.); *Judicial Watch v. CIA*, No. 17-cv-397 (TSC), 2019 WL 4750245, at *4 (D.D.C. Sept. 29, 2019) (Chutkan, J.); *Poitras v. DHS*, 303 F.Supp.3d 136, 157 (D.D.C. 2018) (Howell, J.); *Elkins v. Fed. Aviation Admin.*, 134 F.Supp.3d 1, 3 (D.D.C. 2015) (Boasberg, J.); *Tipograph v. Dep't of Just.*, 83 F.Supp.3d 234, 239 (D.D.C. 2015) (Cooper, J.); *Durrani v. DOJ*, 607 F.Supp.2d 77, 89 (D.D.C. 2009) (Kollar–Kotelly, J.); *Owens v. DOJ*, No. 04-cv-1701 (JDB), 2006 WL 3490790 at *5 (D.D.C. Dec. 1, 2006) (Bates, J.). The point of Exemption 7(A) is "to prevent disclosures which might prematurely reveal the government's case in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence." *Maydak v. DOJ*, 218 F.3d 760, 762 (D.C. Cir. 2000).

The D.C. Circuit has thus made clear the text of Exemption 7(A) requires analysis of whether disclosure would "reasonably be expected to interfere with enforcement proceedings" and thus the requirement of concreteness looks not only to whether there is a "concrete" pending or future proceeding, but whether the records at issue would have a *concrete impact* on that proceeding. 5 U.S.C. § 552(b)(7)(A); *see, e.g.*, *Juarez v. DOJ*, 518 F.3d 54, 59 (D.C. Cir. 2008); *Antonelli v. ATF*, No. 04-cv-1180 (CKK), 2005 WL 3276222, at *4 (D.D.C. Aug. 16, 2005) ("'[r]easonably anticipated' means a 'concrete prospective law enforcement proceeding.'") (citation omitted). That analysis is "functional" such that "it allows the court to trace a rational link between the nature of the document and the alleged likely interference." *See, e.g.*, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986); *accord Bevis v. U.S. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). Under that analysis, "it is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate *how* disclosure would reveal that focus." *Sussman v. U.S. Marshalls Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007). And that analysis must account for the temporality of Exemption 7(A)—it protects records for a limited time, but not to eternity. *See supra* p. 18. That functional

analysis necessarily requires a concrete "enforcement proceeding[]"—*i.e.*, the investigation being impaired. Courts have applied the Exemption, for example, when releasing the records would have jeopardized an ongoing criminal investigation (*see, e.g.*, *Juarez*, 518 F.3d at 58-59; *Boyd v. DOJ*, 475 F.3d 381, 386 (D.C. Cir. 2007)); or a potential murder prosecution. *See, e.g.*, *Bevis*, 801 F.2d 1386 at 1389.

The Government does not seriously claim that releasing the interview recording would interfere with any pending or reasonably anticipated proceeding arising out of the Hur investigation.[4] After all, the Special Counsel declined to bring any charges, the Special Counsel's Office has been dissolved, and the Government certainly is not encouraging the Special Counsel to reconsider that conclusion. Instead, the Government advances the exceedingly sweeping theory that "release of the audio recording here may make witnesses or potential witnesses in" other, completely unrelated "investigations reasonably fear that if they sat for a recorded interview, audio recordings of their interview would ultimately be released to either Congress or the public." Def. Mot. at 31. But Judge Sullivan rejected that precise argument over a decade ago. The Government argued in that case that "disclosure of Vice President Cheney's interview could have a chilling effect and deter [senior White House officials] from voluntarily cooperating" in "future law enforcement investigations." *CREW I*, 658 F.Supp.2d at 226. In rejecting that argument, Judge Sullivan explained that there is "long line of cases—both prior to and since *Mapother*—that have recognized the necessity of identifying a 'concrete prospective law enforcement proceeding.'" *Id.* at 229.

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[4] The closest the Government comes is when its declarant states that he is "aware of ongoing investigations in particular in which witnesses declined to be audio recorded, suggesting they feared their interview recording would be publicly disclosed in the future," and that "[s]uch refusals reasonably would be expected to increase if witnesses believed an audio recording could be released in FOIA." Weinsheimer Decl. at ¶ 34. But the Weinsheimer Declaration provides little detail. No *actual* concrete proceeding has been identified. Weinsheimer Decl. at ¶ 34. Moreover, most interviews are not recorded. *See* Declaration of the Honorable Michael B. Mukasey ("AG Mukasey Decl.") at ¶ 11 n.2. And "witnesses always have the right to decline the audio recording of an interview, just as they have the right to refuse to be interviewed, and they often decline interviews or audio recording for any number of reasons." *Id.* at ¶ 12. That they have done so, without more, proves nothing. *See id*.

While Judge Sullivan's decision does not bind this Court, this Court should follow it because it is eminently correct. After all, the Government's theory would cover virtually all records of virtually all law enforcement interviews. Anytime the Government is forced to disclose details of an interview taken in the course of a law enforcement investigation, that could theoretically dissuade future subjects from voluntarily cooperating with law enforcement. Moreover, the Government's argument would write Exemption 7(A)'s temporal limitation out of existence. *See* Def. Mot. at 30–31. An FBI FD-302 from the White House Chief of Staff on Iran Contra is still exempt some 37 years later under the Government's theory because its release even now would lead to the putative harm postured by the Government. That is an exceedingly broad sweeping conception of Exemption 7(A) that cannot be squared with the repeated pronouncements of the Supreme Court that "FOIA exemptions are to be narrowly construed," *FBI v. Abramson,* 456 U.S. 615, 630 (1982), or that the current version of Exemption 7 is properly understood as narrowly drafted and carefully calibrated. *See, e.g.*, *Robbins Tire*, 437 U.S. at 235 ("What Congress clearly did have in mind was that Exemption 7 permit nondisclosure only where the Government 'specif[ies]' that one of the six enumerated harms is present." (internal citation omitted)); *ACLU v. Dep't of Def.*, 543 F.3d 59, 77 (2d Cir. 2008) ("The 1974 amendments were intended to reinvigorate FOIA. By eliminating the ability of an agency to place entire law enforcement files out of the public's reach, and then narrowing the withholding authority to the six specified categories of records, they accomplished that goal.") (internal quotation and citation omitted), *vacated and remanded on other grounds*, 558 U.S. 1042 (2009).

Perhaps recognizing that problem, the Government seeks to limit the sweep of its rule to law enforcement records in "high profile" investigations. But the logic of the Government's position sweeps far broader than "high profile" investigations. If releasing interview recordings in "high profile" investigations will dissuade White House officials from voluntarily participating in future "high profile" investigations, there is no reason why releasing interview recordings in more garden-variety investigations would not discourage witnesses from voluntarily participating in similar investigations. If anything, disclosing details of an interview taken in the course of a

garden-variety investigation would arguably be even more chilling for future witnesses than disclosing details of an interview taken in the course of a high-profile investigation, where witnesses might reasonably suspect that their participation will receive public attention.

But even if the Government could somehow limit the sweep of its rule to "high profile" investigations, its conception of Exemption 7(A) would still be "breathtakingly broad." *CREW I*, 658 F.Supp.2d at 228 n.5. As Judge Sullivan explained, the Government's theory would "encompass *any* law enforcement investigation during which law enforcement might wish to interview senior White House officials." *Id.* (emphasis in the original).

> Such proceedings might include an investigation into alleged criminal activity that physically took place in the White House; financial wrongdoing by a White House official that took place before or during his or her tenure in the executive branch; misconduct relating to official responsibilities, such as the breach of national security protocol that formed the basis of the Plame investigation; or even an event occurring outside the White House with only tangential connection to one or more White House officials.

Id. at 229. Taking the Government's theory on its own terms, it would cover all manner of high-profile investigations. Investigations into Article III judges are high-profile; investigations into major businesses or their officers are high-profile; investigations into celebrities of all casts are high-profile; even investigations of major criminal figures are high-profile. In effect, the Government's submission would create one rule for the famous, rich, powerful, and notorious, and another for the run-of-the-mill gun-and-drug cases this Court sees every day. As Judge Sullivan concluded:

> Indeed, the dramatic and far-reaching extension to the current reach of Exemption 7(A) that DOJ urges this Court to adopt is more properly directed to Congress to consider and, in its discretion, to enact if it sees fit. This Court, however, is bound by the law in its current state, which does not sanction such an expansive reading of the statute.

Id. at 230.[5]

[5] Tellingly, the Government does not even cite what it argued in 2009 was its best case, *Mapother*, which allowed the Government to withhold files it expected would interfere with its potential defense of challenges to the exclusion of former Nazis from the country. *See Mapother*, 3 F.3d 1533 at 1542–43. Perhaps this is because, as Judge Sullivan explained in *CREW I*, *Mapother*'s

2. Tellingly, the Government cannot assert *any* authority in support for its sweeping rule.

First, the Government latches onto language in *Juarez*, that "nothing in the text of Exemption 7(A) or in D.C. Circuit precedent should prevent its application to situations where information from a closed investigation would harm a future one that is 'reasonably anticipated'" and that "a 'concrete prospective law enforcement proceeding' . . . is not quite the formidable hurdle appellant would make it out to be' and is readily satisfied by showings of prospective law enforcement need." Def. Mot. at 32 (quoting *Juarez* at 58–59.). But that language does not do the work the Government would have it do. That language arose in the context of rejecting the requester's argument that "the DEA was no longer actively pursuing its investigation." *Juarez* at 59. There was no dispute as to the concreteness of the proceeding in *Juarez*; all agreed it was an investigation of the requester for money laundering. *See Juarez* at 57–58.

Second, the Government asserts that *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), supports its argument that information from a "closed investigation" can nonetheless be withheld if it is "expected to interfere with *separate*, ongoing investigations." Def.

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elucidation of the D.C. Circuit's most expansive view of a "reasonably expected" law enforcement proceeding undercuts the Government's arguments. Judge Sullivan first explained that "[a]lthough the proceedings in *Mapother* had not yet been commenced, the court could readily identify and articulate the scope and nature of those proceedings, in addition to the form that they would take and the potential harm that disclosure could cause to those future proceedings." *CREW I*, 658 F.Supp.2d at 228. A far field from here, where proceedings could range from the next Watergate, to a sordid Hollywood tale of abuse of power, the excesses of the next substance riddled pop-star or athlete, or to the next cartel king-ping with a good media team. Judge Sullivan also noted that "DOJ's proffered reading of *Mapother* also disregards an important factual predicate underpinning the court's conclusion that the prospective-proceeding requirement had been met in that case: namely, the nexus that existed between the information withheld and the proceedings that were ongoing or anticipated." *Id.* at 229. The same defect applies here. Under DOJ's view, disclosing notes of the interview of then-Vice President H.W. Bush (*See* Exhibit 2 to the Declaration of Max Taylor Matheu (June 21, 2024) ("Matheu Declaration" or "Matheu Decl.")) could be said to impair the criminal investigation into Senator John Ensign for action following his affair with his "former campaign staffer" who was also the wife of his "former chief of staff" (*CREW v. DOJ*, 978 F.Supp.2d 1, 5 (D.D.C. 2013) ("*CREW II*"), which could, in turn, be said to impair the on-going investigation into Sean "Diddy" Combs.

Mot. at 31 (emphasis added). But the Government misses the point. The problem here is that the Government does not claim that it has any plans to use the audio recording of the Special Counsel's interview with the President in any way in *any* pending or anticipated proceeding. Nor does the Government claim that the release could impact any such concrete proceeding. That readily distinguishes this case from *Center for National Security Studies*, where the Government withheld the names of 700 individuals detained on immigration charges in connection with the September 11 terrorism investigation because the requested information was relevant to *that investigation*, which was still ongoing for a subset of those individuals. It therefore made no difference whether a particular individual was the direct target of those investigations. It was enough that *all* "[t]he names ha[d] been compiled for the 'law enforcement purpose' of successfully prosecuting the terrorism investigation" that remained ongoing and was likely to lead to charges, and that disclosing any of those names was "reasonably likely to interfere" with those *particular* proceedings. *Ctr. Nat. Sec. Studies*, 331 F.3d at 926 (quoting 5 U.S.C. § 552(b)(7)(A)). Here, by contrast, the Government does not even try to argue that there is any chance of the audio actually being used or directly impacting in any pending or anticipated proceedings. That suffices to doom its Exemption 7(A) argument under settled D.C. Circuit precedent.

C. In Any Event, Release of the Audio Recording Could Not Reasonably be Expected to Interfere with Unrelated Future Enforcement Proceedings.

1. Even assuming generic interference with law enforcement investigations in the abstract (as opposed to concrete ongoing or reasonably anticipated proceedings) could suffice, the Government's arguments are unavailing. Attorney General Garland claims that disclosure of the Government's audio would cause "diminished cooperation" in "high-profile investigation where voluntary cooperation is exceedingly important" because:

> If witnesses in such investigations reasonably fear that materials like the recordings at issue here would subsequently be released to Congress or the public even when prosecutors declined to charge them with a crime, they may be less likely to cooperate with the Department's investigatory efforts, including by refusing to sit for recorded interviews. Or they might cooperate less fully, such as by being less comprehensive in their answers during interviews."

Garland Ltr. at 6; *id.* at 5 (similar); *accord* Weinsheimer Decl. at ¶¶ 31–36.

2. The Government's theory eschews learned experience as to how investigations involving high-ranking government officials play out since Judge Sullivan's decision in *CREW I* was not appealed and has been on the books since 2009. Tellingly, then-Assistant Attorney General Lanny Bruer's Declaration claimed that release of the interview notes there would lead to the very harms predicted in the Weinsheimer Declaration. *Compare* Weinsheimer Decl. at ¶¶ 29, 35 *with* Declaration of Lanny A. Breuer at ¶¶ 5, 6, 8, *CREW v. DOJ*, 08-cv-01468 (EGS) (Jul. 1, 2009) (ECF No. 17-1), 2d Cornett Decl. at Ex. 39 at 2–3, 5. But that prediction was wrong, and fifteen years of history have demonstrated that those harms have not come to pass. Indeed, as Attorney General Mukasey notes, "every witness in Special Counsel Hur's investigation—from President Biden on down—chose to sit for a recorded interview with the knowledge that portions of the interview could be released under FOIA pursuant to the *CREW* holding." AG Mukasey Decl. at ¶ 8 n.1. Experience shows that senior officials continue to volunteer to testify even though portions of those interviews are regularly released. *See, e.g.*, Matheu Decl. (collecting authorities). Revealingly, the Weinsheimer Declaration does not even address this widely known fact.

3. Moreover, even spotting the Government its sweeping view of Exemption 7(A)—at odds with Circuit precedent—as Attorney General Mukasey explains, it asks the wrong question. AG Mukasey Decl. at ¶ 9. Again, this case is much more than any "such" high-profile investigation. "The President is unique." *Id.* He is the living, breathing, embodiment of the unitary Executive Branch. He alone among Americans has absolute power to refuse to cooperate with the Department or to dictate the terms of that cooperation. Critically, he "is the only person in the Executive Branch who has the authority to order the Attorney General to release the transcript of an interview." *Id.* And he is the only person with absolute veto power over release. The record here is crystal clear that President Biden released the transcript for political reasons; the pressure to do so was politically unavoidable. *See supra* p. 12; AG Mukasey Decl. at ¶ 10 ("President Biden made the decision to release the transcript of his interview for his own reasons, which to my eye were political, including pressure associated with his campaign for reelection.").

That puts this case in a different dimension. AG Mukasey Decl. at ¶ 16. As Attorney General Mukasey explains, "[o]ther witnesses may face similar political pressures, but no other witnesses—not even the Vice President or other senior officials in the White House—would have the ability to make the Department release the transcript of their interviews, regardless of the intensity of pressure or publicity surrounding a criminal investigation." *Id.*

It follows that even under the Government's sweeping view of Exemption 7(A), no other witness—and certainly no lawyer—will consider this case to have any application to them or their clients. It applies only to a sitting President who *voluntarily* releases a *prior* transcript. Accordingly, "witnesses in future investigations will continue to place reasonable reliance on the Department's 'well-established and consistent practice' of maintaining the confidentiality of investigative interviews whether or not the Court in this case orders the Government to disclose the audio recording of an interview the substance of which has already been released in written form." AG Mukasey Decl. at ¶ 12 (citing Garland Ltr. at 5–6).

4. Attorney General Garland and the Weinsheimer Declaration are also blind to the political reality of Washington, D.C. As Attorney General Mukasey explains, politics drives cooperation in White House investigations. *Id.* at ¶ 15 ("But at least since Watergate, the President knows that he will suffer politically if he refuses to cooperate with a Special Counsel investigation. And for similar reasons, a President will direct the Department to put aside its usual policy of protecting confidentiality and release sensitive information when it suits the political interests of the President and his Administration. President Biden's decision to release his interview transcript is a prime example."). This political reality makes the mere threat of compulsory process extraordinarily potent. 2d Cornett Decl. at Ex. 40. Therefore, as Attorney General Mukasey explains:

> Senior officials interviewed in high profile criminal cases are usually represented by experienced counsel who understand the risk that an interview transcript or recording may be released by the President for political reasons. That is one way political accountability operates in Washington, and it is a particular factor in "investigations where the voluntary cooperation of White House officials is exceedingly important." Garland Letter at 5. White House personnel and other senior officials know (or will be advised by counsel) that any

> interview they give may be disclosed if the President deems it expedient. The Court's decision in this case will not change that reality.

AG Mukasey Decl. at ¶ 13. For similar reasons, it is absurd to contemplate that witnesses will somehow be "less comprehensive in their answers during interviews." Weinsheimer Decl. at ¶35. *See* AG Mukasey Decl. at ¶ 13 n.3 (dismissing Weinsheimer's argument).

II. THE GOVERNMENT'S CLAIM OF LAW ENFORCEMENT EXECUTIVE PRIVILEGE UNDER EXEMPTION 5 MUST BE REJECTED.

Perhaps recognizing the uphill battle it faces under Exemption 7(A), the Government leads not with the section of FOIA that actually addresses the release of law enforcement materials, but with an exceedingly broad Exemption 5 argument that would render all of the careful limits Congress put on FOIA exemptions pointless. The Government asserts a free-standing claim of executive privilege under Exemption 5 that would allow an Administration to withhold *any* material the President sees fit "'to preserve the integrity and independence of criminal investigations and prosecutions.'" Def. Mot. at 9 (quoting *Assertion of Exec. Priv. Concerning the Special Counsel's Interviews of the Vice Pres. & Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008)). This privilege would effectively apply as a "Super Exemption 7," allowing the Government to withhold information for "law enforcement" (and perhaps even other) reasons even when it flunks the requirements of Exemption 7. *See* Def. Mot. 11–13. And the Government goes further, strongly implying (but cannot not bring itself to expressly say) that an assertion of executive privilege is effectively unreviewable—once the President invokes executive privilege, the matter is over, and the records cannot be released. *See e.g.*, Def. Mot. at 11 ("the assertion is dispositive so long as the record in question is susceptible to a claim of executive privilege."). As shown below, the Government's eyebrow-raising arguments fail for three primary reasons.

First, the Government's argument would make total nonsense out of FOIA. FOIA is a carefully crafted statutory scheme of disclosure and exemptions. Exemption 7 codified the previous body of executive common law enforcement privilege. Pursuant to binding Circuit law, this operates as preemption. And on-point authority squarely rejects the Government's argument that a law enforcement exemption can be advanced through Exemption 5.

Second, the Government's argument by implication boils down to the Government's principal assertion that is as breath-taking as it is broad: There is a freestanding, constitutional mandate of executive privilege that eviscerates Congress's carefully drafted Exemption 7. But the Government provides no caselaw for this expansive claim.

Third, contrary to the Government's suggestion, this Circuit frequently reviews the merits of executive privilege claims. It should do the same here.

A. FOIA Codified All Law Enforcement Privileges Under Exemption 7; Such Claims Cannot be Brought Under Exemption 5.

The Government's principal argument is that the audio recording is exempt under Exemption 5 because the President asserted executive privilege over it. But DOJ does not invoke any of the traditional categories of executive privilege. The recording does not implicate the presidential communications privilege, which protects confidential communications between the President and his advisors that relate to presidential decision making. Nor does it implicate the deliberative process privilege, which protects pre-decisional and deliberative communications within executive branch agencies. Instead, DOJ invokes the "law enforcement" privilege, which (according to DOJ) the President may assert "to preserve the integrity and independence of criminal investigations and prosecutions." Def. Mot. at 32.

This argument is contrary to the basic statutory structure of FOIA. Congress expressly addressed law enforcement records in Exemption 7 and exempted them from disclosure only in a few narrow circumstances laid out by the statute itself. *See* 5 U.S.C. § 552(b)(7)(A)–(F). As previously noted, the Supreme Court and Circuit courts have repeatedly instructed that Exemption 7 is to be read as a narrow, carefully reticulated scheme of disclosure and exemption. *See, e.g.*, *Robbins Tire*, 437 U.S. at 235 (internal citation omitted); *ACLU*, 543 F.3d 59 at 68. The Government's interpretation of Exemption 5 would eviscerate those carefully crafted limits, as the Government appears to be arguing that Exemption 5 "allow[s] the government to withhold" any record so long as it is "subject to formal invocation of privilege." Def. Mot. at 13. In other words, it does not matter in the Government's view whether disclosure could result in one of the categories

of harm specified in Exemption 7; the record is exempt under Exemption 5 so long as the President formally invokes executive privilege over it and so long as the record is "susceptible to a claim of executive privilege." Def. Mot. at 10, 12. But that reading of Exemption 5 would largely render the limits in Exemption 7 a dead letter. Courts do not read statutes in a way that renders other provisions superfluous. *See, e.g.*, *Pulsifer v. United States*, 601 U.S. 124, 143 (2024). The Government's reading, moreover, cannot be squared with the longstanding rule that specific provisions govern the general. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). FOIA's statutory structure omits any independent "law enforcement" disclosure privilege lingering under Exemption 5.

Indeed, Judge Sullivan recognized as much in 2009 (albeit in dicta):

> [I]f this Court *were* to consider whether to recognize a law enforcement privilege under Exemption 5, it would not be inclined to do so. In particular, the fact that Exemptions 6 and 7 already protect the law enforcement interests that are traditionally of concern in the civil litigation context weighs heavily against recognizing the law enforcement privilege under Exemption 5." *Cf. Colo. Nurses Ass'n v. Fed. Labor Relations Auth.*, 851 F.2d 1486, 1492 (D.C. Cir. 1988) (reiterating the "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum" (internal quotation marks omitted)); *Abramson*, 456 U.S. at 630 ("FOIA exemptions are to be narrowly construed[.]").)

CREW I, 658 F.Supp.2d at 232 n.9; *see also Dean v. F.D.I.C.*, 389 F.Supp.2d. 780, 792 (E.D. Ken. 2005) ("The Court is unwilling to recognize the 'law enforcement privilege' in the present case. Neither of the cases cited by the defendants were FOIA cases and a number of the factors to be considered in whether to apply the privilege are already covered in other FOIA exemptions— . . . . Further, the Court is of the opinion that if this privilege were to be recognized at all, it should be recognized under Exemption 7, not Exemption 5.").[6]

This structural reality is confirmed by the fact that Exemption 7 largely codified the existing common law privilege for law enforcement records. As the Supreme Court explained as

[6] Indeed, even the Government could not bring itself to make this argument in 2009 where it conceded that there was no "'meaningful difference' between the application of Exemption 7(A) and the law enforcement privilege under Exemption 5." *CREW I*, 658 F.Supp.2d at 232.

regards Exemption 7(C), "[w]e can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms." *Nat. Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004); s*ee also, e.g.*, *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762, n.13 (1989) (contrasting the scope of the privacy protection under FOIA with the analogous protection under the common law and the Constitution); *Summers v. DOJ*, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (Silberman, J., concurring) (referring to Exemption 7 as "the law enforcement privilege"); *Hemstreet v. Duncan*, No. 07-cv-732 (ST), 2007 WL 4287602, at *2 (D. Ore. Dec. 7, 2007) ("The federal investigatory or law enforcement privilege is not based on any statute, but is 'rooted in common sense as well as common law,' *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977), and has been largely incorporated into the Freedom of Information Act ("FOIA"), 5 USC § 552(b)(7)"). That codification of common law and structure unambiguously preempts any existing common law "law enforcement privilege" right of non-disclosure for the purposes of FOIA. *Cf., e.g.*, *Ctr. for Nat. Sec. Studies*, 331 F.3d at 936–37 ("FOIA provides an extensive statutory regime for plaintiffs to request the information they seek. Not only is it uncontested that the requested information meets the general category of information for which FOIA mandates disclosure, but for the reasons set forth above, we have concluded that it falls within an express statutory exemption as well. It would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the court to carefully apply that statutory scheme, and then to turn and determine that the statute had no effect on a preexisting common law right of access. Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure. That scheme preempts any preexisting common law right."); *Nat'l. Sec. Counselors v. C.I.A.*, 960 F.Supp.2d 101, 144–45 (D.D.C. 2013) (similar).

B. Claims of Executive Privilege Under Exemption 5 Are Fully Reviewable.

The Government strongly implies that, at least in this case, it is *not* "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S.

(1 Cranch) 137, 177 (1803). Rather, "[t]he President's assertion of executive privilege resolves this case." Def. Mot. at 12. That is wrong. The D.C. Circuit has time and again reviewed claims of Presidential Communications privilege asserted under Exemption 5 on the merits. *See, e.g.*, *Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 321 (D.C. Cir. 2006) (adjudicating claim of executive privilege on the merits); *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1109, 1113–14 (D.C. Cir. 2004) (same); *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 516–18 (D.C. Cir. 1996) (same). Indeed, even the Office of Legal Counsel concedes this point in opinions cited by the Attorney General here. *See Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 35 (1982).

