

January 12, 2024

VIA ELECTRONIC MAIL

Representative James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives

Representative Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives

Re: Subpoenas and Contempt Proceedings Related to Robert Hunter Biden

Dear Chairmen Comer and Jordan:

On January 10, 2024, you led your respective committees' markup proceedings of parallel resolutions¹ recommending that the House of Representatives vote to hold our client, Robert Hunter Biden, in contempt for failing to comply with subpoenas "duly issued" to him on November 8 and 9, 2023,² despite his offering repeatedly that he would answer all pertinent and relevant questions you and your colleagues had for him at a public hearing.

Chairman Comer's Invitations For A Public Hearing

You proceeded with a contempt process, erroneously claiming Mr. Biden was seeking "special treatment," despite Mr. Comer's repeated and public statements about witnesses' and Mr. Biden's ability to testify at a deposition or hearing at their choice. For example:

¹ Resolution Recommending That The House of Representatives Find Robert Hunter Biden In Contempt Of Congress For Refusal To Comply With A Subpoena Duly Issued By the Committee On Oversight And Accountability, 118th Cong., 2d Sess. (Jan. 10, 2024) [hereinafter Biden Contempt Report]. The House Judiciary Committee also released a companion resolution recommending the same on January 10, 2024. The Rules Committee has now scheduled a meeting on January 16, 2024, to take up those resolutions.

² Mr. Biden was issued two subpoenas. The Oversight Committee's subpoena was issued on November 8, 2023, and the Judiciary Committee's subpoena was issued on November 9, 2023. Both were accompanied by the same joint letter from Chairmen Comer and Jordan.

“We’re in the downhill phase of this investigation now because we have so many documents, and we can bring these people in for depositions or committee hearings, *whichever they choose, . . .*”³

“Hunter Biden is more than welcome to come *in front of the committee . . .* he’s invited today. We will drop everything.”⁴

Obviously, accepting your unqualified invitation to choose a forum for his testimony is neither seeking “special treatment” nor contemptuous behavior. Nevertheless, your actions demonstrate that you were not serious about getting facts or the truth, and simply wanted to stage some “gotcha” political theater and create another legal issue for Mr. Biden.

The November 8 and 9, 2023 Subpoenas Are Legally Invalid As Issued Before An Impeachment Resolution

Rather than accepting Mr. Biden’s offer to voluntarily sit for a public hearing,⁵ you are now seeking to have the full House find him in contempt based on subpoenas for a deposition that you issued on November 8 and 9, 2023. I write to make you aware (if you are not already) that your subpoenas were and are legally invalid and cannot form a legal basis to proceed with your misdirected and impermissible contempt resolution. And you two, of all people, should know that is the case.

Similar Subpoenas Issued in 2019 Were Found to Be Improper

As you recount in your contempt reports,⁶ in 2019, when the Democrats held the majority, they similarly issued impeachment subpoenas before the impeachment inquiry of former President Trump was authorized by a full House vote.⁷ The basis at that time was then-Speaker of the House Nancy Pelosi’s September 24, 2019, statement that “the House of Representatives is moving forward with an official impeachment inquiry” into then President Trump’s conduct and that she

³ @Bennyjohnson, X (Oct. 31, 2023) (emphasis added), *available at* <https://twitter.com/bennyjohnson/status/1719381752823578977>.

⁴ @Newsmax, X (Sept. 13, 2023) (emphasis added), *available at* <https://twitter.com/newsmax/status/1701928094003511311?s=46&t=a0UGYR3ho6S39dDafp8SGg>.

⁵ In total, Mr. Biden has offered to engage, speak with, or answer pertinent questions from the committees *six* times, in letters to Chairman Comer on February 9, 2023; June 14, 2023; September 13, 2023; November 28, 2023; and December 6, 2023, and his offer on Capitol Hill on December 13, 2023. Neither of you has ever responded to our earlier offers, and you are, instead, seeking contempt despite our repeated efforts to engage in a productive dialogue.

⁶ Biden Contempt Report, *supra* note 1, at 15 n.100 (“And in 2019, the Speaker of the House announced the beginning of a formal impeachment inquiry into President Trump more than a month before the full House voted to authorize it.”).

