

**AMENDMENT IN THE NATURE OF A SUBSTITUTE TO THE COMMITTEE REPORT
FOR THE 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
ISSUED BY THE COMMITTEE ON THE JUDICIARY**

OFFERED BY MR. JORDAN

Beginning on page 1, strike “The Committee on the Judiciary, having considered” and all that follows through the end of the report, and insert the following:

“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 Merrick B. Garland, Attorney General, U.S. Department of Justice, for contempt of Congress pursuant to this Report is as follows:

Resolved, That Merrick B. Garland, Attorney General, U.S. Department of Justice, 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 Merrick B. Garland, Attorney General, U.S. Department of Justice, 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 Attorney General Merrick B. Garland 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.

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EXECUTIVE SUMMARY

In the weeks following the February 5, 2024, release of Special Counsel Robert K. Hur’s report, the three House Committees conducting an impeachment inquiry to determine whether to draft articles of impeachment against President Joseph R. Biden¹ engaged with the Department of Justice to obtain a limited set of documents and records related to the report. After the Department declined to provide the Committees with the relevant documents and records, the Committee on the Judiciary (“Judiciary Committee”) and the Committee on Oversight and Accountability (“Oversight Committee”) issued identical subpoenas on February 27, 2024, to Attorney General Merrick B. Garland compelling production of four specific categories of documents and records, including audio and video recordings of Special Counsel Hur’s interviews with President Biden and his ghostwriter, Mark Zwonitzer.² The Judiciary Committee subpoenaed these materials for several reasons—including to determine whether sufficient grounds exist to draft articles of impeachment against President Biden for consideration by the full House of Representatives and to determine if legislation is needed to codify procedures governing the Department’s special counsel investigations or to strengthen the Department’s commitment to impartial justice. To date, the Department has refused to produce the audio recordings, despite not having invoked any privilege to justify its failure to comply with the subpoena.

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

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”).

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, 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.”⁷ Despite this evidence, Special Counsel Hur ultimately concluded that no criminal charges were warranted.⁸

President Biden has vehemently denied 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.”⁹ Yet during his testimony before the Committee, Special Counsel Hur stated that, “[t]he evidence and the President himself put his memory squarely at issue.”¹⁰ 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].”¹¹ Special Counsel Hur also observed that President Biden “did not remember when he was vice president,” “for[got] when his [vice presidential] term ended,” and “did not remember, even within several years, when his son Beau died.”¹²

The Department continues to withhold key material responsive to the subpoenas from the Judiciary and Oversight Committees—specifically the audio recordings of Special Counsel Hur’s interviews with President Biden and Zwonitzer. The Department has invoked no constitutional or legal privilege to support withholding this material. Its failure to fully comply with the

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”).

⁴ *Id.* at 231.

⁵ *Id.* at 141, 231.

⁶ *Id.* at 231.

⁷ *Id.* at 231-32.

⁸ *Id.* at 345.

⁹ 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 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 . . .”).

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.

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 Power of Impeachment”¹³ and provides that the “President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁴ As the U.S. Court of Appeals for the District of Columbia Circuit has stated, “[t]o level the grave accusation that a President may have committed ‘Treason, Bribery, or other high Crimes and Misdemeanors,’ U.S. Const. art. II, § 4, the House must be appropriately informed.”¹⁵ Congress’s authority to access information during an impeachment investigation is broader in certain instances than in a purely legislative investigation,¹⁶ a fact that the executive branch traditionally has recognized.¹⁷ Investigating and collecting all relevant evidence is the traditional means by which the House begins an impeachment inquiry.¹⁸ Indeed, conducting an impeachment inquiry without all pertinent evidence would be an affront to the Constitution and irreparably damage public faith in the impeachment process.¹⁹

¹³ U.S. CONST. art. I, § 2, cl. 5.

¹⁴ *Id.* art. II, § 4.

¹⁵ *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 765 (D.C. Cir. 2020) (en banc).

¹⁶ TODD GARVEY, CONG. RSCH. SERV.: LEGAL SIDEBAR, LSB11083, IMPEACHMENT INVESTIGATIONS, PART II: ACCESS, at 1 (2023) (“[T]here is reason to believe that invocation of the impeachment power could improve the committees’ legal claims of access to certain types of evidence relevant to the allegations of misconduct against President Biden.”). *See also In re Application of Comm. on Judiciary*, 414 F. Supp. 3d 129, 176 (D.D.C. 2019) (“[D]enying [the House Judiciary Committee] evidence relevant to an impeachment inquiry could pose constitutional problems.”), *aff’d*, 951 F.3d 589 (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) (concluding that “limit[ing] the investigatory power of the House in impeachment proceedings . . . would clearly violate separation of powers principles”).