C. Any Constitutional Law Enforcement Privilege is Not Available Here.

1. The Government's Constitutional Claim of Executive Privilege Fails on Its Own Terms.

Even if Exemption 5 did implicitly provide broader protection to assertions of a "law enforcement" privilege than Exemption 7 explicitly provides because that privilege originated from the Constitution (and not common law), the Government's privilege claim fails on its own terms. The Government's central argument boils down to a freestanding claim of Constitutional privilege exempting the audio recording despite the fact that: (1) it is of a sitting President in an investigation of his *private* conduct; and (2) the President has already released a transcript of that audio. But again, DOJ does not invoke any of the traditional categories of executive privilege. The recording does not implicate the presidential communications privilege, which protects confidential communications between the President and his advisors that relate to presidential decision making. Nor does it implicate the deliberative process privilege, which protects pre-decisional and deliberative communications within executive branch agencies. Instead, the Government invokes the "law enforcement" privilege, which (according to the Government) the President may assert in a freestanding manner to "to preserve the integrity and independence of criminal investigations and prosecutions." Def. Mot. at 9. The Government provides no further definition on this test which, as discussed *supra*, lacks any limiting principle. Whether there is a

Constitutionally based claim of "law enforcement" executive privilege or not, it does not apply here (and in any event it would not sweep any more broadly than Exemption 7).

2. Any Constitutional Law Enforcement Privilege is No Broader Than Exemption 7.

Any law enforcement privilege that may exist simply does not apply here. Even if one assumes the Government's own opinions as to the law enforcement executive privilege are correct—the broadest possible conception of law enforcement privilege— they do not reach this case. Attorney General Garland relies almost exclusively on Attorney General Mukasey's Opinion in *Assertion of Exec. Priv. Concerning the Special Counsel's Interviews of the Vice Pres. & Senior White House Staff*, 32 Op. O.L.C. 7, 10–11 (2008) ("*2008 Special Counsel Assertion*"). *See* Garland Ltr. at 1, 4–5. But as Attorney General Mukasey *himself* explains, the *2008 Special Counsel Assertion* has no application here. First, that assertion was carefully tailored and cabined to "official White House actions" (*2008 Special Counsel Assertion* at 11) and arose in the context of interviews about material over which the President asserted "the presidential communications and deliberative process components of executive privilege." *Id.* at 9. In contrast, the assertion here involves President Biden's private conduct. *See* AG Mukasey Decl. at ¶¶ 6–7. Second, the 2008 materials were withheld in their entirety. *Id.* at ¶ 8. Here, President Biden has already released the transcript, which makes it hard to see how the Government can nonetheless claim some independent *law enforcement* interest in the audio given that everyone already knows the identity of the witness. And for the reasons discussed, *supra*, the fact this case is a class of one means it will not have any appreciable impact on law enforcement efforts in the future.

The Government cites no caselaw to establish a privilege of the breadth asserted here—because there is none. Indeed, the only case the Government cites on law enforcement privilege speaks to the common law government informant privilege and the common law privilege to withhold files in *pending* investigations. *See In Re Sealed Case* (*Espy*), 121 F.3d 729, 736–37 (D.C. Cir. 1997). That privilege (whether common law or constitutional) is clearly encompassed within Exemptions 7(D) and 7(A), respectively. The Government's citation to OLC opinions fairs

little better. None stand for the broad claim of constitutionally compelled executive privilege the Government asserted here. Indeed, the vast majority of these opinions merely assert categories of law enforcement privilege steeped in the common law enforcement privileges that fit comfortably within the scope of Exemption 7. *See Position of the Executive Department Regarding Investigative Reports*, 40 U.S. Op. Atty. Gen. 45, 46–47 (1941) (explaining disclosure of investigative reports would "seriously prejudice law enforcement" by providing "prospective defendants" with "information the Government has, and what witnesses or sources of information it can rely upon;" "prejudice the national defense;" "prejudice confidential sources" and "innocent individuals.").

On the other side of the ledger, there is no reason to read any Constitutional law enforcement privilege more broadly than the common law enforcement privilege. There is ample authority that the sweep of Exemption 7 is comparable to—if not broader than—the common law enforcement privilege which is largely codified. *See, e.g.*, *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 62–63 (1st Cir. 2007) ("Although Puerto Rico has not made a request for information under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, the provisions of this statute also provide guidance in determining the appropriate scope of the privilege. The law enforcement exemption to FOIA shields from disclosure documents whose production would, *inter alia*, 'interfere with enforcement proceedings' or 'endanger the life or physical safety of any individual.' *Id.* § 552(b)(7)"); *Appel v. City of Saint St. Louis*, No. 4:05-cv-772 (SNL), 2007 WL 9808048, at *2 (E.D. Mo. Mar. 19, 2007) (adjudicating common law claim of privilege by looking to FOIA precedent and stating "[a]t common law, courts recognize the existence of a law enforcement privilege. This privilege can be equated to that created by FOIA."); *United States v. Lang*, 766 F.Supp. 389, 404 (D. Md. 1991) (applying FOIA precedent to resolve claim of "law enforcement privilege"). Indeed, elsewhere the Government itself has taken this position. *See, e.g.*, *Chinn v. Blackenship*, No. 09-cv-5119 (RJB), 2010 WL 11591399, at *2 (W.D. Wash. Feb. 26, 2010) (noting in United States's motion to quash subpoena in civil rights action against local defendant, "[t]he United States supports its law enforcement privilege argument by asserting that

courts often look to cases construing the FOIA for guidance on the scope of the law enforcement privilege, including the weight accorded to the government interest in nondisclosure.").

D. The Government's "Avoidance" Argument Should be Rejected Out of Hand.

The Government's avoidance argument makes no sense. It argues that it would raise "separation of powers concerns" to interpret FOIA to require the disclosure of information subject to a formal claim of executive privilege. But that cannot possibly be right.

After all, Courts have long adjudicated executive privilege claims raised in valid cases and controversies, and they have made clear that FOIA's statutory right of access requires only a denied request to confer standing and a right to judicial review.

An Act of Congress can unambiguously put a claim of executive privilege before a Court—even when that claim is contested by the political branches. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 692–97 (1974) (exercising jurisdiction over President's motion to quash criminal subpoena); *Sen. Select. Comm. v. Nixon*, 498 F.2d 725, 727–28 (D.C. Cir. 1974) (en banc) (exercising jurisdiction over bespoke statute allowing the Senate to seek judicial enforcement of subpoena seeking Nixon tapes). Once there is a justiciable case and controversy and cause of action, any implicated claim of executive privilege on the merits is fully subject to judicial resolution. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 861 (2020) (stating "the parties agree that this particular controversy is justiciable" and adjudicating validity of third-party subpoenas to sitting President's accountants and bankers).[7] That is why the courts in this Circuit have *repeatedly* adjudicated claims of executive privilege on the merits. *See supra* p. 31. Indeed, the Solicitor General took the exact opposite position in *Mazars* that the Government takes here. Even though

[7] The Government repeatedly cites language in *Mazars* to support its proposition that the claim of executive privilege here cannot be adjudicated under FOIA. *See* Def. Mot. at 12–1. But that misses the point. The cited and quoted language went to the merits of the separate legal question of Congressional authority to subpoena the President's private information. *See Mazars*, 591 U.S. at 858–59, 861. There was no question the Court had power to adjudicate the case under a standard claim of private right and the generic federal questions statute. *Id.* at 861.

the Solicitor General viewed the Congressional subpoenas there to "third party custodians" as being an "end-run" around the "usual political process," the Solicitor General argued that:

> Like any other litigant, President Trump is entitled to bring suit to vindicate his personal interest in preventing third-party disclosure of his personal records, including on the grounds that respondents exceeded their powers in issuing the subpoenas in light of the public office he holds . . . . Although resolving the *merits* of that claim requires answering significant constitutional questions about the scope of legislative power under Article I and the protections afforded the Executive under Article II, the suit itself is justiciable because the President has Article III standing . . . and because those questions are amenable to judicially manageable standards and their resolution is not committed to the political branches.

See Supplemental Letter Brief of the United States at 2, *Trump v. Mazars USA LLP*, No. 19-715 (May 8, 2020). So too here, "like any other litigant," Plaintiffs seek to vindicate their informational right under FOIA. "All that is required to show standing and have a cause of action under FOIA is a denied request." *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989); *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617–618 (D.C. Cir. 2006). Indeed, the Government previously conceded in the D.C. Circuit that any Member of Congress can make a FOIA Request; they simply must sit as any individual under that statute, not a coordinate branch of government with special rights and prerogatives. *See Maloney v. Murphy*, 984 F.3d 50, 62 (D.C. Cir. 2020) (Government concession), *reh'g en banc denied sub nom. Maloney v. Carnahan*, 45 F.4th 215 (D.C. Cir. 2022), *vacated*, 143 S.Ct. 2653 (2023). The clash between the Executive and Congress simply does not factor into this calculus. Claims of executive privilege can be raised under FOIA, and courts can adjudicate them as they have always done before. *See supra* p. 31.[8]

[8] FOIA, of course, can intersect with any number of statutes in ways that allow FOIA to be used at times as an end run around a bar to obtaining the requested records under another procedure. *See, e.g.*, *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (reversing District Court holding that Exemption 7(A) bars release of information that would "undercut" a criminal trial judge's order and "distort criminal discovery mechanisms," and further explaining "[t]he fact that a defendant in an ongoing criminal proceeding may obtain documents via FOIA that he could not procure through discovery, or at least before he could obtain them through discovery, does not in and of itself constitute interference with a law enforcement proceeding. Rather, the government must show that disclosure of those documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding.").

E. The Government Waived Its Claim of Executive Privilege on This Record.

Executive privilege is waived if the information is voluntarily disclosed. *See Protect Democracy Project, Inc. v. DOJ*, No. 20-cv-172 (RC), 2021 WL 4935540, at *1 (D.D.C. May 17, 2021) ("Voluntary disclosure of privileged information waives any applicable privilege."). Courts only find waiver where the withheld information is the same as the "document or *information* specifically released, and not for related materials." *In Re Sealed Case* (*Espy*), 121 F.3d at 741 (emphasis added). Plaintiffs bear the burden of showing: (1) the record sought "must be as specific as the information previously released;" (2) it "must match the information previously disclosed;" and (3) "the information requested must already have been made public through an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

Here, there is no dispute the Government released the transcript through an official documented disclosure to both the press and Congress. The audio tape of President Biden's interview with Special Counsel Hur is as specific as the information previously released. There is little question the same specificity of information is available in both formats; it is merely a different format. As Plaintiffs have argued elsewhere in this motion, the *value* of the audio tapes is a separate analysis. As to the issue of waiver, it is the information, not its format that matters. *See In Re Sealed Case* (*Espy*), 121 F.3d at 741 (requiring the withheld information to be the same as the "document or *information* specifically released, and not for related materials.").

III. RELEASE OF THE AUDIO RECORDINGS WOULD NOT RESULT IN AN UNWARRANTED INVASION OF PRESIDENT BIDEN'S PRIVACY.

Plaintiffs concede that the Exemption 7 threshold applies and therefore that the Court need only analyze President Biden's asserted privacy interests under Exemption 7(C). *Accord* Def. Mot. at 15.

A. Standard of Review.

Analysis under Exemption 7(C) occurs in three phases in which there is some shift in the usual burdens.

First, *the Government* must demonstrate that a privacy interest protected by a privacy exemption is "present." *Favish*, 541 U.S. 157 at 172; *see also ACLU v. DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011).

Second, the "FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest." *Boyd*, 475 F.3d 381 at 386–87 (internal quotation marks and citations omitted). Here, the burden is on the *requester*. *See, e.g.*, *Ctr. For Investigative Reporting v. USCIS*, No. 18-cv-1964 (CJN), 2019 WL 6498817, at *3 (D.D.C. Dec. 3, 2019).

For the purpose of determining what constitutes a "public interest" in the privacy context, the "purposes for which the request for information is made" are irrelevant. *Reporters Comm.*, 489 U.S. at 771. The inquiry "turn[s] on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.'" *Id.* at 772 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). That purpose includes the fact "the Act was designed to create a broad right of access to 'official information'" *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)), that is to say a "citizens' right to be informed about 'what their government is up to.'" *Id.* at 773 (quoting *Rose*, 425 U.S. at 360–61)).

Third, in the final analysis here, the *Government* bears the burden to show the privacy interests outweigh the public interests in the final balancing analysis. *Bartko v. DOJ*, 898 F.3d 51, 64 (D.C. Cir. 2018); *see also CREW III*, 746 F.3d at 1096.

B. President Biden Has Little, If Any, Privacy Interest Here.

1. The Government insists that disclosing the recording would result in an unwarranted invasion of President Biden's privacy. But the principal problem with that argument is that the President has already decided to release the *transcript* of his interview. *See* AG Mukasey Decl. at ¶ 16. Given that disclosure, it is hard to see what additional privacy interests withholding

the audio recording would protect. It is not simply the President's involvement in the investigation that is public; he has voluntarily released the content of his interview. *Cf. CREW III*, 746 F.3d at 1090 (noting separate privacy interest in "content"). Moreover, the President did so for political reasons; privacy interests do not operate as a sword and shield. That release vitiates any privacy interest here. *See, e.g., CREW III*, 746 F.3d at 1092; *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Nation Mag., Washington Bureau v. U.S. Cust. Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). And this is the President acting *politically* from the bully-pulpit. A public figure has little if any privacy interest in that context. *Cf., e.g.*, *CREW III*, 746 F.3d at 1092; *Nation Mag.*, 71 F.3d 885 at 894, n.9.

2. The Government insists that the President has a distinct privacy interest in the manner in which he answered the Special Counsel's questions—*i.e.*, the "pauses, hesitations, mannerisms, and intonations that occurred during that sensitive event." Def. Mot. at 19, 21. But, the *en banc* D.C. Circuit has made clear that "when the government asserts that only the non-lexical aspect is exempt from disclosure, the court must consider whether the information that would be *newly revealed* by that disclosure is or is not exempt." *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) (emphasis added); *see also id.* ("The information recorded through the capture of a person's voice is distinct and in addition to the information contained in the words themselves."). Put differently, the only privacy interest the Government can legitimately assert here is the interest in President Biden's voice against the backdrop that the transcript was already released. And here, releasing the recording would reveal little new private information about the President's "pauses, hesitations, mannerisms, and intonations." After all, the public is already quite familiar with how he speaks, as his mannerisms while speaking have been the subject of significant reporting over the course of his Presidency. But it would provide significant value—by either supporting or undercutting Special Counsel Hur's non-charging decision—to the public debate.

In arguing otherwise, the Government relies heavily on *NASA*, but that case is not remotely on point. There, the Court declined to order the disclosure of a recording that revealed sensitive

voice communications of NASA astronauts on board the *Challenger* in the final moments before the space shuttle exploded when a transcript of those communications was already public. *N.Y. Times Co. v. NASA*, 782 F.Supp. 628, 633 (D.D.C. 1991). It hardly goes without saying that revealing a recording of the panicked communications of private individuals moments before their death is not remotely comparable to revealing a recording of an interview with President of the United States during an investigation into potential crimes he committed. As former Attorney General Mukasey explains, the "Garland Letter illustrates this very point when it compares the President's demeanor evidence—recorded while he was being interviewed in a secure White House location—to the death throes of the Challenger astronauts." AG Mukasey Decl. at ¶ 22; *see also id.* ("Any reasonable lawyer knows that a release of the audio recording of the President's interview will have significant value to the public's legitimate interest in judging the President's demeanor, candor, and mental acuity (especially when the President is running for reelection), while disclosure of the Challenger recording would have inflicted trauma on the astronauts' families without any significant public interest value."). The same is true of *Pike v. DOJ*, 306 F.Supp.3d 400 (D.D.C. 2016). Withholding a recording where the "voice inflection" would reveal the identity of an undercover source is not remotely comparable. *Id.* at 412.

The Government's other cases are similarly inapt. It relies heavily on *Judicial Watch v. Nat'l Archives and Records Admin.*, 876 F.3d 346 (D.C. Cir. 2017), in which the D.C. Circuit declined to grant access to records related to the independent counsel's draft indictments against Hillary Clinton. But that case is plainly distinguishable, as the content of the draft indictments in *Judicial Watch* were never released to the public. *See id.* at 349 ("Although the *existence* of the Independent Counsel's investigation of her is public knowledge, Mrs. Clinton. . . retains a distinct privacy interest in the *contents* of the investigative files."). *EPIC v. DOJ*, 18 F.4th 712 (D.C. Cir. 2021), likewise involved records of declination decisions (most of which involved private citizens rather than public officials) that were not otherwise public. In that context, the privacy interests in keeping the Government's investigatory files and records of uncharged conduct under wraps is undoubtedly significant. But that reasoning does not begin to translate to this case, where the

substance of the President's interview is already public, and the allegations against him are already well known.

3. Perhaps realizing this fact, the Government argues that there is unique harm from audio recordings because of the "stressful" content of an audio law enforcement interview which is a "unique intrusion." Weinsheimer Decl. at ¶¶ 28, 31, 38. That comparison is inapt in any sort of "high profile" case, as Attorney General Mukasey persuasively explains:

> [A]lthough the type of demeanor evidence provided by an audio recording is essential to evaluating the credibility of a witness and how the witness's testimony may come across to a jury, the recording is typically no more intrusive or revealing of personal information, let alone of the substance of the testimony, than a transcript of the same interview.

AG Mukasey Decl. at ¶ 21. *See also id.* ("[T]he suggestion that witnesses who are represented by sophisticated counsel will be given to emotional outbursts during such interviews seems far-fetched.").

But again, that is not even *this* case. This is "the President of the United States, clothed with immense power," (Doris Keans Goodwin, *Team of Rivals*, at 687 (2005)), in a White House SCIF, surrounded by White House Counsel and the best private counsel money can buy, and being interviewed by individuals serving at his pleasure. Nothing in the Weinsheimer Declaration remotely addresses that issue—and that is dispositive. Merely stating the Government's comparison, equating "the President's demeanor evidence—recorded while he was being interviewed in a secure White House location—to the death throes of the Challenger astronauts" demolishes the argument. AG Mukasey Decl. at ¶ 22.[9]

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[9] The Government's analogies to other contexts are similarly inept. For example, a mug shot "captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties." *Karantsalis v. U.S. Dep't of Justice,* 635 F.3d 497, 503 (11th Cir. 2011). That is not remotely applicable here. And in most cases what information of public interest is contained in a mugshot? It is merely a booking record. *See e.g., World Pub. Co. v. DOJ*, 672 F.3d 825, 831 (10th Cir. 2012). The same goes for cases dealing with common law rights of access to judicial proceedings and protective orders. They deal with different issues over which judges have discretion, not FOIA's statutory scheme. *Cf.* Def. Mot. at 22–23. They are also inapposite here. For example, in *United States v. McDougal*, 940 F.Supp. 224, 226–28 (E.D. Ark. 1996), the press *had* access, albeit limited, to President Clinton's

Finally, the Government resorts to the reddest of herrings: A concern about deepfakes. *See* Def. Mot. at 23–24. Just one major problem. There already are deepfakes. And there is more than enough audio of President Biden and Special Counsel Hur to use the transcript as a template to create a deepfake. The answer to the deepfake concern is more transparency, not less, by a mechanism such as that suggested by Senator Mark Warner: a secure watermarked tape on the Department's website. *See* 2d Cornett Decl. at Ex. 27 at 3. That is the obvious answer here. *See* AG Mukasey Decl. at ¶ 23; Declaration of Jerry Hatchett at ¶ 5(f) (June 21, 2024).

C. There Is Overwhelming Public Interests in Disclosure of the Audio Recordings.

1. The D.C. Circuit has "repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy." *CREW III*, 746 F.3d at 1093. As the D.C. Circuit has explained, relevant to that interest (in the context of a specific criminal investigation) is "the diligence of the FBI's investigation and the DOJ's exercise of its prosecutorial discretion: whether the government had the evidence but nevertheless pulled its punches." *Id.*; *accord id.* at 1093–94 (collecting authorities); *CREW v. DOJ*, 854 F.3d 675, 682 (D.C. Cir. 2017) ("*CREW IV*") (same).[10] That interest may be amplified by "[w]idespread media attention, an ongoing public policy discussion, and the public profile of the subject of the investigation[.]" *CREW II*, 978 F.Supp.2d 1 at 13.

In a desperate attempt to pretermit the obvious application of that line of authority here, the Government submits that "[i]n light of the voluminous information already available to the public, disclosure of the audio recording would do little to meaningfully advance the public's understanding of Special Counsel Hur's investigation and his declination decision," and incredibly, that "[w]hile the Report discusses the President's interview and Mr. Hur testified that

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videotaped deposition. It was played in open court, thus granting the public substantial access. *Id.* at 225. That is not the case here.

[10] Necessarily, that interest is applicable even to a specific case, especially a high-profile one. *See, e.g.*, *CREW III*, 746 F.3d at 1094; *CREW IV*, 854 F.3d at 679; *CREW II*, 978 F.Supp.2d at 13.

he relied in part on the audio recordings in reaching his decisions . . . that does not increase the weight of the public interest" supposedly because Special Counsel Hur already explained why he did not charge President Biden. Def. Mot. at 26–27. That explanation ignores reality.

Special Counsel Hur repeatedly testified that President Biden's "diminished faculties and faulty memory" was an important component of his decision not to charge the President because a jury would see him as "a sympathetic well-meaning elderly man with a poor memory." Hur Report at 248, 6; *see supra* pp. 4–6. That opinion is immensely controversial, and the American people have the right to judge it for themselves. To quote Attorney General Mukasey: "I believe the public has an overwhelming interest in hearing the audio recording and that that interest in disclosure overwhelms any conceivable intrusion on the President's privacy interests." AG Mukasey Decl. at ¶ 16. Indeed, it is the height of hubris for the Government to claim the matter is effectively explained and settled when the White House *itself* (and through its numerous proxies and political allies) have vigorously attacked this conclusion since before the Hur Report was made public. *See supra* pp. 9–10. The President himself felt so strongly about the matter that he disputed these findings from the podium the day the Hur Report was released. *See supra* p. 8. How can resolving that controversy, which is emphatically about Special Counsel Hur's Report and the functioning of the Government, *possibly* not be of overwhelmingly public interest when the White House and the President's re-election campaign fan the controversy at every turn? It cannot. That the Government does not even *address* that issue speaks volumes.

On that point, the audio recording cannot *possibly* be cumulative. Special Counsel Hur's contested conclusion was based on demeanor evidence. *See supra* pp. 9–10. It is the very type of evidence the Government *admits* is captured by audio recordings. *See* AG Mukasey Decl. at ¶ 17; Weinsheimer Decl. at ¶ 27; Garland Ltr. at 5. And as Special Counsel Hur explained in his testimony, a cold transcript is no substitute for live audio. That is particularly so because the critical point was how, in Special Counsel Hur's seasoned prosecutorial judgment, the President's "diminished faculties and faulty memory" (Hur Report at 248) would cause a jury to see the President as "a sympathetic well-meaning elderly man with a poor memory." *Id.* at 6.

The Government has stated that the *only* contemporaneous evidence of demeanor is the audio recording. 2d Cornett Decl. at Ex. 2 at 3:2–4. Special Counsel Hur himself testified he relied upon the tape for demeanor evidence. *See supra* p. 4. As Attorney General Mukasey puts it, the Government's "assertion is directly contradicted by the actions and statements of the Special Counsel." AG Mukasey Decl. at ¶ 18. The Government does not dispute these facts—it cannot—and that concession is fatal. *See EPIC*, 18 F.4th at 721 (rejecting similar argument that disclosure was cumulative as to Special Counsel Robert Mueller's Report because the records at issue went to an issue on which information had not been released); Def. Mot. at 17 (summarizing this portion of *EPIC*'s holding); *see also Dow Jones & Co., Inc. v. DOJ*, 880 F.Supp. 145, 152–53 (S.D.N.Y. 1995) (Sotomayor, J.) (ordering disclosure of Vince Foster's suicide note despite prior release of transcript of that note and rejecting DOJ's analogy to *NASA* because "the public not only has an interest in the contents of the Note but also in viewing a photocopy of the actual document. According to statements made at the Press Conference, the Note was torn up by someone, and some of the pieces are missing. . . . The missing pieces, the 'look' of the handwriting, and the significance to be drawn therefrom, are, as plaintiffs note, matters of public concern. DOJ itself has implicitly recognized the public interest by making a photocopy of the Note available for viewing."), *vacated as moot*, 907 F.Supp. 79 (S.D.N.Y. 1995).[11]

2. Further, there is immense public interest in President Biden's current and future fitness for Office. "If the recording reveals information about the President's diminishing memory and mental acuity, as the Special Counsel has related, that would have obvious relevance to any judgment the voters may make about the President's continuing fitness for office." AG Mukasey

[11] The Government's extensive analogy to *Judicial Watch v. NARA*, 876 F.3d 346 (D.C. Cir. 2017) is even more flawed. *See* Def. Mot. at 16–17. There, the record sought did not even concern a decision of the Independent Counsel; it was an internal draft. *Id.* at 350. Therefore, Judicial Watch only asserted a general interest in the "operations" of the Independent Counsel's Office, and that general information in operations was cumulative. That is a world removed from a key *finding* by Special Counsel Hur that is the subject of immense controversy and on which only highly limited information has been released.

Decl. at ¶ 19. The President's fitness for Office is plainly a matter of concern to the American people and a major issue of public debate in the 2024 Election. *See supra* p. 11.

Yet again, the Government does not address this argument head on, but comes at it indirectly, arguing "D.C. Circuit precedent requires that any public interest in disclosure be grounded on how release of the audio recording would inform the public about the activities of Special Counsel Hur, not on any conduct of President Biden." Def. Mot. at 25. That is true, but only insofar as there is no public interest in finding out "what [the official] himself was 'up to.'" *CREW III*, 746 F.3d at 1093. But there clearly is a compelling separate interest in information that is of electoral salience to the American people, even if it is about a particular candidate. This Court has so held. In *Brennan Ctr. for Just. at NYU Sch. of L. v. Dep't of Com.*, this Court found a delayed release of records related to the 2020 Census and reapportionment process until after legislative action on apportionment was likely to result in irreparable harm to the plaintiff, "as this is the rare case where after a date certain, the value of the information sought . . . to inform the public about these matters would be materially lessened or lost." 498 F.Supp.3d 87, 99–100 (D.D.C. 2020); *see also Leadership Conf. on C.R. v. Gonzales*, 404 F.Supp.2d 246, 257 (D.D.C. 2005) (information for vote on Civil Rights Act).

