

**AMENDMENT TO THE AMENDMENT IN THE NATURE OF A
SUBSTITUTE TO THE COMMITTEE REPORT FOR THE RESOLUTION
RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND
ATTORNEY GENERAL MERRICK B. GARLAND IN CONTEMPT OF
CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY
ISSUED BY THE COMMITTEE ON THE JUDICIARY**

Offered by M __. _____

On page 2, in the sentence that begins with “To date, the Department has refused to produce the audio recordings,” STRIKE all after “recordings” and up to and including “subpoena”.

On page 3, STRIKE the sentence that reads, “The Department has invoked no constitutional or legal privilege to support withholding this material.”

On page 12, STRIKE the sentence that reads, “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 attempt by the Department to even cite a constitutional or legal privilege as the basis for doing so.”

On page 12, after the sentence that begins with “The Committees have articulated the impeachment and legislative purpose,” INSERT the following:

“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.”

On page 14, after the sentence that begins “The Department has relied upon this decision” begin a new paragraph and INSERT the following:

“On May 16, 2024, a mere two hours before the start of the Committee’s meeting to consider a resolution holding the Attorney General in contempt of Congress, letters from both Mr. Edward N. Siskel, Counsel to President Joe Biden, and the Justice Department arrived, informing the Committee that the President has asserted executive privilege over certain documents and materials covered by the

subpoena.¹ The Committee has numerous concerns about the validity of this assertion, including:

1. The President has waived executive privilege by releasing the contents of his interview with Special Counsel Hur to the media and public on or around March 11, 2024;
2. The assertion of privilege is three months late and, therefore, is not valid. To have been timely, any privilege should have been asserted by March 7, 2024, the subpoena return date, and;
3. Even if the privilege were valid, which it is not, it certainly has been overcome here, as: (i) the Committee has demonstrated a sufficient need for the audio recordings as they are likely to contain evidence important to the Committee's inquiry and, (ii) the audio recordings sought cannot be obtained any other way. The audio recordings are uniquely in the possession of the Justice Department.

Further, President Biden has already waived any potential assertion of executive privilege over the information discussed in his interviews with Special Counsel Hur. This conclusion is consistent with *U.S. v. Mitchell*, which rejected a presidential claim of privilege over audio recordings involving, as here, “portions of subpoenaed recordings which the President has caused to be reduced to transcript form and published.”² *Mitchell* concluded that “the privilege claimed [was] non-existent since the conversations are . . . no longer confidential.”³ Moreover, the Justice Department could have taken steps to protect the confidentiality of the transcripts, but failed to do so when they released them to the press prior to providing them to the Committee.

¹ Letter from Mr. Edward N. Siskel, Counsel to the President, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (May 16, 2024) (hereinafter “Siskel Letter”); Letter from Asst. Att’y Gen. Carlos Felipe Uriarte, 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 (May 16, 2024).

² See *U.S. v. Mitchell*, 377 F. Supp. 1326, 1330 (D.D.C. 1974) (citing *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973)).

³ See *id.*

In Mr. Siskel’s letter to the Committee, the President did not set forth any valid reasons for invoking executive privilege. Instead, Mr. Siskel stated that the President “has a duty to safeguard the integrity and independence of Executive Branch law enforcement functions and protect them from undue partisan influence that could weaken those functions in the future.”⁴ Mr. Siskel also stated that “the Attorney General has warned that the disclosure of materials like these audio recordings risks harming future law enforcement investigations by making it less likely that witnesses in high-profile investigations will voluntarily cooperate.”⁵ Both of these arguments have already been evaluated and overruled by the Committee.⁶

Without these audio recordings, the Committee’s important legislative work will continue to be stymied. The audio recordings are necessary to evaluate what government reform is necessary within the Justice Department to avoid the problems uncovered by the investigation in the future.

The President has now asserted executive privilege. This assertion, however, does not change the fact that Attorney General Merrick B. Garland is in contempt of Congress today for failing to turn over lawfully subpoenaed materials.”

On page 15, STRIKE the sentence that reads, “The Attorney General has further invoked no constitutional or legal privilege relieving his obligation to fully respond to the Committees’ subpoenas.”

⁴ Siskel Letter, *supra* note 1, at 2.

⁵ *Id.*

⁶ See Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al., to Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice (Apr. 15, 2024).