IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States,

Defendant.

Case No. 1:24-cv-1911-ABJ

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR EXPEDITED SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Executive Branch has taken an astonishing position in this case: it claims that the president has unfettered discretion to shield any information from Congress so long as he or she subjectively believes that disclosure could harm any Executive Branch function and the public interest. Under this infinitely elastic theory, "executive privilege" essentially covers whatever the president wants it to cover. And, according to the Executive Branch, the president's decisions about what information to shield from Congress are unreviewable by the judiciary. Congress is thus left to conduct oversight solely on the terms dictated by the president, and courts, as the Executive Branch tells it, have no ability to level the playing field.

This claim, if accepted, would fundamentally alter the balance of power among the three branches. It would allow a future president, of either party, to withhold from Congress any Executive Branch information that he or she would rather not disclose, all under the guise of executive privilege. The facts here expose how easy it is (and will be for future presidents) to take advantage of such a standardless privilege. According to the Department of Justice (DOJ), this purported privilege goes beyond substantive content and applies to voice inflection, pauses, and other nuances perceptible on an audio recording but not on a written transcript. Likewise, a president's public-facing rationale for how disclosure might harm Executive Branch functions can be quite creative and divorced from the Executive's day-to-day operations. It can also be tied to disclosure to the public rather than disclosure to Congress. Here, for example, DOJ has pointed to the possibility that third parties (but presumably not the Committee, given the presumption of good faith that applies to its Members) will use subpoenaed material to create deepfakes of Special Counsel Robert Hur's interview with the President (something that DOJ says has already happened). A president may even bend executive privilege to his will to

obstruct a Congressional impeachment inquiry in which he or she is the target. Indeed, a president could shield evidence of his own wrongdoing, so long as he or she subjectively believes that sharing such damaging information could harm the Executive. And all the while, according to DOJ, Article III judges must remain bystanders. This self-serving, maximalist approach finds no support in the Constitution or judicial precedent.

Perhaps recognizing the limitless nature of its claim, DOJ projects and attempts to paint the Committee as an impossible-to-please coordinate branch that wants to "reconstruct every jot and tittle of a past criminal investigation." *See* Def. Mem. 49, ECF Nos. 18-1, 19. But this suggestion ignores the nature of the Committee's investigation and its stated need for the subpoenaed audio recordings. The Special Counsel's investigation lasted more than a year. During that time, his team "collected over seven million documents,"[1] but the Committee subpoenaed just two of them. The Special Counsel "conducted 173 interviews of 147 witnesses," Report at 29, but the Committee subpoenaed the transcripts and audio recordings of only the two most important: the target himself (President Joseph Biden) and a third party with whom the target shared classified material (Mark Zwonitzer).[2]

These materials—and the audio recordings in particular—are fundamental to the Committee's investigation, which is assessing whether the Special Counsel's conclusions are

[1] *See* 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.* 29 (Feb. 2024) (Report), https://perma.cc/X5MV-RU8J.

[2] The Committee also subpoenaed communications between or among DOJ, the White House, and the President's personal counsel regarding the Special Counsel's Report. It did not, however, subpoena numerous materials that would likely be included in the Special Counsel's investigative files, including internal memoranda, communications between members of the investigative team, notes or other mental impressions, and so on.

consistent with a commitment to impartial justice. The Special Counsel's views about the President's state of mind were critical to his recommendation that criminal charges should not be brought against President Biden. And in forming his views, the Special Counsel pointedly relied upon the way the President presented himself during their interview. The Committee therefore cannot meaningfully assess the Special Counsel's conclusions without the best evidence of these interviews. And the best available evidence is the audio recordings—a fact that DOJ does not dispute. DOJ's blanket claim that the Committee does not need the audio recordings to decide whether legislative reforms of special counsels are necessary ignores that the Committee must first decide for itself whether the current special counsel process is working, specifically whether the Special Counsel's conclusions are consistent with a commitment to impartial justice. To do so, it needs the audio recordings of the Special Counsel's interviews with President Biden and his ghostwriter, Zwonitzer. Only then—after it has evaluated the Special Counsel's recommendations—can the Committee determine whether reforms are necessary.

By refusing to provide the subpoenaed audio recordings, Attorney General Merrick Garland is depriving the Committee of information to which it is legally entitled. Courts have consistently held that such a deprivation constitutes an Article III injury. Courts have likewise found that the judiciary has the power to remedy that injury. Although DOJ raises several threshold arguments, it is largely left arguing against precedent with which it "respectfully disagrees." *See* Def. Mem. 12, 18. This Court should reject those rehashed arguments and reach the merits of this dispute. Allowing Congress to sue to enforce a subpoena, the en banc D.C. Circuit has explained, "preserves the power of subpoena that the House … is already understood to possess," *see Comm. on Judiciary v. McGahn*, 968 F.3d 755, 771 (D.C. Cir. 2020) (en banc) (*McGahn En Banc*), and thus promotes our system of checks and balances.

On the merits, the Executive Branch waived any privilege that might have applied both by releasing the transcripts to the public and Congress and by failing to invoke any privilege by the Subpoena's return date. Regardless, the Committee's need for the audio overcomes the Executive's interest in secrecy. As explained above, the Committee needs the audio recordings to carry out its oversight investigation. It also needs them to advance its impeachment inquiry. The Executive, by contrast, will still be able to carry out its Executive functions despite any minimal chilling effect that might flow from disclosing the tone of a witness's voice or releasing material that may be used for a deepfake. This Court should thus require Garland to produce the audio recordings of the Special Counsel's interviews with President Biden and Zwonitzer.

ARGUMENT

I. This Court can and should resolve this case

First, Garland is depriving the Committee of information to which it alleges it is legally entitled; binding precedent establishes this as an Article III injury. *Second*, as multiple Judges in this District have found, this Court has statutory jurisdiction under 28 U.S.C. § 1331 because this dispute over a Congressional subpoena arises under the Constitution. *Third*, multiple Judges have likewise concluded that the Committee has a cause of action to sue to enforce a subpoena, both under the Declaratory Judgment Act (DJA) and as part of its Article I powers. *Fourth*, deciding this dispute will protect the House's legislative authority, facilitate the accommodations process, and promote the separation of powers. The Court should thus hear this case.

A. The en banc D.C. Circuit has resolved the standing question at issue here

Although DOJ (at 12) "respectfully disagrees" with the D.C. Circuit's en banc decision in *McGahn*, it controls here. The Committee here, like the Committee there, exercised the full House's investigative authority when it subpoenaed the audio recordings. *See McGahn En Banc*,

968 F.3d at 767; Rule XI.2(m)(1)(B), (3)(A)(i), Rules of the House of Representatives, 118th Cong. (2023) (House Rules), https://perma.cc/3UX4-2YG5; H. Res. 917, 118th Cong. § 2 (2023). By refusing to comply with the Subpoena, DOJ is depriving the Committee of information to which it alleges it is legally entitled. *See McGahn En Banc*, 968 F.3d at 763, 765-68. This is an injury that would be redressed by a Court order requiring DOJ to produce the audio recordings. *See id.* at 768. While DOJ argues (at 12) that "[h]istory and tradition … do not support the Committee's asserted standing in this case," it fails to mention that *McGahn En Banc* rejected a nearly identical argument. *See* 968 F.3d at 776 (explaining this argument had "serious flaws" and was inconsistent with the relevant historical practice in this Circuit). DOJ's efforts to distinguish *McGahn En Banc*—which either collapse the standing analysis into the merits or second guess the way the House chooses to authorize litigation—fare no better.

1. Ignoring the issues of injury-in-fact, causation, and redressability, DOJ conflates the standing analysis with the merits when it argues (at 12) the Court's decision in *McGahn En Banc* "did not involve 'taking sides in an interbranch dispute,' … to the extent it would require here" because McGahn could appear and assert privilege. (citation omitted). There is no "interim step" here, DOJ says (at 12), because the Committee asks for a final order overruling the privilege assertion. But a final order overruling the privilege assertion would come only after the Court reached the merits, not after it decided the standing question. Just as the en banc Court did not require McGahn to answer certain questions by holding that the Committee had standing, the Court here would not require Garland to produce the audio recordings by concluding the Committee has standing. To be sure, the Committee is also asking this Court to decide whether the Committee is ultimately entitled to the audio recordings, but that is a merits question. Finding that the Committee has standing here would no more take sides than the Court did in

McGahn En Banc. Beyond that logical flaw, this argument fails on its own terms. *See McGahn En Banc*, 968 F.3d at 773 ("A court is not normally understood to be taking sides when it enforces a subpoena in civil litigation, and McGahn [like DOJ here] points to nothing to support a contrary conclusion here.").

2. Although the Committee's suit here has been authorized by the House in three ways, DOJ argues (at 12-14) that this authorization is insufficient. As DOJ tells it, a House committee has standing to enforce a subpoena issued to an Executive Branch official only if the full House adopts a resolution that specifically names the subpoena recipient and authorizes the committee to sue that recipient. This argument—an attempt to micromanage the House's constitutional authority to organize itself—fails.

At the outset, while not required, two separate House resolutions authorize the Committee to bring this suit. *First*, House Resolution 917 provides that the Committee has authority to issue subpoenas "for the purpose of furthering the impeachment inquiry." H. Res. 917, § 2. It then authorizes the Committee's Chairman to bring a lawsuit to enforce such subpoenas. *See id.* § 4(a)(1). The Resolution explains that such authority "includ[es]" suits to enforce subpoenas issued to certain individuals, *id.*, but, consistent with the ordinary meaning of "include," the authorization is not limited to the named subpoena recipients and thus covers the Subpoena at issue here, *see Samantar v. Yousuf*, 560 U.S. 305, 317 n.10 (2010) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation." (alteration in original) (citation omitted)). DOJ (at 14) ignores the text and claims that the Resolution does not provide the necessary authorization because it does not list the specific Subpoena at issue here. But this magic-words requirement lacks support, and DOJ's attempt to ground its argument in the "especially rigorous" standing inquiry falls flat. The level of specificity the House uses when

authorizing a committee to bring an enforcement action has nothing to do with standing. The authorization question simply asks whether the House has provided it. If it has, the mode and specificity of that authorization are within the House's discretion.

