No. 21-

IN THE

Supreme Court of the United States

DONALD J. TRUMP, IN HIS CAPACITY
AS 45TH PRESIDENT OF THE UNITED STATES,

Applicant,

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; DAVID S. FERRIERO, IN HIS OFFICIAL CAPACITY AS ARCHIVIST OF THE UNITED STATES; AND THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Respondents.

ON APPLICATION FOR STAY TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR DISTRICT OF COLUMBIA CIRCUIT.

EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING THE DISPOSITION OF PETITION FOR CERTIORARI AND INJUNCTION PENDING REVIEW

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PARTIES TO THE PROCEEDING

THE PARTIES TO THE PROCEEDING BELOW ARE AS FOLLOWS:

APPLICANT IS DONALD J. TRUMP, IN HIS CAPACITY AS THE 45TH PRESIDENT OF THE UNITED STATES. HE WAS THE PLAINTIFF IN THE DISTRICT COURT AND APPELLANT IN THE COURT OF APPEALS.

RESPONDENTS ARE BENNIE G. THOMPSON, IN HIS CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL; DAVID FERRIERO, IN HIS CAPACITY AS ARCHIVIST OF THE UNITED STATES; AND THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

RELATED PROCEEDINGS BELOW

1. *Donald J. Trump v. Bennie G. Thompson, et al.,* No. 21-2769 – Judgment entered on November 9, 2021; and
2. *Donald J. Trump v. Bennie G. Thompson, et al.*, No. 21-5254 – Judgment entered on December 9, 2021.

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court and Circuit Justice for the District of Columbia Circuit:

This application seeks to maintain the *status quo* so the Court can carefully consider this important case that fundamentally affects the functioning of the American presidency. The underlying petition, filed contemporaneously with this application, presents a matter of first impression: whether a congressional request for a former President's confidential records runs afoul of the Presidential Records Act or the constitutional protections of executive privilege and separation of powers.

Congress limited its own access to Presidential records when it adopted the Presidential Records Act, a law it now refuses to follow. The Executive adopted implementing regulations and an executive order reasonably regulating access to the records of former Presidents. The U.S. House of Representatives' Select Committee to Investigate the January 6th Attack on the United States Capitol, however, ignored these important and reasonable restrictions by sending a "sweeping" records request to the National Archives and Records Administration seeking broad swaths of confidential records created during President Trump's term of office.

The Constitution, this Court's precedent, and federal statutes invalidate the expansive request at issue here. Moreover, a former President has the right to assert executive privilege, even after his term of office. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 439 (1977) ("*GSA*"). This is so because executive privilege "safeguards the public

interest in candid, confidential deliberations within the Executive Branch; it is 'fundamental to the operation of Government.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

The D.C. Circuit's opinion endorsed the power of a congressional committee to broadly seek the records of a prior Presidential administration and, as long as the incumbent President agrees to waive executive privilege, gain unfettered access to confidential communications of that administration. This troubling ruling lacks any meaningful or objective limiting principle. In an increasingly partisan political climate, such records requests will become the norm regardless of what party is in power. Consequently, this Court's review is critical.

There are no countervailing reasons to alter the *status quo* during the *certiorari* stage. Especially considering that the next transition of power is more than three years away, providing ample time for any needed legislation after this case is properly reviewed. Any harm the Committee might endure pales in comparison to the harm facing Applicant, including potential mootness of review. When it comes to the balancing of harms, this is not a "close case." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

For these reasons, Applicant asks this Court to stay issuance of the United States Court of Appeals for the District of Columbia Circuit's mandate pending the

disposition of Applicant's concurrently filed petition for *certiorari* and enjoin Respondents from producing any responsive documents until such disposition.[1]

OPINIONS BELOW

The United States District Court for the District of Columbia's opinion denying preliminary injunction is reported at *Trump v. Thompson*, ---F. Supp. 3d ---, 2021 WL 5218398 (D.D.C. Nov. 9, 2021), and is reproduced at Appendix ("App.") E, at 1-39. The district court's opinion denying injunction pending appeal is reproduced at App. D, at 1-6. The United States Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") opinion denying preliminary injunction and conditionally dissolving the administrative injunction is reported at *Trump v. Thompson*, ---F.4th ---, 2021 WL 5832713 (D.C. Cir. Dec. 9, 2021), and is reproduced at App. A, at 1-68.

JURISDICTION

The D.C. Circuit issued its opinion and order on December 9, 2021. The D.C. Circuit requested Applicant bring a petition for certiorari and application for stay pending appeal within fourteen days of its order; otherwise, the D.C. Circuit would

[1] As the D.C. Circuit acknowledged, there will be forthcoming tranches over which President Trump intends to assert privilege. For example, there has been a fourth tranche of documents due to be produced by January 19, 2022, absent court order. For the sake of judicial efficiency and to preserve the status quo, President Trump asks that Respondents be enjoined from producing any potentially privileged or restricted records until the petition for a writ of certiorari matter is resolved by the Court.

dissolve the administrative injunction, issue their mandate, and allow the release of the records. This Court has jurisdiction under 28 U.S.C. § 1651(a) and 28 U.S.C. § 2101(f) to stay the issuance of the D.C. Circuit's mandate pending the filing and disposition of a petition for *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are: U.S. Const. art. I, § 8; U.S. Const. art. II, § 1, cl. 1; and the Presidential Records Act of 1978, specifically 44 U.S.C. §§ 2204-2205, appended at App. F.

STATEMENT OF THE CASE

Democrats in Congress created the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee") pursuant to House Resolution 503. *See* App. G. The Committee now is requiring the Archivist of the United States to produce records pursuant to their sweeping records request.

Congress already conducted a thorough investigation of the events of January 6 in the context of its impeachment effort. It has not identified a clear legislative purpose in the present effort. Instead, the additional material it seeks to uncover seems focused on political exposure, not towards addressing security flaws that are

easily uncovered through documents and testimony from security officers and experts.

Further, the records request at issue is exceedingly broad. President Trump has exercised his constitutional and statutory right to assert executive privilege over a subset of those documents, and he has made a protective assertion of privilege over any future materials requested. Subsequently, President Biden refused to assert privilege over the documents and sought to allow Congress to invade the executive privilege of President Trump. This unprecedented dispute between an incumbent and former President resulted in this litigation.

The Presidential Records Act of 1978 ("PRA"), 44 U.S.C. §§ 2201-2209, governs the official records of Presidents and Vice Presidents. The PRA charges the Archivist and the National Archives and Records Administration ("NARA") to work with the President to administer and store presidential records after the President leaves office. *See generally,* 44 U.S.C. §§ 2202-2209.

The President may specify a period not to exceed twelve years after his term, during which access to presidential records will be restricted. *See* 44 U.S.C. § 2204. Section 2205(2), the portion of the PRA cited by the Committee in issuing its records request to the Archivist, provides three exceptions to the PRA's access restrictions. 44 U.S.C. § 2205(2)(A)-(C). In pertinent part, it states that "Presidential records shall be made available . . . (C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not

otherwise available." 44 U.S.C. § 2205(2)(C). Importantly, while Congress has purportedly arrogated to itself the power to request documents in certain instances under the statute, the Committee failed to comply with the jurisdictional and source limitations contained in the PRA and related regulations.

In an effort to guard against this unprecedented encroachment on executive privilege, President Trump acted promptly and filed his complaint on October 19, 2021, and his Motion for a Preliminary Injunction shortly thereafter. The district court denied President Trump's Motion for a Preliminary Injunction on November 9, 2021. *See Trump v. Thompson,* Civil Action No. 21-CV-2769, 2021 WL 5218398 (D.D.C. Nov. 9, 2021); App. E. President Trump filed his Notice of Appeal on November 9, 2021. President Trump filed a motion for injunction pending appeal in the district court on November 10, 2021. The district court denied President Trump's motion. App. D. President Trump filed an emergency motion for an administrative injunction in the D.C. Circuit. The D.C. Circuit granted the motion and "[o]rdered that an administrative injunction be entered and appellees the National Archives and Records Administration and the Archivist be enjoined from releasing the records requested by the House Select Committee over which appellant asserts executive privilege, pending further order of this court." (D.C. Cir. Nov. 11, 2021).[2]

[2] While the plain language of the order clearly prohibited release of all the records requested by the Committee over which President Trump has asserted executive privilege, the Court subsequently mentioned in its December 9, 2021 opinion that the injunction applied to "the first three tranches over which President Trump had claimed executive privilege." Consequently, the National Archives has notified President Trump that it intends to produce records in a fourth tranche of

The D.C. Circuit has since set the injunction to dissolve on December 23, 2021, unless President Trump filed a petition for a writ of certiorari and a request for an injunction by then. *See Trump v. Thompson*, Civil Action No. 21-5254, 2021 WL 5832713, at *31 n.20 (D.C. Cir. Dec. 9, 2021); App. A. This filing and the accompanying petition for a writ of *certiorari* satisfy that requirement. Consequently, the Circuit's administrative injunction will remain effective while the Court considers this application. Absent injunctive relief, President Trump risks losing his opportunity to obtain any meaningful remedy. The district court and D.C. Circuit decisions were improper, prompting the need for President Trump to bring this motion before the Court.

REASONS FOR GRANTING THE APPLICATION

An applicant is entitled to a stay pending the filing and disposition of a petition for a writ of *certiorari* upon the showing of:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). If it is a close call, "the Circuit Justice or the Court will balance the equities and weigh the relative harms to the

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documents on January 19, 2022, absent court order. For the sake of judicial efficiency and because of the similarity of the legal issues between the various tranches, President Trump asks the Court to enjoin all productions of all privileged and restricted records while this Court reviews the matter.

applicant and to the respondent." *Id.* (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)).

Furthermore, this Court's Circuit Justices have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when "[a]pplicants are likely to succeed on the merits of their . . . claim," when they would be "irreparably harmed," and when it would not harm the public interest. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curium) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curium)). This case presents the exact situation Justice Scalia described for granting such injunctions: the case here presents "critical and exigent circumstances," the legal rights at issue are "indisputably clear," and an injunction is necessary to aid the Court's jurisdiction. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers).

A Circuit Justice may grant an application for an injunction without it serving as "an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014) (Mem). All that is needed is a "fair prospect" that four other justices will grant reversal and that irreparable harm is "likely." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

This Court recently noted that the presentation of a serious question is significant in weighing whether to grant injunctive relief pending appeal. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). This is especially true when the question is a novel one. *Id.* at 2496 (Roberts, C.J., dissenting). Novel questions of

congressional access to presidential records and executive privilege are at the heart of this case. These are serious issues, which this Court understands to be "fundamental to the operation of Government." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Without an emergency injunction, the issue will become moot.

The disagreement between an incumbent President and his predecessor from a rival political party is both novel and highlights the importance of executive privilege and the ability of Presidents and their advisers to reliably make and receive full and frank advice, without concern that communications will be publicly released to meet a political objective. Granting interim relief will permit the Court to maintain the *status quo* and consider the critical constitutional questions with the benefit of fulsome briefing and with the time required to come to thorough, reasoned conclusions.

I. There is a reasonable probability that the Court will grant certiorari to determine whether the Respondent's assertions are improper.

This Court has determined a former President may invoke executive privilege. *GSA,* 433 U.S. 425, 449 (1977). In that case, the Court also held the incumbent's decision not to support the former president's claim "detract[s]" from the weight of the assertion, but it is not dispositive. *Id.*

In *GSA*, this Court limited its analysis to the materials being taken into custody and screened and did not consider claims relating to a future release of

information. *Id.* at 450. Here, the novel constitutional and statutory issues specifically pertains to the release of information despite an assertion of executive privilege by President Trump. This dispute is of critical importance to the future of the Executive Branch, because it will undermine executive privilege and compromise the full and frank advice necessary to the proper functioning of the Executive Branch.

Pursuant to Supreme Court Rule 10, the Court should take up cases where: (1) a court of appeal has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[,]" (2) a court of appeal "has decided an important question of federal law that has not been, but should be, settled by this Court[,]" and (3) "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The district court's and D.C. Circuit's decisions seriously undermine executive privilege by holding that the incumbent's determination almost certainly overrules the former President's. This question is novel and of such importance that it should be settled by this Court.

As the Court recently held, "information subject to executive privilege deserves 'the greatest protection consistent with the fair administration of justice.'" *Mazars*,

140 S. Ct. at 2032 (2020) (citing *Nixon*, 418 U.S. at 715)). In *Nixon*, this Court granted the petition for *certiorari* given the "public importance of the issues presented." *Nixon*, 418 U.S. at 686-87. As such, it is likely that this Court will grant President Trump's petition for certiorari.

Further, these questions will be presented in a petition filed by a former President of the United States, which increases the likelihood that the Court will grant *certiorari*. The President is no "'ordinary'" litigant. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (quoting *Nixon*, 418 U.S. at 715). The Court gives Presidents "special solicitude" when deciding whether to grant review. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). In *Jones*, the Court granted a petition because the "representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration." *Clinton v. Jones*, 520 U.S. 681, 689-90 (1997). The Court, in sum, should preserve its ability to review this case not to benefit this "particular President," but for the benefit of "the Presidency itself." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

II. There is a fair prospect that this Court will reverse the D.C. Circuit's decision upholding production of the documents.

1. The Lower Courts' Opinions are Wrong Regarding Congressional Requests and Executive Privilege.

The district court and circuit court opinions analyze the case incorrectly by first holding that President Biden's refusal to exert executive privilege is dispositive

with respect to privilege and then applying the wrong analysis regarding the constitutionality of congressional requests. App. E, at 17-28; App. A, at 5 ("The central question in this case is whether . . . a federal court can . . . override President Biden's decision[.]"). This statement makes it clear that the D.C. Circuit never properly considered President Trump's assertion of privilege, instead giving improperly dispositive weight to President Biden's declination. The D.C. Circuit began with the notion that President Trump's assertion must somehow "override" President Biden's refusal to uphold the assertion, which is not the standard under *GSA*.

2. The Presidential Records Act dispositively prohibits the Committee's records request.

The PRA states that the Legislative Branch may only have access to otherwise statutorily-restricted Presidential records "*if such records contain information that is needed for the conduct of its business and that is not otherwise available*." 44 U.S.C. § 2205(2)(C)(emphasis added). This tracks the constitutional rule that a Congressional request for documents "is valid only if it is related to, and in furtherance of, a legitimate task of the Congress." *Mazars*, 140 S. Ct. at 2031 (cleaned up). Congress has no "general power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure." *Id.* at 2032 (cleaned up).

A straightforward review of the PRA makes clear the Committee has not met the statutory requirements to demand the disputed records, to say nothing of how it has

fallen short of the constitutional standard. In addition to a valid legislative purpose, Congress must also demonstrate it has tried and failed to obtain the information through all other available means.

Respondents' approach provides no meaningful limiting principle to Congress's authority to obtain presidential records. They have prevailed below on a theory that effectively grants Congress plenary power to request any information, from any party, at any time. CADC Doc. 1923479 at 34; CADC Doc. 1923461 at 48 (claiming the Committee's request here has a valid legislative purpose simply because the subject of the request was one on which legislation "could be had."). The Committee is using this litigation to push past the gatehouse erected by *Mazars*, where the court crafted objective factors to ensure these types of disputes are reasoned in a constitutional and neutral fashion. The Court soundly rebuffed this approach barely a year ago. *Mazars*, 140 S. Ct. at 2034 (rejecting Congress's approach because it aggravated separation of powers principles by eschewing any limits on the power to subpoena Presidential records).

Congress may not rifle through the confidential, presidential papers of a former President to meet political objectives or advance a case study. CADC Doc. 1923479 at 35. In the last month, Congressman Adam Schiff, a member of the Committee, revealed on national television that "all [the Committee] can do is expose all the malefactors, follow the evidence, wherever it leads, tell the American people

the story of what went into January 6th, all the planning that went into it, who was behind it in terms of the money." Late Night with Seth Meyers, *Rep. Adam Schiff Says It Was Torture Listening to Kevin McCarthy's Speech*, YouTube (Nov. 22, 2021), https://www.youtube.com/watch?v=mPvKNFC615o. He explicitly stated the point of the investigation was to expose "[w]hat Donald Trump was doing, what was he not doing, at the time that the Capitol was being attacked, and make the case publicly." *Id.* This Court has been clear: such objectives fail constitutional scrutiny. *Mazars*, 140 S. Ct. at 2032. Nevertheless, the Circuit completely ignored this striking admission by Congressman Schiff.

Congressman Kinzinger recently admitted on live television that the Committee was engaged in a criminal investigation to determine whether laws were broken on January 6, 2021. ABC News, *'This Week' Transcript 12-19-21: Dr. Anthony Fauci & Rep. Adam Kinzinger*, ABC News (Dec. 19, 2021), https://abcnews.go.com/Politics/week-transcript-12-12-21-dr-anthony-fauci/story?id=81833124; CNN Politics, *Kinzinger says January 6 panel is investigating Trump's involvement in insurrection,* Cable News Network (Dec. 19, 2021) https://www.cnn.com/2021/12/19/politics/adam-kinzinger-trump-investigation-insurrection-cnntv/index.html. The public comments of Committee members make it clear that the body is acting more like an inquisitorial tribunal than a legislative committee. Its members seek a "precise reconstruction of past events" not because there are "specific legislative decisions that cannot reasonably be made without" the

information it seeks, but simply for the sake of the information itself. *Select Committee,* 498 F.2d at 731-33.

Even if the Committee had an appropriate legislative purpose for pursuing President Trump's confidential records, their request is strikingly broad. Indeed, they seek the President's schedule, call logs, legal documents, and briefing materials. They want to forage for information by reviewing every White House email concerning President Trump on January 6, 2021. They even want campaign polling data dating to April 2020. These sweeping requests are indicative of the Committee's broad investigation of a political foe, divorced from any of Congress's legislative functions clearly delineated in Article I, § 8 of the Constitution.

The D.C. Circuit's decision not only allows but encourages a blue-penciling system where Congress will be incentivized to send broad requests for Presidential records to incumbent and former Presidents, divorced from any legislative purpose, and then allow courts, including this one, to limit them (or not) later. Again, Congress can only *request information* tethered to a "valid legislative purpose." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020). But just as a court "may not rewrite a contract void for vagueness, making it definite by designating a new clearly demarcated area[s]," *Wharf, Inc. v. District of Columbia Wharf Horizontal Reit Leaseholder LLC*, Civil Action No. 15-1198, 2021 WL 1198143, at *14 (D.D.C. Mar. 30, 2021), so, too Congress's requests – overbroad and without a legitimate legislative

end–cannot be reformed, rewritten, or redrafted by the courts to remedy inexact drafting and improper purposes.

The Committee did not even attempt to get the information elsewhere, as is statutorily required, before submitting its request to the Archivist. The Committee is moving backwards: requesting the documents first and then subpoenaing dozens of witnesses and documents afterward.

The Committee claims it could not obtain the requested information elsewhere, *see* CADC Doc. 1923479 at 52-53, but the Committee has obtained other evidence and testimony regarding the events of January 6th that are perfectly adequate to inform it regarding any proposed legislation. Moreover, privileged records are not needed for the Committee to legislate. The Committee has never explained why other sources of information–outside of the requested records–could not "reasonably provide Congress the information it needs in light of its particular legislative objective." *Mazars*, 140 S. Ct. at 2035-36.

3. The Committee's Request Serves No Legislative Purpose.

Before and apart from any discussion of executive privilege, all congressional requests must comply with the principles of constitutional separation of powers, regardless of the dictates of the incumbent President. *Mazars*, 140 S. Ct. at 2035. The court may only consider questions of executive privilege after it has determined that a congressional request serves a valid legislative purpose. *Id.*

When Congress seeks a person's information or documents, the person whose information will be exposed may sue in federal court for an "injunction or declaratory judgment." *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1259 (D.C. Cir. 1973). A "valid legislative purpose," articulating a "'specific need' for the . . . information," must support all congressional information requests. *Mazars,* 140 S. Ct. at 2035, 2032 (quoting *Nixon*, 418 U.S. at 713). The "valid legislative purpose" requirement stems directly from the Constitution. *Kilbourn v. Thompson*, 103 U.S. 168, 182–89 (1880). "The powers of Congress . . . are dependent solely on the Constitution," and "no express power in that instrument" allows Congress to investigate individuals or to issue boundless records requests. *Id.* at 182. The Constitution instead permits Congress to enact certain kinds of legislation, see, e.g., Art. I, § 8, and Congress's power to investigate "is justified solely as an adjunct to the legislative process." *Watkins v. United States*, 354 U.S. 178, 197 (1957).

When Congress seeks the most sensitive, privileged presidential records, like those requested here, its burden is even higher because it is intruding on a co-equal branch of government in a manner that affects the balance and separation of powers. Congress must show the requested documents are "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).

In determining the constitutionality of congressional records requests, the *Mazars* Court instructed courts to "perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant

legislative interests of Congress and the 'unique position' of the President." *Mazars*, 140 S. Ct. at 2035. The Court then provided four "special considerations" meant to guide that analysis, *id.* at 2035–36, all of which confirm the wide-ranging request here serves no legitimate legislative purpose. The lower courts' cursory analysis of the four *Mazars* factors guts them. App. E, at 33–34; App. A, at 54-56.

As discussed above, under the first *Mazars* factor, the lower courts ignored the significant separation of powers concerns associated with a congressional request for a President's materials. Yet, the courts' most egregious errors involved the second *Mazars* factor, where both courts claimed that because President Biden has refused to exert executive privilege, the request is not overly broad and in the public interest. App. E, at 34; App. A, at 56-57. This Court has held that requests must be "no broader than reasonably necessary to support Congress's legislative objective." *See Mazars*, 140 S. Ct. at 2036.

Third, the lower courts waived the Committee's burden to articulate its specific need for the specific documents (App. E, at 28; App. A, at 51-56), even though "it is 'impossible' to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Id.* (citing *Watkins*, 354 U.S. at 201, 205).

Finally, the courts below ignored the institutional damage wrought by their holdings that improperly empower "a rival political branch that has an ongoing

relationship with the President and incentives to use subpoenas for institutional advantage." *Id.*

Even under the "*Mazars* lite" test, fashioned by a district court to consider a subpoena's effect on a President no longer in office, the request at issue here is invalid. *See generally Trump v. Mazars USA, LLP*, 2021 WL 3602683 (D.D.C. Aug. 11, 2021). Congress must still show how the requested documents will "uniquely advance its legislative objectives." *Id.* at *16. An "undeniably broad" subpoena will still be invalid, *id.* at *17, because "[t]he risk of 'unnecessary intrusion into the operation of the Office of the President' . . . increases with a subpoena's breadth and intrusiveness. The more Congress can invade the personal sphere of a former President, the greater the leverage Congress would have on a sitting President." *Id.* (citing *Mazars*, 140 S. Ct. at 2036). The congressional request cannot satisfy even the *Mazars* lite test.

Next, the courts below erred by claiming that the incumbent President's privilege determination could somehow legitimize the Committee's fishing expedition. App. E, at 31; App. A, at 36-42, 56-57. There is no precedent for such a holding, which would give incumbent Presidents the unchecked power to validate or invalidate congressional requests that serve no legitimate legislative purposes. This is inconsistent with the separation of powers and this Court's precedents.

Finally, any investigation into alleged claims of wrongdoing is a quintessential law-enforcement task reserved to the executive and judicial branches. Congress is not

a law-enforcement branch of government; nor can it seek information "for the sake of exposure." *Watkins,* 354 U.S. at 200.

4. The Requested Documents are Privileged.

President Trump is likely to succeed in claiming that numerous legal privileges protect the requested records and thus should not be produced to the Committee. He has already reviewed and identified a handful of documents allegedly responsive to the Committee's request in the first three sets of documents provided by the Archivist and clearly protected by the presidential communications privilege, among others. *See* App. M. President Trump created these documents during his term of office, and they reflect presidential decisionmaking, deliberations, and communications among close advisors, attorneys, and the President.

"The presidential communications privilege . . . extends 'beyond communications directly involving and documents actually viewed by the President, to the communications and documents of the President's immediate White House advisors and their staffs,'" *i.e.*, documents "'solicited and received' by the President or his immediate White House advisors who have 'broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Judicial Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997)).

The deliberative process privilege covers records documenting the decisionmaking of executive officials generally. *See In re Sealed Case*, 121 F.3d at

745. This privilege allows the President to withhold certain documents containing "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987) (citing *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150–54 (1975)). In addition, the attorney-client privilege applies to communications between a client and his lawyer made to obtain legal advice. *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998). Notably, the D.C. Circuit recognized that "President Biden does not dispute that the particular documents at issue qualify for executive privilege." App. A, at 51.

Binding precedent confirms President Trump may assert executive privilege and other privileges over Congress's requested materials. *See GSA,* 433 U.S. at 439 (1977). "[T]he remaining separation of powers concern at issue [with former Presidents] involves the threat of a post-presidency congressional subpoena for personal information in order to influence 'how the sitting President treats Congress while in office.'" *See Mazars*, 2021 WL 3602683, at *17. Therefore, President Trump will likely succeed on the merits.

The decision to uphold a claim of privilege is a decision on the legal correctness of the original assertion of said privilege, not an invitation for the incumbent President to waive an otherwise valid privilege. Had Congress intended to give the incumbent President the ability to waive the claim of a former President, they certainly had the vocabulary to do so. *See*, *e.g.*, 44 U.S.C. § 2204 (b)(1)(A)(i) (allowing a former President to "waive" a privilege).