¹⁷ *See* GARVEY, *supra* note 16 (“As a historical matter, all three branches have suggested that the House possesses a robust right of access to information when it is investigating for impeachment purposes.”); Jonathan David Schaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 87 (2020) (“[P]residents and others have recognized throughout the history of the country that their ability to withhold information from Congress disappears in the context of impeachment.”).

¹⁸ *See, e.g.*, H.R. Rep. No. 116-346, at 28 (2019) (“Here, consistent with historical practice, the House divided its impeachment inquiry into two phases, first collecting evidence and then bringing that evidence before the Judiciary Committee for its consideration of articles of impeachment.”); H.R. Rep. No. 111-427, at 7 (2010) (“[T]he impeachment inquiry was referred by the Committee on the Judiciary to a Task Force on Judicial Impeachment . . . , comprised of 12 Committee Members, to conduct the investigation.”). *See also Hearing on the Basis for the Impeachment Inquiry of President Joseph R. Biden: Before the H. Comm. on Oversight & Accountability*, 118th Cong. (Sept. 28, 2023) (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

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 918, 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 Chairs of the Committees . . . included, from the beginning of the existing House of Representatives 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 a “broad” and “indispensable” power to conduct oversight and investigations that “encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys in our social, economic or political system for the purpose of enabling 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

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.”).

²⁰ Sept. 27 Memo, *supra* note 18.

²¹ 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).

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 the Department pursues impartial justice. The circumstances of Special Counsel Hur’s investigative findings and President Biden’s public denial of these 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.²⁷ Moore notified his colleague Bob Bauer, who then notified White House Counsel Stuart Delery.²⁸ 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).²⁹ 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.³⁰ 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.³¹

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.”³² 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.³³

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.³⁴ During his investigation, Special

²⁷ Hur Report, *supra* 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 things, President Biden is an “elderly man with a poor memory.”³⁸

As a part of the Committees’ inquiry into whether sufficient grounds exist to draft articles of impeachment against President Biden, the Committees have sought information regarding President Biden’s mishandling of classified information.³⁹ The Committees have sought this information to determine whether President Biden willfully retained classified information and documents related to, among other places, Ukraine to assist his family’s business dealings or to enrich his family.⁴⁰ Doing so would be an abuse of his office of public trust.

Evidence gathered during the Committees’ impeachment inquiry raises the prospect that President Biden willfully retained classified information relating to his family’s business dealings in Ukraine. Then-Vice President Biden served as the “point man” for the Obama Administration’s anti-corruption efforts in Ukraine at the same time that his son, Hunter Biden, served on the board of a notoriously corrupt Ukrainian energy company.⁴¹ By 2015, Ukrainian prosecutors had opened an “unlawful enrichment” investigation into Burisma and its owner, Mykola Zlochevsky.⁴² Shortly thereafter, Mr. Zlochevsky and other Burisma executives approached Hunter Biden, informed him that the investigations placed significant pressure on the company, and asked Hunter Biden if he could help alleviate such pressure.⁴³ Testimony provided to the Committees shows that Hunter Biden subsequently “called D.C.”⁴⁴ After this phone call, in November and December 2015, Vice President Biden purportedly took official actions concerning Ukraine—including meeting with Ukrainian Prime Minister Arseniy Yatsenyuk—and conditioning the United States’s \$1 billion loan “to fight corruption” on the firing of

³⁵ *Id.*

³⁶ *Id.* at 29.

³⁷ *Id.* at 1.

³⁸ *Id.* at 220.

³⁹ See Subpoena Letter, *supra* note 2; Letter from Rep. Jamie Comer, Chairman, H. Comm. on Oversight & Accountability; Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary; Jason Smith, Chairman, H. Comm. on Ways & Means, to Merrick 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.

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 purpose of and talking points for a call with Ukrainian Prime Minister Yatsenyuk," and document "A10" was a "document in the format of a transcript documenting the substance of a December 11, 2015[,] call between [Vice President] Biden and Ukrainian Prime Minister Yatsenyuk."⁴⁸ Given that Hunter Biden's business dealings in Ukraine were still active when Joe Biden left the vice presidency, President Biden's retention of these classified documents raises questions about whether he purposefully took them when he left office in order to benefit his family.