Second, House Resolution 1292, which found Garland in contempt of Congress for failing to comply with the Subpoena at issue here, provides "[t]hat the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena." H. Res. 1292, 118th Cong. cl. 3 (2024). The Speaker convening the Bipartisan Legal Advisory Group (BLAG) to authorize this lawsuit is an appropriate action to enforce the Subpoena, and this lawsuit is thus authorized by House Resolution 1292.

In any event, there is no requirement—in the Constitution, judicial precedent, or the House Rules—that the House authorize litigation by passing a resolution. The Constitution vests each House of Congress with the exclusive authority to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Under that authority, the House has authorized the Speaker, acting in consultation with BLAG, to direct the General Counsel of the House to represent the House and its committees in litigation, including by initiating lawsuits. The House's choice, under its rulemaking authority, to rely on BLAG in this way is no different from the House's choice to create a particular committee structure or to assign certain tasks to a given standing or select committee. Those choices concern "matters of method," which are "open to the determination" of the House, not DOJ. *See United States v. Ballin*, 144 U.S. 1, 5 (1892).

BLAG's pedigree goes back to the 103rd Congress. *See* H. Res. 5, 103d Cong. cl. 2 (1993). In the 114th Congress, the House elected to delegate to BLAG the authority to "speak[] for, and articulate[] the institutional position of, the House in all litigation matters." H. Res. 5, 114th Cong. § 2(b) (2015). The current House adopted that same provision, codified as House

Rule II.8(b), by majority vote in adopting its organizing resolution for the 118th Congress. *See generally* H. Res. 5, 118th Cong. (2023); *see Constitution, Jefferson's Manual, and Rules of The House of Representatives of the United States*, H. Doc. 117-161, §§ 670-670a (2023), https://perma.cc/3HCB-WYMP.

Using that delegated authority, BLAG authorized this lawsuit. Compl. ¶ 56, ECF No. 1. To hold BLAG's authorization insufficient would be to undermine the House's constitutionally mandated right to create its own Rules. That authority includes the ability to select the process by which House committees are authorized to participate in litigation. *See, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 522 (D.C. Cir. 2003) ("The Constitution grants Congress discretion to regulate its internal proceedings.").

DOJ suggests (at 13) that while BLAG may exercise its delegated authority for "ordinary litigation needs of the House," that is not sufficient authority to ask a court to decide a dispute between the two branches. This artificial distinction finds no support in the Constitution, and DOJ cites none. The Constitution does not require either chamber of Congress to follow any specific procedure when authorizing a lawsuit. That silence leaves the matter within each chamber's exclusive control. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892) (when constitutional clause does not specify how each house should exercise a power, the manner of exercise is "left to the discretion of the respective houses of congress"); *Exxon Corp. v. FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978) ("[W]here constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress ….").

Although DOJ tries to draw a distinction between types of authorization, *McGahn En Banc* and the other cases cited by DOJ show that, in the context of institutional injuries, the proper question is whether the plaintiff has the authority to act on the institution's behalf. The

Committee in *McGahn En Banc* had that authority because it issued the subpoena under authority delegated from the full House, meaning it exercised the full House's subpoena authority. *See* 968 F.3d at 767 ("Because the Committee exercised the investigative authority of the full House, the Committee was entitled to McGahn's testimony."). The House then authorized the Committee—the same party "whose informational and investigative prerogatives ha[d] been infringed"—by House resolution to bring suit. *See id.* at 767-68. The Committee was thus "the proper party to bring the lawsuit," which the en banc Court explained is the focus of the standing inquiry. *See id.* at 766.

That distinguished *McGahn En Banc* from *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658 (2019), where the Virginia House of Delegates attempted to assert an interest that it shared with the Virginia Senate. *See McGahn En Banc*, 968 F.3d at 767. This created a "mismatch" between the body asserting the interest (the Virginia House of Delegates) and the body to which the interest belonged (the full Virginia legislature). *See id.* at 767-68 (contrasting that situation with the U.S. House's "unilateral[]" right to compel information by subpoena). That lack of authority to act on the institution's behalf also distinguishes many of the other cases that DOJ cites (at 13). *See Raines v. Byrd*, 521 U.S. 811, 829 (1997) (explaining that individual Members "have not been authorized to represent their respective Houses of Congress in this action"); *Walker v. Cheney*, 230 F. Supp. 2d 51, 68 (D.D.C. 2002) ("[T]he Comptroller General here has not been expressly authorized by Congress to represent its interests in this lawsuit."). The Committee here, like the Committee in *McGahn En Banc*, exercised the full House's authority when it subpoenaed the audio recordings, and BLAG acted on behalf of the full House when it authorized the Committee (the same party "whose informational and investigative prerogatives ha[d] been infringed," *see* 968 F.3d at 767) to bring this suit.

No part of the analysis in *McGahn En Banc* focused on the type of authorization. The Court's analysis focused on whether the Committee was the proper party to assert an institutional injury. *See McGahn En Banc*, 968 F.3d at 766-68. Neither *McGahn En Banc* nor any of the decisions in any other suits the full House authorized suggest that BLAG authorization would be deficient. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (emphasizing the House authorization as a distinguishing factor from *Raines* and other suits brought by individual plaintiffs asserting institutional injury); *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (*Miers I*) (same).[3]

While it is unclear how the Committee's mode of authorization would even bear on Article III standing, the Committee has the House's authorization three times over.

B. This Court has subject-matter jurisdiction

Eleven years ago, this Court found, "as did the court in [the earlier case of *Miers I*, 558 F. Supp. 2d 53], that this [subpoena enforcement] case presents a federal question and that therefore, the court has jurisdiction under 28 U.S.C. § 1331." *Holder*, 979 F. Supp. 2d at 17. These holdings were correct. Section 1331 provides jurisdiction over "all civil actions arising under the Constitution," and given that the Committee's suit to enforce its Subpoena raises a federal question regarding Congressional power, *see, e.g., id.*, it falls under the plain text of § 1331. DOJ even conceded in *Miers I* that § 1331 applies. 558 F. Supp. 2d at 64. But DOJ now

[3] DOJ also cites (at 13-14) *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974) (en banc), but that case was dismissed in the district court for lack of statutory jurisdiction, not because the committee there lacked authorization from the Senate. While the appeal was pending, Congress both passed an authorizing resolution and enacted a new jurisdictional statute. *See id.* The D.C. Circuit then remanded "in light of this new jurisdictional statute," not because of the authorizing resolution. *See id.* at 727-28. The D.C. Circuit in no way relied on the authorization and mentioned it only when discussing the factual and procedural background. *See id.* at 727.

"respectfully disagrees" with *Holder* (at 18-19) based on its own historical interpretation. DOJ's telling of history is wrong. The D.C. Circuit held decades ago in *United States v. AT&T*, 551 F.2d 384, 389 (D.C. Cir. 1976) (*AT&T I*), that courts have jurisdiction under § 1331 to hear disputes over Congressional subpoenas. This Court should follow *AT&T I* and its decision in *Holder* and hold that § 1331 supplies jurisdiction here.

In *AT&T I*, the D.C. Circuit affirmed that § 1331 supplied jurisdiction in a suit where DOJ sued to enjoin AT&T from responding to a House subpoena. 551 F.2d at 389. Although the parties' roles were reversed in *AT&T I*, even DOJ's Office of Legal Counsel (OLC) has acknowledged that this makes no difference, and that *AT&T I*'s holding on subject-matter jurisdiction "would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena." *See Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act*, 10 Op. O.L.C. 68, 88 (1986). In fact, the only impediment to using § 1331 at the time was that it contained an amount-in-controversy requirement, which the D.C. Circuit found was satisfied in *AT&T I*, *see* 551 F.2d at 389 n.7. But even then, there was no doubt of the federal nature of such suits. For example, in *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), the committee brought a civil action to enforce its subpoena against President Nixon. President Nixon fully "agree[d] [the case presented] a 'federal question' in the sense that … it … raise[d] an issue of the respective rights of the President and Congress and of the power of the courts to mediate between them," but he disputed that the amount-in-controversy requirement was met.[4]

[4] *Presidential Campaign Activities of 1972, Senate Resolution 60: Appendix to the Hearings of the Select Committee on Presidential Campaign Activities of the United States Senate*, 93d Cong. 826-30 (1974) (pages 22-26 of President Nixon's brief), https://archive.org/details/presidentialcamp173unit/page/n7/mode/2up. The Court agreed with President Nixon and

As OLC has acknowledged, "28 U.S.C. [§] 1331 has been amended to eliminate the amount in controversy requirement, which was the only obstacle cited to foreclose jurisdiction under [§] 1331 in a previous civil enforcement action brought by the Senate." *Prosecution for Contempt of Cong. of an Exec. Branch Off. Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 137 n.36 (1984) (citing *Senate Select*, 366 F. Supp. 51). It is therefore unsurprising that, after this amendment, courts have continued following *AT&T I* and exercised § 1331 jurisdiction over House subpoena enforcement suits.[5] *See Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 175-76 (D.D.C. 2019); *Holder*, 979 F. Supp. 2d at 17-20; *Miers I*, 558 F. Supp. 2d at 64.