III. Failure to grant emergency relief would irreparably harm President Trump and future Presidential administrations.

Absent judicial intervention, President Trump will suffer irreparable harm through the effective denial of a constitutional and statutory right to be fully heard on a serious disagreement between the former and incumbent President. President Trump is more than an ordinary citizen. *Cheney*, 542 U.S. at 367. He is one of only five living Americans who, as former Presidents, are granted special authority to make determinations regarding the disclosure of records and communications created during their terms of office. *GSA*, the Presidential Records Act, its associated regulations, and Executive Order 13489 are clear: a former President is not merely a "private party." Instead, he has the right to be heard and to seek judicial intervention should a disagreement between the incumbent and former Presidents arise regarding congressional requests and executive privilege.

As the D.C. Circuit correctly noted, "there is no question that the former President can file suit to press his claim of executive privilege" and that his assertion of privilege is of "constitutional stature." App. A, at 35 (citing *GSA*, 433 U.S. 425, 439 (1977)). Further, the D.C. Circuit correctly noted that the Presidential Records Act provides for assertions of executive privilege by former Presidents. App. A, at 32-34 (citing 44 U.S.C. § 2208). This provides standing for President Trump's lawsuit. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) ("[T]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'").

If this Court were to deny President Trump injunctive relief, his rights to pursue his legitimate assertions of executive privilege would be violated. Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. The assertion of executive privilege in this instance is President Trump's constitutional right, and this Court has stated that a deprivation of constitutional rights "unquestionably constitutes irreparable injury" for purposes of injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 376 (1976) (holding First Amendment violations constitute irreparable injury); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.").

The D.C. Circuit's contention that the current President alone can determine the best interests of the Executive Branch is plainly wrong. This Court in *GSA*, 433 U.S at 449, granted the former President the "right to be heard," in accordance with the PRA, which allows former Presidents to seek a remedy in court. *See* 44 U.S.C. § 2205 (restricting access "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke"); *see also* 36 C.F.R. § 1270.44 (stating the Archivist discloses records after incumbent denial of the privilege only if no court order is issued). The court cannot be so cavalier in shirking its responsibility and abrogating the law.

Certainly, the disclosure of the documents themselves also constitutes irreparable harm. If the Court does not intervene, the Archivist could give the

Committee confidential, privileged information. Once disclosed, the information loses its confidential and privileged nature. "The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure," accordingly "create[s] an irreparable injury." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Preventing mootness is "'[p]erhaps the most compelling justification'" for a stay pending certiorari. *Id.* (quoting *New York Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307 (1976) (Marshall, J., in chambers); *see also Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The *status quo* could never be restored."); *PepsiCo, Inc. v. Redmond*, 1996 WL 3965, at *30 (N.D. Ill. 1996) ("[J]ust as it is impossible to unring a bell, once disclosed, . . . confidential information lose[s] [its] secrecy forever"); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976) ("Once disclosed, such information would lose its confidentiality forever.").

Producing these privileged documents would irreparably harm the institution of the Presidency. As President Lyndon Johnson noted, confidences are "essential to the functioning of the constitutional office of the Presidency." *GSA*, 433 U.S. at 517 (Burger, C.J., dissenting). This Court itself recognized the expectation a President has in the confidentiality of his conversations so that he can be "candid, objective, and even blunt" in his decisionmaking. *Nixon*, 418 U.S. at 708. Waiving privilege in this instance will cause all future administrations to be wary of their confidential communications. It will be on the minds of all future Presidents that a successive

administration of a rival political party could waive the privacy of their communications with ease. This will detrimentally impact Presidential decisionmaking for all future Presidents. Accordingly, President Trump has satisfied his burden of a showing of irreparable harm.

IV. Balance of equities and public interest weigh in favor of granting emergency relief.

Given the likelihood of this Court granting certiorari and the case-mooting harm President Trump will suffer absent relief, it is unlikely that this is a "close call" for a stay, requiring the balance of equities. *Hollingsworth*, 558 U.S. at 190. Still, the balance of equities and public interest also favor granting President Trump's request for a stay and injunction. For an injunction, President Trump must only show that the public interest would not be harmed by the grant of injunction. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (per curium); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curium).

Interim relief only "postpones the moment of disclosure . . . by whatever period of time may be required" to reach a final adjudication on the merits of President Trump's claims. *Providence Journal,* 595 F.2d at 890; *see also Araneta v. United States,* 478 U.S. 1301, 1305 (1986) (granting a stay despite the public's "strong interest in moving forward expeditiously with a grand jury investigation" because "the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay"). The

Committee's "interest in receiving the records immediately" thus "poses no threat of irreparable harm to them." *John Doe Agency*, 488 U.S. at 1309. Further, "[r]efusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010). While there may be delay, delay "is an inherent corollary of the existence of coordinate branches." *United States v. AT&T Co.*, 567 F.2d 121, 133 (1977).

The limited interest the Committee may have in immediately obtaining the requested records pales in comparison to President Trump's interest in securing judicial review before he suffers irreparable harm. Further, the Committee does not "need" these records to legislate, given that "legislative judgments normally depend more on the predicted consequences of proposed legislative actions" than on "precise[ly] reconstructi[ng] past events." *Senate Select Comm.*, 498 F.2d at 732. There will not be another Presidential transition for more than three years; Congress has time to allow this Court to consider this expedited appeal. The records sought are in the custody and control of NARA and therefore are being preserved as a matter of law. The Committee has identified no reasonable justification for requiring the documents immediately.

CONCLUSION

For these reasons, Applicant respectfully requests that the Court stay the mandate from the D.C. Circuit pending the resolution of Applicant's Petition for

Certiorari and grant an injunction, prohibiting the National Archives and Records Administration and the Archivist from releasing any and all records requested by the House Select Committee over which appellant asserts executive privilege, until further order of the Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 30, 2021 Decided December 9, 2021

No. 21-5254

DONALD J. TRUMP, IN HIS CAPACITY AS THE 45TH PRESIDENT OF THE UNITED STATES,
APPELLANT

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02769)

Jesse R. Binnall and *Justin R. Clark* argued the cause and filed the briefs for appellant.

Douglas N. Letter, General Counsel, U.S. House of Representatives, argued the cause for appellees Bennie Thompson and the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol. With him on the brief were *Todd B. Tatelman*, Principal Deputy General Counsel, *Stacie M. Fahsel*, Associate General

Counsel, *Eric R. Columbus*, Special Litigation Counsel, and *Annie L. Owens*, *Mary B. McCord*, and *Joseph W. Mead*, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center.

Brian M. Boynton, Acting Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee National Archives and Records Administration. With him on the brief were *Michael S. Raab* and *Gerard Sinzdak*, Attorneys. *Mark R. Freeman*, *Sarah E. Harrington*, and *Elizabeth J. Shapiro*, Attorneys, entered appearances.

Elizabeth B. Wydra and *Brianne J. Gorod* were on the brief for *amici curiae* Former Department of Justice Officials in support of appellees.

Norman L. Eisen was on the brief for *amici curiae* States United Democracy Center and Former Federal, State, and Local Officials in support of appellees.

Nikhel S. Sus and *Conor M. Shaw* were on the brief for *amici curiae* Citizens for Responsibility and Ethics in Washington and Former White House Attorneys in support of appellees.

John A. Freedman, *Samuel F. Callahan*, and *Cameron Kistler* were on the brief for *amici curiae* Former Members of Congress in support of appellees.

Kelly B. McClanahan was on the brief for *amici curiae* Government Accountability Project, et al. in support of appellees.

Before: MILLETT, WILKINS, and JACKSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: On January 6, 2021, a mob professing support for then-President Trump violently attacked the United States Capitol in an effort to prevent a Joint Session of Congress from certifying the electoral college votes designating Joseph R. Biden the 46th President of the United States. The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol.[1] Then-Vice President Pence, Senators, and Representatives were all forced to halt their constitutional duties and flee the House and Senate chambers for safety.

The House of Representatives subsequently established the Select Committee to Investigate the January 6th Attack on the United States Capitol, and charged it with investigating and reporting on the "facts, circumstances, and causes relating to" the January 6th attack on the Capitol, and its "interference with the peaceful transfer of power[.]" H.R. Res. 503, 117th Cong. § 3(1) (2021). The House Resolution also tasked the January 6th Committee with, among other things, making "legislative recommendations" and proposing "changes in law, policy, procedures, rules, or regulations" both to prevent future acts of

[1] STAFF REP. OF S. COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFS. & S. COMM. ON RULES & ADMIN., 117TH CONG., EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 29 (June 8, 2021) ("*Capitol Attack* Senate Report"); *Hearing on Health and Wellness of Employees and State of Damages and Preservation as a Result of January 6, 2021 Before the Subcomm. on the Legis. Branch of the H. Comm. on Appropriations* ("House Hearing"), 117th Cong., at 1:25:40–1:26:36 (Feb. 24, 2021) (statement of J. Brett Blanton, Architect of the Capitol), https://perma.cc/XS7N-MRG8.

such violence and to "improve the security posture of the United States Capitol Complex[.]" *Id.* § 4(b)(1), (c)(2).

As relevant here, the January 6th Committee sent a request to the Archivist of the United States under the Presidential Records Act, 44 U.S.C. § 2205(2)(C), seeking the expeditious disclosure of presidential records pertaining to the events of January 6th, the former President's claims of election fraud in the 2020 presidential election, and other related documents.

This preliminary injunction appeal involves only a subset of those requested documents over which former President Trump has claimed executive privilege, but for which President Biden has expressly determined that asserting a claim of executive privilege to withhold the documents from the January 6th Committee is not warranted. More specifically, applying regulations adopted by the Trump Administration, President Biden concluded that a claim of executive privilege as to the specific documents at issue here is "not in the best interests of the United States," given the "unique and extraordinary circumstances" giving rise to the Committee's request, and Congress's "compelling need" to investigate "an unprecedented effort to obstruct the peaceful transfer of power" and "the most serious attack on the operations of the Federal Government since the Civil War." Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), J.A. 107–108 ("First Remus Ltr."); *see also* Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), J.A. 113 ("Second Remus Ltr."); Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 25, 2021), J.A. 173–174 ("Third Remus Ltr.").

The central question in this case is whether, despite the exceptional and imperative circumstances underlying the Committee's request and President Biden's decision, a federal court can, at the former President's behest, override President Biden's decision not to invoke privilege and prevent his release to Congress of documents in his possession that he deems to be needed for a critical legislative inquiry.

On the record before us, former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents. Both Branches agree that there is a unique legislative need for these documents and that they are directly relevant to the Committee's inquiry into an attack on the Legislative Branch and its constitutional role in the peaceful transfer of power.

More specifically, the former President has failed to establish a likelihood of success given (1) President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States; (2) Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations; (3) the demonstrated relevance of the documents at issue to the congressional inquiry; (4) the absence of any identified alternative source for the information; and (5) Mr. Trump's failure even to allege, let alone demonstrate, any particularized harm that would arise from disclosure, any distinct and superseding interest in confidentiality attached to these particular documents, lack of relevance, or any other reasoned justification for withholding the documents. Former President Trump likewise has failed to establish irreparable harm, and the

balance of interests and equities weigh decisively in favor of disclosure.[2]

For those reasons, we affirm the district court's judgment denying a preliminary injunction as to those documents in the Archivist's first three tranches over which President Biden has determined that a claim of executive privilege is not justified.

I

A

On November 3, 2020, Americans elected Joseph Biden as President, giving him 306 electoral college votes. Then-President Trump, though, refused to concede, claiming that the election was "rigged" and characterized by "tremendous voter fraud and irregularities[.]" President Donald J. Trump, *Statement on 2020 Election Results* at 0:34–0:46, 18:11–18:15, C-SPAN (Dec. 2, 2020), https://www.c-span.org/video/?506975-1/president-trump-statement-2020-election-results (last accessed Dec. 7, 2021). Over the next several weeks, President Trump and his allies filed a series of lawsuits challenging the results of the election. *Current Litigation*, ABA: STANDING COMM. ON ELECTION LAW (April 30, 2021), https://perma.cc/9CRN-2464. The courts rejected every one of the substantive claims of voter fraud that was raised. *See, e.g.*, *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020) ("[C]alling an election unfair does not make it so. Charges

[2] Given former President Trump's failure to meet his burden, we need not decide to what extent a court could, after a sufficient showing of congressional need, second guess a sitting President's judgment that invoking privilege is not in the best interests of the United States.

require specific allegations and then proof. We have neither here.").

As required by the Twelfth Amendment to the Constitution and the Electoral Count Act, 3 U.S.C. § 15, a Joint Session of Congress convened on January 6, 2021 to certify the results of the election. 167 CONG. REC. H75–H85 (daily ed. Jan. 6, 2021). In anticipation of that event, President Trump had sent out a Tweet encouraging his followers to gather for a "[b]ig protest in D.C. on January 6th" and to "[b]e there, will be wild!" Donald Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 1:42 AM) ("Statistically impossible to have lost the 2020 Election.").

Shortly before noon on January 6th, President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House. J.A. 180. During his more than hour-long speech, President Trump reiterated his claims that the election was "rigged" and "stolen," and urged then-Vice President Pence, who would preside over the certification, to "do the right thing" by rejecting various States' electoral votes and refusing to certify the election in favor of Mr. Biden. *See* Donald J. Trump, *Rally on Electoral College Vote Certification* at 3:33:05–3:33:10, 3:33:32–3:33:54, 3:37:19–3:37:29, C-SPAN (Jan. 6, 2021), https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification (last accessed Dec. 7, 2021) ("January 6th Rally Speech"). Toward the end of the speech, President Trump announced to his supporters that "we're going to walk down Pennsylvania Avenue * * * to the Capitol and * * * we're going to try and give our Republicans * * * the kind of pride and boldness that they need to take back our country." *Id.* at 4:42:00–4:42:32. Urging the crowd to "demand that Congress do the right thing and only count the electors who have been lawfully slated[,]" he warned that "you'll never take back our country with weakness" and

declared "[w]e fight like hell and if you don't fight like hell, you're not going to have a country anymore." *Id.* at 3:47:20–3:47:42, 4:41:17–4:41:33.

Shortly after the speech, a large crowd of President Trump's supporters—including some armed with weapons and wearing full tactical gear—marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results. *See Capitol Attack* Senate Report at 23, 27–29. The mob quickly overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol. *Id.* at 24–25. Police officers were attacked with chemical agents, beaten with flag poles and frozen water bottles, and crushed between doors and throngs of rioters. *Id.* at 28–29; *Hearing on the Law Enforcement Experience on January 6th Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong., at 2 (July 27, 2021) (statement of Sgt. Aquilino A. Gonell, U.S. Capitol Police).

As rioters poured into the building, members of the House and Senate, as well as Vice President Pence, were hurriedly evacuated from the House and Senate chambers. *Capitol Attack* Senate Report at 25–26. Soon after, rioters breached the Senate chamber. *Id.* In the House chamber, Capitol Police officers "barricaded the door with furniture and drew their weapons to hold off rioters." *Id.* at 26. Some members of the mob built a hangman's gallows on the lawn of the Capitol, amid calls from the crowd to hang Vice President Pence.[3]

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[3] 167 CONG. REC. E1133 (daily ed. Oct. 22, 2021) (statement of Rep. Sheila Jackson Lee); 167 CONG. REC. H2347 (daily ed. May 14, 2021) (statement of Rep. Steve Cohen); Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete*

Even with reinforcements from the D.C. National Guard, the D.C. Metropolitan Police Department, Virginia State Troopers, the Department of Homeland Security, and the FBI, Capitol Police were not able to regain control of the building and establish a security perimeter for hours. *Capitol Attack* Senate Report at 26. The Joint Session reconvened late that night. It was not until 3:42 a.m. on January 7th that Congress officially certified Joseph Biden as the winner of the 2020 presidential election. *Id.*

The events of January 6, 2021 marked the most significant assault on the Capitol since the War of 1812.[4] The building was desecrated, blood was shed, and several individuals lost their lives. *See Capitol Attack* Senate Report at 27–29. Approximately 140 law enforcement officers were injured, and one officer who had been attacked died the next day. *Id.* at 29. In the aftermath, workers labored to sweep up broken glass, wipe away blood, and clean feces off the walls.[5] Portions of the building's historic architecture were damaged or destroyed, including "precious artwork" and "[s]tatues, murals, historic benches and original shutters[.]" House Hearing at 1 (statement of J. Brett Blanton, Architect of the Capitol).

Account So Far of Jan. 6, N.Y. TIMES (Feb. 13, 2021), https://perma.cc/2Z47-5XHX.

[4] Jess Bravin, *U.S. Capitol Has a History of Occasional Violence, but Nothing Like This*, WALL ST. J. (Jan. 6, 2021), https://perma.cc/TPW2-9CD8; Press Release, Liz Cheney, Congresswoman, House of Representatives, A Select Committee Is The Only Remaining Option To Thoroughly Investigate January 6th (June 30, 2021), https://perma.cc/5RNC-Q6J3.

[5] Baker & Tavernise, note 3, *supra*.

B

On June 30, 2021, the United States House of Representatives created the Select Committee to Investigate the January 6th Attack on the United States Capitol. H.R. Res. 503. The House directed the Committee to (1) "investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol, including * * * influencing factors that contributed to" it; (2) "identify, review, and evaluate the cause of and the lessons learned" from the attack, including "the structure, coordination, operational plans, policies, and procedures of the Federal Government, * * * particularly with respect to detecting, preventing, preparing for, and responding to targeted violence and domestic terrorism"; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures * * * as it may deem necessary." *Id.* § 4(a). Those "corrective measures" include "changes in law, policy, procedures, rules, or regulations" to (1) "prevent future acts of violence * * * targeted at American democratic institutions"; (2) "improve the security posture of the United States Capitol Complex"; and (3) "strengthen the security and resilience" of the United States' "democratic institutions[.]" *Id.* § 4(c).

The resolution expressly incorporates Rule XI of the Rules of the House of Representatives, which empowers the Committee "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary," including from "the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or Executive

Office of the President[.]" Rules of the U.S. House of Reps. (117th Cong.) XI.2(m)(1)(B) & (m)(3)(D) (2021); *see also* H.R. Res. § 5(c).

C

On August 25, 2021, pursuant to the Presidential Records Act, 44 U.S.C. § 2205(2)(C), the January 6th Committee requested that the United States Archivist produce from the National Archives documents, communications, videos, photographs, and other media generated within the White House on January 6, 2021 that relate to the rally on the Ellipse, the march to the Capitol, the violence at the Capitol, and the activities of President Trump and other high-level Executive Branch officials that day. Letter from Bennie G. Thompson, Chairman of the January 6th Committee, to David Ferriero, Archivist of the United States (Aug. 25, 2021), J.A. 33–44 ("Thompson Ltr."). The Committee also asked for calendars and schedules documenting meetings or events attended by President Trump, White House visitor records, and call logs and telephone records from January 6th. J.A. 34–36. In addition, the Committee requested records from specified time frames in 2020 and 2021 relating to (1) efforts to contest the results of the 2020 presidential election, (2) the security of the Capitol, (3) the planning of protests, marches, rallies, or speeches in D.C. leading up to January 6th, (4) information former President Trump received regarding the results of the 2020 election and his public messaging about those results, and (5) the transfer of power from the Trump Administration to the Biden Administration. J.A. 36–44.

"Given the urgent nature of [the] request," the Committee asked the Archivist to "expedite [its] consultation and processing times pursuant to * * * 36 C.F.R. § 1270.44(g)." Thompson Ltr., J.A. 33.

On August 30, 2021, as provided by regulation, the Archivist notified former President Trump that he had identified a first tranche of 136 pages of responsive records that he intended to disclose to the January 6th Committee. J.A. 125; 36 C.F.R. § 1270.44(c).

President Biden was notified of that same planned disclosure about a week later. J.A. 125; 36 C.F.R. § 1270.44(c). The Archivist later withdrew seven pages from disclosure as non-responsive. J.A. 125. On October 8, 2021, the former President advised the Archivist that he was asserting executive privilege over 46 of those pages. J.A. 110–111, 126. The documents subject to Mr. Trump's assertion of privilege involve "daily presidential diaries, schedules, [visitor logs], activity logs, [and] call logs, * * * all specifically for or encompassing January 6, 2021[,]" "drafts of speeches, remarks, and correspondence concerning the events of January 6, 2021[,]" and "three handwritten notes concerning the events of January 6 from [former Chief of Staff Mark] Meadows' files[.]" J.A. 129. Former President Trump also made "a protective assertion of constitutionally based privilege with respect to all additional records" to be produced. J.A. 111.

That same day, Counsel to President Biden informed the Archivist that the President had "determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the Documents" in the first tranche. First Remus Ltr., J.A. 107; 36 C.F.R. § 1270.44(d). The letter explained:

> [T]he insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again. Congress has a compelling need in service of its legislative functions to understand the

> circumstances that led to these horrific events. The available evidence to date establishes a sufficient factual predicate for the Select Committee's investigation: an unprecedented effort to obstruct the peaceful transfer of power, threatening not only the safety of Congress and others present at the Capitol, but also the principles of democracy enshrined in our history and our Constitution. The Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War.
>
> These are unique and extraordinary circumstances. Congress is examining an assault on our Constitution and democratic institutions provoked and fanned by those sworn to protect them, and the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities. The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

First Remus Ltr., J.A. 107–108.

President Biden specified that his decision "applie[d] solely" to the documents in the first tranche. First Remus Ltr., J.A. 108. After President Trump asserted privilege over some of the documents, the President advised that, for the reasons already given, he would "not uphold the former President's assertion of privilege." Second Remus Ltr., J.A. 113.

Citing "the urgency of the Select Committee's need for the information," President Biden instructed the Archivist to provide the relevant pages to the Committee 30 days after its notification to former President Trump. Second Remus Ltr., J.A. 113; *see* 36 C.F.R. § 1270.44(f)(3), (g). Accordingly, on October 13, 2021, the Archivist informed former President Trump that, "as instructed by President Biden," he would disclose to the Committee the privileged pages in the first tranche on November 12, 2021, "absent any intervening court order[.]" J.A. 115; *see* 36 C.F.R. § 1270.44(f)(3). That same day, the Archivist disclosed to the January 6th Committee the 90 pages from the first tranche for which privilege was not claimed. J.A. 126.

On September 9, 2021, the Archivist informed former President Trump that he intended to disclose a second tranche of 742—later reduced to 739—responsive pages. J.A. 127. President Biden was notified shortly thereafter. J.A. 127. Counsel to the President later instructed the Archivist to extend for one week the review period for the second tranche. J.A. 127.

On September 16 and 23, 2021, the Archivist notified former President Trump and President Biden, respectively, of a third tranche of 146 pages. J.A. 127, 130.

Former President Trump subsequently claimed privilege over 724 pages in the second and third tranches combined. J.A. 127, 165–171. Those documents cover "pages from multiple binders containing proposed talking points for the Press Secretary * * * principally relating to allegations of voter fraud, election security, and other topics concerning the 2020 election[,]" "presidential activity calendars and a related handwritten note for January 6, 2021, and for January 2021 generally," the "draft text of a presidential speech for the

January 6, 2021, Save America March[,]" "a handwritten note from * * * Meadows' files listing potential or scheduled briefings and telephone calls concerning the January 6 certification and other election issues[,]" and "a draft Executive Order on the topic of election integrity[.]" J.A. 130. They also include "a memorandum apparently originating outside the White House regarding a potential lawsuit by the United States against several states President Biden won[,]" "an email chain originating from a state official regarding election-related issues[,]" "talking points on alleged election irregularities in one Michigan county[,]" "a document containing presidential findings concerning the security of the 2020 presidential election and ordering various actions[,]" and "a draft proclamation honoring the Capitol Police and deceased officers Brian Sicknick and Howard Liebengood, and related emails[.]" J.A. 130–131.

Several days later, President Biden advised the Archivist that he would not assert executive privilege to prevent disclosure or uphold the former President's assertion of privilege for the identified documents in the second and third tranches. The President again concluded that an assertion of executive privilege "is not in the best interests of the United States," reiterating his reasoning from the first letter. Third Remus Ltr., J.A. 173. Citing "the urgency of the Select Committee's need for the information," President Biden instructed the Archivist to provide the contested pages to the Committee 30 days after its notification of former President Trump, unless ordered otherwise by a court. Third Remus Ltr., J.A. 174; *see* 36 C.F.R. § 1270.44(f)(3), (g).

The letter to the Archivist also advised that, "[i]n the course of an accommodation process between Congress and the Executive Branch," the Committee had agreed to defer its

request as to fifty pages of responsive records. J.A. 128; Third Remus Ltr., J.A. 174.

On October 27, 2021, the Archivist advised former President Trump that he would disclose the 724 pages in the second and third tranches for which a claim of privilege had been made to the January 6th Committee on November 26, 2021, "absent any intervening court order." J.A. 176. The Archivist added that he would not provide the documents that President Biden and the January 6th Committee had agreed to set aside. J.A. 176.

The Archivist's search for presidential records covered by the Committee's request is ongoing, and it "anticipates providing multiple additional notifications * * * on a rolling basis as it is able to locate responsive records." J.A. 129.

D

On October 18, 2021, former President Trump brought suit in the United States District Court for the District of Columbia to halt the disclosure of documents to the January 6th Committee. He filed suit "solely in his official capacity as a former President[,]" Compl. ¶ 20, J.A. 16, asserting claims under the Presidential Records Act, its regulations, the Declaratory Judgment Act, Executive Order No. 13,489, and the Constitution. Compl. ¶ 1, J.A. 7. Former President Trump argued that the Committee's request seeks disclosure of records protected by executive privilege and lacks a valid legislative purpose. Compl. ¶ 38, 49, 50, J.A. 23–24, 28–29. He sought a declaratory judgment that the Committee's request is invalid and unenforceable, as well an injunction preventing the Committee "from taking any actions to enforce the request[]" or "using * * * any information obtained as a result of the request[]" and barring the Archivist from "producing the requested information[.]" Compl. ¶ 54, J.A. 30–31.