Indeed, this interest is so compelling as to have justified the grant of preliminary injunction prior to the electoral or legislative event in multiple cases. *See, e.g.*, *Brennan Ctr.,* 498 F.Supp.3d at 100; *Protect Democracy Project, Inc. v. DOJ*, 498 F.Supp.3d 132, 142 (D.D.C. 2020) (records relating to the United States Postal Service's involvement in Department of Justice's voting fraud task force before 2020 election); *Am. Oversight v. Dep't of State*, 414 F.Supp.3d 182, 188 (D.D.C. 2019) (impeachment inquiry); *Ctr. for Pub. Integrity v. Dep't of Def.*, 411 F.Supp.3d 5, 15 (D.D.C. 2019) (same); *Wash. Post v. DHS*, 459 F.Supp.2d 61, 74 (D.D.C. 2006) (records of visitors to White House Complex and Vice President's residence prior to 2006 elections). That separate interest controls here.

D. The Interest in Disclosure is Overwhelming.

The balance of interests here is not even close. The President gutted his already diminished privacy interests when he chose to release the transcript for political reasons. And the public interests in disclosure of a raging political dispute at the center of the election—fanned by the very Administration that resists disclosure—are overwhelming.

CONCLUSION

Defendant's Motion for Summary Judgment should be denied. Heritage Plaintiffs' Cross-Motion for Summary Judgment should be granted; Defendant's categorical withholding rejected; and Defendant should be required to produce appropriately redacted audio tapes within 10 days of an order.

Dated: June 21, 2024

Respectfully submitted,

/s/ Samuel Everett Dewey

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff,	
THE HERITAGE FOUNDATION, et al., Plaintiffs,	Case No. 1:24-cv-00700-TJK (Consolidated Cases)
CABLE NEWS NETWORK, INC., Plaintiffs, **v.** **U.S. DEPARTMENT OF JUSTICE,** Defendant.	

DECLARATION OF THE HONORABLE MICHAEL B. MUKASEY

I, Michael B. Mukasey, declare as follows:

1. I make this declaration in response to the letter dated May 15, 2024, from Attorney General Merrick B. Garland to President Joseph R. Biden requesting that the President assert executive privilege over subpoenaed audio recordings of interviews conducted by Special Counsel Robert K. Hur (the "Garland Letter"), and the Declaration of Bradley Weinsheimer, Associate Deputy Attorney General, filed in this case (the "Weinsheimer Declaration"). The Garland Letter is Exhibit 5 to the Weinsheimer Declaration. I am providing this declaration in the belief that it will assist the Court in this matter. I am not receiving any compensation or inducement for providing this declaration.

2. I served as the 81st Attorney General of the United States from November 9, 2007, to January 20, 2009, under President George W. Bush. Previously, I served from 1987 to 2006 as a District Judge on the United States District Court for the Southern District of New York (SDNY), and I was Chief Judge of that court from March 12, 2000, until August 1, 2006. From 1972 to 1976, I served as an Assistant U.S. Attorney for SDNY, where I was Chief of the Official Corruption Unit from 1975 to 1976. I have also served as partner and of counsel in major international law firms.

3. During my tenure as Attorney General, I gained extensive experience with the constitutional and historical grounds for executive privilege, as well as with the considerations supporting a President's proper assertion of executive privilege in response to a subpoena from Congress. Working with the support of the attorneys in the Office of Legal Counsel (OLC) of the U.S. Department of Justice (the "Department"), I advised the President on matters relating to executive privilege. On July 15, 2008, I requested that the President assert executive privilege over Federal Bureau of Investigation (FBI) reports and notes of interviews of the Vice President and senior White House staff conducted by Special Counsel Patrick Fitzgerald in connection with his investigation into the disclosure of Valerie Plame Wilson's identity as an employee of the Central Intelligence Agency. *See* *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. OLC 7 (2008) ("*2008 Executive Privilege Letter*").

4. With that experience in mind, I have reviewed the grounds given for President Biden's assertion of executive privilege over the audio recording of his own interview, which is the Department record at issue in this Freedom of Information Act (FOIA) case. The President has asserted the privilege over the audio recording notwithstanding that the

Department already publicly released a verbatim transcript of the same interview at the President's direction. As set forth in the Garland Letter, the justification given for invoking the privilege is the supposition that, even though the transcript has already been disclosed, the additional release of the recording "would raise an unacceptable risk of undermining the Department's ability to conduct similar high-profile criminal investigations—in particular, investigations where the voluntary cooperation of White House officials is exceedingly important." Garland Letter pp. 3-4. *See id.* p. 6; Weinsheimer Declaration ¶ 24 (same). In support, the Garland Letter places heavy reliance on my analysis of the law enforcement component of executive privilege as set forth in my *2008 Executive Privilege Letter*. *See* Garland Letter pp. 1, 4-6.

5. I am a strong proponent of the President's constitutional responsibility to assert executive privilege when necessary to protect sensitive information in the possession of the Executive Branch, including confidential information in law enforcement files, the disclosure of which could seriously compromise the Department's ability to enforce the law. However, I believe the assertion of executive privilege made here goes well beyond the limits of any prior assertion and is not supported by the *2008 Executive Privilege Letter* or other precedents relied upon by the Department. The reasons given for invoking the privilege are entirely unconvincing, and I believe that by pressing this flawed privilege assertion, the Department has lost sight of the true institutional interests of the presidency and is putting at risk the important traditions and principles on which the doctrine of executive privilege rests, and thus the ability of this and future Presidents to invoke that doctrine when necessary and appropriate.

6. Let me begin by pointing out the obvious differences between the considerations involved in my *2008 Executive Privilege Letter* and the circumstances addressed in the Garland Letter. First, the FBI reports and interview notes at issue in the *2008 Executive Privilege Letter* contained information reflecting "frank and candid deliberations among senior presidential advisers" about official White House business involving sensitive decisions of the President and communications with the President. *2008 Executive Privilege Letter*, 32 Op. OLC at 7-8. Indeed, for that reason, the primary grounds identified for the 2008 assertion of privilege were "the presidential communications and deliberative process components of executive privilege." *Id.* at 9. In contrast, Special Counsel Hur's interview of the President did not touch on official White House business, let alone the sensitive deliberations of presidential advisers, but only private conduct—the retention and handling of classified materials by the President at his private premises occurring mostly before he was President.

7. That the materials at issue in 2008 involved sensitive White House business also informed my analysis of the law enforcement component of executive privilege. As I explained, I was specifically concerned that disclosure of those materials "could discourage voluntary cooperation with future Department criminal investigations involving *official White House actions*." *Id.* at 11 (emphasis added). An investigative interview concerning only private actions, like Special Counsel Hur's interview of President Biden, does not implicate the same concerns.

8. Second, all of the materials at issue in 2008 were maintained as confidential, and the Department had not released any of them at the time of the executive privilege assertion. Here, of course, the President decided to have the Department release a verbatim

transcript of his interview and then later asserted executive privilege over the audio recording. The Weinsheimer Declaration explains that the Department's concern about chilling cooperation with law enforcement investigations turns on an "expectation of confidentiality"—the fact that "interview subjects and their counsel understand and depend on the Department's well-established and consistent practice of, to the greatest extent possible, maintaining the confidentiality of interviews." Weinsheimer Declaration ¶ 25. That "expectation of confidentiality" factor was, of course, fully at stake in the 2008 executive privilege assertion, but it is entirely absent here as a result of the President's own decision to release the transcript.[1]

9. The release of the transcript brings into sharp focus the most critical distinction between the 2008 assertion of executive privilege and the present case. While the materials addressed in the *2008 Executive Privilege Letter* involved interviews of the Vice President and other senior White House officials below the President, the interview at issue here was of the President himself. The President is unique. As the head of the Executive Branch, he is the Attorney General's boss and, through the Attorney General, the boss of all subordinate officials in the Department. As such, the President is the only person in the

[1] It is worth noting the procedural history of the *2008 Executive Privilege Letter*, which is omitted from the Garland Letter's analysis. The 2008 law enforcement withholdings were ordered released in a subsequent FOIA lawsuit. *See CREW v. Department of Justice*, 658 F. Supp. 2d 217, 225-31(D.D.C. 2009). The Department chose not to appeal that decision. As a result, every witness in Special Counsel Hur's investigation—from President Biden on down—chose to sit for a recorded interview with the knowledge that portions of the interview could be released under FOIA pursuant to the *CREW* holding. In my opinion, that is yet another fact undercutting the law enforcement basis for the privilege assertion here.

Executive Branch who has the authority to order the Attorney General to release the transcript of an interview.

10. President Biden made the decision to release the transcript of his interview for his own reasons, which to my eye were political, including pressure associated with his campaign for reelection. Other witnesses may face similar political pressures, but no other witnesses—not even the Vice President or other senior officials in the White House—would have the ability to make the Department release the transcript of their interviews, regardless of the intensity of pressure or publicity surrounding a criminal investigation.

11. Therefore, the Department's supposed concern that the compelled release of the audio recording of the President's interview following the President's voluntary decision to release the interview transcript might deter White House officials or other witnesses in future high-profile criminal investigations from cooperating with requests for recorded interviews, *see* Garland Letter pp. 5-6, rings hollow. Those witnesses in future investigations will continue to place reasonable reliance on the Department's "well-established and consistent practice" of maintaining the confidentiality of investigative interviews whether or not the Court in this case orders the Department to disclose the audio recording of an interview the substance of which has already been released in written form.[2]

12. The Department's declarant asserts that he is "aware of ongoing investigations in particular in which witnesses declined to be audio recorded, suggesting they feared their

[2] What is more, the majority of interviews, even in high-profile criminal cases, are not audio recorded. Instead, most interviews are documented in the usual manner, by FBI notes and interview reports. There is no reason to expect that the Court's decision in this case will affect in any way the Department's confidential treatment of those FBI interview records.

interview recording would be publicly disclosed in the future," and that "[s]uch refusals reasonably would be expected to increase if witnesses believed an audio recording could be released in FOIA." Weinsheimer Declaration ¶ 34. But witnesses always have the right to decline the audio recording of an interview, just as they have the right to refuse to be interviewed, and they often decline interviews or audio recording for any number of reasons. The fact that witnesses may do so in particular investigations does not prove a connection to any specific factor.

13. Moreover, if White House officials are concerned that the substance of their interviews in criminal investigations might be disclosed, that concern stems more from the political motivations of the President than from FOIA. Senior officials interviewed in high-profile criminal cases are usually represented by experienced counsel who understand the risk that an interview transcript or recording may be released by the President for political reasons. That is one way political accountability operates in Washington, and it is a particular factor in "investigations where the voluntary cooperation of White House officials is exceedingly important." Garland Letter p. 5. White House personnel and other senior officials know (or will be advised by counsel) that any interview they give may be disclosed if the President deems it expedient. The Court's decision in this case will not change that reality.[3]

[3] The claim that release of the President's audio recording here "might" somehow cause other witnesses to be "less comprehensive in their answers during interviews" is not persuasive. Garland Letter p. 6; Weinsheimer Declaration ¶ 35. There is no reason to think that witnesses in high-profile matters who are advised by sophisticated counsel will change the way they answer questions based on speculation that (1) the President might decide to order the Department to release the transcript of their interview for political reasons, and then (2) if the President has released the transcript, the Department might be required by a court in a FOIA case to disclose the audio recording of the interview.

14. The Department does not even try to suggest that the release of the audio recording in the present circumstances would deter future Presidents from sitting for recorded interviews. Any President, in deciding whether to cooperate with a prosecutor's request for an interview and whether to let the interview be recorded, will be influenced more by prevailing political considerations than by the Court's decision in this FOIA litigation. There is no reason to expect that a court order requiring disclosure of the audio recording of an interview the transcript of which was previously released would have any real-world effect on the decisions of future Presidents to cooperate with criminal investigations.

15. In my *2008 Executive Privilege Letter*, I recognized the "admirable tradition, extending back through Administrations of both political parties, of full cooperation by the White House with criminal investigations," 32 Op. OLC at 11 (internal quotation omitted), and that the incentives for White House cooperation are aided by the expectation that the Department will maintain the confidentiality of law enforcement files. *See* Garland Letter p. 5; Weinsheimer Declaration ¶ 26. But at least since Watergate, the President knows that he will suffer politically if he refuses to cooperate with a Special Counsel investigation. And for similar reasons, a President will direct the Department to put aside its usual policy of protecting confidentiality and release sensitive information when it suits the political interests of the President and his Administration. President Biden's decision to release his interview transcript is a prime example.

16. If the President had not released the transcript of his interview, the grounds for protecting the confidentiality of the audio recording would, of course, be very different. But now that the President made the political decision to release the transcript, the issue to be decided is whether there would be additional value in the further public disclosure of the

audio recording and whether the public interest in that disclosure is clearly outweighed by some concrete harm. I believe the public has an overwhelming interest in hearing the audio recording and that that interest in disclosure overwhelms any conceivable intrusion on the President's privacy interests.

17. As the Department says, "[r]ecording interviews is a highly useful law enforcement tool, especially during high-profile or complex investigations," and audio recordings offer "unique characteristics" not available in written transcripts. Garland Letter p. 5. *See* Weinsheimer Declaration ¶ 27. Among other things, audio recordings can provide rich information not apparent from a cold transcript about the witness's demeanor, credibility, mental acuity, and other attributes. These can come across through voice intonations, a halting or weak voice, pauses, hesitations, and other personal verbal mannerisms. *See* Weinsheimer Declaration ¶ 40.

18. This is precisely the type of information Special Counsel Hur relied on in making his decision not to prosecute President Biden for his retention and mishandling of classified documents. The Special Counsel has said he declined to prosecute because of concerns about the President's "diminished faculties and faulty memory," in addition to other factors. In the Special Counsel's judgment, these factors would cause a jury to see the President as "a sympathetic well-meaning elderly man with a poor memory," which could compromise the government's chances of securing a conviction at trial. Special Counsel Robert K. Hur, *Report on the Investigation into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Eiden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.*, p. 248 (Feb. 2024). The Department urges "that release of the recording would do very little to advance

the public's understanding of Special Counsel Hur's activities given the substantial amount of information already in the public record," Weinsheimer Declaration ¶ 47, but that assertion is directly contradicted by the actions and statements of the Special Counsel.

19. I understand that the Department has acknowledged that the audio recording is the only available contemporaneous evidence of the President's demeanor. I also understand that the Special Counsel and the Department have both stated that the Special Counsel relied upon the recording in reaching his decision not to prosecute. In these circumstances, the public interest in allowing the American people (including America's voters) access to the recording to judge these questions in their own minds is overwhelming. If the recording reveals information about the President's diminishing memory and mental acuity, as the Special Counsel has related, that would have obvious relevance to any judgment the voters may make about the President's continuing fitness for office.

20. The lack of a concrete basis for withholding the audio recording raises the strong implication that the Administration believes its release would prove embarrassing to the President and politically damaging. Political embarrassment, however, is not a proper ground for executive privilege or the withholding of records under FOIA. The President, his Administration, his campaign, and his supporters have repeatedly attacked Special Counsel Hur for his conclusion about the President's diminished faculties and memory. They have asserted that these statements are factually incorrect and inappropriate. I concur with Special Counsel Hur's assessment that "the evidence and the President himself put his memory squarely at issue." *Hearing on the Report of Special Counsel Rober K. Hur Before the H. Comm. on the Jud.*, 118th Cong. 8 (Mar. 12, 2024). But there remains public disagreement and controversy over whether the Special Counsel was correct, and the White House has

continued to fan this controversy. The American people can and should be allowed to evaluate the question for themselves by listening to the demeanor evidence provided by the audio recording.

21. The Department, nevertheless, maintains that releasing an audio recording involves a "unique intrusion" into "privacy interests" not implicated by the prior release of the written transcript and that this intrusion "may be particularly severe when the recording is of a law enforcement interview—a consequential interaction conducted under criminal penalty for false statements—in a case where the interviewee has not been charged with a crime." Garland Letter p. 5. *See* Weinsheimer Declaration ¶¶ 21, 28. However, in my experience, although the type of demeanor evidence provided by an audio recording is essential to evaluating the credibility of a witness and how the witness's testimony may come across to a jury, the recording is typically no more intrusive or revealing of personal information, let alone of the substance of the testimony, than a transcript of the same interview. And the suggestion that witnesses who are represented by sophisticated counsel will be given to emotional outbursts during such interviews seems far-fetched.

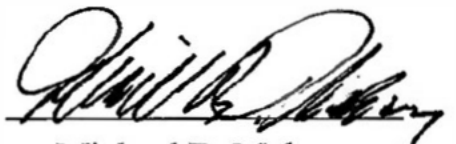
22. The Garland Letter illustrates this very point when it compares the President's demeanor evidence—recorded while he was being interviewed in a secure White House location—to the death throes of the Challenger astronauts. *See* Garland Letter p. 5 (citing *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005–07 (D.C. Cir. 1990) (en banc)). Any reasonable lawyer knows that a release of the audio recording of the President's interview will have significant value to the public's legitimate interest in judging the President's demeanor, candor, and mental acuity (especially when the President is running for reelection), while disclosure

of the Challenger recording would have inflicted trauma on the astronauts' families without any significant public interest value.

23. Finally, the suggestion that the audio recording should be suppressed because "disclosure of audio recordings presents a significant opportunity for misuse and possible manipulation," Garland Letter p. 6, is similarly baseless. The notion that release of the authorized audio recording could lead to so called "deep fakes," Weinsheimer Declaration ¶¶ 43-45, ignores reality. The potential for faked audio of the President's interview is already present. There are ample publicly available recordings of the voices of the President, Special Counsel Hur, and the Deputy Special Counsel. Using AI programs readily obtainable, those voice recordings can easily be combined with the written transcript—voluntarily released by the President—to produce a fake recording, which could then be manipulated to dramatic effect. Now that the President has released the transcript, the real way to combat deep fakes is more transparency, not less. The best defense against deep fakes is for the Department to make available a secure, watermarked version of the audio on its website. The public can then compare any purported versions against this official version.

I declare under penalty of perjury that the foregoing is true and correct.

June 18, 2024



Michael B. Mukasey

From: "Berger, Christine (OAG)" (b) (6)
To: "Klapper, Matthew B. (OAG)" (b) (6)
Subject: FW: House complaint
Date: Mon, 01 Jul 2024 12:32:51 -0400
Importance: Normal
Attachments: 01_-_Complaint.pdf

From: Mizer, Benjamin (OASG) <(b) (6)
Sent: Monday, July 1, 2024 12:25 PM
To: Berger, Christine (OAG) <(b) (6)
Subject: FW: House complaint

Chris, just wanted to make sure your office is tracking this. No judge assigned yet, and no TRO or PI motion yet either.

From: Moxley Beatty, Lauren (OASG) (b) (6)
Sent: Monday, July 1, 2024 11:45 AM
To: Mizer, Benjamin (OASG) <(b) (6)
Cc: Reich, Mitchell (OASG) <(b) (6)
Subject: House complaint

Ben: here is the House Judiciary Committee's complaint in the audio recordings matter.

Lauren

Lauren Moxley Beatty
Senior Counsel
Office of the Associate Attorney General
Department of Justice
(b) (6) (cell)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,

2138 Rayburn House Office Building
Washington, D.C. 20515,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States,

950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530,

Defendant.

Case No. 1:24-cv-1911

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Committee on the Judiciary of the United States House of Representatives (Judiciary Committee or Committee) brings this civil action against Defendant Merrick Garland to enforce a duly authorized, issued, and served Congressional subpoena (Subpoena) to Garland, which is attached as Exhibit A. The Judiciary Committee alleges as follows:

INTRODUCTION

1. This dispute is principally about a frivolous assertion of executive privilege. As part of its oversight investigation into the Department of Justice's (DOJ) commitment to impartial justice and its impeachment inquiry into President Joseph Biden, the Judiciary Committee issued a Subpoena to Attorney General Merrick Garland to obtain records related to

Special Counsel Robert Hur's investigation of President Biden's mishandling of classified documents. Among other things, the Committee sought materials related to the Special Counsel's interviews with President Biden and Mark Zwonitzer, the ghostwriter of President Biden's 2017 memoir.

2. While DOJ has provided the Committee with transcripts of those interviews, transcripts that the Executive Branch has released publicly, Attorney General Garland has refused to produce the audio recordings of the Special Counsel's interviews with President Biden and Mr. Zwonitzer. Instead, Attorney General Garland asked that President Biden assert executive privilege over those recordings, and President Biden complied with that request.

3. Audio recordings are better evidence than transcripts of what happened during the Special Counsel's interviews with President Biden and Mr. Zwonitzer. For example, they contain verbal and nonverbal context that is missing from a cold transcript. That verbal and nonverbal context is quite important here because the Special Counsel relied on the way that President Biden presented himself during their interview—"as a sympathetic, well-meaning, elderly man with a poor memory"[1]—when ultimately recommending that President Biden should not be prosecuted for unlawfully retaining and disclosing classified information. The audio recordings, not the cold transcripts, are the best available evidence of how President Biden presented himself during the interview. The Committee thus needs those recordings to assess the Special Counsel's characterization of the President, which he and White House lawyers have forcefully disputed, and ultimate recommendation that President Biden should not be prosecuted.

[1] Robert K. Hur, *Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.* 6 (Feb. 2024) (Report), https://perma.cc/X5MV-RU8J

4. President Biden's self-serving attempt to shield the audio recording of his interview with the Special Counsel while publicly releasing a transcript of that same interview represents an astonishing effort to expand the scope of executive privilege from a constitutional privilege safeguarding certain substantive communications to an amorphous privilege that can be molded to protect things like voice inflection, tone, and pace of speech. Any privilege that could conceivably apply to President Biden's interview with the Special Counsel was waived when the Executive Branch released a transcript of that interview to the press and produced that transcript to the Committee. And any privilege that could conceivably apply to the Special Counsel's interview with Mr. Zwonitzer was waived when the Executive Branch produced a transcript of that interview to the Committee and released that transcript in response to a Freedom of Information Act (FOIA) request.

5. Additionally, the heart of the privilege claim—that Executive Branch employees will be less likely to cooperate with DOJ investigations if they know that audio recordings of their interviews may be released to Congress *after DOJ has made transcripts of those same interviews publicly available*—is at odds with common sense. If the potential for disclosure would chill cooperation, it would be the disclosure of a transcript, which DOJ voluntarily disclosed here, not the disclosure of audio recordings after the transcripts are widely available.

6. For these reasons and the others set forth below, President Biden's invocation of executive privilege lacks any merit. The Committee therefore asks this Court to overrule the assertion of executive privilege and order that Attorney General Garland produce the audio recordings of the Special Counsel's interviews with President Biden and Mr. Zwonitzer to the Committee.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. This case arises under Article I of the Constitution of the United States and implicates Article I, Section 1, which vests "[a]ll legislative Powers" in the Congress of the United States, and Article 1, Section 2, Clause 5, which provides the House of Representatives with "the sole Power of Impeachment."

8. This Court has authority to issue a declaratory judgment and order other just and proper relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1), 1391(b)(2), and 1391(e)(1).

PARTIES

10. Plaintiff Committee on the Judiciary of the United States House of Representatives is a standing committee of the House that, among other duties, conducts oversight of DOJ.

11. Defendant Merrick Garland serves as the Attorney General of the United States.

ALLEGATIONS

I. The Committee's constitutional authority to conduct investigations, including an impeachment inquiry, and to issue subpoenas to advance its investigations

12. Article I of the Constitution vests Congress with "[a]ll legislative Powers."[2] Those powers include the authority to investigate matters relating to subjects within its broad legislative purview; conduct oversight of Executive Branch agencies; examine whether Executive Branch agencies are faithfully, effectively, and efficiently executing the laws; and determine whether changes to federal law are necessary and proper. For nearly a century, the

[2] U.S. Const. art. I, § 1, cl. 1.

Supreme Court has recognized that the Constitution vests the House with the "power of inquiry—with process to enforce it"—commensurate with the House's Article I legislative authority to investigate any subject on which "legislation could be had."[3]

13. The Constitution commits to each chamber of Congress the authority to "determine the Rules of its Proceedings."[4] Pursuant to this authority, the 118th House of Representatives adopted the Rules of the House of Representatives (House Rules) to govern itself during the current Congress.[5] The House Rules establish various standing committees, including the Judiciary Committee, and delegate to each committee "jurisdiction and related functions."[6]

14. The Judiciary Committee's legislative and oversight jurisdiction includes, among other subjects, "judicial proceedings, civil and criminal," as well as "[c]riminal law enforcement and criminalization."[7] Thus, the Judiciary Committee exercises jurisdiction (among other matters) over legislation relating to criminal proceedings and law enforcement matters. The House Rules further mandate that "[a]ll bills, resolutions, and other matters relating to" subjects within the Judiciary Committee's jurisdiction be referred to the Judiciary Committee for its consideration.[8]

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[3] *McGrain v. Daugherty*, 273 U.S. 135, 174, 177 (1927).

[4] U.S. Const. art. I, § 5, cl. 2.

[5] *See* H. Res. 5, 118th Cong. § 1 (2023) (adopting House Rules for the 118th Congress), https://perma.cc/28AM-XD4R; *see also* House Rules, 118th Congress (Jan. 10, 2023), https://perma.cc/3UX4-2YG5.

[6] House Rule X.1.

[7] House Rule X.1(*l*)(1), (7).

[8] House Rule X.1.

