

# House Calendar No. 87

118TH CONGRESS }  
2d Session } HOUSE OF REPRESENTATIVES { REPORT  
118-628

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

AUGUST 9, 2024.—Referred to the House Calendar and ordered to be printed

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

## R E P O R T

together with

## DISSENTING 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.

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### 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.<sup>1</sup> 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*.<sup>2</sup> 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.”<sup>3</sup> Special Counsel Hur found that Vice President Biden had “strong motivations” to flout the rules for properly handling classified materials.<sup>4</sup> In particular, Special Counsel Hur observed that “months before leaving office”<sup>5</sup> as vice president, President Biden decided to write a book for “an advance of \$8 million.”<sup>6</sup> 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.”<sup>7</sup> Additionally, Special Counsel Hur observed that President Biden viewed the classified materials “as an irreplaceable contemporaneous record of some of the most important mo-

<sup>1</sup> 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).

<sup>2</sup> 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”).

<sup>3</sup> 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”).

<sup>4</sup> *Id.* at 8, 231.

<sup>5</sup> *Id.* at 231.

<sup>6</sup> *Id.* at 141.

<sup>7</sup> *Id.* at 231.

ments 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.”<sup>8</sup>

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.”<sup>9</sup> 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.”<sup>10</sup> Despite this evidence, Special Counsel Hur ultimately decided not to pursue charges against President Biden.<sup>11</sup> 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*.”<sup>12</sup> According to Special Counsel Hur, the recordings “had significant evidentiary value.”<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup>

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.”<sup>16</sup> 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.”<sup>17</sup> 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[d] to remember events and strain[ed] at times to read and relay his own [handwriting].”<sup>18</sup> Special Counsel Hur also observed that President

<sup>8</sup>*Id.* at 231–32.

<sup>9</sup>*Id.* at 106.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 345.

<sup>12</sup>*Id.* at 334.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 343.

<sup>16</sup>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. . . .”).

<sup>17</sup>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”).

<sup>18</sup>Hur Report, *supra* note 3, at 207.

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.”<sup>19</sup>

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.”<sup>20</sup> The Supreme Court has noted that without such power, Congress would not be able to “legislate wisely or effectively.”<sup>21</sup> Courts recognize that “this power of inquiry—with the process to enforce it—is an *essential* and *appropriate* auxiliary to the legislative function.”<sup>22</sup> 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.<sup>23</sup>

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 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 at-

<sup>19</sup> *Id.* at 208.

<sup>20</sup> *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957).

<sup>21</sup> *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

<sup>22</sup> *Id.* at 174 (emphasis added).

<sup>23</sup> Rules of the U.S. House of Representatives, R. X, cl. 1(l) (2023).

torneys, 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.<sup>24</sup> Moore notified his colleague Bob Bauer, who then notified White House Counsel Stuart Delery.<sup>25</sup> 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).<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> During his investigation, Special Counsel Hur conducted 173 interviews of 147 witnesses, including President Biden himself and his memoir ghostwriter, Mark Zwonitzer.<sup>32</sup> 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.<sup>33</sup> 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,”<sup>34</sup> criminal charges were not warranted because, among other things, President Biden is an “elderly man with a poor memory.”<sup>35</sup>

Special Counsel Hur found that President Biden “had strong motivations to ignore the proper procedures for safeguarding the clas-

<sup>24</sup> Hur Report, *supra* note 3, at 19–20 (The classification marks on the documents “dat[ed] back to [President Biden]’s vice presidency”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 24–25.

<sup>28</sup> *Id.* at 28.

<sup>29</sup> *Id.* at 21.

<sup>30</sup> *Id.* at 26.

<sup>31</sup> *Id.*; Attorney General Merrick B. Garland Delivers Remarks on the Appointment of a Special Counsel, U.S. DEP’T OF JUSTICE (Jan. 12, 2023).

<sup>32</sup> Hur Report, *supra* note 3, at 26.

<sup>33</sup> *Id.* at 29.

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 6, 219.

sified information in his notebooks. He decided months before leaving office to write a book and began meeting with his ghostwriter while still vice president.”<sup>36</sup> Notably, Special Counsel Hur’s report found that President Biden received an advance of \$8 million to produce a memoir.<sup>37</sup> President Biden’s 2017 memoir, *Promise Me, Dad*, discussed, among other things, President Biden’s thoughts on foreign policy.<sup>38</sup> 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.”<sup>39</sup>

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.”<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup> 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.”<sup>43</sup> Special Counsel Hur determined that these passages also “contain information that remains classified up to the Secret level.”<sup>44</sup>

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.”<sup>45</sup> 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.”<sup>46</sup> 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.”<sup>47</sup> While showing the passage to Zwonitzer,

<sup>36</sup> *Id.* at 231.

<sup>37</sup> *Id.* at 97–106.

<sup>38</sup> *See, e.g., id.* at 97.

<sup>39</sup> *Id.* at 97–106.

<sup>40</sup> *Id.* at 102–04.

<sup>41</sup> *Id.* at 104.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 104–5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 105–06.

<sup>47</sup> *Id.* at 106.

President Biden stated, “[s]ome of this may be classified, so be careful.”<sup>48</sup> 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.”<sup>49</sup>

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.’”<sup>50</sup> 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.<sup>51</sup>

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.”<sup>52</sup> 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.<sup>53</sup> It is undisputed that, at the time President Biden revealed and transmitted classified information to Zwonitzer, Zwonitzer lacked any national security credentials or clearance.<sup>54</sup> 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.”<sup>55</sup>

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*.”<sup>56</sup> According to Special Counsel Hur, “[t]hese recordings had *significant* evidentiary value.”<sup>57</sup> However, Special Counsel Hur and FBI technicians “were able to recover deleted recordings relating to *Promise Me, Dad*[,]” and Zwonitzer “kept[] and did not delete or attempt to delete[] near-verbatim transcripts he made of some of the recordings.”<sup>58</sup> 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.”<sup>59</sup>

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 109–10.

<sup>51</sup> *Id.* at 108.

<sup>52</sup> *Id.* at 185; see 18 U.S.C. § 793(e).

<sup>53</sup> *Id.* at 186 (citing *U.S. v. Morrison*, 844 F.2d 1057, 1075 (4th Cir. 1988)).

<sup>54</sup> *Id.* at 245.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 334.

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> *Id.*

<sup>59</sup> *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.

Consequently, Special Counsel Hur declined to bring charges against Zwonitzer for obstruction of justice.<sup>60</sup>

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, *Promise 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.<sup>61</sup>

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.<sup>62</sup> That discussion occurred on February 26, 2024, during which Zwonitzer's attorney represented that, upon Zwonitzer's return from a personal trip, he would produce documents to the Committee before March 8.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

On March 22, 2024, the Committee issued a subpoena to Zwonitzer for the same six categories of materials requested in the

<sup>60</sup> *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.”).

<sup>61</sup> Zwonitzer Subpoena Letter, *supra* note 2.

<sup>62</sup> Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Feb. 23, 2024) (voicemail on file with Committee).

<sup>63</sup> Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Feb. 26, 2024).

<sup>64</sup> *Id.*

<sup>65</sup> 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).

<sup>66</sup> Phone Call Between Mr. Louis M. Freeman, Esq., and Comm. Staff, H. Comm. on the Judiciary (Mar. 11, 2024).



February 14 letter.<sup>67</sup> The subpoena set a return date of April 12.<sup>68</sup> 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.<sup>69</sup> 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.”<sup>70</sup> Second, Zwonitzer raised a First Amendment challenge to the subpoena, alleging that it “violates [Zwonitzer’s] own rights as an author and journalist.”<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup> First, the Committee explained that its subpoena to Zwonitzer furthers a legitimate legislative purpose.<sup>75</sup> Second, the Committee explained that no valid constitutional privilege relieved Zwonitzer of his legal obligation to comply with the subpoena.<sup>76</sup> The Committee accordingly notified Zwonitzer that it “expects full compliance with the subpoena” by May 20, 2024 and that failure to do so could result in the invocation of contempt of Congress proceedings.<sup>77</sup>

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.”<sup>78</sup> This letter repeated and restated the same concerns that the Committee had previously considered and addressed.

On June 25, 2024, just two days before the start of the Committee’s meeting to consider a report recommending that Zwonitzer be held in contempt of Congress, the Committee received a letter from Mr. Edward Siskel, Counsel to President Biden, informing the Committee that the subpoenaed information and materials are “the personal information of the sitting President[,]” and, accordingly,

<sup>67</sup> Zwonitzer Subpoena Letter, *supra* note 2.

<sup>68</sup> *Id.*

<sup>69</sup> 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”).

<sup>70</sup> *Id.* at 3–5.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 7.

<sup>73</sup> *Id.* at 2.

<sup>74</sup> 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”).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 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).

“raise ‘significant separation of powers issues.’”<sup>79</sup> On the same day, the Committee also received a letter from Zwonitzer’s attorney, stating that the White House informed Zwonitzer that he “is not authorized to provide any of the President’s information until it has been reviewed for Executive Branch confidentiality concerns and a resolution of the[] constitutional issues between the two branches has been reached.”<sup>80</sup> Also attached to that correspondence was a June 25, 2024, letter from Mr. Siskel to Zwonitzer’s attorney, stating that the Committee’s subpoena “seeks broad swaths of personal information that President Biden provided to [Zwonitzer] in confidence as part of the process of writing his memoirs[,]” and “[t]he vast majority of th[e] information is private.”<sup>81</sup>

Despite the fact that the Committee has already heard and responded to similar arguments from Zwonitzer, Zwonitzer continues to use these arguments in an effort to flout the Committee’s subpoena. 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.<sup>82</sup> 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

<sup>79</sup> Letter from Mr. Edward N. Siskel, Counsel to the President, The White House, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, at 2 (June 25, 2024) (“In addition, it is my understanding that the Committee’s sweeping subpoena encompasses information—such as details about confidential and non-public conversations among senior presidential advisors—that Congress, the Executive Branch, and the Supreme Court have long protected against unwarranted disclosure in order to safeguard the ‘complete candor and objectivity’ of presidential advisors.”).