⁷ See Steve Holland & Patricia Zengerle, *House Democrats Subpoena White House for Documents in Trump Impeachment Probe*, REUTERS (Oct. 5, 2019), <https://www.reuters.com/article/us-usa-trump-whistleblower/house-democrats-subpoena-white-house-for-documents-in-trump-impeachment-probe-idUSKBN1WJ0E8/>.

was directing committees to proceed to obtain information for that purpose.⁸ You even cited Speaker Pelosi as precedent for your latest actions.⁹

Yet, as if Speaker Pelosi's statement were the last word, your January 10, 2024, reports recommending contempt completely omit Republicans' response to her statement and approach in 2019. Shortly after Speaker Pelosi's statement, then-House Minority Leader Kevin McCarthy and Judiciary Committee Ranking Member Doug Collins objected to the pre-authorization subpoenas.¹⁰ And you, Chairman Jordan, during a House Republican leadership press conference immediately after the actual impeachment inquiry resolution vote finally occurred, stated: "I want you all to think about something. This morning, I was in an impeachment deposition, but then had to leave that to come to the floor for a vote on the rules for impeachment. That [] says it all about this entire process. And it is a sad day."¹¹

Your 2023 Subpoenas Suffer the Same Infirmary as Those You Objected To in 2019

On November 8 and 9, 2023, history repeated itself. You noticed an impeachment deposition a month *before* an impeachment inquiry vote was held to authorize such a deposition. Astonishingly, the sequence of events was the same as 2019. Almost four years to the day that Speaker Pelosi made her statement authorizing impeachment-based subpoenas before a House resolution authorized them, it was now Speaker Kevin McCarthy who, despite criticizing his predecessor for trying to do the same thing, *did the same thing*. On September 12, 2023, Speaker McCarthy said: "These are allegations of abuse of power, obstruction, and corruption. And they warrant further investigation by the House of Representatives. That's why today, *I am directing our House committee to open a formal impeachment inquiry into President Joe Biden*."¹² Chairman Jordan, you should be similarly saddened by your own use of pre-impeachment inquiry subpoenas against Mr. Biden.

The impropriety and legal invalidity of the November 8 and 9, 2023, subpoenas and the January 10, 2024, proceedings recommending contempt were demonstrated by your own party's officials seeking definitive legal guidance on these exact issues. In 2020, in the face of Democrat-controlled committee subpoenas issued before a formal impeachment proceeding of former President Trump was approved, Attorney General William Barr sought a legal opinion concerning the legality of such a process. A *54-page* memorandum opinion from the Office of Legal Counsel (OLC) in January 2020 made clear that the "subpoena first, impeachment inquiry resolution second" approach taken then and being attempted now was and is improper, and that a legal

⁸ Nancy Pelosi, Speaker of the House, *Press Release: Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), www.speaker.gov/newsroom/92419-0.

⁹ Biden Contempt Report, *supra* note 1, at 15 n.100.

¹⁰ Letter from Rep. Kevin McCarthy, Republican House Leader, to Rep. Nancy Pelosi, House Speaker (Oct. 3, 2019); Mem. Amicus Curiae of Ranking Member Doug Collins in Supp. of Denial, *In re Application of the Comm on the Judiciary* (D.D.C. Oct. 3, 2019).

¹¹ House Republican Leadership After Impeachment Inquiry Resolution Vote at 8:41, C-SPAN (Oct. 31, 2019), <https://www.c-span.org/video/?465945-1/house-republican-leadership-impeachment-inquiry-resolution-vote>.

¹² House Speaker McCarthy News Conference on Impeachment Inquiry at 2:22, C-SPAN (Sept. 12, 2023) (emphasis added), <https://www.c-span.org/video/?530391-1/house-speaker-mccarthy-news-conference-impeachment-inquiry>.

contempt proceeding could not and cannot be based on that sequence. It is telling that in their 19 pages and 117 footnotes, your committees' January 10, 2024, contempt reports seeking to provide a *legal basis* for your actions *never once mention* the OLC opinion. That opinion states:

“The House of Representatives must expressly authorize a committee to conduct an impeachment investigation and to use compulsory process in that investigation before the committee may compel the production of documents or testimony in support of the House’s power of impeachment.”¹³