DOJ's current position is that § 1331 jurisdiction was displaced by 28 U.S.C. § 1365, a provision that applies only to subpoena enforcement by the Senate. According to DOJ, under the "general/specific canon," § 1365 is the more specific authorization to § 1331's general authorization and thus controls. This Court in *Holder* rejected that argument because § 1365 does not apply to House subpoena enforcement actions; it thus is not a specific provision that would control over § 1331 for House lawsuits. *See* 979 F. Supp. 2d at 19. More fundamentally, DOJ's entire premise that "[p]rior to 1978 [when § 1365 was enacted] Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power," and that § 1365 thus created the only way to seek judicial enforcement, is wrong. Def. Mem. 15 (quoting *In re Application of*

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held that § 1331 did not supply jurisdiction, but only because of the amount-in-controversy requirement. *Senate Select*, 366 F. Supp. at 59-61.

[5] President Trump also cited to § 1331 for jurisdiction in his suit to quash House subpoenas. *See* Compl. ¶ 18, *Trump v. Mazars USA LLP*, No. 1:19-cv-01136-APM (D.D.C. Apr. 22, 2019), ECF No. 1.

the U.S. Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1238 (D.C. Cir. 1981) (*Subcomm. on Investigations*)). An accurate review of history demonstrates that § 1365 was meant to augment § 1331 jurisdiction.

The dictum from *Subcomm. on Investigations*, 655 F.2d at 1238, cited by DOJ simply reflected the reality that § 1331 had an amount-in-controversy requirement that prevented many subpoena enforcement suits from proceeding. After *Senate Select*, in 1976, Congress amended § 1331 to remove the amount-in-controversy requirement for actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, 2721, but the requirement remained for actions against all others. Thus, Congress could either pursue subpoena enforcement under § 1331 against any person or entity (but meet the amount-in-controversy requirement) or against "the United States, any agency thereof, or any officer or employee thereof in his official capacity" (without regard to the amount-in-controversy requirement).

Then in 1978, Congress passed § 1365. Pub. L. No. 95-521, tit. VII, § 705(f)(1), 92 Stat. 1824, 1879-80 (1978) (originally codified at 28 U.S.C. § 1364), which eliminated the amount-in-controversy requirement for the enforcement of Senate subpoenas against private parties. Viewed properly, § 1365 was an additional tool for the Senate to pursue subpoena enforcement suits against private parties (without any amount-in-controversy requirement), a tool the House, at the time, did not have. Contrary to DOJ's arguments (at 16) that excluding the House from § 1365 was a deliberate choice to deny the House any subpoena enforcement authority, the Senate Committee on Governmental Affairs stated explicitly that the passage of § 1365 was "not intended to be a Congressional finding that the Federal courts do not now have

the authority to hear a civil action to enforce a subp[o]ena against an officer or employee of the Federal Government." S. Rep. No. 95-170, at 91-92 (1977).[6]

Finally, in 1980, Congress removed § 1331's amount-in-controversy requirement entirely. Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369. Eliminating the "amount in controversy from section 1331 made … numerous special federal jurisdictional statutes that required no minimum amount in controversy … beached whales, yet no one thought to repeal those now-redundant statutes." *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991). After all, "[r]edundancies across statutes are not unusual events in drafting." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). In short, any overlap between § 1331 and § 1365 does not suggest that § 1365 impliedly repealed jurisdiction for House subpoena enforcement actions under § 1331. Rather, the chronological history of § 1331 and § 1365 indicates that the latter statutory provision was only meant to augment, not diminish, Congress's ability to pursue subpoena enforcement actions in court. *See, e.g.*, *Response to Cong. Requests*, 10 Op. O.L.C. at 87 n.31 (explaining that legislative history counsels against any argument that § 1365 "provides the exclusive route for either House to bring a civil action to enforce its subpoenas, and thus, that no route exists for civil enforcement against an executive branch officer").

DOJ also raises a minor clarifying amendment to § 1365 that Congress passed in 1996 long after it had repealed the amount-in-controversy requirement from § 1331. DOJ (at 20)

[6] DOJ mischaracterizes the House Conference Report's explanation that the House has "not considered the Senate's proposal to confer jurisdiction on the courts to enforce subpenas [sic] of House and Senate committees," Def. Mem. 16 (quoting H. Rep. No. 95-1756, at 80 (1978)), as meaning that "the House did not support the proposal, and it did not pass," *id.* Non-review of the Senate's proposal does not equate to a lack of support, and it certainly does not mean that the House intended to deny itself the subpoena authority it already had under § 1331.

argues the amendment would have "no purpose if Section 1331 already applied." But nothing suggests the amendment affects § 1331 or that Congress intended to disturb *AT&T I*'s holding. Likewise, nothing suggests the amendment represents a departure from Congress's statement at enactment—that § 1365 was not meant to indicate that federal courts lacked authority to hear subpoena enforcement actions against an officer or employee of the federal government. Congress "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Finally, DOJ's constitutional avoidance argument fares no better. The D.C. Circuit resolved the question of subject-matter jurisdiction over House subpoenas more than forty years ago in *AT&T I*, *see* 551 F.2d at 389, and more recently confirmed that "constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary," *McGahn En Banc*, 968 F.3d at 761.

C. The Committee has a cause of action

DOJ argues (at 20-21) that because there is no statute specifically authorizing the House to enforce its subpoenas, the House lacks a cause of action to enforce its subpoenas in court. That argument was rejected in *Miers I*, *McGahn*, and *Holder*, and as those courts recognized, Congress has a statutory cause of action under the DJA, as well as an equitable cause of action under its Article I powers.[7]

[7] DOJ's citation (at 21 & n.9) to a vacated D.C. Circuit panel opinion does not change the calculus. *See Comm. on Judiciary v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020) (*McGahn Vacated Panel*). While DOJ is correct "[t]he en banc Court never had occasion to rule on the merits of the panel opinion," Def. Mem. 21 n.9, and the vacatur of the opinion came at the request of both parties, the vacatur of the panel's judgment came when the full Circuit voted to rehear the case en banc, presumably because it had serious concerns with the panel's holding that the Committee lacked a cause of action. *See* Order, *Comm. on Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Oct. 15, 2020).

1. The Declaratory Judgment Act supplies a cause of action

The DJA states that in "a case of actual controversy within its jurisdiction … any court of the United States … may declare the rights and other legal relations of any interested party." 28 U.S.C. § 2201(a). Given that "the [DJA's] text is plain and unambiguous," courts "must apply the [DJA] according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). As this Court made clear in *Holder*, "since plaintiff [a House committee] has alleged an actual injury to rights derived from the Constitution, giving rise to Article III standing and federal question jurisdiction, there is no further requirement that plaintiff include a substantive count or claim for relief in addition to the request for declaratory relief." *Holder*, 979 F. Supp. 2d at 23.

DOJ rehashes (at 26-27) the same arguments it made before in *Holder*, without even citing to that decision much less grappling with it in this section of its pleading. It asks this Court to ignore the plain and unambiguous text of the DJA and hold that the DJA does not alone provide a cause of action. But in this case, as with *Holder*,

> [i]t is well established that the Committee's power to investigate, and its right to further an investigation by issuing subpoenas and enforcing them in court, derives from the legislative function assigned to Congress in Article I of the Constitution [and] [t]hus, this case fulfills all of the requirements of the [DJA as] plaintiff has alleged an actual injury to rights derived from the Constitution, giving rise to Article III standing and federal question jurisdiction.

979 F. Supp. 2d at 22-23. The cases that DOJ cites (at 27) simply say that the DJA itself is not a source of substantive rights and may not be used to circumvent other limits that Congress has placed on district courts' authority.[8] They do not undermine the long-settled understanding that

[8] *See Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (stating DJA does not provide a "cause of action," after court had already rejected plaintiffs' claims pertaining to each of the substantive rights asserted); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007) (stating DJA does not provide a "cause of action," after court rejected plaintiff's lone claim); *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) (noting that because the DJA "does not

the DJA provides a mechanism for the courts to resolve the legal rights and obligations of parties, as long as those rights and obligations are established elsewhere, such as in this case.

2. The Committee has an equitable cause of action under its Article I powers

DOJ admits that Congress has the Article I power of inquiry through the issuance of subpoenas and that it may enforce subpoenas using its "own devices," that is, inherent contempt. Def. Mem. 21, 23. But DOJ argues (at 21-26) that "Article I does not expressly confer a right on congressional committees to sue to enforce subpoenas, and thus it does not itself provide such a right of action," especially in cases where Congress is seeking to "enforce an institutional prerogative based on non-compliance with a legislative subpoena." DOJ is incorrect.

First, Congress's right to sue to enforce subpoenas need not be express. Like a judicial cause of action, inherent contempt is not expressly found in Article I. Yet the Supreme Court made clear over two hundred years ago that the House has this power. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228 (1821). In fact, the Court sardonically remarked "what is the alternative? The argument [that the House does not have contempt power] obviously leads to the total annihilation of the power of the House of Representatives …." *Id.* This is because "[t]here is not in the whole of [the Constitution], a grant of powers which does not draw after it others, *not expressed, but vital to their exercise*." *Id.* at 225-26 (emphasis added). As *Miers I* pointed out, 558 F. Supp. 2d at 88-94, the same logic counsels in favor of recognizing that Congress has an implied power to enforce its subpoenas in civil actions. If Congress has the power to fine,

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create an independent cause of action," a federal court "must have jurisdiction already under some other federal statute"); *Hanson v. Wyatt*, 552 F.3d 1148, 1156-57 (10th Cir. 2008) (explaining that the DJA "does not create substantive rights" and that the "plaintiff must have a cause of action arising from a federal right"). DOJ also cites *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), but that decision states only that the DJA does not expand courts' jurisdiction. *See id.* at 671-72.

arrest, or detain through inherent contempt, then surely Congress can appeal to the courts for more modest relief. Indeed, "'the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced,' and consequently, '[a]t least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," [we] may presume that justiciable constitutional rights are to be enforced through the courts.'" *Id.* at 88 (alterations in original) (citation omitted).