15. As a standing committee, the Judiciary Committee also has "general oversight responsibilities," including regarding the "operation of Federal agencies and entities" within its areas of jurisdiction.[9] As such, the Judiciary Committee exercises oversight of the structure and functions of DOJ.[10] Among other responsibilities, the Judiciary Committee is charged with reviewing "on a continuing basis … the application, administration, execution, and effectiveness of laws and programs … within its jurisdiction."[11] The Judiciary Committee must determine whether such laws are being "implemented and carried out in accordance with the intent of Congress" and if there are "any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation."[12]

16. The House Rules empower all standing committees, including the Judiciary Committee, to "conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities" over matters within its jurisdiction.[13] To aid these inquiries, the Judiciary Committee, like all standing committees, is authorized to issue subpoenas for testimony and records.[14]

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[9] House Rule X.2(a), (b)(1)(B).

[10] *See, e.g.*, *Oversight of DOJ: Hearing Before the H. Comm. on the Judiciary*, 118th Cong. (June 4, 2024) (oversight hearing conducted with Attorney General Merrick Garland appearing as a witness), https://perma.cc/M7WE-2JC3.

[11] House Rule X.2(b)(1)(A).

[12] House Rule X.2(b)(1)(C).

[13] House Rule XI.1(b)(1).

[14] *See* House Rule XI.2(m)(1)(B), (3)(A)(i); *see also* Rule IV(a), Rules of the Committee on the Judiciary of the U.S. House of Representatives, 118th Cong. (2023) (Judiciary Committee Rules) ("A subpoena may be authorized and issued by the Chair, in accordance with clause 2(m) of rule XI of the House of Representatives, in the conduct of any investigation or activity or

17. Separate from Congress's legislative authority, the power of impeachment is textually committed by the Constitution to the House and the House alone.[15] This power is far-reaching. Indeed, in "an impeachment investigation involving the President of the United States[,] [i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information."[16] Even prior presidents have admitted that an impeachment inquiry "would penetrate into the most secret recesses of the Executive Departments" and would include the authority to "command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge."[17]

18. The Committee's jurisdiction includes impeachment.[18] Resolutions that call for the impeachment of officials are normally referred by the Speaker of the House to the

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series of investigations or activities within the jurisdiction of the Committee, following consultation with the Ranking Minority Member."), https://perma.cc/6UUS-LYEH.

[15] U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives … shall have the sole power of impeachment.").

[16] *In re Rep. & Recommendation of June 5, 1972*, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

[17] 4 J. Richardson, *A Compilation of the Messages and Papers of the Presidents*, H. Misc. Doc. 53-210, at 434 (1897) (statement of President James K. Polk), https://perma.cc/82XR-DWJ2.

[18] *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States*, H. Doc. 117-161, § 605, at 329 (2023) ("[R]esolutions … that directly call for the impeachment of an officer have been referred to the Committee on the Judiciary …."), https://perma.cc/6JDB-H6C3. As *Jefferson's Manual* explains, "[i]n the House various events have been credited with setting an impeachment in motion," including "charges made on the floor;" "a resolution introduced by a Member and referred to a committee;" or "facts developed and reported by an investigating committee of the House." *Id.* § 603, at 327.

Committee[19] and are eligible for consideration pursuant to applicable House and Committee Rules.[20]

19. On September 12, 2023, Speaker Kevin McCarthy directed the Judiciary Committee, among other committees, to open a formal impeachment inquiry into President Joseph Biden.[21] The scope of the inquiry includes whether President Biden has abused his office of public trust to enrich himself or his family, including in connection with his family's business dealings with foreign parties.[22] On December 13, 2023, the House adopted House Resolution 918,[23] which directed three committees, including the Judiciary Committee, "to continue their ongoing investigations as part of the House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Joseph Biden, President of the United States of America."[24] The full House has also confirmed

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[19] *See, e.g.*, 169 Cong. Rec. H2809 (daily ed. June 12, 2023) (referring to the Judiciary Committee House Resolution 493, setting forth articles of impeachment against President Biden), https://perma.cc/CA8S-BXDJ; 169 Cong. Rec. H4181 (daily ed. Aug. 11, 2023) (referring to the Judiciary Committee House Resolution 652, setting forth articles of impeachment against President Biden), https://perma.cc/8GM8-JXBF; 162 Cong. Rec. H4926 (daily ed. July 13, 2016) (referring to the Judiciary Committee House Resolution 828, setting forth articles of impeachment against John Andrew Koskinen, Commissioner of the IRS), https://perma.cc/D22N-YEMN; 133 Cong. Rec. 6522 (1987) (referring to the Judiciary Committee House Resolution 128, setting forth articles of impeachment against Judge Alcee Hastings), https://perma.cc/TV7V-JXVK.

[20] *See* House Rule XI.2(b), (c)(1); *see also* Judiciary Committee Rule II(c).

[21] Memorandum from Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, et al., to Members of the H. Comm. on Oversight & Accountability, et al., at 2 (Sept. 27, 2023) (Impeachment Memorandum) (attached as Ex. B).

[22] *See id.* at 27-28.

[23] 169 Cong. Rec. H6922-23 (daily ed. Dec. 13, 2023), https://perma.cc/ATQ9-27VV.

[24] H. Res. 918, 118th Cong. (2023), https://perma.cc/69QX-U332.

that the Committee has the "authority to issue subpoenas … [to] further[] the impeachment inquiry."[25]

II. The Judiciary Committee's ongoing oversight of DOJ's commitment to impartial justice

A. DOJ's investigation of President Biden's mishandling of classified information

20. On November 2, 2022, President Biden's personal counsel discovered boxes containing documents with classification markings, dating from when he was Vice President, in an office that he previously used at the Penn Biden Center in Washington, D.C.[26] The boxes and documents were retrieved by the National Archives, and upon review, archivists found documents that were classified up to the Top Secret level and included codes indicating that some of this material constituted Sensitive Compartmented Information.[27] The National Archives then informed DOJ and the Office of the Director of National Intelligence about the discovery of these classified records.[28] On November 14, 2022, Attorney General Garland assigned John Lausch, then the U.S. Attorney for the Northern District of Illinois, to investigate the matter to determine whether a Special Counsel should be appointed to oversee the investigation.[29]

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[25] *Id.* § 6 (adopting House Resolution 917); H. Res. 917, 118th Cong. § 2 (2023) (confirming subpoena authority), https://perma.cc/B3JT-WEZT.

[26] Report at 19.

[27] *Id.* at 19-20.

[28] *Id.* at 20.

[29] *Id.* at 21.

21. On December 20, 2022, personal counsel for President Biden discovered additional classified documents, this time in two separate locations in the garage of President Biden's Wilmington, Delaware home.[30] Lausch was notified of the discovery, and FBI agents retrieved the documents.[31] On January 11, 2023, personal counsel for President Biden found another document with classification markings, this time in a notebook located in the basement den of the President's Wilmington home.[32] Lausch was notified the next day, and the FBI eventually collected two classified documents related to Afghanistan and Iraq from that notebook.[33] Shortly thereafter, an attorney from the White House Counsel's Office provided the FBI with the notebook.[34]

22. That same day, January 12, Attorney General Garland appointed Robert K. Hur as Special Counsel.[35] Garland's order authorized Hur to continue Lausch's investigation, "including [into] possible unauthorized removal and retention of classified documents or other records discovered at the Penn Biden Center for Diplomacy and Global Engagement and the Wilmington, Delaware, private residence of President Joseph R. Biden, Jr., as well as any matters that arose from the initial investigation or may arise directly from the Special Counsel's

[30] *Id.* at 22-23.

[31] *Id.* at 23.

[32] *Id.* at 24-25.

[33] *Id.* at 25.

[34] *Id.*

[35] Off. Att'y Gen., DOJ, Order No. 5588-2023, *Appointment of Robert K. Hur as Special Counsel* (Jan. 12, 2023) (attached as Ex. C).

investigation or that are within the scope of 28 C.F.R. § 600.4(a)."[36] Hur was also authorized to prosecute federal crimes arising from his investigation into these matters.[37]

23. During Special Counsel Hur's investigation, FBI agents found additional classified documents in President's Biden's home and within his Senate papers at the University of Delaware.[38]

24. The Special Counsel and his team conducted 173 interviews of 147 witnesses.[39] These witnesses included President Biden, as well as Mark Zwonitzer, the ghostwriter for the President's 2017 memoir, *Promise Me, Dad*.[40]

25. The Special Counsel and his team also listened to audio recordings Zwonitzer made of his interviews with the President as he was ghostwriting the memoir.[41] Zwonitzer had deleted digital audio recordings of his conversations with President Biden, but because "[t]he recordings had significant evidentiary value," investigators recovered them from Zwonitzer's laptop and external hard drive.[42] Indeed, the Special Counsel stated that "there is unique evidentiary value in a subject's own voice as captured on an audio recording."[43]

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[36] *Id.* at 1.

[37] *Id.*

[38] Report at 26-28.

[39] *Id.* at 29.

[40] *Id.* at 29, 98, 336.

[41] *Id.* at 103.

[42] *Id.* at 334.

[43] *Id.* at 343.

26. During a recorded interview with Zwonitzer in February 2017, the President, who had just left the vice presidency and at that point was renting a home in Virginia, commented that he had "just found all the classified stuff downstairs."[44] Hur concluded that this statement was likely a reference to the same marked classified documents that FBI investigators had found in his Delaware garage in 2022.[45] Additionally, during his recorded discussions with Zwonitzer in 2017, the President disclosed classified information to his ghostwriter by reading aloud classified passages from a notebook nearly verbatim on at least three occasions.[46]

27. The Special Counsel's Report about his investigation was publicly released on February 8, 2024. He concluded that while the "investigation uncovered evidence that President Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen," "no criminal charges [were] warranted."[47] The Report explained that this latter conclusion was based in part on the belief that "jurors would likely find reasonable doubt" that the President willfully, that is, "with intent to break the law," retained and disclosed classified information because "some jurors [would likely believe] that [the President] made an innocent mistake rather than acting willfully."[48]

28. The Special Counsel reached this determination in part based on his analysis of how the President appeared and presented. In fact, the Special Counsel himself stated as much when he testified in front of the Committee, explaining that he "did take into account not just the

[44] *Id.* at 3-4, 110-115.

[45] *Id.* at 4, 114.

[46] *Id.* at 9.

[47] *Id.* at 1.

[48] *Id.* at 4-5.

words from the cold record of the transcript, but the entire manner in living color in real time of how the President presented himself."[49] For example, the Special Counsel's Report explained that the President "would likely present himself to a jury, as he did during [Hur's] interview of him, as a sympathetic, well-meaning, elderly man with a poor memory."[50] In the President's own recorded interview with the Special Counsel, the Special Counsel noted that the President's memory "appeared hazy."[51] For example, Hur noted that President Biden "did not remember when he was vice president," forgetting both when his term as vice president began and ended.[52] As a result, the Special Counsel believed that a reasonable juror could believe that the President lacked the required mens rea, willfulness, to support a conviction.

29. In transmitting the Special Counsel's Report, the Attorney General notified the Committee of the President's decision "not to assert executive privilege over any part of the report or its appendices."[53] Further, the Report does not include any redactions.

30. President Biden has disputed the Special Counsel's subjective interpretation of how he presented himself. Three days before the Report was publicly released, President Biden's attorneys sent a letter to the Special Counsel attacking the "highly prejudicial language"

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[49] *Hearing on the Report of Special Counsel Robert K. Hur: Before the H. Comm. on the Judiciary*, 118th Cong. 50 (Mar. 12, 2024) (statement of Special Counsel Hur) (Special Counsel Hearing Transcript) (attached as Ex. D).

[50] Report at 6.

[51] *Id.* at 208.

[52] *Id.*

[53] Letter from Merrick Garland, Att'y Gen., DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Feb. 8, 2024) (attached as Ex. E).

the report used to describe the President's memory.[54] The letter disputes that the President's memory was "hazy," and instead asserts that the President offered "detailed recollections across a wide range of questions."[55] The day before the Report was released, President Biden's attorneys sent another letter to DOJ, again disputing the Report's "critical comments about the President's memory."[56] Hours after the Report was released, President Biden told the nation at a press conference: "[M]y memory is fine."[57] Finally, on February 12, President Biden's attorneys sent yet another letter to DOJ excoriating the Special Counsel's Report for its "repeated unnecessary, inflammatory, and prejudicial statements," about "the quality of the President's memory in sweeping, quasi-medical terms."[58]

B. The Committee conducts oversight and attempts to obtain relevant investigatory materials voluntarily from DOJ

31. Throughout the 118th Congress, the Committee has pursued a sustained effort to oversee the Executive Branch's commitment to impartial justice. Since early 2023, the Committee has been conducting oversight of DOJ's activities with the aim of ensuring that DOJ's operations are consistent with its mission. One aspect of the Committee's oversight has

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[54] Letter from Richard Sauber, Special Couns. to the President, et al., to Robert K. Hur, Special Couns., et al., DOJ, at 1 (Feb. 5, 2024) (attached as Ex. F).

[55] *Id.* at 1-2.

[56] Letter from Edward N. Siskel, Assistant to the President & White House Couns., et al., to Merrick Garland, Att'y Gen., DOJ, at 2-3 (Feb. 7, 2024) (Siskel to Garland Feb. 7, 2024 Letter) (attached as Ex. G).

[57] *Remarks in the Diplomatic Reception Room*, White House (Feb. 8, 2024), https://perma.cc/X6KC-Z4WL.

[58] Letter from Richard Sauber, Special Couns. to the President, et al., to Bradley Weinsheimer, Assoc. Deputy Att'y Gen., DOJ, at 3-4 (Feb. 12, 2024) (Sauber to Weinsheimer Feb. 12, 2024 Letter) (attached as Ex. H).

focused on "the politicization of criminal investigations and prosecutorial decisions."[59] For example, the Committee has conducted oversight of Special Counsel Jack Smith's investigation of President Donald Trump for retaining classified documents to determine whether it was being handled in a manner consistent with the Department's commitment to impartial justice.[60] For the same reason, the Committee moved quickly to investigate the circumstances surrounding the appointment of Special Counsel Hur and his investigation generally.

32. On January 13, 2023, the day after the Attorney General appointed the Special Counsel, the Committee wrote to DOJ regarding its "oversight of the Justice Department's actions with respect to former Vice President Biden's mishandling of classified documents," seeking documents related to the Special Counsel's appointment, the selection of Lausch to conduct the initial investigation, and President Biden's retention of classified documents more generally.[61]

33. After the release of the Special Counsel's Report, the Committee ramped up its investigation. On February 12, 2024, the Committee, along with the other two impeachment committees, requested from DOJ a specific set of materials relevant to the Special Counsel's Report to inform its ongoing oversight of DOJ's commitment to impartial justice—the same four categories of documents it would later be forced to seek via subpoena, including all audio

[59] Authorization and Oversight Plans for All House Committees, H. Rep. No. 118-36, at 128 (2023), https://perma.cc/ARW9-J8GV.

[60] *See, e.g.*, Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Jack Smith, Special Couns., DOJ (Sep. 7, 2023) (attached as Ex. I).

[61] *See generally* Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ (Jan. 13, 2023) (attached as Ex. J).

recordings of the Special Counsel's interview with President Biden.[62] The requested materials were:

a. All documents and communications, including audio and video recordings, related to Special Counsel Robert Hur's interview of President Joseph R. Biden, Jr.;

b. All documents and communications, including audio and video recordings, related to Special Counsel Hur's interview of Mr. Mark Zwonitzer;

c. The documents identified as "A9" and "A10" in Appendix A of the Special Counsel's Report, which related to Vice President Biden's December 11, 2015 call with then-Ukrainian Prime Minister Arseniy Yatsenyuk; and

d. All communications between or among representatives of DOJ, including the Office of the Special Counsel, the Executive Office of the President, and President Biden's personal counsel referring or relating to the Special Counsel's Report.[63]

34. DOJ responded on February 16, 2024, informing the Committee that several of the requested records required review to assess classification, national defense, confidentiality, and privacy interests.[64] DOJ neither offered a timeframe by which it expected to produce responsive documents nor committed to produce all the material requested.

C. The Committee issues the Subpoena, and Attorney General Garland defies it

35. On February 27, 2024, the Committee issued the Subpoena for records to Attorney General Garland that is the subject of this suit.[65] The Committee explained that it

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[62] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ, at 3 (Feb. 12, 2024) (Jordan to Garland Feb. 12, 2024 Letter) (attached as Ex. K).

[63] *Id.*

[64] Letter from Carlos Uriarte, Asst. Att'y Gen., DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., at 2 (Feb. 16, 2024) (attached as Ex. L).

[65] Ex. A (Subpoena). The same day, the Committee on Oversight and Accountability of the U.S. House of Representatives (Oversight Committee) issued a subpoena for the same

required the subpoenaed materials "for its ongoing oversight of the Department's commitment to impartial justice" and as part of its efforts "to consider potential legislative reforms to [DOJ] and its use of a special counsel to conduct investigations of current and former Presidents of the United States."[66] The Committee also stated that these materials were directly relevant to its impeachment inquiry.[67] The Committee offered to review any classified materials separately from other materials, while adding that it believed most of the subpoenaed information was not classified.[68]

36. The Subpoena specifically required Attorney General Garland to produce the same four categories of documents requested in the Committee's February 12, 2024, letter by March 7, 2024. [69]

37. The Subpoena further notified the Attorney General that, in the event a document were withheld on the basis of privilege, he would be required to provide a privilege log detailing certain information about the document and the basis for the privilege assertion.[70]

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materials. *See* Press Release, H. Comm. on Oversight & Accountability, *Chairman Comer and Jordan Subpoena DOJ for Special Counsel Hur Investigation Documents* (Feb. 27, 2024), https://perma.cc/6BU2-HX4H.

[66] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ, at 2 (Feb. 27, 2024) (Jordan to Garland Feb. 27, 2024 Letter) (attached as Ex. M).

[67] *See id.*

[68] *See id.* at 2-3.

[69] Ex. A (Subpoena) at Schedule A.

[70] *Id.* at Instructions (page 4, number 17).

38. On March 7, 2024, DOJ provided its initial response to the Subpoena on the Attorney General's behalf.[71] Claiming to "supplement[]" its nearly substance-free February 16 letter, DOJ informed the Committee that it would permit review of the two classified documents referenced in Paragraph 3 of the Subpoena *in camera*, an offer the Committee quickly accepted.[72] DOJ also produced six communications responsive to Paragraph 4 of the Subpoena.[73]

39. However, DOJ offered a spate of vague reasons for why it needed more time to review the other responsive materials, including the classification, confidentiality, and privacy interests it had previously noted. DOJ also mentioned the need to protect internal deliberations about prosecutorial decisions and investigative steps and stated that some of the subpoenaed information may be "subject to other privileges and Executive Branch confidentiality interests," but did not actually assert any privilege over any of the subpoenaed materials.[74]

40. By March 9, 2024, the Committee still had not received all the subpoenaed records. Accordingly, it extended the deadline for a complete production of responsive materials to March 11, 2024.[75]

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[71] Letter from Carlos Uriarte, Asst. Att'y Gen., DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, at 1 (Mar. 7, 2024) (Uriarte to Jordan Mar. 7, 2024 Letter) (attached as Ex. N).

[72] *Id.*; E-mail from Greta Gao, Off. of Legis. Affs., DOJ, to Stephen Castor, Gen. Couns., H. Comm. on the Judiciary, et al. (Mar. 8, 2024, 12:24 PM) (attached as Ex. O).

[73] *See* Ex. N (Uriarte to Jordan Mar. 7, 2024 Letter) at 3.

[74] *Id.* at 2-3.

[75] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ, at 1 (Mar. 9, 2024) (attached as Ex. P).

41. On March 12, 2024, a little more than two hours before a Committee hearing with Special Counsel Hur, DOJ produced two redacted transcripts of the Special Counsel's interviews with President Biden to the Committee.[76] Before the Committee received these transcripts, they had already been provided to reporters. (It has been reported that DOJ later released a redacted transcript of Special Counsel Hur's interview with Zwonitzer to a reporter, pursuant to a Freedom of Information Act request.[77]) DOJ did not produce the audio recordings of these interviews as the Subpoena required.

42. During the Committee's March 12 hearing, Committee members questioned the Special Counsel about his conclusions and how he went about his investigation. At the hearing, the Special Counsel acknowledged that, for his decision to be credible, "[t]he need to show my work was especially strong here."[78] He explained that his decision was based on "not only the words in the cold record of the transcript of the interview," but also the "President's overall demeanor," including "the fact that he was prompted on numerous occasions by the members of the White House Counsel's office."[79]

43. On March 25, 2024, the Committee once again extended the deadline for a complete production of responsive materials, this time to April 8, 2024.[80] On April 8, DOJ

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[76] *See* Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ, at 2 (Mar. 25, 2024) (Jordan to Garland Mar. 25, 2024 Letter) (attached as Ex. Q).

[77] Jason Leopold, *New Transcript Details Biden's Handling of Classified Records*, Bloomberg News (June 13, 2024, 9:46 AM) (attached as Ex. R).

[78] Ex. D (Special Counsel Hearing Transcript) at 7-8.

[79] *Id.* at 65.

[80] Ex. Q (Jordan to Garland Mar. 25, 2024 Letter) at 2.

produced a transcript of the Special Counsel's interview with Zwonitzer.[81] But DOJ's response also made clear that it would not produce all of the subpoenaed materials, including the audio recordings of the Special Counsel's interviews with President Biden and Zwonitzer. DOJ justified the Attorney General's refusal to comply with the Subpoena by labeling the outstanding requests as political in nature and contending that they only sought cumulative information.[82] It further argued that withholding the audio recordings from the Committee would promote voluntary witness cooperation with future special counsel investigations.[83] It reiterated that the President had decided "not to assert executive privilege over the report or his interview transcript."[84] Before deciding to produce that information to the Committee, DOJ had considered the relevant "protections for privacy, security, law enforcement, and Executive Branch confidentiality interests."[85]

44. On April 15, 2024, the Committee, working with the Oversight Committee, made one final attempt to obtain the subpoenaed information without resorting to a lawsuit or contempt proceedings. It sent a letter to DOJ explaining its rationale for requesting the materials and addressing how DOJ had waived any privilege over the audio recordings of the interviews when

[81] Letter from Carlos Uriarte, Asst. Att'y Gen., DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., at 1 (Apr. 8, 2024) (attached as Ex. S).

[82] *Id.* at 3-4.

[83] *Id.* at 5.

[84] *Id.* at 4.

[85] *Id.* at 5.

it released the transcripts of those same interviews to the press.[86] The Committee explained that it needed the audio recordings because they offer unique and invaluable insight about information that cannot be captured in a transcript, such as vocal tone, pace, inflections, verbal nuance, and other idiosyncrasies.[87] In a final accommodation, the Committee offered to allow a complete production of materials by April 25, 2024.[88]

45. The day of that deadline, DOJ responded on the Attorney General's behalf with a letter explaining why he would not be producing any additional records to the Committee.[89] In short, DOJ quibbled with the Committee's reasons for seeking the materials, incorrectly asserting that DOJ had provided the Committee with information sufficient to "know why [the Special Counsel] made [his] determinations."[90]

46. Notwithstanding the fact that the Special Counsel investigation was closed and DOJ had disclosed the Report and interview transcripts, DOJ refused to produce the audio recordings due to a generalized risk of harm to prosecutorial decision-making, the privacy interests of witnesses and uncharged parties, and the purported need to protect investigatory sources and methods.[91] Even though DOJ had already decided not to assert executive privilege

[86] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Merrick Garland, Att'y Gen., DOJ (Apr. 15, 2024) (Jordan to Garland Apr. 15, 2024 Letter) (attached as Ex. T).

[87] *Id.* at 3.

[88] *Id.* at 4.

[89] *See generally* Letter from Carlos Uriarte, Asst. Att'y Gen. DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Apr. 25, 2024) (attached as Ex. U).

[90] *Id.* at 2.

[91] *Id.* at 5.

over the interview transcripts, it resisted producing the audio recordings to avoid "undermining confidence in the Department's ability to protect sensitive law enforcement information."[92] DOJ also claimed that it was "particularly concerned about the chilling effect of producing the specific files requested here. … [I]f potential witnesses expected that volunteering for an interview and allowing it to be recorded might result in the release of that recording to Congress or the public, that could dissuade them from cooperating or agreeing to be recorded."[93]

47. DOJ relied on the vocal tone, inflections, and other idiosyncrasies in the audio recordings as a basis to not produce them to the Committee, arguing that "the privacy interest in one's voice—including tone, pauses[,] emotional reactions, and cues—is distinct from the privacy interest in a written transcript of one's conversation."[94] DOJ also cited the "potential for misuse" of an audio recording, such as through "cutting, erasing, and splicing."[95]

E. President Biden asserts executive privilege over the audio recordings and other subpoenaed materials moments before the Committee meets to consider a contempt citation for Attorney General Garland

48. Despite the Committee's repeated efforts to give the Attorney General more time to complete his production of the subpoenaed materials, the Committee and the Attorney General were at an impasse. As a result, the Committee scheduled a public business meeting for May 16, 2024, to consider whether to recommend to the full House that Attorney General Garland be held in contempt of Congress for his refusal to comply with the Subpoena. As of the early morning of

[92] *Id.* at 6.

[93] *Id.* at 6-7.

[94] *Id.* at 7.

[95] *Id.* at 7-8 (quoting *United States v. McDougal*, 103 F.3d 651, 654 (8th Cir. 1996)).

May 16, the Attorney General had not yet asserted any privilege to justify his failure to comply with the Subpoena.

49. However, less than two hours before the meeting was scheduled to begin, the Committee received a letter from the White House conveying the President's assertion of executive privilege over the audio recordings of Special Counsel Hur's interviews with the President and Zwonitzer.[96] DOJ also wrote to the Committee that morning, explaining that President Biden had made a protective executive privilege claim over any other materials responsive to the Subpoena that had not been produced and arguing that the disclosure of the audio recordings to the Committee would damage future law enforcement efforts.[97] DOJ included a copy of the Attorney General's letter from the previous day, in which he had requested that the President assert executive privilege over the audio recordings and any other responsive materials that had not already been produced.[98] Among the Attorney General's reasons for recommending that the President assert privilege, he argued that DOJ's prior disclosure of the interview transcripts did not constitute a waiver of privilege because "audio recordings have distinct features and law enforcement uses, which implicate privacy interests and risks of misuse

[96] Letter from Edward N. Siskel, Assistant to the President & White House Couns., to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., at 1 (May 16, 2024) (attached as Ex. V).

