118TH CONGRESS
2ND SESSION
} HOUSE OF REPRESENTATIVES {
REPORT
118-

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND MARK ZWONITZER IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE COMMITTEE ON THE JUDICIARY

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June __, 2024. Referred to the House Calendar and ordered to be printed

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MR. JORDAN, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

_____ VIEWS

The Committee on the Judiciary, having considered this Report, reports favorably thereon and recommends that the Report be approved.

The form of the Resolution that the Committee on the Judiciary would recommend to the House of Representatives citing Mark Zwonitzer for contempt of Congress pursuant to this Report is as follows:

Resolved, That Mark Zwonitzer shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on the Judiciary, detailing the refusal of Mark Zwonitzer to produce documents, records, and materials to the Committee on the Judiciary as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mark Zwonitzer be proceeded against in the manner and form provided by law.

Resolved, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

CONTENTS

EXECUTIVE SUMMARY

In the weeks following the February 5, 2024, release of Special Counsel Robert K. Hur's report, the Committee on the Judiciary (the "Committee"), engaged with Mark Zwonitzer to obtain a limited set of documents and records related to Special Counsel Hur's report.[1] Zwonitzer served as the ghostwriter for President Joe Biden's memoirs and Special Counsel Hur's report revealed that Zwonitzer possessed records that would inform potential legislative reforms. After Zwonitzer declined to provide the relevant documents and records, the Committee issued a subpoena on March 22, 2024, to Zwonitzer compelling the production of six specific categories of documents and records, including audio recordings and transcripts of his interviews with President Joe Biden relating to his ghostwriting work on the President's memoirs, *Promise Me, Dad* and *Promises to Keep*.[2] The Committee subpoenaed these materials for several reasons—including to determine if legislation is needed to codify procedures governing clear statutory guidelines related to the handling, storage, and disclosure of classified materials or modify criminal penalties for the unauthorized dissemination and disclosure of classified materials. To date, Zwonitzer has refused to produce any of the requested documents or materials.

During Special Counsel Hur's investigation, his team uncovered evidence that President Biden "willfully retained and disclosed classified materials after his vice presidency when he was a private citizen."[3] Special Counsel Hur found that Vice President Biden had "strong

[1] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Mr. Mark Zwonitzer (Feb. 14, 2024) (requesting six narrow categories of documents and materials relating to Zwonitzer's ghostwriting work on President Biden's memoirs).
[2] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Mr. Mark Zwonitzer (Mar. 22, 2024) (enclosing subpoena compelling six narrow categories of documents and materials relating to Zwonitzer's ghostwriting work on President Biden's memoirs) (hereinafter "Zwonitzer Subpoena Letter").
[3] 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., SPECIAL COUNSEL ROBERT K. HUR, U.S. DEP'T OF JUSTICE AT 1 (FEB. 2024) (hereinafter "Hur Report").

motivations" to flout the rules for properly handling classified materials.[4] In particular, Special Counsel Hur observed that "months before leaving office"[5] as vice president, President Biden decided to write a book for "an advance of $8 million."[6] The classified materials retained by President Biden were an "invaluable resource that he consulted liberally" while writing his book so that he could give Zwonitzer "raw material . . . detailing meetings and events that would be of interest to prospective readers and buyers of his book."[7] Additionally, Special Counsel Hur observed that President Biden viewed the classified materials "as an irreplaceable contemporaneous record of some of the most important moments of his vice presidency[,]" which "was valuable to him for many reasons, including to help defend his record and buttress his legacy as a world leader."[8]

As Special Counsel Hur acknowledged, "during his dozens of hours of interviews with Zwonitzer, [President] Biden read from notebook entries relating to many classified meetings, including National Security Council meetings, CIA briefings, Department of Defense briefings, and other meetings and briefings with foreign policy officials."[9] Special Counsel Hur also found that President Biden even "showed part of [his classified] handwritten [notes] to Zwonitzer[,]" and warned him that "[s]ome of this may be classified, so be careful."[10] Despite this evidence, Special Counsel Hur ultimately decided not to pursue charges against President Biden.[11] Additionally, during his investigation, Special Counsel Hur noted that, "[a]t some point after learning of [the Special Counsel's] appointment . . . Zwonitzer[] deleted digital audio recordings of his conversations with [President] Biden during the writing of [the President's memoir], *Promise Me, Dad*."[12] According to Special Counsel Hur, the recordings "had significant evidentiary value."[13] However, "Zwonitzer turned over his laptop computer and external hard drive and gave consent for investigators to search the devices[]" and "FBI technicians were able to recover [the] deleted recordings."[14] Because Zwonitzer cooperated with investigators, "preserved the transcripts and produced them to investigators[,]" and "later produced the devices on which the recordings had been stored and consented to a search of those devices[,]" Special Counsel Hur declined to bring charges for obstruction of justice against Zwonitzer.[15]

President Biden has vehemently denied some of the findings in Special Counsel Hur's report and he and his legal team have attempted to frame Special Counsel Hur's mention of President Biden's poor memory as "gratuitous."[16] Yet during his testimony before the