Moreover, “the House must provide express authorization *before* any committee may exercise compulsory powers in an impeachment investigation.”¹⁴ Importantly, the House, by a full House vote, must actually exercise its discretion by making that judgment in the first instance, and its resolution must then set the terms of a committee’s authority. *See United States v. Rumely*, 345 U.S. 41, 44 (1953). Accordingly, “[n]o committee may exercise the House’s investigative powers in the absence of such a delegation.”¹⁵ Where no impeachment resolution existed at the time the subpoenas were issued, there is no plausible argument that the committees had proper authority to issue subpoenas seeking information in support of their so-called impeachment inquiry. *See Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978) (“To issue a valid subpoena, . . . a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers[.]”).

Your Attempt to Seek Ratification of the Premature Subpoenas Is Also Legally Infirm

Despite citing the passage of current House Resolution 917 in your reports¹⁶ in an attempt to retroactively ratify your subpoenas, the OLC opinion addressed this very issue with pages of historic and legal precedent demonstrating that the House could not then, and cannot now, retroactively bless or authorize a previously issued subpoena before the inquiry was duly authorized. As the OLC memorandum explained:

“The House had not authorized an impeachment investigation in connection with impeachment-related subpoenas issued by House committees before October 31, 2019, and the subpoenas therefore had no compulsory effect.

The House’s adoption of Resolution 660 on October 31, 2019, did not alter the legal status of those subpoenas, because the resolution did not ratify or otherwise address their terms.”¹⁷

¹³ House Committees’ Authority to Investigate for Impeachment, 44 Op. O.L.C. 1, 19 (Jan. 19, 2020) [hereinafter OLC Opinion].

¹⁴ *Id.* at 17 (emphasis added).

¹⁵ *Id.* at 18.

¹⁶ H.R. Res. 917, 118th Cong., 1st Sess. (2023) (“The authority provided by clause 2(m) of Rule XI of the Rules of the House of Representatives to the Chairs of the Committees . . . included, from the beginning of the existing House of Representatives impeachment inquiry . . . the authority to issue subpoenas on behalf of such committees for the purpose of furthering the impeachment inquiry.”).

¹⁷ OLC Opinion, *supra* note 13, at 1.

...

*“Even if the House had sought to ratify a previously issued subpoena, it could give that subpoena only prospective effect. . . . [T]he Supreme Court has recognized that the House may not cite a witness for contempt for failure to comply with a subpoena unsupported by a valid delegation of authority at the time it was issued.”*¹⁸

Thus, “Resolution 660’s direction, however, was entirely prospective. . . . Accordingly, the pre-October 31 subpoenas, which had not been authorized by the House, *continued to lack compulsory force.*”¹⁹ As Resolution 660 was ineffective in 2019, so is Resolution 917 now. To quote you, Chairman Jordan, during the first impeachment of former President Trump, “[c]odifying a sham process halfway through doesn’t make it any less of a sham process.”²⁰

Despite your complaints and the Republicans’ obtaining a definitive legal opinion in 2020, you seemed to forget what occurred just four years ago and followed the same course that Republican leadership at the time and the OLC opined to be improper.

The 2023 Subpoenas Sought Information for “The Impeachment Inquiry”

Chairmen Comer and Jordan, there can be no question that your subpoenas to Mr. Biden were issued for the purpose of gathering testimony in pursuit of “the impeachment inquiry” of President Biden referred to in the September 2023 statement of Speaker McCarthy. That is precisely what you said.

The very first reference in your joint letter accompanying the November 8 and 9, 2023, subpoenas is to your September 27, 2023, “Impeachment Memorandum.”²¹ The very first purpose stated in your letter makes clear the subpoenas’ impeachment purpose: “The Committees are investigating whether sufficient grounds exist to draft articles of *impeachment* against President Biden”²² The very first reason stated for Mr. Biden’s testimony reiterates that impeachment purpose: “The Committees require [Mr. Biden]’s testimony to provide evidence that is relevant to *the impeachment inquiry.*”²³ Your letter’s further references to alleged wrongdoing by *President*