For this same reason, DOJ's attempt to distinguish *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Quinn v. United States*, 349 U.S. 155 (1955), fails. DOJ argues (at 22-23) that these cases concerned Congress using inherent and criminal contempt instead of judicial enforcement. But given that inherent contempt is an implied Article I power that is necessary for Congress to effectuate its other Article I powers, and criminal contempt is a device Congress enacted to further its powers, DOJ does not explain why judicial recourse cannot also be "an essential and appropriate auxiliary" for Congress's power. *McGrain*, 273 U.S. at 174.

DOJ attempts to argue (at 21-22) that *Reed v. County Commissioners of Delaware County*, 277 U.S. 376 (1928), held that a Senate committee lacked a cause of action to enforce its subpoena. But that case did not concern whether the committee had a cause of action, rather whether the court had subject-matter jurisdiction to hear the case under 28 U.S.C. § 41(1). Under § 41(1), jurisdiction turned on whether "the committee or its members were authorized to sue by" Senate resolution. *Id.* at 388. Jurisdiction was lacking because the relevant resolutions did not authorize the Committee to sue on behalf of "the United States." *Id.* at 388-89.

Second, a cause of action in equity has "long been recognized as the proper means for *preventing entities from acting unconstitutionally*." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (emphasis added). And "a long history of judicial review of illegal executive action"

establishes that equitable relief is available "to prevent an injurious act by a public officer." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (citation omitted); *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Consistent with these precedents, what matters is the relief sought, not the identity of the plaintiff. DOJ even trips over its own words (at 24) when it admits that "equity jurisdiction to the federal courts is … limited *to the relief that* 'was traditionally accorded by courts of equity.'" (emphasis added) (citation omitted). That distinguishes *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999). "[T]he relatively subtle shift from suits by post-judgment creditors to creditor suits before judgment," DOJ claims (at 25), was in fact, as the Supreme Court noted, "a type of relief that has never been available before." *Grupo Mexicano*, 527 U.S. at 322. But the equitable relief the Committee seeks here is not unique: it asks the Court to prevent the Executive from breaking the law.

In any case, DOJ does not offer any reason why Congress, as a victim of the Executive's excesses, should be treated differently than private individuals, whom federal courts have traditionally accorded equitable relief. After all, "an attack upon [the House], is an attack upon the whole Congress. The necessity of self-defence is as incidental to legislative, as to judicial authority. This power is not a substantive provision of the common law adopted by us; it is rather a principle of universal law growing out of the natural right of self-defence *belonging to all persons*." *Anderson*, 19 U.S. at 218-19 (emphasis added). For this same reason, DOJ's attempt to distinguish *Armstrong*, 575 U.S. 320, fails. DOJ claims (at 25-26) that *Armstrong* only applied "to the injury of an individual," and "the Committee can only assert injury as a Branch of the Government." Yet, that same logic would apply to both *United States v. AT&T*, 567 F.2d 121, 130-31 (D.C. Cir. 1977) (*AT&T II*), and *Trump v. Mazars USA, LLP*, 591 U.S.

848, 869-71 (2020), where the D.C. Circuit and the Supreme Court permitted the Executive Branch, as well as the President in his personal capacity, to seek equitable relief to vindicate their constitutional prerogatives in a subpoena dispute with Congress. That DOJ takes a different tack when Congress initiates litigation, without even attempting to justify an asymmetrical rule permitting Executive suits in equity but disallowing similar Congressional suits, is further evidence that the nature of the suit and the relief sought is what matters, not the identity of the plaintiff.

D. This Court should hear this case

Lastly, DOJ pleads with this Court (at 29) to exercise its equitable discretion to decline to hear this case and to leave the parties to "political struggle and compromise." DOJ argues that if the Court were to adjudicate this dispute, it would "threaten the separation of powers and its system of checks and balances." Def. Mem. 28. This Court should ignore this familiar refrain and adjudicate this case on the merits.

To begin with, DOJ has it backwards. By hearing this case, this Court will promote, rather than threaten, the separation of powers and the accommodations process. That is because "there is no congressional 'arrogation' of power here and no threat that the court's decision will disrupt the historical practice of accommodation." *McGahn En Banc*, 968 F.3d at 771. Indeed, "permitting Congress to bring this lawsuit preserves the power of subpoena that the House … already … possess[es]. Rather, it is [DOJ] that seeks to alter the *status quo ante* and aggrandize the power of the Executive Branch at the expense of Congress." *Id.* In fact, the accommodations process requires the threat of judicial involvement to be successful. If this Court were to defer to DOJ and stay its hand, the lack of judicial intervention would:

> upset settled expectations and dramatically alter bargaining positions in the accommodation process …. Without the possibility of enforcement of a subpoena

> issued by a House of Congress, the Executive Branch faces little incentive to reach a negotiated agreement …. Indeed, the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table …. Without that possibility, Presidents could direct widescale non-compliance with lawful inquiries by a House of Congress, secure in the knowledge that little can be done to enforce its subpoena …. Traditional congressional oversight of the Executive Branch would be replaced by a system of voluntary Presidential disclosures, potentially limiting Congress to learning only what the President wants it to learn.

Id. Simply put, nonintervention by this Court poses a far greater threat to the separation of powers by permitting the Executive's power grab to go unchecked.

Second, while DOJ wants the branches to "struggle and compromise" among themselves, refusing to adjudicate this case would be tantamount to declaring DOJ the victor. DOJ has the information the Committee needs; the status quo benefits only DOJ. This is precisely why this Court in *Holder* noted that

> [w]hile [DOJ] presents its motion as a request that the court remain neutral while the other two bodies work out their difficulties, dismissing the case without hearing it would in effect place the court's finger on the scale, designating the executive as the victor based solely on his untested assertion that the privilege applies.

979 F. Supp. 2d at 24.[9]

The Court should thus reach the merits of this dispute.

II. President Biden's privilege assertion lacks merit and does not justify withholding the audio recordings

Despite claiming that its assertion of executive privilege is "rare, narrow, and carefully considered" (at 30), DOJ expends nearly five pages of its cross motion (at 30-35) attempting to justify its expansive view of executive privilege and its applicability to law enforcement files. This effort attacks a strawman. The Committee neither took issue with the claim that the audio

[9] DOJ also argues (at 30) against the Court's entry into this case because "weighty constitutional questions" are being brought to this Court "on the strength of three Members' votes." But for the reasons explained above, *see supra* at 6-10, that is simply not true.

recordings are part of a law enforcement file, nor argued against the existence of a law enforcement privilege. Rather, the Committee has asserted that to the extent that any privilege applies, it (a) is not a constitutional privilege, as DOJ contends (at 31-42), but rather is rooted in the common law, (b) has been waived, (c) does not apply to Congress, and (d) is overcome by the requisite showing of need. *See* Pl. Mem. 29-41, ECF No. 11.

A. The law enforcement privilege claims lack any constitutional basis

Relying exclusively on the Take Care Clause, U.S. Const. art. II, § 3, and internal Executive Branch opinions, DOJ asserts a view of a constitutionally based executive privilege that, if adopted, could apply to literally any information related to the operation of the Executive Branch. *See* Def. Mem. 32 ("[T]he President may assert executive privilege … when necessary to effectively carry out his Article II duties and when disclosure would harm the public interest." (citing *Cong. Requests for Conf. Exec. Branch Info.*, 13 Op. O.L.C. 153, 154 (1989))). Under this astonishingly broad formulation of executive privilege, any information would be covered so long as the President determines that its disclosure would harm any Executive Branch function. And if that conception were not broad enough, DOJ also appears to contend that any assertion of privilege by the President—regardless of the type of privilege asserted or the subject matter at issue—is automatically considered to be one tethered to the Constitution.

This conception of executive privilege, however, is unsupported by governing judicial precedent, history, or even Executive Branch practice. It is no wonder that DOJ does not cite any judicial opinion for support but rather relies exclusively on internal, self-serving statements of executive privilege drafted by its own OLC, at least when it suits DOJ. It is well-established that "OLC's views are not binding, nor are they entitled to deference." *Ctr. for Biological*

Diversity v. U.S. Int'l Dev. Fin. Corp., 77 F.4th 679, 689 (D.C. Cir. 2023). To the extent that OLC opinions can be considered persuasive, those cited by DOJ in this case are not.

1. DOJ's version of executive privilege (at 31-32) extends far beyond Supreme Court precedent, which has recognized that only a *limited and qualified* executive privilege is rooted in the Constitution and is applicable to military and diplomatic secrets and certain presidential communications (although in both cases it rejected the proposed application of that privilege). *See, e.g., United States v. Nixon*, 418 U.S. 683, 710-11 (1974) (*Nixon I*) (acknowledging "utmost deference" to the President regarding "military or diplomatic secrets" but rejecting a broad "generalized interest in confidentiality"); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 446, 449 (1977) (*Nixon II*) (recognizing that *Nixon I* held that executive privilege "is limited to communications 'in performance of (a President's) responsibilities'" (citation omitted)). The Supreme Court has also expressly recognized that the privilege is not absolute and can be overcome by the coordinate branches, specifically Congress. *See Nixon II*, 433 U.S. at 446, 453 ("qualified" privilege can be overcome by "substantial public interest[]," including Congress exercising its "broad investigat[ory] power" to "guage [sic] the necessity for remedial legislation"); *Nixon I*, 418 U.S. at 707, 710 (noting that the "legitimate needs" of other branches "may outweigh Presidential privilege" and recognizing that the privilege is not to be "expansively construed," because it operates "in derogation of the search for truth"). Likewise, the D.C. Circuit has opined that executive privilege "is qualified, not absolute, and can be overcome by an adequate showing of need." *In re Sealed Case (Espy)*, 121 F.3d 729, 745 (D.C. Cir. 1997).