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[4] *Id.* at 8, 231.
[5] *Id.* at 231.
[6] *Id.* at 141.
[7] *Id.* at 231.
[8] *Id.* at 231-32.
[9] *Id.* at 106.
[10] *Id.*
[11] *Id.* at 345.
[12] *Id.* at 334.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 343.
[16] Rebecca Beitsch, et al., *Special counsel overstepped mandate with 'gratuitous' Biden slams, say ex-DOJ Dems*, THE HILL (Feb. 12, 2024) ("'When the inevitable conclusion is that the facts and the evidence don't support any charges,' said Ian Sams, a spokesman for the White House's special counsel office, 'you're left to wonder why this

Committee, Special Counsel Hur stated that, "[t]he evidence and the President himself put his memory squarely at issue."[17] In his report, Special Counsel Hur noted that, during both his and Zwonitzer's interviews with President Biden, the president's "memory was significantly limited," and he "struggle[ed] to remember events and strain[ed] at times to read and relay his own [handwriting]."[18] Special Counsel Hur also observed that President Biden "did not remember when he was vice president," "did not remember when he was vice president," and "did not remember, even within several years, when his son Beau died."[19]

Zwonitzer continues to withhold all documents and materials in his possession that are responsive to the subpoena from the Committee. The materials requested from Zwonitzer are crucial for the Committee's understanding of the manner and extent of President Biden's mishandling and unlawful disclosure of classified materials, as well as Zwonitzer's use, storage, and deletion of classified materials on his computer. Zwonitzer's failure to fully comply with the Committee's subpoena has hindered the Committee's ability to adequately conduct oversight of Special Counsel Hur's investigative findings, the Justice Department's commitment to impartial justice, and the President's retention and disclosure of classified materials.

AUTHORITY AND PURPOSE

Article I of the Constitution vests in Congress a "broad" and "indispensable" power to conduct oversight and investigations that "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes[,]" and "includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them."[20] The Supreme Court has noted that without such power, Congress would not be able to "legislate wisely or effectively."[21] Courts recognize that "this power of inquiry—with the process to enforce it—is an *essential* and *appropriate* auxiliary to the legislative function."[22] Pursuant to the Rules of the House of Representatives, the Committee is authorized to conduct oversight of the Department of Justice and of criminal justice matters in the United States to inform potential legislative reforms.[23]

To further the Committee's constitutionally mandated oversight and legislative duties, it must ensure compliance with duly authorized congressional subpoenas. The information that the Committee requires, and Zwonitzer 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

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report spends time making 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 . . . .").

[17] 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").

[18] Hur Report, *supra* note 3, at 207.

[19] *Id.* at 208.

[20] *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957).

[21] *McGrain v. Daughtery*, 273 U.S. 135, 175 (1927).

[22] *Id.* at 174 (emphasis added).

[23] Rules of the U.S. House of Representatives, R. X, cl. 1(l) (2023).

legislative reforms may include, among other things, changing certain procedures governing the Department's special counsel investigations to better ensure that the Department pursues impartial justice. The Committee may also consider legislative reforms governing criminal penalties for destroying evidence—especially when that evidence includes classified information that was disclosed in an unauthorized manner. The circumstances of Special Counsel Hur's investigative findings demonstrate why such potential legislative reforms may be necessary.

BACKGROUND ON THE INVESTIGATION

According to the report of Special Counsel Robert K. Hur, in November 2022, Patrick Moore, one of President Biden's personal attorneys, discovered 44 pages of documents "classified up to the Top Secret level" stemming from his tenure as Vice President at President Biden's office in Washington, D.C., located at the Penn Biden Center.[24] Moore notified his colleague Bob Bauer, who then notified White House Counsel Stuart Delery.[25] The same day, the White House Counsel's Office passed the information along to the National Archives and Records Administration (NARA), which retrieved the documents, and referred the case to the Department and Federal Bureau of Investigation (FBI).[26] Additionally, between December 2022 and January 2023, Bauer, Moore, and another Biden personal counsel, Jennifer Miller, discovered additional classified materials, also from his tenure as Vice President, in the garage, basement den, and office of President Biden's personal residence in Wilmington, Delaware.[27] Between January and June 2023, FBI agents located additional materials with classification markings at the Morris Library and Biden Institute at the University of Delaware.[28]

After receiving notification from NARA of the discovery of classified documents at the Penn Biden Center, on November 14, 2022, Attorney General Garland assigned John Lausch, then the U.S. Attorney for the Northern District of Illinois, to lead an investigation into President Biden's retention of classified materials and "assess whether the Attorney General should appoint a special counsel to investigate the matter."[29] After further discoveries of classified material at President Biden's home and the University of Delaware, Lausch determined that the appointment of a special counsel was necessary.[30]

Accordingly, on January 12, 2023, Attorney General Garland appointed Robert K. Hur to serve as special counsel to investigate whether President Biden unlawfully retained classified information when he left office after the vice presidency.[31] During his investigation, Special Counsel Hur conducted 173 interviews of 147 witnesses, including President Biden himself and his memoir ghostwriter, Mark Zwonitzer.[32] Special Counsel Hur collected over seven million