¹⁸ *Id.* n.37 (emphasis added) (first citing *Rumely*, 345 U.S. at 48; and then citing *Exxon*, 589 F.2d at 592); *see also Rumely*, 345 U.S. at 42–43, 48 (affirming reversal of conviction for contempt of Congress because it was not clear at the time of questioning that “the committee was authorized to exact the information which the witness withheld”); *United States v. Lamont*, 18 F.R.D. 27, 37 (S.D.N.Y. 1955) (dismissing indictment for contempt of Congress in part because the indictment did not sufficiently allege, among other things, “that the [Permanent Subcommittee on Investigations] . . . was duly empowered by either House of Congress to conduct the particular inquiry” or “that the inquiry was within the scope of the authority granted to the [sub]committee”).

¹⁹ OLC Opinion, *supra* note 13, at 3–4 (emphasis added).

²⁰ “Pelosi announces they’ll finally vote to open the impeachment inquiry. Codifying a sham process halfway through doesn’t make it any less of a sham.” @Jim_Jordan, X (Oct. 28, 2019), https://twitter.com/Jim_Jordan/status/1188932784334819329.

²¹ Nov. 8, 2023 Letter from Chairmen James Comer & Jim Jordan to Abbe D. Lowell, Esq., at 1 n.1.

²² *Id.* at 3 (emphasis added).

²³ *Id.* (emphasis added).

Biden confirmed that impeachment purpose. As one example, in a press release on November 8, 2023, you, Chairman Comer, reiterated: “The House Oversight Committee has followed the money and built a record of evidence revealing how *Joe Biden* knew, was involved, and benefited from his family’s influence peddling schemes. Now, the House Oversight Committee is going to bring in members of the Biden family and their associates to question them on this record of evidence.”²⁴ Your purpose was also revealed on November 29, 2023, during an appearance on Newsmax, where you, Chairman Comer, stated: “Where the argument is [] what *Joe Biden*’s level of involvement is. And we want to ask Hunter Biden about that.”²⁵ Actions to investigate President Biden, by definition, are for an impeachment inquiry. And should those statements not be evidence enough that the November subpoenas issued to Hunter Biden were intended to further the House’s yet-to-be-authorized impeachment resolution of President Biden, your September 27, 2023, memorandum concerning the scope of the *impeachment inquiry* mentioned “Hunter Biden” some *150 times* in laying out the basis for an impeachment of President Biden.²⁶ That figure, staggering as it may be, speaks volumes about the purposes of your seeking Mr. Biden’s testimony.

Still further, on December 13, 2023, you issued a joint statement directly tying Mr. Biden’s subpoenas to the still yet-to-be-authorized impeachment inquiry: “Today, the House *will vote* on an *impeachment inquiry* resolution to strengthen our legal case in the courts as we face obstruction from the White House and witnesses. Today’s obstruction by Hunter Biden reinforces the need for a formal vote. President Biden and his family must be held accountable for their corruption and obstruction. And we will provide that to the American people.”²⁷

Finally, your committees’ January 10, 2024, contempt reports only further make certain that the purpose of the November 8 and 9, 2023, subpoenas was for “impeachment.” In fact, in the reports’ 19 pages, “impeachment” is mentioned *60 times*. To note just a few examples: “[t]he deposition subpoenas to Mr. Biden were issued as part of the Committees’ *impeachment* inquiry”; “[t]he Committees Seek Information from Hunter Biden Central to the Investigative Purpose of the *Impeachment* Inquiry of President Joe Biden”; and “[i]nformation held by and known to Mr. Biden is vital to the *impeachment* inquiry of President Biden.”²⁸ The reports even go on to say that “[w]ith the possible exception of President Biden, Mr. [Hunter] Biden is the most important witness possessing information about President Biden’s involvement in his son’s business dealings.”²⁹ This, too, reflects that the subpoenas’ purpose was for a proceeding against President Biden; in other words, an impeachment.

²⁴ Press Release, H. Oversight & Accountability Comm., *Comer Issues Subpoenas to Biden Family & Associates* (Nov. 8, 2023) (emphasis added).

²⁵ Newsmax, *Comer: If He No-Shows, Hunter Will Be Held in Contempt of Congress*, YOUTUBE (Nov. 29, 2023) (emphasis added), <https://www.youtube.com/watch?v=kjrsf0wi1iQ>.

