

# [***Rep. Claudia Tenney (R-NY), Is Being Interviewed About Calling For 25th Amendment Explored To Potentially Remove Biden From Office; Biden Makes Multiple Gaffes At Press Conference; Biden Mixes Up Mexican And Egyptian Presidents; Report Notes Biden Willful Retention Of Documents; Tenney Sends Letter To Garland On 25th Amendment; Trump Is Projected Winner Of Nevada GOP Caucus; Biden Pressed On Memory Problems After Docs Report***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6B95-91J1-F072-X0KY-00000-00&context=1516831)

Fox News FOX NEWS @ NIGHT 11:00 PM EST

February 8, 2024 Thursday

Copyright 2024 Fox News Network LLC All Rights Reserved

**Section:** NEWS; Domestic

**Length:** 8250 words

**Byline:** Trace Gallagher, Bill Melugin, Kevin Corke, Lauren Green

**Guests:** Vivek Ramaswamy, Kaylee McGhee White; Stephanie Hamill; Mehek Cooke; John Yoo, Kash Patel

**Body**

GREG GUTFELD, FOX NEWS CHANNEL HOST: We're out of time!

Thanks to Tulsi Gabbard, Tyler Fischer, Kat Timpf, Tyrus, our studio audience. FOX NEWS @ NIGHT with dreamy Trace Gallagher is next. I'm Greg Gutfeld. I love you, America.

TRACE GALLAGHER, FOX NEWS CHANNEL ANCHOR: Good evening. I'm Trace Gallagher. It's 11:00 p.m. on the East Coast, 8:00 here in Los Angeles, and this is America's late news, FOX NEWS @ NIGHT.

And breaking tonight, a live look now at Trump headquarters in Las Vegas. We are now waiting for the former president to speak concerning the caucus night in Nevada, where Trump will likely pick up all of the delegates. And we also expect comments on the disastrous day for his political opponent.

President Biden now facing questions about whether he should step down, following the blockbuster report from Special Counsel Robert Hur, who investigated declassified documents stored in the president's Delaware garage.

The report broadly and boldly called into question the president's mental acuity, something Biden tried to dispute in a very unusual evening news conference at the White House.

The president tried to assure Americans that his mind is sound, but then immediately made a series of mistakes, including calling Egypt's leader, the president of Mexico. And now, Republicans are asking Biden's Cabinet to consider invoking the 25th Amendment, removing him from office. It all comes while former President Trump is about to claim victory in Nevada. We have "TEAM FOX COVERAGE" tonight.

The senior national correspondent Kevin Corke, live in D.C. with more on what's in the Special Counsel report. Lauren Green, covering President Trump's upcoming remarks in Nevada, and likely his rebuttal to President Biden.

But we begin with Bill Melugin, and the late breaking information on the White House damage control.

Bill, good evening. Got a lot of work ahead of them.

BILL MELUGIN, FOX NEWS CHANNEL NATIONAL CORRESPONDENT: Trace, good evening to you. The damage control did not go well, to say the least. On a day of damaging headlines all about his mental acuity, President Biden held a late evening press conference from the Oval Office, where he hoped to show he's still sharp.

Instead, though, he quickly had multiple gaffes and appeared combative at times. So, we'll go into the very first gap. It happened when Biden expressed anger that special counsel Robert Hur said in his classified documents report that Biden couldn't remember when his son Beau died, while he was being questioned by investigators.

Now, in refuting that Biden appeared to forget where his late son got his rosary.

(BEGIN VIDEOTAPE)

JOE BIDEN, PRESIDENT OF THE UNITED STATES: There's even referenced that I don't remember when my son died. How in the hell dare he raised that? Frankly, when I was asked the question, I thought to myself, it wasn't any of their damn business.

Let me tell you something. Some of you have comment, I wear since the day he died every single day the rosary he got from Our Lady of --

MELUGIN (voice over): And he never finished that statement there. Biden also bristled when asked about voter concerns regarding his age.

UNIDENTIFIED MALE: Voters have concerns about your age. How are you going to assuage them?

And do you fear that this report is only going to fuel further concerns about your age?

BIDEN: Only by some of you.

UNIDENTIFIED FEMALE: Mr. President, for months, when you're asked about your age, you would respond that the words, watch me. Many American people have been watching, and they have expressed concerns about your age, this - - they --

(CROSSTALK)

BIDEN: That is your judgement. That is your judgement. That is not the judgments of the press.

UNIDENTIFIED FEMALE: This is (INAUDIBLE) to public -- express concerns --

BIDEN: I didn't want him to --

MELUGIN (voice over): And shortly after defending his mental acuity, the president said Israel has been too heavy handed in Gaza. Then, he mixed up the leaders of Mexico and Egypt, when he said Mexico wouldn't open humanitarian corridor with the Gaza Strip.

BIDEN: The conduct of the response in Gaza -- in Gaza Strip has been over the top. I think that, as you know, initially, the president of Mexico, Sisi, did not want to open up the gate to allow humanitarian material to get in.

I talked to -- I convinced him to open the gate.

(END VIDEOTAPE)

MELUGIN: And Trace, as a result of today's events. New York Republican congresswoman Claudia Tenney is now calling for the 25th Amendment to be explored to potentially remove Biden from office. I know you're going to be talking to her here in a few minutes.

GALLAGHER: She will come and break that news on FOX NEWS @ NIGHT.