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[24] Hur Report, *supra* note 3, at 19-20 (The classification marks on the documents "dat[ed] back to [President Biden]'s vice presidency").
[25] *Id.*
[26] *Id.*
[27] *Id.* at 24-25.
[28] *Id.* at 28.
[29] *Id.* at 21.
[30] *Id.* at 26.
[31] *Id.*; *Attorney General Merrick B. Garland Delivers Remarks on the Appointment of a Special Counsel*, U.S. DEP'T OF JUSTICE (Jan, 12, 2023).
[32] Hur Report, *supra* note 3, at 26.

documents, including e-mails, text messages, photographs, videos, toll records, and other materials from both classified and unclassified sources.[33] 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,"[34] criminal charges were not warranted because, among other things, President Biden is an "elderly man with a poor memory."[35]

Special Counsel Hur found that President Biden "had strong motivations to ignore the proper procedures for safeguarding the classified information in his notebooks. He decided months before leaving office to write a book and began meeting with his ghostwriter while still vice president."[36] Notably, Special Counsel Hur's report found that President Biden received an advance of $8 million to produce a memoir.[37] President Biden's 2017 memoir, *Promise Me, Dad*, discussed, among other things, President Biden's thoughts on foreign policy.[38] While working with Zwonitzer on this memoir, Special Counsel Hur's report noted that President Biden read from classified materials "verbatim," and such classified materials included notes regarding "the President's Daily Brief[,]" "meeting notes summariz[ing] the actions and views of U.S. military leaders and CIA director relating to a foreign country," "notebook entries related to many classified meetings, including National Security Council meetings, CIA briefings, Department of Defense briefings, and other meetings and briefings with foreign policy officials."[39]

Apparently, in two instances, on February 16, and April 10, 2017, after he was no longer vice president, President Biden met with Zwonitzer and "read from notes [then-Vice President Biden] took during a meeting in the Situation Room in the summer of 2015, which was attended by senior military officials, the CIA Director, and others."[40] These notes "summarized the actions and views of U.S. military leaders and the CIA Director relating to a foreign country and a foreign terrorist organization."[41] According to Special Counsel Hur's report, during the February 16, 2017, meeting, President Biden read to Zwonitzer "portions [of the notes] containing information that remain classified up to the Secret level."[42] During the April 10, 2017, meeting, President Biden "returned to the same notebook entry detailing the same Situation Room meeting" and "read additional portions of the entry nearly verbatim, including the portions of the entry he read to Zwonitzer during the February 16, 2017[,] meeting."[43] Special Counsel Hur determined that these passages also "contain information that remains classified up to the Secret level."[44]

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[33] *Id.* at 29.
[34] *Id*. at 1.
[35] *Id.* at 6, 219.
[36] *Id.* at 231.
[37] *Id.* at 97-106.
[38] *See, e.g.*, *id.* at 97.
[39] *Id.* at 97-106.
[40] *Id.* at 102-04.
[41] *Id.* at 104.
[42] *Id.*
[43] *Id.* at 104-5.
[44] *Id.*

Additionally, as Special Counsel Hur's report noted, "[i]n a later recorded conversation with Zwonitzer on April 24, 2017, [President] Biden read from a different notebook entry, this time from notes he took during a National Security Council meeting in the Situation Room in November 2014."[45] According to Special Counsel Hur, President Biden "read aloud" to Zwonitzer "from notes summarizing a range of issues relating to a foreign terrorist organization, including specific activities of the U.S. military and views expressed by the intelligence community, including the Director of National Intelligence and the CIA Director."[46] Special Counsel Hur found that "[w]hile reading these notes, [President] Biden struggled to read his handwriting, and he showed part of the handwritten passage to Zwonitzer."[47] While showing the passage to Zwonitzer, President Biden stated, "[s]ome of this may be classified, so be careful."[48] Nevertheless, Special Counsel Hur determined that President Biden "continued to read nearly verbatim from portions of his notes[,]" some of which "remain[] classified at the Secret level."[49]

Furthermore, on February 16, 2017, during one of his meetings with Zwonitzer, President Biden "told Zwonitzer he had sent President Obama a 40-page, handwritten memo arguing against the deployment of additional troops in Afghanistan 'on the grounds that it wouldn't matter.'"[50] At that time, Special Counsel Hur determined that President Biden "told Zwonitzer he had just found classified material downstairs" in his rental home in Virginia.[51]

As observed in Special Counsel Hur's report, the Espionage Act "prohibits the willful communication, delivery, or transmission of national defense information to a person not entitled to receive it."[52] Special Counsel Hur properly acknowledged that a "person is not entitled to receive national defense information if he or she lacks a need to know and an appropriate clearance as required" by Executive Order 13526.[53] It is undisputed that, at the time President Biden revealed and transmitted classified information to Zwonitzer, Zwonitzer lacked any national security credentials or clearance.[54] Under these provisions, Special Counsel Hur concluded that "[the] evidence shows that [President] Biden disclosed classified information to Zwonitzer, who was not authorized to receive it."[55]

Moreover, Special Counsel Hur found that "[a]t some point after learning of Special Counsel Hur's appointment" to examine President Biden's mishandling of classified information, "Zwonitzer deleted digital audio recordings of his conversations with [President] Biden during the writing of the book, *Promise Me, Dad*."[56] According to Special Counsel Hur, "[t]hese recordings had *significant* evidentiary value."[57] However, Special Counsel Hur and FBI technicians "were able to recover deleted recordings relating to *Promise Me, Dad*[,]" and

[45] *Id.*
[46] *Id.* at 105-06.
[47] *Id.* at 106.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 109-10.
[51] *Id.* at 108.
[52] *Id.* at 185; *see* 18 U.S.C. § 793(e).
[53] *Id.* at 186 (citing *U.S. v. Morrison*, 844 F.2d 1057, 1075 (4th Cir. 1988)).
[54] *Id.* at 245.
[55] *Id.*
[56] *Id.* at 334.
[57] *Id.* (emphasis added).