The next day, Mr. Trump filed a motion for a preliminary injunction "prohibiting Defendants from enforcing or complying with the Committee's request." Pl.'s Mot. for Prelim. Inj. at 1, D. Ct. Dkt. 5. He argued that he is likely to prevail on the ground that the Committee's request "ha[s] no legitimate legislative purpose" and seeks "information that is protected by numerous privileges[,]" *id.* at 2, and that the court was required to conduct an *in camera* review of each assertedly privileged document, Pl.'s Reply at 24, D. Ct. Dkt. 33. He also contended that "the Republic" and "future Presidential administrations" would suffer irreparable harm if the records were released. Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 5–6 ("Prelim. Inj. Mem."), D. Ct. Dkt. 5-1.

The district court denied the motion for a preliminary injunction, ruling that former President Trump's "assertion of privilege is outweighed by President Biden's decision not to uphold the privilege," and declining to "second guess that decision by undertaking a document-by-document review[.]" J.A. 197. The court also said that the Committee acted within its legislative authority because its request involves "multiple subjects on which legislation 'could be had[.]'" J.A. 204 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)). The court added that the Committee needs the documents to understand the "circumstances leading up to January 6[,]" and to "identify effective reforms," and that "President Biden's decision not to assert the privilege alleviates any remaining concern that the requests are overly broad." J.A. 207.

As for irreparable injury, the district court found that the former President had not identified any personal interest threatened by production of the records, and that his claim that disclosure would "gravely undermine the functioning of the executive branch" was overtaken by President Biden's determination that the records could safely be released, as well

as the long history of past Presidents waiving privilege when it was in the interests of the United States to do so. J.A. 212–213. Lastly, with respect to the balance of harms and public interest, the court concluded that "discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance[,]" and that "the public interest lies in permitting—not enjoining—the combined will of the legislative and executive branches[.]" J.A. 214–215.

The district court subsequently denied Mr. Trump's request for an injunction pending appeal. D. Ct. Dkt. 43.

E

Former President Trump filed an appeal and a motion for both an injunction pending appeal and expedited briefing. Emergency Mot. for Admin. Inj. (Nov. 11, 2021). That same day, this court administratively enjoined the Archivist from releasing the records from the first three tranches over which former President Trump had claimed executive privilege, and set a highly expedited schedule for the preliminary injunction appeal. Per Curiam Order (Nov. 11, 2021).[6]

[6] The only privilege at issue in this appeal is the constitutionally based presidential communications privilege. Mr. Trump has not argued that any of the documents for which he has asserted privilege are protected by common-law privileges, and his counsel told the district court that there are no private attorney-client documents among those ready for release. *See* Hearing Tr. 60:21–61:6, D. Ct. Dkt. 41 (Nov. 10, 2021), J.A. 278–279.

II

The district court exercised jurisdiction under 44 U.S.C. § 2204(e) and 28 U.S.C. § 1331. This court has jurisdiction under 28 U.S.C. § 1292(a)(1).

We review the district court's denial of a preliminary injunction for an abuse of discretion, its legal conclusions *de novo*, and its factual findings for clear error. *Make the Road New York v. Wolf*, 962 F.3d 612, 623 (D.C. Cir. 2020).

III

While the underlying lawsuit challenges the full span of the January 6th Committee's request for presidential records, this preliminary injunction appeal involves the narrower question of whether former President Trump's assertion of executive privilege as to a subset of documents in the Archivist's first three tranches requires that those documents be withheld from the Committee. *See* Oral Arg. Tr. 12:25–13:6. Those are the only documents for which President Biden has determined that withholding based on executive privilege is not in the interests of the United States, contrary to former President Trump's position.

The Archivist's search for responsive records is ongoing, and there will almost certainly be documents in future tranches over which former President Trump will claim privilege. But at this early stage of the proceedings, those potential claims of privilege over records in not-yet-extant tranches have not yet been considered by President Biden, nor been subject to interbranch negotiation and accommodation. Any potential future claims are neither ripe for constitutional adjudication nor capable of supporting this preliminary injunction, since courts should not reach out to evaluate a former President's executive privilege claim based on "future possibilities for constitutional

conflict[.]" *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 444–445 (1977); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–348 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.") (internal quotation marks and citation omitted); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (courts should take "the narrower ground for adjudication of the constitutional questions").[7]

To understand the legal dispute, some background on the constitutional interests at stake is in order.

Congress's Investigative Power

Congress's power to conduct investigations appears nowhere in the text of the Constitution. Yet it is settled law that Congress possesses "the power of inquiry" as "an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 175. That is because "[w]ithout information, Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain*, 273 U.S. at 174). Congress's power to obtain information is "broad" and

[7] The Archivist provided a fourth tranche of roughly 551 pages of responsive records to former President Trump and President Biden in mid-October. *See* J.A. 128. As of now, former President Trump and President Biden have reviewed only a small set of pages from that tranche. *See Records Related to the Request for Presidential Records by the House Select Committee to Investigate the January 6th Attack on the United States Capitol*, NATIONAL ARCHIVES (last updated Nov. 19, 2021), https://www.archives.gov/foia/january-6-committee (last accessed Dec. 7, 2021). Former President Trump asserted executive privilege over six pages, and President Biden has declined to support that assertion. *Id.* Former President Trump has not raised any arguments about those six pages in this appeal.

"indispensable[,]" *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957), and "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them,'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187).

Congress's power to investigate has limits, however. Because it is "justified solely as an adjunct to the legislative process[,]" *Watkins*, 354 U.S. at 197, "a congressional subpoena is valid only if it is 'related to, and in furtherance of, a legitimate task of Congress[,]'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187). That generally means it must "concern[] a subject on which 'legislation could be had.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975) (quoting *McGrain*, 273 U.S. at 177).

Relatedly, "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)). Likewise, "there is no congressional power to expose for the sake of exposure." *Watkins*, 345 U.S. at 200.

Finally, "recipients of legislative subpoenas * * * have long been understood [by the courts] to retain common law and constitutional privileges with respect to certain materials, such as * * * governmental communications protected by executive privilege." *Mazars*, 140 S. Ct. at 2032.

Because "Congress's responsibilities extend to 'every affair of government[,]'" its "inquiries might involve the President in appropriate cases[.]" *Mazars*, 140 S. Ct. at 2033 (quoting *United States v. Rumely*, 345 U.S. 41, 43 (1953)).

"Historically, disputes over congressional demands for presidential documents" have not involved the courts but, instead, "have been hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive." *Mazars*, 140 S. Ct. at 2029 (internal quotation marks and citation omitted).

But when disputes between the President and Congress over records requests have made their way to court, courts have employed carefully tailored balancing tests that weigh the competing constitutional interests. *See Mazars*, 140 S. Ct. at 2035–2036 (asking whether a subpoena for a President's personal records is "related to, and in furtherance of, a legitimate task of Congress" in that (1) the legislative purpose warrants a request for a President's records in particular, (2) the subpoena is not overbroad, (3) Congress has adequately identified a valid legislative purpose, and (4) the subpoena would not unduly burden the President) (quoting *Watkins*, 345 U.S. at 187); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (weighing a President's assertion of privilege against whether "subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions"); *cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."). None of those tests, though, have been applied to resolve a privilege dispute between a former President and the joint judgment of the incumbent President and the Legislative Branch.

Executive Privilege

The canonical form of executive privilege, and the one at issue here, is the presidential communications privilege. That

privilege allows a President to protect from disclosure "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997); *see United States v. Nixon*, 418 U.S. at 705. The privilege applies not only to materials viewed by the President directly, but also to records "solicited and received by the President or [the President's] immediate White House advisers who have broad and significant responsibility" for advising the President. *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (internal quotation marks and citation omitted).

This presidential privilege, like Congress's investigative power, is not mentioned in the text of the Constitution. Nonetheless, "presidential claims to such a power go as far back as the early days of the Republic[,]" 26A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5673 (1st ed. 2021), and the Supreme Court has concluded that "the silence of the Constitution on this score is not dispositive," *United States v. Nixon*, 418 U.S. at 705 n.16. Instead, an implied executive privilege "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities," *Nixon v. GSA*, 433 U.S. at 447, is "fundamental to the operation of Government[,] and [is] inextricably rooted in the separation of powers under the Constitution," *United States v. Nixon*, 418 U.S. at 708.

The executive privilege is just that—a privilege held by the Executive Branch, "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449 (citation omitted). Because "[a] President and those who assist him must be free to explore alternatives in the process of shaping polices and making decisions and to do so in a way many would be unwilling to

express except privately," *United States v. Nixon*, 418 U.S. at 708, the privilege "safeguards the public interest in candid, confidential deliberations within the Executive Branch," *Mazars*, 140 S. Ct. at 2032.

But the executive privilege is a qualified one; it is not "absolute[.]" *United States v. Nixon*, 418 U.S. at 707. Executive privilege may be overcome by "a strong showing of need by another institution of government[.]" *Senate Select Comm.*, 498 F.2d at 730; *see also United States v. Nixon*, 418 U.S. at 707. And the privilege may give way in the face of other "strong constitutional value[s,]" *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977), such as "the fundamental demands of due process of law" in criminal trials, *United States v. Nixon*, 418 U.S. at 713; *see also Protect Democracy Project, Inc. v. National Security Agency*, 10 F.4th 879, 886 (D.C. Cir. 2021).

Despite its unquestioned significance, executive privilege also can be waived. The historical record documents numerous instances in which Presidents have waived executive privilege in times of pressing national need. *See* page 41, *infra* (providing examples).

The privilege, like all other Article II powers, resides with the sitting President. Nevertheless, in *Nixon v. GSA*, the Supreme Court held that former Presidents retain for some period of time a right to assert executive privilege over documents generated during their administrations. 433 U.S. at 449, 451. The Court held that this residual right protects only "the confidentiality required for the President's conduct of office[,]" rather than any personal interest in nondisclosure. *Id.* at 448.

In addition, when it comes to evaluating the impact on the Executive Branch of disclosing presidential materials, the

Supreme Court was explicit that the incumbent President is "in the best position to assess the present and future needs of the Executive Branch[.]" *Nixon v. GSA*, 433 U.S. at 449.[8]

The Management of Presidential Records: Statutory Provisions

Starting with George Washington, "Presidents exercised complete dominion and control over their presidential papers" after leaving office. *Nixon v. United States*, 978 F.2d 1269, 1277 (D.C. Cir. 1992). This tradition "made for a highly idiosyncratic if not entirely unhappy record of preserving the papers of United States Presidents." NATIONAL STUDY COMM'N ON RECORDS & DOCUMENTS OF FED. OFFICIALS, MEMORANDUM OF FINDINGS ON EXISTING CUSTOM OR LAW, FACT AND OPINION 3 (undated), *reprinted in Presidential Records Act of 1978: Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th Cong. 467, 469 (1978).

Following the Watergate scandal and the resignation of President Richard Nixon, Congress passed the Presidential Recordings and Materials Preservation Act ("Preservation Act"), which focused exclusively on former President Nixon's tape recordings, papers, and other historical materials from his term in office. *See* Pub. L. No. 93-526, § 101, 88 Stat. 1695 (1974). The Preservation Act required the General Services Administrator to "receive, retain, or make reasonable efforts to obtain, complete possession and control of" those historical materials, and make them publicly "available, subject to any

[8] Like the Supreme Court, we treat the terms "presidential privilege," "presidential communications privilege," and "executive privilege" as interchangeable for purposes of this case. *See Nixon v. GSA*, 433 U.S. at 446 n.9; *see also Dellums*, 561 F.2d at 245 n.8.

rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpena [*sic*] or other legal process." *Id.* §§ 101, 102, 88 Stat. at 1695–1696; *see* 44 U.S.C. § 2111 note.[9]

Four years later, Congress enacted the Presidential Records Act of 1978. That Act provides that, as of January 21, 1981, the United States "shall reserve and retain complete ownership, possession, and control of Presidential records." 44 U.S.C. § 2202 & note. The Act defines "Presidential records" as:

> [D]ocumentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

Id. § 2201(2). "[P]ersonal records" of a President, defined as documentary materials "of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or

[9] The Archivist of the National Archives and Records Administration replaced the Administrator of the General Services Administration in 1984. *See Public Citizen v. Burke*, 843 F.2d 1473, 1475 (D.C. Cir. 1988); National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 103(b)(2), 98 Stat. 2280, 2283.

ceremonial duties of the President[,]" are excluded from regulation. *Id.* § 2201(3).

Under the Presidential Records Act, once a President's time in office concludes, the "Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. § 2203(g)(1). The Archivist has "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions" of the Presidential Records Act. *Id.* § 2203(g)(1).

The Act provides former Presidents with some protection against public disclosure. Specifically, the Act allows a President, when leaving office, to restrict for up to twelve years public access to records that (1) are classified and involve national defense or foreign policy, (2) relate to appointments to public office, (3) are exempt from disclosure under certain federal statutes, (4) contain trade secrets or other privileged or confidential commercial or financial information obtained from a person, (5) constitute "confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers[,]" or (6) personnel, medical, and similar files implicating personal privacy. 44 U.S.C. § 2204(a) & (a)(1)–(a)(6); *see also* 36 C.F.R. § 1270.40(a).

The Act tasks the Archivist with properly designating "[a]ny Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President[,]" and preventing public access to those documents until the appropriate time. 44 U.S.C. § 2204(b)(1); *see also* 36 C.F.R. § 1270.40(c). The Presidential Records Act precludes judicial review of the Archivist's designations "[d]uring the period of restricted access[,]" except for "any

action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. § 2204(b)(3), (e).

Relevant to this case, under the Presidential Records Act, those restrictions on public access do not apply, and the Archivist "shall" provide access to presidential records, when the documents are:

- subpoenaed or subjected to other judicial process by a court as part of a civil or criminal proceeding;
- requested by an incumbent President "if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available"; or
- requested by either House of Congress or a committee acting within its jurisdiction and the information is "needed for the conduct of its business and [is] not otherwise available[.]"

44 U.S.C. § 2205(2)(A)–(C). Disclosure under this section is "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke[.]" *Id*. at § 2205(2).

The Management of Presidential Records: Regulatory Provisions

Under the Preservation Act, the National Archives and Records Administration promulgated regulations providing that the Archivist would decide which assertions of "legal or constitutional right[s] or privilege[s]" would "prevent or limit public access" to the presidential records of former President Nixon. *See* 36 C.F.R. §§ 1275.26(g), 1275.44(a) (1987).

The Department of Justice's Office of Legal Counsel interpreted those regulations as requiring that "the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, * * * [and] that the Archivist must and will treat any claim by a former President" in accordance with "the supervision and control of the incumbent President." Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, Office of Management. and Budget 23–24, 26 (Feb. 18, 1986), *reprinted in Review of Nixon Presidential Materials Access Regulations: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations,* 99th Cong. 263–292 (1986) ("1986 OLC Memorandum"); *see Public Citizen v. Burke*, 843 F.2d 1473, 1476–1477 (D.C. Cir. 1988).

In the view of the Office of Legal Counsel, the incumbent President "should respect a former President's claim of executive privilege without judging the validity of the claim[,]" leaving the "judgment regarding such a claim * * * to the judiciary in litigation between the former President and parties seeking disclosure." 1986 OLC Memorandum at 26. The OLC memorandum acknowledged, though, that "if the incumbent President believes that the discharge of his [or her] constitutional duties * * * demands the disclosure of documents claimed by the former President to be privileged, it may be necessary for [the President] to oppose a former President's claim" even if "it is generally not appropriate for an incumbent President to review and adjudicate the merits of a predecessor's claim of executive privilege[.]" *Id.*; *see also Burke*, 843 F.2d at 1478–1479. In that event, the Archivist would be obliged to follow the direction of the incumbent President. 1986 OLC Memorandum at 24, 26; *see Burke*, 843 F.2d at 1478–1479.

In *Public Citizen v. Burke*, this court held that the Office of Legal Counsel's interpretation was neither constitutionally required nor compatible with the Preservation Act. 843 F.2d at 1479–1480. We ruled that "the incumbent President is not constitutionally obliged to honor former President Nixon's invocation of executive privilege with respect to the Nixon papers[.]" *Id*. at 1479. Rather, it was the incumbent President's duty under the Preservation Act to "consider the host of difficult questions that arise in this area," even if that meant being put in the "awkward position" of taking "a position on claims of executive privilege put forward by former President Nixon." *Burke*, 843 F.2d at 1479.

Meanwhile, the Presidential Records Act had tasked the Archivist with promulgating regulations for the provision of notice to a former President when materials for which access had been restricted are sought by a court, the President, or Congress under 44 U.S.C. § 2205(2), and "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have[.]" 44 U.S.C. § 2206(2)–(3).

The Archivist promulgated those regulations in 1988. *See* 36 C.F.R. Pt. 1270 (1989). The regulations required the Archivist to notify a former President or the former President's designated representative "before any Presidential records of his [or her] Administration [were] disclosed" either to the public or under Section 2205, including releases to Congress and its committees. 36 C.F.R. § 1270.46(a) (1989). If then "a former President raise[d] rights or privileges which he [or she] believe[d] should preclude the disclosure of a Presidential record," but the Archivist decided that the record still should be disclosed, "in whole or in part," the Archivist was required

to give notice to the former President or the President's representative. *Id.* § 1270.46(c).

Shortly after those regulations were promulgated, President Ronald Reagan issued an Executive Order that expanded on the process for responding to a former President's invocation of privilege. *See* Exec. Order No. 12,667, 54 Fed. Reg. 3403 (Jan. 18, 1989); *see also* 44 U.S.C. § 2204 note. Under that Executive Order, when the incumbent President invoked executive privilege, the Archivist was prohibited from disclosing the records "unless directed to do so by an incumbent President or by a final court order." Exec. Order No. 12,667 § 3(d). If a former President invoked executive privilege, but the incumbent did not, the Archivist was charged with determining "whether to honor the former President's claim of privilege[.]" *Id.* § 4(a). In making that determination, though, the Archivist was bound to "abide by any instructions given him [or her] by the incumbent President or [the President's] designee unless otherwise directed by a final court order." *Id.* § 4(b).

President Reagan's Executive Order governed the handling of privilege claims by former Presidents for more than a decade. *See* 44 U.S.C. § 2204 note.

In 2001, President George W. Bush issued an Executive Order that took a different tack. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001); *see* 44 U.S.C. § 2204 note.

For disclosures to Congress or one of its committees under 44 U.S.C. § 2205(2)(C), the new Executive Order provided that the "Archivist shall not permit access to the records unless and until * * * the former President *and* the incumbent President agree to authorize access" or a "final and nonappealable court order" requires it. Exec. Order No. 13,233 § 6 (emphasis

added). While that new procedure reflected President Bush's view of proper policy, the Administration was explicit that such deference to a former President was not constitutionally compelled and would not affect a court's disposition of a lawsuit by the former President. *See Hearings on Executive Order 13,233 and the Presidential Records Act Before the Subcomm. of the H. Comm. on Gov't Reform*, 107th Cong. 20, 108 (2001–2002) ("*Executive Order 13,233 Hearings*") (statement of M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice); *id.* at 21 ("Let me emphasize, moreover, that the Executive order is wholly procedural in nature." It does not "in any respect purport to redefine the substantive scope of any constitutional privilege.").[10] In addition, the incumbent President need not "support that privilege claim" in the "forum in which the privilege claim is challenged." Exec. Order No. 13,233 § 4.[11]

President Barack Obama returned to the procedures established by President Reagan. Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009); *see* 44 U.S.C. § 2204 note.

In 2014, Congress largely codified the approach of the Reagan Executive Order. The Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003, provided detailed procedures for protecting and

[10] Mr. Trump has not argued that the Constitution requires that the views of a former President unilaterally control. Nor could he. *See Nixon v. GSA*, 433 U.S. at 449; *Burke*, 843 F.2d at 1479; *Nixon v. United States*, 978 F.2d at 1272.

[11] The Executive Order provided that the incumbent President "will support" the former President's privilege claim only when he concurs in the assertion of privilege and access is sought by the public under 44 U.S.C. § 2204(c)(1). Exec. Order No. 13,233 § 4.

asserting claims of "constitutionally based privilege" against disclosure "to the public" of presidential records. *Id.* § 2; 44 U.S.C. § 2208 (procedures for public disclosure). The 2014 Amendments provide that, if "the incumbent President determines not to uphold the claim of privilege asserted by the former President," then "the Archivist *shall* release the Presidential record subject to the claim" at the end of a 90-day period unless otherwise directed by a court order. 44 U.S.C. § 2208(c)(2)(C) (emphasis added).

The 2014 amendments did not expressly extend those notification procedures to disclosures to Congress, the incumbent President, or the judiciary under Section 2205. But under the Trump Administration, the National Archives promulgated regulations "ensur[ing] that the former and incumbent Presidents are given notice and an opportunity to consider whether to assert a constitutionally based privilege" when disclosure is sought under Section 2205. Presidential Records, 82 Fed. Reg. 26,588, 26,589 (June 8, 2017). Under those regulations, the Archivist must "promptly notif[y] the President * * * during whose term of office the record was created, and the incumbent President" of a document request by, *inter alia*, "either House of Congress, or * * * a congressional committee or subcommittee" under 44 U.S.C. § 2205(2)(c). 36 C.F.R. § 1270.44(a)(3), (c). Once notified, "either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days after the date of the Archivist's notice." *Id.* § 1270.44(d).

If the incumbent President maintains a privilege claim, the Archivist may not disclose the document absent court order. 36 C.F.R. § 1270.44(e)(2). On the other hand, if the former President asserts privilege, the Archivist must consult with the incumbent President "to determine whether the incumbent

President will uphold the claim." 36 C.F.R. § 1270.44(f)(1). If the incumbent President upholds and maintains the claim, then the Archivist may not disclose the presidential record without a court order. *Id.* § 1270.44(f)(2). If the incumbent President does not uphold or withdraws the privilege claim or fails to decide within 30 days, the Archivist must "disclose[] the Presidential record" after a 60-day time period, unless a court orders otherwise. *Id.* § 1270.44(f)(3).

So for 24 years of the Presidential Records Act's operation and across five different presidencies, Presidents, including former President Trump, have agreed that the disclosure decision of an incumbent President controls within the Executive Branch over the contrary claim of a former President. And all Presidents have agreed that the Constitution does not obligate an incumbent President or court to uphold the views of a former President. *See Burke*, 843 F.2d at 1479.

IV

With that background in mind, we turn to the merits of former President Trump's appeal. Our starting point is the Supreme Court's admonition that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The movant must: (1) establish a likelihood of "succe[ss] on the merits"; (2) show "irreparable harm in the absence of preliminary relief"; (3) demonstrate that the equities favor issuing an injunction; and (4) persuade the court that "an injunction is in the public interest." *Id.* at 20. The likelihood of success and irreparability of harm "are the most critical" factors. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The balance of harms and the public interest factors merge when the government is the opposing party. *Id.* at 435.

On this record, former President Trump has failed to satisfy any of those criteria for preliminary injunctive relief.

A

There is no question that the former President can file suit to press his claim of executive privilege. The Supreme Court in *Nixon v. GSA* specifically "reject[ed] the argument that only an incumbent President may assert such claims" and ruled that "a former President[] may also be heard to assert them" in court. 433 U.S. at 439. The Court explained that executive privilege "is necessary to provide the confidentiality required for the President's conduct of office" because, "[u]nless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Id*. at 448–449. "[T]he privilege survives the individual President's tenure[,]" the Court said, because the "privilege is not for the benefit of the President as an individual, but for the benefit of the Republic." *Id*. at 449 (internal quotation marks and citation omitted). So the privilege that Mr. Trump asserts in his capacity as a former President is of constitutional stature.

The Presidential Records Act reflects that understanding by providing that a former President may initiate an action "asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. § 2204(e). And "[n]othing in [the] Act shall be construed to * * * limit * * * any constitutionally-based privilege which may be available to a[] * * * former President." *Id.* at § 2204(c)(2).

B

While former President Trump can press an executive privilege claim, the privilege is a qualified one, as he agrees. *See Nixon v. GSA*, 433 U.S. at 446; *United States v. Nixon*, 418 U.S. at 707; Appellant Opening Br. 35. Even a claim of executive privilege by a sitting President can be overcome by a sufficient showing of need. *See United States v. Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 292. The right of a former President certainly enjoys no greater weight than that of the incumbent.

In cases concerning a claim of executive privilege, the bottom-line question has been whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege "must yield[.]" *Nixon v. GSA*, 433 U.S. at 454; *see United States v. Nixon*, 418 U.S. at 706, 713.[12]

In this case, President Biden, as the head of the Executive Branch, has specifically found that Congress has demonstrated a compelling need for these very documents and that disclosure is in the best interests of the Nation. Congress, which has engaged in a course of negotiation and accommodation with the President over these documents, agrees. So the tests that courts have historically used to police document disputes between the Political Branches seem a poor fit when the Executive and Congress together have already determined that the "demonstrated and specific" need for disclosure that former President Trump would require, Appellant Opening Br. 35, has been met. A court would be hard-pressed under these circumstances to tell the President that he has miscalculated the

[12] Mr. Trump's counsel agrees that this standard governs. *See* Oral Arg. Tr. 34:23–25; Appellant Opening Br. 35 ("[T]he executive privilege * * * can only be invaded pursuant to a demonstrated and specific showing of need[.]").

interests of the United States, and to start an interbranch conflict that the President and Congress have averted.

But we need not conclusively resolve whether and to what extent a court could second guess the sitting President's judgment that it is not in the interests of the United States to invoke privilege. Under any of the tests advocated by former President Trump, the profound interests in disclosure advanced by President Biden and the January 6th Committee far exceed his generalized concerns for Executive Branch confidentiality.