There is also the prospect that President Biden in general willfully retained classified documents in order to enrich himself and his family. President Biden's 2017 memoir, *Promise Me, Dad*, discussed, among other things, President Biden's thoughts on foreign policy.⁴⁹ While working with Zwonitzer on his memoir, President Biden read from classified materials "verbatim," and such classified materials included notes on matters of foreign policy, "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."⁵⁰ Notably, Special Counsel Hur's report found that President Biden received an advance of \$8 million to produce a memoir.⁵¹ To the extent that President Biden willfully took classified information when he left office in order to help him write a book and make a large amount of money for himself and his family, that could constitute an abuse of his office of public trust.

On February 12, 2024, approximately four days after the release of Special Counsel Hur's report, the Chairs of the Judiciary Committee, the Oversight Committee, and the Committee on Ways and Means sent a letter to Attorney General Garland requesting four categories of documents and records: (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, relating to the Special Counsel's interview of Zwonitzer; (3) the documents identified as "A9" and "A10" in Appendix A of Special Counsel 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, including the Office of the Special Counsel, the

⁴⁵ Glenn Kessler, *Inside 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 Accordingly, on February 27, 2024, the Judiciary Committee and the Oversight Committee issued identical subpoenas to Attorney General Garland compelling the production of the four categories of materials:

1. All documents and communications, including audio and video recordings, related to Special Counsel Robert Hur’s interview of President Joseph R. Biden, Jr.;
2. All documents and communications, including audio and video recordings, related to Special Counsel Hur’s interview of Mr. Mark Zwonitzer;
3. The documents identified as “A9” and “A10” in Appendix A of Special Counsel 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 Special Counsel Hur’s report.⁵⁵

The subpoenas set a return date of March 7, 2024. On that date, the Department produced an incomplete set of documents comprising only correspondence exchanged between President Biden’s legal counsel and the Department, along with an offer to review two classified documents *in camera*.⁵⁶ Two days later, the Committees notified the Department that its initial production in response to the subpoenas was inadequate.⁵⁷ In this letter, the Committees specifically noted that the Department had failed to produce unredacted transcripts and audio recordings of Special Counsel Hur’s interviews of President Biden or Zwonitzer.⁵⁸ Because Special Counsel Hur was scheduled to testify in front of the Judiciary Committee on March 12, 2024, the Committees offered to accept a production of all materials responsive to the

⁵² Feb. 12 Letter, *supra* note 39.

⁵³ Letter from Asst. Attorney Gen. Carlos Felipe Uriarte, U.S. Dep’t of Justice, to Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, et al. (Feb. 16, 2024).

⁵⁴ *Id.*

⁵⁵ Subpoena Letter, *supra* 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.*

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

On March 12, 2024, a little more than two hours before Special Counsel Hur's scheduled testimony in front of the Judiciary Committee, the Department produced to the Committees two redacted transcripts of Special Counsel Hur's interviews with President Biden.⁶² Significantly, the Department failed to produce the audio recordings of the interviews. In its letter accompanying the two redacted transcripts, which was transmitted to the Committees at 7:45 a.m., the Department represented to the Committees that it had just completed the "standard interagency review process" earlier that morning, thereby allowing the material to be released.⁶³ Despite the Department's representation, however, it was apparent that several news outlets had received and reviewed the transcripts before they were produced to the Committees.⁶⁴

The Committees next wrote to Attorney General Garland on March 25, 2024, regarding the Department's continued withholding of material responsive to the Committees' subpoenas, particularly the audio recordings of Special Counsel Hur's interviews with President Biden and the transcripts and audio recordings of Special Counsel Hur's interviews with Zwonitzer.⁶⁵ The letter again reminded Attorney General Garland about the legal obligations imposed upon him by the Committees' subpoenas and directed him to produce all responsive materials no later than 12:00 p.m. on April 8, 2024 to avoid further action on this matter, including the invocation of contempt of Congress proceedings.⁶⁶

The Department replied on April 8, 2024, but again flouted the Committees' subpoenas, choosing instead to produce only the transcripts of Special Counsel Hur's two interviews with

⁵⁹ *Id.*

⁶⁰ 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. 12, 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. 12, 2024) (collectively "March 12 Letters").

⁶¹ Letter from Hon. Merrick Garland, Att'y Gen., U.S. Dep't of Justice, to Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. Jason Smith, Chairman, H. Comm. on Ways and Means at 2 (Feb. 16, 2024); Email from Office Staff, Office of Legislative Affairs, U.S. Dep't of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 11, 2024, 3:12 p.m.).

⁶² Email from Office Staff, Office of Legislative Affairs, Dep't of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:43 a.m.) (hereinafter "DOJ OLA 7:43 a.m. Email"); Email from Office Staff, Office of Legislative Affairs, Dep't of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:44 a.m.); Email from Office Staff, Office of Legislative Affairs, Dep't of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:45 a.m.); DOJ-HJC-HUR-0000033-0000290.