2. Consistent with Supreme Court precedent, the D.C. Circuit has also carefully distinguished the presidential communications privilege, which "is rooted in constitutional

separation of powers principles," *Espy*, 121 F.3d at 745, from other forms of privilege that might be asserted by the Executive Branch, such as the deliberative process privilege, or, in this case, the law enforcement privilege, *see, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (describing law enforcement privilege as a "qualified, common law executive privilege"); *Espy*, 121 F.3d at 737, 745 (noting deliberative process privilege "originated as" and "is primarily a common law privilege" and that "congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege" (citations omitted)); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984) (defining law enforcement privilege as "a qualified common-law privilege").

Despite this binding case law, DOJ attempts (at 31-32) to elevate assertions of law enforcement privilege to the same status as presidential communications privilege, arguing that the decision to withhold the audio recordings should be afforded maximum deference. But because DOJ's withholdings here do not reflect presidential communications, national security, or state secrets, they "do not have [a] constitutional dimension." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541-42 (D.C. Cir. 1977); *see also id.* at 541 (noting that law enforcement privilege is "more accurate[ly] … refer[red] to … as a 'law enforcement *evidentiary* privilege'" (emphasis added); *Ass'n for Women in Sci. v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977) (explaining that "the law enforcement evidentiary privilege" is "based primarily on specific governmental interests rather than on constitutional principles" (citation omitted)). Accordingly, this Court is neither required to defer to the President's judgment nor exercise judicial abdication when reviewing the propriety of the privilege claim at issue here. *See Black*, 564 F.2d at 545-46 (acknowledging "that law enforcement investigatory files contain privileged information" but cautioning that "a generalized assertion of privilege" can be overcome if "the public interests that

would be served by disclosure" outweigh "the public interest protected by the privilege" (citation omitted)).

3. Apart from being contrary to judicial precedent, DOJ's formulation of the law enforcement privilege contains no limiting principle and has been ever expanding. Early formulations of the privilege limited its application to only investigative files involving ongoing or pending criminal investigations. In fact, in 1971, William H. Rehnquist, then head of OLC, explained in Congressional testimony that "[t]he doctrine of Executive privilege has historically been pretty well confined to the areas of … *pending* investigations."[10]

It was not until 1986 that OLC first expanded the scope of the privilege to encompass closed investigative files. *See Response to Cong. Requests*, 10 Op. O.L.C. at 76. Even then, the formulation of the privilege was narrower than the version DOJ asserts here. In 1986, OLC noted that protection would be warranted for things such as "unpublished details of allegations," as well as "confidential sources, and investigative techniques and methods." *Id.* None of those are at risk by disclosing the audio recordings here. The allegations against President Biden are well known, not secret or unpublished, and no confidential sources, investigative techniques, or methods are at issue. Quite the contrary. The audio recordings are of voluntary interviews of the target of the investigation (the President himself) and a key witness in the Special Counsel's investigation, meaning they involve quintessentially standard law enforcement methods and techniques.

[10] *Executive Privilege: The Withholding of Information by the Executive*: *Hearing on S. 1125 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 431 (1971) (statement of William H. Rehnquist) (emphasis added), https://archive.org/details/executiveprivile00unit/page/n1/mode/2up.

Continuing with the ever-expanding view of executive privilege espoused by OLC, in 2008, it dropped the 1986 limitations in favor of protecting anything that "might … undermine the Executive Branch's 'long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process.'" *Assertion of Exec. Privilege Concerning the Special Couns.'s Interviews of the Vice President & Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008) (citation omitted). But expansions of the privilege have not stopped there. In its current form, DOJ asserts (at 35) that the privilege now protects the mere possibility that disclosure "*might* affect the Department's ability to obtain vital cooperation" in non-specific and hypothetical future "high-profile criminal investigations" involving the White House. Decl. of Stephen Castor (Castor Decl.), ECF No. 11-1, Ex. W (attached letter at 5) (emphasis added).

With past as prologue, there will be no end to the Executive Branch's desire to expand the far-reaching privilege it has created for itself absent any constraints. Any information regarding law enforcement that the Executive does not wish to produce to Congress could be considered privileged, even absent any demonstrable harm to the public interest that would result from disclosure. As the Committee has noted, Pl. Mem. 30, this situation is the perfect example of a privilege assertion unrestrained by any limiting principle. None of the prior rationales for withholding the audio recordings were applicable, so DOJ simply fashioned new standards, moving the goal posts yet again to fit its needs, thereby frustrating legitimate Congressional oversight and thwarting an impeachment investigation.

4. Finally, DOJ's suggestion (at 35) that judicial intervention here will "disturb" the balance of power between the Legislative and Executive Branches has it backwards. If this Court simply defers to the Executive Branch on whether privilege applies, it would effectively be granting the Executive Branch unfettered authority to deny Congress access to vast realms of

information critical to its oversight function—the very free pass the Executive often has sought and has always been denied. *See, e.g.*, *Nixon I*, 418 U.S. at 692-97; *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997); *Miers I*, 558 F. Supp. 2d at 71. This is not surprising, as DOJ has admitted that "the Executive Branch has a headstart [sic] in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has …. All the Executive has to do is maintain the status quo, and [it] prevails."[11] In other words, the judicial abdication DOJ advocates for here would actually be judicial *acquiescence* to Executive Branch recalcitrance towards Congress. *See, e.g.*, *Miers I*, 558 F. Supp. 2d at 95 ("[A] decision to foreclose access to the courts, as the Executive urges, would tilt the balance in favor of the Executive here, the very mischief the Executive purports to fear.")

It is no exaggeration to say that if the judiciary simply defers to the Executive Branch in interbranch disputes of this nature, the Executive's incentive to respond to Congressional requests for information will virtually disappear—save only for situations where disclosure is politically beneficial—and, with it, effective Congressional oversight. *See* Bernard A. Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 Calif. L. Rev. 3, 47 (1959) ("Whenever you take away from the legislative body ... the power to look into the executive department … you have taken a full step that will eventually lead into absolute monarchy and destroy any government such as ours." (citation omitted)). In particular, much of DOJ's operations would become an oversight-free zone. As Judge Bates observed, "[t]wo parties

[11] Memorandum from William H. Rehnquist, Assistant Att'y Gen., OLC, DOJ, to John D. Ehrlichman, Assistant to the President for Domestic Affs., *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* 6-7 (Feb. 5, 1971), https://perma.cc/TX6S-VS56.

cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner." *Miers I*, 558 F. Supp. 2d at 99.

B. Executive privilege was waived by publicly releasing the information and failing to timely assert the privilege

Executive privilege has been waived here for two reasons: (1) the White House already disclosed the content of the interviews by publicly releasing written transcripts, and (2) DOJ did not timely assert privilege or comply with the terms of the Subpoena.

1. DOJ makes multiple arguments against any finding of waiver. Initially, DOJ contends (at 43) that waiver of executive privilege cannot be inferred and argues that the "explicit and unequivocal renunciation" standard for waiver of the Speech or Debate Clause privilege by Members of Congress, *United States v. Helstoski*, 442 U.S. 477, 491 (1979), also applies to assertions of executive privilege. It relies on a quote that is purportedly from a D.C. Circuit decision. But the D.C. Circuit said no such thing. DOJ instead misleadingly cites to a statement from Judge Rao respecting a denial of rehearing en banc, not an opinion for the court. *See In re Sealed Case*, 77 F.4th 815 (D.C. Cir. 2023), *reh'g denied sub nom. In re Search of Info. Stored at Premises Controlled by Twitter, Inc.*, No. 23-5044, 2024 WL 158766, *4 (D.C. Cir. Jan. 16, 2024) (Rao, J., statement respecting the denial of rehearing en banc). Moreover, the quote from Judge Rao is actually criticizing decisions of the D.C. Circuit and this Court for *not* providing executive privilege the same level of protection as Speech or Debate Clause privilege. *Id.* (observing that "the judicial decisions here provide less protection to executive privilege claims than to privilege claims raised by Members of Congress under the Speech or Debate Clause").

DOJ next argues (at 43) that it did not waive privilege by releasing the transcripts because the audio recordings contain additional information implicating the privilege. But because the White House "published" the transcripts, including by disclosing them to the public and media,

the interviews are "no longer confidential" and the claimed privilege over the audio recordings is "non-existent." *United States v. Mitchell*, 377 F. Supp. 1326, 1330 (D.D.C. 1974) (citing *Nixon v. Sirica*, 487 F.2d 700, 718 (D.C. Cir. 1973)). DOJ's attempt to distinguish *Mitchell* falls flat. That case involved an assertion of the constitutionally based presidential communications privilege, and, notwithstanding the applicability of that privilege, a waiver was found, and the audio recordings were released. Here, only the lesser, common-law-based law enforcement privilege has been asserted, but DOJ is arguing for greater privacy protection for the President's voice.

DOJ then (at 43-44) turns to the Freedom of Information Act (FOIA) context, noting that the D.C. Circuit has held that an audio recording can be withheld even after release of a transcript because the audio contains unique information. But *Pike v. DOJ*, 306 F. Supp. 3d 400 (D.D.C. 2016), which DOJ principally relies upon, is distinguishable. In *Pike*, then-Judge Jackson held that because DOJ identified "additional, distinct information contained in the audio format" that "does not reside in the public domain"—specifically, "the identity of the individual source who created the recording"—there was no requirement to produce the recording. *Id.* at 412 (emphasis omitted). Here, DOJ identifies no comparable additional information beyond what is contained in the transcripts that would properly fall within the scope of the law enforcement privilege.

Finally, DOJ relies on *Espy* for two related propositions. *First*, DOJ cites *Espy* (at 44) for the proposition that "in both the FOIA and congressional-executive contexts, courts disfavor loose conceptions of waiver because" it "would disincentivize the release of information." This argument misses the mark. *Espy* involved an *intra*-branch dispute between the Office of the Independent Counsel and the White House—not an *inter*-branch dispute between Congress and

the Executive Branch—and none of the cases that *Espy* cited for the quoted proposition are from the "congressional-executive context." As for FOIA, this Circuit has been clear that Congress has more authority to obtain information from the Executive Branch than do FOIA requesters. *See Murphy v. Dep't of Army*, 613 F.2d 1151, 1158 (D.C. Cir. 1979) ("Congress … must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively.").