Zwonitzer "kept[] and did not delete or attempt to delete[] near-verbatim transcripts he made of some of the recordings."[58] Additionally, Special Counsel Hur found that in his interviews with Zwonitzer, Zwonitzer "offered plausible, innocent reasons for why he deleted the recordings[,]" and his later actions—"including the production [of] transcripts that mention classified information—suggest[ed] that his decision to delete the recordings was not aimed at concealing those materials from investigators."[59] Consequently, Special Counsel Hur declined to bring charges against Zwonitzer for obstruction of justice.[60]

On February 14, 2024, approximately six days after the release of Special Counsel Hur's report, the Committee sent a letter to Zwonitzer, requesting six categories of documents and records:

1. All documents and communications shared between Zwonitzer and President Biden or the President's staff or representatives relating to Zwonitzer's ghostwriting work on President Biden's memoirs, *Promise Me, Dad* and *Promises to Keep*;

2. All contracts or agreements relating to Zwonitzer's ghostwriting work on President Biden's memoirs, *Promises Me, Dad* and *Promises to Keep*;

3. All documents evidencing payments to Zwonitzer relating to his ghostwriting work on President Biden's memoirs, *Promise Me, Dad* and *Promises to Keep*;

4. All audio recordings of any interviews or conversations between Zwonitzer and President Biden relating to Zwonitzer's ghostwriting work on his memoirs, *Promise Me, Dad* and *Promises to Keep*;

5. All transcripts of any interviews or conversations between Zwonitzer and President Biden relating to Zwonitzer's ghostwriting work on President Biden's memoirs, *Promise Me, Dad* and *Promises to Keep*; and

6. All documents and communications between Zwonitzer and President Biden or his staff or representatives referring or relating to Department of Justice Special Counsel Robert K. Hur's Report.[61]

On the letter's return date, February 23, 2024, Zwonitzer's attorney contacted the Committee and requested that Committee staff contact him to discuss the Committee's requests.[62] That discussion occurred on February 26, 2024, during which Zwonitzer's attorney

[58] *Id.*
[59] *Id.* at 341-42. Special Counsel Hur also found it persuasive that Zwonitzer "voluntarily consented to two interviews and could have, but did not, invoke the Fifth Amendment to decline production of the transcripts, his laptop, and the external hard drive." *Id.* at 342.
[60] *Id.* at 338, 343 ("For these reasons, we believe that the admissible evidence would not suffice to obtain and sustain a conviction of Mark Zwonitzer for obstruction of justice.").
[61] Zwonitzer Subpoena Letter, *supra* note 2.
[62] Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Feb. 23, 2024) (voicemail on file with Committee).

represented that, upon Zwonitzer's return from a personal trip, he would produce documents to the Committee before March 8.[63] As an accommodation to Zwonitzer, and based upon his attorney's representations, the Committee agreed to give Zwonitzer until March 8, 2024, to produce the requested records.[64] On March 7, 2024, however, Zwonitzer's attorney retracted his previous representations, indicating that Zwonitzer would not produce the documents on March 8 as promised, and instead stated that he would follow up with the Committee.[65] On March 11, 2024—over two weeks after the return date on the original letter—Zwonitzer's attorney informed the Committee that Zwonitzer would not produce the documents without a subpoena compelling his cooperation.[66]

On March 22, 2024, the Committee issued a subpoena to Zwonitzer for the same six categories of materials requested in the February 14 letter.[67] The subpoena set a return date of April 12.[68] On that date, Zwonitzer's attorney responded with a letter raising, for the first time, objections and concerns with the Committee's requests and the subpoena.[69] First, Zwonitzer challenged the legislative purpose behind the subpoena—namely that the requests contained therein were "broad" and "d[id] not make it at all clear how the materials [sought] . . . would further the purpose of [the Committee's] legislative reform."[70] Second, Zwonitzer raised a First Amendment challenge to the subpoena, alleging that it "violates [Zwonitzer's] own rights as an author and journalist."[71] Third, in a seemingly vague reference to the Fifth Amendment, Zwonitzer stated a "reluctance to comply with the subpoena[]" because of "comments" by Members of Congress that "either directly or indirectly suggest[ed] that . . . Zwonitzer should have been, should be or will be (under a different administration) prosecuted for his actions."[72] Finally, Zwonitzer claimed that the subpoenaed documents and materials "contain the President's highly personal information," therefore he is not required to produce those materials.[73]