1

On this record, a rare and formidable alignment of factors supports the disclosure of the documents at issue. President Biden has made the considered determination that an assertion of executive privilege is not in the best interests of the United States given the January 6th Committee's compelling need to investigate and remediate an unprecedented and violent attack on Congress itself. Congress has established that the information sought is vital to its legislative interests and the protection of the Capitol and its grounds. And the Political Branches are engaged in an ongoing process of negotiation and accommodation over the document requests.

a

President Biden's careful and cabined assessment that the best interests of the Executive Branch and the Nation warrant disclosing the documents, by itself, carries immense weight in overcoming the former President's assertion of privilege.

To start, as the incumbent, President Biden is the principal holder and keeper of executive privilege, and he speaks authoritatively for the interests of the Executive Branch. Under our Constitution, we have one President at a time. Article II is

explicit that "[t]he executive Power shall be vested in *a* President of the United States of America." U.S. CONST. Art. II, § 1, cl. 1 (emphasis added); *see Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) ("[T]he 'executive Power'—all of it—is 'vested in *a* President[.]'") (emphasis added) (quoting U.S. CONST., Art. II, § 1, cl. 1). As between a former and an incumbent President, "only the incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448.

To be sure, former President Trump has important insight on the value of preserving the confidentiality of records created during his administration. But it is only President Biden who can make a fully informed and circumspect assessment of all the competing needs and interests of the Executive Branch. These might include (to name just a few) the current and prospective threats to democratic institutions and the electoral process, intelligence on domestic extremists, the full panoply of competing privilege claims and disputes between the Executive Branch and Congress, the sensitive status of interbranch relations at multiple levels, and the costs and benefits of a privilege battle or disclosure at the time the matter arises.

The Supreme Court underscored this point when it held, in rejecting a claim of executive privilege by another former President, that "it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *Nixon v. GSA*, 433 U.S. at 449; *see also Dellums*, 561 F.2d at 247 ("[I]t is the new President who has the information and attendant duty of executing the laws in light of current facts and circumstances, and who has the primary * * * responsibility of deciding when presidential privilege must be claimed[.]").

So President Biden's explicit and informed judgment "detracts from the weight of" former President Trump's view that disclosure in these circumstances "impermissibly intrudes into the executive function and the needs of the Executive Branch." *Nixon v. GSA*, 433 U.S. at 449.

In addition, President Biden has identified weighty reasons for declining to assert privilege here. He grounded his decision in the "unique and extraordinary circumstances" of the January 6th attack—"an unprecedented effort to obstruct the peaceful transfer of power" that "threaten[ed] not only the safety of Congress and others present at the Capitol, but also the principles of democracy enshrined in our history and our Constitution." First Remus Ltr., J.A. 107–108. President Biden further emphasized Congress's "compelling need in service of its legislative functions to understand the circumstances that led to these horrific events." First Remus Ltr., J.A. 107. President Biden also tied his decision to "[t]he available evidence to date[,]" which he concluded "establishes a sufficient factual predicate for the Select Committee's investigation" of these presidential papers. First Remus Ltr., J.A. 107. Finally, President Biden acknowledged the "constitutional protections of executive privilege[,]" but explained that "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities[,]" and the privilege "should not be used to shield * * * information that reflects a clear and apparent effort to subvert the Constitution." First Remus Ltr., J.A. 108; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174.

The record also shows that, for the documents over which the former President asserted privilege, President Biden and his staff took at least a month to review each tranche. *See* J.A. 125–128. During that time, former President Trump's views

were obtained. J.A. 13. In addition, the sitting President and the Committee reached compromises under which the Committee deferred its request for some documents. J.A. 128, 176.

On this record, we cannot credit the former President's argument that President Biden's calibrated judgment is merely "the whim[] of [a] sitting President who may be unable [to] see past his own political considerations." Appellant Opening Br. 17. Indeed, President Biden's care to limit his decision to the particular documents that "shed light on events within the White House on and about January 6[,]" First Remus Ltr., J.A. 107; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174, bears no resemblance to the "broad and limitless waiver" of executive privilege former President Trump decries, Appellant Opening Br. 35.

That is not to say, of course, that an incumbent President *must* provide a written explanation for a former President's claim of privilege to fail. In *Nixon v. GSA*, the incumbent President had not provided such an explanation, but instead had simply chosen to defend the facial constitutionality of the Preservation Act in court. *See* 443 U.S. at 441. And in *Dellums*, the incumbent was silent as to privilege. 561 F.2d at 247.

Still, when the head of the Executive Branch lays out the type of thoroughgoing analysis provided by President Biden, the scales tilt even more firmly against the contrary views of the former President. For Article III courts are generally ill-equipped to superintend or second guess the expert judgment of the sitting President about the current needs of the Executive Branch and the best interests of the United States on matters of such gravity and so squarely within the President's Article II discretion.

President Biden's explanation also makes clear that his decision respects and preserves the strong constitutional reasons for executive privilege at the heart of the former President's objection. Here, the letter shows that President Biden's judgment is of a piece with decisions made by other Presidents to waive privilege in times of pressing national need. For example, President Nixon decided that executive privilege would "not be invoked as to any testimony concerning * * * discussions of possible criminal conduct" as part of the Senate Select Committee's investigation of Watergate. Statements About the Watergate Investigations, 1973 PUB. PAPERS 547, 554 (May 22, 1973). During congressional investigations into the Iran-Contra affair, President Reagan authorized testimony and the production of documents, including excerpts from his personal diaries. *See* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. No. 100-433, S. REP. No. 100-216, at xvi (1987). In the aftermath of the September 11th attacks, President Bush and Vice President Richard Cheney sat for a more than three-hour interview with the commission investigating the attacks.[13] And President Trump himself chose not to invoke privilege to prevent former FBI Director James Comey from testifying before Congress, despite (borne out) expectations that the testimony would include Comey's recollections of confidential conversations with President Trump.[14]

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[13] Philip Shenon & David E. Sanger, *Bush & Cheney Tell 9/11 Panel of '01 Warnings*, N.Y. TIMES (April 30, 2004), https://perma.cc/QD2N-MAVX; *see* NATIONAL COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, at xv (2004).

[14] Peter Baker, *Trump Will Not Block Comey From Testifying, White House Says*, N.Y. TIMES (June 5, 2017), https://perma.cc./B93T-8STK.

In short, President Biden's considered judgment that the interests of the United States and the interests of the Executive Branch favor disclosure in this instance substantially "detracts from the weight of" former President Trump's contrary privilege contention. *Nixon v. GSA*, 433 U.S. at 449.

b

Also countering former President Trump's claim is Congress's uniquely weighty interest in investigating the causes and circumstances of the January 6th attack so that it can adopt measures to better protect the Capitol Complex, prevent similar harm in the future, and ensure the peaceful transfer of power. The Presidential Records Act requires that the January 6th Committee show that presidential records are "needed for the conduct of its business[.]" 44 U.S.C. § 2205(2)(C). The Committee has comfortably met that standard here.

The very essence of the Article I power is legislating, and so there would seem to be few, if any, more imperative interests squarely within Congress's wheelhouse than ensuring the safe and uninterrupted conduct of its constitutionally assigned business. Here, the House of Representatives is investigating the single most deadly attack on the Capitol by domestic forces in the history of the United States. Lives were lost; blood was shed; portions of the Capitol building were badly damaged; and the lives of members of the House and Senate, as well as aides, staffers, and others who were working in the building, were endangered. They were forced to flee, preventing the legislators from completing their constitutional duties until the next day.

The January 6th Committee has also demonstrated a sound factual predicate for requesting these presidential documents specifically. There is a direct linkage between the former

President and the events of the day. Then-President Trump called for his supporters to gather in Washington, D.C. for a "wild" response to what he had been alleging for months was a stolen election. Donald Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 1:42 AM). On January 6th, President Trump directed his followers to go to the Capitol and "fight" for their Country with the aim of preventing Congress's certification of the electoral vote. January 6th Rally Speech at 3:47:20 ("[Y]ou'll never take back our country with weakness. * * * We have come to demand that Congress do the right thing and only count" certain electors.), 4:41:28.

The White House is also the hub for intelligence about threats of violent action against the government, and the Executive Branch is in charge of federal law enforcement and mobilizing the National Guard to defend the Capitol. *See* U.S. CONST. Art. II, § 2, cl. 1; D.C. Code § 49-409. So information from within the White House is critical to understanding what intelligence failures led the government to be underprepared for such a violent attack, and what can be done to expedite the mobilization of law enforcement forces in a crisis on Capitol Hill going forward. H.R. Res. 503 § 4(a)(2)(A)–(B), (c). Given all of that, the Committee has sound reasons for seeking presidential documents in particular as part of its investigation into the causes of the attack on the Capitol.

The Supreme Court's decision in *Nixon v. GSA* makes clear that Congress's interests go far in outweighing the former President's privilege claim. In *Nixon v. GSA*, the Court found a "substantial public interest[]" in "Congress' need to understand how those political processes [in the Watergate scandal] had in fact operated in order to g[au]ge the necessity for remedial legislation" and "to restore public confidence in our political processes[.]" 433 U.S. at 453. In that way, the Court explained, Congress's efforts to preserve and afford

access to presidential records "may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power[.]" *Id*. These "important" congressional interests in coming to terms with the Watergate scandal supported the Court's conclusion that the former President's claims of executive privilege "must yield[.]" *Id*. at 454.

So too here, the January 6th Committee's access to the requested materials is vital to Congress's own evaluation of whether the process for transferring power between administrations is "characterized by deficiencies susceptible of legislative correction[,]" *Nixon v. GSA*, 433 U.S. at 499 (Powell, J., concurring).

Keep in mind that the "presumptive privilege" for presidential communications "must be considered in light of our historic commitment to the rule of law." *United States v. Nixon*, 418 U.S. at 708. In *United States v. Nixon*, the particular component of the rule of law that overcame a *sitting* President's assertion of executive privilege was the "right to every [person]'s evidence" in a criminal proceeding. *Id.* at 709 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)). Allowing executive privilege to prevail over that principle would have "gravely impair[ed] the basic function of the courts." *Id.* at 712.

An equally essential aspect of the rule of law is the peaceful transition of power, and the constitutional role prescribed for Congress by the Twelfth Amendment in verifying the electoral college vote. To allow the privilege of a no-longer-sitting President to prevail over Congress's need to investigate a violent attack on its home and its constitutional operations would "gravely impair the basic function of the" legislature. *United States v. Nixon*, 418 U.S. at 712.

c

Weighing still more heavily against former President Trump's claim of privilege is the fact that the judgment of the Political Branches is unified as to these particular documents. President Biden agrees with Congress that its need for the documents at issue is "compelling[,]" and that it has a "sufficient factual predicate" for requesting them. First Remus Ltr., J.A. 107; *see also* Third Remus Ltr., J.A. 173. As a result, blocking disclosure would derail an ongoing process of accommodation and negotiation between the President and Congress, and instigate an interbranch dispute.

The Supreme Court has emphasized the importance of courts deferring to information-sharing agreements wrestled over and worked out between Congress and the President. *See Mazars*, 140 S. Ct. at 2029, 2031. Historically, "disputes over congressional demands for presidential documents have not ended up in court[,]" but rather "have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive,'" *id.* at 2029 (citation and internal quotation marks omitted), generally allowing the courts to avoid being drawn into the power struggle. That "hurly-burly" is a flexible, dynamic process that could involve interlocking and contingent negotiations over multiple different requests for information, the President's legislative priorities, nominations and confirmations, and the many other complementary and competing interests and responsibilities of those two Branches.

In that "tradition of negotiation and compromise[,]" the Executive and Legislative Branches have reached an accommodation here. *Mazars*, 140 S. Ct. at 2031. President Biden and Congress have come to an agreement that the pressing needs of the January 6th Committee and the interests

of the United States warrant a limited disclosure of the documents for which privilege has been asserted. That arrangement reflects give-and-take, as the Committee agreed to defer its request for fifty pages of responsive records from the second and third tranches. J.A. 170, 176.

Former President Trump states that he too was engaged in negotiations with the White House. But he abruptly stopped them when the decision to release documents from the first tranche was made. Compl. ¶¶ 15–16, J.A. 13–15. And even though, in the past, committees have sometimes "agreed to restrictions on the type of access provided" to privileged documents, such as "read-only access or committee-confidential restrictions[,]" Laster Decl., J.A. 124, former President Trump makes no showing of having requested such restrictions from the Committee or White House, and his counsel admitted that he did not propose a more limited injunction along those lines, *see* Oral Arg. Tr. 36–37.

In short, confronting former President Trump's claim of privilege is the hydraulic constitutional force of not only a reasoned decision by the President that a limited release is in the interests of the United States, and the uniquely compelling need of Congress for this information, but also this court's "duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that those [Political] branches themselves have reached.'" *Mazars*, 140 S. Ct. at 2031 (formatting modified; quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524–526 (2014)).

2

That accumulation of forces favoring disclosure is at least equal to, if not greater than, what has supported the disclosure of the privileged materials of even a sitting President. To establish a likelihood of success in prevailing, then, former

President Trump bears the burden of at least showing some weighty interest in continued confidentiality that could be capable of tipping the scales back in his favor, and of "mak[ing] particularized showings in justification of his claims of privilege[.]" *Senate Select Comm.*, 498 F.2d at 730. He has not done so. He has not identified any specific countervailing need for confidentiality tied to the documents at issue, beyond their being presidential communications. Neither has he presented arguments that grapple with the substance of President Biden's and Congress's weighty judgments. Nor has he made even a preliminary showing that the content of any particular document lacks relevance to the Committee's investigation. He offers instead only a grab-bag of objections that simply assert without elaboration his superior assessment of Executive Branch interests, insists that Congress and the Committee have no legitimate legislative interest in an attack on the Capitol, and impugns the motives of President Biden and the House. That falls far short of meeting his burden and makes it impossible for this court to find any likelihood of success.

a

Because Mr. Trump has sued solely in his "official capacity" as the "45th President of the United States[,]" Compl. ¶ 20, J.A. 16, he does not assert that disclosure of the documents before us would harm any personal interests in privacy or confidentiality. His sole objection is that disclosure would "burden[] the presidency generally[,]" in light of the need for "candid advice" and the potential for a "chilling effect[.]" Appellant Opening Br. 29. In support of this claim, he presses the undisputed points that the confidentiality of presidential communications protects "the proper functioning of the government" and "ensure[s] full and frank advice" for future Presidents. Appellant Opening Br. 14, 36.

That is all he offers. And that is not close to enough. When a former and incumbent President disagree about the need to preserve the confidentiality of presidential communications, the incumbent's judgment warrants deference because it is the incumbent who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch[.]" *Nixon v. GSA*, 433 U.S. at 449. Mr. Trump's disagreement with President Biden's judgment, by itself, provides the court no basis to override the sitting President's judgment.

Nor is such a "generalized interest in confidentiality," *United States v. Nixon*, 418 U.S. at 711, sufficient for a court to cast aside the January 6th Committee's exercise of core legislative functions, let alone enough for a court to throw a wrench into the ongoing working relationship and accommodations between the Political Branches.[15]

Former President Trump's bare allegations of partisan motives do not move the needle either. *See* Appellant Opening Br. 3, 5–6, 15–17, 21–22, 35, 47; Appellant Reply Br. 1–2, 5–8, 11, 19, 25–27, 32; Prelim. Inj. Mem. at 1–4, 8, 17, 33–34. They are unsupported by any plausible factual allegations and cannot stand up to President Biden's substantive explanation for not asserting privilege and Congress's distinct interest in investigating and legislating in response to an attack on itself. To that same point, the presumption of executive regularity "has been recognized since the early days of the Republic."

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[15] The former President makes a vague reference to presidential discussions during the COVID pandemic in early 2020. *See* Appellant Opening Br. 46. But he makes no argument that any of the documents at issue here involved that topic. Nor is it at all apparent that the Archivist would treat such communications as responsive to the Committee's request, or that President Biden would decline to assert executive privilege over them.

American Fed'n of Gov't Employees v. Reagan, 870 F.2d 723, 727 (D.C. Cir. 1989). When, as here, "the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law." *Id.* (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32–33 (1827)) (alteration in original).

Former President Trump predicts that, going forward, incumbent Presidents will indiscriminately decline to assert executive privilege over a former President's records whenever they are of the opposite political party. *See* Appellant Opening Br. 47. But the possibility of mutually assured destruction of the privilege cuts against the risk of heedless disclosures.

More to the point, the greatest protection for executive privilege is the natural self-interest of each new occupant of the White House. Presidents of both parties have long jealously guarded the powers and prerogatives of the office. And every incumbent President will be the next former President. That gives the incumbent every incentive to afford robust protection to the confidentiality of presidential communications, even if only to assure receipt of the best possible advice during his or her tenure. *See Nixon v. GSA*, 433 U.S. at 448 ("[A]n incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers."). There are, in other words, "obvious political checks against an incumbent's abuse of the privilege." *Id.*

Former President Trump next speculates about certain communications for which the interests against disclosure could extend beyond a generalized interest in confidentiality, such as communications concerning "complex and sensitive matters of foreign affairs." Appellant Opening Br. 46.

The problem is that he has not pointed to a single record in the existing tranches that implicates a delicate matter of

foreign affairs or other "complex and sensitive" topics. Appellant Opening Br. 46. He also puts the cart before the horse. For even if the Archivist later were to conclude that such a document was responsive to the Committee's request, it "must be presumed" that the sitting President would factor a document's sensitivity, foreign policy or otherwise, into a future decision whether to assert executive privilege. *Nixon v. GSA*, 433 U.S. at 449.[16]

b

Rather than articulate any superseding interest in confidentiality, former President Trump argues that the courts are obligated to comb through every single document *in camera* to evaluate its privileged nature before it is released. Appellant Opening Br. 38–39; Appellant Reply Br. 14–15. Not so.

First of all, in briefing and at oral argument, counsel for former President Trump was inconsistent in explaining his request for *in camera* review. *See* Appellant Opening Br. 38–

[16] Anyhow, given the Article III courts' general "lack of competence" in matters of national security policy, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (internal quotation marks and citations omitted), former President Trump does not explain how a court could override the sitting President's judgment that release of a document does not imperil, or perhaps advances, foreign relations. *See also id*. at 34 ("[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.") (quoting *Boumediene v. Bush*, 553 U.S. 723, 797 (2008)); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (Presidential decisions that implicate "foreign affairs" are "entrusted to the executive, [and] the decision of the executive is conclusive").

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39; Appellant Reply Br. 14–15; Oral Arg. Tr. 62:18–63:7, 65:1–6. To the extent that the former President proposes that the court determine whether each document constitutes a privileged presidential communication, that would be a meaningless exercise. *See* Oral Arg. Tr. 62:19–23. President Biden does not dispute that the particular documents at issue qualify for executive privilege. He instead has made the deliberate decision not to invoke that privilege. Therefore, the issue in this case is not whether executive privilege could be asserted for each document. It is whether a court can override President Biden's reasoned decision to forgo privilege as to them and Congress's compelling need for them. So even if the court were to examine each document *in camera* and determine that every single one is privileged, we would simply end up right back where we started.

If what former President Trump means instead is that the court should hunt through the documents in an effort to espy important reasons why President Biden's decision might be ill-advised, he gets the law backwards. *See* Oral Arg. Tr. 65:1–6. Having asserted the importance of confidentiality in these documents based on his expert viewpoint as the President during whose term they were created, former President Trump had the burden of articulating some compelling explanation for nondisclosure to the court. He cannot stand silent and leave it to the court to come up with arguments for him.

Former President Trump insists that "[i]t is vital the Court's analysis be specific[.]" Appellant Reply Br. 16. Our analysis can only be as specific as his claims are.

c

Having provided nothing to surmount President Biden's considered judgment, former President Trump pivots to arguing that the January 6th "Committee lacks a specific need

for the requested information," Appellant Opening Br. 16, and so its disclosure violates the separation of powers.

Former President Trump sets forth several formulations of the test he believes this court should apply, all of which require that the January 6th Committee do more than meet its burden under the Presidential Records Act to show that the requested documents are "needed for the conduct of its business" and "not otherwise available[,]" 44 U.S.C. § 2205(2)(C). Most prominently, he argues that disclosure is forbidden under the four-factor test laid out in *Mazars*. Appellant Opening Br. 16, 18–20, 23–31; Appellant Reply Br. 21–24, 27–28. At other times, he invokes *Senate Select Committee*'s requirement that the documents be "demonstrably critical to the responsible fulfillment of the Committee's functions." Appellant Opening Br. 22–23 (quoting *Senate Select Comm.*, 498 F.2d at 731). Later, he claims that the Committee must make the "demonstrated and specific showing of need" that was required in *United States v. Nixon.* Appellant Opening Br. 35 (citing *United States v. Nixon*, 418 U.S. at 713).

We have significant doubt that any of these tests are appropriate in the context of a former President's challenge to the joint decision of an incumbent President and the Legislative Branch that disclosure is warranted. All of the cases on which Mr. Trump relies involved requests for information from a sitting President, not a former President, and called upon the courts to resolve an interbranch dispute. The *Mazars* test, for example, was expressly tied to "special concerns regarding the separation of powers" that arise when the "legislative interests of Congress" clash with the "unique position of the President[.]" *Mazars*, 140 S. Ct. at 2035–2036 (internal quotation marks and citation omitted); *cf. United States v. Nixon*, 418 U.S. at 686 (addressing a judicial subpoena issued to a sitting President); *Senate Select Comm.*, 498 F.2d at 726

(addressing a congressional subpoena issued to a sitting President). Those separation of powers concerns necessarily have less traction when the request is for records from a former administration, since the objecting former President no longer occupies the "unique position of the President," *Mazars*, 140 S. Ct. at 2035 (internal quotation marks and citation omitted). And they have less salience when the Political Branches are in agreement. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

If anything, *Nixon v. GSA* would seem to be more closely on point, because it specifically involved a former President's objection, over the contrary positions of the incumbent President and Congress, to the Executive Branch taking possession of and reviewing his presidential records. There, the Supreme Court ruled that an "important" congressional purpose overcame the former President's privilege claim when, as here, the incumbent President supported the disclosure. *Nixon v. GSA*, 433 U.S. at 454; *see id.* at 443 ("Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."). Congress's interest in investigating the January 6th attack on the Capitol and obtaining information to allow meaningful legislation easily rises to the level of "important."

To be sure, *Nixon v. GSA* did not involve a direct document request by Congress. But neither did former President Nixon ask the Court to disrupt an ongoing accommodation and negotiation process between the Political Branches—a process that courts historically have stayed out of.

Regardless, even assuming they apply, the legislative interest at stake passes muster under any of the tests pressed by former President Trump.

(i)

As for the *Mazars* test, the January 6th Committee plainly has a "valid legislative purpose" and its inquiry "concern[s] a subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031–2032 (internal quotation marks and citations omitted). In fact, House Resolution 503 expressly authorizes the Committee to propose legislative measures. H.R. Res. 503 § 4(a)(3). For example, Congress could (1) pass laws imposing more serious criminal penalties on those who engage in violence to prevent the work of governmental institutions; (2) amend the Electoral Count Act to shore up the procedures for counting electoral votes and certifying the results of a presidential election; (3) allocate greater resources to the Capitol Police and enact legislation to "elevat[e] the security posture of the United States Capitol Complex," *id.* § 4(a)(2)(D); or (4) revise the federal government's "operational plans, policies, and procedures" for "responding to targeted violence and domestic terrorism[,]" *id.* § 4(a)(2)(B), J.A. 97.

Former President Trump argues that the Committee has an "improper law enforcement purpose[,]" Appellant Opening Br. 21, because its request constitutes an effort to "try" him "for * * * wrongdoing[,]" Appellant Opening Br. 21 (quoting *McGrain*, 273 U.S. at 179). Not at all. The Committee's announced purpose is to "issue a final report to the House containing such findings, conclusions, and recommendations" for such "changes in law, policy, procedures, rules, or regulations" as the Committee "may deem necessary[.]" H.R. Res. 503 § 4(a)(3), (c). The Committee's request to the Archivist reiterates that it "seeks to * * * recommend laws, policies, procedures, rules, or regulations necessary to protect our Republic in the future." Thompson Ltr., J.A. 33. The mere prospect that misconduct might be exposed does not make the

Committee's request prosecutorial. Missteps and misbehavior are common fodder for legislation.

Mazars also requires that the "asserted legislative purpose warrant[] the significant step of involving the President and his papers." 140 S. Ct. at 2035. As President Biden stated, the January 6th Committee has a "sufficient factual predicate" for obtaining these presidential records, First Remus Ltr., J.A. 107, because of the President's direct role in rallying his supporters, directing them to march to the Capitol, *see* January 6th Rally Speech at 3:47:02–3:47:21, and propagating the underlying false narrative of election fraud. The House has also presented evidence indicating that, leading up to January 6th, individuals encouraging "dramatic action" on that day were in frequent contact with the White House. *See* H.R. REP. NO. 117-152, 117th Cong., 1st Sess. 6 (2021). And as the Commander-in-Chief and Chief Law Enforcement Officer on January 6th, President Trump had control over the sharing of any intelligence concerning a potential riot and, once the mob attacked, the decision to deploy (or not) the National Guard and other federal law enforcement resources to quell the riot.

For those reasons, Congress's request for records "adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation." *Mazars*, 140 S. Ct. at 2036. It has provided "detailed and substantial" evidence of its legislative purpose, *id.*, and its specific need for presidential records in House Resolution 503, the Committee's letter to the Archivist, public reports, and public statements made by members of the Committee. *See* H.R. Res. 503; Thompson Ltr., J.A. 33–44; H.R. REP. NO. 117-152; 167 CONG. REC. H5759 (daily ed. Oct. 21, 2021) (statement of Rep. Liz Cheney).