Second, DOJ argues (at 44) that a loose conception of waiver will disincentivize the release of information and undermine the accommodations process. Contrary to DOJ's characterization, the Committee's position here is consistent with a narrow conception of waiver. All the Committee argues is that, like in *Mitchell*, release of these interview transcripts waives any privilege claims over the audio recordings of the exact same interviews. The Committee has not argued for application of a subject-matter waiver and nowhere suggests, for example, that the release of transcripts means that privilege over any document related to the Special Counsel's investigation has been waived.

2. Regarding the timeliness of its privilege assertion, DOJ baldly declares (at 45) that its assertion was timely because it was "consistent with Executive Branch practice." That contention is belied by precedent. The Supreme Court has made clear that objections to a Congressional subpoena must be expressed promptly. In *United States v. Bryan*, the Court held that if a subpoena recipient "had legitimate reasons for failing to produce" subpoenaed records, a "decent respect for the House" requires that it state its "reasons for noncompliance upon the return of the writ." 339 U.S. 323, 332 (1950). Such disrespect is equally intolerable when Congress demands information from the Executive Branch. "[T]here is a plain duty on … the [E]xecutive … [B]ranch[] to advance any problems for prompt consideration" when "an

important legislative interest" is involved. *AT&T II*, 567 F.2d at 133 n.40. Effective negotiation and accommodation is a "mutual" process where the political branches "seek optimal accommodation through a realistic evaluation of the needs of" each branch. *Id.* at 127, 133. Keeping those "needs" secret from Congress subverts this process. *Exxon*, 589 F.2d at 594 (noting "clear public interest in maximizing the effectiveness of the investigatory powers of Congress").

DOJ also mistakenly relies on *Espy* (at 46) for the proposition that the D.C. Circuit has foreclosed the Committee's timeliness argument. In *Espy*, however, the Independent Counsel "was well aware the White House would be asserting privileges in regard to certain documents," and so the parties were able to negotiate with that understanding. 121 F.3d at 741. That is not the case here. Although DOJ continually second guessed the Committee's articulated bases for requesting the audio recordings, in an attempt to force the Committee into an endless back and forth on that issue, its correspondence ostensibly suggested that it would be willing to produce the audio recordings if the Committee made the proper showing of need (as interpreted by DOJ). *See* Castor Decl., Exs. S, U. The White House then waited to assert the privilege until only two hours before the Committee met to consider whether to recommend holding the Attorney General in contempt, effectively ending the accommodations process. Castor Decl., Exs. V, W. This approach effectively uses privilege as a "trump card" to be played only when the Executive Branch concludes the negotiations process is ending with an outcome unfavorable to its position.

The Subpoena at issue not only contained an explicit return date, which was extended several times, *see* Compl. ¶ 110, but it also directed that "[i]f the subpoena cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible." Castor Decl., Ex. A at Instructions (page 4,

number 18). DOJ simply ignored these instructions and instead waited *nearly ten weeks* to assert any privilege over the audio recordings—long after it had disclosed the transcripts of the interviews to the Committee.

DOJ's two-month delay in asserting privilege, and its subsequent shell-game approach to disclosing the basis for that assertion, made effective negotiation and accommodation virtually impossible. In short, the constitutionally mandated authority for Congress to issue compulsory process must mean that subpoena recipients—including the Attorney General—cannot blithely ignore the terms of a Congressional subpoena without consequence.

Accordingly, the Court should find this privilege assertion invalid because it was waived both when the transcripts were publicly released and when it was not timely asserted.

C. The Executive Branch may not withhold the audio recordings from Congress based on a common law privilege

No court has held that a common law privilege (not grounded in the Constitution) may validly be asserted in response to a Congressional subpoena; the case law indicates the opposite. *See, e.g.*, *In re Provident Life & Accident Ins.*, 1990 U.S. Dist. LEXIS 21067, *6 (E.D. Tenn. June 19, 1990) ("Congress … stands as a separate and co-equal branch of government which is capable of making its own determinations regarding privileges asserted by witnesses before it.").

DOJ relies (at 42) on language in *Mazars*, 591 U.S. at 861, for its view that common law privileges are applicable in response to legislative subpoenas. But that language is, at best, dictum because President Trump did not rely on any common law privilege before the Court, so the question of applicability was neither briefed by the parties nor necessary to the Court's holding. A more plausible reading is that "recipients of congressional subpoenas who are compelled to produce information to Congress retain their right to assert … privilege *in other venues*." David Rapallo, *House Rules and the Attorney-Client Privilege*, 100 Wash. U. L. Rev.

455, 509 (2022). This reading is supported by the CRS Report citation used by the Court (and cited by DOJ), which described a negotiated resolution between the White House and a Congressional committee, whereby the Committee *obtained* privileged information after assuring the White House that the production did not constitute a privilege waiver. *See Mazars*, 591 U.S. at 861.

Judicial recognition of common law privileges in the context of Congressional subpoenas would seriously distort the balance of power between the Legislative and Executive Branches. Moreover, it would downgrade Congress's ability to obtain Executive Branch information to that of civil litigants and FOIA requesters, a consequence this Circuit has already rejected. *See Murphy*, 613 F.2d at 1158.

D. The Committee has shown that it needs the audio recordings to exercise its constitutional authorities, and that need overcomes DOJ's concerns about disclosing voice inflection and deepfakes

The Committee needs the audio recordings to execute its oversight investigation and to advance the impeachment inquiry. DOJ's justifications for withholding the audio recordings, on the other hand, are extremely weak.

1. The Committee needs the audio recordings to evaluate the Special Counsel's recommendations and to decide whether legislative reforms are necessary

Even if a privilege applies here, the Committee is entitled to the audio recordings as part of its oversight investigation so long as it shows that they "likely contain[] important evidence" "that … is not available with due diligence elsewhere." *See Espy*, 121 F.3d at 745 (grand jury subpoena to White House counsel); *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 113 (D.D.C. 2016) ("[l]ooking at the *Espy* factors" when weighing a House committee's need for subpoenaed material against the Executive's interest in confidentiality).

DOJ wrongly argues (at 47) that the "demonstrably critical" standard from *Senate Select* applies. It does not. That case dealt with a subpoena for audio recordings of President Nixon's conversations with a close advisor, the White House Counsel. *Id.* at 726. The recordings at issue here, by contrast, do not involve the presidential communications privilege, and therefore *Senate Select*'s standard does not apply. *Cf. Jud. Watch, Inc. v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) ("The presidential communications privilege thus is a broader privilege that provides greater protection against disclosure [than the deliberative process privilege], although it too can be overcome by a sufficient showing of need.").

DOJ's reliance (at 49-51) on the standard from *Mazars* makes even less sense. Courts use that framework when assessing whether a Congressional subpoena for the president's personal information is consistent with the House's authority. *See* 591 U.S. at 853. The Supreme Court was not addressing a privilege claim in *Mazars* and did not consider when the House's need for information would overcome the Executive Branch's interest in secrecy, which is what this Court must do here.

In any event, the Committee's showing here satisfies all of these standards. The Committee is assessing whether the Special Counsel's recommendations are consistent with a commitment to impartial justice. In concluding that President Biden should not be charged criminally, the Special Counsel relied upon the way the President presented himself during their interview. *See* Castor Decl. ¶ 16 & Ex. D at 50. The Committee cannot take the Special Counsel's characterizations at face value. *See* Pl. Mem. 38. Both the President and his lawyers have disputed those characterizations, showing they are up for debate. *Id.* at 10, 38. The Special Counsel likewise drew conclusions about Zwonitzer's credibility in deciding that he should not be charged criminally. *See* Report at 336-38, 341-44. The Committee thus needs the audio

recordings—the best available evidence of the Special Counsel's interviews—to assess his conclusions. Once it has done that, the Committee will be able to decide whether any legislative reforms to DOJ's use of special counsels are necessary.

DOJ ignores the Committee's stated need and instead props up a strawman. The Committee, DOJ claims (at 49), is trying to "fully reconstruct" the Special Counsel's investigation and is seeking "every scrap of potentially relevant evidence." (citation omitted). As explained below, that strawman finds no support in the record. Up against the Committee's actual stated need, DOJ's arguments unravel.

First, no other source can provide the information the Committee seeks, which is the best available evidence of the Special Counsel's interviews. The Committee needs the audio recordings because the cold transcripts are incomplete accounts of those interviews. *See* Pl. Mem. 7-10. DOJ does not dispute that the audio recordings are the best available evidence. It is thus forced to argue that the Committee does not truly need the best available evidence. In DOJ's view (at 50), the Committee has enough information to determine whether legislative reforms are needed, and "[n]o more information could be necessary." But the Committee, not DOJ, decides what information it needs to execute its investigation. The Committee has explained that it cannot decide whether reforms are necessary until it first decides for itself whether the Special Counsel's recommendations are consistent with a commitment to impartial justice. *See* Castor Decl. ¶ 24. And it cannot do that without the audio recordings. *Id.*

After all, the Special Counsel's subjective view of the President's state of mind—which was based on "the entire manner in living color in real time of how the President presented himself," *see* Castor Decl., Ex. D at 50—affected his recommendation. Despite finding evidence that President Biden "willfully retained and disclosed classified materials … when he was a

private citizen," the Special Counsel concluded that he should not be charged criminally. *See* Report at 1. This was based, in part, on the Special Counsel's view that jurors would likely believe that President Biden's actions were not willful. *See id.* at 4-5. As support for that belief, the Special Counsel relied on his subjective view of President Biden's allegedly poor memory. *See* Pl. Mem. 8-9. The audio recordings, unlike the transcripts, capture nuances that will allow the Committee to better understand how the President presented himself: things like tone, inflection, pace, hesitation, filler words, and repeated words. These aspects of President Biden's interview convey unique information and, in turn, will allow the Committee to better evaluate the Special Counsel's subjective view of the President's mental state.

