

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Committee on the Judiciary)
of the U.S. House of) Civil Action
Representatives,) No. 24-cv-1911
)
Plaintiff,) MOTIONS HEARING
)
vs.) Washington, DC
) October 28, 2024
Merrick B. Garland,) Time: 10:00 a.m.
)
Defendant.)

TRANSCRIPT OF MOTIONS HEARING
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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* * * * * P R O C E E D I N G S * * * * *

THE COURTROOM DEPUTY: We are on the record with civil case 24-1911, *Committee on the Judiciary of the United States House of Representatives versus Merrick B. Garland*.

Counsel, starting with the plaintiff, please approach and state your appearance for the record.

MR. BERRY: Hello my name is Matthew Berry and I represent the Committee on the Judiciary.

THE COURT: All right. Good morning.

THE COURTROOM DEPUTY: Sir, would you --

MR. TATELMAN: Todd Tatelman, also for the Committee on the Judiciary.

THE COURT: All right. Good morning.

MR. NETTER: Good morning, Your Honor. Brian Netter for the defendant, Merrick Garland.

THE COURT: All right.

MS. SHAPIRO: Good morning, Your Honor. Elizabeth Shapiro, also from the Department of Justice. And with me is Alexander Resar and Brian Boynton.

THE COURT: All right. Good morning, everyone.

Pending before the Court is plaintiff's motion for a preliminary injunction, Docket 11 which we deemed to be a motion for summary judgment. I have defendant's opposition and cross-motion for summary judgment at Docket 18, and 19 is the

1 memo. The matter has been fully briefed. The Committee had an
2 opportunity to file a reply and cross-opposition at Dockets 21
3 and 22. And the government filed its cross-reply -- well,
4 let's say, the Executive Branch filed its cross-reply at Docket
5 24.

6 This case concerns a congressional subpoena, a copy
7 of which is at Docket 11, which was issued to the attorney
8 general, calling for several sets of material, including all
9 documents and communications, including audio and video
10 recordings related to Special Counsel Robert Hur's interview of
11 President Joseph R. Biden and his interview of Mark Zwonitzer,
12 an author identified as the ghostwriter of President Biden's
13 2017 memoir.

14 And the President has asserted Executive privilege
15 over the audio recordings at the Attorney General's request.
16 And that assertion is in a letter in Exhibit 5 to the
17 complaint, at docket 122. This came after the Executive Branch
18 had already provided a transcript of the same interview.

19 The Department of Justice advances merits arguments
20 and jurisdictional arguments as to why I shouldn't take up this
21 case. So I'm going to take up the jurisdictional and
22 procedural issues first, the standing issues, whether the Court
23 has subject matter jurisdiction, whether there's a cause of
24 action in the judicial restraint issue, although that's not
25 exactly jurisdictional. And then I'm going to hear from both

1 sides on those issues before we turn to the assertion of
2 privilege itself and the basis for that.

3 We have a lot of issues to cover and I'm sure you're
4 both prepared to stand here and talk about a lot of things, but
5 I'm going to take over early and start by asking questions.
6 But I promise you, if we get to the end of this hearing and
7 there's an issue that you wanted to address that you didn't get
8 a chance to address, I will give you a chance to address it.
9 But right now I have very specific concerns that I want to ask
10 each side.

11 So I'm going to start with the Committee. And we're
12 going to start, as I said, with the more jurisdictional issues
13 and the subpoena and things like that.

14 In the *McGahn* case, the Circuit noted, and I observed
15 in the *Holder* case, that in those cases, the full House had
16 authorized the bringing of the lawsuit and the invocation of
17 the Court's Article III jurisdiction. *McGahn* said, at page
18 768, "Because of delegations pursuant to House Rules and
19 passage of a House Resolution authorizing the present lawsuit,
20 the Committee is an appropriate plaintiff to vindicate the
21 injury."

22 Does that case stand for the proposition that a vote
23 by the House as a whole is a necessary predicate?

24 MR. BERRY: I don't believe so, Your Honor. With
25 respect to -- I guess, I would say two things: One, with

1 respect to standing, the question is whether or not the
2 Committee is the appropriate plaintiff. And here the Committee
3 is the appropriate plaintiff because it is the institution that
4 has suffered the informational injury. The informational
5 injury has been caused by the defendant's refusal to submit the
6 audio recordings to comply with the subpoena and it would be
7 redressed by a decision of this Court.

8 So I don't believe that the issue of standing -- that
9 the full vote of the House is necessary for there to be
10 standing. That having been said, I do think this lawsuit has
11 been authorized pursuant to House Rules. In House Resolution
12 917, the House specifically authorized committees to go to
13 court to enforce subpoenas that were issued in furtherance of
14 the impeachment inquiry. And on its face the subpoena was
15 issued pursuant to the impeachment inquiry.

16 Number two --

17 THE COURT: Well, if the House Resolution was
18 necessary to authorize the Committee to enforce subpoenas in
19 furtherance of the impeachment inquiry, then how does that show
20 that the Committee had the inherent authority? It needed a
21 House Resolution to do it. So what is the source of its doing
22 it with respect to its inquiry into the Special Counsel?

23 MR. BERRY: Your Honor, we do not believe that that
24 was necessary, but -- that you give this general authorization,
25 but we certainly think it's helpful in this case.

1 Secondly, I would point to House Resolution 1292
2 which specifically authorized the Speaker to take all
3 appropriate action to enforce the subpoena. One of the ways he
4 did that was by convening the Bipartisan Legal Advisory Group
5 which, again, pursuant to House Rules took a specific vote to
6 authorize the filing of this lawsuit.

7 THE COURT: All right. The complaint cites House
8 Rules giving the Committee authority to issue subpoenas. And
9 no one questions your authority to issue subpoenas. But I
10 don't see a rule that gives the Committee authorization to
11 enforce them in court. Why do you say that the vote by the
12 Bipartisan Legal Advisory Group is sufficient?

13 MR. BERRY: Well, Your Honor, because it's -- the
14 Bipartisan Legal Advisory Group, it's the position -- it's the
15 responsibility of that body, pursuant to House Rules, to
16 establish the House's position with respect to litigation. It
17 is authorized -- voted in the past to authorize litigation,
18 such as when the Committee on Ways and Means sought President
19 Trump's tax information. And the Speaker convening that BLAG
20 was specifically authorized by 1292, House Resolution, which
21 said that he should take -- otherwise take all appropriate
22 action to enforce the subpoena.

23 The defendant's argument here is, well, that meant
24 forwarding the contempt citation to the U.S. Attorney. But he
25 was already directed in the resolution to do that. So the

1 question --

2 THE COURT: Well, where is the resolution for this
3 case?

4 MR. BERRY: Excuse me, Your Honor?

5 THE COURT: You're talking about other cases where
6 there was a resolution. Is there a resolution with respect to
7 this case?

8 MR. BERRY: 1292 is specifically about this -- the
9 subpoena, Your Honor. When the Attorney General was held in
10 contempt for refusing to abide by this subpoena, the House also
11 directed the Speaker to otherwise take all appropriate action
12 to enforce the subpoena. That would include convening the BLAG
13 to authorize this lawsuit.

14 THE COURT: But why does convening the BLAG get to
15 authorize the lawsuit? You lifted a sentence from the House
16 Rules that said, "The Bipartisan Legal Advisory Group speaks
17 for and articulates the institutional position of the House in
18 all litigation matters." So I went to the House Rules to see,
19 where does it talk about the BLAG? And the BLAG gets very
20 limited role in the House Rules. It's under Rule II, which is
21 called Other Officers or Officials, which includes things like
22 the Sergeant at Arms. And then there's Clause 8. And Clause 8
23 is about the Office of General Counsel. 8(a) says there's
24 going to be established an Office of General Counsel and it
25 says what it does, and it says it's going to consult with the

1 Bipartisan Legal Advisory Group.

2 And 8(b) says, "There is established a Bipartisan
3 Legal Advisory Group, unless otherwise provided by the
4 House" -- the part of the sentence that you didn't put in your
5 brief -- "the Bipartisan Legal Advisory Group speaks for and
6 articulates the institutional position of the House in all
7 litigation matters." So that is what you're saying is the
8 source of the authority for the Bipartisan Legal Advisory Group
9 to authorize subpoena enforcement litigation?

10 MR. BERRY: Yes, Your Honor.

11 THE COURT: All right. It says, "Unless otherwise
12 provided." So it is otherwise provided by the House Rules,
13 isn't it? If you get to Rule XI, that's the rule about
14 committees, right?

15 MR. BERRY: Yes, Your Honor.

16 THE COURT: Okay. And that rule says committees are
17 authorized to issue subpoenas in Clause 2, but doesn't it also
18 say that Rule XI, Clause 2, Section (m)(3)(C), "Compliance with
19 a subpoena issued by a committee may be enforced only as
20 authorized or directed by the House." So how can that broad
21 statement about the Bipartisan Legal Advisory Group trump that
22 very specific House Rule that says the House has to authorize
23 litigation to enforce a subpoena?

24 MR. BERRY: I would say, Your Honor, number one, the
25 House Resolution 917 did authorize the subpoena, the

1 enforcement of the subpoena in court. Specifically, anything
2 related to the impeachment inquiry.

3 Number two, House Resolution 1292 specifically
4 instructed that the Speaker take all appropriate action to
5 enforce the subpoena, which includes then going to the BLAG.
6 And I would also say, Your Honor, that this has been the
7 House's interpretation of its own rules for a number of years,
8 and that pursuant to precedent, courts give great deference to
9 the House's interpretation of its own rules.

10 THE COURT: Well, it's just that most of the subpoena
11 enforcement cases that I'm familiar with, the House did
12 authorize them.