[97] Letter from Carlos Uriarte, Asst. Att'y Gen., DOJ, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., at 1, 2 (May 16, 2024) (Uriarte to Jordan May 16, 2024 Letter) (attached as Ex. W).

[98] Letter from Merrick Garland, Att'y Gen., DOJ, to Joseph R. Biden, Jr., President of the United States, at 1 (May 15, 2024) (Garland to Biden May 15, 2024 Letter) (attached as part of Ex. W).

to a greater degree than transcripts, and disclosure to Congress of the recordings would have a chilling effect on future cooperation in similar investigations."[99]

50. At the meeting, the Committee marked up its report detailing the Committee's basis for seeking the subpoenaed materials, its attempts to obtain them voluntarily, and the reasons why the Attorney General's failure to comply with the Subpoena warranted a contempt citation.[100]

51. In particular, the Committee rejected the President's executive privilege claim.[101] The Committee's Report noted that the President had waived any potential assertion of executive privilege over the information discussed in his interviews with Hur when he released the transcripts to the public and media.[102] And while the Department could have taken steps to attempt to protect the confidentiality of the transcripts when it produced them to Congress, it chose not to do so.[103] Furthermore, the Committee found that the privilege claim was not timely and, therefore, was invalid.[104] Indeed, the Attorney General did not assert any privilege by March 7, 2024, the Subpoena return date, nor has he provided a privilege log of any kind since then. Finally, even if the privilege claim had been timely and valid, the Committee determined that it had been overcome because the audio recordings were necessary to evaluate potential

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[99] *Id.* at 7.

[100] *See generally Markup of Report Recommending that the House of Representatives Cite Attorney General Merrick Garland for Contempt of Congress: Before the H. Comm. on the Judiciary*, 118th Cong. (May 16, 2024), https://perma.cc/DN7E-VALV.

[101] *See* H. Rep. 118-527, at 10, 14-16 (2024) (attached as Ex. X).

[102] *Id.* at 14.

[103] *Id.*

[104] *Id.*

reforms to DOJ.[105] As a result, the Committee voted 18-15 to report the Attorney General's contumacious conduct to the full House.[106]

F. The House finds Attorney General Garland in contempt of Congress

52. The House passed House Resolution 1292 on June 12, 2024, which found Attorney General Garland in contempt of Congress in violation of 2 U.S.C. § 192, by a vote of 216-207.[107] The Resolution provides that Attorney General Garland "shall be found to be in contempt of Congress for failure to comply with a congressional subpoena."[108] When it voted, the House had before it the Committee's Report, which contained detailed information regarding the conduct of Attorney General Garland and the facts and circumstances warranting the contempt finding, and Dissenting Views.[109] The Committee Report was filed with the Clerk of the House the same day.[110]

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[105] *See id.* at 14-15.

[106] *Id.* at 16.

[107] 170 Cong. Rec. H3970 (daily ed. June 12, 2024), https://perma.cc/SBZ9-J7WQ. The same day, the House adopted House Resolution 1293, which found Attorney General Garland in contempt for failing to comply with the subpoena from the Oversight Committee. H. Res. 1293, 118th Cong. (2024), https://perma.cc/P6WT-U866; H. Res. 1287, 118th Cong. § 6 (2024) (adopting House Resolution 1293 upon adoption of House Resolution 1292), https://perma.cc/J2X7-UDVM.

[108] H. Res. 1292, 118th Cong. (2024), https://perma.cc/HFQ7-MPW9.

[109] *See* 170 Cong. Rec. H3739-59 (daily ed. June 12, 2024), https://perma.cc/V6RJ-YE3W.

[110] 170 Cong. Rec. H3970-71 (daily ed. June 12, 2024), https://perma.cc/GG73-E6DH.

53. On June 14, 2024, DOJ informed Speaker of the House Mike Johnson that it would not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General.[111]

54. Speaker Johnson certified the Committee's report to Matthew Graves, U.S. Attorney for the District of Columbia, on June 14, 2024.

55. On June 26, 2024, Speaker Johnson called Attorney General Garland in a last-ditch attempt to find a way to resolve this dispute before the Committee filed this complaint. However, during their conversation, Attorney General Garland indicated that the matter was out of his hands because he had received a direct order from President Biden. When the Speaker's Office then reached out to the White House, its effort to find a solution to this impasse was rebuffed.

56. The same day, the Bipartisan Legal Advisory Group (BLAG), which is authorized by House Rules to speak for the House in litigation matters, authorized the House Office of General Counsel to initiate this suit on behalf of the Committee to enforce the Attorney General's legal obligations to comply with the Subpoena.[112] Moreover, House Resolution 917 specifically authorizes the Committee to seek enforcement of subpoenas issued in furtherance of the impeachment inquiry.[113]

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[111] Letter from Carlos Uriarte, Asst. Att'y Gen., DOJ, to Rep. Mike Johnson, Speaker of the House (June 14, 2024) (attached as Ex. Y).

[112] BLAG is comprised of the Honorable Mike Johnson, Speaker of the House, the Honorable Steve Scalise, Majority Leader, the Honorable Tom Emmer, Majority Whip, the Honorable Hakeem Jeffries, Minority Leader, and the Honorable Katherine Clark, Minority Whip. *See* House Rule II.8(b). The Speaker of the House, the Majority Leader, and the Majority Whip voted to authorize this litigation; the Minority Leader and Minority Whip did not.

[113] H. Res. 917, 118th Cong. § 4 (2023), https://perma.cc/B3JT-WEZT.

III. The Committee needs the audio recordings to investigate DOJ's commitment to impartial justice

56. The Committee needs the audio recordings—not simply the cold, incomplete transcripts—of the interviews with President Biden and Zwonitzer to fully assess for itself the Special Counsel's recommendations. For example, the Special Counsel's conclusions hinged, in part, on his assessment of how the President presented himself, and an audio recording of an interview captures critical verbal and nonverbal context that a transcript does not. Additionally, an audio recording will include all the words spoken during the interviews, while DOJ has admitted that the transcript of the Special Counsel's interview of President Biden is missing certain words. The audio recordings are therefore critical to allowing the Committee to make its own complete assessment of the Special Counsel's conclusions. That assessment, in turn, will help it decide whether legislative reforms aimed at DOJ's use of special counsels are needed (and what any reforms should look like). It will also shed light on whether the President willfully retained the classified materials to benefit either his family (through their foreign business deals) or himself (through a book deal), which bears directly on the Committee's impeachment inquiry.

A. A cold transcript has limits and does not fully replicate an interview the way an audio recording does

57. A transcript is not a carbon copy of an oral interview and thus is undeniably inferior evidence to an audio recording. By its nature, a transcript is an incomplete accounting of an interview; it can reflect the words uttered (although oftentimes not every single word) but not verbal context, such as tone and tenor, and nonverbal context, such as pauses. An audio recording, by contrast, paints a more complete picture of an interview because it captures aspects of the interview that a transcript cannot and, unlike a transcript, is not manipulated by a human transcriber.

58. DOJ readily admits that "audio recordings have distinct features."[114] As the Special Counsel acknowledged in his Report, "there is unique evidentiary value in a subject's own voice as captured on an audio recording."[115] When transcribing spoken words, certain aspects of the communication are lost.[116] Transcripts do not and cannot capture emphasis, inflection, intonation, nuance, pace, pauses, pitch, rhythm, tone, and other verbal and nonverbal cues and idiosyncrasies that convey meaning to a listener.[117] A witness communicates even when he or she hesitates, pauses, or remains silent—all of which have no replication in a transcript.[118] These aspects of an interview provide immeasurable insight into a witness's credibility and mental state and help in evaluating and understanding a witness's answers.

59. Research indicates that paralinguistic cues—the vocalized aspects of communication other than words—can be better deception predictors than even visual cues.[119] For example, deceptive communications tend to be higher pitched, slower, and shorter, and they tend to include more filler words and hesitations, such as "ah," "uh," or "um."[120] On the other

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[114] Ex. W (Garland to Biden May 15, 2024 Letter at 7).

[115] Report at 343.

[116] Rebecca White Berch et al., *A Proposal to Amend Rule 30(b) of the Federal Rules of Civil Procedure: Cross-Disciplinary and Empirical Evidence Supporting Presumptive Use of Video to Record Depositions*, 59 Fordham L. Rev. 347, 347, 358 (1990).

[117] *Id.* at 347; Ex. T (Jordan to Garland Apr. 15, 2024 Letter) at 3; Clifford S. Fishman, *Recordings, Transcripts & Translations as Evidence*, 81 Wash. L. Rev. 473, 519 (2006).

[118] Berch, *supra* note 116, at 361 (using as an example the effect of a long pause prior to answering a question).

[119] *Id.* at 358, 365.

[120] *Id.* at 365-66.

hand, heightened volume and faster and more fluent speech, along with more narrative, rather than fragmented, responses, enhance a witness's credibility.[121]

60. Relying solely on transcripts can "elevate the importance of the words and word order … over the communicative importance of the form."[122] The absence of non-verbal communicative features increases the chance that a transcript fails to represent the speaker's communication accurately.[123]

61. Because transcripts cannot capture verbal and nonverbal cues, they do not adequately capture the way that a witness gives an answer.[124] For example, the Special Counsel noted that during Zwonitzer's interviews with President Biden, the president would "struggle" and "strain at times."[125] These are elements that cannot be conveyed in a written transcript. A reader thus has no way to evaluate whether the struggling and straining were due to memory lapses, evasiveness, or some other reason.

62. Not only do transcripts fail to capture nuance and context, they can also be incomplete or inaccurate. Although witnesses constantly manipulate the precise words they use, experts agree that nonverbal cues are generally involuntary, meaning witnesses are unable to modify their nonverbal cues.[126] Transcripts, on the other hand, have certain shortfalls because they require a transcriber to listen to the testimony and then record what the transcriber perceived

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[121] *Id.* at 366.

[122] *Id.* at 349.

[123] *Id.*

[124] *See id.* at 347, 349-350.

[125] Report at 207.

[126] *See* Berch, *supra* note 116, at 367.

was said. Transcripts are thus more susceptible to unintentional modification or intentional doctoring.[127] This makes unedited audio recordings a much more accurate account of an interview, capturing both the words said and how the words were expressed. It is thus unsurprising that, as an evidentiary matter, audio recordings control when audio recordings and transcripts diverge.[128]

63. That there might be discrepancies between the transcripts and audio recordings of the interviews at issue here is not hypothetical: despite DOJ's assertions that it has "produced unedited transcripts of the interviews to the Committees,"[129] it has admitted in an affidavit filed in another case pending in this District that the transcripts are not, in fact, complete:

> The interview transcripts are accurate transcriptions of the words of the interview contained in the audio recording, except for minor instances such as the use of filler words (such as "um" or "uh") when speaking that are not always reflected on the transcripts, or when words may have been repeated when spoken (such as "I, I" or "and, and") but sometimes was only listed a single time in the transcripts.[130]

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[127] *See id.* at 353.

[128] *See United States v. Nunez*, 532 F.3d 645, 651 (7th Cir. 2008) ("[T]ranscripts should not ordinarily be given independent weight. … The jury should be instructed that it is the tape recording itself which is the primary evidence, … and that if the jury determines that the transcript is in any respect incorrect, it should disregard it to that extent and rely on its own interpretation of the recording."); *United States v. Rosa*, 17 F.3d 1531, 1548 (2d Cir. 1994) (holding that a trial court must "clearly" instruct the jury "that the transcripts themselves are not evidence and may be used only as aids in listening to the audio tapes and as nonbinding guides that are subject to the jurors' own assessment of the transcripts' accuracy").

[129] Ex. W (Garland to Biden May 15, 2024 Letter at 9).

[130] Decl. of Bradley Weinsheimer ¶ 14, *Citizens for Resp. & Ethics in Wash. v. DOJ*, No. 1:24-cv-00700 (D.D.C. May 31, 2024), ECF No. 32-2 (attached as Ex. Z).

64. DOJ has also stated that the transcripts here sometimes "indicate that some words from the audio recording are indiscernible," and that in its view, "in those instances[,] the words are indiscernible."[131]

65. But the Biden Administration has claimed before that spoken words were indiscernible when they were not. For example, on April 24, 2024, President Biden gave a speech, which was recorded by audio and by video, where he can be seen and heard reading a teleprompter instruction to pause during the speech: "Imagine what we could do next. Four more years, pause."[132] However, the official transcript of the speech that the White House initially released did not reflect President Biden saying "pause"—instead the transcript used "(inaudible)" in place of "pause."[133] This is just one example showing that transcripts often do not fully capture all words actually spoken, including President Biden's. Others abound.[134]

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[131] *Id.* ¶ 13.

[132] PBS NewsHour, *Biden Delivers Campaign Remarks at Construction Union Conference*, YouTube, at 25:00-25:09 (Apr. 24, 2024), https://perma.cc/9ZKS-JL79.

[133] *Compare Remarks by President Biden at the North America's Building Trades Union National Legislative Conference*, White House (Apr. 24, 2024) (original version posted and archived as of Apr. 25, 2024) ("Folks, imagine what we can do next. Four … more years (inaudible)."), https://web.archive.org/web/20240425002537/https:/www.whitehouse.gov/briefing-room/speeches-remarks/2024/04/24/remarks-by-president-biden-at-the-north-americas-building-trades-unions-national-legislative-conference/, *with Remarks by President Biden at the North America's Building Trades Union National Legislative Conference*, White House (Apr. 24, 2024) (current version reflecting edits available as of June 25, 2024) (showing the word "pause" in the transcript"), https://perma.cc/7W3M-RD3F.

[134] *See, e.g.*, *Remarks by President Biden at a Campaign Event*, White House (May 19, 2024), https://perma.cc/UMN4-F227 (making several changes to President Biden's speech in official White House transcript, including correcting his claim that he served as vice president during the COVID-19 pandemic); Reagan Reese, *White House Officially Claims Biden Has Made 148 Mistakes During 2024 Public Remarks*, Daily Caller (Apr. 29, 2024, 6:30 PM) ("In several cases, official statements had to be changed to convey the exact opposite of what Biden actually said."), https://perma.cc/7BZE-3EE5.

66. As DOJ itself admits, audio recordings "provide a mechanism … to ensure that a transcript accurately records the interviewee's testimony."[135] The Committee agrees. Given the inherent limits of a transcript, and the known edits to the transcript at issue here, the audio recordings are the evidence that best captures what actually transpired during the interviews.

B. The interviews are relevant to the Committee's investigation of whether the Special Counsel made appropriate recommendations and whether those recommendations are consistent with a commitment to impartial justice

67. The Committee's investigation (assessing the Special Counsel's recommendations and conclusions) depends on it having access to the best evidence of the Special Counsel's interviews. The Committee thus needs the audio recordings.

68. The Committee is investigating whether the Special Counsel's recommendation—that criminal charges against President Biden are not warranted even though the Special Counsel found evidence that President Biden willfully retained and disclosed classified documents—followed the facts and law without prejudice or improper influence.[136] The Special Counsel interviewed President Biden over two days, and he relied on that interview when reaching his conclusion. He likewise relied on his interview with Zwonitzer in evaluating President Biden's credibility and making his recommendations. The interviews with President Biden and Zwonitzer are thus crucial to the Committee's investigation, and it cannot fairly evaluate the Special Counsel's conclusions without the audio recordings of those interviews.

69. To determine whether criminal charges should be brought against President Biden, the Special Counsel considered, among other things, whether a jury would find that the

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[135] Ex. W (Garland to Biden May 15, 2024 Letter at 5).

[136] *Cf. Organization, Mission and Functions Manual*, DOJ (noting that DOJ "works each day to earn the public's trust by following the facts and the law wherever they may lead, without prejudice or improper influence"), https://perma.cc/6D87-5C44.

government had proven President Biden's guilt beyond a reasonable doubt.[137] And because the relevant charge requires a mental state of willfulness, the Special Counsel evaluated President Biden's state of mind—including his memory—and predicted how a jury would view President Biden's state of mind.[138]

70. On that issue, the Special Counsel concluded that President Biden "is someone for whom many jurors will want to identify reasonable doubt."[139] In the Special Counsel's view, "[i]t would be difficult to convince a jury that they should convict [President Biden]—by then a former president well into his eighties—of a serious felony that requires a mental state of willfulness."[140] This was based, in part, on the Special Counsel's subjective view that President "Biden would likely present himself to a jury, as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory."[141]

71. The Special Counsel's assessment that the President presents as an elderly man with a poor memory was relevant to his ultimate conclusion for a number of reasons. *First*, the

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[137] *See, e.g.*, Report at 1, 4, 10.

[138] Ex. D (Special Counsel Hearing Transcript) at 8 ("My task was to determine whether the President retained or disclosed national defense information willfully. That means knowingly and with the intent to do something the law forbids. I could not make that determination without assessing the President's state of mind. For that reason, I had to consider the President's memory and overall mental state and how a jury likely would perceive his memory and mental state in a criminal trial."); *see also* Letter from Bradley Weinsheimer, Assoc. Deputy Att'y Gen., DOJ, to Edward N. Siskel, Assistant to the President & White House Couns., et al., at 2 (Feb. 8, 2024) (explaining that the statements about President Biden's memory were "offered to explain Special Counsel Hur's conclusions about the President's state of mind in possessing and retaining classified information") (attached as Ex. AA).

[139] Report at 6.

[140] *Id.*

[141] *Id.*

Special Counsel relied on President Biden's memory when assessing whether the evidence showed that he willfully retained classified documents he found at the Virginia home. In February 2017, while sitting at the Virginia home, President "Biden told Zwonitzer he had 'just found all the classified stuff downstairs.'"[142] But the Special Counsel concluded "[i]t is possible" that President Biden simply forgot about the classified materials "soon after" he told Zwonitzer about finding them.[143] The Special Counsel acknowledged that "such a swift and permanent bout of forgetfulness may seem implausible" but concluded that "several pieces of evidence"—including President Biden's memory—"provide some support for this possibility."[144]

72. The Special Counsel also noted that President Biden was unable to remember during their interview when he served as Vice President.[145] Moreover, President Biden's "memory appeared hazy," in the Special Counsel's view, when he described a policy debate about Afghanistan, an issue "that was once so important to him."[146] And the Special Counsel concluded that President Biden made a "mistake[]" when he said that he disagreed with someone who was, in fact, an ally with whom President Biden had agreed while serving as Vice President.[147] The Special Counsel concluded that these examples were evidence of the

[142] *Id.* at 204 (citation omitted).

[143] *Id.* at 205.

[144] *Id.* at 205, 207-08.

[145] *Id.* at 208.

[146] *Id.*

[147] *Id.*

"significant limitations" in President Biden's memory, an issue that he believed President Biden's attorneys would emphasize at trial.[148]

73. *Second*, the Special Counsel relied on President Biden's inability to recognize documents recovered from the Penn Biden Center when concluding that there was insufficient evidence to show that President Biden willfully retained an envelope that contained classified information. The Special Counsel concluded that President Biden's staff "unwittingly" took the envelope out of the West Wing at the end of the Obama Administration and eventually moved it to the Penn Biden Center.[149] As support for that conclusion, the Special Counsel noted that President Biden "did not appear to recognize the documents during his interview with the special counsel."[150]

74. *Third*, the Special Counsel pointed to President Biden's "diminished faculties in advancing age, and his sympathetic demeanor," as evidence supporting his conclusion that it would be difficult for jurors to conclude that President Biden had criminal intent when retaining his classified notebooks.[151]

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[148] *Id.* at 207-08. When a witness says that he or she cannot remember something, both verbal and nonverbal nuances can shed light on whether the witness truly cannot remember or is instead choosing to be less than forthcoming. *See, e.g.*, *Roberts v. Printup*, No. 02-2333-CM, 2008 WL 2725807, at *3 (D. Kan. July 10, 2008) ("Her mannerisms and tone suggested that she remembered what was beneficial to her case, but either forgot or chose not to remember the answers to many of defense counsel's questions. The court's impression of plaintiff was that she elected not to search her memory to answer questions for defense counsel. This weakened her overall credibility."), *rev'd and remanded on other grounds*, 595 F.3d 1181 (10th Cir. 2010).

[149] Report at 304-05.

[150] *Id.* at 306.

[151] *Id.* at 242.

75. Beyond influencing the Special Counsel's conclusions about whether President Biden willfully retained classified information, the Special Counsel's perception of President Biden's memory also affected his view of whether the government could prove that the President willfully disclosed national defense information to Zwonitzer. President Biden read to Zwonitzer from notes that he took during national security meetings.[152] The Special Counsel explained that President Biden should have realized that the notes likely contained classified information.[153] But some jurors may have reasonable doubts, the Special Counsel concluded, because President Biden's "apparent lapses and failures" when disclosing information to Zwonitzer "will likely appear consistent with the diminished faculties and faulty memory he showed in Zwonitzer's interview recordings and in [the Special Counsel's] interview of him."[154]

76. As these examples show and the Special Counsel himself has stated,[155] the Special Counsel relied on the way that President Biden presented during their interview to draw many of his conclusions about whether criminal charges would be appropriate. The audio recording will give the Committee a much more complete picture of how the President presented himself than the cold transcripts and will thus allow the Committee to better assess the Special Counsel's conclusions.

77. The Special Counsel also relied on verbal nuances in another way to reach his conclusion about whether the government could prove that President Biden possessed the necessary mental state when he retained classified materials.

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[152] *Id.* at 244.

[153] *Id.* at 247.

[154] *Id.* at 247-48.

[155] *See, e.g.*, Ex. D (Special Counsel Hearing Transcript) at 50.

78. The Special Counsel questioned whether the government could prove that President Biden intended to break the law because, among other things, President Biden believed the notebooks that contained classified material were his property and because other presidents have done similar things.[156] The Special Counsel noted that President Biden was "emphatic" in making these declarations during their interview.[157] The audio recording, unlike the transcript, will allow the Committee to hear President Biden's tone and evaluate for itself the Special Counsel's characterization .

79. Not everyone agrees with the Special Counsel's views. For example, a White House lawyer called the Special Counsel's statements about President Biden's memory "unsupported personal opinion."[158] The White House Counsel himself also wrote to the Attorney General and suggested that the Special Counsel had made "[a] global and pejorative judgment on the President's powers of recollection in general."[159] And he also pointed to one part of the report that, in his view, undermined the Special Counsel's views about President Biden's memory.[160]

80. The objections from the White House Counsel's Office show that the Special Counsel's conclusions are open to interpretation. And the Committee cannot meaningfully assess the Special Counsel's ultimate conclusion that criminal charges are not warranted unless it

[156] Report at 8, 232.

[157] *Id.* at 232.

[158] Ex. H (Sauber to Weinsheimer Feb. 12, 2024 Letter) at 3.

[159] Ex. G (Siskel to Garland Feb. 7, 2024 Letter) at 2.

[160] *Id.* at 3 (quoting from the Special Counsel's Report and arguing "[t]his is hardly the picture of a man struggling to recall events as Mr. Hur unfairly paints").

can evaluate the Special Counsel's views about (1) President Biden's memory and (2) the way that President Biden's memory would affect the government's odds of securing a conviction. Given the inherent limits of a cold transcript, the Committee needs the audio recording to do that.[161]

81. That a different special counsel is currently prosecuting a former president and current presidential candidate for allegedly mishandling classified information makes it even more important for the Committee to fairly assess the Special Counsel's conclusion here.[162] The Committee must assess whether the Special Counsel's divergent conclusion (that criminal charges are not warranted despite discovering evidence that President Biden willfully retained classified materials) is consistent with DOJ's commitment to following the facts and the law wherever they lead.

82. The cold transcript will not allow the Committee to assess whether the Special Counsel's recommendations here are consistent with the other special counsel's decision to pursue charges. The transcript does not capture nuances such as voice inflection and pace, nuances that the Special Counsel relied on when assessing the President's mental state and ultimately deciding not to recommend criminal charges. The Committee needs access to those same nuances to evaluate the Special Counsel's recommendations. The audio recordings, which capture those nuances and are the best evidence of what took place during the interview, are thus not cumulative of the transcript.

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[161] *See e.g.*, *United States v. French*, 291 F.3d 945, 951 (7th Cir. 2002) (suggesting that things like "tone of voice" and "confused or nervous speech patterns"—which are not reflected in "the cold pages of an appellate record"—go to a witness's credibility (citation omitted)).

[162] *See Special Counsel Jack Smith Delivers Statement*, DOJ (June 9, 2023), https://perma.cc/74NK-LQ6U.

83. Separately, the Committee—not DOJ, which is the focus of this oversight investigation—determines how best to execute its investigation. Here, it has concluded that it needs the audio recordings to evaluate the Special Counsel's recommendations. DOJ cannot second guess that conclusion and micromanage the Committee's investigation.[163]

84. In sum, to fairly evaluate the Special Counsel's recommendations, the Committee has concluded that it must have access to the audio recording of the President's interview with the Special Counsel. That decision—which is the Committee's to make, not DOJ's—is reasonable because the Special Counsel relied on verbal (tone) and non-verbal (pace) nuances that are not captured by the cold transcript. The Committee is simply seeking access to that same information.

85. The Committee also needs the audio recording of the Special Counsel's interview with Zwonitzer to, at a minimum, have a full understanding of what took place during that interview. Indeed, DOJ has admitted that the transcript of President Biden's interview is not a carbon copy of the audio—it leaves out certain filler words and repeated words. It is reasonable to assume the transcript of Zwonitzer's interview includes similar deviations.