Bill, back to you as the news breaks. Thank you. Let's bring in former GOP presidential candidate, Vivek Ramaswamy. Vivek, thank you for coming on. We very much appreciate this.

Very bad day for President Biden. What do you think?

VIVEK RAMASWAMY (R), PRESIDENTIAL CANDIDATE: Look, I think the number one takeaway, Trace, is this: Joe Biden will not be the nominee. I said this last year, people dismiss Instead of some type of conspiracy theory. Today, I think it became that much more obvious.

Play this out. Biden's own DOJ and Special Counsel is effectively releasing a report that undermines the case for him to actually be a candidate for the U.S. presidency, right as Biden's poll numbers are cratering.

We have to do the math, skate to where the puck is going, not fall for the deflection, but I do think what they're planning for is to sidelined, Biden is the nominee, trot in a different puppet instead. That's the most significant takeaway from tonight.

GALLAGHER: And what do you think caused the most damage, Vivek? I mean, we saw covering live today the report that came down from Robert Hur, it was detrimental. But then, you had the news conference tonight? Did the President make a mistake by coming out with his news conference? Would have been better just to issue a statement, and then, maybe move on, or at least address it tomorrow?

What do you think about the timing and the decision making?

RAMASWAMY: I think the decision making was even poorer than the actual execution of it, both of which were terrible. But I think the reality is this. The managerial class and the Democratic Party, and I believe in the deep state has decided that they have lost their use for Joe Biden as a puppet. I think they laid a trap for him, they invited him effectively to prove to the American people that he doesn't have the mental acuity to do it, he fell into their trap. And now, they are laying the groundwork for in the coming three months to sideline him and actually put up who the real nominee is going to be.

So, I said this at the end of one of the Republican presidential debates, and I'll say it again, just be honest with the American people, tell us who the actual nominee is going to be, so that we don't play these games. And we can actually have an honest, open debate about who should be the next president of the United States.

GALLAGHER: Yes.

RAMASWAMY: Because we know that Joe Biden is not going to be one of those candidates. And today -- tonight made that, that much more clearer.

GALLAGHER: I wonder if you were like a lot of people tonight, Vivek, because the news conference was set for 7:45 Eastern Time, it ended up being about 7:55.

During that time, during the wait time, which was a better part of an hour. Did you at any time think like a lot of people did that Joe Biden was going to come out and make some bold statement, maybe not to run for reelection?

RAMASWAMY: I think that there was probably a discussion heading into it. And the reality is, the Democratic Party has always had one obstacle, stopping them from sidelining Joe Biden, that's what I call the Kamala Harris problem.

They've tethered their identity to identity ***politics***. Yet, if they don't make her the nominee, it makes them very difficult to sideline Biden, which is what leads me to I think, the likely conclusion that is going to be someone like Michelle Obama, who they do put up.

So, I think there are serious discussions likely underway. Pretty soon those that are going to spill over into the public sphere. And I wouldn't have been shocked if that happened tonight.

GALLAGHER: Yes.

RAMASWAMY: But I think the greater likelihood, Trace, is that they wait another couple of months and let this play out.

GALLAGHER: We talked about the mistakes that he made. And this is my last - - my last question to you, Vivek. Thank you for coming on. We talked about the mistakes the president made tonight, after trying to convince America that he had a sound mind. What struck me the most was his back and forth with a reporter, where she was saying that America is concerned about your mental acuity. And he said, that's your take. That's your opinion. That's your -- and it really wasn't, because it's been happening all day, very defensive about that.

RAMASWAMY: Look, it does seem increasingly like a form of elder abuse, Trace. I mean, this is a man who was clearly personally hurt, personally insulted, but didn't have the mental acuity to process or even communicate the extent to which he had been hurt or insulted.

And so, the reality is, this man is a puppet, the puppet masters who are wielding him have lost their use. And it's really just a sad situation, to watch play out in plain sight where this is the president of the United States. This is a man who ran on a campaign to reunite this country. And I think that this is a chance for the Republican Party to now take that mantle.

GALLAGHER: Yes.

RAMASWAMY: This man said he wanted to unite the country, he failed, he lacks the acuity to do it. I think in the Republican nominee, that will be President Trump, we have an opportunity for someone with the acuity to say that we will unite this country. And I think that's how we're going to win this in a landslide.

GALLAGHER: Vivek Ramaswamy, good to see you, sir. Thank you for coming on.

RAMASWAMY: Thank you.

GALLAGHER: Meantime, let's dig in more to the damning report. Special Counsel Robert Hur, declined to prosecute President Biden, but Biden was not left unscathed, clearly.

The senior national correspondent Kevin Corke, live with the details on this. Kevin, good evening.

CORKE: Wow, what a day. Trace, evening to you.

Now, despite a host of damning allegations in his very lengthy report, the Special Counsel Robert Hur, recommended against criminal charges, in part, because he said he believed that a jury might view the president as "elderly man with a very poor memory."

But just that's only part of the stunning proclamations. In his 388-page investigation record, which admonished the 81-year-old for willfully flouting legal restrictions by keeping sensitive documents throughout and after his career as a senator and vice president.

Special Counsel Bob Hur said, Biden's practices presented, "serious risks" to national security and added this: "We have also considered that, at trial, Mr. Biden would likely present himself to a jury as he did during our interview of him, as a sympathetic, well-meaning, elderly man with a poor memory. It would be difficult to convince a jury that they should convict him -- by then, a former president well into his 80s of a serious felony that requires a mental state of willfulness."