<sup>80</sup> Letter from Mr. Louis M. Freeman, Esq., Counsel for Mr. Mark Zwonitzer, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, at 1 (June 25, 2024) [hereinafter “Zwonitzer June 25 Letter”].

<sup>81</sup> Letter from Mr. Edward N. Siskel, Counsel to the President, The White House, to Mr. Louis Freeman, Counsel for Mr. Mark Zwonitzer, at 2 (June 25, 2024) (“[Y]our client has no authority to resolve the separation-of-powers concerns at issue.”) [hereinafter “Siskel June 25 Letter to Zwonitzer”].

<sup>82</sup> Hur Report, *supra* note 3, at 335.

Security Council . . . probably was classified[,]” but nonetheless “read aloud . . . portions of th[at] notebook entry that contained classified information.”<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> 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 him, ‘[s]ome of this may be classified, so be careful. . . .’”<sup>86</sup> 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[,]”<sup>87</sup> 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.”<sup>88</sup> 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. . . .”<sup>89</sup> 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.<sup>90</sup>

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 be-

<sup>83</sup> *Id.* at 245.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 246.

<sup>86</sup> *Id.* at 246.

<sup>87</sup> *Id.* at 247.

<sup>88</sup> *Id.* at 244.

<sup>89</sup> *Id.* at 245.

<sup>90</sup> *Id.* at 247–248.

tween 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.”<sup>91</sup> Courts recognize that “this power of inquiry—with the process to enforce it—is an *essential* and *appropriate* auxiliary to the legislative function.”<sup>92</sup> To that end, a congressional subpoena is valid “if it is related to, and in furtherance of, a legitimate task of the Congress.”<sup>93</sup> The subpoena must serve a “valid legislative purpose, and concern a subject on which “legislation could be had.”<sup>94</sup> 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.’”<sup>95</sup> 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.<sup>96</sup> 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.

<sup>91</sup> *Watkins*, 354 U.S. at 187.

<sup>92</sup> *McGrain*, 273 U.S. at 174.

<sup>93</sup> *Watkins*, 354 U.S. at 187.

<sup>94</sup> *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506 (1975).

<sup>95</sup> *Bragg v. Jordan*, 669 F.Supp.3d 257, 267–68 (2023) (quoting *McPhaul v. U.S.* 372, 381 (1960)).

<sup>96</sup> *Id.*

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.<sup>97</sup>

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.”<sup>98</sup> 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].”<sup>99</sup> It is undisputed that Zwonitzer lacked any security clearance or satisfied 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.”<sup>100</sup> 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.<sup>101</sup> Despite this admission, Special Counsel Hur declined to bring charges against Zwonitzer for obstructing the investigation.<sup>102</sup> The Committee seeks to understand the extent to which Zwonitzer potentially impeded Special Counsel Hur’s investigation by deleting the subject recordings and the sub-

<sup>97</sup> Zwonitzer Subpoena Letter, *supra* note 2.

<sup>98</sup> Exec. Order No. 13526 § 4.1(a)(1)–(3); see Hur Report, *supra* note 3, at 16–17.

<sup>99</sup> Exec. Order No. 13526 § 4.4(b)(1)–(2); see Hur Report, *supra* note 3, at 16–17.

<sup>100</sup> *Id.* 335–36.

<sup>101</sup> *Id.* at 337–38.

<sup>102</sup> See *id.*

poenaed 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.<sup>103</sup> 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."<sup>104</sup> 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 spoke with President Biden "in the course of gathering the news."<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

<sup>103</sup> 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 Ciprian-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.")

<sup>104</sup> *U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos.*, 507 F.Supp.2d 45, 50 (D.D.C. 2007).

<sup>105</sup> *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("The journalist's privilege is designed to protect investigative reporting. . . .").

<sup>106</sup> 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).

<sup>107</sup> 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

C. THERE IS NO FIFTH AMENDMENT BASIS TO WITHHOLD THE  
SUBPOENAED MATERIAL

To avoid complying with the Committee’s subpoena, only two days before the Committee’s meeting to consider a report recommending that Zwonitzer be held in contempt of Congress, Zwonitzer invoked the Fifth Amendment right against self-incrimination.<sup>108</sup> 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.’”<sup>109</sup> 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.”<sup>110</sup> 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.<sup>111</sup> 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.

D. MAZARS IS INAPPLICABLE TO THE SUBPOENA TO ZWONITZER AND  
ANY ASSERTION OF EXECUTIVE PRIVILEGE WOULD BE INVALID

Zwonitzer has argued that the Supreme Court’s decision in *Trump v. Mazars USA, LLP*,<sup>112</sup> makes the subpoenaed materials part of President Biden’s “personal papers,” and, thus, not subject to disclosure.<sup>113</sup> 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. . . .”<sup>114</sup> 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 confidentiality 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.

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is no evidence that [the journalists] have disclosed any portion of the interviews to the government or its agents”).

<sup>108</sup> Zwonitzer June 25 Letter, *supra* note 80, at 4.

<sup>109</sup> *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.*

<sup>110</sup> *Id.* at 266–67.

<sup>111</sup> Hur Report, *supra* note 3, at 334–44.

<sup>112</sup> *Trump v. Mazars USA, LLP*, 591 U.S. 848, 854–56 (2020).

<sup>113</sup> Zwonitzer Apr. 12 Letter, *supra* note 69, at 3.

<sup>114</sup> *Mazars*, 591 U.S. at 854–56.

Despite the White House’s position that “the Committee seeks to avoid the analysis required by *Mazars*—and the invalidity of its subpoena that would unavoidably result under such analysis[.]”<sup>115</sup> the Committee determined, based on the actual holding of *Mazars*, that its framework is inapplicable to the subpoena at bar. 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*. Accordingly, the *Mazars* framework is inapplicable, and Zwonitzer’s argument is without merit.

Turning to the White House’s invocation of Executive Branch confidentiality interests, the Committee has numerous concerns about the validity of the White House’s assertions both to the Committee and to Zwonitzer’s attorney. First, the White House does not cite any legal or persuasive authority or support for its proposition that executive privilege somehow applies to conversations between a former Vice President and a private citizen.<sup>116</sup> Second, in the unlikely event that such authority or support exists, any assertion of executive privilege has been waived. Specifically, since President Biden provided such material to and created such material with Zwonitzer for the purpose of writing a book, allowed Zwonitzer to keep the material after the book project was over, and apparently did not have any contract with Zwonitzer requiring him to keep the material confidential, any assertion of executive privilege would be without merit. This is also bolstered by the fact that the White House apparently did not assert executive privilege over the material before it was disclosed to Special Counsel Hur and his team.<sup>117</sup> Consequently, the White House’s last-minute decision to raise the prospect that executive privilege could apply is baseless and serves no purpose other than to further impede the Committee from carrying out its duties.

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.<sup>118</sup> Rather, “congressional committees have significant discre-

<sup>115</sup> Siskel June 25 Letter to Zwonitzer, *supra* note 81, at 2 (The Committee’s subpoena, “necessitate[s], on the advice of counsel, an assertion of the constitutional privilege against self-incrimination.”).

<sup>116</sup> See *id.* at 3 (“Your client is not authorized to provide any of the President’s information until it has been reviewed for Executive Branch confidentiality concerns . . .”).

<sup>117</sup> Letter from Mr. Robert K. Hur, Special Counsel, U.S. Dep’t of Justice, to Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice, at 2 (Feb. 5, 2024) (“The White House Counsel has not conveyed to me the President’s decision as to assertions of executive privilege.”).

<sup>118</sup> 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).



tion in how they approach an investigation[.]”<sup>119</sup> 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 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 27, 2024, the Committee met in open session and ordered the report favorably reported to the House with an amendment in the nature of a substitute by a recorded vote of 13–11, a quorum being present.

### **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:

1. Vote on Amendment #1 to the Report ANS offered by Mr. Bishop of North Carolina—passed 13 ayes to 12 nays.
2. Vote on Amendment #3 to the Report ANS offered by Ms. McBath—failed 9 ayes to 13 nays.
3. Vote on Amendment #4 to the Report ANS offered by Ms. Dean—failed 8 ayes to 13 nays.
4. Vote on Amendment #5 to the Report ANS offered by Ms. Escobar—failed 8 ayes to 11 nays.
5. Vote on Amendment #6 to the Report ANS offered by Mr. Johnson of Georgia—failed 8 ayes to 11 nays.
6. Vote on Amendment #7 to the Report ANS offered by Mr. Johnson of Georgia—failed 8 ayes to 13 nays.
7. Vote on favorably reporting the Report, as amended—passed 13 ayes to 11 nays.

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<sup>119</sup> TODD GARVEY, CONG. RSCH. SERV., COMMITTEE DISCRETION IN OBTAINING WITNESS TESTIMONY 2 (2023).