86. Beyond that, the Special Counsel assessed Zwonitzer's credibility—calling him "forthright" and crediting his explanations as "plausible[and] innocent"[164]—which could potentially bear on President Biden's credibility. The Special Counsel's view of Zwonitzer's credibility also factored into his decision not to bring charges against Zwonitzer for obstruction

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[163] *Cf. Bragg v. Jordan*, 669 F. Supp. 3d 257, 271 n.9 (S.D.N.Y. 2023) ("Although [a subpoena recipient] contends that he has 'little if anything to say that will advance the purported legislative purpose,' … it is not this Court's role to prescribe the most effective manner for congressional inquiry." (citation omitted)), *appeal dismissed sub nom. Bragg v. Pomerantz*, No. 23-615, 2023 WL 4612976 (2d Cir. Apr. 24, 2023).

[164] Report at 336, 341, 344.

of justice,[165] a decision that also bears on DOJ's commitment to impartial justice. The Committee thus needs the audio recording of Zwonitzer's interview (and the nuances the audio captures) to fully assess the Special Counsel's recommendations.

C. The Committee's investigation will inform its decision on whether legislative reforms to special counsel investigations are necessary, and if so, what those reforms should be

87. The Committee is considering whether legislative reforms of DOJ and its use of special counsels are necessary. The Committee's investigation into the Special Counsel's recommendations here will help it make that decision.[166] If the Committee concludes that the Special Counsel's investigation into the sitting President did not deliver impartial justice, it may very well determine that legislative reforms are necessary to advance in the future both actual justice and the appearance of justice.

88. But as explained above, the Committee cannot accurately evaluate the Special Counsel's recommendations unless it has access to the audio recordings of the Special Counsel's interviews with President Biden and Zwonitzer. As the Supreme Court has explained, Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[167]

89. Here, if the Committee has concerns after properly assessing the Special Counsel's recommendations, it may consider legislative reforms to address those concerns. For example, the Committee could conclude that, moving forward, special counsels should have

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[165] *See id.* at 343-44.

[166] *Cf. Watkins v. United States*, 354 U.S. 178, 187 (1957) (explaining that Congress may conduct "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them").

[167] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) (citation omitted).

more independence from the Attorney General or the President. Indeed, the Committee has led previous Congressional efforts to provide such independence with the Ethics in Government Act,[168] which, among other things, created a mechanism for a three-judge panel to appoint an independent counsel when the Attorney General received specific information that certain persons, including the President, had committed a federal crime.[169]

90. The Committee might consider reauthorizing the independent counsel statute in full, as Congress has done in the past. The Committee could also adopt discrete aspects of the independent counsel statute that it concludes are most likely to produce impartial outcomes. The Committee could even consider tweaking aspects of the independent counsel statute or adopting new proposals. The Committee's investigation will inform its consideration of all potential reforms.

91. *First*, the Committee could consider legislation that governs the way that special counsels are appointed. Congress could, for example, follow the independent counsel statute's approach and have a three-judge panel appoint the relevant official.[170] Or it could chart a

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[168] *See generally* Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 49, 591-98); *see also* H. Rep. 103-224 (1993) (describing the Judiciary Committee's consideration of legislation to reauthorize the independent counsel statute) (attached as Ex. BB); Special Counsel Act of 1999, H.R. 2083, 106th Cong. (1999) (introduced and referred to the Judiciary Committee).

[169] *See* Ethics in Government Act secs. 601-02, §§ 49, 591-93, 92 Stat. 1867-69, 1873-74. The original statutory language referred to the position as a special prosecutor. *See, e.g.*, *id.* sec. 601, 92 Stat. 1867 (adding new chapter called "Special Prosecutor"). Congress later amended the statute and replaced the term special prosecutor with independent counsel. Act of Jan. 3, 1983, Pub. L. 97-409, § 2(a)(1)(A), 96 Stat. 2039. For simplicity, we refer to the position as independent counsel.

[170] *See also* Transparency in Government Act of 2021, H.R. 2055, 117th Cong. § 622(a)(3), (b)(2) (requiring a three-judge panel to appoint a special prosecutor when DOJ refuses to prosecute after the Speaker certifies a violation of 2 U.S.C. § 194).

different path and require the Attorney General to nominate a special counsel and a three-judge panel appointed by the Chief Justice to approve the nominee. Each approach would prevent the Attorney General from unilaterally installing a special counsel, as he did here, which could create independence from the Attorney General. Indeed, each reform could avoid a situation where a special counsel feels a sense of loyalty to the Attorney General—who singlehandedly gave him or her the job—or to the Attorney General's political party.

92. *Second*, the Committee could explore adopting statutory removal protections for special counsels. Indeed, bills that would have done just that have been introduced in previous Congresses.[171] Here, the Committee could borrow from the independent counsel statute, which allowed only the Attorney General to remove the official in narrow circumstances.[172] Or it could consider a different removal standard.[173] Greater protections—prescribed by statute rather than by DOJ's own regulations[174]—may give future special counsels the freedom to take actions and

[171] *See, e.g.*, H.R. 2055, § 622(d)(1) (requiring a special counsel appointment when DOJ refuses to prosecute after the Speaker certifies a violation of 2 U.S.C. § 194 and providing that the "special counsel may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General, and only for good cause, physical or mental disability, or any other condition that substantially impairs the performance of that special counsel's duties"); Special Counsel Independence and Integrity Act, H.R. 197, 116th Cong. § 2 (2019) ("A special counsel … may be removed only for misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice."); Special Counsel Independence and Integrity Act, H.R. 5476, 115th Cong. § 2(b) (2018) (same); Special Counsel Independence Protection Act, H.R. 3654, 115th Cong. § 2 (2017) ("A special counsel … may be removed only after the [three-judge] court has issued an order finding misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice.").

[172] Ethics in Government Act sec. 601(a), § 596(a)(1), 92 Stat. 1872.

[173] *See, e.g.*, 5 U.S.C. § 1202(d) (members of the Merit Systems Protection Board "may be removed … only for inefficiency, neglect of duty, or malfeasance in office").

[174] Based on the relevant DOJ regulation, the Attorney General could have removed this Special Counsel for reasons that neither the independent counsel statute nor the Merit Systems

make recommendations without having to worry about whether they will be removed by their political superiors, including a superior appointed by the same person they are investigating.

93. *Third*, just as the independent counsel statute did, the Committee may consider insulating future special counsels from DOJ control. The Special Counsel here, for example, was obligated under DOJ regulations to notify the Attorney General of certain "significant events" in his investigation.[175]

94. In considering legislative reforms, the Committee is not limited to the independent counsel statute or deviations from it. Congress could, for example, expand the jurisdiction of the U.S. Office of Special Counsel, which (among other things) currently investigates certain allegations of employment misconduct and enforces the Hatch Act's prohibition on political activities. Or it could create a new agency that is similar to the U.S. Office of Special Counsel that would handle investigations into high-ranking government officials when there are allegations of criminal conduct. A more permanent and formalized approach to the special counsel's role could bring stability and autonomy that case-by-case appointments do not and improve the public's confidence in the justice system.

95. Finally, the Committee may conclude that legislative reforms are unnecessary at this time because the current special counsel process is working well, but it cannot make that decision until after it fully assesses the Special Counsel's recommendations. And it needs the audio recordings to do that.

Protections Board statute would have permitted. *See* 28 C.F.R. § 600.7(d) ("The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.").

[175] *See id.* § 600.8(b).

D. The interviews are relevant to the impeachment inquiry

96. The Committee also subpoenaed the audio recordings to help it determine whether sufficient grounds exist to draft articles of impeachment against President Biden for consideration by the full House of Representatives.[176]

97. Among other things, the impeachment inquiry is assessing whether President Biden has abused his federal office to enrich himself or his family members. The Committee believes that the audio recordings will shed light on whether President Biden willfully retained classified information to assist his family's business dealings with foreign nationals or companies or to enrich himself with a book deal.

98. *First*, the Committee is concerned that President Biden may have willfully retained sensitive documents related to certain countries involving his family's foreign business dealings, including Ukraine, to enrich his family, as doing so would be an abuse of his office of public trust.[177]

99. Evidence gathered during the impeachment inquiry raises the prospect this could have happened. As Vice President, Biden served as the "point man" for the Obama Administration's anti-corruption efforts in Ukraine at the same time his son Hunter Biden served on the board of Burisma Holdings Ltd., a Ukrainian energy company.[178] Also, by 2015, Ukrainian prosecutors had begun investigating the owner of Burisma for "unlawful enrichment"

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[176] *See* Ex. X (H. Rep. 118-527) at 2; Ex. M (Jordan to Garland Feb. 27, 2024 Letter) at 1 (citing H. Res. 918, 118th Cong. (2023)); Ex. B (Impeachment Memorandum) at 1-3.

[177] *See* Ex. X (H. Rep. 118-527) at 7; Ex. K (Jordan to Garland Feb. 12, 2024 Letter) at 1; Ex. M (Jordan to Garland Feb. 27, 2024 Letter), at 1.

[178] Alan Cullison, *Bidens in Ukraine: An Explainer*, Wall St. J. (Sept. 22, 2019, 6:03 PM) (attached as Ex. CC).

and "abuse of power."[179] Shortly after, Burisma executives approached Hunter Biden to get help from "D.C."[180] to alleviate the pressure placed on the company from the investigation. According to testimony provided to the Oversight Committee, Hunter Biden subsequently "called his dad."[181] In December 2015, then-Vice President Biden spoke with the Ukrainian President and conditioned a $1 billion loan from the United States on firing the prosecutor, Viktor Shokin—a policy change that, according to one source, he unilaterally made to the Obama Administration's position on providing the loan.[182]

100. The Special Counsel's Report indicates that at least two classified documents unlawfully retained by President Biden, A9 and A10, concerned his 2015 interactions with the Ukrainian government.[183] "Document A9 is a telephone call sheet setting forth the purpose and talking points for a call between Mr. Biden and the Ukrainian Prime Minister."[184] It included a handwritten signed note to his executive assistant that said: "Get copy of this conversation from

[179] Paul Sonne et al., *The Gas Tycoon and the Vice President's Son: The Story of Hunter Biden's Foray Into Ukraine*, Wash. Post (Sept. 28, 2019, 8:08 PM), https://perma.cc/P6WY-L4Q5.

[180] Transcript of Interview of Devon Archer at 34-35 (July 31, 2023) (attached as Ex. DD).

[181] *Id.* at 36.

[182] Glenn Kessler, *Inside VP Biden's Linking of a Loan to a Ukraine Prosecutor's Ouster*, Wash. Post (Sept. 15, 2023, 7:10 AM) ("On the plane, … Biden 'called an audible'—he changed the plan." Despite the original plan to have Poroshenko fire Shokin independently of the loan guarantee, the Vice President instead told "Poroshenko the loan would not be forthcoming until Shokin was gone."), https://perma.cc/8CAE-6JRQ.

[183] Report at 279-81, A-2.

[184] *Id.* at 281, 310, A-2.

Sit Rm for my Records please."[185] A10 was "a transcript documenting the substance of a December 11, 2015 call between Mr. Biden and Ukrainian Prime Minister Yatsenyuk."[186] The Special Counsel found that "given [the] handwritten note, documents A9 and A10 have additional indicia of *willful* retention by Mr. Biden."[187]

101. Since President Biden retained classified information about Ukraine from the time prosecutors were investigating the Ukrainian company where Hunter Biden sat on the board and Hunter Biden still sat on the board at the time his father left office in 2017, the Committee needs to know if President Biden willfully took the classified information to benefit his family. The audio recordings—which fully capture the interviews with President Biden and his ghostwriter—will help the Committee make that determination and decide whether any impeachment action is warranted.

102. *Second*, the Committee is investigating whether President Biden willfully retained and disclosed classified documents to enrich himself. Indeed, the Special Counsel found President Biden had "strong motivations" to flout the rules for properly handling classified materials, including to enrich himself by writing a memoir for "an advance of $8 million."[188] While working with Zwonitzer on his 2017 memoir, President Biden read from classified materials aloud "nearly verbatim."[189] The classified materials were an "invaluable resource that

[185] *Id.* at 310.

[186] *Id.* at A-2; *see also id.* at 310.

[187] *Id.* at 310 (emphasis added).

[188] *Id.* at 141, 231; *see generally id.* at 97-106.

[189] *Id.* at 7; *see also id.* at 104-06, 223, 244-47, 253-54.

he consulted liberally" while writing his book.[190] If President Biden willfully retained classified information for the purpose of carrying out a multimillion-dollar book deal, that may constitute an abuse of his office of public trust meriting impeachment.

103. Listening to the audio recordings, which capture President Biden's and Zwonitzer's tone and pace, as well as any hesitation or reluctance, will help the Committee determine whether President Biden retained classified material with an eye toward enriching himself through a book deal. In particular, the audio recording of the Special Counsel's interview with Zwonitzer may shed light on this issue because President Biden shared classified information with him while writing the book.

104. The Committee is under no obligation to rely exclusively on transcripts created, edited, and produced by executive agencies subordinate to the President—the subject of the impeachment inquiry—especially when superior evidence exists in the form of audio recordings that would ensure an accurate and complete record of the interviews.

105. DOJ has not disputed that the House is entitled, as part of an impeachment inquiry, to investigate whether the President abused his office. Indeed, DOJ has provided documents, including the transcripts of these audio recordings, to the Committee as part of its inquiry.

106. By refusing to comply with the Committee's Subpoena, DOJ is impeding the Committee's impeachment inquiry and preventing the House from discharging its solemn power of impeachment—a power the Constitution specifically vests in the House to hold Executive and Judicial officers accountable for violations of law and abuses of power.[191]

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[190] *Id.* at 231.

[191] The Federalist No. 65 (Alexander Hamilton).

IV. The President's assertion of executive privilege over the audio recordings lacks merit

107. President Biden's claim of executive privilege over the audio recordings lacks any basis in law.

108. Any claim of executive privilege over the audio recordings sought by the Committee was waived when the White House disclosed the transcripts of those interviews to the Committee and released them to the public. When President Nixon published transcripts of subpoenaed recordings, this Court held that his claim of privilege over audio recordings of those conversations had been relinquished, stating that "the privilege claimed [was] non-existent since the conversations [were] … no longer confidential."[192] The same is true in this case. Here, the President had not asserted executive privilege over any portion of the transcripts of the interviews prior to their disclosure to the Committee. Additionally, no conditions had been placed on the provision of the transcripts before DOJ turned them over to the Committee. No agreement was reached between the parties in advance that the transcripts were not to be disclosed, and DOJ failed even to ask the Committee not to release the transcripts.

109. Moreover, the transcripts have also been released to the public. Indeed, the transcripts of President Biden's interviews had been released to the news media by the Executive Branch *before* DOJ produced them in response to the Committee's subpoena.[193] Both disclosure to the media and disclosure to the Committee of the transcripts constitute a waiver of privilege, and accordingly, the audio recordings of those interviews are now non-privileged.

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[192] *See United States v. Mitchell*, 377 F. Supp. 1326, 1330 (D.D.C. 1974) (citing *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973)).

[193] Ex. Q (Jordan to Garland Mar. 25, 2024 Letter) at 2.

110. Finally, executive privilege was waived here because it was not timely invoked. Privilege had not been asserted as of the original Subpoena return date of March 7, 2024, nor on any of the subsequent return dates that resulted from extensions provided by the Committee, March 11, April 8, and April 25. In fact, instead of making a proper and timely assertion of privilege, the only timely objections raised by DOJ were on the grounds of the "compressed time frame" and a vague claim related to "Executive Branch confidentiality interests."[194] It was not until May 16, 2024, ten weeks after the Subpoena's original return date, and the morning that the Committee was scheduled to mark-up its report recommending that the full House hold the Attorney General in contempt of Congress, that the President publicly intervened to assert executive privilege over the audio recordings.[195]

111. The President's privilege assertion also represents the latest step in the Executive Branch's continuing efforts to expand the breadth and scope of executive privilege by repackaging common-law privileges as constitutionally based assertions. The President's assertion of privilege over the audio recordings is based on a faulty premise and lacks substantive merit.

112. The underlying information sought by the Committee does not implicate presidential decision-making, involve communications with close presidential advisors, involve national security, or otherwise intrude into any other areas traditionally held to be within the narrow confines of executive privilege.[196] Rather, the Committee seeks information related to a

[194] *See* Ex. N (Jordan Mar. 7, 2024 Letter) at 2-3.

[195] *See* Ex. W (Uriarte to Jordan May 16, 2024 Letter at 1).

[196] *See In re Sealed Case*, 121 F.3d 729, 744-45 (D.C. Cir. 1997) (distinguishing between the constitutionally based presidential communications privilege and other common-law privileges that may be asserted by the Executive Branch).

closed criminal investigation, making it subject at most to the common-law privilege afforded to law enforcement investigatory materials.

113. DOJ conceded (and this Court accepted), in the context of *Citizens for Resp. & Ethics in Wash. v. DOJ*, that the law enforcement privilege is "co-extensive" with the scope of the exemption found under the Freedom of Information Act (FOIA) Exemption 7(A).[197] Exemption 7(A) applies only to materials reasonably expected to interfere with enforcement proceedings that are pending or reasonably anticipated.[198] More specifically, the very argument advanced by the Attorney General here—that disclosure would have a chilling effect on White House participation in unspecified and undefined future criminal investigations—has been rejected by this very Court in the FOIA context.[199] And Congress's right to access information when performing its constitutionally prescribed functions of oversight and impeachment must be greater than the access afforded based on the statutory rights of FOIA requestors.

114. Similarly, the Attorney General's argument that release of the audio recordings presents a "unique intrusion" into "privacy interests" inappropriately conflates release of the records to Congress with release to the general public in response to a request under FOIA.[200] The cases upon which the Attorney General relies relate to protecting certain privacy interests when publicly releasing information under FOIA and are inapplicable to Congressional oversight and impeachment proceedings.

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[197] *See* 658 F. Supp. 2d 217, 232 (D.D.C. 2009).

[198] *Id.* at 225 (citing *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)).

[199] *See id.* at 228-29 (holding that "the category of proceedings must be more narrowly defined than simply any investigation that might benefit from the cooperation of some senior White House official at some undetermined future point regarding some undefined subject").

[200] *See* Ex. W (Garland to Biden May 15, 2024 Letter at 5-6).

115. DOJ has already produced to the Committee written transcripts that reflect the subject matter of the interviews. Thus, the assertion of privilege here appears, at best, to be over nuances from inflection, pace, emphasis, and other verbal indicators that would reveal themselves only on the audio recordings. There is no claim of privilege over any substantive content from the interview. As far as the Committee is aware, this is the first time such a broad privilege assertion has been made in these terms, and it reflects an expansive view of executive privilege with no limiting principle.

116. The Attorney General's argument that release of the tapes will have a "chilling effect" on DOJ's ability to obtain information in future investigations does not withstand scrutiny.[201] According to the Attorney General, if witnesses knew that audio recordings of their interviews could become public, the "ability to obtain vital cooperation in high-profile criminal investigations" might be impeded.[202] Any possible "chilling" effect, however, more properly flows from the fact that the substance of the interview is being released, not the format the release takes. The assertion that witnesses will be any less likely to participate in an interview with a future special counsel if the audio recordings of the interviews in question are produced to Congress strains credulity, considering that the transcripts of the underlying interviews have already been released without any assertions of privilege and made subject to scrutiny in the public sphere. If the Attorney General were serious about this concern, executive privilege would have been asserted over the transcripts themselves in the first instance and the Executive Branch would not have released them to the media.

[201] *See id.* at 4.

[202] *See id.* at 5.

117. The Attorney General for another reason grossly overstates the potential impact that turning over the audio recordings to the Committee would have on future investigations. DOJ's overemphasis on voluntary cooperation entirely ignores other, far more powerful, investigative tools available to it, such as grand jury subpoenas, other forms of compulsory process (search warrants, Stored Communications Act warrants, etc.), and the ability to prosecute individuals for noncompliance therewith. Indeed, DOJ "doesn't rely on strangers' munificence or let witnesses dictate the terms of its investigations" but instead relies on compulsory process.[203] Any suggestion that DOJ's investigative efforts would be hampered is a frivolous one.

118. Even setting aside the fact that in this instance privilege has been waived and has no substantive merit, executive privilege is a qualified privilege that can be overcome by a sufficient showing of need.[204] Here, the audio recordings are critically relevant to both the Committee's oversight of DOJ's use of a special counsel in conducting this investigation as well as its impeachment inquiry.

119. As set forth above,[205] the Committee needs the audio recordings to fully assess for itself the Special Counsel's recommendations and to carry out its constitutional oversight functions and determine whether legislative reforms aimed at DOJ's use of special counsels are needed. The Committee has the authority and the obligation to examine the use, appointment,

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[203] James Burnham, Opinion, *Biden, Nixon and the Hur Report*, Wall St. J. (May 20, 2024, 5:42 PM) (attached as Ex. EE).

[204] *Nixon*, 418 U.S. at 705-07.

[205] *See supra* ¶¶ 67-95.

funding, and functioning of special counsels to conduct sensitive investigations of high-ranking government officials.

120. Additionally, the Committee has a constitutional obligation to make an independent assessment of whether articles of impeachment are warranted based on President Biden's actions. And as set forth above,[206] the Committee believes that the audio recordings will shed light on whether President Biden abused his office of public trust to willfully retain classified information to assist his family's business dealings with foreign nationals or companies, or to enrich himself with a book deal.

121. Failure to require the production of the audio recordings would impermissibly impede the Committee's ability to exercise the House's constitutionally delegated oversight and impeachment functions. The Committee cannot and should not be precluded from access to this evidence by an assertion of a common-law privilege made by the very target of its investigation. Accordingly, even if executive privilege had not been waived, and were validly asserted here, the Committee's robust and unquestionable need for the information to carry out its core constitutional oversight and impeachment functions would be sufficient to overcome that privilege.

SPECIFIC CLAIM FOR RELIEF

COUNT I

122. The Judiciary Committee incorporates by reference and realleges the preceding paragraphs, as if set forth fully here.

[206] *See supra* ¶¶ 96-106.

123. The Subpoena was duly authorized, issued, and served pursuant to the Judiciary Committee's legislative and impeachment powers under Article I of the Constitution of the United States.

124. The Subpoena required, and still requires, Defendant Garland to produce the documents and records as set forth in Schedule A of the Subpoena, including the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer.

125. The Judiciary Committee has attempted to make reasonable accommodations for Garland's production, including by agreeing to review two documents *in camera* and extending the return date of the Subpoena three times, but those efforts are at an impasse, and Garland continues to refuse to produce the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer.

126. There is no lawful basis for Garland's refusal to produce to the Committee the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer.

127. The audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer are not covered by executive privilege, and, even if they were, President Biden has waived that privilege.

128. Garland violated, and continues to violate, his legal obligation by refusing to produce to the Committee the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer when those recordings are not covered by executive privilege, and, even if they were, executive privilege has been waived.

129. As a result, the Judiciary Committee has been, and will continue to be, injured by Garland's refusal to produce the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer.

PRAYER FOR RELIEF

WHEREFORE, the Judiciary Committee respectfully prays that this Court:

A. Pursuant to 28 U.S.C. §§ 2201 and 2202, enter declaratory and injunctive relief as follows:

1. Declare that Garland's refusal to produce the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer to the Committee lacks legal justification; and

2. Issue an injunction ordering Garland to produce the audio recordings of the Special Counsel's interviews with President Biden and Mark Zwonitzer to the Committee.

B. Retain jurisdiction to review any disputes that may arise over compliance with the Court's order.

C. Grant the Committee such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

/s/ Matthew B. Berry
Matthew B. Berry (D.C. Bar No. 1002470)
General Counsel
Todd B. Tatelman (VA Bar No. 66008)
Deputy General Counsel
Brooks M. Hanner (D.C. Bar No. 1005346)
Associate General Counsel
Sarah E. Clouse (MA Bar No. 688187)
Associate General Counsel
Bradley Craigmyle (IL Bar No. 6326760)
Associate General Counsel
Andy T. Wang (D.C. Bar No. 1034325)
Assistant General Counsel
Rachel A. Jankowski (D.C. Bar No. 1686346)
Assistant General Counsel

OFFICE OF GENERAL COUNSEL[207]
U.S. HOUSE OF REPRESENTATIVES
5140 O'Neill House Office Building
Washington, DC 20515
Telephone: (202) 225-9700
Matthew.Berry@mail.house.gov

Counsel for Plaintiff Committee on the Judiciary of the U.S. House of Representatives

July 1, 2024

[207] Attorneys for the Office of General Counsel for the U.S. House of Representatives are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

From: "Haddad, Soraya (OLA)" (b) (6)
To: Undisclosed recipients:;
Subject: OLA Correspondence 2/9/24
Date: Fri, 09 Feb 2024 17:40:41 -0500
Importance: Normal
Attachments: 2024-02-08-IN-_-Tenney-_SC_Hur_report.pdf; 2024-02-09-IN-OLA-_Johnson,_Grassley_-DOJ_FBI_Special_Counsel_(Hur_Report).pdf; A-24-0021-Incoming_Follow-up_letter_from_Rep._Earl_Blumenauer.pdf

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Good evening,

Please find today's incoming correspondence attached and summarized below.

Incoming:

1. **Letter from Representative Claudia Tenney to the Attorney General** regarding the confidential report provided by Special Counsel Robert Hur, stating concerns and requesting the Attorney General begin proceedings to remove the President pursuant to the 25th Amendment.
2. **Letter from Permanent Subcommittee on Investigations Ranking Member Ron Johnson and Committee on the Budget Ranking Member Charles Grassley to the Attorney General, FBI Director Chris Wray and Special Counsel Robert Hur**, stating there appears to be a significant factual omission in Special Counsel Hur's recently published report; requesting answers to questions no later than Saturday, February 24, 2024.
3. **Letter from Representative Earl Blumenauer to DEA Administrator Anne Milgram (cc'ing the Attorney General)** responding to DEA's December 19, 2023, response to the Representative's October 27,2023, letter regarding the agency's ongoing review of the scheduling of marijuana, stating this scheduling review is a necessary step in the work to end the federal government's prohibition of cannabis.

No priority outgoing correspondence.

