

Congress of the United States
Washington, DC 20515

April 15, 2024

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Garland:

On February 27, 2024, the Committee on the Judiciary and the Committee on Oversight and Accountability issued subpoenas to you for a narrow and specific set of material in the Department of Justice’s possession relating to Special Counsel Robert K. Hur’s investigation of President Joe Biden’s “willful” mishandling of classified documents.¹ Your response to the subpoenas remains inadequate, suggesting that you are withholding records for partisan purposes and to avoid political embarrassment for President Biden.

On March 7, 2024, the subpoena’s return date, the Department provided the Committees with an incomplete production that only included letters exchanged between President Biden’s legal counsel and the Department, along with an offer to review two classified documents *in camera*.² On March 12, 2024, hours before Special Counsel Hur was set to testify before the Judiciary Committee, the Department produced transcripts of the Special Counsel’s interviews with President Biden to the Committees, stating that “the standard interagency review process” of the transcripts was completed that day.³ Despite the Department’s representation, however, several news outlets received and reviewed the transcripts before they were produced to the Committees.⁴

¹ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice (Feb. 27, 2024) [hereinafter “Committees’ February 27 Letter”].

² Letter from Hon. Carlos F. Uriarte, Assistant Att’y Gen., Office of Legislative Affairs, U.S. Dep’t of Justice, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Mar. 7, 2024); Letter from Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice, to Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability (Mar. 7, 2024).

³ Email from Office Staff, Office of Legislative Affairs, Dep’t of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:43 a.m.) (hereinafter “DOJ OLA 7:43 a.m. Email”); Email from Office Staff, Office of Legislative Affairs, Dep’t of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:44 a.m.); Email from Office Staff, Office of Legislative Affairs, Dep’t of Justice, to Comm. Staff, H. Comm. on the Judiciary (Mar. 12, 2024, 7:45 a.m.).

⁴ DOJ OLA 7:43 a.m. Email, *supra* note 3; Mark Swanson, *Rep. Jordan to Newsmax: WH Sat on Biden-Hur Transcripts*, NEWSMAX (Mar. 12, 2024); *see* Tamara Keith, *Interview transcript shows more nuance on Biden’s memory than special counsel report*, NPR (Mar. 12, 2024); *see* Matt Viser, *Full transcript of Biden’s special counsel*

On March 25, 2024, the Committees notified you that your compliance with the subpoena was deficient, specifically with respect to the Department’s withholding of the audio recordings of Special Counsel Hur’s interviews with President Biden and the transcript and audio recordings of Special Counsel Hur’s interviews with President Biden’s ghostwriter Mark Zwonitzer.⁵ We informed you that the subpoenas imposed a legal obligation on you to produce this material, and we requested that you do so by April 8.⁶ We warned you that the Committees may be forced to consider contempt of Congress proceedings if you continued to ignore your legal obligations.⁷

On April 8, 2024, the Department responded, again failing to comply in full with the subpoenas.⁸ The Department only produced two transcripts of Special Counsel Hur’s interview with President Biden’s ghostwriter Mark Zwonitzer, but withheld the audio recordings of Special Counsel Hur’s interviews of President Biden and Mr. Zwonitzer.⁹

In choosing to withhold these records in the face of the Committees’ subpoenas, the Department offered several excuses. The Department asserted that the audio recordings are “cumulative” of information the Department had already produced and thus unnecessary for the Committees’ purposes.¹⁰ As an initial matter, the Constitution does not permit the Executive Branch to dictate to Congress how to conduct its oversight.¹¹ Rather, “congressional committees have significant discretion in how they approach an investigation.”¹² This fact is especially true in the context of an impeachment inquiry, for which federal courts have emphasized that Congress must possess all pertinent evidence.¹³ As previously explained in detail, the

interview paints nuanced portrait, WASH. POST (Mar. 12, 2024). Notably, the stories from NPR and The Washington Post were published at 8:00 a.m. on March 12, 2024, and included detailed information from the transcripts of Special Counsel Hur’s interviews with President Biden.

⁵ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Justice (Mar. 25, 2024).

⁶ *Id.*

⁷ *Id.*

⁸ Letter from Hon. Carlos F. Uriarte, Assistant Att’y Gen., Office of Legislative Affairs, U.S. Dep’t of Justice, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, and Rep. James Comer, Chairman, H. Comm. on Oversight & Accountability (Apr. 8, 2024) [hereinafter “Uriarte April 7 Letter”].

⁹ Uriarte April 7 Letter, *supra* note 5.

¹⁰ *Id.*

¹¹ See Linda D. Jellum, “Which Is to be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 884 (2009) (“Each branch of government deserves the autonomy necessary to carry out its functions within the constitutional scheme, and each branch should enjoy a protected sphere of control over its internal affairs. No branch should be able to regulate the inner workings of any other branch. Rather, each branch must be master in its own house.”) (cleaned up).

¹² CONG. RSCH. SERV., COMMITTEE DISCRETION IN OBTAINING WITNESS TESTIMONY 2

¹³ See *In re Application of Comm. on Judiciary*, 414 F. Supp. 3d 129, 176 (D.D.C. 2019) (“Impeachment based on anything less than all relevant evidence would compromise the public’s faith in the process.”), *aff’d*, 951 F.3d 589 (D.C. Cir. 2020), *vacated and remanded sub nom. on other grounds DOJ v. House Comm. on the Judiciary*, 142 S. Ct. 46 (2021); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445 (11th Cir. 1987) (“Public confidence in a procedure as political and public as impeachment is an important consideration justifying disclosure.”); *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974) (“It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair [impeachment] inquiry based on all the pertinent information.”).