13 MR. BERRY: And the House did authorize this one,
14 Your Honor. But with respect to --

15 THE COURT: The BLAG has authorized this one. I'm
16 talking about -- I'm sorry, the whole House.

17 MR. BERRY: House Resolution 917, Your Honor,
18 specifically authorizes the committees to go to court to
19 enforce any subpoena that's not complied with that was issued
20 pursuant to the impeachment inquiry. This is one of those.

21 THE COURT: I thought this one was issued as part of
22 your inquiry into Special Counsel Hur.

23 MR. BERRY: There were two purposes, Your Honor.
24 Specifically, in the cover letter accompanying the subpoena, as
25 well as all the letters going back and forth. One is the

1 oversight rationale, which is very important. And secondly is
2 the impeachment inquiry.

3 THE COURT: Okay. So the impeachment inquiry was
4 into the question of whether the Biden family had profited from
5 his position through the son's dealings abroad, et cetera.
6 What does this have to do with that?

7 MR. BERRY: Well, Your Honor, there are two things I
8 would point to. Number one, two of the documents that
9 President Biden retained after his vice presidency specifically
10 dealt with his conversations, communications with the
11 government of Ukraine. Communications that took place around
12 the time that Hunter Biden approached D.C. to try to get help
13 from the U.S. government with respect to the Ukrainian
14 government's treatment of Burisma. So the question is, were
15 those documents willfully retained in any way in order to help
16 his family's business?

17 Number two, the Committee is looking into whether or
18 not, as Special Counsel Hur said, the President, now President
19 willfully retained documents so that he could write his book
20 and make millions of dollars, which the Special Counsel
21 specifically admitted created a large motive for him to retain
22 these documents.

23 THE COURT: What does that have to do with the audio
24 recording of his voice? You have the transcript. You know
25 what he said. You have Hur's report and you know what he

1 thought. We're talking about a very narrow little piece of
2 evidence here, what the President sounded like when he met the
3 Special Counsel. Explain to me the connection between that
4 piece of evidence and the impeachment. I understand the
5 connection between that piece of evidence and Hur's decision,
6 but what does this have to do with House Rule -- Resolution
7 817?

8 MR. BERRY: So, Your Honor, in assessing a witness's
9 credibility, in terms of his willful retention of documents,
10 why he retained them and the like, credibility is important.
11 And as Your Honor is well aware, being able to listen to an
12 audio recording and listen to how a witness says something is
13 relevant in terms of evaluating credibility, not just reading
14 the cold words of a transcript.

15 So, did the President sound credible, for instance,
16 when he was talking about his retention of the documents, that
17 he didn't mean to do it, he didn't do it in order to write his
18 book.

19 THE COURT: He wasn't president when he retained the
20 documents, correct?

21 MR. BERRY: He was -- well, he was -- correct.
22 That's absolutely correct.

23 THE COURT: So that has nothing to do with the
24 impeachment inquiry, why he retained the documents. It may be
25 something you're interested in, it may have something to do

1 with whether you think the Special Counsel did his job. But
2 what does it have to do with the impeachment inquiry?

3 MR. BERRY: Because, Your Honor, as the Committee has
4 been clear throughout its impeachment inquiry, to the extent
5 that President Biden abused his authority when he was
6 vice president to willfully retain documents for impermissible
7 reasons, his behavior as vice president is impeachable.

8 THE COURT: I'm not sure that that theory of the
9 impeachment is in your complaint. You just talk about his
10 involvement in foreign transactions and. I just really don't
11 see how what Biden sounded like when he met with Special
12 Counsel Hur advances what you say your impeachment inquiry is.
13 How are those bound together?

14 MR. BERRY: Because the issue is whether or not --

15 THE COURT: You're not impeaching him for retaining
16 documents, correct? You're impeaching him for supposedly using
17 his influence as President to advance his son's business
18 operations, is that correct? Is that still going on, by the
19 way, that --

20 MR. BERRY: The impeachment inquiry is still going
21 on, Your Honor. That was specifically noted in the impeachment
22 report that was issued.

23 The issue is, if the President, when he was vice
24 president, willfully retained classified information that he
25 should not have been able to in order to assist his family's

1 business dealings, or if he did so in order to make a lot of
2 money post vice presidency in writing a book, that -- those are
3 potentially impeachable offenses, Your Honor.

4 THE COURT: So other than the House Resolution that
5 authorizes the Committee to get the documents it needs for the
6 impeachment, is there anything else you're pointing to that
7 authorizes the issuance of this lawsuit to obtain the audio
8 recording?

9 MR. BERRY: Yes, Your Honor. Besides House
10 Resolution 917, which authorizes litigation, not just the
11 issuance of subpoenas, we would point to House Resolution 1292,
12 as well as the vote of the Bipartisan Legal Advisory Group.

13 THE COURT: All right. Do you have a problem under
14 the *Raines* case? In that case the Supreme Court seemed to be
15 concerned with the fact that the plaintiffs had not been
16 authorized by the House or by Congress to seek enforcement of
17 what they wanted.

18 MR. BERRY: I don't believe so, Your Honor, because
19 setting aside the question of whether there is authorization,
20 in the *Raines* case there was a mismatch in terms of the
21 plaintiffs and who suffered the injury. Here the -- there's no
22 dispute, the Committee issued the subpoena so it has the legal
23 right to the information. The defendant's refusal to produce
24 that information is causing an informational injury to the
25 Committee, the institution that issued the subpoena, and it is

1 redressable by this Court.

2 So I think the individual legislator standing cases
3 are not at all opposite to this case.

4 THE COURT: I think *McGahn* supports the position, in
5 terms of the Committee having standing. But it didn't address
6 this question of -- in *McGahn* it pointed to the fact that the
7 full House had supported the issuance of the lawsuit.

8 Does *Trump versus Mazars*, the Supreme Court decision
9 at 591 U.S. 848, bear on this situation? In that case, it was
10 very interesting because Chief Justice Roberts recognized the
11 Legislative power to seek information, but he spent several
12 pages kind of wagging his finger at Congress. And he said,
13 "Because this power is justified solely as an adjunct to the
14 legislative process, it's subject to several limitations. Most
15 importantly, a congressional subpoena is valid only if it's
16 related to and in furtherance of a legitimate task of the
17 Congress. The subpoena must have a valid legislative purpose,
18 it must concern a subject in which legislation could be had."
19 And he says, "Congress may not issue a subpoena for the purpose
20 of law enforcement because those powers are assigned under our
21 Constitution to the Executive and the Judiciary." And so, he
22 said, "Thus, Congress may not use subpoenas to try someone
23 before a committee for any crime or wrongdoing. Congress has
24 no general power to inquire into private affairs and to compel
25 disclosures, and there's no congressional powers to expose for

1 the sake of exposure. Investigations conducted solely for the
2 personal aggrandizement of the investigator or to punish those
3 investigators are indefensible."

4 So I wonder how you square that language, which was
5 pretty strong, with paragraph 31 of the complaint, where you
6 tell me that this is what we're doing. And it says,
7 "Throughout the 118th Congress, the Committee has pursued a
8 sustained effort to oversee the Executive Branch's commitment
9 to impartial justice. Since early 2023 the Committee has been
10 conducting oversight of DoJ's activities, with the aim of
11 ensuring that DoJ's operations are consistent with its
12 mission."

13 And then you say, "For example, we've conducted
14 oversight of Special Counsel Jack Smith's investigation of
15 President Donald Trump and to determine whether it was being
16 handled in a manner consistent with the Department's commitment
17 to impartial justice and so we moved quickly to investigate the
18 circumstances surrounding the appointment of Special Counsel
19 Hur and his investigation generally."

20 Does that run afoul of what Chief Justice Roberts was
21 talking about in *Mazars*? Sounds like you're trying to second
22 guess the Special Counsel here.

23 MR. BERRY: Absolutely not, Your Honor. First of
24 all, I would point out that here we're conducting oversight of
25 Department activities. *Mazars* was about the President's

1 personal information. But more importantly, the Committee is
2 engaging in oversight of Special Counsel investigations because
3 this is an area where legislative reform -- where the Committee
4 has been active in the past in terms of legislative reforms and
5 where the Committee is considering whether or not this whole
6 system needs reforms.

7 For instance, the Special Counsel regulations now
8 aren't even codified. And so if the Committee determines that
9 the system for highly sensitive investigations where there is a
10 conflict of interest is not producing impartial outcomes, then
11 there are a number of reforms that it could consider. You
12 know, we had the independent counsel statute way back when, it
13 was renewed, then it was not renewed. Now we have a different
14 system.

15 But the Committee could consider whether to codify
16 Special Counsel regulations, whether or not there should be
17 certain modifications to them. Should there be a report
18 mandated to be provided to Congress? Should there be a mandate
19 to provide materials to Congress? Should the Special Counsel
20 have more independence from DoJ, either with respect to the
21 appointment of the Special Counsel, with respect to the actual
22 running of the investigation.

23 So if the Committee determines, after looking at the
24 Special Counsel investigations, that it's actually not either
25 leading to impartial outcomes or not leading to public

1 confidence in impartial outcomes, there are a number of things
2 that can be done legislatively in hoping to address that. And
3 I actually think the fact that the Committee has been engaged
4 in comprehensive oversight of Special Counsel investigations
5 shows that this is actually not just in order to try to expose
6 for exposure sake, or the like, that the Committee has been
7 involved in assessing is this system working? And, if not, are
8 reforms necessary?

9 And that's exactly what we should want our nation's
10 elected representatives to be doing. Because, again, we used
11 to have a system by congressional statute to investigate these
12 types of cases. We no longer do. It is all now up to DoJ and
13 its regulations.

14 THE COURT: Well, there are a lot of reasons that led
15 Congress to decide not to use the Independent Counsel Act
16 anymore. It was their decision not to re-up it, correct?