And then, there was this, Trace, really just blew me away. He said, "In his interview with our office, Mr. Biden's memory was worse. He said he did not remember when he was vice president, forgetting on the first day of the interview, when his term ended, and forgetting on the second day of the interview, when his term began. He did not remember even within several years, when his son Beau died. And his memory appeared hazy when describing the Afghanistan debate that was once so important to him." Wow.

And there is this. Despite Mr. Biden's denials, the report is full of references to willful retention, including headings such as there is evidence that Mr. Biden willfully retained the classified Afghanistan document. Willful and other notices in that scathing report, Trace.

GALLAGHER: Yes.

CORKE: It was really something else to read and I think people will be talking about this at great length tomorrow and in the days ahead.

GALLAGHER: 388 pages.

CORKE: Yes.

GALLAGHER: Kevin Corke, live for us in D.C. Kevin, thank you.

Let's bring in the editor Restoring America for the Washington Examiner, Kaylee McGhee White; Media Research Center T.V. contributing writer Stephanie Hamill, along with Republican strategist and attorney Mehek Cooke, thank you all for coming on.

Kevin was talking at the end there about Afghanistan. And Kaylee, I remember when he blamed Afghanistan on the generals that was a big press conference blaming everybody except for himself. And now, he's blaming the classified documents on his staff. This is call for number eight. Watch this.

(BEGIN VIDEO CLIP)

BIDEN: Thanks for (INAUDIBLE). Were moved not by me, but my staff. But my staff. I didn't have a responsibility to that. That was my staff was supposed to do that. And they referenced that in the report.

And my staff did not do it in a way that -- for example, I didn't know how half the boxes got to my garage until I found out staff gathered them up.

(END VIDEO CLIP)

GALLAGHER: We have him on tape, Kaylee saying opposite things. What do you think about that?

KAYLEE MCGHEE WHITE, RESTORING AMERICA EDITOR, WASHINGTON EXAMINER: Well, it's another sign of a weak president, who knows that he is on his way out. And I think we should be clear that the special report -- the Special Counsel report from Robert Hur, the justice department is still protecting Biden legally.

Remember, the arguments about his mental fitness and his memory have only come up as an excuse for the Special Counsel not to prosecute Joe Biden for crimes that they have evidence of him committing and crimes that they're currently prosecuting his top political rival for.

GALLAGHER: Yes.

WHITE: However, what this does communicate is that they are no longer willing to protect him politically. There is a very clear message being sent to Joe Biden that even if they'll protect him legally, he is going to step aside because he is no longer fit to run against the Republican candidate Donald Trump.

GALLAGHER: Yes, and I do want your opinion on this, Stephanie, because this is kind of your industry, you do this, you prep people -- you kind of follow the media.

If it was you, if you were putting together this news conference, one, would you have done it? And two, would you have done it in this way in this capacity?

STEPHANIE HAMILL, CONTRIBUTOR, MEDIA RESEARCH CENTER: I mean, this was a total disaster today for the Biden White House, probably one of his worst days. I mean, he's coming off the heels of this report, and trying to prove that he is capable to be the leader of the free world.

And for him to have all of these mix ups during the press conference, the hostility that he had towards reporters, who he's ignored for the most part of his presidency. I mean, it's absolutely totally absurd.

And I hope that those in the mainstream media will be critical of President Biden, because I would not judge those who are wondering if Biden is even capable of running a lemonade stand at this point.

GALLAGHER: Yes, it's interesting, quickly, breaking news before I get to you, Mehek. We are now been told that the Associated Press has called Nevada, the caucuses for President Trump, he will take all 26 delegate -- elite delegates and leads that is the prediction. And when we get more information on this, we of course will bring it.

President Trump there, winning the Nevada caucuses, as we thought, no surprise here.

The primary was on Tuesday, and you recall Nikki Haley came in like 30 points behind no candidate, particularly. So, she lost a nobody. Mehek Cooke, to you now, he went to great lengths for talking about President Biden to indicate that his memory was fine. And then he said this talking about his son Beau and the rosary that he still wears watch.

(BEGIN VIDEO CLIP)

BIDEN: Every single day the rosary he got from Our Lady of --

Every Memorial Day we hold a service, remember him.

(END VIDEO CLIP)

GALLAGHER: Yes. I mean, it's Lady of Guadalupe was the actual church. But the question becomes, Mehek, you know, you go out there, and you come back, and you do yourself a disservice by proving that your memory is not what you were -- you were saying it was.

MEHEK COOKE, GOP STRATEGIST: I mean, this press conference single handedly has tanked not only his presidency, but his upcoming election. We are now seeing that he does not have his mental faculties, that he is not fit to be president, that he should not have nuclear codes. We do not trust Biden. And whatever he tried to do to try and convince the American people that he is fit, he failed. He has continued to fail us, Trace, and we have lost confidence.

And who this man is? He is not running our country. He is not fit to be commander in chief. We're in grave danger. We have a national security crisis at our border. We have Ukraine funding that we're fighting against.

GALLAGHER: Yes.

COOKE: We have so much at stake in our country. Joe Biden has to step down and Kamala Harris is going to be worse. But, at least, she can string a couple sentences together and she knows where she is most days.