Nor does Congress have a viable alternative source for this critical information. *See* 44 U.S.C. § 2205(2)(C). As President Biden agreed, the January 6th Committee has shown that these presidential documents specifically are necessary for the Committee's work. Former President Trump has made no showing that the Committee already has access to information about what administration officials knew about the January 6th attack, when they knew it, what actions they took in response, and how their actions might have affected the events of that day. Nor has he demonstrated that the Committee could obtain this same type of information from another source. The information sought pertains to the activities of former President Trump and White House staff in "carrying out the * * * duties of the President" on and around January 6, and those records are exclusively within the control of the Archivist, 44 U.S.C. §§ 2201(2), 2202.

For similar reasons, former President Trump's claim that the Committee is improperly using him as a "'case study' for general legislation" fails. *Mazars*, 140 S. Ct. at 2036 (citation omitted). The Committee is investigating a singular event in this nation's history, in which there is a sufficient factual predicate for inferring that former President Trump and his advisors played a materially relevant role.

Mr. Trump's argument that the January 6th Committee's request to the Archivist is "broader than reasonably necessary to support Congress's legislative objective[,]" *Mazars*, 140 S. Ct. at 2036, does not work either. He has made no claim that the documents at issue in this appeal are not relevant to the Committee's purpose or that a request capturing those documents is overbroad. Nor could he. All of the documents currently at issue pertain to presidential activities on or around January 6th, or surrounding the election and its aftermath.

If forthcoming tranches contain records that Mr. Trump claims are unmoored from the Committee's objectives, he can attempt to raise an overbreadth challenge then. But that dispute may never arise. The Archivist will winnow out any documents that are not responsive or that are not "Presidential records[,]" 44 U.S.C. § 2205(2), such as those that are "strictly personal" or "strictly campaign-related[,]" J.A. 275 (counsel for the Executive Branch advising district court that such documents would not be "appropriate for production").

More to the point, President Biden could very well agree to assert executive privilege if aspects of the document request were to overreach the "unique and extraordinary circumstances" that underlay his waiver of privilege for these documents. First Remus Ltr., J.A. 108; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174. Or he could work with Congress to withdraw its request for those documents as part of the accommodation process.

In short, the "congressional power of inquiry * * * [and] the right of resistance to it are to be judged in the concrete, not on the basis of abstractions." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Former President Trump's speculation about possible problems with possible future disclosures does nothing to establish a likelihood of success as to these documents actually slated for disclosure.

Lastly, *Mazars* requires that we "carefully scrutinize[]" any "burdens on the President's time and attention" imposed by the request for information. 140 S. Ct. at 2036. "[I]n determining whether [a challenged act] disrupts the proper balance between the coordinate branches" in that way, the "proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. GSA*, 433 U.S. at 443. In this

case, President Biden has determined that, thus far, the time and effort required of him and his staff is within reasonable bounds and consonant with the grave matters before the January 6th Committee.

Former President Trump argues that the large number of potentially responsive records, combined with the limited amount of time he has to review the records for privileged materials, imposes a significant burden on him personally. Appellant Opening Br. 29. But a former President is "in less need of" a shield "against burdensome requests for information" because requiring a former President to respond to a request does not directly implicate the interests of the Executive Branch or distract the President from executing his constitutional functions. *Nixon v. GSA*, 433 U.S. at 448.

Still, if there were no limits to Congress's ability to drown a President in burdensome requests the minute he leaves office, Congress could perhaps use the threat of a post-Presidency pile-on to try and influence the President's conduct while in office. But once again, former President Trump has made no showing that he has been saddled with anything close to such a daunting burden. The Archivist is the one who bears the burden of searching for responsive records. The records he has found have been separated into manageably sized tranches for Mr. Trump's review, which diffuses any burden. And former President Trump has alleged no actual difficulty completing his review of the tranches within the allotted timeframes thus far. If he were to need more time, he could simply request an extension from the Archivist. *See* 36 C.F.R. § 1270.44(g) ("The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section."). In fact, the Archivist has provided additional time for review once already. J.A. 127. Were the burden to become unduly demanding at some point in the

future, it could very well be that President Biden—who is simultaneously juggling all manner of presidential responsibilities—would object, to the benefit of former President Trump. Indeed, the previous extension was initiated by President Biden and afforded to him and former President Trump alike. J.A. 127.

At the end of the day, the *Mazars* test is of no help to former President Trump's effort to demonstrate a likelihood of success in invalidating the January 6th Committee's request.

(ii)

For those same reasons, the Committee's request for these records readily satisfies the other tests that the former President proposes.

In *Senate Select Committee*, this court concluded that evidence subpoenaed from the sitting President was not "demonstrably critical" because the House Committee on the Judiciary already had access to all of the tapes sought by the Select Committee. 498 F.2d at 731–732. Former President Trump, by contrast, has made no showing that the records at issue here are already within the possession of another committee of the House or Senate. As such, the Committee's efforts would not be "merely cumulative[,]" and the records remain "demonstrably critical[,]" *id.*, to its task of investigating the January 6th attack.

In *United States v. Nixon*, the Court held that President Nixon's "generalized assertion of privilege" had to "yield to the demonstrated, specific need for evidence in a pending criminal trial." 418 U.S. at 713. Here, the Committee has—as President Biden agrees—demonstrated a specific and compelling need for these presidential records because they provide a unique and critically important window into the

events of January 6th that the Committee cannot obtain elsewhere.

d

The former President's remaining arguments do not help his case.

He argues that the Committee has not been authorized by the full House to request a former President's records. *See* Appellant Opening Br. 32–33. That is wrong. House Resolution 503 expressly states that "Rule XI of the Rules of the House of Representatives shall apply to the Select Committee[,]" with exceptions not relevant here. H.R. Res. 503 § 5(c). And House Rule XI provides that "[s]ubpoenas for documents or testimony may be issued to * * * the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or the Executive Office of the President[.]" House Rule XI.2(m)(3)(D).

Mr. Trump argues in his reply brief, for the first time in this litigation, that the Presidential Records Act confines an incumbent President to deciding only the "legal correctness" of the former President's privilege claim, without any ability to make a determination as to whether an assertion of privilege is in the best interests of the United States. Appellant Reply Br. 10–11. Former President Trump forfeited this statutory argument by failing to raise it before the district court and before this court in his opening brief. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) (stating that issues not argued in the opening brief are forfeited on appeal); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 & n.5 (D.C. Cir. 1992) (Absent exceptional

circumstances, "it is not our practice to entertain issues first raised on appeal[.]"). Principles of constitutional avoidance further counsel against entertaining, without adversarial briefing, the notion that a statute shuts the sitting President out of any meaningful role in an exercise of executive privilege over Executive Branch documents in response to a congressional request. *See Burke*, 843 F.2d at 1479 (citing *Nixon v. GSA*, 433 U.S. at 449).

Lastly, former President Trump argues that, to the extent the Presidential Records Act is construed to give the incumbent President "unfettered discretion to waive former Presidents' executive privilege," it is unconstitutional. Appellant Opening Br. 47. There is nothing "unfettered" about President Biden's calibrated judgment in this case.

Anyhow, the Presidential Records Act is explicit that "[n]othing in [the] Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. § 2204(c)(2). Therefore, the Presidential Records Act gives the incumbent President no more power than the Constitution already does. And under the Constitution, the incumbent President does not have "unfettered discretion" to release records over a former President's objection given the former President's opportunity to obtain judicial review of his privilege claim. *See Nixon v. GSA*, 433 U.S. at 439.

The problem for Mr. Trump is not that the Constitution affords him no say in the matter. It is his failure to make any relevant showing of a supervening interest in confidentiality that might be capable of overcoming President Biden's considered and weighty judgment that Congress's imperative need warrants the disclosure of these documents specifically tied to the investigation of the events of January 6th.

e

One factor cutting in former President Trump's favor is that these records are being sought so soon after his Presidency ended. In *Nixon v. GSA*, the Court explained that the "confidentiality of executive communications" does not dissipate as soon as a President's term ends. Rather, it is "subject to erosion over time after an administration leaves office." 433 U.S. at 451. Here, less than a year has passed since Mr. Trump left office.

But the former President does not make this argument. He only makes an unelaborated reference to the fact of the timing in his opening brief. *See* Appellant Opening Br. 36. In this court, "mentioning an argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones is tantamount to failing to raise it." *Maloney v. Murphy*, 984 F.3d 50, 68 (D.C. Cir. 2020) (internal quotation marks and citation omitted). He certainly does not present the argument in a manner that gets him any closer to demonstrating a likelihood of success on the merits. That is especially so given Congress's demonstrated need for the information now because it is investigating a last-ditch effort to thwart the peaceful transfer of power from former President Trump to President Biden. In light of the regularity of federal elections, we credit the Committee's assertion that its work is "urgent[,]" Thompson Ltr., J.A. 33, as it seeks to understand the violence that marked the end of the last Presidency and to prevent any recurrence. First Remus Ltr., J.A. 107; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174.[17]

[17] At times, former President Trump's briefing suggested that he was pressing a freestanding challenge to the statutory and

V

Former President Trump has also failed to satisfy any of the remaining preliminary injunction factors.

A

To obtain a preliminary injunction, former President Trump must show that the executive-privilege interests he seeks to vindicate will likely be irreparably harmed. *See Winter*, 555 U.S. at 20. Because Mr. Trump seeks this preliminary injunction solely in his "official capacity as a former President[,]" the only relevant injury would be one to the present and future interests of the Executive Branch itself in confidentiality, Compl. ¶ 20, J.A. 16. That is because the interest in confidentiality of presidential communications "is not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449 (citation omitted). So the interests of the Executive Branch are the lens through which we view former President Trump's concerns about vitiating the confidentiality that he relied upon "when the communications and records at issue were created[,]" Appellant Opening Br. 51, and his duty to "protect[] the records and communications created during [his] term of office," Appellant Opening Br. 49.

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constitutional validity of the Committee's request, separate and apart from his executive privilege claim. *See, e.g.*, Appellant Opening Br. 18; Appellant Reply Br. 1. But at oral argument, Mr. Trump's counsel was explicit that he is not bringing such a challenge and that all of his arguments about the statutory and constitutional validity of the Committee request are part and parcel of his argument that the former President's claim of executive privilege over the specific documents at issue here should prevail. *See* Oral Arg. Tr. 14:21–15:23.

The difficulty for Mr. Trump's claim of irreparable harm is that President Biden has already determined that disclosure of the privileged documents in the first three tranches advances the interests of the Executive Branch and is affirmatively in the interests of the United States. Having weighed the interests of the privilege against the January 6th Committee's compelling need for this information, President Biden made a deliberate decision to forgo executive privilege and to disclose the documents. Given the "unprecedented" attack on the Capitol and the tradition of peaceful transfers of power, as well as the "unique and extraordinary circumstances" precipitating and surrounding the attack, President Biden explained that "an assertion of executive privilege is not in the best interests of the United States[.]" First Remus Ltr., J.A. 107–108; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174.

As between a former President and an incumbent, it "must be presumed" by a court that the incumbent President is "in the best position to assess the present and future needs of the Executive Branch" and to determine whether disclosure "impermissibly intrudes into the executive function[,]" *Nixon v. GSA*, 433 U.S. at 449, or otherwise will "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions," *id*. at 443.

To be sure, executive privilege is vital to the effective operations of the Presidency. *See United States v. Nixon*, 418 U.S. at 708. But it is a qualified privilege that has been waived by Presidents—including by President Trump—when they determined that the overriding interests of the Nation warranted it. *See* page 41, *supra*. The former President has not alleged or shown that such waivers irreparably harmed the operation of the Executive Branch or impaired his ability as President, or the ability of other Presidents, to obtain needed confidential advice.

The uniqueness of the circumstances prompting disclosure here further mitigates any potential harm to the "full and frank" nature of presidential communications. *Nixon v. GSA*, 433 U.S. at 449 (citation omitted). Advisors of the President are unlikely to "be moved to temper the candor of their remarks" simply because of the "infrequent occasions" on which an event as unparalleled as January 6th might arise. *United States v. Nixon*, 418 U.S. at 712.

Former President Trump argues that President Biden "lacks context and information concerning the documents in question" and "cannot fairly evaluate President Trump's rights." Appellant Opening Br. 51. But beyond that unelaborated assertion, Mr. Trump has made no record nor even hinted to this court what context or information has been overlooked or what information could override President Biden's calculus. We cannot just presume it. Nor can we, on our own, hunt through the documents for sensitivities or concerns that have never been articulated by Mr. Trump. The former President no doubt begs to differ with President Biden's judgment. But that difference of opinion by itself establishes no likelihood of irreparable harm to the Presidency or the interests protected by executive privilege.

We acknowledge that irreparable injury is frequently found when a movant seeks to prevent the disclosure of privileged documents pending litigation. That is generally because the holders of the privileges will, themselves, be irreparably harmed by release, and time is not of the essence.

This case is materially different from the mine-run of privilege cases. The privilege being asserted is not a personal privilege belonging to former President Trump; he stewards it for the benefit of the Republic. The interests the privilege protects are those of the Presidency itself, not former President

Trump individually. And the President has determined that immediate disclosure will promote, not injure, the national interest, and that delay here is itself injurious.[18]

B

Mr. Trump argues that the Committee "would suffer no harm by delaying production while the parties litigate the request's validity." Appellant Opening Br. 52. We disagree. Both the public interest and the balance of hardships decidedly disfavor issuance of a preliminary injunction.

Even under ordinary circumstances, there is a strong public interest in Congress carrying out its lawful investigations, *McGrain*, 273 U.S. at 174, and courts must take care not to unnecessarily "halt the functions of a coordinate branch," *Eastland*, 421 U.S. at 511 n.17.

That public interest is heightened when, as here, the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power. Importantly, the Supreme Court has instructed that Congress's "desire to restore public confidence in our political processes" by "facilitating a full airing of the events leading to" such political crises constitutes a "substantial public interest[.]" *Nixon v. GSA*, 433 U.S. at 453.

Reinforcing that public interest, President Biden has concluded on behalf of the Executive Branch that disclosure is "in the best interests of the United States[.]" First Remus Ltr.,

[18] Nor is an injunction necessary to preserve jurisdiction. Disclosure of these documents will not end the case as more tranches of documents are forthcoming. *See also* note 7, *supra*.

J.A. 107; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173–174.

Mr. Trump has not advanced any formulation of the public interest or balance of hardships that can overcome those weighty interests and concerns.

* * * * *

For all of the foregoing reasons, former President Trump has not shown that he is entitled to a preliminary injunction.

We do not come to that conclusion lightly. The confidentiality of presidential communications is critical to the effective functioning of the Presidency for the reasons that former President Trump presses, and his effort to vindicate that interest is itself a right of constitutional import.

But our Constitution divides, checks, and balances power to preserve democracy and to ensure liberty. For that reason, the executive privilege for presidential communications is a qualified one that Mr. Trump agrees must give way when necessary to protect overriding interests. *See* Oral Arg. Tr. 33:18–21, 34:23–25. The President and the Legislative Branch have shown a national interest in and pressing need for the prompt disclosure of these documents.

What Mr. Trump seeks is to have an Article III court intervene and nullify those judgments of the President and Congress, delay the Committee's work, and derail the negotiations and accommodations that the Political Branches have made. But essential to the rule of law is the principle that a former President must meet the same legal standards for obtaining preliminary injunctive relief as everyone else. And former President Trump has failed that task.

Benjamin Franklin said, at the founding, that we have "[a] Republic"—"if [we] can keep it."[19] The events of January 6th exposed the fragility of those democratic institutions and traditions that we had perhaps come to take for granted. In response, the President of the United States and Congress have each made the judgment that access to this subset of presidential communication records is necessary to address a matter of great constitutional moment for the Republic. Former President Trump has given this court no legal reason to cast aside President Biden's assessment of the Executive Branch interests at stake, or to create a separation of powers conflict that the Political Branches have avoided.

The judgment of the district court denying a preliminary injunction is affirmed.[20]

So ordered.

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[19] PAPERS OF DR. JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787 (1787), *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 952 (Charles C. Tansill ed., 1927).

[20] This court's administrative injunction, entered November 11, 2021, will be dissolved in 14 days, reflecting the amount of time the former President's counsel requested to file a petition for a writ of certiorari and an accompanying motion for an injunction pending review with the Supreme Court. *See* Oral Arg. Tr. 152:21–23. But if such a motion is filed, the administrative injunction will dissolve upon the Supreme Court's disposition of that motion.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5254 **September Term, 2021**
FILED ON: DECEMBER 9, 2021

DONALD J. TRUMP, IN HIS CAPACITY AS THE 45TH PRESIDENT OF THE UNITED STATES,
APPELLANT

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02769)

Before: MILLETT, WILKINS, and JACKSON, *Circuit Judges*

J U D G M E N T

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED that the District Court's denial of the preliminary injunction appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date. It is

FURTHER ORDERED that this court's administrative injunction entered on November 11, 2021, be dissolved in 14 days from the date of this judgment, reflecting the amount of time the former President's counsel requested to file a petition for writ of certiorari and an accompanying motion for an injunction pending review with the Supreme Court. But if such a motion is filed, this court's administrative injunction will dissolve upon the Supreme Court's disposition of that motion. Appellant is directed to notify this court promptly both of any motion filed in the Supreme Court and of the disposition of that motion.

The Clerk is directed to withhold issuance of the mandate pending disposition of any motion for injunction filed in the Supreme Court. The administrative injunction will dissolve in 14 days from the date of this judgment if appellant does not seek an injunction pending review from the Supreme Court. The Clerk is directed to issue the mandate immediately after the dissolution of this court's administrative injunction. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: December 9, 2021

Opinion for the court filed by Circuit Judge Millett.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5254 **September Term, 2021**

1:21-cv-02769-TSC

Filed On: November 11, 2021

Donald J. Trump, in his capacity as the 45th President of the United States,

Appellant

v.

Bennie G. Thompson, in his official capacity as Chairman of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol, et al.,

Appellees

BEFORE: Millett, Wilkins, and Jackson, Circuit Judges

O R D E R

Upon consideration of the emergency motion for an administrative injunction and for expedited briefing schedule, it is

ORDERED that an administrative injunction be entered and appellees the National Archives and Records Administration and the Archivist be enjoined from releasing the records requested by the House Select Committee over which appellant asserts executive privilege, pending further order of this court. The purpose of this administrative injunction is to protect the court's jurisdiction to address appellant's claims of executive privilege and should not be construed in any way as a ruling on the merits. See D.C. Circuit Handbook of Practice and Internal Procedures 33 (2021). It is

FURTHER ORDERED that the motion for an expedited briefing schedule, which the court construes as a motion to expedite consideration of the appeal of the district court's order denying the motion for a preliminary injunction, be granted. The following briefing schedule will apply:

Appellant's Brief	November 16, 2021 (12:00 noon)
Joint Appendix	November 16, 2021 (12:00 noon)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5254 **September Term, 2021**

Appellees' Briefs	November 22, 2021 (12:00 noon)
Appellant's Reply Brief	November 24, 2021 (12:00 noon)

Oral argument will be held before this panel on November 30, 2021, at 9:30 a.m.

All issues must be raised by appellant in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43 (2021); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

The parties are directed to file their briefs electronically on the date and time due, and to submit paper copies as soon as possible thereafter. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amanda Himes
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD J. TRUMP, Plaintiff, v. **BENNIE G. THOMPSON**, *in his official capacity as Chairman of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol, et al.*, Defendants.	)	Civil Action No. 21-cv-2769 (TSC)

ORDER

Before the court is Plaintiff's Emergency Motion for a Preliminary Injunction Pending Appeal or an Administrative Injunction, ECF No. 38. For the reasons explained below, Plaintiff's motion is DENIED.

I. BACKGROUND[1]

On October 18, Plaintiff filed this action, seeking: (1) a declaratory judgment that the United States House Select Committee to Investigate the January 6 Attack of the United States Capitol's requests for Plaintiff's presidential records are invalid and unenforceable, (2) an injunction preventing the Congressional Defendants from enforcing the requests or using any

[1] This court provided the factual background of the January 6 attack and the events leading to the creation of the Select Committee in its Memorandum Opinion denying Plaintiff's Motion for a Preliminary Injunction. *See Trump v. Thompson*, No. 21-2769, 2021 WL 5218398, at *1-3 (D.D.C. Nov. 9, 2021).

information obtained via the requests, and (3) an injunction preventing the Archivist and NARA from producing the requested records. *See* ECF No. 1, at 25-26. The next day, Plaintiff moved for a preliminary injunction "prohibiting Defendants from enforcing or complying with the Committee's request." ECF No. 5, Pl. Mot. at 3. At the parties' request, the court set an accelerated briefing schedule and heard argument on the motion on November 4, 2021. *See* Min. Order (Oct. 22, 2021).

On November 8, Plaintiff filed what appeared to be a preemptive emergency motion requesting an injunction pending appeal, or an administrative injunction, "should the court refuse" to grant his requested relief. ECF No. 34, at 1. The court denied Plaintiff's emergency motion without prejudice as premature and stated that it would consider such a motion from the non-prevailing party after it issued its ruling. *See* Min. Order (Nov. 9, 2021) (citing Fed. R. Civ. P. 62(d)).

On November 10, 2021, the court denied Plaintiff's original motion for preliminary injunction. In so doing, it denied Plaintiff's request to enjoin Defendants from enforcing or complying with the Select Committee's August 25, 2021, requests. *See Trump v. Thompson*, 2021 WL 5218398, at *1. On November 11, Plaintiff filed a "renewed" Emergency Motion for Preliminary Injunction Pending Appeal or Administrative Injunction. ECF No. 34, Pl. Renewed Mot. Both the Congressional and NARA Defendants oppose the motion.

II. ANALYSIS

Plaintiff's motion is a renewed request for injunctive relief and not a request for a stay. Federal Rule of Civil Procedure 62 allows for the court to stay the effects of an interlocutory order or final judgment for a period of time to allow time for the non-prevailing party to pursue

an appeal. *See Nat'l Treas. Emps. Union v. Federal Labor Relations Auth.*, 712 F.2d 669, 671 (D.C. Cir. 1983) ("[S]tays, of course, do not impede appeals from the stayed dispositive order; their sole purpose is to preserve the status quo while an appeal is in the offing or in progress."). Injunctive relief, by contrast, is more concerned with the prevention of irreparable harm. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original).

Plaintiff characterizes his motion as a Rule 62 motion "seeking . . . to preserve the status quo." Pl. Renewed Mot. at 1. However, it is clear from the caption and the substance of Plaintiff's arguments that he again seeks injunctive relief, rather than a stay of this court's November 9 order. A stay would not give Plaintiff the relief he seeks—preventing the transmission of documents from NARA to the House Select Committee—as the status quo in this case is that NARA will disclose documents on November 12, "absent any intervening court order." Pl. Mot., Ex. 7. Accordingly, the court will analyze Plaintiff's motion as one seeking injunctive relief, rather than a stay.[2]

A. <u>Preliminary Injunction Pending Appeal</u>

A motion for a preliminary injunction pending appeal requires the same four elements necessary for a preliminary injunction: (1) a likelihood of success on the merits, (2) the likely prospect of irreparable harm in the absence of preliminary relief, (3) that the balance of equities

[2] The standard for a preliminary injunction and a stay are similar, but the standard for a stay replaces the balance of equities factor with a requirement that "other parties interested in the proceedings" will not be "substantially injure[d]." *Compare Winter*, 555 U.S. at 20 (preliminary injunction standard), *with Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987) (stay standard).

tip in movant's favor, and (4) that an injunction is in the public interest. *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). This court analyzed these factors at length in its Opinion denying Plaintiff's original motion for a preliminary injunction, and found that none justified injunctive relief. *See Trump v. Thompson*, 2021 WL 5218398, at *12-39. In his renewed motion, despite the fact that he requests essentially the same relief as in his original preliminary injunction motion, Plaintiff has not advanced any new facts or arguments that persuade the court to reconsider its November 9, 2021, Order. The court's analysis previously rejecting Plaintiff's requested relief is thus equally applicable here: Plaintiff is unlikely to succeed on the merits of his claims or suffer irreparable harm, and a balance of the equities and public interest bear against granting his requested relief. *Id.*

Nor is Plaintiff entitled to injunctive relief under the "serious legal question" doctrine. That doctrine, which Plaintiff contends is a "more flexible" standard, weighs in favor of granting an injunction pending appeal, even when the likelihood of success on the merits is low, if the remaining three preliminary injunction factors "tip sharply in the movant's favor." *In re Special Proceedings*, 840 F. Supp. 370, 372 (D.D.C. 2012) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)).[3] Moreover, when the relief sought is an

[3] Courts in this Circuit have applied a "sliding scale" to analyze the four preliminary injunction factors–a particularly strong showing in one factor could outweigh weakness in another. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). While it is unclear if that approach and its import for the "serious legal question" doctrine have survived the Supreme Court's decision in *Winter*, its use is still applicable here. *See, e.g.*, *Banks v. Booth*, 459 F. Supp. 3d 143, 149-50 (D.D.C. 2020) (citing *Sherley*, 644 F.3d at 393); *see also Davis v. Billington*, 76 F. Supp. 3d 59, 63 n.5 (D.D.C. 2014) ("[T]he Circuit has had no occasion to decide this question . . . [t]hus, because it remains the law of this Circuit, the Court must employ the sliding-scale analysis here.").

injunction on the coordinate branches of government—in this case, the legislative and executive branches, who are united in their desire to have the records produced—it is even more important that the three remaining factors outweigh the lack of likelihood of success on the merits. *See Sampson v. Murray*, 415 U.S. 61, 83-84 (1974).