17 MR. BERRY: Yes. Absolutely. And Congress, after
18 looking at how this system is working and doing its thorough
19 oversight, can conclude that there are some changes needed --

20 THE COURT: So how does the audio recording advance
21 this very broad, general, abstract discussion that you've just
22 talked to me about, whether this is the appropriate way for
23 Special Counsel to proceed or whether they need more
24 legislation about it?

25 MR. BERRY: So, the audio recordings are critical to

1 determining whether or not Special Counsel Hur's
2 recommendations resulted in impartial justice in this case.
3 Special Counsel Hur is the one that put this at issue because
4 even though there was evidence that the President had willfully
5 retained and disclosed classified material in an unlawful
6 manner, one of the principle reasons why Special Counsel Hur
7 concluded that charges weren't warranted is because jurors
8 would likely find reasonable doubt because they would conclude
9 he was not acting willfully.

10 And the President -- and the Special Counsel Hur
11 reached that conclusion because he said the President would
12 present himself to a jury, as he did in his interview, as a
13 sympathetic, well-meaning elderly man with a poor memory.

14 THE COURT: He also distinguished the case from the
15 other classified records case on a number of other --

16 MR. BERRY: Yes, but this is one of the key reasons.

17 THE COURT: Okay.

18 MR. BERRY: And also, when the Special Counsel came
19 to the Committee and explained his reasoning, he said that he
20 considered, and I quote: Not just the words from the cold
21 record of the transcript, but the entire manner in living
22 color, in real time of how the President presented himself.

23 THE COURT: Yes. And I'm familiar with a lot of
24 that, and I'm going to be asking the Department of Justice a
25 lot of questions about that.

1 But getting back to -- before we get to the merits of
2 the subpoena, the legitimacy of the subpoena, it seemed like,
3 in the *Mazars* case, what the Chief Justice was saying, the gist
4 of it was, courts really should stay out of these disputes
5 unless every I has been doted and every T has been crossed.
6 And so if that's true, if he's saying, okay, if you absolutely
7 have to get into this, Courts, get into it. But before you get
8 into it, you need to make sure that your jurisdiction is
9 well-established, that everything is teed up properly.

10 Should I be worried about the fact that there are
11 arguments as to why this has not been authorized in accordance
12 with House Rules? Is that something I should take into
13 consideration if I agree with their position that this is not
14 authorized, this lawsuit? Should that matter?

15 MR. BERRY: Your Honor, while I disagree -- while I
16 certainly think that this has been authorized, number one, I do
17 not think that this is relevant to standing for the reasons
18 I've stated before. With respect to *Mazars*, that was a case
19 about the president's personal information, his tax returns.
20 It was not a case about oversight of Executive Branch
21 activities. And so I think that there are certainly different
22 standards, in terms of different level of scrutiny that should
23 apply there.

24 Also, I would point out again, Your Honor, that this
25 is an instance where the full House has said that the Attorney

1 General is in contempt of Congress because he has refused to
2 turn over these documents and has directed the Speaker to take
3 all appropriate enforcement action to enforce the subpoena. So
4 I think the House has pretty clearly spoken here that the
5 Committee -- that the Committee's subpoena has been defied
6 unlawfully and that action needs to be taken to enforce the
7 subpoena.

8 THE COURT: All righty. I'm going to talk to the
9 Department of Justice about standing and procedural issues and
10 then we will get back to the need for the material itself.

11 MR. BERRY: Okay. Thank you.

12 THE COURT: All right. Let me start where I last
13 started with him, which is regarding who authorized the suit.
14 Does that matter? The Court certainly noted in *McGahn* that the
15 full House had authorized the bringing of the lawsuit. But, at
16 page 765, it finds standing without that. It said because each
17 House of Congress delegates its power of inquiry to the
18 committees, which are endowed with the full power of Congress
19 to compel testimony, the Committee exercised the House subpoena
20 power when it issued the subpoena to *McGahn*. And when *McGahn*
21 refused to testify, the Committee was injured.

22 So it certainly found that it had a concrete injury
23 and it had standing. So does *McGahn* stand for the proposition
24 that a vote by the House as a whole is necessary?

25 MR. NETTER: So we think it does, Your Honor. It's

1 not our assertion that *McGahn* squarely provides a holding that
2 directly controls. But this is a unique lawsuit. There are
3 not examples of cases in which a committee of either the House
4 or the Senate has sought to create an interbranch dispute by a
5 vote of a subcommittee of five individuals, instead by a vote,
6 in the case of the House, the full membership, the 435 members
7 of the House.

8 The courts that have considered these issues have
9 emphasized time and again, as this Court did in the *Fast and*
10 *Furious* litigation, that there is an especially rigorous
11 standard that must be applied when evaluating the history and
12 that tradition that goes into whether Article III permits
13 adjudication of certain issues.

14 And there are two especially important reasons why
15 having only three members of Congress authorize this litigation
16 is constitutionally inappropriate. The first is that requiring
17 a vote of the full House before a committee of the House comes
18 into court to create this interbranch dispute that would
19 protect against the premature abandonment of the accommodations
20 process, in which there's supposed to be a give-and-take
21 between the Executive and the Legislature, a process that is
22 sometimes painful, but that generally works without involving
23 the third branch of government.

24 Also --

25 THE COURT: I think it's fair to say at this point

1 we're at a standoff. I mean, aren't we past accommodation with
2 respect to this particular piece of evidence at this point?

3 MR. NETTER: I don't think so, Your Honor. And I
4 don't want to get into particular discussions between the
5 branches of government, but the accommodations process is
6 ongoing. There have been conversations as recently as last
7 week. And the cases that have arisen in this context do
8 emphasize that courts should get out of the way to the maximum
9 extent possible because the interests of the political branches
10 ought, if at all possible, to be resolved through that
11 political process. And requiring a vote of the whole House
12 allows the measure of accountability that attaches to the
13 Legislative Branch, political accountability to apply.

14 Whereas here, the House's theory is that there's been
15 this delegation where suddenly 430 members of the House don't
16 need to weigh in on whether going into court is the appropriate
17 recourse.

18 THE COURT: Well, I don't see that delegation in the
19 House Rules. But even if I agree with you that it doesn't
20 appear that this was authorized in accordance with House Rules,
21 why is that a basis for the suit to be dismissed? How does
22 that affect my jurisdiction?

23 MR. NETTER: So, Your Honor, it affects your
24 jurisdiction because of the especially rigorous principles that
25 attach to when the judiciary is going to get involved in

1 disputes between the Legislature and the Executive branch.

2 And the need for full consideration and full
3 accountability when there's going to be an unusual lawsuit,
4 such as this one, with respect to the Senate, it's actually a
5 matter of statute. I would refer the Court to 2 U.S.C.
6 Section 288d(c).

7 Now, of course, the Senate has its own statutory
8 scheme, which wouldn't apply in these circumstances. So even
9 in circumstances that one might describe as lower stakes, the
10 Senate says that it can bring a case to court only if there has
11 been a resolution adopted by the full Senate, after a committee
12 vote and after a committee report that identifies how the
13 subpoena was issued, the extent of compliance, the objections
14 and privileges that have been raised, and the comparative
15 effectiveness between bringing a civil action under the Senate
16 statute, as compared to certifying a criminal contempt or
17 initiating a contempt proceeding before the Senate.

18 THE COURT: All right. Well, if I say, well, I don't
19 have jurisdiction because I don't think you followed your own
20 rules, wouldn't that be my intruding on how the legislature
21 manages itself? I mean, at this point I haven't seen any House
22 members filing amicus briefs or joining the motion to dismiss
23 because they didn't get a full House vote.

24 MR. NETTER: Your Honor, we would not characterize
25 the issue here as whether the House is following its own rule.

1 That's not the constitutional issue, although it's an important
2 issue.

3 THE COURT: It's certainly an argument you made.

4 MR. NETTER: Well, the argument that we make is that
5 the House, the full House is required, as a matter of
6 constitutional law, to invoke this Court's jurisdiction, not
7 whether --

8 THE COURT: Where is it in the constitutional law, if
9 it's not in the House Rules? I thought what you cited was the
10 House Rule. What is the principle that says the full House has
11 to vote? That's what I was asking you if *McGahn* said that.
12 *McGahn* didn't say that, *McGahn* implies that. And *McGahn* notes
13 that -- well, certainly in *Raines*, the Supreme Court noted that
14 that was absent. And I noted in *Holder* that it happened. And
15 *McGahn* noted that it had happened. So what is the source of
16 the constitutional imperative? I thought that you cited the
17 House Rules to me.

18 MR. NETTER: So, Your Honor, the constitutional
19 impairment arises directly from the history and tradition
20 requirements that are imposed by Article III. Now, we cite the
21 House Rules to demonstrate that there hasn't been a vote of the
22 full House here to authorize this litigation.

23 THE COURT: What's your response to their suggestion
24 that, well, the House resolution's about go ahead and get
25 contempt and enforce this serves that purpose, or the one about

1 the impeachment, that that serves that purpose?

2 MR. NETTER: So, a few responses. First of all, Your
3 Honor, with respect to 1292, the Committee says that it was
4 authorized to undertake all appropriate actions. But we know
5 from other resolutions that the House knows full well how to
6 authorize actual litigation, and it didn't do so here.

7 Likewise, the Senate statute that I just referenced
8 identifies that there are -- at least in the view of -- well,
9 in the view of the House and the Senate, they both passed that
10 legislation -- there ought to be a weighing of when a body --
11 when a chamber of Congress is going to use which of its powers.
12 So merely saying that we think this conduct constitutes
13 contempt and should be referred to the Justice Department does
14 not imply that filing a lawsuit is appropriate under those same
15 circumstances.

16 THE COURT: All right. Well, let me get to, I think,
17 an argument -- a different argument, which is your argument
18 that I don't have subject matter jurisdiction, even if they had
19 provided me a beautifully House-authorized complaint in this
20 case.