Best,

Soraya Haddad
Office of Legislative Affairs
U.S. Department of Justice

CLAUDIA TENNEY
MEMBER OF CONGRESS
NEW YORK
24TH DISTRICT
TENNEY.HOUSE.GOV

House Committee on Ways and Means
Subcommittee on Health
Subcommittee on Oversight
Subcommittee on Work and Welfare
House Committee on Science, Space, and Technology
Subcommittee on Energy

Congress of the United States
House of Representatives
Washington, DC 20515–3222

February 8th, 2024

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dear Attorney General Garland:

I write to you today with grave concerns regarding the confidential report provided to you by Special Counsel Robert K. Hur. After concluding that President Biden knowingly and willfully removed, mishandled, and disclosed classified documents repeatedly over a period of decades, Mr. Hur nevertheless recommended that charges not be brought against him.

Special Counsel's reasoning was alarming. He recited numerous instances in which President Biden exhibited dramatically compromised mental faculties and concluded that a jury would be likely to perceive President Biden as a sympathetic and forgetful old man.

I need not tell you that selective prosecution is morally, ethically, and legally prohibited. We don't prosecute or decline to prosecute people based on their personalities, or on the public's anticipated perception of them. If Special Counsel finds that the evidence forms a reasonable basis to bring charges, he must do so. The Department of Justice cannot ethically bring charges against former president Trump because he has mental acuity and a forceful personality and decline to bring charges against President Biden because of his cognitive decline. President Biden needs to be charged.

Unless he is not mentally competent to stand trial.

Candidly, the Special Counsel's report makes a reasonable case that he is not. Being unable to remember what position he held, and when, is exceptionally concerning. Being unable to remember when one's child died - even within a time frame of several years - is perhaps more frightening. He may not be competent to stand trial.

And he most assuredly lacks the ability to execute his presidential responsibilities. Accordingly, it is incumbent upon you to begin proceedings to remove the President pursuant to the 25th Amendment of the United States Constitution.

President Biden needs to be charged, or he needs to be removed. There is no middle ground.

Sincerely,

Claudia Tenney

CLAUDIA TENNEY
Member of Congress

WASHINGTON DC
2349 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-3665

VICTOR, NY
7171 PITTSFORD-VICTOR ROAD, SUITE 210
VICTOR, NY 14564
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OSWEGO, NY
46 E. BRIDGE STREET, SUITE 102
OSWEGO, NY 13126
(315) 236-7088

LOCKPORT, NY
169 NIAGARA STREET
LOCKPORT, NY 14094
(716) 514-5130

From: "Weinsheimer, Bradley (ODAG)" <(b) (6)
To: "Hinojosa, Xochitl (PAO)" (b) (6) , "Klapper, Matthew B. (OAG)" (b) (6) "Atkinson, Lawrence (ODAG)" (b) (6)
Subject: RE: Seeking comment for a story
Date: Fri, 09 Feb 2024 13:07:49 -0500
Importance: Normal
Attachments: Response_to_AG_Letter_02082024.pdf

Duplicative Records

U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

February 8, 2024

Edward N. Siskel
Assistant to the President and White House Counsel
The White House

Bob Bauer
Personal Counsel to Joseph R. Biden, Jr.

Via Email

Dear Mr. Siskel and Mr. Bauer:

I serve as the Department of Justice's (Department) senior career official and write in response to your February 7, 2024, letter to the Attorney General concerning the report of Special Counsel Robert K. Hur relating to his investigation into unauthorized removal, retention, and disclosure of classified documents discovered at locations including the Penn Biden Center and the Delaware private residence of President Biden. In your letter, you state your objections to aspects of the report and ask that a copy of your letter be included in the investigative file.

The objections you raise in your letter to the Attorney General are substantially similar to the objections you raised in your February 5, 2024, letter to Special Counsel Hur. In both letters, you contend that the report contains statements that violate long-standing Department policy.

Having carefully considered your arguments, the Department concludes that the report as submitted to the Attorney General, and its release, are consistent with legal requirements and Department policy. The report will be provided to Congress and released publicly, consistent with Department practice and the Attorney General's commitment to transparency.

In particular, you first highlight brief language in the report discussing President Biden's use of the term "totally irresponsible" to refer to former President Trump's handling of classified information. Second, you object to the "multiple denigrating statements about President Biden's memory."

The context in which this information is used in the report makes it appropriate under Department policy and the Special Counsel regulations. The identified language is neither gratuitous nor unduly prejudicial because it is not offered to criticize or demean the President;

rather, it is offered to explain Special Counsel Hur's conclusions about the President's state of mind in possessing and retaining classified information. The Special Counsel regulations specifically require the Special Counsel to prepare a report for the Attorney General that explains the Special Counsel's prosecution and declination decisions. See 28 CFR § 600.8(c). The identified language in the report does just that. And, as the Attorney General has made clear regarding each Special Counsel who has served since he has taken office, the Attorney General is committed to making as much of a Special Counsel's report public as possible, consistent with legal requirements and Department policy.

Your claim that Special Counsel Hur inappropriately commented on uncharged conduct is misplaced. As an initial matter, as described above, rather than commenting on uncharged conduct, Special Counsel Hur was applying the evidence he gathered to the applicable law. While Department policy advises Department employees to exercise caution when describing uncharged conduct, the policy also provides that when considering a statement about uncharged individuals, deciding officials should consider whether public disclosure may advance a significant law enforcement interest, including upholding the integrity of the investigation, and whether the public has a significant need to know the information.[1]

Special Counsel Hur's report provides significant detail on the bases for his declination decisions. This includes factors that support his determination of whether the President knew he possessed classified information and whether he acted willfully in possessing and retaining it. The language to which you object goes directly to these issues.

For these reasons, inclusion of the identified language in the report and the report itself fall well within the Department's standards for public release. The report addresses whether the President, as a private citizen, mishandled classified information in violation of criminal laws. This sits near the apex of the public interest. The report and its release, including the identified language, are consistent with Department policies and practice.

---

[1] The references in your letters to then-FBI Director Comey's press conference concerning the FBI's charging recommendation relating to Secretary Hillary Clinton's use of a private server, and the resulting Office of Inspector General (OIG) report, are inapt. Former Director Comey was not a Special Counsel, prosecutor, or Department official charged or approved to announce a declination decision. The OIG criticized his explanation as being incomplete and not carefully assessing and applying all of the facts to the applicable law in announcing the FBI's charging recommendation. His reference to Secretary Clinton being "extremely careless," the OIG found, was a comment on her uncharged conduct -- it was not a comment offered in explanation of the evidence and its application to the law. For these reasons, the OIG concluded Director Comey acted outside of his authority and in violation of Department policy. In contrast, Special Counsel Hur is specifically charged by the Special Counsel regulations and his appointment order with making charging and declination decisions. And as explained above, Special Counsel Hur then is required to furnish a report to the Attorney General explaining those decisions. That is what Special Counsel Hur's report does, and it does so in a manner consistent with Department policy. As the OIG report you cite recognizes, "It is not unprecedented for the Department to announce the completion of an investigation without a prosecution. In fact, it happens frequently in high profile matters. . . . Comey's announcement was unusual in that it concentrated in substantial part on criticizing former Secretary Clinton's uncharged conduct." *OIG Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* at 246. Special Counsel Hur's report is readily distinguishable from Director Comey's press conference.

Thank you for raising these issues for the Attorney General's consideration. As you request, the Department will ensure that your letter is maintained in its files in connection with Special Counsel Hur's report.

Sincerely,

Bradley Weinsheimer

From: "Dulaney, Emma (PAO)" (b) (6)
To: "Klapper, Matthew B. (OAG)" (b) (6), "Hinojosa, Xochitl (PAO)" (b) (6), "Uriarte, Carlos F. (OLA)" (b) (6), "Zdeb, Sara (OLA)" (b) (6) "Evers, Austin (ODAG)" (b) (6), "Benson, Adrienne (ODAG)" (b) (6)
Subject: Draft Contempt Report
Date: Wed, 08 May 2024 17:46:19 -0400
Importance: Normal
Attachments: DRAFT Garland Contempt Report re Hur Report Materials.pdf

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Got this off the record so please do not distribute. Reading through now to see which lines in our 4/25 letter make the most sense to point her to as a response.

From: Rebecca Beitsch <RBeitsch@TheHill.com>
Sent: Wednesday, May 8, 2024 5:44 PM
To: Dulaney, Emma (PAO) <(b) (6)
Subject: [EXTERNAL] Fw:

Here you go.

Please do not distribute to any other reporters as I am currently the only one that has this.

Thanks!

Rebecca Beitsch
National Security and Legal Affairs Reporter
The Hill
rebecca@thehill.com | @rebeccabeitsch

CAUTION: This message was sent from outside the Nexstar organization. Please do not click links or open attachments unless you recognize the sender.

Sent from my iPhone

118TH CONGRESS
2ND SESSION
} HOUSE OF REPRESENTATIVES {
REPORT
118-

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND UNITED STATES ATTORNEY GENERAL MERRICK B. GARLAND IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY IS UED BY THE COMMITTEE ON THE JUDICIARY

May __, 2024. Referred to the House Calendar and orde ed to be pri d

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MR. JORDAN, from the Committee on the Judici , submitted the following

R E P O R

together with

_ _ VIEWS

The Committee on the Judiciary, ha g conside his Report, reports favorably thereon and recommends that the Report be approved

The form of the Re hat the Com ttee on the Judiciary would recommend to the House of Representativ citing M ck B. Garl d, Attorney General, U.S. Department of Justice, for contempt Congress p suant to this port is as follows:

Resolved, Th Merrick ney General, U.S. Department of Justice, shall be found to be in conte t o ongress for failure to comply with a congressional subpoena.

solv hat pursu to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Rep entatives sha ertify th port of the Committee on the Judiciary, detailing the refusal of M rrick B. Garland, A rney Gen al, U.S. Department of Justice, to produce documents, ords, and materials t he Committee on the Judiciary as directed by subpoena, to the United St Attorney for the D trict of Columbia, to the end that Attorney General Merrick B. Garla be proceeded a inst in the manner and form provided by law.

Res ed, T t the Speaker of the House shall otherwise take all appropriate action to enforce the su na.

DRAFT

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EXECUTIVE SUMMARY

In the weeks following the Februar 5, 20 elease of Spec Counsel Robert K. Hur's report, the three House Committees conduc g an imp ent inquiry to determine whether to draft articles of impeachment against Preside Joseph . Bid gaged with the Department of Justice to obtain a limited set of documents nd r ords related to the report. After the Department declined to pro Committee th the relevant documents and records, the Committee on the Judici y ("Judic y Commit ") and the Committee on Oversight and Accountability ("Ov ght Commi e") issued id tical subpoenas on February 27, 2024, to Attorney General M rrick B. Garl d compelling p duction of four specific categories of documents and reco includin ideo recordings of Special Counsel Hur's interviews with Presid Bi n and his ghostwriter, Mark Zwonitzer.[2] The Judiciary Committee subpoenaed these materia or several reasons—including to determine whether sufficient ground ft article f impeachment against President Biden for consideration by the full use of Repr tatives a to determine if legislation is needed to codify procedures g erning the Departm nt's speci counsel investigations or to strengthen the Department's mmitment to imparti ustice. To date, the Department has refused to produce the audio re dings, despite not h ing invoked any privilege to justify its failure to comply with the subp a.

Du Spe l Counsel Hur's investigation, his team uncovered evidence that President Biden "willfu tained and disclosed classified materials after his vice presidency when he

[1] H.R. Res. 918, 118th Cong. (2023).
[2] Letter from Rep. Jim Jordan, Chairman. H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice (Feb. 27, 2024) (hereinafter "Subpoena Letter").

DRAFT

was a private citizen."[3] Special Counsel Hur found that then-Vice President Biden had "strong motivations" to flout the rules for properly handling classified materials.[4] In particular, Special Counsel Hur observed that "months before leaving office" as vice president, President Biden decided to write a book for "an advance of $8 million."[5] The classified materials retained by President Biden were an "invaluable resource that he consulted liberally" while writing his book so that he could give his ghostwriter "raw material . . . detailing meetings and events that would be of interest to prospective readers and buyers of his book."[6] Additionally, Sp al Counsel Hur observed that President Biden viewed the classified materials "as an irrepla ble contemporaneous record of some of the most important moments of his v residency[,]" which "was valuable to him for many reasons, including to help defen his re d and buttress his legacy as a world leader."[7] Despite this evidence, Special Couns Hur ultim y concluded that no criminal charges were warranted.[8]

President Biden has vehemently denied the finding n Special Counsel Hur's rep and he and his legal team have attempted to frame Special C nsel Hur's mention of President Biden's poor memory as "gratuitous."[9] Yet during his timony bef the Committee, Special Counsel Hur stated that, "[t]he evidence and the Presiden imself ut his memory squarely at issue."[10] In his report, Special Counsel Hur noted that, durin h his and Zwonitzer's interviews with President Biden, the president's "memory was nificantly limited," and he "struggle[ed] to remember events and str d] at times to read a relay his own [handwriting]."[11] Special Counsel Hur als obser that President B en "did not remember when he was vice president," "for[got] whe his [vice p d ntial] term ended," and "did not remember, even within several years, when h son Be died

The Department co withhold k material responsive to the subpoenas from the Judiciary and Oversight ommitte —specifical the audio recordings of Special Counsel Hur's interviews with Presi nt Biden and wonitzer. T Department has invoked no constitutional or legal privilege to s port withhold g this material s failure to fully comply with the

---

[3] REPORT ON THE INVESTIGA N O UNAUTHORIZED REMOVAL, RETENTION, AND DISCLOSURE OF CLASSIFIED DOCUMENTS DISCOVERED AT L TIONS INCLUDING THE PENN BIDEN CENTER AND THE DELAWARE PRIVATE RESIDEN NT JOSEPH BIDEN, JR., SPECIAL COUNSEL ROBERT K. HUR, U.S. DEP'T OF JUSTICE AT 1 (FEB 24) (hereinaft Hur Repor

[4] *I* t 231.

d. at 141, 231.

at 231.

[7] *Id* 231-32.

[8] *Id.* a 5

[9] Rebecc itsch, et al., *S ial counsel overstepped mandate with 'gratuitous' Biden slams, say ex-DOJ Dems*, THE HILL (F 12, 202 "When the inevitable conclusion is that the facts and the evidence don't support any charges,' said Sa a spokesman for the White House's special counsel office, 'you're left to wonder why this report spends tim king gratuitous and inappropriate criticisms of the president.'"); *see* Letter from Mr. Richard Sauber, Special Counsel to the President, The White House, and Mr. Bob Bauer, Personal Counsel to Joseph R. Biden. Jr., to Mr. Bradley Weinsheimer, Assoc. Deputy Att'y Gen., U.S. Dep't of Justice at 2-3 (Feb. 12, 2024) ("This is the very definition of a derogatory comment . . . .").

[10] Hearing on the Report of Special Counsel Robert Hur: Hearing Before the H. Comm. on the Judiciary, 118th Cong. 17 (2024) (statement of Special Counsel Robert K. Hur, U.S. Dep't of Justice) (hereinafter "Hearing on Hur Report").

[11] Hur Report, *supra* note 3, at 207.

[12] *Id.* at 207-08.

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Committees' subpoenas has hindered the House's ability to adequately conduct oversight over Special Counsel Hur regarding his investigative findings and the President's retention and disclosure of classified materials and impeded the Committees' impeachment inquiry.

AUTHORITY AND PURPOSE

The Constitution vests the House of Representatives with the "sole Pow of Impeachment"[13] and provides that the "President, Vice President and all civ Officers of the United States, shall be removed from Office on Impeachment for, and C tion of, Treason, Bribery, or other high Crimes and Misdemeanors."[14] As the U.S. Cou f App ls for the District of Columbia Circuit has stated, "[t]o level the grave accusati n that a Pr dent may have committed 'Treason, Bribery, or other high Crimes and Misdem nors,' U.S. Cons t II, § 4, the House must be appropriately informed."[15] Congress's auth ity to access informati during an impeachment investigation is broader in certain instanc han in a purely legislative investigation,[16] a fact that the executive branch tradition y has recognized.[17] Investigating and collecting all relevant evidence is the traditional mean y which the ouse begins an impeachment inquiry.[18] Indeed, conducting an impeachm t inqui without all pertinent evidence would be an affront to the Constitution and irrepar damage public faith in the impeachment process.[19]

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[13] U.S. CONST. art. I, § 2, cl. 5.

[14] *Id.* art. II, § 4.

[15] *Comm. on Judiciary of U.S. House of Representati v. McGah* 96 755, 765 (D.C. Cir. 2020) (en banc).

[16] TODD GARVEY, CONG. RSCH. SERV.: LEGAL SIDEBA LSB11 3, IMPEACHMENT INVESTIGATIONS, PART II: ACCESS, at 1 (2023) ("[T]here is re to believe that oc on of the impeachment power could improve the committees' legal claims of acc o types of evi ce relevant to the allegations of misconduct against President Biden."). *See also e Applica of Comm. o udiciary*, 414 F. Supp. 3d 129, 176 (D.D.C. 2019) ("[D]enying [the House J iary Commit evidence rel nt to an impeachment inquiry could pose constitutional problem , *aff'd*, 951 F.3d 89 (D.C. Cir. 20 *vacated and remanded sub nom. on other grounds*, *DOJ v. House Comm. the Judiciary* S C 46 (2021); *n re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445 (11th C 987) (co uding tha g] the investigatory power of the House in impeachment proceedings . . . would clea io separation of powers principles").

[17] *See* GARVEY *supra* note 16 a historical matter, all three branches have suggested that the House possesses a robust ri o informat when it is investigating for impeachment purposes."); Jonathan David Schaub, *The E utive's Privi* 70 DUKE 1, 87 (2020) ("[P]residents and others have recognized throughout the hi y of the country th eir ability ithhold information from Congress disappears in the context of peachment.").

ee, e.g., H.R. Rep. No. 1 346, at 28 (2019) ("Here, consistent with historical practice, the House divided its imp hment inquiry into tw hases, first collecting evidence and then bringing that evidence before the Judiciary Comm e for its considerat of articles of impeachment."); H.R. Rep. No. 111-427, at 7 (2010) ("[T]he impeach t inquiry was r rred by the Committee on the Judiciary to a Task Force on Judicial Impeachment . . . , comprised 2 Commi Members, to conduct the investigation."). *See also Hearing on the Basis for the Impeachment iry resident Joseph R. Biden: Before the H. Comm. on Oversight & Accountability*, 118th Cong. (Sept. 28,) (statement of Jonathan Turley, Professor, The George Washington University Law School); Memorandum from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, and Rep. Jason Smith, Chairman, H. Comm. on Ways & Means, to Members of the H. Comm. on the Judiciary, H. Comm. on Oversight & Accountability, and H. Comm. on Ways & Means (Sept. 27, 2023) (hereinafter "Sept. 27 Memo").

[19] *See In re Application of Comm. on Judiciary*, 414 F. Supp. 3d at 176 ("Impeachment based on anything less than all relevant evidence would compromise the public's faith in the process."); *In re Request for Access to Grand Jury Materials*, 833 F.2d at 1445 ("Public confidence in a procedure as political and public as impeachment is an

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On September 27, 2023, pursuant to the directive of the Speaker, the Chairs of three House Committees (the Judiciary, Oversight, and Ways and Means Committees) released a memorandum setting forth the justification for and scope of the inquiry into whether sufficient grounds exist to draft articles of impeachment against President Biden.[20] On December 13, 2023, the House of Representatives adopted House Resolution 918, directing these three Committees to continue the ongoing impeachment inquiry.[21] By approving House Resolution 8, the House also adopted House Resolution 917,[22] which provided that "[t]he authority provided by clause 2(m) of Rule XI of the Rules of the House of Representatives to the Chair of the Committees . . . included, from the beginning of the existing House of Representatives's impeachment inquiry . . . and continues to include, so long as the impeachment inquiry is ongoing, the authority to issue subpoenas on behalf of such Committees for the purpose of furthering the impeachment inquiry."[23]

The subpoenas issued to the Department by the Judiciary and Oversight Committees are part of the House's impeachment inquiry. As explained in detail below, the requested documents and materials are necessary to determine whether sufficient grounds exist to draft articles of impeachment against President Biden.

However, the impeachment inquiry is not the only purpose underlying the Committee's subpoena; it was also issued pursuant to the Committee's authority to conduct legislative oversight.[24] Article I of the Constitution vests in Congress "broad" and "indispensable" power to conduct oversight and investigations that encompass inquiries into the administration of existing laws, studies of proposed laws, and surveys of our social, economic or political system for the purpose of enabling the Congress to remedy them."[25] Pursuant to the Rules of the House of Representatives, the Committee on the Judiciary is authorized to conduct oversight of the Department and of criminal justice matters in the United States to inform potential legislative reforms.[26]

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important justifying closure."); *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974) (would be difficult to conceive of a more compelling need than that of this country for an unswerving fair [impeachment] inquiry based on all the pertinent information.").

Sept. 27 Memo, *supra* note 8.

H.R. Res. 918, 118th Cong. (2023).

[22] H.R. Res. 917, 118th Cong. (2023).

[23] *Id.*

[24] *See* Rules of the U.S. House of Representatives, R. XI, cl. 2(m)(1) (2023) (providing that "a committee or subcommittee is authorized . . . (B) to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary"; Rules of the H. Comm. on Oversight & Accountability, R. 12(g) ("The Chair of the Committee shall . . . [a]uthorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the Committee."); Rules of the H. Comm. on the Judiciary, R. IV(a) ("A subpoena may be authorized and issued by the Chair, in accordance with clause 2(m) of rule XI of the House of Representatives, in the conduct of any investigation or activity or series of investigations or activities within the jurisdiction of the Committee, following consultation with the Ranking Minority Member.").

[25] *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957).

[26] Rules of the U.S. House of Representatives, R. X, cl. 1(l) (2023).

DRAFT

To further the Committee's constitutionally mandated oversight and legislative duties, the Committee must ensure compliance with duly authorized congressional subpoenas. The information that the Committee requires, and the Department is in possession of, is necessary for the Committee to consider potential legislative reforms to the Department and its use of special counsels to conduct investigations of current and former Presidents of the United States. These potential legislative reforms may include, among other things, codifying certain procedures governing the Department's special counsel investigations to better ensure that e Department pursues impartial justice. The circumstances of Special Counsel Hur's inves gative findings and President Biden's public denial of these findings demonstrate why such p tial legislative reforms may be necessary.

BACKGROUND ON THE INVESTIGATION

According to the report of Special Counsel Robert K Hur, in November 2022, Pa k Moore, one of President Biden's personal attorneys, dis vered 44 pag s of documents "classified up to the Top Secret level" stemming from tenure as V e President at President Biden's office in Washington, D.C., located at the Penn B en Ce r.[27] Moore notified his colleague Bob Bauer, who then notified White House Coun uart Delery.[28] The same day, the White House Counsel's Office passed the information along the National Archives and Records Administration (NARA), which ved the documents, d referred the case to the Department and Federal Bureau of Investi tion (I) [29] Additional between December 2022 and January 2023, Bauer, Moore, and anoth Biden pe l counsel, Jennifer Miller, discovered additional classified materials, al from hi enur Vice President, in the garage, basement den, and office of President Biden's erso al residence in Wilmington, Delaware.[30] Between January and June BI agents lo d additional materials with classification markings at the Morris L rary and den Institu at the University of Delaware.[31]

After recei ng notification om NARA of e discovery of classified documents at the Penn Biden Center, Novemb ttorney General Garland assigned John Lausch, then the U.S. Attorney r th Northern District of Illinois, to lead an investigation into President Biden's retention of class d materials and "assess whether the Attorney General should appoin p unsel to estigate the matter."[32] After further discoveries of classified mat al at Presiden Biden's h e and the University of Delaware, Lausch determined that the a ointment of a spec counsel s necessary.[33]

Accordingly, on nuary 12, 2023, Attorney General Garland appointed Robert K. Hur to serve special counsel investigate whether President Biden unlawfully retained classified informa when he l office after the vice presidency.[34] During his investigation, Special

[27] Hur Report, *sup* note 3, at 19 (The classification marks on the documents "dat[ed] back to [President Biden]'s vice presidency").
[28] *Id.*
[29] *Id.*
[30] *Id.* at 24-25.
[31] *Id.* at 28.
[32] *Id.* at 21.
[33] *Id.* at 26.
[34] *Id.*

Counsel Hur conducted 173 interviews of 147 witnesses, including President Biden himself and his memoir ghostwriter, Mark Zwonitzer.[35] Special Counsel Hur collected over seven million documents, including e-mails, text messages, photographs, videos, toll records, and other materials from both classified and unclassified sources.[36] On February 8, 2024, Attorney General Garland released Special Counsel Hur's 375-page report, which concluded that although there was evidence that President Biden had "willfully retained and disclosed classified materials as a private citizen,"[37] criminal charges were not warranted because, among other th ngs, President Biden is an "elderly man with a poor memory."[38]

As a part of the Committees' inquiry into whether sufficient gr nds e t to draft articles of impeachment against President Biden, the Committees have soug informati egarding President Biden's mishandling of classified information.[39] The C mmittees have so ht this information to determine whether President Biden willfully r ned classified informa n and documents related to, among other places, Ukraine to assis is family's business dealing to enrich his family.[40] Doing so would be an abuse of his ce of public trust.

Evidence gathered during the Committees' impea ment i quiry raises the prospect that President Biden willfully retained classified information rel o his family's business dealings in Ukraine. Then-Vice President Biden served as the int man" for the Obama Administration's anti-corruption efforts i ine at the same tim that his son, Hunter Biden, served on the board of a notoriously corru Ukra energy comp [41] In August 2014, Ukrainian Prosecutor General Shokin open an "unlaw nrichment investigation into Burisma and its owner, Mykola Zlochevsky. Shortly ereaf Mr. Zlochevsky and other Burisma executives approached Hunter Biden nfo ed him that the investigations placed significant pressure on the p and asked nter Biden if he could help alleviate such pressure.[43] Testimony p ided to Committe shows that Hunter Biden subsequently "called D.C."[44] After this ph e call, in No mber and D ember 2015, Vice President Biden purportedly took o cial actions c cerning Ukrain —including meeting with Ukrainian Prime Minister Arseniy Y nyuk—a the United States's $1 billion loan "to fight

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[36] *I* 29.