Second, far from an attempt to "completely reconstruct" the Special Counsel's investigation, *see* Def. Mem. 50, the Subpoena is narrowly focused on the information that is most critical to the Committee's investigation: the Special Counsel's interviews with the two people whom, in the Special Counsel's view, should not be charged criminally. In reaching his conclusions that neither President Biden nor Zwonitzer should be charged, the Special Counsel relied on those interviews, including his assessment of how the President presented and his views about Zwonitzer's credibility. *See* Castor Decl., Ex. D at 50; Report at 336-38, 341-44. The Committee thus subpoenaed the best available evidence of critical aspects of the investigation. The Special Counsel interviewed 147 total witnesses, Report at 29, and the Committee did not seek the audio recordings or transcripts for 145 of those. And of the more than "seven million documents" collected by investigators, *id.*, the Committee subpoenaed just two. And there are surely earlier drafts of the Special Counsel's Report, as well as internal notes, memoranda, and other related materials, none of which the Committee subpoenaed. DOJ's related claim (at 50-51) that the Committee has pointed to no legislative decision that it is unable to responsibly make

without the audio recordings ignores what the Committee has said. The Committee cannot evaluate whether the Special Counsel's conclusions are consistent with a commitment to impartial justice. *See* Castor Decl. ¶ 24. And this, in turn, prevents it from determining whether legislative reforms to DOJ's use of special counsels are necessary. *Id.*

Third, DOJ (at 51) would penalize the Committee for not identifying any specific instance in the transcripts where there are gaps to fill. But those gaps—verbal and nonverbal nuances and deleted words—are not reflected in the transcripts. *See* Pl. Mem. 7. That is a fundamental reason why the Committee needs the audio recordings. *See* Castor Decl. ¶ 21. It cannot point to any gaps because the Committee has no way of knowing where they might be. It is unrealistic to expect it to, for example, point out exactly where DOJ's transcriber deleted repeated or filler words from the transcript or where there are long pauses in answers that could be evidence of a poor memory. Nor has the Committee ever claimed that it needs the audio to "discern the meaning of the answers provided." *See* Def. Mem. 51. Rather, it has consistently explained that it needs the audio recordings to evaluate the Special Counsel's conclusions. *See, e.g.*, Castor Decl. ¶ 24. The Special Counsel explained that he considered "not just the words from the cold record of the transcript, but the entire manner in living color in real time of how the President presented himself." Castor Decl., Ex. D at 50. The Special Counsel also relied on his view of Zwonitzer's credibility, *see* Report at 336-38, 341-44, and judgments about credibility are often informed by verbal and non-verbal context that do not show up on a cold transcript, *see* Pl. Mem. 7-8. The Committee thus needs the audio recordings to conclude whether the Special Counsel's recommendations are consistent with a commitment to impartial justice.

In sum, the Committee's need for the audio recordings satisfies whichever standard the Court applies: the Committee cannot complete its oversight investigation—and thus cannot exercise its constitutional authority—without them. *See* Castor Decl. ¶ 27. Nor can it obtain from any other source the critical verbal and nonverbal context that it will get from the audio recordings. No written document captures it; the Special Counsel's testimony doesn't either.

2. The Committee needs the audio recordings to advance the impeachment inquiry

The Committee has also demonstrated that the audio recordings will advance the impeachment inquiry.[12] As the Executive Branch has recognized, Congressional authority is at its apex when the House is conducting an impeachment inquiry. *See* 4 J. Richardson, *A Compilation of the Messages and Papers of the Presidents*, H. Misc. Doc. 53-210, at 434 (1897) (statement of President James K. Polk) (noting that an impeachment inquiry "penetrate[s] into the most secret recesses of the Executive Department" and includes the authority to "command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge"), https://perma.cc/82XR-DWJ2. This makes sense given the critical role that impeachment plays in addressing Executive Branch misconduct, *see* The Federalist No. 66 (Alexander Hamilton) ("[T]he powers relating to impeachments are … an essential check … upon the encroachments of the executive."), https://perma.cc/Z5CY-THR5.

Thus, even if a privilege could apply to an impeachment inquiry, *but see* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev.

[12] DOJ speculates (at 55 n.14) that a forthcoming report relating to impeachment shows that the Committee has finished its impeachment investigation. That report will not represent the end of the Committee's impeachment inquiry. Rather, the Committee will continue gathering evidence to advance its inquiry after that report is released.

563, 630 (1991) (arguing it would not), it would apply in its weakest form: yielding whenever the information sought is relevant to the inquiry. Otherwise, a president who is the subject of an impeachment inquiry could simply shield evidence of his or her wrongdoing and frustrate the House's constitutional impeachment power. The House would then be unable to protect the nation from presidential misconduct. *Cf.* 2 *The Records of the Federal Convention of 1787*, at 65-66 (Max Farrand ed., 1911) (Madison explaining that "[t]he limitation of the period of [the President's] service[] was not a sufficient security" against incapacity or corruption, which could be "fatal to the Republic"), https://perma.cc/CZ5A-V3WU. DOJ suggests (at 52-53) that standards from the grand jury context, the criminal third-party subpoena context, or the civil discovery context might instead apply. But unlike those contexts, the Constitution textually commits the impeachment power to Congress for the targeted purpose of addressing malfeasance by Executive Branch officials, including the president. Thus, an Executive-Branch-specific privilege that would thwart the impeachment power must be easier to overcome than it might be in other contexts.

The Committee has shown that the audio recordings are relevant to the impeachment inquiry, which overcomes any privilege claim. *First*, President Biden retained two classified documents related to a call that he had with the Ukrainian Prime Minister. *See* Report at 281, 310, A-2. According to testimony received during the impeachment inquiry, the Committee has learned that Hunter Biden, who sat on the board of a Ukrainian company whose owner was under investigation by Ukrainian prosecutors, was asked "to get help from 'D.C.'" and "called his dad" just days before then-Vice President Biden had that call with the Ukrainian Prime Minister. *See* Castor Decl. ¶ 11 (quoting Ex. DD at 35-36). During the Special Counsel's interview, President Biden discussed the box in which the Ukraine documents were found. *See*

Transcript of Special Counsel Interview with President Biden at 75-96 (Oct. 9, 2023), https://perma.cc/64ZP-FK7X. And the Special Counsel specifically asked the President if he knew how certain materials in that box ended up in the Penn Biden Center. *Id.* at 96. It is possible that President Biden hesitated more than normal or used an unusual number of filler words that, depending on the context, could convey deception when discussing these topics. If President Biden did seem deceptive when discussing them, the Committee may decide that it needs to take additional investigative steps related to his retention of the classified materials related to Ukraine.

Second, President Biden discussed with the Special Counsel the classified materials that he ultimately relied upon when writing his memoir. *See, e.g.*, Transcript of Special Counsel Interview with President Biden at 100-36 (Oct. 8, 2023), https://perma.cc/FN87-B2XK. (These were not the materials related to Ukraine, as DOJ wrongly claims at 54-55.) If he seemed deceptive during that conversation, including when answering whether he placed a notebook that contained classified materials in the drawer where it was ultimately found, *see id.* at 125, the Committee may decide that additional investigative steps are necessary. After all, the Special Counsel concluded that President Biden's book deal provided "strong motivations" for the President to retain the notebooks. *See* Report at 8. And if then-Vice President Biden willfully retained classified documents to make millions of dollars from a book deal, that would be an abuse of office that could constitute an impeachable offense. Zwonitzer also answered questions about the notebooks President Biden relied upon while sharing information with Zwonitzer, and Zwonitzer was directly asked whether he believed then-Vice President Biden kept his diaries "with the sense that someday he might write a book about his experiences as vice president." Transcript of Special Counsel Interview with Mark Zwonitzer at 64-65 (July 31, 2023),

https://perma.cc/ZM9Z-M2VK. If Zwonitzer seemed less than forthcoming, the Committee may decide that it should take additional steps to learn more about then-Vice President Biden's motivations for retaining the classified material he relied upon while writing his book.

The Committee thus needs the audio recordings to advance its impeachment inquiry. DOJ misunderstands the Committee's need when it faults the Committee (at 55) for not pointing to specific questions in the transcript that ask whether President Biden retained classified information to benefit his family's business dealings or to enrich himself with a book deal. The Committee has never suggested that the interview by itself will expose an impeachable offense. Rather, the connection between the audio recordings and the impeachment inquiry, while less ambitious, is a straightforward one: if the President sounds deceptive or defensive when discussing the circumstances surrounding his retaining the classified materials related to Ukraine or the classified materials that he relied upon to write a book, the Committee may decide that further investigative steps should be taken. Investigators regularly follow up when they believe a witness is being evasive; the Committee is simply trying to understand how the President presented himself and whether additional steps are necessary.

DOJ's claim (at 55-56) that the audio recordings would be cumulative fails for the same reason. The Committee has never argued that the words President Biden uttered may show by themselves that he committed an impeachable offense. It is simply trying to understand how the President presented, including whether he seemed deceptive or evasive, when discussing classified material related to Ukraine and classified material he relied upon to write his book.

Finally, DOJ wrongly argues (at 53-54) that the Committee's inquiry is constrained by the text of the impeachment memorandum. The plain text of the House Resolution 918 shows that the investigation "includes" the topics discussed in the impeachment memorandum but is not

limited to those topics. *See* H. Res. 918, 118th Cong. (2023) (directing the committees to "continue their ongoing investigations as part of the House … inquiry into whether sufficient grounds exist for the House … to exercise its Constitutional power to impeach Joseph Biden, President of the United States of America, *including* as set forth in the [impeachment] memorandum" (emphasis added)); *Samantar*, 560 U.S. at 317 n.10 ("[T]he word 'includes' is usually a term of enlargement, and not of limitation." (alteration in original) (citation omitted)).