21 I take it that I would have to find not only that I
22 was wrong in *Committee versus Holder* when I said the Court had
23 subject matter jurisdiction to hear this kind of dispute, and
24 that Judge Bates was wrong before me when he made the same
25 decision in *Committee versus Miers*. But I would also have to

1 find that the circuit, sitting en banc, was wrong in *McGahn*.
2 And do you have any particular authority for why I get to do
3 that?

4 MR. NETTER: So, Your Honor, we don't think that our
5 position naturally is inconsistent with the Circuit's en banc
6 decision in *McGahn*. We acknowledge that there have been
7 developments since this Court and since the *Mires* decision
8 considered similar issues. We think it is notable, for
9 example, in *McGahn*, that the Court found that there was no need
10 in that case, because the issue was merely testimonial
11 immunity, as opposed to the adjudication of a question of
12 privilege, there was no need to take sides in an interbranch
13 dispute.

14 This case, however, does squarely present the
15 question of whether one needs to take sides in an interbranch
16 dispute. Now, I don't want to suggest that the position of the
17 Executive Branch here is fully consistent with what Your Honor
18 found in the *Fast and Furious* case. It remains the position of
19 the Executive Branch that Article III does not permit
20 jurisdiction in any of these circumstances.

21 THE COURT: Right. Well, it might be your position,
22 I'm just wondering how you can -- how I'm supposed to sustain
23 that position when the Circuit said, on page 771, in *McGahn*, it
24 cited the two lowly District Court opinions in *Mires* and *Holder*
25 for the proposition that, quote: For more than 40 years this

1 Circuit has held that a House of Congress has standing to
2 pursue a subpoena enforcement lawsuit in federal court. And it
3 said, at page 763, Because the Committee's inquiry has been
4 caused by *McGahn*'s defiance of his subpoena and can be cured
5 here only by judicial enforcement of the subpoena, it assumes
6 and it articulates subject matter jurisdiction in the courts in
7 an interbranch dispute.

8 It noted that *McGahn* hadn't suggested that any court
9 had ever ruled to the contrary, other than the majority opinion
10 that it was vacating. Can you find any opinion where any other
11 court has ruled in your favor on this argument that we don't
12 have subject matter jurisdiction to act like the third branch
13 of government here?

14 MR. NETTER: So, no, Your Honor, although we would
15 point to the scarcity of any cases in this area of the law. We
16 would emphasize that the context in which the *McGahn* court
17 ruled was, again, a context in which it was comforted that
18 there could be Article III jurisdiction because there was no
19 need for the judiciary to resolve an interbranch dispute.

20 THE COURT: It doesn't seem to me comforting, and it
21 didn't carve that out as the exception to jurisdiction. It
22 explicitly relied on two cases in which district courts took
23 jurisdiction.

24 I mean, I'm not saying that you can't tell me that I
25 was wrong. I'm sure there are plenty of commentators that

1 think I was wrong. But the Circuit quoted that case as a
2 reason to assume subject matter jurisdiction exists. So where
3 is the contrary law coming from that supports your position?

4 MR. NETTER: Your Honor, we would refer the Court, as
5 well, to the Supreme Court's subsequent decision in *Mazars*. In
6 *Mazars* Chief Justice Roberts' opinion discusses how the
7 political branches, the Executive and the Legislature, are
8 necessarily motivated by a relationship of rivalry and
9 reciprocity, such that the give-and-take of the accommodations
10 process that I was describing earlier is necessarily affected
11 by the political interests of those two political branches.

12 We take from the decision in *Mazars* the implication
13 that the contrary interests that a Court would be required to
14 weigh in the context of adjudicating a question of Executive
15 privilege, these are necessarily questions of political import
16 that are different from the sort of interests that a Court
17 ordinarily adjudicates in a more standard-fare privilege
18 dispute.

19 So, although we acknowledge that there is not a --

20 THE COURT: But at the end of the day, what we have
21 is a privilege dispute, and isn't that what courts do all the
22 time?

23 MR. NETTER: Courts do adjudicate privilege disputes
24 in context where the balancing on the two sides of the case are
25 not infused with the political natures of the motivations of

1 the political branches.

2 THE COURT: Well, you suggested in your brief this
3 very point. You cited *Raines*, as the Executive Branch did,
4 unsuccessfully, in *Mires*, *Holder*, and *McGahn*, that the
5 separation of powers requires the Court to stay out of it. Not
6 just that maybe it should, but it has to. And I don't
7 understand why judicial consideration of a legal issue at the
8 heart of a stalemate upsets that balance? And *McGahn* -- the
9 *McGahn* Court said, "To the contrary, the judiciary, in
10 exercising jurisdiction over the present lawsuit, does not
11 arrogate any new power to itself at the expense of either of
12 the other branches, but, rather, plays its appropriate role."

13 How is that language consistent with what you're
14 telling me?

15 MR. NETTER: So, Your Honor, our fundamental position
16 here is that the two political branches have political tools at
17 their disposals to resolve issues that are infused with
18 politics, as the Supreme Court explained in *Mazars*.

19 Now, we fully accept that although we have preserved
20 the issues in this regard in our briefing and we are appearing
21 here before a Court that has already taken a position on this
22 issue, we disagree with those aspects of this Court's decision
23 and the prior decision in *Miers* and are preserving the issues
24 to that degree.

25 However, for present purposes, our understanding and

1 our construction of Article III is that because of the nature
2 of the dispute that this Court would be required to resolve,
3 the nature of the interbranch dispute, this is not a case or
4 controversy within the historical understanding of Article III,
5 such that the appropriate response is that this Court does not
6 have jurisdiction to adjudicate the dispute.

7 THE COURT: But if I don't take sides, if I say, You
8 don't want to turn it over, fine. Doesn't that take your side
9 and doesn't that kind of put the Executive Branch in the
10 driver's seat, even possibly in an impeachment inquiry. If
11 they're asking for information and you get to say I don't want
12 to turn it over, and then you say and, Judge, you stay out of
13 this. Then doesn't that give you more power at the expense of
14 Congress?

15 MR. NETTER: I don't think so, Your Honor, and that's
16 because Congress has available to it the Article I authorities
17 that are unique to that branch of government. But what is
18 essentially presented in this case is a contest between the
19 Article I powers of Congress and the Article II powers of the
20 president. And in our view, that dispute ought to be
21 adjudicated by Congress using its available Article I powers
22 and the President using his Article II powers.

23 THE COURT: Well, the mere exercise of jurisdiction
24 by the court doesn't guarantee a particular outcome on one side
25 or the other, does it? I mean, it doesn't mean I'm necessarily

1 siding with the Executive or I'm necessarily siding with
2 Congress, just I'm going to try to resolve the privilege issue
3 that seems to be holding things up.

4 MR. NETTER: We can accept that that possibility is
5 true, Your Honor.

6 THE COURT: Well, what if the accommodation fails?
7 Does the exercise of jurisdiction at that point infringe upon
8 the process? Doesn't eliminate its availability in the future.

9 MR. NETTER: So, Your Honor, our position is that the
10 exercise of judicial authority, even if the parties appear to
11 be at an impasse, would be inconsistent with the Court's
12 Article III authority. And we certainly acknowledge that it
13 would be better for the Court to delay its exercise of
14 authority, if it disagrees with our assertion, until such time
15 as the accommodations process is hopeless.

16 But it still remains the case that Congress has the
17 levers that it can pull under Article I and the Executive
18 Branch has its powers under Article II. And if they are at an
19 impasse, then it may mean that the political branches have
20 determined that it is not in their interests to use additional
21 of those powers. And that's a perfectly acceptable
22 constitutional outcome, even if there hasn't been a crisp
23 adjudication of the particular privilege issue; for example,
24 the one that is presented in this case.

25 THE COURT: All right. Well, as you can tell, I have

1 some problems with the notion that I don't have subject matter
2 jurisdiction here. But you also argue that even if I do, I
3 should exercise judicial restraint. So I wonder why is this
4 case different from the cases in which the courts in this
5 district have heard and have resolved questions involving the
6 enforcement of a legislative subpoena against the Executive
7 Branch?

8 MR. NETTER: So, Your Honor, a few answers to that.
9 First, as this Court is aware, in other circumstances where a
10 court has adjudicated privilege disputes, there has been a
11 greater passage of time, a greater opportunity for the
12 political branches to mediate their dispute through their
13 political processes.

14 Fundamentally, we also disagree with some of the
15 decisions by district courts in this circuit as to the
16 appropriateness of adjudicating those disputes. But
17 fundamentally, insofar as Congress is seeking to invoke the
18 equitable powers of this Court, equity necessarily entails an
19 element of discretion.

20 And what the Supreme Court's guidance from *Mazars*
21 tells this Court is the need for a court to engage ought to be
22 proportional to the need that is asserted by the legislature.
23 The Chief Justice says, you know, the more specific the
24 legislative need, the better, so the courts can assure
25 themselves that they have an appropriate role. In part because

1 the showing that the Committee has made here is so thin, and
2 given that they have the transcript, and I can't really point
3 to any aspect of the transcript on which having the recording
4 in addition to the transcript would be value-added in terms of
5 their legitimate legislative needs.

6 These are all justifications for the Court to stay on
7 the side and to let the political branches adjudicate the
8 issue.

9 THE COURT: Well, assuming I conclude I have
10 jurisdiction -- and you haven't really pointed me to any
11 analogous case that said I don't -- wouldn't that risk the
12 appearance that I am taking sides? Oh, I could hear this, but
13 I prefer not to. Doesn't that suggest then a more, kind of,
14 political, as opposed to legal decision coming down from this
15 Court? I mean, if we're talking about the separation of powers
16 and the very delicate balance between the three branches that
17 are represented in this room right now, wouldn't it be upset
18 more if courts decided on a case-by-case basis, instead of
19 exercising its jurisdiction as a matter of course?

