



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON



February 27, 2023

The Hon. Kevin McCarthy
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Re: Request For Retrieval Of January 6, 2021 Surveillance Video Footage Or, Alternatively, For Public Disclosure Under Common Law Right Of Access

Dear Speaker McCarthy:

Citizens for Responsibility and Ethics in Washington (“CREW”) and Public Citizen respectfully request that you immediately retrieve the January 6, 2021 Capitol surveillance video footage that you released exclusively to Fox News host Tucker Carlson. If you refuse to do so, then we alternatively request pursuant to the common law right of access that you or any other authorized Member of Congress promptly make public all January 6 video footage released to Mr. Carlson.¹

As you recently confirmed in a fundraising email, you have released to television host Tucker Carlson and his staff the “full 44,000 hours of uncut camera surveillance footage” from the January 6 insurrection at the Capitol.² Your release of a massive trove of sensitive government material to a politically-friendly media outlet is both unprecedented and dangerous. Reports show that you did so without consulting the Chief of the U.S. Capitol Police, the House Minority Leader, House Republican leadership, the Senate Majority Leader, or the Senate Sergeant-at-Arms.³ Members of Congress have raised grave concerns that some of the footage could expose security vulnerabilities and increase the risk of future

¹ A spokesperson for the U.S. Capitol Police has reportedly confirmed that “congressional leaders” and members of “the oversight committees” of either party can access the January 6 video footage, and the Capitol Police “cannot control what congressional leaders or the oversight committees do with the materials we provide.” Greg Sargent, *Kevin McCarthy’s Jan. 6 footage stunt demands a real response*, Washington Post, Feb. 23, 2023, <https://www.washingtonpost.com/opinions/2023/02/23/mccarthy-jan-6-footage-tucker-carlson-propaganda/>; see also Annie Grayer, Jamie Gangel, Alayna Treene, Hannah Rabinowitz, *McCarthy gives Tucker Carlson access to January 6 Capitol security footage, sources say*, CNN, Feb. 21, 2023, <https://www.cnn.com/2023/02/20/politics/kevin-mccarthy-tucker-carlson-january-6-footage/index.html> (quoting Capitol Police source who stated “any member of Congress[] could request access to the footage and that [the Capitol Police] would generally grant it”).

² Emily Wilkins (@emrwilkins), *Twitter*, Feb. 22, 2023, <https://twitter.com/emrwilkins/status/1628472578548408321>; Luke Broadwater and Jonathan Swan, *In Sharing Video With Fox Host, McCarthy Hits Rewind on Jan. 6*, New York Times, Feb. 22, 2023, <https://www.nytimes.com/2023/02/22/us/politics/tucker-carlson-jan-6-mccarthy.html>.

³ Grayer, Gangel, Treene, CNN, *supra*.

attacks on the Capitol complex.⁴ There are also concerns that Mr. Carlson—a prominent January 6 conspiracy theorist—could use the video deceptively, cherry-picking details to downplay the insurrection or to shift blame for the attack.⁵

While much of the Capitol's January 6 surveillance video has been and should be made public, that should only happen through appropriate channels—not through secret deals between the Speaker of the House and a politically-aligned media personality. Our strong preference, then, is that you promptly retrieve the video footage from Mr. Carlson and his staff.

If, however, you refuse to retrieve the video, then basic democratic norms and the common law right of access counsel that you make it available to the rest of the American public.

The D.C. Circuit Court of Appeals has recognized that “there is a federal common law right of access ‘to inspect and copy public records and documents.’”⁶ “[T]he general rule is that all three branches of government, legislative, executive, and judicial, are subject to the common law right.”⁷ This “precious common law right ... predates the Constitution itself” and “is fundamental to a democratic state.”⁸

Whether a record “must be disclosed pursuant to the common law right of access involves a two-step inquiry.”⁹ “First, the court must decide ‘whether the document sought is a public record.’”¹⁰ “If the answer is yes, then the court should proceed to balance the government's interest in keeping the document secret against the public's interest in disclosure.”¹¹

Both conditions are met here. First, the January 6 video footage fits the D.C. Circuit's definition of a common law “public record” because it was “created and kept for the purpose of memorializing or recording an official action ... or other matter of legal significance, broadly conceived.”¹² Specifically, the video was “creat[ed]” to “record” events at the Capitol on the legally-designated date for Congress's certification of the 2020 presidential election, and it is being “kept” because, according to the U.S. Capitol Police's General Counsel, it is “essential to both criminal prosecutions” and “to understand how such a vast breach of security could occur” at the U.S. Capitol¹³—*i.e.*, “matter[s] of legal significance.” You have confirmed repeatedly that the January 6 video footage is a public record that “belong[s] ... to

⁴ *Id.*

⁵ *Id.*

⁶ *Wash. Legal Found. v. U.S. Sent'g Comm'n (“WLF II”)*, 89 F.3d 897, 902 (D.C. Cir. 1996) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

⁷ *Id.*

⁸ *United States v. Mitchell*, 551 F.2d 1252, 1258, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589.