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 6/27/24

Vote on: Bishop Amndt #1 to Conscript Report AYES

Roll Call #: 1

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>	✓			MR. NADLER (NY) <i>Ranking Member</i>		✓	
MR. ISSA (CA)				MS. LOFGREN (CA)		✓	
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)	✓			MR. COHEN (TN)		✓	
MR. McCLINTOCK (CA)	✓			MR. JOHNSON (GA)		✓	
MR. TIFFANY (WI)				MR. SCHIFF (CA)		✓	
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)	✓			MS. JAYAPAL (WA)		✓	
MS. SPARTZ (IN)				MR. CORREA (CA)			
MR. FITZGERALD (WI)	✓			MS. SCANLON (PA)		✓	
MR. BENTZ (OR)				MR. NEGUSE (CO)			
MR. CLINE (VA)	✓			MS. McBATH (GA)		✓	
MR. ARMSTRONG (ND)				MS. DEAN (PA)		✓	
MR. GOODEN (TX)				MS. ESCOBAR (TX)		✓	
MR. VAN DREW (NJ)	✓			MS. ROSS (NC)			
MR. NEHLS (TX)	✓			MS. BUSH (MO)			
MR. MOORE (AL)	✓			MR. IVEY (MD)		✓	
MR. KILEY (CA)	✓			MS. BALINT (VT)		✓	
MS. HAGEMAN (WY)	✓						
MR. MORAN (TX)							
MS. LEE (FL)	✓						
MR. HUNT (TX)							
MR. FRY (SC)	✓						
MR. RULLI (OH)							

Roll Call Totals: Ayes: 13 Nays: 12 Present: \_\_\_\_\_  
 Passed: X Failed: \_\_\_\_\_

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 6/27/24

Vote on: McBath Amndt #3 to Contempt Report ANS

Roll Call #: 2

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>		✓		MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)		✓		MS. LOFGREN (CA)	✓		
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)		✓		MR. COHEN (TN)	✓		
MR. McCLINTOCK (CA)		✓		MR. JOHNSON (GA)			
MR. TIFFANY (WI)		✓		MR. SCHIFF (CA)	✓		
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)		✓		MS. JAYAPAL (WA)			
MS. SPARTZ (IN)		✓		MR. CORREA (CA)	✓		
MR. FITZGERALD (WI)		✓		MS. SCANLON (PA)	✓		
MR. BENTZ (OR)		✓		MR. NEGUSE (CO)			
MR. CLINE (VA)		✓		MS. McBATH (GA)	✓		
MR. ARMSTRONG (ND)				MS. DEAN (PA)	✓		
MR. GOODEN (TX)				MS. ESCOBAR (TX)	✓		
MR. VAN DREW (NJ)				MS. ROSS (NC)	✓		
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)				MR. IVEY (MD)			
MR. KILEY (CA)				MS. BALINT (VT)			
MS. HAGEMAN (WY)							
MR. MORAN (TX)							
MS. LEE (FL)		✓					
MR. HUNT (TX)							
MR. FRY (SC)		✓					
MR. RULLI (OH)		✓					

Roll Call Totals:

Ayes: 9

Nays: 13

Present: X

Passed: \_\_\_\_\_

Failed: \_\_\_\_\_

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 9/27/24

Vote on: Dean Amndt #1 to Conject Report ANS

Roll Call #: 3

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>		✓		MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)		✓		MS. LOFGREN (CA)	✓		
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)		✓		MR. COHEN (TN)	✓		
MR. McCLINTOCK (CA)		✓		MR. JOHNSON (GA)	✓		
MR. TIFFANY (WI)				MR. SCHIFF (CA)			
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)		✓		MS. JAYAPAL (WA)			
MS. SPARTZ (IN)		✓		MR. CORREA (CA)			
MR. FITZGERALD (WI)		✓		MS. SCANLON (PA)	✓		
MR. BENTZ (OR)		✓		MR. NEGUSE (CO)			
MR. CLINE (VA)		✓		MS. McBATH (GA)			
MR. ARMSTRONG (ND)				MS. DEAN (PA)	✓		
MR. GOODEN (TX)				MS. ESCOBAR (TX)	✓		
MR. VANDREW (NJ)		✓		MS. ROSS (NC)	✓		
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)				MR. IVEY (MD)	✓		
MR. KILEY (CA)				MS. BALINT (VT)			
MS. HAGEMAN (WY)							
MR. MORAN (TX)		✓					
MS. LEE (FL)		✓					
MR. HUNT (TX)							
MR. FRY (SC)		✓					
MR. RULLI (OH)							

Roll Call Totals:

Ayes: 8

Nays: 13

Present: X

Passed: \_\_\_\_\_

Failed: \_\_\_\_\_

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 10/27/19

Vote on: Escobar Amendment #5 to Contempt Report + DNS

Roll Call #: 4

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>		✓		MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)		✓		MS. LOFGREN (CA)	✓		
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)		✓		MR. COHEN (TN)			
MR. McCLINTOCK (CA)		✓		MR. JOHNSON (GA)	✓		
MR. TIFFANY (WI)				MR. SCHIFF (CA)			
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)		✓		MS. JAYAPAL (WA)			
MS. SPARTZ (IN)		✓		MR. CORREA (CA)			
MR. FITZGERALD (WI)		✓		MS. SCANLON (PA)	✓		
MR. BENTZ (OR)		✓		MR. NEGUSE (CO)			
MR. CLINE (VA)				MS. McBATH (GA)			
MR. ARMSTRONG (ND)				MS. DEAN (PA)	✓		
MR. GOODEN (TX)				MS. ESCOBAR (TX)	✓		
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)	✓		
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)				MR. IVEY (MD)	✓		
MR. KILEY (CA)				MS. BALINT (VT)	✓		
MS. HAGEMAN (WY)							
MR. MORAN (TX)		✓					
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)		✓					
MR. RULLI (OH)							

Roll Call Totals: Ayes: 8 Nays: 11 Present: X  
 Passed: \_\_\_\_\_ Failed: \_\_\_\_\_

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 06/27/24

Vote on: Johnson Amendment #16 to Contempt Report ANS Roll Call #: 5

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>		✓		MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)				MS. LOFGREN (CA)	✓		
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)		✓		MR. COHEN (TN)			
MR. McCLINTOCK (CA)		✓		MR. JOHNSON (GA)	✓		
MR. TIFFANY (WI)				MR. SCHIFF (CA)			
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)	✓		
MR. BISHOP (NC)		✓		MS. JAYAPAL (WA)			
MS. SPARTZ (IN)				MR. CORREA (CA)			
MR. FITZGERALD (WI)		✓		MS. SCANLON (PA)	✓		
MR. BENTZ (OR)		✓		MR. NEGUSE (CO)			
MR. CLINE (VA)				MS. McBATH (GA)			
MR. ARMSTRONG (ND)				MS. DEAN (PA)			
MR. GOODEN (TX)				MS. ESCOBAR (TX)	✓		
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)	✓		
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)				MR. IVEY (MD)	✓		
MR. KILEY (CA)				MS. BALINT (VT)	✓		
MS. HAGEMAN (WY)		✓					
MR. MORAN (TX)		✓					
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)		✓					
MR. RULLI (OH)		✓					

Roll Call Totals: Ayes: 8 Nays: 11 Present: X Failed: X

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 6/27/19

Vote on: Johnson Amendment #7 to Contempt Report ARLS

Roll Call #: 60

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>		✓		MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)				MS. LOFGREN (CA)	✓		
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)		✓		MR. COHEN (TN)			
MR. McCLINTOCK (CA)		✓		MR. JOHNSON (GA)	✓		
MR. TIFFANY (WI)				MR. SCHIFF (CA)			
MR. MASSIE (KY)				MR. SWALWELL (CA)			
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)		✓		MS. JAYAPAL (WA)			
MS. SPARTZ (IN)				MR. CORREA (CA)			
MR. FITZGERALD (WI)		✓		MS. SCANLON (PA)	✓		
MR. BENTZ (OR)		✓		MR. NEGUSE (CO)	✓		
MR. CLINE (VA)		✓		MS. McBATH (GA)			
MR. ARMSTRONG (ND)				MS. DEAN (PA)			
MR. GOODEN (TX)				MS. ESCOBAR (TX)	✓		
MR. VAN DREW (NJ)		✓		MS. ROSS (NC)	✓		
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)		✓		MR. IVEY (MD)	✓		
MR. KILEY (CA)				MS. BALINT (VT)	✓		
MS. HAGEMAN (WY)		✓					
MR. MORAN (TX)		✓					
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)		✓					
MR. RULLI (OH)		✓					

Roll Call Totals:

Ayes: 8

Nays: 13

Present: X

Passed: \_\_\_\_\_

Failed: \_\_\_\_\_

## COMMITTEE ON THE JUDICIARY

118<sup>th</sup> CONGRESS

25-19

## ROLL CALL

Date: 10/27/24

Vote on: Final Passage of the Contempt Report, as amended

Roll Call #: 7

REPUBLICANS	AYE	NO	PRESENT	DEMOCRATS	AYE	NO	PRESENT
MR. JORDAN (OH) <i>Chairman</i>	✓			MR. NADLER (NY) <i>Ranking Member</i>			
MR. ISSA (CA)				MS. LOFGREN (CA)		✓	
MR. GAETZ (FL)				MS. JACKSON LEE (TX)			
MR. BIGGS (AZ)	✓			MR. COHEN (TN)			
MR. McCLINTOCK (CA)	✓			MR. JOHNSON (GA)		✓	
MR. TIFFANY (WI)				MR. SCHIFF (CA)			
MR. MASSIE (KY)				MR. SWALWELL (CA)		✓	
MR. ROY (TX)				MR. LIEU (CA)			
MR. BISHOP (NC)	✓			MS. JAYAPAL (WA)			
MS. SPARTZ (IN)				MR. CORREA (CA)		✓	
MR. FITZGERALD (WI)	✓			MS. SCANLON (PA)		✓	
MR. BENTZ (OR)	✓			MR. NEGUSE (CO)		✓	
MR. CLINE (VA)	✓			MS. McBATH (GA)			
MR. ARMSTRONG (ND)				MS. DEAN (PA)		✓	
MR. GOODEN (TX)				MS. ESCOBAR (TX)		✓	
MR. VAN DREW (NJ)	✓			MS. ROSS (NC)		✓	
MR. NEHLS (TX)				MS. BUSH (MO)			
MR. MOORE (AL)	✓			MR. IVEY (MD)		✓	
MR. KILEY (CA)				MS. BALINT (VT)		✓	
MS. HAGEMAN (WY)	✓						
MR. MORAN (TX)	✓						
MS. LEE (FL)							
MR. HUNT (TX)							
MR. FRY (SC)	✓						
MR. RULLI (OH)	✓						

Roll Call Totals: X Ayes: 13 Nays: 11 Present: \_\_\_\_\_  
 Passed: X Failed: \_\_\_\_\_



### **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.

### **Dissenting Views**

#### **I. INTRODUCTION**

The Majority continues to lash out in anger that Special Counsel Robert Hur exonerated President Biden. After a failed impeachment inquiry, spending millions of taxpayer dollars on a weaponization subcommittee that has gone nowhere, conducting over 125 witness interviews, and reviewing millions of pages of documents, the Majority has absolutely nothing to show for its work this do-nothing Congress. To compound its frustration, the Supreme Court recently shot down one of the Majority's biggest conspiracy theories—that social media companies were coerced by the Biden White House to “censor” harmful disinformation during a global pandemic—noting that a number of the lower court's findings were “clearly erroneous”.