The court has already found that Plaintiff is unlikely to succeed on the merits in this case, and the three remaining preliminary injunction factors do not "tip sharply" in his favor. To the contrary, those factors counsel against injunctive relief. *See Trump v. Thompson*, 2021 WL 5218398, at *36-39. Plaintiff cannot do an end run around the preliminary injunction factors simply because he seeks appellate review. Rather, the court maintains "a considerable reluctance in granting an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief being sought." 11 Wright & Miller, Fed. Prac. & Proc. Civ., § 2904 (3d ed. 2021). Were the court to grant Plaintiff's motion, the effect would be "to give [Plaintiff] the fruits of victory whether or not the appeal has merit." *See, e.g.*, *Jimenez v. Barber*, 252 F.2d 550 (9th Cir. 1958). Plaintiff is not entitled to injunctive relief simply because the procedural posture of this case has shifted.

B. Administrative Injunction

Plaintiff also seeks an administrative injunction per the *All Writs Act*, 28 U.S.C. § 1651, which allows federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act, however, is not an independent jurisdictional grant for federal courts to issue extraordinary writs—it is confined to the issuance of writs in aid of the issuing court's jurisdiction. *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (quoting *Clinton v. Goldsmith*, 52 U.S. 529, 534-35 (1999)). Plaintiff alleges

that such a writ is necessary, lest "the issues at hand [be] mooted."[4] Pl. Renewed Mot. at 5. But while November 12 draws near, this court's jurisdiction is not imperiled. Plaintiff has already filed a notice of appeal with the Court of Appeals for the D.C. Circuit. *See* Notice of Appeal to the DC Circuit Court, ECF No. 37. He is therefore free to petition that Court for relief. Because there is no threat to the ongoing jurisdiction of this court, there is no need to issue a writ pursuant to the Act.

III. CONCLUSION

Plaintiff, as is his right, has sought review of this court's denial of his Motion for a Preliminary Injunction. And the court is aware that the timeline for appellate review of that decision will be accelerated. But nothing in the court's November 9, 2021, Order, or this Order, triggers the harm he alleges because the Archivist will not submit the requested records to the Select Committee until November 12, 2021, and Plaintiff can seek appellate relief in the interim. This court will not effectively ignore its own reasoning in denying injunctive relief in the first place to grant injunctive relief now.

For the above reasons, Plaintiff's Emergency Motion for Preliminary Injunction Pending Appeal or Administrative Injunction, ECF No. 38, is DENIED.

Date: November 10, 2021

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

[4] An Article III court loses jurisdiction when an issue is moot. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 319-320 (1974).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD J. TRUMP, Plaintiff, v. **BENNIE G. THOMPSON**, *in his official capacity as Chairman of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol*, *et al.*, Defendants.	Civil Action No. 21-cv-2769 (TSC)

MEMORANDUM OPINION

On January 6, 2021, hundreds of rioters converged on the U.S. Capitol. They scaled walls, demolished barricades, and smashed windows in a violent attempt to gain control of the building and stop the certification of the 2020 presidential election results. This unprecedented attempt to prevent the lawful transfer of power from one administration to the next caused property damage, injuries, and death, and for the first time since the election of 1860, the transfer of executive power was distinctly not peaceful.

The question of how that day's events came about and who was responsible for them is not before the court. Instead, the present dispute involves purely legal questions that, though difficult and important to our government's functioning, are comparatively narrow in scope. Plaintiff—former President Donald J. Trump—challenges the legality of a U.S. House of Representatives Select Committee's requests for certain records maintained by the National

Archives and Records Administration ("NARA") pursuant to the Presidential Records Act. Plaintiff argues that the Committee's requests are impermissible because at least some of the records sought are shielded by executive privilege and because the requests exceed Congress' constitutional power. He seeks an injunction prohibiting Defendants—the House Select Committee, the Chairman of the House Select Committee, NARA, and the Archivist of NARA—from enforcing or complying with the Committee's requests. For the reasons explained below, the court will deny Plaintiff's requested relief.

I. BACKGROUND

A. The 2020 Presidential Election and January 6, 2021

While not material to the outcome, some factual background on the events leading up to and including January 6, 2021, offers context for the legal dispute here. In the months preceding the 2020 presidential election, Plaintiff declared that the only way he could lose would be if the election were "rigged." *See, e.g.*, Donald J. Trump, Speech at Republican National Convention Nomination Vote at 22:08 (Aug. 24, 2020) *in* C-SPAN, https://www.c-span.org/video/?475000-103/president-trump-speaks-2020-republican-national-convention-vote. In the months after losing the election, he repeatedly claimed that the election was rigged, stolen, and fraudulent. For example, in a December 2 speech, he alleged "tremendous voter fraud and irregularities" resulting from a late-night "massive dump" of votes. *See* President Donald J. Trump, Statement on 2020 Election Results at 0:39, 7:26 (Dec. 2, 2020) *in* C-SPAN, https://www.c-span.org/video/?506975-1/president-trump-statement-2020-election-results. He also claimed that certain votes were "counted in foreign countries," that "millions of votes were cast illegally

in the swing states alone," and that it was "statistically impossible" he lost. *Id.* at 12:00, 14:22, 19:00.

After losing the election, Plaintiff and his supporters filed a plethora of unsuccessful lawsuits seeking to overturn the results. *See, e.g.*, *Current Litigation*, AMERICAN BAR ASSOCIATION: STANDING COMMITTEE ON ELECTION LAW, Apr. 30, 2021, https://www.americanbar.org/groups/public_interest/election_law/litigation/. The United States Supreme Court also denied numerous emergency applications aimed at overturning the results. *Id.* In response, Plaintiff tweeted that the Court was "totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election." Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 26, 2020, 1:51 PM), https://www.presidency.ucsb.edu /documents/tweets-december-26-2020.[1] He continued his claim that "We won the Presidential Election, by a lot," and implored Republicans to "FIGHT FOR IT. Don't let them take it away." *Id.* (Dec. 18, 2020, 2:14 PM), https://www.presidency.ucsb.edu/documents/tweets-december-18-2020.

A Joint Session of Congress was scheduled to convene on January 6, 2021, to count the electoral votes of the 2020 presidential election and to officially announce the elected President, as required by the Twelfth Amendment to the U.S. Constitution and the Electoral Count Act, 3

[1] Plaintiff was permanently suspended from Twitter on January 8, 2021. *See* Press Release, Twitter, Inc., Permanent Suspension of @realDonaldTrump (Jan. 8, 2021), https://blog. twitter.com/en_us/topics/company/2020/suspension. As a result, Plaintiff's tweets are permanently unavailable in their original form. *See* Quint Forgey, *National Archives can't resurrect Trump's tweets, Twitter says*, POLITICO (Apr. 7, 2021), https://www.politico.com /news/2021/04/07/twitter-national-archives-realdonaldtrump-479743. The court has relied on the University of California, Santa Barbara's *The American Presidency Project* for archived tweets. *See* John Wolley & Gerhard Peters, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/.

U.S.C. § 15. In the days leading up to January 6, Plaintiff began promoting a protest rally to take place hours before the Joint Session convened. On December 19, 2020, he tweeted "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!" Donald J. Trump (@realDonaldTrump), TWITTER (December 19, 2020, 6:42am), https://www.presidency.ucsb.edu/documents/tweets-december-19-2020. During a rally, he warned that "Democrats are trying to steal the White House . . . you can't let that happen. You can't let it happen," and promised that "[w]e're going to fight like hell, I'll tell you right now." *See* Donald J. Trump, Remarks at Georgia U.S. Senate Campaign Event at 8:40, 14:19 (Jan. 4, 2021) *in Campaign 2020*, C-SPAN, https://www.c-span.org/video/?507634-1/president-trump-campaigns-republican-senate-candidates-georgia.

On January 6, Plaintiff spoke at the rally at the Ellipse, during which he (1) repeated claims, rejected by numerous courts, that the election was "rigged" and "stolen"; (2) urged then-Vice President Pence, who was preparing to convene Congress to tally the electoral votes, "to do the right thing" by rejecting certain states' electors and declining to certify the election for President Joseph R. Biden; and (3) told protesters to "walk down to the Capitol" to "give them the kind of pride and boldness that they need to take back our country," "we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore," and "you'll never take back our country with weakness." *See* Donald J. Trump, Rally on Electoral College Vote Certification at 3:33:04, 3:33:36, 3:37:20, 3:47:02, 3:47:22, 4:42:26, 4:41:27 (Jan. 6, 2021) *in Campaign 2020*, C-SPAN, https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification.

Shortly thereafter, the crowds surged from the rally, marched along Constitution Avenue, and commenced their siege of the Capitol.

B. The Select Committee and its Presidential Records Act Request

On June 30, 2021, the U.S. House of Representatives passed House Resolution 503, creating the Select Committee. ECF No. 5, Pl. Mot., Ex. 3, H.R. 503, § 3, 117th Cong. (2021). H.R. 503 empowers the Select Committee to (1) "investigate the facts, circumstances, and causes relating to" the January 6 attack; (2) "identify, review, and evaluate the causes of and the lessons learned from" the attack; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures . . . as it may deem necessary." *Id.* § 4(a). Such corrective measures may include:

> [C]hanges in law, policy, procedures, rules, or regulations that could be taken—(1) to prevent future acts of violence, domestic terrorism, and domestic violent extremism, including acts targeted at American democratic institutions; (2) to improve the security posture of the United States Capitol Complex while preserving accessibility of the Capitol Complex for all Americans; and (3) to strengthen the security and resilience of the United States and American democratic institutions against violence, domestic terrorism, and domestic violent extremism.

Id. § 4(c). The resolution also authorizes the Select Committee to publish interim reports, which may include "legislative recommendations as it may deem advisable." *Id.* § 4(b).

The Select Committee is authorized "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary." 47 Rule XI.2(m)(1)(B), Rules of the U.S. House of Rep., 117th Cong. (2021) ("House Rules"); *see also* H.R. 503, § 5(c) (unless otherwise specified, Rule XI applies to the Select Committee). Under House Rule XI:

> Subpoenas for documents or testimony may be issued to any person or entity, whether governmental, public, or private, within the United States, including, but

> not limited to, the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or Executive Office of the President.

House Rule XI.2(m)(3)(D).

On August 25, 2021, pursuant to section 2205(2)(C) of the Presidential Records Act ("PRA"), the Committee issued a document request to NARA seeking several categories of records from the Executive Office of the President and the Office of the Vice President. Compl., Ex. 1. Specifically, the Select Committee sought written communications, calendar entries, videos, photographs, or other media relating to Plaintiff's January 6 speech, the January 6 rally and subsequent march, the violence at the Capitol, and the response within the White House. *See id.* at 2-4. The Committee also requested materials from specific time periods relating to any planning by the White House and others regarding the January 6 electoral count, *id.* at 4-7; preparations for rallies leading up to the January 6 violence, *id.* at 7-8; information Plaintiff received regarding the election outcome, *id.* at 9-10; Plaintiff's public remarks regarding the election outcome and the validity of the election system more broadly, *id.*; and for a specified timeframe surrounding the 2020 election, documents and communications of the Plaintiff and certain of his advisors relating to the transfer of power and obligation to follow the rule of law, including with respect to actual or potential changes in personnel at certain executive branch agencies, and relating to foreign influence in that election, *id.* at 10-12. These requests are the subject of this lawsuit.

C. Presidential Records in the Nixon Era

In the wake of its investigation of presidential wrongdoing in the Watergate scandal, Congress passed two laws relating to presidential records. The first was the Presidential Recordings and Materials Preservation Act of 1974 ("PRMPA"), enacted after former President Richard Nixon indicated that he intended to destroy certain tape recordings of his conversations while in office.

Four years later, after the Supreme Court's ruling in *Nixon v. Adm'r of Gen. Servs.* (*Nixon v. GSA*), 433 U.S. 425, 448 (1977),[2] Congress passed the PRA, which changed the legal ownership of the President's official records from private to public, and established a new statutory scheme under which Presidents, and NARA, must manage the records of their Administrations. In passing the PRA, Congress sought a balance between, on the one hand, "encourag[ing] the free flow of ideas within the executive branch" by allowing a President to restrict access to their Presidential records for up to twelve years after their tenure ends, and on the other hand, permitting Congress to access any records it needs to conduct its business before the twelve-year clock runs. *See, e.g.*, 95 Cong. Rec. H34895 (daily ed. Oct. 10, 1978) (statement of Rep. Brademas); *see also* 95 Cong. Rec. S36845 (daily ed. Oct. 13, 1978) (statement of Sen. Nelson) (explaining that the legislation was "carefully drawn" to strike a balance between the confidentiality of the President's decision-making process and the public interest in preservation of the records).

The PRA defines "Presidential records" as records reflecting "the activities, deliberations, decisions, and policies" of the Presidency. 44 U.S.C. § 2203(a). Under the Act, when a

[2] *See* discussion *infra* at § III.A.1.ii.a.

President leaves office, the Archivist "assume[s] responsibility for the custody, control, and preservation of, and access to" the Presidential records of the departing administration. *Id.* § 2203(g)(1). The Archivist must make Presidential records available to the public under the Freedom of Information Act five years after the President leaves office. *Id.* § 2204(b)(2), (c)(1); *see also* 36 C.F.R. § 1270.38. However, the outgoing President can restrict access to especially sensitive materials for a period of up to 12 years. 44 U.S.C. § 2204(a); *see also* 36 C.F.R. § 1270.40(a). One exception is that "Presidential records shall be made available . . . to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available." 44 U.S.C. § 2205(2)(C).

The PRA gives the Archivist the power to promulgate regulations to administer the statute. 44 U.S.C. § 2206. Pursuant to those regulations, the Archivist must promptly notify both the former President as well as the incumbent President of a request for the former President's records. *See* 36 C.F.R. § 1270.44(c). Either the former or incumbent President "may assert a claim of constitutionally based privilege" against disclosure within thirty calendar days after the date of the Archivist's notice. *Id.* § 1270.44(d). If a former President asserts the claim, the Archivist consults with the incumbent President as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim to determine whether the incumbent President will uphold the claim. *Id.* § 1270.44(f)(1). If the incumbent President does not uphold the former President's claim, the Archivist must disclose the Presidential records 60 calendar days after receiving notification of the claim unless a federal court order directs the Archivist to withhold the records. *Id.* § 1270.44(f)(3); *see also* Exec. Order No. 13489, § 4(b)

(providing that the Archivist shall abide by the incumbent President's determination as to a privilege assertion by a former President unless otherwise directed by a final court order). The Archivist may also "adjust any time period or deadline . . . to accommodate records requested." 36 C.F.R. § 1270.44(g).

D. Response to Select Committee's Request

On August 30, 2021, after receiving the Select Committee's requests, the Archivist notified Plaintiff that NARA intended to produce a first tranche of approximately 136 pages of records responsive to the Committee's requests. ECF No. 21, NARA Br. at 11.

On October 8, 2021, White House Counsel notified the Archivist that President Biden would not be asserting executive privilege over the first tranche of Presidential records because doing so "is not in the best interests of the United States." Pl. Mot., Ex. 4 at 1. Counsel further explained the President's position:

> Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events. . . . The Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War. These are unique and extraordinary circumstances. . . . The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

Id. at 1-2.

That same day, Plaintiff notified the Archivist that he was asserting executive privilege with respect to thirty-nine pages of records in the first tranche, and seven pages of records that were subsequently withdrawn from the first tranche as non-responsive. NARA Br. at 11. Plaintiff also made a "protective assertion of constitutionally based privilege with respect to all additional records following the First Tranche." Pl. Mot., Ex. 5 at 2.

White House Counsel then notified the Archivist that President Biden "does not uphold the former President's assertion of privilege." Pl. Mot., Ex. 6. Counsel further instructed the Archivist to turn the requested records over to the Committee thirty days after the Archivist notified Plaintiff, absent an intervening court order, "in light of the urgency of the Select Committee's need" for the requested records. *Id.*

On October 13, 2021, the Archivist notified Plaintiff that, "[a]fter consultation with Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden," the Archivist "determined to disclose to the Select Committee," on November 12, 2021, all responsive records that President Trump determined were subject to executive privilege, absent an intervening court order. *Id.*, Ex. 7.[3]

The review and submission process for additional tranches of records is proceeding on staggered timelines. Regarding the second and third tranches of records, NARA notified Plaintiff and President Biden on September 9 and 16 that it was planning to disclose 888 pages of additional records, three of which NARA later withdrew because they were not Presidential records. NARA Br. at 11-12. Plaintiff asserted privilege over 724 pages. *Id.* at 12. President Biden again responded that he would not uphold the privilege. *Id.* NARA notified Plaintiff and President Biden that it would turn over the 724 pages to the Committee on November 26 absent an intervening court order. *Id.* On October 15, NARA sent notification of its intent to disclose a fourth tranche of 551 pages of responsive records. *Id.* The review period for the fourth tranche

[3] On the same date, the Archivist produced to the Select Committee the ninety pages of records in the first tranche that were both responsive to the Committee's requests and not subject to Plaintiff's assertions of privilege. NARA Br., Laster Decl. ¶ 20.

is ongoing, and NARA anticipates that it will identify additional tranches of responsive records on a rolling basis. *Id.*

E. Procedural History

On October 18, Plaintiff filed this action, seeking a declaratory judgment that the Select Committee's requests are invalid and unenforceable, an injunction against the Congressional Defendants' enforcement of the requests or use of any information obtained via the requests, and an injunction preventing the Archivist and NARA's production of the requested information. *See* ECF No. 1, Compl. at 25-26. The following day, Plaintiff moved for a preliminary injunction "prohibiting Defendants from enforcing or complying with the Committee's request." Pl. Mot. at 3. At the parties' request, the court set an accelerated briefing schedule and heard argument on the motion on November 4, 2021. *See* Min. Order (Oct. 22, 2021).

On November 8, 2021, Plaintiff filed a preemptive emergency motion requesting an injunction pending appeal, or an administrative injunction, "should the court refuse" to grant his requested relief. ECF No. 34, at 1. The court denied Plaintiff's emergency motion without prejudice as premature and stated that the court would consider a motion for a stay from the non-prevailing party following its ruling. *See* Min. Order (Nov. 9, 2021) (citing Fed. R. Civ. P. 62(d)).

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary" remedy that "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). To prevail on a motion for preliminary injunction, the movant bears the burden of showing that: (1) "he is likely to succeed on the merits"; (2) "he

is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the federal government is the opposing party, the balance of equities and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). In the past, courts in this jurisdiction have evaluated the four preliminary injunction factors on a "sliding scale"— a particularly strong showing in one factor could outweigh weakness in another. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). However, it is unclear if this approach has survived the Supreme Court's decision in *Winter*. *See, e.g.*, *Banks v. Booth*, 459 F. Supp. 3d 143, 149-50 (D.D.C. 2020) (citing *Sherley*, 644 F.3d at 393 (D.C. Cir. 2011)). Despite this uncertainty, each factor must still be present. Thus, if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief on that basis alone. *See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (citing *CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

III. ANALYSIS

A. Likelihood of Success on the Merits

1. Executive Privilege

This case presents the first instance since enactment of the PRA in which a former President asserts executive privilege over records for which the sitting President has refused to assert executive privilege. Plaintiff argues that at least some of the requested records reflect his decision-making and deliberations, as well as the decision-making of executive officials generally, and that those records should remain confidential. Specifically, Plaintiff claims such

records fall within two constitutionally recognized categories of executive privilege—the presidential communications privilege and deliberative process privilege—and that he can prevent their disclosure. He argues that his power to do so extends beyond his tenure in Office, in perpetuity, and that his assertion of privilege is binding on the current executive branch. Plaintiff also argues that to the extent the PRA constrains his ability to assert executive privilege, the Act is unconstitutional. In the alternative, he contends that when a former President and current President disagree about whether to assert privilege, a court must examine each disputed document and decide whether it is privileged.

Defendants acknowledge that executive privilege may extend beyond a President's tenure in office, but they emphasize that the privilege exists to protect the executive branch, not an individual. Therefore, they argue, the incumbent President—not a former President—is best positioned to evaluate the long-term interests of the executive branch and to balance the benefits of disclosure against any effect on the on the ability of future executive branch advisors to provide full and frank advice. The court agrees.

i. *The Executive Power and the Origins of Executive Privilege*

The Constitution vests all "executive Power" in the President, who "must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1 & § 3)). Only the "incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448. It is the incumbent President who is best situated to protect executive branch interests; the incumbent has "the information and attendant duty of executing the laws in the light of current facts and circumstances." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977). And

only the incumbent remains subject to "political checks against . . . abuse" of that power. *Nixon v. GSA*, 433 U.S. at 448.

The Constitution does not expressly define a President's right to confidential communications. The executive privilege "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibility." *Id.* at 447. Indeed, as far back as George Washington's presidency, it has been established that Presidents may "exercise a discretion" over disclosures to Congress, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. *Trump v. Mazars USA, LLP* (*Mazars*), 140 S. Ct. 2019, 2029-30 (2020) (quoting 1 Writings of Thomas Jefferson 189-90 (P. Ford ed. 1892)). The notion of executive privilege is "inextricably rooted in the separation of powers under the Constitution," and is meant to protect the President's ability to have full and unfettered discussions with advisors, liberated by the veil of confidentiality. *United States v. Nixon*, 418 U.S. 683, 708 (1974). The privilege "belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party." *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

Presidential conversations are presumptively privileged, but the privilege is not absolute. *Nixon v. GSA*, 433 U.S. at 447. It exists for the benefit of the Republic, not any individual, and accordingly, the presumption can be overcome by an appropriate showing of public need by the judicial or legislative branch. *See, e.g.*, *Nixon v. GSA*, 433 U.S. at 447, 449; *Nixon*, 418 U.S. at 707; *Senate Select Committee on Presidential Campaign Activities v. Nixon* (*Senate Select Committee*), 498 F.2d 725, 730 (D.C. Cir. 1974).

a) Senate Select Committee

In 1973, a special committee of the Senate was formed to investigate "illegal, improper or unethical activities" occurring in connection with then-President Nixon's presidential campaign and election of 1972. *Senate Select Comm.*, 498 F.2d at 726. The committee issued a subpoena to Nixon for tape recordings of his conversations with White House Counsel; in response, Nixon invoked executive privilege. *See id.* at 727. The D.C. Circuit noted that presidential conversations are presumptively privileged, and that the "presumption can be overcome only by an appropriate showing of public need." *Id.* at 730. Weighing these two principles, the court held that the committee had not overcome the presumption of privilege because it had not shown that the tapes were "demonstrably critical" to its investigation. *Id.* at 731. The court explained that because the House Committee on the Judiciary already had access to copies of the tapes, the special committee's stated interest was "merely cumulative" and not sufficient to overcome the presumption favoring confidentiality. *Id.* at 732.

ii. Former President's Ability to Assert Privilege

a) Nixon v. GSA

In 1974, shortly after he resigned from office, former President Nixon indicated that he intended to destroy tape recordings he made during his presidency. *See Nixon v. GSA*, 433 U.S. at 432. The legislative and executive branches, recognizing the public interest in such materials, intervened. Congress enacted, and President Ford signed, the PRMPA, to give custody of Nixon's records to the National Archives and to prohibit the destruction of the tapes or any other presidential materials. *See* H.R. Rep. No. 95-1487 at 5 (1978). Nixon sued, arguing that the PRMPA violated the separation of powers, presidential privilege, and several personal rights.

Nixon v. GSA, 433 U.S. at 439-55. The Supreme Court rejected each of his arguments, holding that the PRMPA was constitutional on its face. As to the separation of powers, the Court noted that the "Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter . . . vigorously supports . . . sustaining its constitutionality." *Id.* at 441. The Court further explained that "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443 (citing *Nixon*, 418 U.S. at 711-12).

The Supreme Court also examined whether Nixon could assert privilege over his presidential records and prevent their disclosure to the Archivist. It found, as a threshold matter, that the privilege survives the end of a President's tenure in office. *Id.* at 449. The Court explained that the basis for the privilege—to allow the President and his advisors the assurance of confidentiality in order to have full and frank discussions—"cannot be measured by the few months or years between the submission of the information and the end of the President's tenure." *Id.* It concluded that the privilege exists for the benefit of the Republic and is not tied to any one individual, and therefore survives the end of a President's term. *Id.*

But the Court also found that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, . . . a former President is in less need of it than an incumbent." *Id.* at 448. Consequently, the fact that neither former President Ford nor then-President Carter supported Nixon's contention that the PRMPA undermined the presidential communications privilege "detract[ed] from the weight" of Nixon's argument. *Id.* at 449. The

Court found that while the privilege may extend beyond the term of any one President, "the incumbent President is . . . vitally concerned with and in the best position to assess the present and future needs of the executive branch, and to support invocation of the privilege accordingly." *Id.*

The Court further held that Nixon's claim of privilege was outweighed by Congress' intent in enacting the PRMPA, noting that Congress had "substantial public interests" in enacting the statue, including Congress' "need to understand how [the] political processes [leading to former President Nixon's resignation] had in fact operated in order to gauge the necessity for remedial legislation." *Id.* at 453. The Court also observed that the "expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office." *Id.* at 451.

b) The Presidential Records Act

In the aftermath of *Nixon v. GSA*, Congress and the Executive established a framework under which a former President can assert privilege over Presidential records. As explained above, the Act permits an outgoing President to shield certain Presidential records for up to twelve years, with an exception for records that a House or Senate committee or subcommittee needs "for the conduct of its business and that is not otherwise available." 44 U.S.C. § 2205(2)(C).

iii. President Biden's Privilege Determination Outweighs that of Plaintiff

At bottom, this is a dispute between a former and incumbent President. And the Supreme Court has already made clear that in such circumstances, the incumbent's view is accorded greater weight. This principle is grounded in "the fact that the privilege is seen as inhering in the

institution of the Presidency, and not in the President personally." *Dellums*, 561 F.2d at 247 n.14 (citing *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 343 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977)). Only "the incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448. And it is the incumbent who is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *Id.* at 449.

