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**The Oversight Project**



**MEMORANDUM**

**DATE:** April 2, 2024

**TO:** XXXX

**FROM:** Mike Howell, Executive Director, The Oversight Project

**SUBJECT:** 50 State Review of Withdrawal and Substitution

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**BLUF**

If the Biden family decides that President Biden will not run for re-election, the mechanisms for replacing him on ballots vary by state. There is the potential for pre-election litigation in some states that would make the process difficult and perhaps unsuccessful. Given the expected intensity of election integrity concerns in this election cycle, policymakers and the public should be educated and aware of the contentious path ahead.

**BACKGROUND**

On February 5, 2024, Special Counsel Robert K. Hur issued his report recommending no criminal charges against President Joseph R. Biden. Hur referred to Biden as an “elderly man with poor memory.”<sup>1</sup> Hur also stated that Biden “did not remember, even within several years, when his son Beau died . . . [and] his memory appeared hazy when describing the Afghanistan debacle,”<sup>2</sup> that his recorded interviews with his ghostwriter were “painfully slow, with Mr. Biden struggling to remember events and straining at times to read and relay his own notebook entries,”<sup>3</sup> and that when Hur interviewed Biden his “memory was worse.”<sup>4</sup>

On June 4, 2024, the *Wall Street Journal* published an article titled *Behind Closed Doors, Biden Shows Signs of Slipping*.<sup>5</sup> The article was based on interviews with more than 45

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<sup>1</sup> See Special Counsel Robert K. Hur’s *Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private residence of President Joseph R. Biden, Jr.*, 6, 219 (Feb. 2024).

<sup>2</sup> *Id.* at 208.

<sup>3</sup> *Id.* at 207.

<sup>4</sup> *Id.* at 208. Note that The Oversight Project is currently leading an effort to force disclosure of the improperly withheld audio tape of Biden’s interview with Special Counsel Hur. See *Heritage, et al., v. DOJ*, No. 24-cv-960 (DLF) (Mar. 6, 2024) [consolidated to Case No. 24-cv-0700].

<sup>5</sup> Annie Linskey and Siobhan Hughes, *Behind Closed Doors, Biden Shows Signs of Slipping*, WSJ (Jun. 4, 2024), <https://www.wsj.com/politics/policy/joe-biden-age-election-2024-8ee15246> (last visited Jun 11, 2024).

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individuals over several months and concluded, based on bipartisan sources, a consensus view that President Biden has mental and age-based struggles with his duty.<sup>6</sup>

Over the course of his Presidency, public polling shows an increasing amount of the American public doubting President Biden’s mental fitness. A majority of Americans—at least 6 in 10—are not very or not at all confident in Biden’s capability to serve effectively as President.<sup>7</sup> These numbers are durable, and cross party and ideological lines.

Several recent patterns of behavior have given rise on social media and elsewhere to significant concerns. These include frequent bouts of “freezing” at events; perceptions of incontinence issues; verbal gaffes and long pauses; and appearing lost and disoriented.

There are other publicly reported trends that support the notion that President Biden may not ultimately be a candidate for President. His public polling numbers continue their downward trend as inflation, the border crisis, and chaotic government remain durable problems in the American public’s mind. Additionally, on June 11, 2024, a jury returned a guilty verdict on all three charged counts against Hunter Biden related to possessing a firearm while addicted to illegal drugs and lying on federal firearms forms.<sup>8</sup> Sentencing will be eminent in this case, and the trial on tax evasion commences in a few months. Further, as was comprehensibly demonstrated by Chairman James Comer, Hunter Biden repeatedly perjured himself before Congress while on conditions of supervised release in both the tax and gun case that prohibited him from committing crimes.<sup>9</sup> If Hunter Biden were an ordinary defendant, the Department would have moved, or would be seriously considering moving within days, to modify Hunter Biden’s conditions of release to potentially include some form of pre-trial detention. This would present an opportunity for President Biden to issue a pardon to Hunter, not only for this lower-level crime, but for all other crimes implicating the President himself in the international influence peddling scheme and associated tax and violations of the Foreign Agents Registration Act.

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<sup>6</sup> *Id.*

<sup>7</sup> Josh Boak and Amelia Thomson-Deveaux, *Growing share of U.S. adults doubt Biden’s mental capability to serve as president, AP poll finds*, PBS NEWSHOUR (2024), <https://www.pbs.org/newshour/politics/growing-share-of-u-s-adults-doubt-bidens-mental-capability-to-serve-as-president-ap-poll-finds> (last visited Jun 11, 2024).

<sup>8</sup> Trans. at ¶1425:15–25;¶1426:1, *United States v. Biden*, No. 23-cr-0061(MN) (D. Del. June 11, 2024).

<sup>9</sup> U.S. House of Representatives, Committee on Oversight and Accountability, Criminal Referral Letter from Chairman James Comer to Christopher Wray, Director of the Federal Bureau of Investigation, and Lisa Monaco, Deputy Attorney General, Department of Justice (June 5, 2024), <https://oversight.house.gov/wp-content/uploads/2024/06/Criminal-Referral-6.5.24.pdf> (last visited Jun. 11, 2024)

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**RESEARCH (See Appendix)**

Three of the expected six most contested states have some potential for pre-election litigation aimed at exasperating, with legitimate concerns for election integrity, the withdrawal process for a presidential candidate.