[37] *Id*.

[38] *Id.* at 2

[39] *See* Subp Letter *a* note 2; Letter from Rep. Jamie Comer, Chairman, H. Comm. on Oversight & Accountability p Jordan, Chairman, H. Comm. on the Judiciary; Jason Smith, Chairman, H. Comm. on Ways & Means, t errick Garland, Att'y Gen., Dep't of Justice (Feb. 12, 2024) (hereinafter "Feb. 12 Letter"); Letter from Rep. Jamie Comer, Chairman, H. Comm. on Oversight & Accountability, to Robert K. Hur, Special Counsel, Dep't of Justice (Oct. 16, 2023).

[40] *Id.*

[41] Alan Cullison, *Bidens in Ukraine: An Explainer*, WALL ST. J. (Sept. 22, 2019).

[42] Paul Sonne, et al., *The gas tycoon and the vice president's son: The story of Hunter Biden's foray into Ukraine*, WASH. POST (Sept. 28, 2019).

[43] Transcribed Interview of Mr. Devon Archer at 33-34 (July 31, 2023) (on file with Committee).

[44] *Id.* at 36.

corruption" on the firing of Prosecutor General Shokin.[45] Withholding the loan guarantee on this condition was contrary to the overwhelming consensus of the Obama Administration.[46]

Special Counsel Hur's report shows that at least two documents, identified in the report as "A9" and "A10," which were made available to the Committees *in camera*, concerned President Biden's 2015 interactions with the Ukrainian government.[47] According to Special Counsel Hur, document "A9" was "a [t]elephone [c]all [s]heet setting forth the urpose of and talking points for a call with Ukrainian Prime Minister Yatsenyuk," and do ment "A10" was a "document in the format of a transcript documenting the substance of a D ber 11, 2015[,] call between [Vice President] Biden and Ukrainian Prime Minister Ya nyuk [8] Given that Hunter Biden's business dealings in Ukraine were still active when J e Biden lef e vice presidency, President Biden's retention of these classified docum nts raises questio bout whether he purposefully took them when he left office in ord o benefit his family.

There is also the prospect that President Biden i eneral willfully retained classified documents in order to enrich himself and his family. P ident Biden 2017 memoir, *Promise Me, Dad*, discussed, among other things, President Biden hough on foreign policy.[49] While working with Zwonitzer on his memoir, President Biden rea f m classified materials "verbatim," and such classified materials included "notes on m rs of foreign policy," "meeting notes summariz[ing] the actions and view U S. military leader nd CIA director relating to a foreign country," "notebook entries relate o ma lassified meetin including National Security Council meetings, CIA briefings, D partment fense briefings, and other meetings and briefings with foreign policy officials."[5] Notably pecia nsel Hur's report found that President Biden received an advance of $8 mi on t produce a memoir.[51] To the extent that President Biden willfully t ified inform n when he left office in order to help him write a book and make a rge amo t of money r himself and his family, that could constitute an abuse of his office public trus

On February 2 2024, a f ur days after the release of Special Counsel Hur's report, the Chair f th udiciary Committee, the Oversight Committee, and the Committee on Ways and ans sent a letter to Attorney General Garland requesting four catego ments and cords: (1) all documents and communications, including audio and deo recording related to e Special Counsel's interview of President Biden; (2) all d uments and comm ications, i luding audio and video recordings, relating to the Special unsel's interview of wonitzer; (3) the documents identified as "A9" and "A10" in Appendix A Special Counsel H s report, which relate to President Biden's December 11, 2015, call with n-Ukrainian Pri e Minister Arseniy Yatsenyuk; and (4) all communications between or among r esentative f the Department, including the Office of the Special Counsel, the

[45] Glenn Kessler, *de VP Biden's linking of a loan to a Ukraine prosecutor's ouster*, WASH. POST (Sept. 15, 2023).
[46] *See id.* ("On the plane, according to a person who participated in the conversation, Biden 'called an audible'—he changed the plan.").
[47] Hur Report, *supra* note 4, at A-2.
[48] *Id.*
[49] *See, e.g.*, *id.* at 97.
[50] *Id.* at 97-106.
[51] *Id.*

Executive Office of the President, and President Biden's personal counsel referring or relating to Special Counsel Hur's report.[52]

On February 16, 2024, the Department responded to the Committees' February 12 letter but failed to produce any of the requested material—stating, instead, that it was "working to gather and process" responsive documents.[53] The Department offered no timeframe or commitment for the production of requested documents and information.[54] Ac dingly, on February 27, 2024, the Judiciary Committee and the Oversight Committee i ed identical subpoenas to Attorney General Garland compelling the production of the categories of materials:

1. All documents and communications, including audio and video recordings, ted to Special Counsel Robert Hur's interview of President J eph R. Biden, Jr.;

2. All documents and communications, including a io and video ecordings, related to Special Counsel Hur's interview of Mr. Mark Z onitzer;

3. The documents identified as "A9" and "A10" in App x A of Special Counsel Hur's report, which relate to President Biden's December 11, 15 call with then-Ukrainian Prime Minister Arseniy Yatsenyuk d

4. All communications between or am g represen s of the Department of Justice, including the Office of the Special C nsel, th xecu Office of the President, and President Biden's personal counsel ref ing relating to Special Counsel Hur's report.[55]

The subpoenas s a return e of March 2024. On that date, the Department produced an incomplete set of cuments com rising only respondence exchanged between President Biden's legal coun and the Dep ment, along w an offer to review two classified documents *in came*[56] Two da mmittees notified the Department that its initial production in response the bpoenas was inadequate.[57] In this letter, the Committees specifically noted that th partment had failed to produce unredacted transcripts and audio recordi ial Couns Hur's interviews of President Biden or Zwonitzer.[58] Because Spe l Counsel H was sched d to testify in front of the Judiciary Committee on March 12, 2 4, the Committees ffered to a ept a production of all materials responsive to the

[52] Feb Letter, *supra* note
[53] Letter Asst. Attorn Gen. Carlos Felipe Uriarte, U.S. Dep't of Justice, to Rep. James Comer, Chairman, H. Comm. on sight & countability, et al. (Feb. 16, 2024).
[54] *Id.*
[55] Subpoena Lette *pra* note 2.
[56] Letter from Hon. Carlos F. Uriarte, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Mar. 7, 2024); Letter from Hon. Carlos F. Uriarte, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability (Mar. 7, 2024); DOJ-HJC-HUR-0000001-0000032.
[57] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice (Mar. 9, 2024) (hereinafter "Mar. 9 Letter.").
[58] *Id.*

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Committees' subpoenas by March 11, 2024, at 3:00 p.m.[59] The Department failed to comply with the Committees' revised deadline,[60] and instead informed the Committees that an "interagency review" for classified and confidential information was pending.[61]

Next, a little more than two hours before Special Counsel Hur's scheduled testimony in front of the Judiciary Committee on the morning of March 12, 2024, the Department produced to the Committees two redacted transcripts of Special Counsel Hur's interviews w h President Biden.[62] Significantly, the Department failed to produce the audio recording f the interviews. In its letter accompanying the two redacted transcripts, which was transm to the Committees at 7:45 a.m., the Department represented to the Committees that it had st co leted the "standard interagency review process" earlier that morning, thereby lowing the terial to be released.[63] Despite the Department's representation, however, it as apparent that s ral news outlets had received and reviewed the transcripts before they re produced to the Com ittees.[64]

The Committees next wrote to Attorney General arland on March 25, 2024, regarding the Department's continued withholding of material re nsive to th ommittees' subpoenas, particularly the audio recordings of Special Counsel Hur tervi s with President Biden and the transcripts and audio recordings of Special Counsel Hur rviews with Zwonitzer.[65] The letter again reminded Attorney General Garland about the lega ligations imposed upon him by the Committees' subpoenas and directed h produce all respon ve materials no later than 12:00 p.m. on April 8, 2024 to avoid furth actio this matter, in ding the invocation of contempt of Congress proceedings.[66]

The Department replied on April 8, 20 bu again flouted the Committees' subpoenas, choosing instead to produc e transcript Special Counsel Hur's two interviews with

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[59] *Id.*

[60] Letter from Hon. Carlo Uriart ssistant Att y Office of Legislative Affairs, U.S. Dep't of Justice, to Rep. Jim Jordan, Chairman, C m. on the Judiciary (Mar. 12, 2024); Letter from Hon. Carlos F. Uriarte, Assistant Att' Gen., Office of islative Affairs, U.S. Dep't of Justice, to Rep. James Comer, Chairman, H. Comm Accounta y (Mar. 12, 2024) (collectively "March 12 Letters").

[61] Le from Hon. M k Garland 'y Gen., U.S. Dep't of Justice, to Rep. James Comer, Chairman, H. Comm. on ersight & Account ty, Rep. Ji rdan, Chairman, H. Comm. on the Judiciary, and Rep. Jason Smith, airman, H. Comm. on W and Means at 2 (Feb. 16, 2024); Email from Office Staff, Office of Legislative irs, U.S. Dep't of Justic Comm. Staff, H. Comm. on the Judiciary (Mar. 11, 2024, 3:12 p.m.).

[62] E il from Office Staff, O ce of Legislative Affairs, Dep't of Justice, to Comm. Staff, H. Comm. on the Judici (Mar. 12, 2024, 7: a.m.) (hereinafter "DOJ OLA 7:43 a.m. Email"); Email from Office Staff, Office of Legislati ffairs, Dep't ustice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:44 a.m.); Email from Office ff, Offic Legislative Affairs, Dep't of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:45); J-HJC-HUR-0000033-0000290.

[63] March 12 Lette *upra* note 60.

[64] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman. H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice (Apr. 15, 2024) (hereinafter "Apr. 15 Letter"); DOJ OLA 7:43 a.m. Email, *supra* note 53; Mark Swanson, *Rep. Jordan to Newsmax: WH Sat on Biden-Hur Transcripts*, NEWSMAX (Mar. 12, 2024).

[65] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice (Mar. 25, 2024).

[66] *Id.*

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Zwonitzer, but not the audio recordings.[67] In a letter to the Committees, the Department explained why it decided to withhold the audio recordings—not because of any applicable legal privilege, but instead based on the Department's unfounded accusations regarding the Committees' motives and its self-interested determination that the audio recordings were "cumulative" of other material already produced.[68] Rather than engaging with the Committees and addressing their articulated reasons for seeking the audio recordings, the Department took it upon itself to dictate to the Committees what materials fulfilled the House's inf mational needs.[69]

The Committees addressed the Department's excuses for failin o com y with the subpoenas in a subsequent letter to Attorney General Garland dated April 15, 202 writing that his response to the subpoenas suggests he is "withholding record for partisan purp s and to avoid political embarrassment for President Biden."[70] In that l ter, the Committees rej ed the Department's unsupported assertion that the audio recordin were "cumulative," explain how audio recordings are materially distinct from writte ranscripts and reminding the Attorney General that federal courts have held that Congress re es "*all* rele nt evidence" in an impeachment inquiry.[71] The Committees also pointed ou at the partment has asserted no constitutional or legal privilege shielding the disclosure of th dio recordings and that any applicable privilege had been waived by the release of the writ transcripts to the media.[72] The Committees also rejected the Department upported speculati about the Committees' motives for obtaining the audio recordings expla their eviden ti value and highlighting the Department's hypocritical insistence on standard pliance here that it would never allow for a private party.[73] The Committees fered th epar until April 25 to produce the withheld materials or else they would conside nvok ng contempt of Congress proceedings.[74]

The Department ain refus to comply n April 25, 2024, the Department responded to the Committees' le r and argue among other ings, that the Committees "have not articulated a legiti te congressio l need to obtai udio recordings from Mr. Hur's investigation[,]" an at releasi ordings "would harm law enforcement and the evenhanded administr n o ustice" because it "would compound the likelihood that future prosecutors will be unabl secure th[e] level of cooperation" that was important to Special Couns stigation

[67] Let om Hon. Carlos F riarte, Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Jim Jordan, Chairman, H. Comm. o e Judiciary, a Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability (Apr. 8, 2024) (here er "Apr Letter"); DOJ-HJC-HUR-0000291-556.
[68] Apr. 8 Lette *pr* te 67.
[69] *Id.*
[70] Apr. 15 Letter, *supra* note 64.
[71] *Id.* at 2-3.
[72] *Id.* at 3.
[73] *Id.*
[74] *Id.*
[75] Letter from Hon. Carlos F. Uriarte, Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman. H. Comm. on Oversight & Accountability (Apr. 25, 2024).

THE ATTORNEY GENERAL'S FAILURE TO PRODUCE THE SUBPOENAED RECORDS WARRANTS CONTEMPT

The Committees have articulated the impeachment and legislative purpose for their subpoenas to the Attorney General. The Department, at the Attorney General's direction, continues to withhold relevant records that have been subpoenaed—despite the Committees' repeated attempts to explain the valid basis for seeking the records and with no tempt by the Department to even cite a constitutional or legal privilege as the basis for d g so.

In the two months since the Committees' initial requests to the epart nt, and following the release of Special Counsel Hur's report, the Departme has produ d only five letters from President Biden's White House and personal counse to the Departmen ne letter from the Department to President Biden's White House and p onal counsel, redacted transcripts of Special Counsel Hur's two interviews with P ident Biden, and redacted transcripts of Special Counsel Hur's two interviews with Zwonitzer. Additionally, the Department has made available two classified docume *in camera* the Committees.

The Department's production of letters and redacted cripts do not relieve it of its obligation to produce all responsive records, including the audi ecordings of Special Counsel Hur's interviews with President Biden an nitzer.[76] During h "dozens of hours of interviews with Zwonitzer," President Bid "rea m notebook en s related to many classified briefings" along with "foreign po y issues in aine, Central America, and Iraq . . . ."[77] Further, the boxes of documents scover in Pr t Biden's personal possession included classified materials regar g f eign policy issues in, among other places, Ukraine, China, Iraq, Afgh Pakistan, an gypt.[78] In his interviews with Special Counsel Hur, President Biden di ssed som of these an other foreign policy issues as well as the retention and handlin f the docum nts containin some of this classified information.[79] Similarly, Zwonit discussed Pr dent Biden's d cription and recollection of these issues during his interview with Speci [80] Although the Department has produced transcripts of Presiden ide and Zwonitzer s interviews with Special Counsel Hur, it has failed to produce the audi cordings of the interviews.

The audio r rdings of ecial Counsel Hur's interviews of President Biden and Z onitzer are of supe r evidenti y value regarding the specific issues the Committees are vestigating. While the xt of the Department-created transcripts purport to reflect the words ut d during these inte ews, they do not reflect important verbal context, such as tone or tenor nonverbal cont t, such as pauses or pace of delivery. For instance, when interviewed, a

[76] Subpoena Lette *pra* note 2; Mar. 9 Letter, *supra* note 57.
[77] Hur Report, *supra* note 4, at 97, 106.
[78] *Id.* at A-1—22.
[79] *See* Recorded Interview Between Special Counsel Robert K. Hur, et al., and President Joseph R. Biden. Jr., at 132-36, DOJ-HJC-HUR-0000164-68 (Oct. 8, 2023); *see* Recorded Interview Between Special Counsel Robert K. Hur, et al., and President Joseph R. Biden, Jr., at 31-32, 49-54, DOJ-HJC-HUR-0000222-23, 240-45 (Oct. 9, 2023).
[80] *See* Recorded Interview Between Special Counsel Robert K. Hur, et al., and Mr. Mark Zwonitzer at 123-27, DOJ-HJC-HUR-0000413-17 (July 31, 2023); *see* Recorded Interview Between Special Counsel Robert K. Hur, et al., and Mr. Mark Zwonitzer at 42-47, DOJ-HJC-HUR-0000518-23 (Jan. 4, 2024).

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subject's pauses and inflections can provide indications of a witness's ability to recall events,[81] or whether the individual is intentionally giving evasive or nonresponsive testimony to investigators. The verbal nuances in President Biden's answers about his mishandling of classified information would assist the Committees' inquiry into whether he abused his office of public trust for his family's financial gain.

This verbal nuance is also important to the Committees' legislative ove ght investigation. Special Counsel Hur concluded that although there was evide e that President Biden's conduct satisfied the elements of willfully retaining classified inf tion, justice would not be served by indicting President Biden because he would appear t jury e a "sympathetic, well-meaning elderly man with a poor memory."[82] Pr ident Bide personal attorneys and the White House Counsel's office have contested S ecial Counsel Hu assessment.[83] However, Special Counsel Hur stood by his ass ment during his sworn testimony before the Judiciary Committee.[84] The transcrip provided to the Committee a insufficient to arbitrate this dispute as to President Bide mental state an issue which goes directly to his culpability and whether Special Counse ur appropri ly pursued justice by declining to bring an indictment.

This is especially important because while Special Cou l Hur declined to bring charges against President Biden, at the same time Department, throug nother Special Counsel's office, is prosecuting a former President a d decl d candidate for t office for allegedly mishandling classified information.[85] The C mmittee m ssess whether Special Counsel Hur's declination decision, which was based n Presid t Bid oor mental state, was consistent with the Department's commitmen im artial justice or whether legislative reforms are necessary regarding Sp nsel invest ons because they are not leading to impartial outcomes. The transcrip produced y the Depa ment, due to their inherent limitations, are not sufficient for that pur se.

In short, the dio recor g ff r unique and important information to advance the Committees' impe me inquiry and inform the Judiciary Committee as to the need for legislative reforms to the rations of the Department or the conduct of Special Counsel investi eover, co ary to the Department's assertion that the audio recordings are "cu lative" of th nscripts, audio recording is the best evidence of a witness interview. W ere audio recordin and trans pts diverge, because of "inflection in a speaker's voice or by ccuracies in the tran ipt," the audio recordings, not the transcripts, control.[86] Such a

[81] Hur ort, *supra* note 3, 6.
[82] *Id.* at 2
[83] Betsy Wo uff Swan *hite House lawyers wrote Garland slamming Hur's report before its' release*, POLITICO (Feb. 15, 2024)
[84] Hearing on Hur port, *supra* note 10, at 18 ("My assessment in the report about the relevance of the President's memory was necessary and accurate and fair.").
[85] Katherine Faulders, et al., *Timeline: Special counsel's investigation into Trump's handling of classified documents*, ABC NEWS (Apr. 5, 2024).
[86] Don Zupanec, *Using Transcripts of Recordings as a Demonstrative Aid*, 23 No. 7 FED. LITIGATOR 13 (July 2008) ("The tape recording is evidence for you to consider. The transcript, however, is not evidence."). *See, e.g., United States v. Hogan*, No. 2:06-CR-10, 2008 WL 2074112, at *1 (E.D. Tenn. May 14, 2008) ("[T]his Court will instruct the jury as to the limited use of the transcripts, as the transcripts are not the evidence but the audio recordings are the actual evidence.").

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divergence does occur and, in fact, it occurred very recently with President Biden. A video and audio recording taken of President Biden's speech on April 24, 2024, reflects him reading a teleprompter instruction to pause, saying: "Imagine what we could do next. Four more years, *pause*."[87] However, the official White House transcript of that same speech initially did not reflect that President Biden uttered the word "pause."[88] In this case, the video and audio recording is the best evidence of the words that President Biden actually spoke.

While the Department has claimed that production of the audio reco ngs of Special Counsel Hur's interviews with President Biden and Zwonitzer to the Com ees is not necessary because "any information in [the audio] files that is relevant the mmittees' stated purposes is cumulative of the information" produced in the provided ranscripts, Department's own actions cut against this view.[89] During Water te, for example, Department subpoenaed audio recordings of conversations be een President Nixon a his advisors. Although the President publicly released more th 1,200 pages of edited transc ts of these conversations after the subpoena was issued, the D partment maintained the subpoena for the audio recordings. In *United States v. Nixon*, the Sup me Court r cted President Nixon's attempt to quash that subpoena.[90] The Department has re d upon is decision repeatedly in support of its own subpoenas,[91] and its own actions demons hat it understands that audio recordings are not simply cumulative of transcripts produced by party that is itself under investigation.

The Constitution does not permit th xecutive h to dictate to Congress how to proceed with an impeachment inquiry or to c duct its versig [2] Rather, "congressional committees have significant discretion in how ey proach an investigation[,]"[93] and, in the context of an impeachment q federal cou mphasize that Congress must possess all pertinent evidence.[94] Th Committ are engag in an inquiry to assess whether to draft

[87] *See* Anders Hagstro *Biden appear r d ipt instruct ons out loud in latest teleprompter gaffe: 'Four more years, pause*,*'* FOX NEW pr. 24, 2).

[88] *See* The White House, R k President Biden at the North America's Building Trades Union National Legislative Conference (Apr. 2 024), https://web.archive.org/web/20240425002537/https://www.whitehouse.gov/briefing s-remarks/ 4/04/24/remarks-by-president-biden-at-the-north-americas-building-trades-union ational-legis -conferen ("Folks, imagine what we can do next. Four . . . more years (inaudible)."). Th hite House subseq tly update transcript after public attention on the omission. The White House, marks by President Bide the North America's Building Trades Union National Legislative Conference (Apr. 2024), https://www.whit use.gov/briefing-room/speeches-remarks/2024/04/24/remarks-by-president-biden-at-the th-americas-building- des-unions-national-legislative-conference/.

[89] Ap Letter, *supra* note 6 at 4.

[90] *U.S. v on*, 418 U.S. 6 (1974).

[91] *See, e.g., ted State Hussain*, No. CR 16-462 (CRB), 2018 WL 6695574 at *2-*3 (Nov. 25, 2018) (citing *Nixon* in oppo n t riminal defendant's motion to quash the Department's subpoena).

[92] *See* Linda D. J , *"Which Is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 884 (2009) ("Each branch of government deserves the autonomy necessary to carry out its functions within the constitutional scheme, and each branch should enjoy a protected sphere of control over its internal affairs. No branch should be able to regulate the inner workings of any other branch. Rather, each branch must be master in its own house.") (cleaned up).

[93] TODD GARVEY, CONG. RSCH. SERV., COMMITTEE DISCRETION IN OBTAINING WITNESS TESTIMONY 2 (2023).

[94] *See In re Application of Comm. on Judiciary*, 414 F. Supp. 3d 129, 176 (D.D.C. 2019) ("Impeachment based on anything less than all relevant evidence would compromise the public's faith in the process."), *aff'd*, 951 F.3d 589

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articles of impeachment against President Biden, who is the head of the executive branch of the federal government. The Committees are under no obligation to rely exclusively on transcripts created, refined, and produced by executive agencies subordinate to the President, especially when, as here, there exists superior evidence—audio recordings—that would ensure an accurate and complete record of the interviews. The Department's refusal to produce the audio recordings amounts to a demand that the Committees trust that the Department-curated interview transcripts are accurate and complete, despite recent evidence of an executive branch entit manipulating a transcript of the President's statements and only fixing the error after being ught.

CONCLUSION

Special Counsel Hur's report makes clear, despite its con lusion that crimin harges are not warranted, that President Biden willfully and unlawfully ained classified materi while he was a private citizen. The Committees subpoenaed Atto ey General Garland to produ documents and materials responsive to four specific req sts concernin Special Counsel Hur's investigation on February 27, 2024. To date, despite n erous reque from the Committees for certain audio recordings responsive to the subpoena, and pecifi arning that failure to produce the audio recordings would result in contempt proc gs, Attorney General Garland has failed to do so. The Attorney General has further invoked n onstitutional or legal privilege relieving his obligation to fully respond t Committees' subpo s. Attorney General Garland's willful refusal to comply with th Com es' subpoenas nstitutes contempt of Congress and warrants referral to the appro iate Unite tes Attorney's Office for prosecution as prescribed by law.

MMITTEE C NSIDERATION

On May X, 20 4, the Comm ee met in op session and [. . .].

TTEE VOTES

In compliance wi ause 3(b) of House rule XIII, the Committee states that the followi d votes oc red during the Committee's consideration of the Report:

[.]

COMMITTEE OVERSIGHT FINDINGS

In compliance w h clause 3(c)(1) of House rule XIII, the Committee advises that the findings d recomme ations of the Committee, based on oversight activities under clause 2(b)(1) of r X of e Rules of the House of Representatives, are incorporated in the descriptive portions of th ort.

(D.C. Cir. 2020*), vacated and remanded sub nom. on other grounds DOJ v. House Comm. on the Judiciary*, 142 S. Ct. 46 (2021); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445 (11th Cir. 1987) ("Public confidence in a procedure as political and public as impeachment is an important consideration justifying disclosure."); *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974) ("It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair [impeachment] inquiry based on all the pertinent information.").

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NEW BUDGET AUTHORITY AND TAX EXPENDITURES

The Committee finds the requirements of clause 3(c)(2) of rule XIII and section 308(a) of the *Congressional Budget Act of 1974*, and the requirements of clause 3(c)(3) of rule XIII and section 402 of the *Congressional Budget Act of 1974*, to be inapplicable to this R port. Accordingly, the Committee did not request or receive a cost estimate from th ongressional Budget Office and makes no findings as to the budgetary impacts of this Re rt or costs incurred to carry out the Report.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of House rule XIII, no provi on of this Report estab es or reauthorizes a program of the federal government known t e duplicative of another fed l program.

PERFORMANCE GOALS AND OBJEC IVES

The Committee states that pursuant to clause 3(c)(4) of use rule XIII, this Report is to enforce the Committee's authority to sub and obtain testimo related to determining whether sufficient grounds exist to impeac Pres Joseph R. Bid Jr., and legislative reforms to the Department of Justice and its se of a sp ounsel to conduct investigations of current and former Presidents of the United S tes.

VISORY O EARMARKS

In accordance ith clause 9 House rule XI, this Report does not contain any congressional earm ks, limited ta benefits, or lim d tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of Hou Rule XXI

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