Republicans should cut their losses and use the last few months of this Congress to help their constituents with the very real problems that they face on a daily basis. Instead, the Majority has chosen to spend its valuable resources by threatening President Biden’s ghostwriter, a private citizen named Mark Zwonitzer, with criminal contempt. The Majority is set on obtaining Mr. Zwonitzer’s audio files of President Biden for political purposes. Oversight Chairman James Comer recently let this admission slip in a campaign email stating that if he gets his hands on the audio tapes of President Biden involving the Hur investigation, he will release them to the public to convince “swing voters.”

This contempt report before the House is yet another step in the Majority’s shameful degradation of this Committee’s reputation and decorum. This Committee has now decided to take a private citizen hostage in a dispute between two co-equal branches of government. The Majority is aware that the Department of Justice has possession of these materials, the vast majority of which is private, and that the materials undisputedly invoke weighty separation of powers issues. Letters from both Mr. Zwonitzer’s attorney and the White House have urged the Committee to respect the Constitution by taking its requests to the Executive Branch where they belong.

This is not, however, a legitimate oversight exercise and the reasons offered by the Committee are completely pretextual. For example, the Majority claims it needs the transcripts and audio recording of Mr. Zwonitzer’s interviews to understand the President’s mental state and to ensure that the Special Counsel “appropriately pursued justice.” Congress, however, is not a law enforcement agency. The Majority has no genuine reason for re-investigating a closed case besides its apparent anger that Donald Trump’s political opponent was exonerated. The Majority is also abundantly aware that Special Counsel Hur considered Mr. Zwonitzer’s materials in his exhaustive 15-month probe with 173 interviews (including interviews of Mr. Zwonitzer), seven million pages of documents, and accompanying 345-page final report. Special Counsel Hur has made his decision appropriately and in accordance with all the applicable Department of Justice guidelines. The Majority needs to accept defeat and move on.

This contempt proceeding is a political stunt and nothing more. It should be roundly defeated.

## II. BACKGROUND

On January 12, 2023, Attorney General Merrick Garland appointed Robert Hur, formerly the Trump-appointed U.S. Attorney for the District of Maryland, as Special Counsel charged with investigating President Biden’s handling of classified documents.<sup>1</sup> Hur focused on five categories of documents: (1) documents related to Afghanistan, in particular a handwritten memo from then-Vice President Biden to President Obama dated November 28, 2009, detailing his concerns about deploying additional troops to the country;<sup>2</sup> (2) personal notebooks from the President’s time as Vice

<sup>1</sup>Press Release, *Appointment of Robert K. Hur as Special Counsel*, U.S. DEP’T OF JUSTICE (Jan. 12, 2023), <https://www.justice.gov/d9/2023-01/Order.Appointment%20of%20Robert%20Hur.11223%20%28002%29.pdf>.

<sup>2</sup>Special Counsel Robert K. Hur, *Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn*

President;<sup>3</sup> (3) certain documents found at the Penn Biden Center, including documents related to negotiations about the Iran nuclear deal;<sup>4</sup> (4) documents found at the University of Delaware dating to the President's time as a senator;<sup>5</sup> and (5) other documents found in the President's Delaware home, including briefing binders from trips that the President took while he was vice president.<sup>6</sup> Over the course of Hur's 15-month probe, his investigators conducted 173 interviews of 147 witnesses and reviewed more than seven million documents. Hur submitted his 345-page final report to Attorney General Garland on February 5, 2024, and Garland publicly released it in full on February 8, 2024.

The Hur Report exonerates President Biden of any prosecutable charges. Specifically, to be charged with the unauthorized retention of national defense information under the Espionage Act, the government must show that "(1) the defendant had unauthorized possession of a document, writing or note; (2) the document, writing, or note related to the national defense; and (3) the defendant willfully retained the document, writing, or note and failed to deliver it to an employee or officer entitled to receive it."<sup>7</sup> Hur found that the evidence does not establish beyond a reasonable doubt that the President willfully retained classified information. He also found that the President likely did not know certain information was classified, and that he likely believed he was permitted to retain certain documents as personal records.<sup>8</sup> Hur's report also distinguished Mr. Biden's conduct from that of Mr. Trump.<sup>9</sup>

#### A. MR. ZWONITZER TAPED PRESIDENT BIDEN'S INTERVIEWS IN THE ORDINARY COURSE

Between the spring of 2016 and summer of 2017, while writing Mr. Biden's memoir, *Promise Me, Dad*, Mr. Zwonitzer made audio recordings of more than a dozen interviews with Biden, as well as additional interviews with some of Mr. Biden's family members, and created transcripts of these interviews.<sup>10</sup> During these interviews, Mr. Biden often referred to the notebooks he kept during his Vice Presidency, and sometimes read aloud from them to Mr. Zwonitzer.<sup>11</sup> On one occasion, Mr. Biden showed Mr. Zwonitzer a page to help decipher Mr. Biden's handwriting. However, Mr. Biden never let Mr. Zwonitzer photocopy or retain the notebooks.<sup>12</sup>

Special Counsel Hur found that Mr. Biden's notebooks contained some classified information up to the Secret and Top Secret level.<sup>13</sup> Hur *did not* find that Mr. Biden regularly read Mr. Zwonitzer classified information; to the contrary, "when Mr. Biden came to potentially classified material in his notebook entries, he appears to have sometimes stopped at or skipped over the potentially classified ma-

*Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.*, U.S. DEP'T OF JUSTICE at 145–48 (Feb. 8, 2024), <https://www.justice.gov/storage/report-from-special-counsel-robert-k-hur-february-2024.pdf> [Hereinafter Hur Report].

<sup>3</sup>*Id.* at 2–3.

<sup>4</sup>*Id.* at 256–311.

<sup>5</sup>*Id.* at 312–25.

<sup>6</sup>*Id.* at 326–33.

<sup>7</sup>*Id.* at 178 (citation omitted).

<sup>8</sup>*Id.* at 2–10.

<sup>9</sup>*Id.* at 10–11, 250.

<sup>10</sup>*Id.* at 100.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 101–102.

<sup>13</sup>*Id.*

terial,” and specifically noted that he needed to be careful not to disclose classified information.<sup>14</sup> On occasion, however, Mr. Biden did read aloud to Mr. Zwonitzer some information from his meeting notes taken when he was Vice President that was classified up to the Secret level, and on one occasion when Mr. Biden could not decipher his own handwriting, he showed Mr. Zwonitzer a page of his notebook that Mr. Biden noted “[wasn’t] marked classified,” but “may” have had classified information on it.<sup>15</sup>

Hur determined that he would not be able to prove beyond a reasonable doubt that Mr. Biden willfully retained the classified information in the notebooks. Specifically, Hur found that Mr. Biden “thought his notebooks were his personal property and that he was allowed to take them home after his vice presidency, even if they contained classified information.” Hur noted that President Biden “was emphatic, declaring that his notebooks are ‘my property,’ and that ‘every president before me has done the exact same thing.’”<sup>16</sup> Hur noted that “at least one former president,” Ronald Reagan, “and the Department of Justice also have concluded that a former president may keep handwritten notes even if they contain classified information.”<sup>17</sup> As a result, “[m]ost jurors would likely find this precedent and Mr. Biden’s claimed reliance on it . . . to be compelling evidence that Mr. Biden did not act willfully.”<sup>18</sup>

B. MR. ZWONITZER DELETED SOME AUDIO FILES OUT OF GENUINE DESIRE TO PROTECT HIS CLIENT’S PRIVACY AND NOT WITH INTENT TO OBSTRUCT ANY INVESTIGATION

At some point after Special Counsel Hur was appointed, Mr. Zwonitzer deleted some of the audio files of his interviews with President Biden from his computer.<sup>19</sup> Mr. Zwonitzer believed this happened at some point between January and February 2023, and he stated that it was his normal practice to delete audio files of his interviewees after he was finished writing the relevant product, in order to protect his interviewee’s privacy.<sup>20</sup>

Subsequently, FBI investigators requested an interview with Mr. Zwonitzer and asked for records related to his work on *Promise Me, Dad*, and Mr. Zwonitzer produced records, including nearly verbatim transcripts of the interviews with President Biden as well as the audio recordings from some of the interviews.<sup>21</sup> When investigators realized some audio files were missing and learned that they had been deleted, Mr. Zwonitzer “provided all electronic devices that contained or were used to create the recordings and transcripts related to *Promise Me, Dad*.”<sup>22</sup> All deleted audio files were recovered by investigators, though on three of the files “portions of the audio appeared to be missing, and a fourth file appeared to have portions overwritten with a separate recording.”<sup>23</sup> Special Counsel Hur’s report notes that “[t]hese results are possible when

<sup>14</sup> *Id.* at 103.

<sup>15</sup> *Id.* at 103–106.

<sup>16</sup> *Id.* at 232.

<sup>17</sup> *Id.* at 239.

<sup>18</sup> *Id.* at 240–41.

<sup>19</sup> *Id.* at 334.

<sup>20</sup> *Id.* at 336–337.