20 MR. NETTER: No, Your Honor, especially given that
21 there is this history of, you know, courts taking a
22 wait-and-see approach and being reluctant to get involved in
23 these disputes between the Executive and Legislative branches.
24 We think it would perfectly appropriate for the Court to say,
25 perhaps without prejudice, that given the state of this

1 dispute, given the fact that the end of this Congress is
2 approaching, all these factors mitigate in favor of not taking
3 the extraordinarily unusual step of having a judicial
4 adjudication of a privilege dispute between the Executive and
5 the Legislative branches.

6 THE COURT: Well, first you're saying I should wait
7 more time, but then you're saying, well, the end of this
8 Congress is approaching. So doesn't that put Congress in kind
9 of a catch-22 in terms of when it's supposed to try to seek
10 enforcement? I mean, it's only got two-year terms.

11 MR. NETTER: I don't think it's a catch-22, Your
12 Honor. It's just a matter of calendar math that this Congress
13 will only exist for a number of months. There's not pending
14 legislation that the Committee is --

15 THE COURT: Right. I'm just wondering, isn't that
16 inconsistent with what you're saying; well, you really need to
17 wait for this accommodation process to work its way out, as if
18 suddenly they're somehow going to turn this over. And how long
19 can I wait, if you're also telling me, oh, by the way, we're
20 almost at the end and you should take that into consideration.
21 Am I supposed to wait or am I not supposed to wait?

22 MR. NETTER: So, Your Honor, I think the appropriate
23 approach here to wait until the Executive and Legislative
24 branches have had an opportunity to --

25 THE COURT: You haven't had an opportunity, really,

1 to talk about? I mean, I just think that's a funny way to put
2 it.

3 MR. NETTER: I would disagree with that
4 characterization, Your Honor.

5 THE COURT: Okay. There was a lot of discussion
6 before the privilege was asserted. There was a lot of back and
7 forth, and then after the privilege was asserted -- yes, it was
8 pretty soon after that that they filed their lawsuit. But
9 there's been a fair amount of time since they filed their
10 lawsuit and everybody briefed it, motion for summary judgment,
11 cross-motion, reply, all that time you could have been -- you
12 could be talking, right?

13 MR. NETTER: Well, indeed, Your Honor, but I would
14 just note that there's -- there are changes in positions. One
15 could look, for example -- we cite at the end of our reply
16 brief in a footnote, that public statements of the Speaker and
17 the Chairs of the Judiciary and Oversight Committees saying
18 that the reason that they want the audio is because they want
19 to play it for the American people.

20 If one looks at the final brief that was filed by the
21 Committee here, they float there the possibility that maybe
22 what the Justice Department should be asking for is some sort
23 of in camera review. Now, that suggests, at least, that
24 perhaps even when there have been conversations and discussions
25 with the branches taking very firm positions, that there are

1 opportunities to explore accommodations and that to the extent
2 there is any possibility of having a resolution between the
3 political branches, that's necessarily preferable to an
4 adjudication by the judiciary.

5 THE COURT: All right. I think we've kind of covered
6 my jurisdiction and the legitimacy of the lawsuit. And now I
7 want to get back into the merits and the privilege issue. So
8 I'm going to ask the gentleman from the Committee to come back
9 to the lectern.

10 MR. NETTER: Thank you, Your Honor.

11 THE COURT: But, I guess, starting where he left off,
12 is there any possibility that if the Committee won this
13 lawsuit, this would not be shared with the American public?
14 Isn't that the point?

15 MR. BERRY: Your Honor, there is certainly that
16 possibility.

17 THE COURT: So is there ongoing discussion about an
18 accommodation actually happening right now?

19 MR. BERRY: Unfortunately, there's not ongoing. Less
20 than two weeks before this hearing DoJ did approach us. We had
21 discussions. It is clear that the Department was not willing
22 to meet the Committee's needs. But there's no proposal on the
23 table, there's no ongoing negotiation.

24 THE COURT: All right. Well, let's get into the
25 merits of this. You pointed to the fact that President Biden

1 took issue with the Special Counsel's characterization of his
2 memory, especially in the context of the entire interview. Why
3 doesn't the transcript give you enough information to see
4 whether he -- as his attorneys asserted in a letter -- offered,
5 quote, detailed recollections across a wide range of questions,
6 or whether he had a poor or hazy memory?

7 And why wouldn't the transcript, for example, answer
8 the question as to whether, as you allege in paragraph 42, he
9 was prompted by his aids with answers? If you want to look at
10 the -- doesn't the transcript tell you whether the aides were
11 talking or whether the president was talking? And doesn't the
12 transcript tell you whether he remembered the answers to lots
13 of questions, as opposed to just the ones that the Special
14 Counsel is focusing on?

15 MR. BERRY: Well, Your Honor, I think that the
16 transcript is not adequate because the Special Counsel
17 specifically said that he based his conclusion not only on the
18 words on the transcript, but how the President presented
19 himself, how the jury would perceive the President based on
20 hearing him. And so I think that how the President sounds is
21 an important component of evaluating the Special Counsel's
22 conclusions.

23 THE COURT: Well, he did say that. But if you go to
24 the *Mazars* case, the Chief Justice says the Court should look
25 closely, and to narrow the scope of the potential conflict as

1 much as possible, the Court should insist on a subpoena that is
2 no broader than reasonably necessary to support your
3 legislative objective. And you've gone in great detail about
4 your legislative objective. And it seems like the transcript
5 gets you pretty far there. And the Court also said, Court
6 should be attentive to the nature of the evidence offered by
7 Congress to establish that a subpoena advances a valid
8 legislature purpose. The more detailed and substantial the
9 evidence of Congress's legislative purpose, the better. This
10 is particularly true, the Chief Justice said, when Congress
11 contemplates legislation that raises sensitive constitutional
12 issues, such as legislation concerning the presidency. In such
13 cases, he said, it's impossible to conclude that a subpoena is
14 designed to advance a valid legislative purpose, unless
15 Congress adequately identifies its aims and explains why the
16 president's information will advance its consideration of the
17 possible legislation.

18 You've talked about legislation as to how -- the
19 kinds of powers Special Counsel should have and how they should
20 be appointed and the oversight of Special Counsel, and you've
21 talked about your impeachment inquiry that relates to the
22 President's involvement with his son's activities abroad. But
23 I'm not sure I saw, in the complaint, a detailed and
24 substantial evidence of Congress's legislative purpose that
25 this subpoena advanced when it was issued. So what is it?

1 MR. BERRY: So, Your Honor, I think it's important to
2 note, the *Mazars* test was specifically a test about obtaining
3 the personal information of the President. Here we're talking
4 about obtaining a government record. And it would be a C
5 change in governmental oversight law if we were going to apply
6 the *Mazars* test, in terms of all the things that you said, that
7 there was going to be that strict of scrutiny of congressional
8 subpoena power when conducting oversight of government
9 activities and requesting government documents.

10 So, Your Honor, I would --

11 THE COURT: Well, I think if it's involving the
12 President personally, as this does, that is exactly when he was
13 saying that you want the most oversight, when it's not just
14 Congress versus the Executive Branch, but it's Congress versus
15 the President, he said that's when you really have to have your
16 antenna up, Judge, before you do anything.

17 MR. BERRY: That was the President's personal tax
18 return information, financial records. This is a record of the
19 Department of Justice that was made pursuant to an activity of
20 the Executive Branch. And I think that is very different and
21 there's no indication, I think, in *Mazars* that this was
22 intended to apply to subpoenas of government information, as
23 opposed to personal information.

24 The Executive --

25 THE COURT: I'm not sure. I thought his language was

1 quite broad. But putting that aside, how does the additional
2 evidence that you're seeking of what he sounded like during his
3 interview, as opposed to the transcript of the interview,
4 inform legislation that you might be considering about Special
5 Counsel in general, across the board for all presidents, and
6 not just for President Biden.

7 MR. BERRY: Because the question is, is there a need
8 for reforms of the system? And if the system is producing
9 impartial outcomes, then there's less need for reform of the
10 system. If the system is not producing impartial outcomes,
11 then there is more need for reform of the system and more need
12 to look forward.

13 THE COURT: Before you told me you weren't really
14 trying to get into assessing the validity of prosecutorial
15 decisions. You're not trying to turn yourself into a mini
16 Department of Justice over there. But now you're saying, well,
17 we just want to make sure he made the right decision.

18 MR. BERRY: The question is whether the system is
19 operating correctly. One aspect of that is, is it producing
20 impartial justice? So the purpose of the inquiry is not for
21 the sake of making a determination, deciding whether or not
22 certain decisions were right or wrong, the question is: Is the
23 system working? Are the right decisions being made? And if
24 not, then there is a need for reform to that system.

25 The idea that the Legislature cannot conduct

1 oversight of the administration of laws and whether they're
2 being administered correctly, I think -- in order to determine
3 whether or not those laws need to be reformed, I think would
4 just be a fundamental mistake by the Court.

5 THE COURT: But, I understand that Special Counsel
6 himself articulated some reliance on the President's demeanor
7 and his voice. I understand that portion of the argument.
8 But, it's also a very lengthy report about what happened, what
9 he said happened, whether he cooperated with the investigation.
10 There's a lot of factors that went into Special Counsel's
11 decision. And I have trouble believing that the Committee is
12 sitting around, scratching its head, trying to figure out
13 whether, in its view, this was an impartial decision or wasn't
14 an impartial decision in absence of this information.

15 Is this information really going to tip the balance
16 as to whether you decide you need some further tweaks to the
17 legislation there already is about how Special Counsel should
18 be appointed?

19 MR. BERRY: It is absolutely a relevant input, Your
20 Honor. And I think the Committee has a demonstrated interest
21 in this subject matter in this area. And I would say, Your
22 Honor, also, that our subpoena is relatively narrow because we
23 read the report, many portions of the report are very self-
24 explanatory, and the like.