Plaintiff does not acknowledge the deference owed to the incumbent President's judgment. His position that he may override the express will of the executive branch appears to be premised on the notion that his executive power "exists in perpetuity." Hearing Tr. at 19:21-22. But Presidents are not kings, and Plaintiff is not President. He retains the right to assert that his records are privileged, but the incumbent President "is not constitutionally obliged to honor" that assertion. *Public Citizen v. Burke*, 843 F.2d 1473, 1479 (D.C. Cir. 1988).[4] That is because

[4] Plaintiff also retains the right to assert his own personal "rights or privileges," if any. 44 U.S.C. § 2204; *see also Nixon v. GSA*, 433 U.S. at 455-83 (analyzing former President Nixon's assertion of personal rights, including privacy and First Amendment associational rights). Plaintiff, however, does not do so here. He makes conclusory assertions of attorney-client privilege and attorney work product, but he appears to do so as a species of executive privilege. *See, e.g.*, Pl.'s Mot. at 3 (referring indiscriminately to "various privileges," including "conversations with (or about) foreign leaders, attorney work product, the most sensitive national security secrets, along with a litany of privileged communications among a pool of potentially hundreds of people"); *id.* at 5 (referring without elaboration to "executive privilege and attorney-client privilege"); *id.* at 30 (referring to deliberative process privilege and attorney-client privilege in the same discussion relating to "the President").

In any event, Plaintiff does not elaborate on these claims with sufficient detail for this court to assess them, nor would any such claim be convincing, because the records maintained by the Archivist, by definition, only include those records reflecting the "activities, deliberations, decisions, and policies" of the Presidency, 44 U.S.C. § 2203(a), and not private communications. Plaintiff offers no evidence that the records contain anything of a personal nature; in fact, he concedes that the responsive records do not involve private conversations between him and a personal attorney. *See* Hearing Tr. at 60:21-61:6. The court need not credit Plaintiff's concern

Plaintiff is no longer situated to protect executive branch interests with "the information and attendant duty of executing the laws in the light of current facts and circumstances." *Dellums*, 561 F.2d at 247. And he no longer remains subject to political checks against potential abuse of that power. *Nixon v. GSA*, 433 U.S. at 448.

Moreover, contrary to Plaintiff's assertion that President Biden's decision not to invoke executive privilege is "unprecedented," Pl. Mot. at 2, history is replete with examples of past Presidents declining to assert the privilege. From President Nixon permitting the unrestricted congressional testimony of present and former White House staff members,[5] to President Ronald Reagan's decision to authorize testimony and the production of documents related to the Iran-Contra affair, including information about his communications and decision-making process,[6] to President George W. Bush's decision to sit for an interview with the 9/11 Commission to answer questions about his decision-making process in the wake of the attack,[7] past Presidents have balanced the executive branch's interest in maintaining confidential communications against the public's interest in the requested information. The Supreme Court noted that this tradition of

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in the abstract. *See Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (the congressional "power [of inquiry] and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions.").

[5] *See* Letter Responding to the Senate Select Committee on Presidential Campaign Activities Request for Presidential Testimony and Access to Presidential Papers (July 7, 1973), *Pub. Papers of Pres. Richard Nixon* 636, 637 (1973).

[6] *See* Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 100-433, S. Rep. No. 100-216, at xvi (1987).

[7] *See* Philip Shenon & David E. Sanger, *Bush and Cheney Tell 9/11 Panel of '01 Warnings*, N.Y. TIMES, Apr. 30, 2004, at A1, https://www.nytimes.com/2004/04/30/us/threats-responses-investigation-bush-cheney-tell-9-11-panel-01-warnings.html.

negotiation and compromise between the legislative and executive branches extends back to the administrations of Washington and Jefferson. *See Mazars*, 140 S. Ct. at 2029-31. President Biden's decision not to assert executive privilege because "Congress has a compelling need in service of its legislative functions to understand the circumstances" surrounding the events of January 6, *see* Pl. Mot., Exs. 4, 6, is consistent with historical practice and his constitutional power.

Plaintiff appears to view the dispute as resulting in some sort of equipoise, and asks the court to act as a tiebreaker, reviewing each disputed record *in camera*. The court, however, is not best situated to determine executive branch interests, and declines to intrude upon the executive function in this manner. It must presume that the incumbent is best suited to make those decisions on behalf of the executive branch. *See Nixon v. GSA*, 433 U.S. at 449. As the Supreme Court noted in *Mazars*, decisions about whether to accommodate congressional requests for information are best "hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Mazars*, 140 S. Ct. at 2029 (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel). When the legislative and executive branches agree that the nation's interest is best served by a disclosure to Congress, as they do here, then the court has a "duty of care to ensure that [it] does not needlessly disturb 'the compromises and working arrangements that [those] branches . . . themselves have reached." *Mazars*, 140 S. Ct. at 2031 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524-26 (2014)). Plaintiff has pointed to no legal authority mandating a different outcome.

The court therefore holds that Plaintiff's assertion of privilege is outweighed by President Biden's decision not to uphold the privilege, and the court will not second guess that decision by undertaking a document-by-document review that would require it to engage in a function reserved squarely for the Executive.

iv. *Plaintiff's Constitutional Challenge to the Presidential Records Act*

Plaintiff's argument that the PRA strips him of his constitutional rights is unavailing. The Act establishes a framework under which a former President may assert executive privilege, subject to the incumbent's decision on whether to uphold the privilege, which is consistent with the constitutional principle explained by the Court in *Nixon v. GSA*. *Compare Nixon v. GSA*, 433 U.S. at 449 (explaining that the incumbent President is best positioned "to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly"), *with* 44 U.S.C. § 2208(c)(1) (establishing that when a former President makes a privilege assertion, the Archivist shall then "determine whether the incumbent President will uphold the claim asserted by the former President"). And because the PRA applies only to "Presidential records," defined as records reflecting "the activities, deliberations, decisions, and policies" of the Presidency, Plaintiff's personal records, such as those reflecting conversations with a personal attorney or campaign staff, would not be subject to preservation or disclosure by the PRA. 44 U.S.C. § 2203(a); *see also* Hearing Tr. at 57:1-13 (counsel for NARA explaining that records relating to the president's own election, campaign activity, or strictly personal matters are not "Presidential records" and are thus sorted out during an accommodation process). Accordingly, the concerns at issue in *Mazars*, that Congress may attempt "to harass" the President about matters of a personal nature, are plainly not present here, where the records to be

produced are confined to Plaintiff's activities, deliberations, and decision making in his capacity as President. *Mazars*, 140 S. Ct. at 2034.

Nor does the Act disrupt the balance between the branches of government. "Congress and the President have an ongoing institutional relationship as the 'opposite and rival' political branches." *Mazars*, 140 S. Ct. at 2033 (quoting THE FEDERALIST NO. 51, at 349 (James Madison)). It is assumed that these two branches, guided by ambition, will act in furtherance and preservation of their own constitutional power, helping to ensure a balance of power between them. *See* THE FEDERALIST NO. 51, at 349. The executive branch became a party to the PRA's regulations over forty years ago when President Carter signed the Act into law. As President Carter said at the time, the PRA was enacted to "make the Presidency a more open institution," and to "ensure that Presidential papers remain public property after the expiration of a President's term." Presidential Statement on Signing the Presidential Records Act of 1978, 14 Weekly Comp. Pres. Doc. 39, 1965 (Nov. 6, 1978). President Carter's decision to sign the Act into law, and each subsequent President's—including Plaintiff's—acquiescence to its framework, demonstrates that the PRA does not prevent the executive branch from accomplishing its constitutionally assigned functions. Each "branch of Government has the duty initially to interpret the Constitution for itself, and that interpretation of its powers is due great respect from the other branches." *Nixon v. GSA*, 433 U.S. at 442-43 (citing *Nixon*, 418 U.S. at 708). *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these

circumstances, it usually means that the Federal Government as an undivided whole lacks power.") (footnote omitted). And finally, by interpreting the PRA's framework as consistent with *Nixon v. GSA*'s constitutional principle, the court adheres to the canon of constitutional avoidance. *See Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883) ("Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established.").

Applying these principles, the court rejects Plaintiff's constitutional challenge to the PRA.

1. Congress' Power to Request Presidential Records

Plaintiff argues that the Select Committee has ventured beyond its constitutionally allotted "legislative Powers" by requesting records that are unrelated to the events of January 6, and by failing to articulate any valid legislative purpose that could be served by its requests. *See* Pl. Mot. at 15-19. He further argues that the court must scrutinize the Select Committee's requests either by using the D.C. Circuit's balancing test in *Senate Select Committee*, 498 F.2d 725 (D.C. Cir. 1974), or the four-factor evaluation articulated by the Supreme Court in *Trump v. Mazars*, 140 S. Ct. 2019 (2020), and that the Committee's requests, having no valid legislative purpose, cannot survive such scrutiny.

Defendants counter that the Select Committee's legislative purpose is legitimate and compelling. Specifically, they contend that the Select Committee is investigating the facts, circumstances, and causes of the events of January 6, 2021, and that the requests are intended to support remedial legislation. *See* ECF No. 19, Comm. Br. at 18-22; NARA Br. at 15-27.

Defendants also maintain that neither the *Senate Select Committee* balancing test nor the four-factor *Mazars* test apply.

i. Legislative Powers

Article I of the Constitution grants Congress all "legislative Powers," U.S. Const. art. I, § 1, encompassed in which is the power to secure "needed information." *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). Indeed, the power to secure "needed information" is deeply rooted in the nation's history: "It was so regarded in the British Parliament and in the colonial Legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state Legislatures." *Id.* While the powers of the British Parliament and Congress are clearly not the same, there is "no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation." *Quinn v. United States*, 349 U.S. 155, 160 (1955).

That power permits "Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957). "From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* (citing James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168–194 (1926)). In the words of one former President—words later adopted by the Supreme Court:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand

> and direct. The informing function of Congress should be preferred even to its legislative function.

United States v. Rumely, 345 U.S. 41, 43 (1953) (quoting Woodrow Wilson, *Congressional Government: A Study in American Politics*, 303 (1913)). Thus, the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain*, 273 U.S. at 161). It is a "critical responsibility uniquely granted to Congress under Article I." *Trump v. Comm. on Oversight and Reform*, 380 F. Supp. 3d 76, 91 (D.D.C. 2019). To ensure that Congress is able to properly carry out that critical responsibility, its power to obtain information is necessarily "'broad' and 'indispensable.'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187). It "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.'" *Id.* In short, "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt*, 360 U.S. at 111.

Congress' power to obtain information, however, is not without limit. A congressional subpoena "must serve a valid legislative purpose; it must concern a subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031 (cleaned up). Consequently, a congressional request for information that extends "to an area in which Congress is forbidden to legislate," is out of bounds. For example, "Congress may not use subpoenas to try someone before a committee for any crime or wrongdoing," because "such powers are assigned under our Constitution to the Executive and Judiciary." *Id.* (cleaned up). Nor is there a "congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200. "Investigations conducted solely for the

personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.* at 187. On the other hand, an inquiry is not illegitimate simply because it calls for information that is private or confidential, might be embarrassing, or could have law enforcement implications. *See, e.g.*, *id.* at 198; *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938) (the fact that a congressional inquiry might seem "incompetent, irrelevant," "embarrass[ing]," or even "impertinent" is generally immaterial).

When a court is asked to decide whether Congress has used its investigative power improperly, its analysis must be highly deferential to the legislative branch. Courts "are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed." *McGrain*, 273 U.S. at 178. *See also Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 619 (1929) (holding that "the proceedings of the houses of Congress, when acting upon matters within their constitutional authority" are entitled to a "presumption in favor of regularity"). Moreover, the Supreme Court has repeatedly held that courts may not "test[ ] the motives of committee members" to negate an otherwise facially valid legislative purpose. *Watkins*, 354 U.S. at 200; *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). Accordingly, it is not this court's role to decide whether Congress is motivated to aid legislation or exact political retribution; rather, the key factor is whether there is some discernable legislative purpose. *See Watkins*, 354 U.S. at 200.

ii. The Select Committee's Requests Serve a Valid Legislative Purpose

The Supreme Court considers congressional resolutions a primary source from which to determine whether information "was sought . . . in aid of the legislative function." *McGrain*, 273 U.S. at 176; *see also Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968) (observing that relevant sources of evidence to "ascertain whether [an inquiry] is within the broad investigative authority of Congress" include "the resolution authorizing the inquiry"). Accordingly, the court begins its inquiry with the resolution stating the Select Committee's intended purpose. H.R. 503, which established the Select Committee and the subject matter within its purview, outlines several purposes and functions of the Select Committee, including:

- Obtaining information and reporting on (1) "the facts, circumstances, and causes relating to" the January 6 attack and "the interference with the peaceful transfer of power"; (2) the "activities of intelligence agencies, law enforcement agencies, and the Armed Forces, . . . with respect to intelligence collection, analysis, and dissemination" surrounding the attack; and (3) the "influencing factors that contributed to the" attack, including how "online platforms, financing, and . . . campaigns may have factored into [its] motivation, organization, and execution," *id.* §§ 3, 4(a)(1);

- Identifying, reviewing, and evaluating "the causes of and the lessons learned from the" January 6 attack, including as to "the command, control, and communications of" law enforcement and the coordination and planning of the Federal Government, *id.* § 4(a)(2); and

- Issuing "a final report to the House" with "recommendations for . . . changes in law, policy, [or] procedures . . . that could be taken[ ] to prevent future acts of violence, domestic terrorism, and domestic violent extremism, including acts targeted at American democratic institutions" . . . and "strengthen the security and resilience of" American democratic institutions, *id.* § 4(a)(3), (c).

Defendants argue that, as set forth in H.R. 503, the Select Committee's August 25 requests are in furtherance of an effort to understand the facts and circumstances that led to the events of January 6, inform its final report, and make recommendations for legislative changes. The Committee Defendants contend that they have questions and concerns about election

integrity, coordination of law enforcement, use of executive resources to pressure Department of Justice and state officials regarding the election outcome, and building safety, and that their investigation into these areas for legislative purposes is legitimate. *See id.*

Plaintiff concedes that the statements in H.R. 503 concerning "safety and election integrity are topics on which legislation theoretically 'could be had.'" Pl. Mot. at 19. He argues however, that the Committee does not "explain with any specificity how this information will in fact assist the Committee in evaluating the proposed legislation" and that the requested information is not "reasonably related" to its investigation. *Id.* at 17, 19.

Plaintiff contends that the Select Committee "fails to identify a single piece of legislation [] the Committee is considering." This claim is a straw man. Congress need not (and usually does not) identify specific legislation within the context of a request for documents or testimony, nor must it do so when establishing a select committee or when that committee requests documents. For instance, the Supreme Court has upheld the validity of a select committee subpoena even though the Senate's "resolution directing the investigation d[id] not in terms avow that it is intended to be in aid of legislation." *McGrain*, 273 U.S. at 177; *see also In re Chapman*, 166 U.S. 661, 669-70 (1897) ("[I]t was certainly not necessary that the resolutions should declare in advance what the [S]enate meditated doing when the investigation was concluded."). The Court found the subpoena valid because the investigation's subject "was one on which legislation *could be had* and would be materially aided by the information which the investigation was calculated to elicit." *McGrain*, 273 U.S. at 177 (emphasis added).

The court has no difficulty discerning multiple subjects on which legislation "could be had" from the Select Committee's requests. *Id.* at 177. Some examples include enacting or

amending criminal laws to deter and punish violent conduct targeted at the institutions of democracy, enacting measures for future executive enforcement of Section 3 of the Fourteenth Amendment against any Member of Congress or Officer of the United States who engaged in "insurrection or rebellion," or gave "aid or comfort to the enemies thereof," U.S. Const. amend. XIV, § 3, imposing structural reforms on executive branch agencies to prevent their abuse for antidemocratic ends, amending the Electoral Count Act, and reallocating resources and modifying processes for intelligence sharing by federal agencies charged with detecting, and interdicting, foreign and domestic threats to the security and integrity of our electoral processes. *See* Comm. Br. at 20; NARA Br. at 18; ECF No. 25, Amicus Br. by Former Members of Congress at 7. These are just a few examples of potential reforms that Congress might, as a result of the Select Committee's work, conclude are necessary or appropriate to securing democratic processes, deterring violent extremism, protecting fair elections, and ensuring the peaceful transition of power. Of course, other forms of legislation not currently imagined may also follow. The critical fact is that Congress reasonably might consider the requested records in deciding whether to legislate in a host of legitimate areas.

To be sure, the Committee has cast a wide net. While some of the requests pertain to Plaintiff's communications and actions, the former Vice President, and other former executive officials on January 6, 2021, other requests more broadly seek information regarding events leading up to January 6, including communications concerning the election, conversations between Plaintiff and Department of Justice and state government officials regarding Plaintiff's allegations that the election was "rigged," records relating to the recruitment, planning, and preparation for rallies leading up to and including January 6, and conversations regarding the

process for transferring power to the incumbent. For example, one of the Committee's requests is for all documents and communications from April 1, 2020, through January 20, 2021, related to the 2020 presidential election, including forecasting, polling, or results, which were authored or presented by, or relate in any way to one of five specific individuals who the Committee presumably believes were involved in strategies to delay, halt, or otherwise impede the electoral count. Pl. Mot., Ex. 1 at 5. Another similarly broad request seeks all documents and communications concerning the 2020 election and relating to any of one of forty named individuals who the Committee presumably believes participated in the recruitment, planning, and preparations for rallies on days leading up to and including January 6. *Id.* at 7-8.

While broad, these requests, and each of the other requests made by the Committee, do not exceed the Committee's legislative powers. Three facts undergird this conclusion.

First, the court again notes that the Committee's requests pertain only to "Presidential records," which by statute are limited to records reflecting "the activities, deliberations, decisions, and policies" of the Presidency. 44 U.S.C. § 2203(a). Accordingly, there is a natural, statutory limit on the types of records that will ultimately be maintained in the Archives and produced to the Select Committee in response to its requests. For example, although the Select Committee has requested certain records, such as polling data, concerning the 2020 election dating back to April 2020, those records, by their very nature, are not Presidential records under the statute, and would not be included in any responsive document tranches sent to the Committee. The same goes for any personal papers or communications.

Second, while some of the Select Committee's requests are indeed broad, so too is Congress' power to obtain information. *See Watkins*, 354 U.S. at 187. The Select Committee

appears to be operating under the theory that January 6 did not take place in a vacuum, and instead was the result of a months-long groundswell. *See* Hearing Tr. at 41:4-7; 42:22-23. Defendants argue that to identify effective reforms, Congress must first understand the circumstances leading up to January 6 and how the actions of Plaintiff, his advisors, and other government officials contributed or responded to that groundswell. NARA Br. at 18. The court notes that the Select Committee reasonably could find it necessary to investigate the extent to which the January 6 attack on the Capitol may have been an outgrowth of a sustained effort to overturn the 2020 election results, involving individuals both in and outside government. But the "very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509. In fact, the Committee need not enact any legislation at all. *Trump v. Mazars USA, LLP*, 940 F.3d 710, 727 (D.C. Cir. 2019) (explaining that the "House is under no obligation to enact legislation after every investigation"). Nor is it problematic that some requests might ultimately return records that are "irrelevant," or "impertinent" to its stated goals. *Townsend*, 95 F.2d at 361. It is not for this court to decide whether the Select Committee's objective is prudent or their motives pure. *See Watkins*, 354 U.S. at 200; *Eastland*, 421 U.S. at 508. Instead, the pertinent question is whether Congress could legitimately legislate in these areas, and, as explained above, it can.

Third, President Biden's decision not to assert the privilege alleviates any remaining concern that the requests are overly broad. In cases such as *Mazars*, which involved separation of powers concerns, limitations on the breadth of a congressional inquiries serve as "important safeguards against unnecessary intrusion into the operation of the Office of the President."

Mazars, 140 S. Ct. at 2036. Plaintiff argues that the requests at issue here are burdensome because they are "unbelievably broad" and that their breadth is "striking" because they could "be read to include every single e-mail sent in the White House" on January 6. *See* Pl. Mot. at 21-24. But upon whom is the burden imposed? President Biden has determined that the requests are not so intrusive or burdensome on the Office of the President as to outweigh Congress' "compelling need in service of its legislative functions." Pl. Mot., Ex. 4 at 1-2. Unlike the circumstances presented in *Mazars*, here, the legislative and executive branches are in harmony and agree that the requests are not unduly intrusive, thus extinguishing any lingering concerns about the breadth of the requests.

iii. *The Alternative* Mazars *Standard Results in the Same Outcome*

Plaintiff urges the court to apply either the balancing test from *Senate Select Committee*, 498 F.2d 725 (1974), or the four-factor standard from *Trump v. Mazars*, 140 S. Ct. 2019 (2020). In the alternative, Plaintiff argues that the court could apply a "*Mazars* lite" test by applying the four *Mazars* factors, but using "reduced judicial scrutiny," "cognizant of the fact that this case now involves a subpoena directed at a former President." *Trump v. Mazars, USA, LLP*, No. 19-cv-01136, 2021 WL 3602683, at *13 (D.D.C. Aug. 11, 2021), *appeal pending*, No. 21-5176 (D.C. Cir.).

Defendants argue that neither the *Senate Select Committee* or *Mazars* standards apply because both cases involved Congressional requests for information from a sitting President, and therefore presented separation of powers concerns arising from a "clash between rival branches of government." *Mazars*, 140 S. Ct. at 2034. Defendants contend that the "*Mazars* lite" approach is inappropriate because, unlike the situation when *Mazars* was decided on remand,

"the executive branch has agreed to provide the requested documents under the PRA, and compulsory process is not at issue." NARA Br. at 23.

The court agrees that the stringent balancing test of *Senate Select Committee* does not apply because, for reasons already stated, the requested records are not privileged. Indeed, at oral argument, Plaintiff's counsel did not mention this test and instead asserted only that the *Mazars* four-factor test is appropriate. *See* Hearing Tr. at 8:12-16. The court also agrees with Defendants that Plaintiff's status as a former President, and the fact that the legislative and executive branches agree that the records should be produced, reduces the import of the *Mazars* test. Each of Plaintiff's arguments about why *Mazars* is applicable assumes separation of powers concerns that have little, if any, force here. Nonetheless, because this is a matter of first impression, the court will apply the four *Mazars* factors, conscious of the fact that Plaintiff is a former President.

Under the first *Mazars* factor, "the asserted legislative purpose" must warrant "the significant step of involving the President and his papers." *Id.* at 2035. "Congress may not rely on the President's information if other sources could reasonably provide" the information Congress needs in light of its legislative objective. *Id.* at 2035–36. The court starts with the obvious: the concerns raised by the "significant step" in *Mazars* are plainly not present here, where Plaintiff is no longer President, and the incumbent President has decided that Congress' legislative purpose warrants production. *See* Pl. Mot., Ex. 4. Moreover, the Select Committee has demonstrated that its asserted legislative purpose is indeed significant. It seeks to learn about what, if anything, Plaintiff, his advisors, other government officials, and those close to him knew about efforts to obfuscate or reverse the results of the 2020 election, recruitment, planning, and

coordination of the January 6 rally, the likelihood of the protest turning violent, and what actions they took in response. *See* Pl. Mot., Ex. 1. Plaintiff has not identified any source from which the Select Committee could gain answers to these questions other than the Presidential records they seek. *See* Pl. Mot. at 19 (offering only the conclusory statement that the Select Committee "could obtain any and all of the information it seeks" from non-privileged sources); Hearing Tr. at 16:10-13 (suggesting without evidence or explanation that non-privilege documents should be sufficient). Accordingly, the Select Committee clears the first hurdle.

Second, under *Mazars*, the congressional inquiry should be "no broader than reasonably necessary to support Congress' legislative objective." *Id.* This limitation is necessary, the Court explained, to "safeguard against unnecessary intrusion into the operation of the Office of the President." *Id.* (cleaned up); *see also Nixon v. GSA*, 433 U.S. at 443 (explaining that "the proper inquiry" for courts is to consider the extent to which a congressional act "prevents the Executive Branch from accomplishing its constitutionally assigned functions"). Here, President Biden has not objected to any of the requests as being overly broad or unnecessarily intrusive. His counsel has reviewed the first three tranches of responsive records and stated that President Biden supports their production because of Congress' compelling interest in them. *See* Pl. Mot., Exs. 4, 6. Plaintiff's argument to the contrary, that the Select Committee's "broad" requests are overly intrusive into the operations of an office he no longer occupies, is therefore unpersuasive.

Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036. "[U]nless Congress adequately identifies its aims and explains why the President's information will advance its consideration of possible legislation," "it is impossible to conclude that a

subpoena is designed to advance a valid legislative purpose." *Id.* The Select Committee has adequately identified its aims and indicated why the requested records may support a valid legislative purpose. As noted above, the Select Committee was created to investigate the facts and circumstances of the January 6 attack, including "influencing factors that contributed to the attack." H.R. 503 § 4(a)(1)(B). Defendants tie this aim to the Committee's Presidential records requests by pointing to Plaintiff's statements claiming the election was "rigged," promoting the January 6 rally, and calling on his supporters to "walk down to the Capitol" to "take back our country," Comm. Br. at 7, public reports regarding Plaintiff's efforts to pressure Department of Justice and state officials to reverse the election results, *id.* at 5-7, and the Committee's findings about the effort of Plaintiff's former aides to stop or delay the counting of election results, H.R. Rep. No. 117-152, at 6 (Oct. 19, 2021). The Committee could reasonably expect the requested records to shed light on any White House planning and strategies concerning public messaging about the election, any efforts to halt or delay the electoral count, and preparations for and responses to the January 6 rally and attack. *See* Pl. Mot., Ex. 1 at 4, 7-9. Such information would be plainly material to the Select Committee's mandate to discover and report on "the facts, circumstances, and causes relating to the January 6 [attack]," H.R. 503, § 3(1), and to pass remedial legislation in any number of previously identified areas within their legislative purview.