<sup>21</sup> *Id.* at 335.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

forensic tools are used to recover deleted files.”<sup>24</sup> For each of these four files that were not able to be fully recovered, Mr. Zwonitzer voluntarily produced transcripts of the interviews to investigators.<sup>25</sup> Subsequently, “Zwonitzer gave two consensual interviews during which he provided relevant information without seeking immunity or any protections or assurances (such as a proffer agreement).”<sup>26</sup>

In these interviews, Mr. Zwonitzer explained that although he was aware of the Special Counsel’s investigation at the time he deleted the files, he “did not expect the investigation to involve him” or think the files contained classified information.<sup>27</sup> He also gave three specific reasons for why he deleted the audio recordings:

- He had a practice of deleting audio recordings after he finished a piece of written work, to protect the interviewee’s privacy;
- He had received threatening emails from individuals hostile to Mr. Biden, and he was “concerned his computer could be hacked” and the audio files stolen and leaked online, which contained deeply personal information about Mr. Biden’s experience losing his son, Beau; and
- He had a heightened sense of awareness about such files being stolen because he had recently written a book on Pegasus, a cyber-surveillance system that could be used to spy on individuals around the world.<sup>28</sup>

Mr. Zwonitzer was also clear that he did not delete the files to obstruct an investigation, and stated, “when I got the subpoena and when I realized that I still had audio that I did not know I had on the laptop, I made sure to preserve that for this investigation.”<sup>29</sup> He also confirmed that no one from President Biden’s circle instructed him to delete any files.<sup>30</sup>

#### C. SPECIAL COUNSEL HUR’S FOUND AGAINST PROSECUTING MR. ZWONITZER FOR OBSTRUCTION

Special Counsel Hur reviewed this information and recommended against prosecuting Mr. Zwonitzer for obstruction. Specifically, the Special Counsel noted that “the available evidence cannot establish beyond a reasonable doubt that Zwonitzer [deleted the recordings] with the intent to impede, obstruct, or influence this federal investigation,” which would have been required for a conviction, and that “Zwonitzer offered plausible, innocent reasons for why he deleted the recordings.”<sup>31</sup> He also noted that Mr. Zwonitzer’s production of records and verbatim transcripts of deleted audio files, his voluntary cooperation in two interviews without pleading the Fifth Amendment, and his forthright testimony to investigators all weigh against the possibility that Mr. Zwonitzer actively tried to impede an investigation.<sup>32</sup> Moreover, the Special Counsel noted that given Mr. Zwonitzer’s cooperation and good

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 335–336.

<sup>26</sup> *Id.* at 336.

<sup>27</sup> *Id.* at 335, 338.

<sup>28</sup> *Id.* at 336–337.

<sup>29</sup> *Id.* at 338.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 341.

<sup>32</sup> *Id.* at 342–343.

faith efforts, it would—on balance—deter good faith cooperation of future witnesses in other investigations if the Department were to prosecute Mr. Zwonitzer.<sup>33</sup>

#### D. THE MAJORITY’S REQUESTS FOR RECORDS AND AUDIO FILES

The Majority has requested a series of documents, files, transcripts, and audio recordings from both the Department of Justice (“DOJ” or “the Department”) and Mr. Zwonitzer directly. Mr. Zwonitzer has already turned over relevant information to the Department, and—as described in Special Counsel Hur’s report—has fully complied with the Department’s investigation of President Biden.

##### 1. *Majority’s Engagement with DOJ Regarding Mr. Zwonitzer*

On February 7, 2024, the Attorney General notified the Committee that Special Counsel Hur had concluded his investigation.<sup>34</sup> The following day, the Attorney General produced the entire unredacted report to Congress and made it available to the public.<sup>35</sup> Four days later, Chairman Jordan, along with House Oversight Chairman James Comer, and House Ways & Means Chairman Jason Smith wrote to the Attorney General and demanded that he produce to the Committees:

1. All documents and communications, including audio and video recordings, related to the Special Counsel’s interview of President Biden;
2. All documents and communications, including audio and video recordings, related to the Special Counsel’s interview of Mark Zwonitzer;
3. The documents identified as “A9” and “A10” in Appendix A of Mr. Hur’s report, which relate to President Biden’s December 11, 2015 call with then-Ukrainian Prime Minister Arseniy Yatsenyuk; and
4. All communications between or among representatives of the Department of Justice, including the Office of the Special Counsel, the Executive Office of the President, and President Biden’s personal counsel referring or relating to Mr. Hur’s report.<sup>36</sup>

In a series of correspondence after this initial February 7, 2024, communication, DOJ continually provided responsive information and documents to the Committee consistent with DOJ regulations, but Committee Republicans repeatedly asserted that the DOJ’s productions were inadequate and issued subpoenas for more information. In one such instance, on March 25, 2024, Chairmen Jordan and Comer notified the DOJ that their compliance had been deficient and requested that the Department provide additional information, which included reiterating the request for the transcripts

<sup>33</sup>*Id.* at 343–344.

<sup>34</sup>Letter from the Hon. Merrick B. Garland, Att’y Gen., to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Feb. 7, 2024).

<sup>35</sup>*See* Letter from the Hon. Merrick B. Garland, Att’y Gen., to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Feb. 8, 2024).

<sup>36</sup>Letter from the Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, et al. to the Hon. Merrick Garland, Att’y Gen. (Feb. 12, 2024).

and audio recordings of Special Counsel Hur's interviews of Mr. Zwonitzer.<sup>37</sup>

On April 8, 2024, the DOJ provided the transcripts of Special Counsel Hur's interviews of Mr. Zwonitzer, which took place on July 31, 2023 and January 4, 2024.<sup>38</sup> The Committees responded on April 15, 2024, claiming that the DOJ's "response to the subpoenas remains inadequate, suggesting that you are withholding records for partisan purposes and to avoid political embarrassment for President Biden."<sup>39</sup>

## 2. Majority's Engagement with Mr. Zwonitzer

In addition to sending requests and subpoenas to DOJ, Committee Republicans requested information from Mr. Zwonitzer directly. On February 14, 2024, Chairman Jordan wrote to Mr. Zwonitzer requesting all information related to his writing of President Biden's memoirs.<sup>40</sup> This request included the production of all documents, communications, phone logs, transcripts, audio recordings, and more related to Mr. Zwonitzer's work with President Biden on the memoirs.<sup>41</sup> It also demanded that Mr. Zwonitzer appear for a transcribed interview before the Committee.<sup>42</sup>

Chairman Jordan issued a subpoena to Mr. Zwonitzer for the requested documents and records on March 22, 2024, citing "Congress's 'broad and indispensable' power to conduct oversight."<sup>43</sup> Mr. Zwonitzer's attorney, Louis M. Freeman, responded on April 12, 2024, outlining constitutional concerns with the subpoena.<sup>44</sup> Specifically, he pointed out that the dozens of hours of interview audio recordings sought by the Committee contains extremely personal information, constituting "personal papers" of the President, which is subject to a higher level of scrutiny when sought by Congress via a subpoena.<sup>45</sup> When Congress seeks the disclosure of personal information of a president, it is required to show how that information sought will advance a specific legislative purpose, and that it could not reasonably obtain the information it needs from other sources.<sup>46</sup> Moreover, Mr. Freeman explained that the District of Columbia Circuit Court respects a reporter's privilege, and that this situation falls squarely under that protection.<sup>47</sup> He finally explained how the Committee has not met

<sup>37</sup> Letter from the Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, & the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, to the Hon. Merrick B. Garland, Att'y Gen. (Mar. 25, 2024).

<sup>38</sup> See Letter from Carlos Felip Uriarte, Asst. Att'y Gen., to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary & the Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability (Apr. 8, 2024).

<sup>39</sup> Letter from the Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, & the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, to the Hon. Merrick B. Garland, Att'y Gen. at 1 (Apr. 15, 2024).

<sup>40</sup> Letter from the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Mark Zwonitzer (Feb. 14, 2024).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Letter from Louis Freeman, Esq. to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (April 12, 2024).

<sup>45</sup> *Id.*; See *Trump v. Mazars*, 140 S. Ct. 2019 (2020).

<sup>46</sup> Letter from Louis Freeman, Esq. to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (April 12, 2024); See *United States v. Watkins*, 354 U.S. 178 (1957).

<sup>47</sup> Letter from Louis Freeman, Esq. to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (April 12, 2024).

these standards, especially given that their “legislative purpose” was vague and unclear.<sup>48</sup>

On May 6, 2024, Chairman Jordan responded to Mr. Freeman, stating that “[t]he objections raised are unfounded and do not excuse [Mr. Zwonitzer] from complying with a Congressional subpoena,” and asserted that “[n]o valid constitutional privilege protects the information in your client’s possession from disclosure.”<sup>49</sup> On May 20, 2024, Mr. Freeman responded to Chairman Jordan, stating that his prior concerns still remain.<sup>50</sup> He also asserted that it would be more appropriate to seek this information from the Department rather than Mr. Zwonitzer, a private citizen; that the Hur report already covered the information sought by the Committee; and that the Committee was seeking First Amendment protected information from a journalist without sufficiently showing specific legislative need or intent, and without proving they had exhausted all other options to gather the information, as required by existing caselaw.<sup>51</sup>

### 3. *The Executive Branch Instructed Mr. Zwonitzer that he is not Authorized to Provide the Materials to the Committee*

On June 25, 2024, the White House wrote to Mr. Zwonitzer’s attorney, Mr. Freeman, confirming that, of the “broad swaths of personal information that President Biden provided to [Mr. Zwonitzer] in confidence as part of his process for writing his memoirs,” the “vast majority . . . is private.”<sup>52</sup> The White House stated that the Committee’s demands invoked weighty separation of powers issues designed to protect private information of the President from harassment by the legislative branch, and noted that the “[t]he fact that the Committee’s subpoena is addressed to [Mr. Zwonitzer], rather than the Executive Branch, does not alter these principles.”<sup>53</sup> The letter further raised additional concerns that some of the materials sought by the Majority implicated sensitive information “such as details about confidential and non-public conversations among senior presidential advisors,” which implicate longstanding protections against disclosure to safeguard the “‘complete candor and objectivity’ of presidential advisors.”<sup>54</sup> The White House concluded that Mr. Zwonitzer “is not authorized to provide any of the President’s information until it has been reviewed by the Executive Branch to resolve this ‘interbranch conflict,’ according to the longstanding accommodation process, consistent with how courts have advised the branches to resolve such disputes.”<sup>55</sup>

On June 25, 2024, the White House wrote separately to Chairman Jordan informing him that, “Mr. Zwonitzer is not authorized to produce to Congress any of the President’s information absent a resolution of the weighty constitutional issues between the Exec-

<sup>48</sup> *Id.*

<sup>49</sup> Letter from the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Louis Freeman, Esq. (May 6, 2024).