On May 6, 2024, the Committee responded to Zwonitzer's attorney, explaining in detail that the stated objections and concerns were unfounded and did not excuse him from his legal obligation to comply with the subpoena.[74] First, the Committee explained that its subpoena to Zwonitzer furthers a legitimate legislative purpose.[75] Second, the Committee explained that no valid constitutional privilege relieved Zwonitzer of his legal obligation to comply with the subpoena.[76] The Committee accordingly notified Zwonitzer that it "expects full compliance with

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[63] Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Feb. 26, 2024).
[64] *Id.*
[65] Email from Mr. Louis M. Freeman, Esq., to Comm. Staff, H. Comm. on the Judiciary (4:01 p.m., Mar. 7, 2024) (on file with Committee).
[66] Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Mar. 11, 2024).
[67] Zwonitzer Subpoena Letter, *supra* note 2.
[68] *Id.*
[69] Letter from Mr. Louis M. Freeman, Counsel for Mr. Mark Zwonitzer, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Apr. 12, 2024) (hereinafter "Zwonitzer Apr. 12 Letter").
[70] *Id.* at 3-5.
[71] *Id.* at 6.
[72] *Id.* at 7.
[73] *Id.* at 2.
[74] Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Mr. Louis M. Freeman, Esq., Counsel for Mr. Mark Zwonitzer (May 6, 2024) (hereinafter "Committee May 6 Letter").
[75] *Id.*
[76] *Id.*

the subpoena" by May 20, 2024 and that failure to do so could result in the invocation of contempt of Congress proceedings.[77]

On May 20, 2024, the date by which the Committee requested Zwonitzer's full compliance with the subpoena, Zwonitzer's counsel wrote again to note the "concerns" with the subpoena "remain."[78] This letter repeated and restated the same concerns that the Committee had previously considered and addressed. To date, Zwonitzer has failed to comply with the Committee's subpoena in any way.

ZWONITZER'S FAILURE TO PRODUCE THE SUBPOENAED RECORDS WARRANTS CONTEMPT

The Committee has articulated the legislative purpose for its subpoena to Zwonitzer. Zwonitzer continues to withhold relevant records that have been subpoenaed—despite the Committee's repeated attempts to explain the valid basis for seeking the records. In the three months since the Committee's initial requests to Zwonitzer, and following the release of Special Counsel Hur's report, Zwonitzer has not produced any responsive information, documents, or materials to the Committee.

I. The Committee has a need for the subpoenaed material.

The responsive records in Zwonitzer's possession are highly relevant to and necessary for the Committee's oversight inquiries.

In his report, Special Counsel Hur noted that once FBI agents contacted Zwonitzer regarding his ghostwriting work on President Biden's memoirs, he "provided investigators [materials] that included near-verbatim transcripts and . . . audio recordings" of his interviews with President Biden.[79] Relying on these materials, Special Counsel Hur recounts several actions of President Biden that could constitute the willful disclosure of classified information to Zwonitzer. For example, on February 16, 2017, Special Counsel Hur reported that President Biden "appeared to explain to Zwonitzer that a notebook entry related to 'a long meeting on the Security Council . . . probably was classified[,]'" but nonetheless "read aloud . . . portions of th[at] notebook entry that contained classified information."[80] Further, on April 10, 2017, Special Counsel Hur reported that "during another recorded conversation with Zwonitzer, [President] Biden turned to the same notebook entry and read additional classified portions aloud, again nearly verbatim."[81] Special Counsel Hur also observed that, on April 24, 2017, President Biden "read aloud to Zwonitzer portions of a different entry of classified notes from a National Security Council meeting, also nearly verbatim."[82] Special Counsel Hur reported that "[w]hen [President] Biden could not read a particular word in the entry, he showed the entry to Zwonitzer but warned

[77] *Id.*
[78] Letter from Mr. Louis M. Freeman, Esq. Counsel for Mr. Mark Zwonitzer, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (May 20, 2024).
[79] Hur Report, *supra* note 3, at 335.
[80] *Id*. at 245.
[81] *Id*.
[82] *Id.* at 246.

him, '[s]ome of this may be classified, so be careful . . . .'"[83] Such actions led Special Counsel Hur to determine that "[President] Biden's decision to read notes nearly verbatim to Zwonitzer that [President] Biden had just identified as potentially classified information cannot be justified[,]"[84] and he "should have known that by reading his unfiltered notes about classified meetings in the Situation Room, he risked sharing classified information with his ghostwriter."[85] Notwithstanding this and other examples, Special Counsel Hur concluded that, although there was evidence that President Biden disclosed classified information to Zwonitzer, "the evidence falls short of proving that [President] Biden did so willfully . . . ."[86] For example, the Special Counsel concluded that some jurors may have reasonable doubts that President Biden *willfully* disclosed classified information to Zwonitzer because his "apparent lapses and failures" in sharing classified information with Zwonitzer would "appear consistent with the diminished faculties and faulty memory he showed" in the recordings of his interviews with Zwonitzer.[87]

The transcripts and audio recordings of Zwonitzer's interviews of President Biden are of ultimate evidentiary value regarding the President's mental state when he disclosed classified materials to Zwonitzer, his intent in doing so, and the extent to which such materials were disclosed. In particular, only by reviewing these transcripts and audio recordings, can the Committee assess for itself the Special Counsel's conclusion that President Biden should not be prosecuted for willfully disclosing classified information even though the evidence is clear that he did disclose classified information.