GALLAGHER: A lot of people have said that, Kaylee, but do you really believe that might happen?

I mean, even might, do you think there is some traction to begin? We're going to talk to Claude Tenney coming up, about her call to implement the 25th Amendment.

Do you think there is a possibility of that happening? You cover ***politics***, you know.

WHITE: What I would say is don't underestimate the democratic establishments' desire to maintain power. If they believe that Joe Biden is a risk that they will lose power, they will toss aside Joe Biden. They have done it before, they will do it again.

So, if that's what has to be done, then, it's that's what's going to happen. And I would argue that what you're seeing now, this concerted effort to force him to step aside, it wouldn't be happening if he was doing well in the polls. But you know, the polls just as well as I do, he's suffering in the swing states. He's losing to Trump in a way that he never did back in 2020.

(CROSSTALK)

GALLAGHER: Yes.

WHITE: And so, now, the effort has begun to force him to step aside.

GALLAGHER: Yes, I mean, you look at some of these polls, and they are disastrous, and they are only going to get worse. Stephanie. That's the key here is that he is getting older. And the polls, because of today are bound to get much worse. How do you battle back?

HAMILL: Yes, this is definitely not a good luck for the Biden White House, and we will see how that will affect potential voters. But we either have a man in the White House who was dishonest, or is incapable. That is that he is an elderly man with a bad memory.

So, either way that you -- they tried to spin it, it's just not a good look. I don't know how you recover from this.

GALLAGHER: Yes.

GALLAGHER: I mean, it's a good -- it's a good point to make, Mehek, but you wonder if there is. I mean, listen, to polls are very close. You talk about direct head-to-head between President Biden and former President Trump, it's still very close. A lot of these in the RCP average are within the margin of error. Do you anticipate in the days and weeks to come that there is some kind of a spread in those polls with Trump getting a bigger advantage?

COOKE: I suspect that there is definitely going to be a spread. Again, this press conference showed the American people that Joe Biden's mental faculties are not intact, that we cannot trust him with our national security, and the way that he's handled from our economy to border, we are continuing to see a decline in our country. And he stood in front of the American people and try to convince us that he is in control.

And Trace, he is not. What you see is what you get. He is failing. He is an elderly man, and I think he's two faced. He's been lying to the American people for a very long time. It's time for him to go. We need to fire Biden and move on.

GALLAGHER: Yes. Mehek Cooke, Stephanie Hamill, and Kaylee McGhee White, thank you all for coming on. We appreciate it.

Meantime, let's bring in former Deputy Assistant Attorney General and Cal Berkeley Law Professor John Yoo. John, I've been wanting to talk to you all day on this, because it really is. It's amazing to me.

I mean, he willfully retained, says the report, these classified documents, but is apparently too impaired to prosecute.

When you look at the report, and you see what it said, what is your criticism about how this was written? And can you really decide not to -- Isn't that up for a judge and a jury and the D.A.s et cetera?

JOHN YOO, FORMER DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE: I actually thought it was a very well-done report, very thorough, and because of the way the Special Counsel works, and keep in mind, this is a special counsel picked by Joe Biden's attorney general. This is not some Trump operative. This is not somebody who works for Gavin Newsom.

This is the considered judgement of a career prosecutor to decide that they -- I think, he thinks that Joe Biden did violate the law, that he doesn't meet the standard for indictment and prosecution. But that he just doesn't think he could win because Joe Biden's defense would be, I'm not really mentally competent to stand trial -- maybe he thinks that.

At the very least, he thinks that a jury is going to sympathize with an old man who can't remember important dates. Now, maybe Joe Biden's legal defense works in a courtroom, but it's as we're all hearing now, dead damning indictment in the political sphere.

GALLAGHER: Yes. And that's the question. Everybody asked John is, you know, you go after this. And Joe Biden says, how dare he. When Joe Biden was coming out tonight, he praised the Special Counsel for coming to the -- coming to the conclusion that there's no charges, but then he damned the Special Counsel for even bringing up his memory, and Beau Biden, et cetera.

So, you know, you bring those was this -- was this a proper strategy, in your estimation for special counsel to do?

YOO: So, here is the thing that Joe Biden, if he really thinks he's being treated unfairly, if he really thinks that the Special Counsel is, right, misrepresenting his facilities and his capabilities, then, Joe Biden can order the release of his interview with the Special Counsel, right?

Apparently, it was, at least a two-day interview. And we saw, right, the select -- just selections from the Special Counsel of what Joe Biden says.

If Biden is saying these being misrepresented. He is the president, his justice department has the full transcript of the interviews, and if he's not afraid of the American people making their judgement, released the whole thing, let us see it. And the American people can make their judgement. Whether they agree with the special counsel or not. I'm worried that the Special Counsel probably didn't present all of the things in the interview that make the president look even worse.

GALLAGHER: What about the two cases? You have the Biden document case, you have the Trump document case, is there a concern on your part, John Yoo that there was different methods, different target, ways of going after these two cases where you had the FBI raiding Mar-a-Lago, you had the FBI asking for permission. Is there differences you see here? Because from the American -- the American person perspective, it seems like you've got classified documents, and you've got classified documents, and you've got a decision not to prosecute the president, and you've got this decision, yes, we're going to prosecute the former president. What do you think about that? What can -- what can simplify it for the American people?