25 One area of the report that is not self-explanatory

1 is the Special Counsel's belief in how the jury would perceive
2 the President and his mental state. And when the Special
3 Counsel came to Congress, he specifically said that's part of
4 what he relied on. So the one area, the one most significant
5 area where you can't just read the report and come to a
6 conclusion about whether the Special Counsel -- how the Special
7 Counsel operated, is the interview with the President and how
8 he presented himself.

9 THE COURT: How does that narrow piece of information
10 bear on the impeachment inquiry into whether the President
11 abused his office to enrich himself, when he was President, in
12 connection with the family's business dealings with foreign
13 parties. What do his voice and demeanor in the interview have
14 to do about that?

15 MR. BERRY: Well, I think, Your Honor, that there
16 it's a question of being able to listen to a tape gives you a
17 greater ability to evaluate credibility than just reading cold
18 words on a transcript. And if the President does not come off
19 as credible, for instance, in terms of his demeanor in denying
20 that he retained the information -- purposely retained the
21 information, for example, to write a book and make millions of
22 dollars, then the Committee may decide that additional
23 investigative steps are wanted.

24 THE COURT: Well, when did the impeachment inquiry
25 get into his retention of the classified documents? The way

1 you described the impeachment inquiry is an impeachment inquiry
2 into whether he abused his office to enrich himself in
3 connection with his family's business dealing, not whether he
4 needs to be impeached for holding onto documents when he was
5 vice president, which wouldn't be something he did in the
6 office as president and be the subject of an impeachment.

7 I don't understand the relationship between -- I
8 understand the relationship between voice and the credibility,
9 but I don't understand the relationship between his voice and
10 what you're saying you want to impeach him for.

11 MR. BERRY: Well, Your Honor, the impeachment inquiry
12 specifically stated, when they issued their memorandum, that
13 they would go where evidence leads and it could take them in
14 directions that they did not foresee at the time. Here you
15 have an instance where the Special Counsel raised the
16 possibility that when he was vice president he willfully
17 retained documents in order to make millions of dollars after
18 he left the vice presidency. That would be an impeachable
19 offense. And the Committee has made it very clear that it's
20 looking into that possibility.

21 With respect to the retention of documents perhaps
22 related to his --

23 THE COURT: Is that in your complaint, that this is
24 about the retention of classified documents?

25 MR. BERRY: Your Honor, we -- we specifically did

1 discuss that aspect in the complaint. Do you want me to find
2 the cite?

3 (Pause.)

4 MR. BERRY: In this discussion of the impeachment
5 inquiry, in paragraph 102, we specifically said, The Committee
6 is investigating whether President Biden willfully retained and
7 disclosed classified documents to enrich himself, and then we
8 discuss that portion of the Special Counsel's report.

9 THE COURT: How does that work as part of the
10 impeachment inquiry? You're impeaching his as vice president?

11 MR. BERRY: Yes, Your Honor. The Committee has been
12 very consistent throughout this investigation, and we've cited
13 to the relevant precedent and the like that the --

14 THE COURT: Can you impeach somebody when they're not
15 in that role anymore?

16 MR. BERRY: Yes, you can, Your Honor. For instance,
17 there was a Court of Appeals judge where the Court -- the House
18 impeached him. Certain counts were just for things he did as a
19 district court judge, and there were other things --

20 THE COURT: Right, but judges have life tenure,
21 presidents have four-year terms.

22 MR. BERRY: This Judge was then moved to -- confirmed
23 to a different post of an Appellate Court Judge. The argument
24 was raised, no, you can't impeach me for things because I no
25 longer hold that office. The House rejected that. Secretary

1 Belknap was impeached as Secretary of War after he resigned his
2 position.

3 So the House's position -- and I think it's been
4 endorsed by history -- is that you can be impeached for
5 activities that you took in Office A, even if you're no longer
6 holding Office A and, in fact, holding Office B.

7 THE COURT: All right. Well, I think I've asked you
8 the questions I wanted to ask you about the legitimacy of the
9 lawsuit and about the need for the information. Is there
10 anything that you wanted to say that you haven't gotten to say?

11 MR. BERRY: I guess I would say a couple of things,
12 Your Honor. First, in terms of examining whether or not the
13 law enforcement privilege applies here, I think it is critical
14 to know that this is, I think, very similar to the Crew case
15 involving the notes and reports of the Special Counsel
16 Fitzgerald's investigation of -- related to Valerie Plame and
17 this interview with Vice President Cheney.

18 And in that case the Executive Branch came forward
19 and said if these reports are released, it is going to harm our
20 ability to conduct investigations in the future, particularly
21 involving high-profile White House officials. What the
22 District Court said in that case is that is not sufficient for
23 the law enforcement privilege to apply, that you have to show
24 that it would impede either a pending investigation or a
25 reasonably anticipated future investigation, and you have to be

1 able to identify with some degree of specificity the future
2 proceedings.

3 And the District Court specifically said that showing
4 up and saying at some point in the future there will be some
5 type of investigation where we will need cooperation of a
6 high-profile White House individual and releasing these reports
7 would harm our ability to obtain that, the Court flatly
8 rejected that argument. It said that that was too vague and
9 amorphous an interest. And it said, specifically, the category
10 of proceedings must be more narrowly defined than simply any
11 investigation that might benefit from the cooperation of some
12 senior White House official at some undetermined future point
13 regarding some unspecified subject. And here, this is
14 exactly --

15 THE COURT: Did that arise in the FOIA context?

16 MR. BERRY: It was. And the judge then said he was
17 analyzing the law enforcement privilege and privilege 7 --
18 exemption 7(a) the same.

19 The Court specifically said the DoJ had not, quote,
20 described with any reasonable degree of particularity the
21 subject matter of these hypothetical proceedings, the parties
22 involved, when such proceedings might occur. Again, this is
23 exactly what happened here.

24 Also, the Court there noted the lack of nexus between
25 the information DoJ seeks to withhold in this case and the

1 unspecified and undefined future proceedings. They're not
2 claiming that the audio recording itself, the information in
3 there is going to harm some unspecified future proceeding.

4 The other point I would make, Your Honor, is that if
5 you reach the privilege claim -- which we certainly think you
6 should -- even if you believe the privilege applies here, the
7 fact that the Executive Branch publicly released the
8 transcripts at issue here certainly bears on the balancing
9 test. And I think that there's a similarity, Your Honor, to
10 the *Holder* case that you decided. There, one of the reasons
11 you gave for your decision was that the materials had already
12 been quoted extensively in the Inspector General's report.
13 Well, here, it's not a matter of quoting the materials
14 extensively, they've actually -- they released the transcript
15 to the public.

16 THE COURT: I understand that.

17 MR. BERRY: So I don't understand -- I think the
18 additional harm that would exist is incredibly minor in this
19 case.

20 THE COURT: All right. Okay. Thank you.

21 All right. I want to hear from the Department of
22 Justice with respect to the privilege issue. But, I guess,
23 before we start, do you dispute the existence of a legislative
24 purpose? I think your focus is more on the reason why this
25 should be exempt or privilege from being produced. But, do you

1 dispute that there's some valid legislative purpose behind the
2 request?

3 MR. NETTER: So, Your Honor, in the abstract we
4 acknowledge that Congress does have a role in oversight of the
5 Department. We think that the legislative purpose that the
6 Committee has asserted here is exceedingly weak and
7 nonspecific, and that bears on the balancing that this Court
8 would need to undertake if it came to an adjudication of
9 Executive privilege.

10 And with respect to legislative -- a legislative
11 purpose stemming from oversight, the presentation of the
12 Committee made it seem as if the governing legal standard was:
13 Is this interesting? And would we like to have this? But, in
14 fact, the governing standard is whether the information is
15 demonstrably critical to the fulfilment of the Committee's
16 functions. That comes from the decision in *Senate Select*.
17 That's quite a high standard, and it is the Committee that
18 bears the burden to establish that it has met that standard,
19 and it plainly has not done so here.

20 THE COURT: All right. Let me get into the privilege
21 itself. And I want to make sure I understand exactly what
22 privilege is being asserted. We talked about Executive
23 privilege, it has two prongs. There's the Executive
24 communications part, there's the deliberative process part of
25 it. And I'm correct that you're not saying that this case

1 involves presidential communications, right? That's not part
2 of what you're invoking here.

3 MR. NETTER: We have not asserted the presidential
4 communications privilege.

5 THE COURT: Right. Okay.

6 MR. NETTER: But to get at the premise there, the law
7 enforcement component of the Executive privilege is typically
8 understood as an additional component, but is not -- it's not a
9 part of the deliberative process privilege either.

10 THE COURT: Okay. And that has the broad purpose of
11 protecting the integrity and independence of federal law
12 enforcement processes.

13 MR. NETTER: That's correct, Your Honor.

14 THE COURT: Obviously, we're all familiar with it
15 within the FOIA context, it's a statutory exemption that we
16 want to preserve the privacy and the internal deliberations
17 associated with an ongoing criminal investigation. But, what
18 is, kind of, the best case that states what the parameters are
19 of the law enforcement privilege that you're relying on here?
20 There's not a lot of case law cited around that particular
21 issue.

22 MR. NETTER: There isn't, Your Honor. And, you know,
23 to our understanding, that's because these issues have
24 historically not been adjudicated. They've not come to the
25 courts because Congress has respected that law enforcement is

1 the exclusive prerogative of the Executive under the Take Care
2 Clause of Article II.

3 THE COURT: And generally speaking, I mean, I've seen
4 op-eds by former attorney generals, there's been a lot of times
5 where the Executive Branch has taken just that position.
6 Congress doesn't get to inquire into why we prosecuted someone
7 or why we didn't prosecute someone. But in this case, if the
8 government's concern here is to shield how a federal
9 investigator went about his decision-making process and to
10 safeguard the privacy of the witnesses, what they said and how
11 they said it, and the subject, who was also interviewed in this
12 criminal investigation, isn't that barn door wide open?