<sup>50</sup> Letter from Louis Freeman, Esq. to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (May 20, 2024).

<sup>51</sup> *Id.*

<sup>52</sup> Letter from Edward N. Siskel, Counsel to the President, The White House, to Mr. Louis M. Freeman, Esq., Counsel to Mark Zwonitzer, (June 25, 2024).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citing *United States v. Nixon*, 481 U.S. 683, 706 (1974); Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209).

<sup>55</sup> *Id.* (citations omitted) (emphasis added).



utive and Legislative Branches.”<sup>56</sup> Implicated Executive Branch interests include “details about confidential and non- public conversations among senior presidential advisors,” which have long been protected to “safeguard the ‘complete candor and objectivity’ of presidential advisors.”<sup>57</sup> The letter also highlighted that the information sought by the Committee has already been investigated by Special Counsel Hur, who detailed his findings in an exhaustive report, and that “[a]s the Committee must surely be aware, it is not legitimate oversight to seek to re-investigate that closed matter.”<sup>58</sup>

The White House also offered to work with Congress: “if you were sincerely interested in examining the handling of classified information, you would engage with the Executive Branch, not a private citizen with no authority related to classified information.”<sup>59</sup> It also admonished the Committee’s treatment of Mr. Zwonitzer, stating: “The Committee’s actions are an obvious example of the very weaponization of government for political purposes that you claim to decry. Putting a private citizen in your political crosshairs and threatening him with criminal prosecution, simply because you refuse to engage with the Executive Branch, is out of bounds.”<sup>60</sup>

On June 25, 2024, Mr. Freeman wrote to Chairman Jordan separately requesting that he not proceed with his plans to hold his client in contempt.<sup>61</sup> Mr. Freeman reiterated his client’s longstanding concerns that the committee lacked a legitimate congressional purpose in seeking the requested materials, and that political rather than legislative purposes were behind the Committee’s actions.<sup>62</sup> Mr. Freeman posited as an example Representative James Comer’s fundraising email promising that he will release the recordings to the public for purposes of showing “Biden’s mental state,” in order to help “with swing voters.”<sup>63</sup> Mr. Freeman also pointed out that the House of Representatives had successfully obtained numerous documents and materials from the Department of Justice and that it had plans to sue the Attorney General to compel additional files.<sup>64</sup> Mr. Freeman also cited concerns regarding the deeply private nature of President Biden’s conversations in the materials (including the subject of his son’s death), which likely constitute “personal papers” of the President. Finally, Mr. Freeman invoked additional constitutional privilege concerns under the First Amendment given that Mr. Zwonitzer is an author and journalist, and the Fifth Amendment.<sup>65</sup>

### III. CONCERNS

#### A. THE MAJORITY MISREPRESENTS THE RECORD

As a threshold matter, the Majority severely misrepresents the record throughout its report in numerous material respects. It is

<sup>56</sup> Letter from Edward N. Siskel, Counsel to the President, to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. at 3 (June 25, 2024).

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.* at 1.

<sup>60</sup> *Id.* at 2.

<sup>61</sup> Letter from Louis Freeman, Esq. to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, (June 25, 2024).

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* (citing Email dated May 16, 2024 from “The desk of the Oversight Chairman.”).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

undisputed that Republican-appointed Special Counsel Hur exonerated President Biden. Hur found insufficient evidence to prove beyond a reasonable doubt that President Biden willfully retained any of the classified documents, and in some cases that the documents themselves were not even classified. President Biden's age was not a material aspect of Hur's decision to decline prosecution, contrary to assertions by members of the Majority. Finally, the report ignores clear historical context provided by the special counsel regarding President Biden's retention and use of his notebook, which other Presidents have done.

### *1. President Biden was Cleared from any Criminal Charges*

Special Counsel Hur focused on five categories of documents in the investigation: (1) documents related to Afghanistan, in particular a handwritten memo from then-Vice President Biden to President Obama dated November 28, 2009, detailing his concerns about deploying additional troops to the country;<sup>66</sup> (2) personal notebooks from the President's time as Vice President;<sup>67</sup> (3) certain documents found at the Penn Biden Center, including documents related to negotiations about the Iran nuclear deal;<sup>68</sup> (4) documents found at the University of Delaware dating to the President's time as a senator;<sup>69</sup> and (5) other documents found in the President's Delaware home, including briefing binders from trips that the President took while he was vice president.<sup>70</sup> With respect to each category of documents, Hur found insufficient evidence to prove beyond a reasonable doubt that President Biden willfully retained any of the classified documents, and in some cases found that the information was not actually classified.

#### *a. Afghanistan Documents*

After leaving the vice presidency in 2017, now-President Biden retained folders of documents related to the 2009 troop surge in Afghanistan, including a handwritten memo he drafted opposing the surge and documents supporting that position. Hur determined that "the evidence falls short of establishing . . . beyond a reasonable doubt" that President Biden willfully retained these classified documents.<sup>71</sup>

During a February 16, 2017, recorded interview with the ghostwriter for his book, *Promise Me*, Mr. Biden said that he had just found classified material "downstairs," and the context indicated that those documents might relate to foreign policy in Afghanistan.<sup>72</sup> At the time of the interview, Mr. Biden was in a rental home in Virginia. The FBI ultimately recovered the Afghanistan documents from Mr. Biden's Delaware residence in 2022, while Mr. Biden was the sitting president and thus authorized to have classified documents in his residence. Special Counsel Hur determined that because Mr. Biden was permitted to have classified documents in his residence in 2022, the only possible charges related to the

<sup>66</sup>*Id.* at 145–148.

<sup>67</sup>*Id.* at 2–3.

<sup>68</sup>*Id.* at 256–311.

<sup>69</sup>*Id.* at 312–325.

<sup>70</sup>*Id.* at 326–333.

<sup>71</sup>*Id.* at 204.

<sup>72</sup>*Id.* at 108.

Afghanistan documents would have had to have come from Mr. Biden willfully possessing them in Virginia in 2017.

Hur concluded that he could not prove that Mr. Biden willfully possessed these documents:

(1) Mr. Biden could have found the classified documents in Virginia in 2017 and forgotten them soon after, because finding classified documents so soon after leaving the vice presidency “may not have been something he found memorable. Mr. Biden, after all, had seen classified documents nearly every day for the previous eight years.”<sup>73</sup>

(2) There was “no definitive evidence” that the classified Afghanistan documents were stored in Mr. Biden’s Virginia home.<sup>74</sup> Specifically, Hur determined that other than the ghostwriter recording, there was “no witness, photo, text message, or other evidence [that] establishes that the documents were ever stored in Virginia.”<sup>75</sup>

(3) Mr. Biden might have been referring to a folder containing documents which were marked classified in 2009, but “there are serious questions about whether those particular documents remain sensitive today, or when Mr. Biden met with [the ghostwriter] in 2017.”<sup>76</sup> With respect to the handwritten memo in particular, Hur noted that Mr. Biden “said he did not consider the memo classified when he discussed it with his ghostwriter,” and that “the memo concerned deliberations from more than seven years earlier about the Afghanistan troop surge, and in the intervening years those deliberations had been widely discussed in public, so Mr. Biden could have reasonably expected that the memo’s contents became less sensitive over time.”<sup>77</sup>

Hur also noted that it would be difficult for prosecutors to win a case based on the Afghanistan documents because it could be hard to prove that “the documents still contain sensitive national defense information” and because at trial he would present credibly to a jury.

#### *b. President Biden’s Personal Notebooks*

As vice president, Mr. Biden regularly took handwritten notes in notebooks during briefings, including during classified briefings.<sup>78</sup> After leaving office, he kept these notebooks with him at his residence.<sup>79</sup> Special Counsel Hur determined that he would not be able to prove beyond a reasonable doubt that Mr. Biden willfully retained the classified information in the notebooks.

Specifically, Hur found that Mr. Biden “thought his notebooks were his personal property and that he was allowed to take them home after his vice presidency, even if they contained classified information.” Hur noted that Mr. Biden “was emphatic, declaring that his notebooks are ‘my property,’ and that ‘every president be-

<sup>73</sup>*Id.* at 205.

<sup>74</sup>*Id.* at 211.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 216.

<sup>77</sup>*Id.* at 221.

<sup>78</sup>*Id.* at 53.

<sup>79</sup>*Id.*

fore me has done the exact same thing.’”<sup>80</sup> Hur noted that “at least one former president,” Ronald Reagan, “and the Department of Justice also have concluded that a former president may keep handwritten notes even if they contain classified information.”<sup>81</sup> As a result, “[m]ost jurors would likely find this precedent and Mr. Biden’s claimed reliance on it . . . to be compelling evidence that Mr. Biden did not act willfully.”<sup>82</sup>

*c. Penn Biden Center Documents, University of Delaware Documents, and other Documents Found in Biden’s Residence.*

The FBI also recovered marked classified documents from Mr. Biden’s time as vice president at the Penn Biden Center and in his Delaware residence, and documents from Biden’s time as senator in papers at the University of Delaware. In each case, the special counsel determined that Mr. Biden did not willfully retain the documents and that they were likely brought to their respective locations by mistake.<sup>83</sup> In reaching these conclusions, the special counsel referred to “the numerous previous instances in which marked classified documents have been discovered intermixed with the personal papers of former Executive Branch officials and members of Congress.”<sup>84</sup>

*2. The Majority Misrepresented the Role that President Biden’s Age and Memory Played in Hur’s Investigation and Decision-Making*

The Majority has misrepresented the role that the President’s age and memory played in Special Counsel Hur’s investigation and decision-making. The Majority has, for example, accused President Biden of not being able to recall the date of his son Beau’s death. To be clear, Special Counsel Hur’s reference to President Biden’s age and memory was not only wildly inappropriate, but it was unsupported by the actual record. The transcript of Mr. Biden’s interview clearly shows he *did* recall the date. In the interview transcripts, President Biden clearly recalled the date of his son’s death, saying: “what month did Beau die? Oh God, May 30.”<sup>85</sup> The special counsel’s decision to make this deeply personal and emotional response from the President part of his report was completely out of bounds and wrong. The Majority’s effort to exploit this response for partisan political gain is dishonest and shameful.