Additionally, among the other requested documents and materials, the Committee subpoenaed "all contracts or agreements relating to [Zwonitzer's] ghostwriting work" on President Biden's memoirs, and "all documents and communications between [Zwonitzer] and [President Biden] or his staff or representatives referring or relating to" Special Counsel Hur's report. These materials would allow the Committee to assess the scope of Zwonitzer's work with President Biden, including but not limited to any agreements between the parties regarding the handling, dissemination, and storage of classified information, and the role that Zwonitzer played, if any, in Special Counsel Hur's decision not to prosecute him or President Biden.

II. Zwonitzer's stated objections to the subpoena are unfounded and unpersuasive.

A. The Committee has a legitimate legislative purpose for the subpoena.

As explained to Zwonitzer, the Committee has articulated a legitimate legislative purpose for the subpoena. As a general matter, Congress has broad power to "conduct inquiries into the administration of existing laws, studies of proposed laws, and . . . studies of defects in our social, economic, or political system for the purpose of enabling Congress to remedy them."[88] Courts recognize that "this power of inquiry—with the process to enforce it—is an *essential* and *appropriate* auxiliary to the legislative function."[89] To that end, a congressional subpoena is valid

[83] *Id*. at 246.
[84] *Id.* at 247.
[85] *Id.* at 244.
[86] *Id.* at 245.
[87] *Id*. at 247-248.
[88] *Watkins*, 354 U.S. at 187.
[89] *McGrain*, 273 U.S. at 174.

"if it is related to, and in furtherance of, a legitimate task of the Congress."[90] The subpoena must serve a "valid legislative purpose, and concern a subject on which "legislation could be had."[91] Therefore, "evaluating a congressional subpoena is strictly limited to determining only whether the subpoena is 'plainly incompetent or irrelevant to any lawful purpose . . . in the discharge of [the subpoenaing Committee's] duties.'"[92] The Committee's subpoena meets this standard.

The Committee's subpoena compels the production of six narrow categories of documents formulated to gather information necessary to inform such potential legislation.[93] First, as discussed in Section I above, the Committee must have the transcripts and audio recordings subpoenaed from Zwonitzer to properly assess whether Special Counsel Hur appropriately pursued justice by declining to recommend charges against President Biden because of his poor mental state at the time that he disclosed classified information to Zwonitzer. If the Committee determines, based on a review of this evidence, that Special Counsel Hur's conclusion was flawed and not consistent with the Department of Justice's commitment to impartial justice, then the Committee will consider whether legislative reforms to the Department of Justice and its use of special counsels are necessary. These potential legislative reforms may include, among other things, changing certain procedures governing the Department's special counsel investigations to better ensure that the Department pursues impartial justice. This is especially important because while Special Counsel Hur declined to bring charges against President Biden, at the same time, the Department, through another Special Counsel's office, is prosecuting a former President and declared candidate for that office for allegedly mishandling classified information.

Second, the information that the Committee requires, and Zwonitzer is in possession of, is necessary for the Committee to consider potential legislative reforms that would alter the willfulness standard in disclosing classified information or modify criminal penalties for the unauthorized dissemination and disclosure of classified materials.[94]

As an initial matter, the Committee seeks to understand the extent to which President Biden disclosed classified materials to Zwonitzer, and the intent, or lack thereof, with which such disclosures were made. Under Executive Order 13526, which governs access to classified information across the executive branch, a person is not authorized to receive classified information unless he or she has: (1) had a "favorable determination of eligibility . . . made by an agency head or the agency head's designee;" (2) "signed an approved nondisclosure agreement; and" (3) "has a need-to-know the information."[95] Notably, however, the Executive Order provides that the "need-to-know requirement" may "be waived by an agency" if the agency "determines in writing that access is consistent with the interest of national security," "takes appropriate steps to protect [the] classified information from unauthorized disclosure or compromise," and "ensures the information is safeguarded in a manner consistent with [the Executive Order]."[96] It is undisputed that Zwonitzer lacked any security clearance or satisfied

[90] *Watkins*, 354 U.S. at 187.
[91] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975).
[92] *Bragg v. Jordan*, 669 F.Supp.3d 257, 267-68 (2023) (quoting *McPhaul v. U.S.* 372, 381 (1960)).
[93] *Id.*
[94] Zwonitzer Subpoena Letter, *supra* note 2.
[95] Exec. Order No. 13526 § 4.1(a)(1)-(3); *see* Hur Report, *supra* note 3, at 16-17.
[96] Exec. Order No. 13526 § 4.4(b)(1)-(2); *see* Hur Report, *supra* note 3, at 16-17.

any of these three conditions for waiver of the "need-to-know" requirement. However, the report of Special Counsel Hur contains evidence that President Biden still—perhaps willfully—disclosed classified information, including national defense information, to Zwonitzer. The Committee seeks to evaluate such information in light of the terms of the Executive Order in order to determine the sufficiency of the Executive Order and whether clearer criminal penalties are needed to prevent such conduct by future executive branch officials entrusted with classified information.