Beyond that fundamental flaw, the impeachment memorandum itself reserved the Committee's right to take the investigation in a direction that was unanticipated at the time. *See* Castor Decl., Ex. B at 27 ("Because the impeachment inquiry will go where that evidence leads, the investigation could head in directions that the Committees do not currently foresee."). Moreover, the audio recordings do relate to a topic discussed in the impeachment memorandum. *See id.* at 28 (explaining that the committees would be investigating whether "Joe Biden, as Vice President and/or President, abuse[d] his office of public trust by providing foreign interests with access to him and his office in exchange for payments to his family or him"). Retaining classified information to benefit his family's foreign business dealings would be a similar abuse.

In any event, the House's authority to conduct an impeachment inquiry does not depend upon (and thus is not limited by) any authorizing document. *See In re Application of Comm. on Judiciary*, 414 F. Supp. 3d 129, 168-69 (D.D.C. 2019) (explaining that "[e]ven in cases of presidential impeachment, a House resolution has never … been required to begin an impeachment inquiry" and noting that imposing one "would be an impermissible intrusion on the House's constitutional authority"), *vacated and remanded on other grounds sub nom. DOJ v. House Comm. on Judiciary*, 142 S. Ct. 46 (2021).

In sum, review of the audio recordings will advance the impeachment inquiry.

3. DOJ's attempts to justify concealing the audio recordings fall short

DOJ claims (at 37) that the audio recordings implicate "at least two significant privacy interests" that it must protect to ensure that future witnesses in similar high-profile investigations will cooperate. As DOJ tells it (at 37-38), audio recordings (a) "contain unique and particularly personal information … different from the information that may be present in transcriptions" and (b) "are more easily and convincingly manipulated than transcripts." Neither reason is persuasive nor withstands scrutiny.

a. DOJ argues (at 38) that releasing the audio recordings would infringe on President Biden's privacy, especially because he was never criminally charged. The case it relies on, *Judicial Watch, Inc. v. NARA*, 876 F.3d 346 (D.C. Cir. 2017), exposes how far-fetched this theory is. There, the D.C. Circuit held that former First Lady Hillary Clinton's privacy interest justified withholding (under FOIA) a non-public draft indictment of her. *Id*. at 349-50. But the audio recordings the Committee seeks here are not remotely equivalent to an unpublished criminal indictment. Among other things, the audio recordings do not contain allegations that President Biden engaged in criminal conduct, and they are of interviews whose substance was made public by the very White House now asserting privilege. The public knows that President Biden was interviewed; it knows the sound of his voice; and the vast majority of the words he spoke are in the public domain. To say (at 38) that release of the audio recordings under these circumstances would affect "a particularly significant intrusion on [President Biden]'s privacy," merely because they involve law enforcement interviews, strains credulity.

b. DOJ also asserts (at 38-39) a privacy-related interest in preventing manipulation of the audio recordings. This concern rests on the faulty assumption, unsupported by any evidence, that the audio recordings will automatically be made public if they are disclosed to the

Committee. But this assumption is incorrect for at least two reasons. *First*, under binding Circuit precedent, the "release of information to the Congress does not constitute 'public disclosure.'" *Exxon*, 589 F.2d at 589 (citations omitted); *see also FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (per curiam). *Second*, the Committee has never indicated it would make the recordings public, and DOJ points to nothing in the record to support its implicit allegation. This Circuit has expressly recognized that "courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties" once sensitive information is "in congressional hands." *Owens-Corning*, 626 F.2d at 970 (citation omitted).

Furthermore, DOJ's concerns are at best a *post hoc* rationale. If DOJ were truly worried about third parties manipulating the audio from the interviews or creating "deepfakes," those concerns could have been addressed through the accommodations process. Numerous options to prevent public exposure of the recordings could have been presented to the Committee. For example, DOJ could have proposed that: (1) Committee Members listen to the audio recordings only during a closed-door executive session, (2) the recordings not be physically transferred to the Committee and instead Members and Committee staff listen to the recordings upon request in a secure location, or (3) each Member or staff who listened to the audio be required to sign in on a log tracking the date and time to ensure accountability in the event of any public disclosure. The accommodations process that DOJ so boastfully touts (at 27-30, 44, and 46) is intended to address these very types of issues. Yet, instead of good faith engagement in that process, DOJ demurred, resting on its view that the Committee had everything it required, and ultimately asserting privilege over the audio recordings. DOJ's approach casts serious doubt on the gravity

of its concern, a concern that, timing aside, seems dubious given that there are already many examples of President Biden's voice and Special Counsel Hur's voice publicly available (which is presumably how the deepfake that DOJ mentions (at 38-39) was created).

c. Although DOJ proclaims that it must protect the audio recordings here to avoid the risk of a chilling effect in the future, it is difficult to see why. DOJ offers no evidence to support its claim. And for the reasons just explained, neither of the purported privacy interests to which DOJ points offers a credible theory for why, if DOJ produced the audio recordings to the Committee, future witnesses would be less likely to cooperate in high-profile investigations.

It is thus hard to imagine that a high-profile Executive Branch witness would agree to participate in a voluntary interview, knowing that a transcript of the interview might be released publicly and to Congress, but would not agree solely because DOJ might additionally produce an audio recording of the interview to Congress. DOJ argues (at 51-52) that the Court should blindly defer to its self-interested assessment of the alleged chilling effect. But the weakness of the Executive Branch's justification for invoking privilege is surely relevant to the Court's assessment of whether the Committee's showing overcomes the privilege claim. Here, the Committee's need to complete its investigation and advance the impeachment inquiry overcomes DOJ's interest in protecting the sound of a witness's voice and avoiding a risk of deepfakes.

Finally, to the extent DOJ meant to suggest (at 47-48) that *Senate Select* stands for the proposition that Congress may never overcome the Executive's privilege claim over audio recordings when transcripts of the recordings are publicly available, such a suggestion would be wrong. To be sure, the D.C. Circuit concluded that the select committee there had not made the required showing to overcome the Executive's privilege claim over audio tapes, but, unlike the situation here, another committee already had the audio tapes at issue. *Senate Select*, 498 F.2d at

732. As the Court explained, this meant that "the Select Committee's immediate oversight need for the subpoenaed tapes [wa]s, from a congressional perspective, merely cumulative." *Id.* And the select committee there failed to point to a specific legislative decision that it needed the audio recordings to make. *See id.* at 733. As explained above, the Committee here has done just that. It cannot decide whether legislative reforms to DOJ's use of special counsels are necessary until it first determines whether the Special Counsel's recommendations are consistent with a commitment to impartial justice. *See* Castor Decl. ¶ 24. And it needs the audio recordings to do that. *Id.*

For these reasons, the Committee's need overcomes DOJ's minimal interest in secrecy.

III. The Committee is entitled to an injunction, which will prevent irreparable harm and safeguard the separation of powers

The Executive Branch's refusal to produce the audio recordings is irreparably harming the Committee: it needs the audio to complete its oversight investigation and to advance the impeachment investigation. By refusing to produce them, the Executive is depriving the Committee of information to which it is entitled and interfering with the Committee's ability to exercise its constitutional authority. This injury is both irreparable and urgent—the 118th Congress expires in less than five months, and the Committee is diligently working to wrap up its oversight investigation and impeachment inquiry. *Cf. Comm. on Judiciary v. Miers*, 575 F. Supp. 2d 201, 207 (D.D.C. 2008) (*Miers II*) (agreeing that "run[ning] out the clock on this Congress" "would be extremely damaging to the Committee, as it seeks closure to this important Investigation prior to the end of the current Congress and Administration" (citation omitted)). The balance of equities and public interest favor an injunction. *Cf. id.* at 209 (concluding the public's interest in the Committee finishing its investigation outweighed the Executive's abstract interest in vindicating abstract separation-of-powers concerns on appeal).

DOJ recycles its claim (at 56-57) that equitable principles caution against the Court resolving a dispute between two branches. But as explained above, "permitting Congress to bring this lawsuit preserves the power of subpoena that the House … is already understood to possess." *See McGahn En Banc*, 968 F.3d at 771. DOJ's position, by contrast, would "aggrandize the power of the Executive Branch at the expense of Congress." *Id.*

CONCLUSION

The Court should grant the Committee's motion for expedited summary judgment, deny Garland's cross-motion for summary judgment, and require Garland to produce the audio recordings to the Committee.

Respectfully submitted,

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August 16, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff,

v.

MERRICK GARLAND, in his official capacity as Attorney General of the United States,

Defendant.

Case No. 1:24-cv-1911-ABJ

[PROPOSED] ORDER

Upon consideration of Plaintiff's Motion for Expedited Summary Judgment (ECF No. 11), Defendant's Cross-Motion for Summary Judgment (ECF No. 18), the Parties' Oppositions and Replies, and the entire record herein, it is hereby

ORDERED that Plaintiff's Motion for Expedited Summary Judgment is **GRANTED**; and it is

FURTHER ORDERED that Defendant's Cross-Motion for Summary Judgment is **DENIED**; and it is

DECLARED that Defendant's refusal to produce the audio recordings of Special Counsel Robert Hur's interviews with President Joseph Biden and Mark Zwontizer to Plaintiff in response to the subpoena issued to Defendant by Plaintiff on February 27, 2024, lacked legal justification; and

a **PERMANENT INJUNCTION** is **ISSUED** ordering Defendant to comply with Plaintiff's February 27, 2024 subpoena and produce the audio recordings of Special Counsel Robert Hur's interviews with President Joseph Biden and Mark Zwontizer to Plaintiff no later than seven days after entry of this Order; and

JUDGMENT is entered for **PLAINTIFF**.

_____
Date

_____
HON. AMY BERMAN JACKSON
United States District Judge