The transcript also shows that President Biden was in clear command of his cognitive functions and that he was able to recall items with specific detail during 5 hours of interview conducted when an international crisis was unfolding in the Middle East.<sup>86</sup> In fact, Special Counsel Hur himself remarked that the president had a

<sup>80</sup> *Id.* at 232.

<sup>81</sup> *Id.* at 239.

<sup>82</sup> *Id.* at 240–41.

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Id.*

<sup>85</sup> Interview with President Joseph R. Biden, Jr. at Day 1, p. 82 (October 8, 2023) (on file with Committee).

<sup>86</sup> The day of the interview, October 8, 2023, was the day after the horrific and deadly Hamas-led attack on Israel. Mr. Hur at the beginning of the interview remarked: “. . . Well Mr. President, I do want to take an additional minute and thank you for being here and making this time for us. I know there’s a lot of other things in the world going on that demand your attention.” *Id.* at Day 1, p. 3. President Biden subsequently acknowledged that he had “just got off the phone with Bibi Netanyahu.” *Id.*

“photographic understanding and recall” in response to certain questions.<sup>87</sup> President Biden was also able to provide detailed and vivid responses regarding events that occurred over 15 years ago including detailed discussions of debates regarding Afghanistan policy.<sup>88</sup> He was able to provide detailed descriptions of how the Naval Observatory was laid out and his office.<sup>89</sup> He was able to provide detailed explanations of the layout of his Wilmington home.<sup>90</sup> Hur observed: “[W]e expect the evidence of Mr. Biden’s state of mind to be compelling,” pointing to his “clear, forceful testimony.”<sup>91</sup>

Finally, the Majority’s Report falsely claims that the special counsel found President Biden to have met the elements of a crime, but that justice would not be served because of his age and memory.<sup>92</sup> Chairman Jordan stated as much in his opening statement: “All this, and yet Special Counsel Hur declined to prosecute Joe Biden because ‘he is a sympathetic, well meaning, elderly man with a poor memory.’”<sup>93</sup> As explained above, Special Counsel Hur exonerated President Biden for each of the categories of documents for reasons because there lacked evidence beyond a reasonable doubt that he had willfully retained any classified documents. President Biden’s memory is not an element of any crime that Special Counsel Hur was charged with investigating.

### 3. *The Majority’s Accusations Regarding President Biden’s Notebooks Ignore the Clear Findings and Historical Context as Described in the Hur Report*

The Majority’s report repeatedly references the executive summary of Special Counsel Hur’s report, which claims that the investigation “uncovered evidence that Biden willfully retained and disclosed classified materials after his vice presidency when he was a private citizen” including “notebooks containing Mr. Biden’s handwritten entries about issues of national security and foreign policy.”<sup>94</sup> However, the Majority ignores Hur’s determination that the evidence would not “meet the government’s burden at trial, particularly the requirement to prove that Mr. Biden intended to do something the law forbids.”<sup>95</sup>

Hur’s investigation clearly shows that President Biden “believed he was allowed to keep the notebooks in his home”<sup>96</sup> and explains that “this view finds some support in historical practice.”<sup>97</sup> According to Hur’s report, “the clearest example is President Reagan, who left the White House in 1989 with eight years’ worth of handwritten diaries, which he appears to have kept at his California home even though they contained Top Secret information.”<sup>98</sup>

Like President Biden’s notebooks, President Reagan’s diaries were used as a source for several books and were read aloud in the den of his home after leaving office. According to Hur’s report, Rea-

<sup>87</sup> *Id.* at Day 1, pp. 47, 92.

<sup>88</sup> *Id.* at Day 2, pp. 18–19, 49–50.

<sup>89</sup> *Id.* at Day 1, pp. 31–32, 32–33.

<sup>90</sup> *Id.* at Day 1, pp. 42–45.

<sup>91</sup> Hur Rept. *supra* at 233.

<sup>92</sup> See, e.g., Contempt Report at 6.

<sup>93</sup> Contempt Markup Tr. (June 27, 2024).

<sup>94</sup> *Id.* at 1.

<sup>95</sup> *Id.* at 8.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 9.

<sup>98</sup> *Id.*

gan’s diaries “served as sources for at least three publications that Mr. Reagan or his representatives authorized: (1) *An American Life*, Mr. Reagan’s autobiography published in 1990; (2) *Dutch*, a biography authored by Edmund Morris and published in 1999; and (3) *The Reagan Diaries*, a collection of the diaries themselves first published in 2007 after Mr. Reagan’s death.”<sup>99</sup> Hur’s report also acknowledges that *An American Life* includes “dozens of verbatim quotations from Mr. Reagan’s diaries”<sup>100</sup> and acknowledges that “[f]or several years after their return to California, the Reagans would often sit together in their den after dinner, reading aloud from their diaries and reminiscing about their White House years.”<sup>101</sup>

#### B. THE MAJORITY IS TARGETING AN INNOCENT CIVILIAN IN A SEPARATION OF POWERS DISPUTE

The Majority is taking a private citizen hostage and pitting him between the demands of two co-equal branches of the federal government. There are numerous constitutional concerns implicated by the request of these materials, as raised in the multiple letters to Chairman Jordan, written both by Mr. Zwonitzer’s attorney as well as the White House.

First, the Supreme Court in *Mazars* made it clear that the President’s personal information raises “significant separation of powers issues.”<sup>102</sup> “Given the close connection between the Office of the President and its occupant, congressional demands for the President’s papers can implicate the relationship between the branches regardless whether those papers are personal or official.”<sup>103</sup> The concern is that, “[e]ither way, a demand may aim to harass the President or render him ‘complaisan[t] to the humors of the Legislature.’”<sup>104</sup> The *Mazars* Court commented that the “separation of powers concerns are no less palpable . . . simply because the subpoenas were issued to third parties.”<sup>105</sup> Otherwise “Congress could sidestep constitutional requirements any time a President’s information is entrusted to a third party. . . .”<sup>106</sup> “The Constitution does not tolerate such ready evasion; it ‘deals with substance, not shadows.’”<sup>107</sup>

The White House also raised concerns about the nature of the Committee’s “sweeping subpoena,” which “encompasses information—such as details about confidential and non-public conversations among senior presidential advisors—that Congress, the Executive Branch, and the Supreme Court have long protected against unwarranted disclosure in order to safeguard the ‘complete candor and objectivity’ of presidential advisors.”<sup>108</sup> As the White House stated in its June 25, 2024 letter:

<sup>99</sup>*Id.* at 197.

<sup>100</sup>*Id.*

<sup>101</sup>*Id.* at 196; *See also*: Ronald Reagan, *THE REAGAN DIARIES* x (Douglas Brinkley ed., First Harper Perennial ed. 2009);

<sup>102</sup>*Mazars*, 591 U.S. at 866.

<sup>103</sup>*Id.* at 868.

<sup>104</sup>*Id.* (quoting Federalist No. 71).

<sup>105</sup>*Id.* at

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* (quoting *Cummings v. Missouri*, 71 U.S. 277 (1867)).

<sup>108</sup>Letter from Edward N. Siskel, Counsel to the President, to the Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. at 3 (June 25, 2024).

Mr. Zwonitzer is not authorized to produce to Congress any of the President's information absent a resolution of the weighty constitutional issues between the Executive and Legislative Branches. The Committee should engage with the Executive Branch to resolve this "interbranch conflict," according to the longstanding accommodation process, consistent with how courts have advised the branches to resolve such disputes. Refusing to do so would expose a contempt for the rule of law and the Constitution.<sup>109</sup>

With this contempt resolution, the Majority has chosen to bully an innocent private citizen in what should be a dispute with the Executive Branch. The Majority is fully aware of its constitutional obligations to resolve this inter-branch conflict, and it is aware that the Department of Justice has possession of these materials. Yet instead of engaging the Executive Branch, the Committee has advanced criminal contempt proceedings (with potential incarceration) even when Mr. Zwonitzer has been instructed by the White House that he is not authorized to release the materials. Using the power of Congress to bully Mr. Zwonitzer under these circumstances is inappropriate and repugnant to the standing and reputation of this Committee.

#### C. THE MAJORITY HAS NOT STATED A LEGITIMATE LEGISLATIVE PURPOSE

The Majority is unable to articulate a legitimate legislative purpose in demanding these personal audio tapes of President Biden. First, the Majority claims, in circular fashion, that it needs these audio tapes to "properly assess whether Special Counsel Hur appropriately pursued justice . . ." which may cause the Committee to consider "changing certain procedures . . . to better ensure that the Department pursues impartial justice."<sup>110</sup> The Committee also alludes to partisan bias because Donald Trump was prosecuted in an unrelated case by a separate special counsel while Special Counsel Hur declined to bring charges against President Biden.<sup>111</sup>

These strained arguments are part of the Majority's continuing efforts to rewrite Special Counsel Hur's report. They have nothing to do with any legitimate purpose. There is simply no evidence that the Department took any action that calls into question its impartiality. Stark differences exist between former President Trump's criminal mishandling of documents versus the circumstances that led to a special counsel investigation into President Biden.

As noted by Special Counsel Hur in his report:

> "[S]everal material distinctions between Mr. Trump's case and Mr. Biden's are clear." There are "serious aggravating facts" in the Trump case.<sup>112</sup>

> "Most notably, after being given multiple chances to return classified documents and avoid prosecution, Mr. Trump allegedly did the opposite. According to the indictment, he not only refused to return the documents for many months, but he

<sup>109</sup> *Id.* (citations omitted).

<sup>110</sup> Contempt Rep. at 12.