Further, given Special Counsel Hur's findings regarding Zwonitzer's deletion of relevant records, the Committee could consider legislative reforms governing criminal penalties for destroying evidence—especially when that evidence includes classified information that was disclosed in an unauthorized manner. According to Special Counsel Hur, after he was "'aware' of the Department of Justice investigation of [President] Biden's potential mishandling of classified materials[,]" Zwonitzer "deleted . . . audio files [of his interviews with President Biden] from his laptop and external hard drive."[97] In his interactions with the Special Counsel's investigation, Zwonitzer apparently declined to "say how much of the percentage of [the Special Counsel's investigation] was [his] motivation" to delete the recordings.[98] Despite this admission, Special Counsel Hur declined to bring charges against Zwonitzer for obstructing the investigation.[99] The Committee seeks to understand the extent to which Zwonitzer potentially impeded Special Counsel Hur's investigation by deleting the subject recordings and the subpoenaed information would inform potential legislation aimed at curbing such conduct by witnesses in the future.

B. The First Amendment does not protect Zwonitzer's noncompliance with the subpoena.

Contrary to the assertion from Zwonitzer's counsel, neither the First Amendment nor any claims of "reporter's privilege" protects the information sought by the Committee from disclosure. The Committee has a strong record of protecting the First Amendment rights of journalists and standing against the compelled disclosure of their sources.[100] But Zwonitzer was not acting as a journalist here. It is established law that the "party asserting the reporter's privilege . . . bears the burden of showing that it applies in a particular case."[101] Whether Zwonitzer has functioned as a reporter in other contexts, as his counsel alleged, is irrelevant. To the extent Zwonitzer claims protection under the qualified common law "reporter's privilege," the Committee has concluded that he has not met his burden in establishing that his work on President Biden's memoirs made him a "reporter." Federal law requires a showing that, while writing the President's memoir, Zwonitzer engaged in "news gathering" activities and that he

[97] *Id.* 335-36.
[98] *Id.* at 337-38.
[99] *See id.*
[100] *See* Fighting for a Free Press: Protecting Journalists and Their Sources: Hearing Before the Subcomm. on the Constitution and Limited Government, 118th Cong. 11 (Apr. 11, 2024) ("[A] free press is essential to having a robust First Amendment and free debate in our culture. And if you don't have free debate, if you can't settle your disputes by arguing and debating, the alternative is frightening.") (Statement of Chairman Jim Jordan); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Ms. Ingrid Ciprián-Matthews, President, CBS News (Feb. 23, 2024) (The seizure of a journalist's investigative files "threaten[s] to chill good journalism and ultimately weaken our nation's commitment to a free press.").
[101] *U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.*, 507 F.Supp.2d 45, 50 (D.D.C. 2007).

spoke with President Biden "in the course of gathering the news."[102] Zwonitzer has provided no evidence or compelling argument that his conversations with President Biden constituted newsgathering as opposed to assisting President Biden's efforts to write a book. Nor has Zwonitzer demonstrated that President Biden qualifies as a "source" under the common law privilege, given that the President is the subject and apparent "author" of the memoirs. Moreover, the information sought by the Committee does not call for any information that came from a confidential source, which is what most cases about the reporter's privilege involve.[103] It is public knowledge that President Biden worked with Zwonitzer to write his memoirs, and the contents of the memoirs are available to the public.

Even assuming that Zwonitzer was acting as a journalist when he helped President Biden write his memoirs, once Zwonitzer disclosed the audiotapes and other materials to the Special Counsel's Office, he cannot now selectively invoke the reporter's privilege concerning material he has already disclosed to another party.[104]

C. There is no Fifth Amendment basis to withhold the subpoenaed material.

Zwonitzer argues that he is reluctant to comply with the Committee's subpoena due to potential criminal liability. However, federal courts observe that "the Fifth Amendment privilege against self-incrimination generally does not apply to incriminating documents [like the ones requested from Zwonitzer]; instead, it applies only to '*testimonial communication* that is incriminating.'"[105] The act of producing a document might constitute a testimonial communication (1) "[i]f the existence and location of the subpoenaed documents are unknown to the government[;]" and (2) "where the [responding party's] production of documents may 'implicitly authenticate' the documents."[106] These criteria are not satisfied here. Special Counsel Hur's report detailed Zwonitzer's actions with respect to the responsive materials in his possession that he deleted.[107] The government already knows the materials exist and their authenticity is not in question. Accordingly, the Fifth Amendment privilege does not shield Zwonitzer from producing the requested materials to the Committee.