YOO: Trace, that's maybe the most important question that comes out of this, because although he doesn't mean to, the special counsel's report here undermines Jack Smith's effort to prosecute Donald Trump for much the same conduct, which is mishandling classified information.

Now, what the special counsel here says Mr. Hur says, and he says this is the main difference is that Donald Trump resisted cooperation with the government, whereas Joe Biden didn't.

Now, the American people can ask themselves, is that really enough to distinguish the way these two people are being treated? The most important thing that the Justice Department has to stand for in our country is equal treatment under the law, same cases are treated in the same way. Because if they don't do that, the Justice Department doesn't do that, that's going to undermine the public's faith in law enforcement.

And we, you know, people depend on our law enforcement, on prosecutors, and we have to voluntarily cooperate with them in order to maintain any semblance of the rule of law in this country, and that's being threatened if you go after Trump, but you don't go after Biden, even though they basically committed the same offences.

GALLAGHER: Yes, it's interesting, because I wanted to kind of get your take on this, because, you know, we have heard many people say, listen, Joe Biden was a senator, he was the vice president, he didn't have the right to take these documents. Donald Trump was the president.

And the reason that Trump resisted is because he thought, at least all his lawyers say, he thought that he was the president, and he had the right to declassify and to keep these documents. Does that play into this at all? John?

YOO: As you -- I think, as you mentioned earlier, Trace, and one of the panelists did, one thing that's important here is a state of mind. To violate the law, you have to have an intent. And so, you can say Donald Trump, look, what the special prosecutor here says is Trump's not our case. We don't make the decision on Trump. That's up to Jack Smith. But the only difference seems to us to be the cooperation issue.

They don't really say they think Trump had sufficient state of mind to violate the law. As you say, Trace, Biden has actually committed violations of these classified regulations for a much longer period. I was actually quite shocked to hear that he'd been keeping things from much longer than before he was president or vice president -- way back to his years as a senator.

GALLAGHER: Yes.

YOO: There is no reason he should have that information.

GALLAGHER: Yes. And that's exactly what I said.

John Yoo, thank you for coming on. We appreciate your insight, as always.

YOO: Thanks, Trace.

GALLAGHER: Well, our next guest is calling on members of the president's Cabinet to explore the use of the 25th Amendment and remove President Biden from office.

Let's bring in Republican Representative from New York Claudia Tenney. Congresswoman, thank you for coming on. We appreciate it. Breaking the news here.

So, tell me why it is that you think that it's important now to use the 25th amendment to try and remove President Biden from office?

REP. CLAUDIA TENNEY (R-NY): Well, first, Trace, I just want to say President Biden needs to be charged, or he needs to be removed from office under the 25th. Amendment. There isn't a middle ground here.

And as some of your prior guests have eloquently explained, you know, the prosecutor has made a reasonable case that Joe Biden, and obviously, stated that he actually mishandled disclosed and improperly used classified materials.

He then said, but you know, we are judging his personality, and that we don't think that we can get a jury to come to a conclusion on that, which is really not the standard, because he is forgetful and an old man. And he actually also makes a reasonable case that Joe Biden can actually stand trial.

GALLAGHER: Yes.

TENNEY: So, if he can't stand trial, he certainly can't carry out the duties of president of the United States and commander in chief of our armed forces.

So, that's why I think it's one or the other, you either have to prosecute him or he has to be removed under the -- under the 25th Amendment.

That's why I sent this letter that I penned this evening on the breaking news to Merrick Garland.

(CROSSTALK)

GALLAGHER: Yes.

TENNEY: And so, we appreciate you highlighting this. But this has become a longtime embarrassing situation. Everyone, I talked to cringes whenever we see Joe Biden on the T.V. and he is struggling, he can't remember things. And it's -- and it's also shocking with John Yoo just pointed out that he's been mishandling classified documents for such a long period of time. And yet there is no decision to prosecute.

GALLAGHER: Yes. You --

(CROSSTALK)

TENNEY: So, prosecutors have an ethical duty not to, you know, there is -- there should be equal justice under the law, you cannot make your distinctions because you don't like somebody's personality.

(CROSSTALK)

GALLAGHER: Sure.

TENNEY: And you likes, and somebody else's, you know, you work for.

GALLAGHER: Yes. You talk about the letter that you wrote. You sent the letter, as you said to the Attorney General Merrick Garland, as well as Cabinet members invoking the 25th Amendment. And it reads, in part, quoting here, "He most assuredly lacks the ability speaking about the president to execute his presidential responsibilities. Accordingly, it is incumbent upon you to begin proceedings to remove the president pursuant to the 25th Amendment of the United States Constitution, President Biden needs to be charged or he needs to be removed. There is no middle ground."

And what I was captured, you just kind of alluded to that is the fact that you're saying there is no middle ground, either it's you charge him with these documents, or something else has to happen. But you can't say he can't go before a jury because he doesn't have the memory to do to put on a positive defense or a strong defense, and yet, he does have the mental acuity to be in the Oval Office for five more years.

TENNEY: Well, that's exactly it Trace. If he's not competent to stand trial, which is a reasonable assessment, which they seem to be alluding to the Special Counsel Hur, then. how can he be president of the United States? How can he be competent enough under the 25th Amendment? This is exactly the moment that the 25th Amendment was created for, for someone who literally cannot carry out the responsibilities. And when you look back and see some of the sensitive documents that he's had in his flimsy garage, you know, with very little security, versus what we've seen President Trump holding, you know, in Mar-a-Lago with the constant Secret Service looking over it.