13 I mean, this case didn't land here in a vacuum. It
14 landed here after Special Counsel's report was made public.
15 Here's what I decided. Here's all the reasons I decided. And
16 then that -- he went before Congress and he testified, and then
17 they produced the transcript of the interview. At that
18 point -- this isn't a case where the Special Counsel just
19 issued a report and said that's my report, I'm standing by it.
20 He went to Capitol Hill and he answered questions. And does
21 that matter?

22 MR. NETTER: So it does matter, Your Honor, but it
23 benefits the position of the Executive Branch. So Courts have
24 been clear that the Executive Branch should not be penalized
25 for making accommodations to the legislature. Were that the

1 legal standard, if there were a penalty, then it would
2 incentivize the Executive Branch to never turn anything over to
3 Congress.

4 Now, there have been some circumstances in which --
5 an assertion of a confidentiality privilege, one of the
6 elements is that the information remains confidential, that a
7 privilege of that nature could be gone if a voluntary
8 disclosure is made. But that's not the case here. The
9 privilege that is being asserted by the President, as being
10 defended by the Executive Branch here, is a privilege
11 associated with the President's Article II authority to conduct
12 law enforcement activities, to prevent a chilling effect. To
13 prevent a chilling effect in a very specific context, the
14 context in which voluntary cooperation from senior White House
15 officials is needed.

16 And we have, over the course of our republic, had a
17 number of these investigations where the Executive Branch has
18 identified just how important it is to get the relevant senior
19 executive officials to cooperate voluntarily in order for the
20 investigation to be completed successfully.

21 THE COURT: Well, does it matter that the Special
22 Counsel not only wrote, but then when he was before Congress,
23 specifically testified about the President's demeanor? And,
24 quote, how the President conducted himself, in his words,
25 in living color and in real time, and how that bore on his

1 opinion. Does it affect the fact, how I rule on this, that
2 he's already put all that out there publicly? And does it
3 matter that then the President himself, the one who's asserting
4 this privilege, then took public issue with the Special
5 Counsel's characterization of the state of his memory and said
6 my memory is fine.

7 MR. NETTER: So, Your Honor, there's no dispute here
8 as to which questions had I-don't-know answers and which
9 questions didn't. There's no dispute here the transcript
10 accurately reflects the extent of recollection on specific
11 questions. So we would ultimately suggest that it is the
12 Committee's burden here to identify what is the demonstrably
13 critical need that they still have after getting the lengthy
14 report, after having more than five hours to question the
15 Special Counsel about what he intended with respect to his
16 report. After seeing the two classified documents that they
17 identify as being important to their various investigations.

18 I think that the lack of specificity here is
19 striking. The fact that the Committee is not standing before
20 us and saying this is the provision, this is the page of the
21 transcript where we don't understand what's happening.
22 Instead, they're saying we need to listen to five-plus hours of
23 interviews, just in case. Just in case something happens here
24 that changes our mind with respect to legislating about future
25 events, even though the *Senate Select Court* acknowledges that

1 legislation about the future is ordinarily driven by
2 predictions about how various policies are going to lead to
3 different outcomes and not to precisely reconstructing past
4 events.

5 THE COURT: Does it matter that the Special Counsel
6 himself emphasized the importance of audio and video and not
7 just the printed word when he decided he needed the Zwonitzer
8 audio? I mean, he really said there's something different,
9 there's something special about that. Does that matter?

10 MR. NETTER: So it matters, Your Honor, but not in a
11 sense of making the information more relevant to the Committee.
12 The Attorney General, the chief law enforcement officer of this
13 nation, indicated in his letter asking the President to assert
14 Executive privilege, that it is important for investigative
15 purposes to have the opportunity, to have the option of having
16 an audio recording, so you don't need to have every person who
17 might want to assess the witness in the room, and so that -- in
18 case there is some dispute about what is said, one can go back
19 to the transcript. These aren't the issues that are presented
20 here.

21 Instead, what the Committee is asserting is because a
22 credibility determination seemed relevant to the Special
23 Counsel -- which, I'll note, is almost always the case in
24 trials taking place in this courtroom, but it is not the
25 practice for video and audio to be sent up to the Court of

1 Appeals for review. They would like to have -- the Committee
2 is saying that they would like to have everything. But that
3 would just allow them to repeat the investigation, to become
4 the mini DoJ that can replicate any sort of prosecutorial
5 function. But that's the not role. The role that they are
6 allowed to conduct is not one that requires that level of
7 detail, particularly where there are extreme costs to the
8 Executive Branch.

9 THE COURT: Well, when you talk about, really, the
10 incremental difference between having the voice and the
11 transcript for their purposes, that you have to turn around
12 that same question and ask it to you. You said the disclosure
13 materials like these recordings risks harming future law
14 enforcement investigations by making it less likely that
15 witnesses in high-profile investigations will voluntarily
16 cooperate.

17 Isn't it fair to say that the main thing witnesses
18 are concerned about is, number one, the fact that I cooperated
19 at all, or, second of all, the substance of what they said
20 publicly. Beyond that, how their voice sounded at the time,
21 that's really the thing that's going to make the difference and
22 make people stay home and not cooperate anymore? Isn't this a
23 very unique little situation?

24 MR. NETTER: It's not, Your Honor. And getting the
25 cooperation to the extent of permitting the voluntary audio is

1 something that the Department of Justice and the Executive
2 Branch believe are important to the ability to conduct
3 appropriate investigations. And it is the ability to get a
4 high-profile witness to agree to that audio recording that
5 forms the basis of the request for the assertion of Executive
6 privilege here.

7 So there are two elements here. One is a chilling
8 future cooperation from individuals who don't believe that the
9 Department of Justice would stand by its word, that agreed to
10 the terms of an interview. Getting cooperation and building
11 that trust in a high profile investigation is critical.

12 Also, there have been a number of courts throughout
13 history that have recognized --

14 THE COURT: Doesn't that relate to the whole thing?
15 It doesn't just relate to the audio. Once you've said, okay,
16 every single thing you said, every word you said in this
17 interview is now going to be public, we're giving out the
18 transcript. What is the impact -- just the additional, the
19 marginal addition of, well, not just what you said, but how you
20 sounded when you said it? That's going to be the linchpin of
21 whether people cooperate or not? What is the basis for that?

22 MR. NETTER: Your Honor there is a history here.
23 During the Clinton administration there was a trial -- this was
24 the *McDougal* case -- a trial where a video of President Clinton
25 was played and the Court determined that it would be

1 appropriate to release a transcript of what was on the video,
2 but not to release the actual audio or video itself because of
3 the risk that the video could be spliced and manipulated and
4 would create an impression that was contrary to reality. And
5 that risk of misrepresentation, especially in a modern world,
6 is quite profound.

7 So what we're talking about is precisely the cost of
8 the delta. The cost of the delta of releasing an audiotape, an
9 audiotape of an unindicted individual, the interview of which
10 is one of the more sensitive events of, certainly, a
11 professional life, and releasing the audio in the view of the
12 chief law enforcement officer of the United States and the head
13 of the Executive Branch would be likely to chill future
14 cooperation in investigations that really matter to the conduct
15 of justice from the perspective of the Department of Justice
16 and the Executive Branch, which is responsible under Article II
17 for the conduct of law enforcement activities, not Congress.

18 THE COURT: All right. Well, back when I was asking
19 you, is there case law that gets into the parameters of the
20 privilege, is there something that talks about this is what we
21 have to weigh, the chilling effect, this is how you consider
22 these issues. Or are we really kind of just in uncharted
23 waters right now?

24 MR. NETTER: It's closer to the latter, Your Honor,
25 in that this is a component of Executive privilege where the

1 key question from the standpoint of the Executive is what is
2 necessary to protect the prerogative of the Executive under
3 Article II? That is not a question that is susceptible to a
4 list of factors such that -- our position is that the Court
5 owes deference to the determinations of the Executive Branch
6 and the President as to what the risks are to the Executive
7 Branch.

8 THE COURT: All right. Well, one of the things in
9 the letter that the Department wrote on April 25th to Congress
10 regarding the privacy concerns, it said, "The privacy interest
11 in one's voice, including tone, pauses, emotional reactions,
12 and cues, is distinct from the privacy interest in a written
13 transcript of one's conversation. So how does the privacy
14 interest bear on the privilege? The privilege is: This is our
15 investigative privilege. So why is that important?

16 MR. NETTER: So the privacy interest, Your Honor, is
17 driving at future cooperation. That an individual who expects
18 to have a recording of his voice made public is going to react
19 very differently in an interview, and is going to react
20 differently in anticipation of the interview, in terms of
21 whether he will consent to those terms of a voluntary
22 interview.

23 So the fact that an individual has a unique privacy
24 interest in the way that he or she has characterized -- the way
25 he or she is presenting himself does bear on the law

1 enforcement interests of the Executive Branch.

2 THE COURT: But the more high profile the person is,
3 the more likely that their voice and their demeanor is all over
4 the internet and the public record already, isn't it?

5 MR. NETTER: As a generic matter, yes, but the
6 voice --

7 THE COURT: In the Crew case they were talking
8 about -- we were talking about someone who had been outed.
9 You're talking about high-profile public officials who are
10 speaking publicly all the time. Does that give them a greater
11 interest in the privacy of the sound of their voice or a
12 diminished privacy interest in the sound of their voice?

13 MR. NETTER: So, Your Honor, the fact that the
14 President is a public figure who has been recorded, and we
15 think gives him a great and profound interest in the sound of
16 his voice in this particular context, if somebody were to go
17 out there today and release what they purported to be an audio
18 recording of the president's investigative interview here, it
19 would be very easy to refute the accuracy of that recording by
20 saying, You might have used snippets of what the President has
21 said previously to recreate some audio. But everybody knows
22 that's not real because the audio has not been released.