⁹ *WLF II*, 89 F.3d at 902.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 905.

¹³ Declaration of Thomas A. DiBiase ¶ 10, *In Re: Press and Public Access to Video Exhibits in the Capitol Riot Cases*, No. 21-mc-00046-BAH, ECF No. 5-1 (D.D.C. filed May 6, 2021).

the American people,” though you have only released the video to Mr. Carlson and not the public at large.¹⁴

Second, a careful balancing of the government’s and the public’s competing interests weighs heavily in favor of public disclosure. In the normal course, Congress would have a “substantial interest” in maintaining the confidentiality of internal security footage, which is why we would prefer to see the footage immediately retrieved. However, “by [your] own actions,” you have “largely eroded” the government’s “[c]onfidentiality and privacy interests” by giving the complete 44,000 hours of video footage to select members of the public (Mr. Carlson and his staff).¹⁵ This highly unusual move tips the balance heavily in favor of disclosure.

Likewise, “the general public interest in the openness of governmental processes’ weighs in favor of disclosure because the right of access is fundamental to our democracy.”¹⁶ And the public has an especially “strong interest” in the January 6 video footage because it sheds light on an unprecedented assault on the Capitol that disrupted the peaceful transfer of presidential power for the first time in American history.¹⁷ As you stated in your recent fundraising email, Americans deserve “all of the facts” surrounding January 6 and “[i]t is in the public interest to know everything that happened that day”¹⁸—not just what Tucker Carlson wants to selectively televise.

Accordingly, we respectfully request (1) that you promptly retrieve the January 6 video footage from Mr. Carlson and his staff, or (2) if you refuse to retrieve the footage, that you or any other authorized Member of Congress make publicly available all January 6 video footage previously released to Mr. Carlson.

¹⁴ See, e.g., Letter from Leader Kevin McCarthy to Chairman Bennie G. Thompson, Nov. 30, 2022, <https://int.nyt.com/data/documenttools/jan6-mccarthy-letter/7aa80d49ec6ca590/full.pdf> (demanding that the January 6 House Select Committee chairman preserve all records collected during the committee’s investigation—which would include the 44,000 hours of video released to Mr. Carlson—because they are “official Congressional Records” that “do not belong to you or any member, but to the American people”); Broadwater and Swan, *New York Times*, *supra* (quoting Speaker McCarthy as stating he “promised” to release the video to the public; “I was asked in the press about these tapes, and I said they do belong to the American public. I think sunshine lets everybody make their own judgment.”).

¹⁵ See *Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 997 (D.C. Cir. 2021) (Henderson, J., concurring in the judgment); see also *id.* (“A district court ... should consider the public’s previous access to the ... [specific] information [sought].”) (alterations in original).

¹⁶ *Id.* at 996–97 (quoting *Washington Legal Found. v. U.S. Sent’g Comm’n*, 17 F.3d 1446, 1452 (D.C. Cir. 1994)).

¹⁷ *Id.*

¹⁸ Emily Wilkins, Twitter, *supra*.

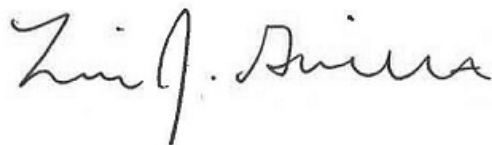
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Sincerely,



Noah Bookbinder
President
Citizens for Responsibility and Ethics in
Washington



Lisa Gilbert
Executive Vice President
Public Citizen

cc:

Hon. Hakeem Jeffries, Minority Leader
U.S. House of Representatives

Hon. Chuck Schumer, Majority Leader
U.S. Senate

Hon. Mitch McConnell, Minority Leader
U.S. Senate

Hon. James Comer, Chairman
U.S. House Committee on Oversight and Accountability

Hon. Jamie Raskin, Ranking Member
U.S. House Committee on Oversight and Accountability