⁶³ March 12 Letters, *supra* 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.*

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 informational needs.⁶⁹

The Committees addressed the Department’s excuses for failing to comply with the subpoenas in a subsequent letter to Attorney General Garland dated April 15, 2024, writing that his response to the subpoenas suggests he is “withholding records for partisan purposes and to avoid political embarrassment for President Biden.”⁷⁰ In that letter, the Committees rejected the Department’s unsupported assertion that the audio recordings were “cumulative,” explaining how audio recordings are materially distinct from written transcripts and reminding the Attorney General that federal courts have held that Congress requires “*all* relevant evidence” in an impeachment inquiry.⁷¹ The Committees also pointed out that the Department has asserted no constitutional or legal privilege shielding the disclosure of the audio recordings and that any applicable privilege had been waived by the release of the written transcripts to the media.⁷² The Committees also rejected the Department’s unsupported speculation about the Committees’ motives for obtaining the audio recordings, explaining their evidentiary value and highlighting the Department’s hypocritical insistence on a standard of compliance here that it would never allow for a private party.⁷³ The Committees offered the Department until April 25 to produce the withheld materials or else they would consider invoking contempt of Congress proceedings.⁷⁴

The Department again refused to comply. On April 25, 2024, the Department responded to the Committees’ letter and argued, among other things, that the Committees “have not articulated a legitimate congressional need to obtain audio recordings from Mr. Hur’s investigation[,]” and that releasing the audio recordings “would harm law enforcement and the evenhanded administration of justice” because it “would compound the likelihood that future prosecutors will be unable to secure th[e] level of cooperation” that was important to Special Counsel Hur’s investigation.⁷⁵

⁶⁷ 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. 8, 2024) (hereinafter “Apr. 8 Letter”); DOJ-HJC-HUR-0000291-556.

⁶⁸ Apr. 8 Letter, *supra* note 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 attempt by the Department to even cite a constitutional or legal privilege as the basis for doing so.

In the two months since the Committees' initial requests to the Department, and following the release of Special Counsel Hur's report, the Department has produced only five letters from President Biden's White House and personal counsel to the Department, one letter from the Department to President Biden's White House and personal counsel, redacted transcripts of Special Counsel Hur's two interviews with President Biden, and redacted transcripts of Special Counsel Hur's two interviews with Zwonitzer. Additionally, the Department has made available two classified documents *in camera* to the Committees.

The Department's production of letters and redacted transcripts do not relieve it of its obligation to produce all responsive records, including the audio recordings of Special Counsel Hur's interviews with President Biden and Zwonitzer.⁷⁶ During his “dozens of hours of interviews with Zwonitzer,” President Biden “read from notebook entries related to many classified briefings” along with “foreign policy issues in Ukraine, Central America, and Iraq”⁷⁷ Further, the boxes of documents discovered in President Biden's personal possession included classified materials regarding foreign policy issues in, among other places, Ukraine, China, Iraq, Afghanistan, Pakistan, and Egypt.⁷⁸ In his interviews with Special Counsel Hur, President Biden discussed some of these and other foreign policy issues as well as the retention and handling of the documents containing some of this classified information.⁷⁹ Similarly, Zwonitzer discussed President Biden's description and recollection of these issues during his interviews with Special Counsel Hur.⁸⁰ Although the Department has produced transcripts of President Biden's and Zwonitzer's interviews with Special Counsel Hur, it has failed to produce the audio recordings of the interviews.

The audio recordings of Special Counsel Hur's interviews of President Biden and Zwonitzer are of superior evidentiary value regarding the specific issues the Committees are investigating. While the text of the Department-created transcripts purport to reflect the words uttered during these interviews, they do not reflect important verbal context, such as tone or tenor, or nonverbal context, such as pauses or pace of delivery. For instance, when interviewed, a

⁷⁶ Subpoena Letter, *supra* 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).

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 oversight investigation. Special Counsel Hur concluded that although there was evidence that President Biden's conduct satisfied the elements of willfully retaining classified information, justice would not be served by indicting President Biden because he would appear to a jury to be a "sympathetic, well-meaning elderly man with a poor memory."⁸² President Biden's personal attorneys and the White House Counsel's office have contested Special Counsel Hur's assessment.⁸³ However, Special Counsel Hur stood by his assessment during his sworn testimony before the Judiciary Committee.⁸⁴ The transcripts provided to the Committee are insufficient to arbitrate this dispute as to President Biden's mental state, an issue which goes directly to his culpability and whether Special Counsel Hur appropriately pursued justice by declining to bring an indictment.