GA, NV, and WI, have specific procedures for withdrawal of a presidential nominee with differing degrees of applicability and timelines.<sup>10</sup> WI does not allow withdrawal for any reason besides death.<sup>11</sup>

Important caveats include the timeline and triggering events. For example, some states allow withdrawal before the 74th day before an election,<sup>12</sup> and failure to adhere to these timelines can result in the candidate's name remaining on the ballot<sup>13</sup> (which provides its own corollary of post-election litigation). Likewise, the rationale for withdrawal (death, medical, or other) can be outcome determinative. Some states, like South Carolina, do not allow withdrawal for political reasons.<sup>14</sup>

There is also the possibility that states will be complicit in an improper withdrawal or substitution.<sup>15</sup> The general scenario plays out after an election where the candidate dies, and the electors are left to choose who they are voting for. This circumstance is only applicable at the close of the election year—there is greater uncertainty if the withdrawal happens before the election. Should the Democrats choose to withdraw in June or July, after many states' withdrawal timelines expire, what happens to those expired ballots? Or if done earlier, in April or May, how would that effect the withdrawal process? The answer is it depends. Much will come down to when Biden withdraws, what procedures he does or does not follow, and the operating state law timelines and triggering events. However, at least 31 states defer to state or national party rules and committees for nominating in the event of withdrawal.<sup>16</sup> These states

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<sup>10</sup> Ga. Code Ann. § 21-2-134(b)(1); Nev. Rev. Stat. Ann. § 293.165; Wis. Stat. Ann. § 8.35

<sup>11</sup> Wis. Stat. Ann. § 8.35(1).

<sup>12</sup> Tex. Elec. Code Ann. § 192.062.

<sup>13</sup> Ga. Code Ann. § 21-2-134(b)(1).

<sup>14</sup> S.C. Code Ann. § 7-11-50.

<sup>15</sup> See Zachary Wolf, *Analysis: What Happens If a Presidential Candidate Has to Leave the Race?*, CNN Politics, CNN (2024), <https://www.cnn.com/2024/02/12/politics/presidential-candidate-race-drop-what-matters/index.html> (last visited Jun. 11, 2024); AP EXPLAINS: What happens if a candidate for president dies?, AP News (2020), <https://apnews.com/article/election-2020-donald-trump-constitutions-elections-us-supreme-court-91ce484b8046e6a555e172f42c4441f9> (last visited Jun. 11, 2024).

<sup>16</sup> A.C.A. § 7-7-106 (Arkansas); Ariz. Rev. Stat. Ann. § 16-343; Conn. Gen. Stat. Ann. § 9-460; Haw. Rev. Stat. Ann. § 11-118; Idaho Code Ann. §34-715; 10 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 3-10-4-5; Mass. Gen. Laws Ann. ch. 53, §14; Md. Code, Elec. Law § 5-901; Mich. Comp. Laws Ann. §168.135 (statute applies to primary); Mo. Ann. Stat. § 115.361; Mont. Code Ann. §13-10-327; Neb. Rev. Stat. Ann. § 32-712 (statute applies to primary); N.H. Rev. Stat. Ann. § 655:38; N.J. Stat. Ann. § 19:13-20 a. (1); N.M. Stat. Ann. §1-8-8; N.Y. Elec. Law § 6-148; N.C. Gen. Stat. Ann. § 163-114; N.D. Cent. Code Ann. § 16.1-12-02; Ohio Rev. Code Ann. § 3513.312

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circumvent the substitution process highlighted above. There may be some avenues for challenges to these laws on improper delegation grounds, however, these may be marginally beneficial.

There is also the issue of applicability. In some of these states there are no statutes that deal with presidential candidate withdrawal or vacancy in nominations, or the laws only operate at the primary election. Even more, there is little caselaw determining when these statutes apply. Some of the extant cases do address applying these withdrawal statutes to different fact patterns than those contemplated by the statutory text, such as withdrawal of independent presidential candidates<sup>17</sup> or congressional candidates.<sup>18</sup> Yet, this confusion may be its own source of litigation. Arguing for strict application of a statute, like Wisconsin's which prohibits withdrawal except in the case of death, would likely bear some fruit.

This memorandum does not address the procedures for presidential elector elections. Additionally, it is outside the scope of this current research to assess different rules for political parties, national and state. Standing and other jurisdictional considerations, such as cause of action (implied or otherwise), are also outside the scope of this project. Further research can easily shore up these deficiencies.

## **CONCLUSION**

Policymakers and the public should be prepared for all externalities that arise from President Biden not running for President in 2024. The process for substitution and withdrawal presents many election integrity issues. Adherence to the law in some states may result in that process being unsuccessful for the purposes of another candidate being on the ballot.

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(death of candidate substitution); Okla. Stat. Ann. tit. 26, § 1-105; Or. Rev. Stat. Ann. §249.190; 25 Pa. Stat. Ann. §2939; 17 R.I. Gen. Laws Ann. §17-15-38; S.D. Codified Laws §12-6-56; Utah Code Ann. § 20A-1-501; Vt. Stat. Ann. tit. 17, §2381; Va. Code Ann. § 24.2-539; Wash. Rev. Code Ann. § 29A.56.360; W. Va. Code Ann. § 3-5-19; Wyo. Stat. Ann. § 22-5-401.

<sup>17</sup> See generally, *Barr v. Galvin*, 584 F. Supp. 2d 316 (D. Mass. 2008).

<sup>18</sup> See generally, *Cummings v. Benderman*, 681 So.2d 97 (Miss. 1996).