Committees require the subpoenaed materials—including the audio recordings of the interviews—to determine whether sufficient grounds exist to draft articles of impeachment against President Biden for consideration by the full House.¹⁴

Contrary to the Department’s assertions, the audio recordings are not “cumulative” of other information produced. The audio recordings of Special Counsel Hur’s interviews of President Biden and Mr. Zwonitzer are materially different from transcripts, offering a unique and invaluable medium of information that capture vocal tone, pace, inflections, verbal nuance, and other idiosyncrasies.¹⁵ Transcription is incapable of recording these revealing verbal cues. For instance, a subject’s pauses and inflections can provide context or evidence of whether a subject is evasive or suffers from a “poor memory.”¹⁶ Phrased another way, audio recordings are the best evidence of witness interviews. Where audio recordings and transcripts diverge, because of “inflection in a speaker’s voice or by inaccuracies in the transcript,” the audio recordings, not the transcripts, control.¹⁷ The Committees’ impeachment inquiry as well as its oversight efforts will suffer without these audio recordings.

The Department’s unsupported speculation about the Committees’ motives in insisting that you produce the audio recordings has no bearing on your legal obligation to produce the subpoenaed materials.¹⁸ You have asserted no constitutional or legal privilege protecting the disclosure of this material or preventing you from producing it pursuant to the subpoena. In fact, any applicable privileges have arguably been waived by release of the transcripts to the press. *See United States v. Mitchell*, 377 F. Supp. 1326 (D.D.C. 1974) (“In citing relinquishment of privilege, the Court has reference to the portions of subpoenaed recordings which the President has caused to be reduced to transcript form and published. For such, the Court finds the privilege claimed non-existent since the conversations are, to that extent at least, no longer confidential.” (citing *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973))).

Federal courts, up to and including the Supreme Court, have recognized the value of audio recordings as evidence.¹⁹ Indeed, the Supreme Court did so in *United States v. Nixon*, a case where President Nixon unsuccessfully attempted to quash a subpoena for audio recordings

¹⁴ Committees’ February 27 Letter, *supra* note 1.

¹⁵ *Cf.* Clifford S. Fishman, *Recordings, Transcripts, and Translations as Evidence*, 1 WASH. L. REV. 473, 519 (2006).

¹⁶ Special Counsel Robert K. Hur, *Report on the Investigation into Unauthorized Removal, Retention, and disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.*, DEPT. OF JUSTICE at 6 (Feb. 8, 2024). *Cf.* *State v. Elwell*, 793 A.2d 499, 502 (Me. 2002) (audiotape offered as evidence to impeach witness testimony where witness’ conveyed a “flat vocal inflection and calm tone of voice during [911] call”).

¹⁷ Don Zupanec, *Using Transcripts of Recordings as a Demonstrative Aid*, 23 No. 7 FED. LITIGATOR 13 (July 2008) (“The tape recording is evidence for you to consider. The transcript, however, is not evidence.”). *See, e.g., United States v. Hogan*, No. 2:06-CR-10, 2008 WL 2074112, at *1 (E.D. Tenn. May 14, 2008) (“[T]his Court will instruct the jury as to the limited use of the transcripts, as the transcripts are not the evidence but the audio recordings are the actual evidence.”).

¹⁸ *Cf. Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (“So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.”) (citations omitted).

¹⁹ *United States v. Nixon*, 418 U.S. 683, 686 (1974).

The Honorable Merrick B. Garland

April 15, 2024

Page 4

of his conversations with his advisors even though the President had publicly released edited transcripts of these conversations after the subpoena was issued.²⁰ The Department has relied upon the Court's opinion in support of its own subpoenas,²¹ and it is difficult to believe that the Department when subpoenaing an audio recording would instead allow the subject of an investigation only to produce its own transcript of the recording. Your refusal to comply with the subpoena's legal obligation appears to be yet another unfortunate example of the Department refusing to abide by the same standards it requires of other Americans.

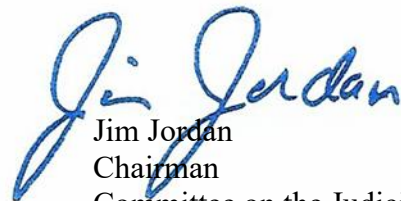
If the Department continues to withhold materials responsive to the Committees' subpoenas—namely, the audio recordings of Special Counsel Hur's interviews with President Biden and Mr. Zwonitzer—we will have no choice but to invoke contempt of Congress proceedings. To avoid this, the Committees expect you to produce all responsive materials no later than 12:00 p.m. on April 25, 2024.

Thank you for your prompt attention to this matter.

Sincerely,



James Comer
Chairman
Committee on Oversight and Accountability



Jim Jordan
Chairman
Committee on the Judiciary

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

The Honorable Jerrold L. Nadler, Ranking Member
Committee on the Judiciary

²⁰ *Id.* at 700-702. Gilliam Brockell, *That time Nixon released doctored transcripts during Watergate*, WASH. POST (Sept. 25, 2019); John Herbers, *Nixon Will Give Edited Tape Transcripts on Watergate To House and the Public; Notes Ambiguities, Insists He Is Innocent*, N.Y. TIMES (Apr. 30, 1974) (“But [Nixon] has decided to release them, he said—not just those subpoenaed, but all conversations bearing on Watergate between him and his aides between Sept. 15, 1972, and April 27, 1973—because they fully depict his own role in Watergate . . .”).

²¹ *See, e.g., United States v. Hussain*, No. CR 16-462 (CRB), 2018 WL 6695574 at *2-*3 (Nov. 25, 2018) (citing *Nixon* in opposition to a criminal defendant's motion to quash the Department's subpoena).