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.⁸⁵ The Committee must assess whether Special Counsel Hur's declination decision, which was based on President Biden's poor mental state, was consistent with the Department's commitment to impartial justice or whether legislative reforms are necessary regarding Special Counsel investigations because they are not leading to impartial outcomes. The transcripts produced by the Department, due to their inherent limitations, are not sufficient for that purpose.

In short, the audio recordings would offer unique and important information to advance the Committees' impeachment inquiry and inform the Judiciary Committee as to the need for legislative reforms to the operations of the Department or the conduct of Special Counsel investigations. Moreover, contrary to the Department's assertion that the audio recordings are "cumulative" of the transcripts, an audio recording is the best evidence of a witness interview. Where audio recordings and transcripts diverge, because of "inflection in a speaker's voice or by inaccuracies in the transcript," the audio recordings, not the transcripts, control.⁸⁶ Such a

⁸¹ Hur Report, *supra* note 3, at 6.

⁸² *Id.* at 219.

⁸³ Betsy Woodruff Swan, *White House lawyers wrote Garland slamming Hur's report before its' release*, POLITICO (Feb. 15, 2024).

⁸⁴ Hearing on Hur Report, *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.").

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 recordings of Special Counsel Hur’s interviews with President Biden and Zwonitzer to the Committees is not necessary because “any information in [the audio] files that is relevant to the Committees’ stated purposes is cumulative of the information” produced in the provided transcripts, the Department’s own actions cut against this view.⁸⁹ During Watergate, for example, the Department subpoenaed audio recordings of conversations between President Nixon and his advisors. Although the President publicly released more than 1,200 pages of edited transcripts of these conversations after the subpoena was issued, the Department maintained the subpoena for the audio recordings. In *United States v. Nixon*, the Supreme Court rejected President Nixon’s attempt to quash that subpoena.⁹⁰ The Department has relied upon this decision repeatedly in support of its own subpoenas,⁹¹ and its own actions demonstrate that it understands that audio recordings are not simply cumulative of transcripts produced by a party that is itself under investigation.

The Constitution does not permit the executive branch to dictate to Congress how to proceed with an impeachment inquiry or to conduct its oversight.⁹² Rather, “congressional committees have significant discretion in how they approach an investigation[,]”⁹³ and, in the context of an impeachment inquiry, federal courts emphasize that Congress must possess all pertinent evidence.⁹⁴ The Committees are engaged in an inquiry to assess whether to draft

⁸⁷ See Anders Hagstrom, *Biden appears to read script instructions out loud in latest teleprompter gaffe: ‘Four more years, pause,’* FOX NEWS (Apr. 24, 2024).

⁸⁸ See The White House, Remarks by President Biden at the North America’s Building Trades Union National Legislative Conference (Apr. 24, 2024), <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/> (“Folks, imagine what we can do next. Four . . . more years (inaudible).”). The White House subsequently updated the transcript after public attention on the omission. The White House, Remarks by President Biden at the North America’s Building Trades Union National Legislative Conference (Apr. 24, 2024), <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/>.

⁸⁹ Apr. 8 Letter, *supra* note 67, at 4.

⁹⁰ *U.S. v. Nixon*, 418 U.S. 683 (1974).

⁹¹ See, e.g., *United States v. Hussain*, No. CR 16-462 (CRB), 2018 WL 6695574 at *2-*3 (Nov. 25, 2018) (citing *Nixon* in opposition to a criminal defendant’s motion to quash the Department’s subpoena).

⁹² 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 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

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 entity manipulating a transcript of the President’s statements and only fixing the error after being caught.

CONCLUSION

Special Counsel Hur’s report makes clear, despite its conclusion that criminal charges are not warranted, that President Biden willfully and unlawfully retained classified materials while he was a private citizen. The Committees subpoenaed Attorney General Garland to produce documents and materials responsive to four specific requests concerning Special Counsel Hur’s investigation on February 27, 2024. To date, despite numerous requests from the Committees for certain audio recordings responsive to the subpoena, and a specific warning that failure to produce the audio recordings would result in contempt proceedings, Attorney General Garland has failed to do so. The Attorney General has further invoked no constitutional or legal privilege relieving his obligation to fully respond to the Committees’ subpoenas. Attorney General Garland’s willful refusal to comply with the Committees’ subpoenas constitutes contempt of Congress and warrants referral to the appropriate United States Attorney’s Office for prosecution as prescribed by law.

COMMITTEE CONSIDERATION

On May 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.

(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.”).

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.”