²⁶ See Mem. from Chairmen James Comer, Jim Jordan & Jason Smith to Members of the Comm. on Oversight & Accountability, Comm. on Judiciary, and Comm. on Ways & Means (Sept. 27, 2023).

²⁷ Press Release, H. Oversight & Accountability Comm., H. Judiciary Comm., Comer & Jordan Statement on Hunter Biden Failing to Appear for Deposition (Dec. 13, 2023) (emphases added).

²⁸ Biden Contempt Report, *supra* note 1, at 4, 7 (emphases added).

²⁹ *Id.* at 7.

Your Attempt to Cite Other Purposes Also Occurred in and Was Disapproved in 2020

Despite clearly and repeatedly stating from November 2023 to the present that your subpoenas were issued “*for the impeachment inquiry*” that did not yet exist when the subpoenas were issued, you try to suggest that you had some other oversight or legislative rationale. Here too, the Republican administration’s OLC legal analysis addresses and defeats any new claim of a mixed motive:

“Perhaps recognizing [the] infirmity, the committee chairmen invoked not merely the impeachment inquiry . . . but also the committees’ ‘oversight and legislative jurisdiction.’ . . . That assertion of dual authorities presented the question whether the committees could leverage their oversight jurisdiction to require the production of documents and testimony that the committees avowedly intended to use for an unauthorized impeachment inquiry. We advised that, under the circumstances of these subpoenas, *the committees could not do so.*”³⁰

Your contempt reports also erroneously claim that “Mr. Lowell has not contested the legitimacy of these stated purposes but rather has taken issue with how the Committees have chosen to conduct their investigation[.]”³¹ This statement is plainly wrong and ignores my February 9, 2023, letter to Chairman Comer, in which I stated: “I write to explain that the Committee on Oversight and Accountability lacks a legitimate legislative purpose and oversight basis for requesting such records from Mr. Biden, who is a private citizen.”³² That letter to Chairman Comer on behalf of Mr. Biden, like many others I sent, went unanswered.

Consequently, the November 8 and 9, 2023, deposition subpoenas to Mr. Biden and the contempt resolutions approved by your committees on January 10, 2024, based on those subpoenas were and are legally invalid. You have not explained why you are not interested in transparency and having the American people witness the full and complete testimony of Mr. Biden at a public hearing. If you issue a new proper subpoena, now that there is a duly authorized impeachment

³⁰ OLC Opinion, *supra* note 13, at 47 (emphasis added) (citations omitted). The 2020 Opinion went on to point out that, as is the case here, the true purpose of the subpoenas was for the stated objective of impeaching the President, and “not to uncover information necessary for potential legislation” in what the OLC called a “token invocation of ‘oversight and legislative jurisdiction.’” *Id.* at 48. In comparison to the 60 references to their “impeachment” purpose, the contempt reports make a handful of attempts to reference some “legislative purpose” or “legislative oversight.” This reflects the same “token invocation” described in the OLC Opinion.

³¹ Biden Contempt Report, *supra* note 1, at 14.

³² Feb. 9, 2023 Letter from Abbe D. Lowell, Esq., to Chairman James Comer, H. Oversight & Accountability Comm. at 1 (transmitted electronically).

inquiry, Mr. Biden will comply for a hearing or deposition.³³ We will accept such a subpoena on Mr. Biden's behalf.

Sincerely,



Abbe David Lowell

Counsel for Robert Hunter Biden

cc: Speaker Mike Johnson, U.S. House of Representatives
Minority Leader Hakeem Jeffries, U.S. House of Representatives
Rep. Jamie Raskin, Ranking Member, House Committee on Oversight and Accountability
Rep. Jerrold Nadler, Ranking Member, House Committee on the Judiciary

³³ During the January 10, 2024, Judiciary Committee markup, Representative Glenn Ivey suggested a procedure for a hybrid process—a public deposition/hearing with alternating rounds of questions for Republicans and Democrats, and with similar rules (e.g., role of counsel in questioning), as is done in a closed-door deposition. Four Republicans actually voted in committee in support of this process. Perhaps that could be the basis for our discussion.