<sup>111</sup> *Id.*

<sup>112</sup> Hur Report, *supra* note 2, at 11.

also obstructed justice by enlisting others to destroy evidence and then to lie about it.”<sup>113</sup>

➤ “In contrast, Mr. Biden turned in classified documents to the National Archives and the Department of Justice, consented to the search of multiple locations including his homes, sat for a voluntary interview, and in other ways cooperated with the investigation.”<sup>114</sup>

Unlike the deliberate acts by former President Trump to retain and conceal classified materials from the federal government, Special Counsel Hur found likely inadvertence and/or mistake. For example, Special Counsel Hur made the following findings:

➤ “[W]e find the evidence as a whole insufficient to meet the government’s burden of proving that Mr. Biden willfully retained the Afghanistan documents in the Virginia home in 2017.”<sup>115</sup>

➤ “For other recovered classified documents, the decision to decline criminal charges was straightforward.”<sup>116</sup>

➤ “[T]he evidence suggests that Mr. Biden did not willfully retain these documents and that they could plausibly have been brought to these locations by mistake.”<sup>117</sup>

Unlike President Biden, Donald Trump flagrantly took and concealed highly classified documents. Mr. Trump’s actions are extremely serious and warranted the 32 counts of Willful Retention of National Defense Information, Conspiracy to Obstruct Justice, and Making False Statements on which he was charged.<sup>118</sup> The Majority’s efforts to conflate the two cases is morally bankrupt and dishonest. It also shows that it is in fact the Majority that seeks to discredit and undermine the fair administration of justice.

The Majority also states that it needs the materials to assess potential reforms to the “willfulness standard” for disclosing classified information and that it needs to ascertain the “intent, or lack thereof, with which such disclosures were made.”<sup>119</sup> Notably, Special Counsel Hur reviewed all the materials in Mr. Zwonitzer’s possession (sought by this Committee), which were produced to the Department. Hur extensively considered “willfulness” and “intent” before determining that President Biden and Mr. Zwonitzer would not be charged with committing a crime. Congress, however, is not “a law enforcement or trial agency.”<sup>120</sup> “These are functions of the executive and judicial departments of government.”<sup>121</sup> The Majority should stop pretending that re-investigating Special Counsel

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 168–69.

<sup>116</sup> *Id.* at 12.

<sup>117</sup> *Id.* at 12.

<sup>118</sup> On July 15, 2024, Judge Aileen Cannon dismissed the classified documents case against former President Trump, ruling that Special Counsel Smith’s appointment was unconstitutional. See Alan Feuer, *Judge Dismisses Classified Documents Case Against Trump*, NEW YORK TIMES (Jul. 15, 2024). In dismissing the charges against Donald Trump in this case, Judge Cannon relied entirely on what she determined were deficiencies in the appointment of Special Counsel Smith and made no judgments as to the merits of the underlying charges. The Eleventh Circuit Court of Appeals has previously overruled Judge Cannon’s decisions in this case, see Alan Feuer and Eileen Sullivan, *Dismissal Brings New Scrutiny to Judge With a History of Unorthodox Decisions*, NEW YORK TIMES (Jul. 15, 2024), and the Justice Department is expected to appeal her dismissal of the case.

<sup>119</sup> *Id.*

<sup>120</sup> *Watkins v. United States*, 354 U.S. 178, 187 (U.S. 1957).

<sup>121</sup> *Id.*



Hur's closed investigation and exercise of prosecutorial discretion is a legitimate exercise of its oversight function.

Finally, the Majority has alleged that it needs the files to "consider legislative reforms governing criminal penalties for destroying evidence"—a veiled threat against Mr. Zwonitzer, despite his full cooperation with Special Counsel Hur's extensive investigation. The record demonstrates that Mr. Zwonitzer gave innocent, plausible explanations for deleting some of the audio files. He did not believe the investigation would involve him, and he deleted the files to protect President Biden's privacy, as was his practice, especially because he believed hackers may try to obtain the files from his computer to attack the President. As soon as the Special Counsel and his team asked for the files, Mr. Zwonitzer provided full transcripts. He also turned over his computer and hard drive to let investigators recover the files that had been deleted. For each of the four files that were not able to be fully recovered, Mr. Zwonitzer voluntarily produced transcripts of the interviews to investigators.<sup>122</sup> Subsequently, "Zwonitzer gave two consensual interviews during which he provided relevant information without seeking immunity or any protections or assurances (such as a proffer agreement)."<sup>123</sup> Special Counsel Hur, taking all these factors into account, found that prosecution was not warranted. With the decision not to prosecute having been made, the Majority's so-called "legislative purpose" of reviewing penalties for destroying evidence is a complete farce.

The true purpose of the Committee's obsession over these materials is not lost on anybody on this Committee or to the American public. The Majority has embarked on this fanatical quest to find private audio tapes it thinks may embarrass a presidential candidate months away from the election.

#### D. FIRST AMENDMENT

Republican members of this Committee have ironically chosen to attack a journalist for refusing to reveal his source materials, even though many of these same members support legislation to protect journalists from similar abuses by the federal government. Specifically, the past several Congresses have previously considered bills to create a federal reporter shield. The "Free Flow of Information Act" was first introduced in the House on February 2, 2005, by then-Representative Mike Pence (R-IN). Since then, versions of the legislation have been reintroduced over multiple Congresses by both Republican and Democratic Members. In the 118th Congress, Reps. Kevin Kiley (R-CA), Darrell Issa (R-CA), Harriet Hageman (R-WY), Russell Fry (R-SC), Jamie Raskin (D-MD), and Ted Lieu (D-CA), among others, introduced H.R. 4250, the "Protect Reporters from Exploitative State Spying Act" or the "PRESS Act," which is essentially an updated version of the "Free Flow of Information Act."

H.R. 4250 would create a qualified federal statutory privilege that protects covered journalists from being compelled by a federal entity (i.e., an entity or employee of the judicial or executive branch of the federal government with power to issue a subpoena or other

<sup>122</sup> Hur Report at 335–336.

<sup>123</sup> *Id.* at 336.

compulsory process) to reveal confidential sources and information. The federal entity seeking to compel disclosure of protected information can defeat this privilege if a court determines, after providing the journalist notice and an opportunity to be heard in court, that the disclosure is necessary to prevent or identify any perpetrator of an act of terrorism or to prevent a threat of imminent violence, significant bodily harm, or death.

The PRESS Act enjoys broad bipartisan support. In July 2023, the House Judiciary Committee passed H.R. 4250 by a vote of 23–0. In January 2024, the House passed H.R. 4250 by voice vote under a motion to suspend the rules. It is curious why now, when President Biden is the topic of journalism, Republican members of this Committee change their tune despite his support for the principles espoused by the PRESS Act.

#### IV. AMENDMENTS

During the markup of this report, the Minority offered various amendments to correct or provide context to the highly partisan language of the report, which were all defeated on party lines.

Representative Steve Cohen (D–TN) offered an amendment that raised concerns that the audio files may be manipulated for political purposes and highlighted Republicans’ repeated circulation of deceptively manipulated “cheap fake” videos targeting President Biden. The amendment provides three recent examples of this practice, including a deceptively edited video of President Biden at a D-Day commemoration ceremony in France and two deceptively edited videos of President Biden at the G7 Summit in Italy.

Representative Lucy McBath (D–GA) offered an amendment that highlighted this committee’s support for the PRESS Act, which would create a qualified federal statutory privilege that protects covered journalists from being compelled by a federal entity to reveal confidential sources and information, and specifically notes the hypocrisy of Chairman Jordan’s demands of Mr. Zwonitzer, who considers himself a journalist.

Representative Madeleine Dean (D–PA) offered an amendment stating that “no portions of the audio files shall be released to the public or used in any campaign materials by Members of Congress seeking reelection.” It is telling that the Majority rejected this opportunity to prove to the American people that its intentions are legitimate and not political.

Representative Veronica Escobar (D–TX) offered an amendment showing that Mr. Zwonitzer had innocent reasons for deleting the audio files of his interviews with President Biden, which were detailed in Special Counsel Hur’s February 2024 report. The amendment also noted that Mr. Zwonitzer fully cooperated with Special Counsel Hur’s investigation.

Representative Henry C. “Hank” Johnson (D–GA) offered an amendment that discussed Jared Kushner’s memoir, *Breaking History*, which claims to take readers “inside debates in the Oval Office, double-crosses at the United Nations, tense meetings in Arab palaces, high-stakes negotiations, and the daily barrage of leaks, false allegations, investigations, and West Wing infighting.” Like President Biden, Kushner’s memoir was written with the help of a ghostwriter, who is identified in the book’s acknowledgements as speechwriter Brittany Baldwin. The amendment noted that mate-

rials created during the process of writing of his memoir, including the ghostwriter's notes and audio recordings, could contain evidence that is relevant to an investigation into the troubling overlap between Jared Kushner's business interests and US foreign policy.

Representative Johnson also offered an amendment highlighting disturbing public gaffes by Republican presidential candidate Donald Trump, which draw serious concerns about his mental competency. Because the Majority has fixated on their so-called need to evaluate President Biden's age and memory, the amendment detailed nonsensical comments that Trump has made at recent rallies, including a bizarre rant about whether it was better to be electrocuted or be attacked by a shark. The record should be clear that the Majority's report does not appear to be concerned when a presidential candidate shows serious signs of cognitive impairment if his name is Donald Trump.

## V. CONCLUSION

After striking out on all previous attempts to find evidence of wrongdoing by President Biden, the Majority has now sunk to a new low by attempting to bully a private citizen into turning over materials that it hopes may embarrass the President, months before he stands for reelection. Special Counsel Hur conducted an exhaustive investigation that exonerated President Biden of wrongdoing and the Committee has no legislative purpose in reinvestigating the Special Counsel's work.

To the extent that there may be any legitimate interest in obtaining Mr. Zwonitzer's interviews, the vast majority of which are private, they are in the possession of the Department of Justice, but the Majority has refused to engage in the constitutionally required accommodation process, despite the weighty separation of powers issues raised by these materials. Indeed, the White House has specifically directed Mr. Zwonitzer not to provide any of the President's information until this "interbranch conflict" can be resolved. But the Majority has barreled ahead with this contempt report because this is not a legitimate oversight exercise and is merely another political stunt that is far beneath the dignity of this Committee.

JERROLD NADLER,  
*Ranking Member.*