23 If, by contrast, the audio were released and somebody
24 were to manipulate that audio then it would be far more
25 difficult to demonstrate to the public that the doctored audio

1 was inaccurate. And that's where the privacy interests here is
2 core, that even somebody who is accustomed to giving speeches
3 in public is not accustomed to having released the audio of his
4 voice at a time of great sensitivity, when a criminal
5 prosecutor is conducting an investigation.

6 THE COURT: All right. Well, the letter that you
7 wrote from the assistant to the President to the Chair of the
8 Committee back in May of 2024 said, Look, we gave you the
9 transcripts, we gave you what you asked for. Those should
10 satisfy your need for the information. So is that the test?

11 I mean, that might bear on how I'm supposed to rule
12 on the assertion, but how does it bear on whether it's
13 privileged or whether it's not?

14 MR. NETTER: So, Your Honor, that messaging reflects
15 how the accommodations process works, which is the Executive
16 Branch is doing what it can to satisfy within scopes -- within
17 the scope of privilege, the informational needs, the bona fide
18 informational needs of the legislature. Here, what's striking
19 is just how small that remaining informational need is. And
20 that certainly bears on the analysis that this Court would
21 apply in determining whether an assertion of Executive
22 privilege stands because the privilege is qualified.

23 But if we look back to what the Committee originally
24 said as to when it needed the audio after the report came
25 out -- this is Exhibit M to the Castor declaration, attached to

1 the Committee's motion -- they said the Committee wanted to
2 assess whether the President had retained documents respecting
3 specific countries involving his relatives' foreign business
4 dealings, and whether the Special Counsel was subject to
5 limitations on the scope of his investigation.

6 Now, these original assertions are plainly resolved
7 by reviewing the transcript. And the Committee keeps bringing
8 up the fact that there were these two classified documents,
9 which have been produced to them. But they haven't reminded
10 the Court that the Special Counsel specifically found that
11 those two documents couldn't possibly have constituted national
12 security information. They were, in fact, a call log and a
13 call summary about a call that was just about pleasantries. So
14 this is not a circumstance in which there is some precise,
15 concrete, discrete need that the Committee needs to satisfy.

16 I would refer the Court also to Federal Rule of Civil
17 Procedure 56(d) because it seems to have some relevance, at
18 least for purposes of being an analogy. So that's the rule, of
19 course, that governs when a party opposing summary judgment can
20 say to the Court, Don't decide this issue yet, we need more
21 information. And in those circumstances, the party opposing
22 the motion has to identify to the Court, with specificity, what
23 is the informational gap that you have and why is it likely
24 that this additional discovery is going to fill that
25 informational void.

1 It's a pretty straightforward standard that applies
2 in matters that are of far less constitutional import than this
3 one, which is why it is remarkable that the Committee here
4 couldn't satisfy that standard. There's nothing specific about
5 their demand. They're not telling us that these are the
6 questions we need to have answered, that will be answered by
7 having audio of an interview that we've already read the
8 transcript of. And that is -- would demonstrate that if there
9 is a balancing to be undertaken here, the Committee simply
10 hasn't met its burden to demonstrate that there's a
11 demonstrably critical need to get information to discharge its
12 legislative function.

13 THE COURT: All right. Does either side think that
14 the Court should listen to the transcript and that that would
15 aid in my determination of whether there's anything relevant in
16 it to what the Committee says it wants it for?

17 MR. NETTER: So we don't, Your Honor, for a couple of
18 reasons. First, in one of the Nixon era cases -- I'm
19 forgetting which one -- the Court has specified that one of the
20 elements of Executive privilege is a discouragement to the
21 Executive Branch of reviewing the materials that are subject to
22 privilege. So there's a thumb on the scale against doing so.

23 Moreover, in this specific case, and because this is
24 not a circumstance in which the Committee is saying this is the
25 particular thing that we think we're going to get out of this,

1 there's -- there's nothing that the Court could listen to --
2 could listen for to assess whether the Committee's need could
3 be satisfied by listening to the audio.

4 THE COURT: All right. Does the Committee have a
5 position on that?

6 MR. BERRY: We would also -- do not think it's
7 necessary, Your Honor. And we would have different reasoning.
8 We believe that it is up to the Committee to assess the
9 demeanor in the audio recording and to make -- draw its own
10 conclusions, and that's the Legislative role here and it would
11 not be the Judicial role. So we would respectfully say that's
12 not necessary.

13 THE COURT: All right. I just wanted to know what
14 your positions were. I hadn't even determined whether I think
15 I need it. I'm not sure I do need it.

16 All right. I think at this point, unless -- is there
17 anything that the Department of Justice hasn't had a chance to
18 say that it wants to say?

19 MR. NETTER: No, Your Honor.

20 THE COURT: Okay. Do you want to respond quickly and
21 just tell me, in as focused a way as possible, exactly what it
22 is that you're going to hear, or that you're going to be
23 listening for, that this tape is relevant to that would
24 require, if I think that there is some legitimacy to the
25 privilege, that I should rule in your favor?

1 MR. BERRY: Yes. Your Honor, may I very briefly
2 respond to a few points DoJ made before I address that
3 question?

4 THE COURT: All right. Briefly.

5 MR. BERRY: Briefly. Number one, as we said in our
6 briefing, we do not believe the demonstrably critical standard
7 applies if the privilege applies. That's from *Senate Select*,
8 which is about presidential communications privilege. The law
9 in this Circuit is that other portions of Executive privilege,
10 like deliberative process privilege, has a lower standard, is
11 more of a balancing test.

12 Number two, Your Honor, with respect to whether the
13 privilege applies. In its briefing and today at the lectern
14 DoJ has not come up with any argument distinguishing this case
15 from the *Crew* case in terms of the rationale they're using to
16 assert that the privilege applies.

17 THE COURT: Well, I think FOIA exceptions are
18 slightly different than privileges. The whole FOIA test is
19 different, that's whether the public gets it to assess how the
20 government is functioning. You're saying, and I believe Chief
21 Justice did say in *Mazars* generally, that if Congress is asking
22 for it, Congress has to explain why it wants it. And, so,
23 that's the question I want answered. I feel like the
24 description of why you need it is somewhat vague and
25 unsupported, and the description of why this incremental

1 disclosure would upset the constitutional balance is also
2 somewhat vague. I mean, we're at the point where I'm having
3 trouble with both sides on different issues.

4 MR. BERRY: Right.

5 THE COURT: But it does seem clear from all the
6 authority I've read that one of the things I'm supposed to
7 consider is your need for the material. And when you've had
8 the opportunity to question the Special Counsel, read his
9 report and read the transcript, and what you say you're looking
10 into, I don't see how that marries up to the voice.

11 MR. BERRY: Because, Your Honor, the Committee is
12 looking into whether or not to make legislative reforms related
13 to the operation of the Special Counsel system. Critical to
14 that decision is whether the Special Counsel system is
15 operating correctly. The Special Counsel here says one of the
16 reasons for my decision not to recommend charges against the
17 President of the United States was how he presented himself
18 during the interview.

19 So all the committee is asking for is an opportunity
20 to listen to that interview. We are not saying, as DoJ said,
21 we would like to have everything. There were 147 witness
22 interviews, we're asking for two. There were 7 million
23 documents document collected, we asked for, basically, two.
24 Special Counsel himself said one of the reasons I did not
25 decide to prosecute was the President's demeanor in assessing

1 whether the system is working, whether impartial justice is
2 being conducted. The Committee is entitled to look into that
3 issue and to hear the recordings.

4 THE COURT: I think that sounds squarely like you're
5 saying we want to decide if he made the right decision or not.
6 Which, it seems to me, to be exactly what Chief Justice Roberts
7 was saying is not the legislative role.

8 MR. BERRY: We are judging whether or not the
9 outcomes are correct for the purpose of assessing whether
10 legislative reforms are necessary. How is the judiciary
11 committee supposed to decide if reforms are necessary to the
12 Department of Justice if it is not allowed to assess whether or
13 not the Department of Justice is making correct decisions?
14 Whether or not it is administering enforcing the law
15 impartially?

16 To say that the Judiciary Committee has to be blind
17 to the merits of the decisions that the Department of Justice
18 is making would have them forgo one of the critical pieces of
19 information necessary to determine whether legislative reforms
20 are necessary to the Department of Justice.

21 THE COURT: All right. Anything you want to say
22 further?

23 MR. NETTER: I just want to clarify one thing about
24 this Crew case that the Committee has been citing, which is,
25 that was a case where there was no interview or transcript that

1 was at issue. It was a 302 of Vice President Cheney. And the
2 assertion there was 7(a), it wasn't an Executive privilege
3 assertion, which I think would have arisen under Exemption 5.

4 I also just want to refer the Court -- although I
5 can't read the headers because there are headers on top of
6 headers, but Exhibit C to the principal declaration attached to
7 their complaint -- this is the declaration of Bradley
8 Whinesheimer, who is the senior career official at the
9 Department of Justice, he says, in paragraph 34, that he's
10 aware of ongoing investigations in particular where witnesses
11 have declined to be audio recorded, which seems to bear on the
12 question of what the delta is. There is no evidence from the
13 Department that that delta exists.

14 THE COURT: Very well. I appreciate everyone trying
15 to focus me on the points they wanted to make today. I
16 appreciate the quality of the arguments. And I will continue
17 to keep the case under advisement. Thank you.

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1 CERTIFICATE OF OFFICIAL COURT REPORTER

2
3 I, JANICE DICKMAN, do hereby certify that the above and
4 foregoing constitutes a true and accurate transcript of my
5 stenographic notes and is a full, true and complete transcript
6 of the proceedings to the best of my ability.

7 Dated this 29th day of October, 2024
8
9

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