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[102] *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("The journalist's privilege is designed to protect investigative reporting . . . .").
[103] *See Branzburg v. Hayes*, 408 U.S. 665, 682-84 (1972); *see Zerilli v. Smith*, 656 F.2d. 705, 710-12 (D.C. App. 1981); *see Carey v. Hume*, 492 F.2d 631, 632-34 (D.C. App. 1974).
[104] *See, e.g.*, *Ayala v. Ayers*, 668 F.Supp.2d 1248, 1250 (S.D. Cal. 2009) ("[L]ike other privileges, it appears that the journalist's privilege may be waived.") (collecting examples of waiver); *id*. at 1251 (finding "an implied waiver of the journalist's privilege" because the journalist had previously produced the material to one party and it "would be unfair and improper to allow [the journalist] to invoke the journalist's privilege with respect to this same material now that [the other party] wants to see it."); *see also U.S. v. Newland*, 2021 WL 6051675 (S.D. Cal. Dec. 21, 2021) (unlike "other cases in which a waiver of the journalist's privilege was implied in cases of selective disclosure," the court found there was no implied waiver in this case because "there is no evidence that [the journalists] have disclosed any portion of the interviews to the government or its agents").
[105] *U.S. v. Clark*, 574 F.Supp.2d 262, 266 (D. Conn. 2008) (emphasis in original). This rule applies when such documents in the responding party's possession were prepared by a third party or were the responding party's personal records. *Id.* Further, courts have observed that "[e]ven though the contents of a document may not be privileged, the Fifth Amendment does protect the communicative aspects of the act of production." *Id.*
[106] *Id.* at 266-67.
[107] Hur Report, *supra* note 3, at 334-44.

D. *Mazars* is inapplicable to the subpoena to Zwonitzer.

Zwonitzer has argued that the Supreme Court's decision in *Trump v. Mazars USA, LLP*,[108] makes the subpoenaed materials part of President Biden's "personal papers," and, thus, not subject to disclosure.[109] However, *Mazars* is not the proper framework here. There, multiple House committees had issued subpoenas to financial institutions and an accounting firm seeking, among other things, "the financial information of the President, his children, their immediate family members, and several affiliated business entities[,]" as well as "information related to the President and several affiliated business entities . . . including statements of financial condition, independent auditors' reports, financial reports, [and] underlying source documents . . . ."[110] In short, each subpoena sought personal financial information of the President in the possession of a third party—and each third party arguably had some legal obligation to maintain the confidentially of that information. The *Mazars* framework thus only applies to personal information about the President held by third parties that is covered by some contractual or statutory obligation of confidentiality.

Zwonitzer has not established that he is under any obligation—whether contractual or otherwise—to maintain the confidentiality of the information that was used to write the publicly released memoir. Furthermore, the information sought here relates to the disclosure of classified information, which, by definition, is in no way *personal* information about the President and therefore is distinct from what was at issue in *Mazars*. Finally, Zwonitzer lacks standing to raise an argument based on *Mazars* here. Accordingly, the *Mazars* framework is inapplicable, and Zwonitzer's argument is without merit.

In short, the subpoenaed materials would inform the Committee as to the need for legislative reforms governing the handling, storage, and disclosure of classified materials by federal officials, and modifying criminal penalties for the unauthorized dissemination and disclosure of classified materials. The subpoenaed materials would also allow the Committee to consider potential legislative reforms regarding the Justice Department's commitment to impartial justice. The Constitution does not permit private citizens or the executive branch to dictate to Congress how to conduct its oversight.[111] Rather, "congressional committees have significant discretion in how they approach an investigation[.]"[112] Zwonitzer's refusal to produce the subpoenaed materials has impeded the House and the Committee in carrying out its constitutional responsibilities.

CONCLUSION

Special Counsel Hur's report makes clear, despite its conclusion that criminal charges are not warranted, that President Biden unlawfully retained and disclosed classified materials while

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[108] *Trump v. Mazars USA, LLP*, 591 U.S. 848, 854-56 (2020).
[109] Zwonitzer Apr. 12 Letter, *supra* note 69, at 3.
[110] *Mazars*, 591 U.S. at 854-56.
[111] *See* Linda D. Jellum, *"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 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).
[112] TODD GARVEY, CONG. RSCH. SERV., COMMITTEE DISCRETION IN OBTAINING WITNESS TESTIMONY 2 (2023).

he was a private citizen. The Committee subpoenaed Zwonitzer to produce documents and materials necessary to inform and carry out the Committee's legislative oversight. To date, despite assurances that Zwonitzer would cooperate, significant accommodations from the Committee, numerous requests for materials responsive to the subpoena, and a specific warning that failure to produce the documents and materials would result in contempt proceedings, Zwonitzer has failed to do so. Zwonitzer's willful refusal to comply with the Committee's subpoena constitutes contempt of Congress and warrants referral to the appropriate United States Attorney's Office for prosecution as prescribed by law.

COMMITTEE CONSIDERATION

On June X, 2024, the Committee met in open session and [. . .].

COMMITTEE VOTES

In compliance with clause 3(b) of House rule XIII, the Committee states that the following recorded votes occurred during the Committee's consideration of the Report:

[. . .]

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

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 Report. Accordingly, the Committee did not request or receive a cost estimate from the Congressional Budget Office and makes no findings as to the budgetary impacts of this Report or costs incurred to carry out the Report.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of House rule XIII, no provision of this Report establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of House rule XIII, this Report is to enforce the Committee's authority to subpoena and obtain testimony related to determining whether sufficient grounds exist to impeach President Joseph R. Biden Jr., and legislative

reforms to the Department of Justice and its use of a special counsel to conduct investigations of current and former Presidents of the United States.

ADVISORY ON EARMARKS

In accordance with clause 9 of House rule XXI, this Report does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clauses 9(d), 9(e), or 9(f) of House Rule XXI.