

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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November 30, 2023

Mr. Robert Flaherty
c/o Brandon L. Arnold
Kramer Levin
2000 K St. NW, 4th Floor
Washington, D.C. 20006

Dear Mr. Flaherty:

The Committee on the Judiciary is conducting oversight of how and to what extent the Executive Branch has coerced and colluded with companies and other intermediaries to censor speech.¹ To develop effective legislation, such as the possible enactment of new statutory limits on the Executive Branch's ability to work with social media platforms and other companies to restrict the circulation of content and deplatform users, the Committee must first understand the nature of this collusion and coercion. As one of the primary liaisons between the Executive Office of the President (EOP) and social media companies, you are uniquely positioned to advance the Committee's oversight.² On June 23, 2023, and again on September 29, 2023, the Committee requested that you voluntarily appear for a transcribed interview.³ This request remains outstanding.

As detailed in previous correspondence to you and your counsel, the Committee has obtained documents that demonstrate the central role you played in communicating the Biden White House's censorship efforts to social media companies, including the White House's demands to censor true information, memes, satire, and other constitutionally protected forms of expression.⁴ As explained, we understand that the information you possess about the White

¹ See Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*, WALL ST. J. (July 28, 2023); Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 27, 2023, 12:03 PM), https://twitter.com/Jim_Jordan/status/1684595375875760128.

² See, e.g., Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 27, 2023, 12:03 PM), https://twitter.com/Jim_Jordan/status/1684595375875760128; Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 28, 2023, 12:03 PM), https://twitter.com/Jim_Jordan/status/1684957660515328001.

³ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (June 23, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (Sept. 29, 2023).

⁴ *Id.*; see also Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 27, 2023, 12:03 PM), https://twitter.com/Jim_Jordan/status/1684595375875760128; Rep. Jim Jordan (@Jim_Jordan), TWITTER (July 28, 2023, 12:03 PM), https://twitter.com/Jim_Jordan/status/1684957660515328001.

House’s censorship efforts is specialized and unavailable to the Committee through other means.⁵ Your testimony will inform the Committee’s legislative reforms aimed at preventing the Executive Branch from wielding its immense power to pressure social media platforms to censor disfavored viewpoints.

The reasons for your noncompliance with our request, as articulated by your attorney, are unpersuasive. In your attorney’s July 7, 2023, letter to the Committee, he asked that the Committee “direct [its] request to the White House in the first instance.”⁶ In our September 29 letter, we informed you that the Committee had already engaged with the White House about these topics and that the White House had declined to engage substantively.⁷ As a show of good faith for the White House’s asserted position that the Committee must first solicit information from other sources, we notified you that the Committee had “exhausted other options for information, including by issuing document subpoenas to federal agencies, technology companies, and other relevant third parties, as well as interviewing personnel at these entities.”⁸ We reiterated our request for a transcribed interview and asked that you schedule it promptly.⁹

Despite the Committee’s representations, your attorney notified us on October 13, 2023, that he had forwarded our letter to the White House and indicated that you would be willing “to work collaboratively with the Committee once [the] process of inter-Branch negotiation and compromise concludes.”¹⁰ As we explained, however, the White House has declined to engage substantively on arranging your testimony and instead has asserted without basis that the Committee must first obtain all possible information from other sources before requesting information concerning the EOP.¹¹ This assertion is inapplicable here for two reasons. First, we are primarily seeking information that is unique to you and not in the possession of other sources. Second, the White House’s interpretation of the exhaustion doctrine—to the extent it applies—seems to require that the Committee must *obtain* all responsive material from Executive Branch agencies before it may even *request* information in the custody of the EOP.¹² Because the EOP controls and coordinates the workings of the Executive Branch, the White House’s position would allow it to effectively deny the Committee any White House information by delaying indefinitely the compliance of subordinate Executive Branch agencies with the Committee’s requests, thereby preventing the Committee from ever obtaining all responsive documents. Such an extreme interpretation of the exhaustion doctrine does not reflect established

⁵ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (June 23, 2023); Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (Sept. 29, 2023).

⁶ Letter from Mr. Brandon L. Arnold to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (July 7, 2023).

⁷ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (Sept. 29, 2023).

⁸ *Id.*

⁹ *Id.*

¹⁰ Letter from Mr. Brandon L. Arnold to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Oct. 13, 2023).

¹¹ Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, to Robert Flaherty (Sept. 29, 2023). *See also* Letter from Richard Sauber, Special Counsel to the President, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Oct. 13, 2023).

¹² Letter from Richard Sauber, Special Counsel to the President, to Rep. Jim Jordan, Chairman of House Comm. on Judiciary 3 (Oct. 13, 2023) (“Given the ongoing production of documents and information and interviews of witnesses from multiple governmental and private entities, the Committee has not yet exhausted other means of obtaining the information you request . . .”).

separation of powers principles and is contrary to the Executive Branch’s own guidance set forth by the Justice Department that a committee must only exhaust the “possibility” of obtaining material through other means.¹³

The White House has also asserted a concern about ongoing litigation relating to the matters on which the Committee is conducting oversight.¹⁴ This assertion also lacks merit. In *Sinclair v. United States*, the Supreme Court noted that the pendency of litigation does not impede Congress’s ability to conduct oversight, stating:

It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.¹⁵

The Court has further noted that “a congressional committee . . . engaged in legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is exposed.”¹⁶ In addition, any implication that a federal court has authoritatively protected you from providing testimony in this matter is unfounded.¹⁷ Our oversight authority, which is based in the Constitution, is not the same as civil litigation, and courts have been clear that senior White House officials do not enjoy absolute immunity from congressional testimony.¹⁸

The Supreme Court has recognized that Congress has a “broad and indispensable” power to conduct oversight, which “encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys in our social, economic or political system for the purpose of enabling Congress to remedy them.”¹⁹ Pursuant to the Rules of the House of Representatives, the Committee on the Judiciary has jurisdiction to conduct oversight of matters concerning “civil liberties” to inform potential legislative reforms.²⁰ In addition, H. Res. 12 authorized the

¹³ See *Congressional Oversight of the White House*, 45 Op. O.L.C. ____ *41 (expressing the view that a congressional committee must only “exhaust[] the *possibility* of obtaining the necessary information elsewhere” before directing its inquiry to the White House and that when, as is the case here, “the *committee* . . . has determined that the necessary information may be obtained only from the White House,” the committee should “direct its inquiry to the White House” (emphases added)).

¹⁴ Letter from Richard Sauber, Special Counsel to the President, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Oct. 13, 2023).

¹⁵ 279 U.S. 263, 295 (1929).

¹⁶ *Hutcheson v. United States*, 369 U.S. 599, 617 (1962).

¹⁷ Letter from Richard Sauber, Special Counsel to the President, to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary (Oct. 13, 2023).

¹⁸ *Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 155 (D.D.C. 2019) (citing *H. Comm. On the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008)).

¹⁹ *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (internal quotation marks omitted).

²⁰ Rules of the House of Representatives R. X (2023).

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Committee’s Select Subcommittee on the Weaponization of the Federal Government to investigate “issues related to the violation of the civil liberties of citizens of the United States.”²¹

Accordingly, for all the reasons explained above, please find attached a subpoena for a deposition. The Committee continues to be willing to work in good faith with you—as well as the White House, if it chooses to engage substantively—to address any legitimate Executive Branch equities stemming from your testimony.

Sincerely,



Jim Jordan
Chairman

cc: The Honorable Jerrold L. Nadler, Ranking Member

Enclosure

²¹ H. Res. 12 § 1(b)(1).