And as you just -- as you distinguish before, Trace --

(CROSSTALK)

GALLAGHER: Yes.

TENNEY: The difference between the president United States who has more immunities than the vice president or a senator, those are the reasons and that's why you can't have it one way or another.

You either remove him, or you -- or you charge him.

GALLAGHER: Yes.

TENNEY: It's got to be one of the other.

GALLAGHER: I just want to play this because this is from former federal prosecutor Andy McCarthy, who is a contributor for us. But he talked about the 25th Amendment today. To me, I want to play that and get your quick response to this. Watch.

(BEGIN VIDEO CLIP)

ANDREW MCCARTHY, FOX NEWS CHANNEL CONTRIBUTOR: As you read the report, I can't help but say it sure looks like there's enough here to invoke the 25th Amendment. And I know that's not what, you know, what he is looking at, what his purpose is. But, you know, his fitness for office is a major issue here.

(END VIDEO CLIP)

GALLAGHER: Yes, the interesting thing there is Marc Thiessen, who was down in the right-hand corner, Congresswoman, his eyes kind of lit up, because he knows Andy McCarthy just doesn't say things willy-nilly. Andy McCarthy is very thoughtful and very thought out when he makes these kinds of comments. So, it says something. Your final comments on this?

TENNEY: Yes, I agree. And I wish I'd say that earlier. I didn't realize that Andy McCarthy had said that. But he is obviously respected legal mind.

Look, this is really important that people see that we treat all justice the same. And it's really important that they don't see one standard for another and one for another person, just because, as I said, their personality or the position they are in. And that's what the people rely on. We rely on our equal justice.

GALLAGHER: Yes.

TENNEY: And that's something that is revered in our system. And so, I'm hoping that Merrick Garland falls through on this and talks to the cabinet officials and we follow through.

GALLAGHER: Yes, we will see if this gains any traction at all. Congresswoman, we appreciate you coming on the show as always. Thank you.

UNIDENTIFIED FEMALE: Thank you so much, Trace.

GALLAGHER: Meantime, a live look at Trump headquarters in Las Vegas where the former president is expected to speak soon. Just moments ago, the Associated Press projected that he won tonight's caucus and Lauren Green is live on what we're likely to hear in his remarks. Lauren, good evening.

LAUREN GREEN, FOX NEWS CHANNEL CORRESPONDENT: Hey, good evening, Trace. Well, as you said, the Associated Press projects all 26 delegates in this week's second Republican presidential contest, the Nevada caucuses tonight will go to former President Trump. Doors just opened moments ago for his watch party in Las Vegas, where we expect to have him give strong words in response to President Biden's remarks tonight. Now, the former President Donald Trump is the only major candidate participating tonight, along with long shot candidate from Texas, businessman and pastor, Ryan Binkley.

Now, here is a live look again at Trump's Nevada headquarters, a state where he enjoys a wide base of support. While he appears to be the leading candidate for the Republican nomination, Trump's team does not appear to be taking anything for granted, urging his supporters at a rally last month in Las Vegas to make a big show of support on caucus night, and that appears to be exactly what they did tonight. He also said they should sit out the state's primary which was held on Tuesday but his supporters had another idea.

While Trump was not on the ballot voters have the option to choose none of these candidates. Many of the former president's supporters showed up to choose that option to deny Nikki Haley a symbolic win. Trump took aim at Haley in remarks earlier today.

(BEGIN VIDEO CLIP)

DONALD TRUMP, 45TH PRESIDENT OF THE UNITED STATES: I don't know why she continues, but she's a -- you know, I don't really care if she continues. It's, I think it's bad for the party. I think it's actually bad for her.

(END VIDEO CLIP)

GREEN: We will continue to keep an eye on the watch party in Las Vegas where we are awaiting remarks and what's likely to be a raucous response from former President Trump to the president's address. Trace?

GALLAGHER: Yes, Lauren Green, live for us in New York. Lauren, thank you. Coming up, continuing coverage of the breaking headlines tonight surrounding the two leading presidential candidates. Could be a pivotal night in the 2024 election. We are right back, continuing our coverage of the day's breaking news. It seemed to go on and on, and so will we. Next.

(COMMERCIAL BREAK)

GALLAGHER: Continuing our breaking news coverage now, let's bring in Trump's former Defense Department Chief of Staff, Kash Patel. Kash, I want to get your take on some of this. Now, this is President Biden comparing, runs about 26 seconds, this is him comparing his document case to the former president's document case, and I'll let you respond.

(BEGIN VIDEO CLIP)

JOE BIDEN, PRESIDENT OF THE UNITED STATES: I was especially pleased to see special counsel make clear the stark distinction and difference between this case and Mr. Trump's case. Special counsel wrote, and I quote, "Several material distinctions between Mr. Trump's case and Mr. Biden's are clear," continuing to quote, "most notably, after giving multiple chances to return classified documents to avoid prosecution," Mr. Trump allegedly did the opposite.

(END VIDEO CLIP)

GALLAGHER: What he's saying, Kash, is that the former president's case is so nefarious and his is relatively innocent.

KASH PATEL, FORMER DEFENSE DEPARTMENT CHIEF OF STAFF UNDER PRESIDENT TRUMP: Hey, Trace, it's great to be with you and apologize for the background noise. I'm here at Trump HQ in Nevada for the victory party. But look, as former national security prosecutor and public defender, I never got to walk my client into court and say, oh, you know what? His infirmity is a defense. Please don't charge him, or he returned the proceeds of the crime in a fair and appropriate fashion, don't give him the bank robbery charge. There is a drastic difference here.

Let's look at the linear case. President Biden, before he was president and did not have presidential privilege, took 40 years' worth of documents that were classified, 115 identified by Special Counsel Hur at the top-secret SCI level or higher, and in three different locations. It doesn't matter if he returned them or not. And the gross distinction is President Trump had presidential privilege, which still has yet to be decided by the Supreme Court. So, the cases could not be more alike in terms of legality, but different in terms of how the law was applied.

GALLAGHER: Yes, I want to play this soundbite, but this is Kerri Kupec, she was on with me today and she was talking about, you know, what she believes are still significant allegations against the president and his documents. Watch.

(BEGIN VIDEO CLIP)

KERRI KUPEC URBAHN, FOX NEWS CHANNEL LEGAL EDITOR: Why does anyone need classified information once they leave office? Certainly, this report is embarrassing for Joe Biden. And again, interesting that Rob Hur did say that he, they found that he willfully retained this classified information.

(END VIDEO CLIP)

GALLAGHER: Yes, it wasn't just like oops, had no idea they were there, he willfully retained these things for a very long time, Kash.

PATEL: Look, the Espionage Act, which I prosecuted underneath as a national security prosecutor is simple. If you intentionally take classified documents, that is illegal. You charge it. You don't consider whether the jury may or may not agree with you. A charging decision must be uniformly applied across the DOJ. What we see here is a two-tier system of justice for political ends, justifying the means. And she was right. That intentional wording.

Remember what the Hillary Clinton treatment, Comey created a new distinction and said she was "reckless", which didn't matter because she took them. And here, Joe Biden took them and he has no presidential immunity for it. And so, and there's a destruction of evidence. Let's not forget his ghostwriter. When President Biden came to the podium tonight to address the American people, you know, he said, oh, he didn't know. He blamed his staff. But he hired a ghostwriter to write a book, issued recordings about the classified documents, and then destroyed that evidence, and not even he was charged. It's a grotesque failure.

GALLAGHER: That ghostwriter is Mark Zwonitzer. And yes, that came up as well in that 388-page report. Now, to the Supreme Court case today and here's Justice John Roberts talking about whether President Trump, whether Colorado can legally keep him off the ballot. Justice Roberts, the Chief Justice, had some very skeptical remarks about it. Watch.

(BEGIN VIDEO CLIP)

JUSTICE JOHN ROBERTS, U.S. SUPREME COURT CHIEF JUSTICE: A goodly number of states will say whoever the Democratic candidate is you're off the ballot, and others, for the Republican candidate, you're off the ballot. It'll come down to just a handful of states that are going to decide the presidential election. That's a pretty daunting consequence.

(END VIDEO CLIP) GALLAGHER: Yes, another good thing for former President Trump that happened in the Supreme Court today.

PATEL: Yes, I think constitutionally, our founding fathers were brilliant. These types of political questions are left to be adjudicated at the polls. And the 14th Amendment specifically prescribes the conduct of insurrection to other officers, not the president because the president appoints every officer, he is not one of them. And I think John Roberts and the founding fathers got this right. The states do not have the authority. And here's the most important point: President Trump has not been charged with insurrection has not been --

GALLAGHER: And we just lost Kash Patel. Kash, if you see the former president, bring him to that camera. We'd love to talk to him. Let's bring in Reform California Chairman and State Assembly Candidate, Carl DeMaio. Carl, it's great to have you on here. You look at this case, 388 pages we're talking about with Kash, but I want to get you on the political aspect of this because not the legalities here. There is a lot of important political news that came out of this today, primarily when you had the special counsel saying, you know what? The president is getting old. He's losing his memory. And this is something that is going to be a headline in this campaign for the next nine months.

CARL DEMAIO, CHAIRMAN, REFORM CALIFORNIA: I think, you know, amongst political observers, they're going to fixate on, you know, what does this mean for Biden? I think people need to question what does it mean for the American people? I think people sitting back at home are thinking three things. Number one, there's a double standard. Clearly, Trump is being treated differently than Joe Biden. Hillary Clinton was treated differently than Donald Trump. So, it's hypocrisy. Second, you've got a president who's not capable of doing the job very clearly. And third, the question has to be asked, who's running the show? Who's actually running our government? Because it's certainly not Joe Biden. The guy doesn't know where he is from day to day.

GALLAGHER: Not in the capacity that they held this news conference tonight. That's, that's a one you think that was a bad decision to hold this news conference tonight?

DEMAIO: Absolutely, it was an epic disaster and it illustrated all the all the problems that the special council is raising that this guy probably is incapable of being charged with a crime. He's incapable of being charged with a crime. Therefore, shouldn't he be incapable of serving as our president?

GALLAGHER: Yes, I want to put this up on the screen because this is the report. It's under elderly man, K.D., it's call for number three. And it says, quoting here, "Mr. Biden would likely present himself to a jury as he did in our interview of him as a sympathetic, well-meaning elderly man with a poor memory." And you think, oh, that's kind of a, that's a slam. And Joe Biden says, well, how dare they? And the White House says, how dare they? But the truth of the matter is every time you hear the president talk, everybody is going to be ultra-focused on what he says, every word he says. And when he says things that we know are not true, when he goes down to the board, when he talks about the border and he says, this is now Donald Trump's fault and maggot Republicans fault.

And you know, that's absolutely not true. And the lion share of America knows it's not true. It makes you think, is there something else going on here?

DEMAIO: Well, clearly, Joe Biden probably doesn't know it's not true. He's just reading off a teleprompter, reading from his notes, confused each and every day. But the American people are asking, what is the impact to us in this presidential election? And let me say right now, I think the border is the paramount issue. Securing the border, a national security threat, it's also about traditional illegal immigration, the financial burden to taxpayers, and the unfairness, the human trafficking, the fact that girls and boys are being victimized by the human trafficking.

But ultimately, we're seeing a national security threat with the number of people on the terror watch list that are being detected and detained coming across. It is very simple and very clear. In the 2024 election, if you want a secure border, you got to vote for Donald Trump. You got to put him back in the White House. We will not get a secure border with, frankly, with any other Republican presidential candidate or Democrat presidential candidate. It's got to be Donald Trump if you want that secure border.

GALLAGHER: I got to go. But how long before the GOP, how long before the Trump campaign puts out an ad with, you know, Joe Biden forgetting that six or seven million illegal immigrants came into this country over the past three years. There's going to be something on that. They're going to play on it, and you know they're going to.

DEMAIO: Forgetting and of course blaming his opponents while we are, we are literally funding with that bill that was proposed earlier this week. We are funding the human trafficking of these people. That's what that bill did. It didn't build a wall. It didn't provide real security. Most of the money of the 18 billion to 20 billion on border security went to funding NGOs who are facilitating human trafficking.

GALLAGHER: Yes, it's a mess. Carl DeMaio, great to see you. Thank you. Well, breaking news coverage continues after the break as we await former President Trump's remarks. It'll be about the Nevada caucus first, but you know, he will also speak about what happened to Joe Biden today in the special counsel report on the classified documents. We're coming right back.

(COMMERCIAL BREAK)

GALLAGHER: And that's a live look now at Las Vegas. Those are Trump headquarters in Vegas, where the former president will speak soon and not exactly sure exactly when he's going to come out But we can tell you the breaking news of course is that the race has been called for Trump It's not a surprise And he will take all 26 delegates there and of course the next move the next big move is on to South Carolina Where he will go head-to- head with Nikki Kate, Nikki Haley It's Nikki Haley's home state, but the former president is up by 30 there. When he speaks we will bring it to you live.

Meantime, let's bring back John Yoo, Stephanie Hamill, Kaylee McGee-White, and Carl DeMaio to get some final thoughts on this. I'm wondering first to you, John You, if you look at the report issued by Robert her today do you think it was more damaging to not charge the president or more damaging to actually put those allegations that the president is losing his memory, getting older, et cetera. What are your final thoughts on this report?

YOO: Trace, when I first looked at that report, I thought, gosh, maybe Biden would rather be charged rather than having his mental fitness question. But think about how the day started. We started this day with Supreme Court arguments about whether Donald Trump should be disqualified from running for president at the Supreme Court under the 14th Amendment. And by the end of the day, what are we talking about? Triggering the 25th Amendment to see if the cabinet and majority of the cabinet should remove President Biden because he's mentally unfit. Think about the huge political disaster this is for the Biden White House.

GALLAGHER: And Kaylee McGee-White, to you, you wonder, you know, I know you cover ***politics***, but you wonder the road out, the pathway out for the Biden administration, for the Biden campaign. What is, what are the, do they keep dealing with this issue or do they forget about it and move forward?

WHITE: Well, it's clear that Biden doesn't want to forget about this issue. He's feeling the squeeze. I think that he was the one who insisted on this press conference tonight and you could see the way that he was lashing out at the reporters and he was visibly frustrated and granted he's not used to staying up past 8:00 p.m. let alone taking on vetted questions from the press but you could tell that he was upset about his mental acuity being questioned and also about being thrown under the bus by his own Justice Department so he's feeling the squeeze here and it's really a question of what the Biden campaign decides to do moving forward.

GALLAGHER: Which is your question Stephanie Hamel what do they do to move forward? How do you, you know, how do you reconstruct your guy without bringing this topic up again and again and again?

HAMILL: Yes, I mean, this is just an incredible day for former President Donald Trump, right? As John had mentioned, it started off with the Supreme Court and their skepticism over the Colorado ballot case. Then we move on to this with Biden coming out giving this press conference. I mean, I will say my jaw was dropped the entire day over the series of news that came out. Like I'm still kind of like in shock, but as for how they go forward, I mean, they're going to have to sit in a room and really, really plan this out because their strategy before was to keep him in the basement. And I think they're going to try --

GALLAGHER: Let me get Carl DeMaio. Everybody's going to be looking at it this.

DEMAIO: Everyone's looking at it. I think that those of us who may think of a conspiracy may be thinking that Democrat elites are now prepping to move Biden off the stage and maybe this report was the way they're going to facilitate that. I think they have a backup candidate. I think it's going to be Gavin Newsom, maybe Michelle Obama.

GALLAGHER: We shall see. Thank you all. Thank you for watching America's late news, FOX NEWS @ NIGHT. I'm Trace Gallagher. We'll see you back here tomorrow.

**Load-Date:** February 9, 2024

**End of Document**