Fourth, courts should "assess the burdens imposed on the President by [the] subpoena" because "[the burdens] stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Mazars*, 140 S. Ct. at 2036. Defendants satisfy this factor as well, because the "burdens imposed on the President" by the Committee's request are of considerably less significance when the Presidential records

sought pertain to a former President and when the incumbent President favors the production. *Mazars*, 2021 WL 3602683, at *13. Moreover, unlike the compulsory nature of the subpoena in *Mazars*, here, the Select Committee made its request pursuant to a statutory framework to which the executive branch is a party and has long acquiesced. This fact, too, undermines any notion that the office of the President is unduly burdened by the requests.

Having found that all four *Mazars* factors weigh against Plaintiff's position, the court concludes that the Select Committee's requests are a valid use of legislative power and refuses to enjoin what the legislative and executive branches agree is a vitally important endeavor.

B. Irreparable Harm

A party seeking preliminary injunctive relief must show an imminent threat of irreparable harm by the challenged action or inaction. The "injury must be both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (cleaned up).

Plaintiff fails to show that any irreparable injury is likely to occur. First, to the extent Plaintiff argues that he, as a private citizen, will suffer injury, he has not identified any personal interest that is threatened by the production of Presidential records. He claims no personal interest in the records or the information they contain, and he identifies no cognizable injury to privacy, property, or otherwise that he personally will suffer if the records are produced, much less a harm that is "both certain and great," *id.*, 787 F.3d at 555, if injunctive relief is denied.

Second, Plaintiff's argument that the executive branch will suffer injury is similarly unavailing. Plaintiff invokes the executive privilege protecting presidential communications,

contending that compliance with the Select Committee's requests "will undoubtedly cause sustainable injury and irreparable harm" to future Presidents because releasing confidential communications between him and his advisors concerning his duties and responsibilities as President to a "rival branch of government" will "chill[ ] advice given by presidential aides[.]" Pl.'s Mot. at 6-7, 36. That privilege, however, is not for the benefit of any "individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449. Moreover, the notion that the contemplated disclosure will gravely undermine the functioning of the executive branch is refuted by the incumbent President's direction to the Archivist to produce the requested records, and by the actions of past Presidents who similarly decided to waive executive privilege when dealing with matters of grave public importance, such as the Watergate scandal, the Iran-Contra affair, and 9/11. Plaintiff therefore has made no showing of imminent irreparable harm to any interests protected by executive privilege that compels an immediate halt to compliance with the Select Committee's requests.

Plaintiff also contends that an injunction is needed to protect against a risk of inadvertent disclosure of privileged documents, allegedly due to the "short time periods" provided under the PRA for review of potentially large volumes of records whose sensitivity may not be apparent if their authors or custodians cannot be readily ascertained. *See* Pl.'s Mot. at 37. This too is not a convincing injury. Thus far, Plaintiff's PRA representatives have successfully reviewed the records in the first three tranches, and Plaintiff has invoked privilege over many of them. Moreover, NARA routinely accommodates requests from former Presidents for additional time to complete their reviews when the volume or complexity of records requires. NARA Br., Laster Decl. ¶ 11. NARA maintains the records in the same order and manner of organization as they

were transmitted by the outgoing administration. *Id.* ¶ 6. To the extent practicable and necessary, NARA informs the PRA representatives where the responsive records came from, such as from a staff member's office files. *Id.* And when asked, NARA also assists former Presidents in identifying records' authors and custodians. *Id.* ¶ 11. These accommodations are sufficient to mitigate any claim by Plaintiff that he is prejudiced by the PRA statutory process.

C. Balance of the Equities and the Public Interest

The legislative and executive branches believe the balance of equities and public interest are well served by the Select Committee's inquiry. The court will not second guess the two branches of government that have historically negotiated their own solutions to congressional requests for presidential documents. *See Mazars*, 140 S. Ct. 2029-31.

Defendants contend that discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance because such information relates to our core democratic institutions and the public's confidence in them. NARA Br. at 41. The court agrees. As the Supreme Court has explained, "the American people's ability to reconstruct and come to terms" with their history must not be "truncated by an analysis of Presidential privilege that focuses only on the needs of the present." *Nixon v. GSA*, 433 U.S. at 452-53. The desire to restore public confidence in our political process, through information, education, and remedial legislation, is of substantial public interest. *See id.*

Plaintiff argues that the public interest favors enjoining production of the records because the executive branch's interests are best served by confidentiality and Defendants are not harmed by delaying or enjoining the production. Neither argument holds water. First, the incumbent President has already spoken to the compelling public interest in ensuring that the Select

Committee has access to the information necessary to complete its investigation. And second, the court will not give such short shrift to the consequences of "halt[ing] the functions of a coordinate branch." *Eastland*, 421 U.S. at 511 n.17. Binding precedent counsels that judicially imposed delays on the conduct of legislative business are often contrary to the public interest. *See id.*; *see also Exxon Corp. v. F.T.C.*, 589 F.2d 582, 589 (D.C. Cir. 1978) (describing *Eastland* as emphasizing "the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress").

Accordingly, the court holds that the public interest lies in permitting—not enjoining—the combined will of the legislative and executive branches to study the events that led to and occurred on January 6, and to consider legislation to prevent such events from ever occurring again.

IV. CONCLUSION

For reasons explained above, the court will deny Plaintiff's request to enjoin Defendants from enforcing or complying with the Select Committee's August 25, 2021, requests because Plaintiff is unlikely to succeed on the merits of his claims or suffer irreparable harm, and because a balance of the equities and public interest bear against granting his requested relief.

Date: November 9, 2021

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX F

U.S. CONSTITUTION

ARTICLE I, SECTION 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONSTITUTION

ARTICLE II, SECTION 1, CLAUSE 1

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

44 U.S.C. 2204-2205

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute

(A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)

(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of--

(A) (i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of--

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1) [sic: should reference 2203(g)(1)]; or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)

(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section

shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208--

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available--

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

36 CFR § 1270.44 - EXCEPTIONS TO RESTRICTED ACCESS.

§ 1270.44 Exceptions to restricted access.

(a) Even when a President imposes restrictions on access under § 1270.40, NARA still makes Presidential records of former Presidents available in the following instances, subject to any rights, defenses, or privileges which the United States or any agency or person may invoke:

(1) To a court of competent jurisdiction in response to a properly issued subpoena or other judicial process, for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the President seeks records that contain information they need to conduct current Presidential business and the information is not otherwise available;

(3) To either House of Congress, or to a congressional committee or subcommittee, if the congressional entity seeks records that contain information it needs to conduct business within its jurisdiction and the information is not otherwise available; or

(4) To a former President or their designated representative for access to the Presidential records of that President's administration, except that the Archivist does not make any original Presidential records available to a designated representative that has been convicted of a crime that involves reviewing, retaining, removing, or destroying NARA records.

(b) The President, either House of Congress, or a congressional committee or subcommittee must request the records they seek under paragraph (a) of this section from the Archivist in writing and, where practicable, identify the records with reasonable specificity.

(c) The Archivist promptly notifies the President (or their representative) during whose term of office the record was created, and the incumbent President (or their representative) of a request for records under paragraph (a) of this section.

(d) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under this section, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days after the date of the Archivist's notice. The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(e) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

(1) The incumbent President withdraws the privilege claim; or

(2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

(f)

(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

(i) The incumbent President withdraws the decision upholding the claim; or

(ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in paragraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(g) The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section.

The White House

January 21, 2009

Executive Order 13489 -- Presidential Records

Executive Order -- Presidential Records

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures governing the assertion of executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration (NARA) pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "NARA" refers to the National Archives and Records Administration.

(c) "Presidential Records Act" refers to the Presidential Records Act, 44 U.S.C. 2201-2207.

(d) "NARA regulations" refers to the NARA regulations implementing the Presidential Records Act, 36 C.F.R. Part 1270.

(e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act, including Vice Presidential records.

(f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A "substantial question of executive privilege" exists if NARA's disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch.

(h) A "final court order" is a court order from which no appeal may be taken.

Sec. 2. Notice of Intent to Disclose Presidential Records.

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, using any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of executive privilege. However, nothing in this order is intended to affect the right of the incumbent or former Presidents to invoke executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of executive privilege by the incumbent or

former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. Claim of Executive Privilege by Incumbent President.

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other executive agencies as they deem appropriate concerning whether invocation of executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of executive privilege is not justified. The Archivist shall be notified promptly of any such determination.

(c) If either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney

General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. Claim of Executive Privilege by Former President.

(a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered

to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. General Provisions.

(a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 6. Revocation. Executive Order 13233 of November 1, 2001, is revoked.

BARACK OBAMA

THE WHITE HOUSE,

January 21, 2009

APPENDIX G

117TH CONGRESS
1ST SESSION

H. RES. 503

Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol.

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 2021

Ms. PELOSI submitted the following resolution; which was referred to the Committee on Rules

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RESOLUTION

Establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol.

Whereas January 6, 2021, was one of the darkest days of our democracy, during which insurrectionists attempted to impede Congress's Constitutional mandate to validate the presidential election and launched an assault on the United States Capitol Complex that resulted in multiple deaths, physical harm to over 140 members of law enforcement, and terror and trauma among staff, institutional employees, press, and Members;

Whereas, on January 27, 2021, the Department of Homeland Security issued a National Terrorism Advisory System Bulletin that due to the ''heightened threat environment across the United States,'' in which ''[S]ome ideologically-motivated violent extremists with objections to the

exercise of governmental authority and the presidential transition, as well as other perceived grievances fueled by false narratives, could continue to mobilize to incite or commit violence.'' The Bulletin also stated that—

(1) ''DHS is concerned these same drivers to violence will remain through early 2021 and some DVEs [domestic violent extremists] may be emboldened by the January 6, 2021 breach of the U.S. Capitol Building in Washington, D.C. to target elected officials and government facilities.''; and

(2) ''Threats of violence against critical infrastructure, including the electric, telecommunications and healthcare sectors, increased in 2020 with violent extremists citing misinformation and conspiracy theories about COVID–19 for their actions'';

Whereas, on September 24, 2020, Director of the Federal Bureau of Investigation Christopher Wray testified before the Committee on Homeland Security of the House of Representatives that—

(1) ''[T]he underlying drivers for domestic violent extremism – such as perceptions of government or law enforcement overreach, sociopolitical conditions, racism, anti-Semitism, Islamophobia, misogyny, and reactions to legislative actions – remain constant.'';

(2) ''[W]ithin the domestic terrorism bucket category as a whole, racially-motivated violent extremism is, I think, the biggest bucket within the larger group. And within the racially-motivated violent extremists bucket, people subscribing to some kind of white supremacist-type ideology is certainly the biggest chunk of that.''; and

(3) ''More deaths were caused by DVEs than international terrorists in recent years. In fact, 2019 was the

deadliest year for domestic extremist violence since the Oklahoma City bombing in 1995'';

Whereas, on April 15, 2021, Michael Bolton, the Inspector General for the United States Capitol Police, testified to the Committee on House Administration of the House of Representatives that—

(1) ''The Department lacked adequate guidance for operational planning. USCP did not have policy and procedures in place that communicated which personnel were responsible for operational planning, what type of operational planning documents its personnel should prepare, nor when its personnel should prepare operational planning documents.''; and

(2) ''USCP failed to disseminate relevant information obtained from outside sources, lacked consensus on interpretation of threat analyses, and disseminated conflicting intelligence information regarding planned events for January 6, 2021.''; and

Whereas the security leadership of the Congress under-prepared for the events of January 6th, with United States Capitol Police Inspector General Michael Bolton testifying again on June 15, 2021, that—

(1) ''USCP did not have adequate policies and procedures for FRU (First Responder Unit) defining its overall operations. Additionally, FRU lacked resources and training for properly completing its mission.'';

(2) ''The Department did not have adequate policies and procedures for securing ballistic helmets and vests strategically stored around the Capitol Complex.''; and

(3) ''FRU did not have the proper resources to complete its mission.'': Now, therefore, be it

Resolved,

SECTION 1. ESTABLISHMENT.

There is hereby established the Select Committee to Investigate the January 6th Attack on the United States Capitol (hereinafter referred to as the ''Select Committee'').

SEC. 2. COMPOSITION.

(a) APPOINTMENT OF MEMBERS.—The Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader.

(b) DESIGNATION OF CHAIR.—The Speaker shall designate one Member to serve as chair of the Select Committee.

(c) VACANCIES.—Any vacancy in the Select Committee shall be filled in the same manner as the original appointment.

SEC. 3. PURPOSES.

Consistent with the functions described in section 4, the purposes of the Select Committee are the following:

(1) To investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex (hereafter referred to as the ''domestic terrorist attack on the Capitol'') and relating to the interference with the peaceful transfer of power, including facts and causes relating to the

preparedness and response of the United States Capitol Police and other Federal, State, and local law enforcement agencies in the National Capital Region and other instrumentalities of government, as well as the influencing factors that fomented such an attack on American representative democracy while engaged in a constitutional process.

(2) To examine and evaluate evidence developed by relevant Federal, State, and local governmental agencies regarding the facts and circumstances surrounding the domestic terrorist attack on the Capitol and targeted violence and domestic terrorism relevant to such terrorist attack.

(3) To build upon the investigations of other entities and avoid unnecessary duplication of efforts by reviewing the investigations, findings, conclusions, and recommendations of other executive branch, congressional, or independent bipartisan or nonpartisan commission investigations into the domestic terrorist attack on the Capitol, including investigations into influencing factors related to such attack.

SEC. 4. FUNCTIONS.

(a) FUNCTIONS.—The functions of the Select Committee are to—

(1) investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol, including facts and circumstances relating to—

(A) activities of intelligence agencies, law enforcement agencies, and the Armed Forces, including with respect to intelligence collection, analysis, and dissemination and information sharing among the branches and other instrumentalities of government;

(B) influencing factors that contributed to the domestic terrorist attack on the Capitol and how technology, including online platforms, financing, and malign foreign influence operations and campaigns may have factored into the motivation, organization, and execution of the domestic terrorist attack on the Capitol; and

(C) other entities of the public and private sector as determined relevant by the Select Committee for such investigation;

(2) identify, review, and evaluate the causes of and the lessons learned from the domestic terrorist attack on the Capitol regarding—

(A) the command, control, and communications of the United States Capitol Police, the Armed Forces, the National Guard, the Metropolitan Police Department of the District of Columbia, and other Federal, State, and local law enforcement agencies in the National Capital Region on or before January 6, 2021;

(B) the structure, coordination, operational plans, policies, and procedures of the Federal Government, including as such relate to State and local governments and nongovernmental entities, and particularly with respect to detecting, preventing, preparing for, and responding to targeted violence and domestic terrorism;

(C) the structure, authorities, training, manpower utilization, equipment, operational planning, and use of force policies of the United States Capitol Police;

(D) the policies, protocols, processes, procedures, and systems for the sharing of intelligence and other information by Federal, State, and local agencies with the United States Capitol Police, the Sergeants at Arms of the House of Representatives and Senate, the Government of the District of Columbia, including the Met-

ropolitan Police Department of the District of Columbia, the National Guard, and other Federal, State, and local law enforcement agencies in the National Capital Region on or before January 6, 2021, and the related policies, protocols, processes, procedures, and systems for monitoring, assessing, disseminating, and acting on intelligence and other information, including elevating the security posture of the United States Capitol Complex, derived from instrumentalities of government, open sources, and online platforms; and

(E) the policies, protocols, processes, procedures, and systems for interoperability between the United States Capitol Police and the National Guard, the Metropolitan Police Department of the District of Columbia, and other Federal, State, and local law enforcement agencies in the National Capital Region on or before January 6, 2021; and

(3) issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures described in subsection (c) as it may deem necessary.

(b) REPORTS.—

(1) INTERIM REPORTS.—In addition to the final report addressing the matters in subsection (a) and section 3, the Select Committee may report to the House or any committee of the House from time to time the results of its investigations, together with such detailed findings and legislative recommendations as it may deem advisable.

(2) TREATMENT OF CLASSIFIED OR LAW ENFORCEMENT-SENSITIVE MATTER.—Any report issued by the Select Committee shall be issued in unclassified form but may include a classified annex, a law enforcement-sensitive annex, or both.

(c) CORRECTIVE MEASURES DESCRIBED.—The corrective measures described in this subsection may include changes in law, policy, procedures, rules, or regulations that could be taken—

(1) to prevent future acts of violence, domestic terrorism, and domestic violent extremism, including acts targeted at American democratic institutions;

(2) to improve the security posture of the United States Capitol Complex while preserving accessibility of the Capitol Complex for all Americans; and

(3) to strengthen the security and resilience of the United States and American democratic institu-

tions against violence, domestic terrorism, and domestic violent extremism.

(d) NO MARKUP OF LEGISLATION PERMITTED.—The Select Committee may not hold a markup of legislation.

SEC. 5. PROCEDURE.

(a) ACCESS TO INFORMATION FROM INTELLIGENCE COMMUNITY.—Notwithstanding clause 3(m) of rule X of the Rules of the House of Representatives, the Select Committee is authorized to study the sources and methods of entities described in clause 11(b)(1)(A) of rule X insofar as such study is related to the matters described in sections 3 and 4.

(b) TREATMENT OF CLASSIFIED INFORMATION.—Clause 11(b)(4), clause 11(e), and the first sentence of clause 11(f) of rule X of the Rules of the House of Representatives shall apply to the Select Committee.

(c) APPLICABILITY OF RULES GOVERNING PROCEDURES OF COMMITTEES.—Rule XI of the Rules of the House of Representatives shall apply to the Select Committee except as follows:

(1) Clause 2(a) of rule XI shall not apply to the Select Committee.

(2) Clause 2(g)(2)(D) of rule XI shall apply to the Select Committee in the same manner as it ap-

plies to the Permanent Select Committee on Intelligence.

(3) Pursuant to clause 2(h) of rule XI, two Members of the Select Committee shall constitute a quorum for taking testimony or receiving evidence and one-third of the Members of the Select Committee shall constitute a quorum for taking any action other than one for which the presence of a majority of the Select Committee is required.

(4) The chair of the Select Committee may authorize and issue subpoenas pursuant to clause 2(m) of rule XI in the investigation and study conducted pursuant to sections 3 and 4 of this resolution, including for the purpose of taking depositions.

(5) The chair of the Select Committee is authorized to compel by subpoena the furnishing of information by interrogatory.

(6)(A) The chair of the Select Committee, upon consultation with the ranking minority member, may order the taking of depositions, including pursuant to subpoena, by a Member or counsel of the Select Committee, in the same manner as a standing committee pursuant to section 3(b)(1) of House Resolution 8, One Hundred Seventeenth Congress.

(B) Depositions taken under the authority prescribed in this paragraph shall be governed by the procedures submitted by the chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021.

(7) Subpoenas authorized pursuant to this resolution may be signed by the chair of the Select Committee or a designee.

(8) The chair of the Select Committee may, after consultation with the ranking minority member, recognize—

(A) Members of the Select Committee to question a witness for periods longer than five minutes as though pursuant to clause 2(j)(2)(B) of rule XI; and

(B) staff of the Select Committee to question a witness as though pursuant to clause 2(j)(2)(C) of rule XI.

(9) The chair of the Select Committee may postpone further proceedings when a record vote is ordered on questions referenced in clause 2(h)(4) of rule XI, and may resume proceedings on such postponed questions at any time after reasonable notice. Notwithstanding any intervening order for the previous question, an underlying proposition shall re-

main subject to further debate or amendment to the same extent as when the question was postponed.

(10) The provisions of paragraphs (f)(1) through (f)(12) of clause 4 of rule XI shall apply to the Select Committee.

SEC. 6. RECORDS; STAFF; TRAVEL; FUNDING.

(a) SHARING RECORDS OF COMMITTEES.—Any committee of the House of Representatives having custody of records in any form relating to the matters described in sections 3 and 4 shall provide copies of such records to the Select Committee not later than 14 days of the adoption of this resolution or receipt of such records. Such records shall become the records of the Select Committee.

(b) STAFF.—The appointment and the compensation of staff for the Select Committee shall be subject to regulations issued by the Committee on House Administration.

(c) DETAIL OF STAFF OF OTHER OFFICES.—Staff of employing entities of the House or a joint committee may be detailed to the Select Committee to carry out this resolution and shall be deemed to be staff of the Select Committee.

(d) USE OF CONSULTANTS PERMITTED.—Section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 4301(i)) shall apply with respect to the Select Committee in the same manner as such section applies

with respect to a standing committee of the House of Representatives.

(e) TRAVEL.—Clauses 8(a), (b), and (c) of rule X of the Rules of the House of Representatives shall apply to the Select Committee.

(f) FUNDING; PAYMENTS.—There shall be paid out of the applicable accounts of the House of Representatives such sums as may be necessary for the expenses of the Select Committee. Such payments shall be made on vouchers signed by the chair of the Select Committee and approved in the manner directed by the Committee on House Administration. Amounts made available under this subsection shall be expended in accordance with regulations prescribed by the Committee on House Administration.

SEC. 7. TERMINATION AND DISPOSITION OF RECORDS.

(a) TERMINATION.—The Select Committee shall terminate 30 days after filing the final report under section 4.

(b) DISPOSITION OF RECORDS.—Upon termination of the Select Committee—

(1) the records of the Select Committee shall become the records of such committee or committees designated by the Speaker; and

(2) the copies of records provided to the Select Committee by a committee of the House under section 6(a) shall be returned to the committee.

○

APPENDIX H

NATIONAL ARCHIVES

Archivist *of the* United States

October 27, 2021

The Honorable Donald J. Trump

Dear President Trump:

After consultation with the Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden, I have determined to disclose to the House Select Committee to Investigate the January 6th Attack on the United States Capital ("Select Committee") the 724 pages from the Second and Third Notifications that you identified as privileged in your letter of October 21, 2021. Pursuant to President Biden's subsequent instruction and my authority under 36 C.F.R. 1270.44(g), I will deliver these pages to the Select Committee 30 days from today (November 26, 2021), absent any intervening court order.

As your letter notes, NARA has determined that the pages numbered P000443-P000445 are not Presidential records, and we have therefore withdrawn these pages from the Second Notification. As your letter further notes, the pages numbered P000143-P000179, P000398, and P000879-P000890 have been deferred from final consideration and thus will not be provided to the Select Committee at this time. I will provide to the Select Committee in short order the remaining 111 pages that are not subject to an assertion of privilege.

Sincerely,

DAVID S. FERRIERO
Archivist of the United States

DAVID S. FERRIERO • T: 202.357.5900 • F: 202.357.5901 • *david.ferriero@nara.gov*
National Archives *and* Records Administration • 700 Pennsylvania Avenue, NW • Washington, DC 20408 • *www.archives.gov*

APPENDIX I

THE WHITE HOUSE
WASHINGTON

October 25, 2021

David Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Ave., N.W.
Washington, D.C. 20408

Dear Mr. Ferriero,

I write in response to your communication of October 22, 2021, informing us that former President Trump has asserted executive privilege with regard to a subset of documents requested by the House Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Select Committee"), and requesting President Biden's views. President Biden has considered the former President's assertion, and I have engaged in consultations with the Office of Legal Counsel at the Department of Justice. President Biden has determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified, as to the documents provided to the White House on September 16, 2021, and September 23, 2021. Accordingly, President Biden does not uphold the former President's assertion of privilege.

As I wrote in my letter to you on October 8, 2021:

> [T]he insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again. Congress has a compelling need in service of its legislative functions to understand the circumstances that led to . . . the most serious attack on the operations of the Federal Government since the Civil War. . . . . Constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

President Biden instructs you, in accord with Section 4(b) of Executive Order 13489, to provide to the Select Committee the pages identified as privileged by the former President. In light of the urgency of the Select Committee's need for the information, President Biden further instructs you to provide those pages 30 days after your notification to the former President, absent any intervening court order.

In the course of an accommodation process between Congress and the Executive Branch, the Select Committee has deferred its request for the following responsive records: Bates Numbers 000143-000179; 000398; 000879-000890. In addition, your staff has informed the White House that a record found at Bates Numbers 000443-000445 is not a presidential record and therefore falls outside the scope of the Select Committee's request. No decision on executive privilege is required for these records.

You should provide to the Select Committee as soon as possible any pages not identified in the preceding paragraph as to which the former President has not asserted privilege. Where appropriate, non-responsive content within responsive records should be redacted.

Sincerely,

Dana A. Remus
Counsel to the President

WHITE HOUSE COUNSEL'S OFFICE
1650 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20502
WHITEHOUSE.GOV

APPENDIX J

DONALD J. TRUMP

October 21, 2021

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Mr. Ferriero:

I write concerning requests for documents and records sent to the National Archives and Records Administration ("NARA") on March 25, 2021 and August 25, 2021 by the Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Committee"). The Committee requested an extremely broad set of documents and records, potentially numbering in the millions, which unquestionably contain information protected from disclosure by the executive and other privileges, including but not limited to the presidential communications, deliberative process, and attorney-client privileges.

On September 9, 2021, NARA the noticed the second set of records for review (P000137 – P000878) (the "Second Notification"). Following a review of such records, pursuant to the Presidential Records Act, Executive Order 13489, and 36 CFR 1270.44, I have determined that the following records contain information subject to executive privilege, including the presidential communications and deliberative process privileges, and I hereby formally assert executive privilege over these records:

P000137 – P000140
P000141 – P000142
P000180
P000181
P000182 – P000191
P000192 – P000198
P000199 – P000201
P000202 – P000204
P000205 – P0000207
P000208 – P000210
P000211 – P000213
P000214
P000215
P000216
P000217 – P000219

P000220 – P000222
P000223 – P000227
P000228 – P000229
P000230 – P000235
P000253 – P000256
P000257 – P000260
P000261 – P000264
P000265 – P000268
P000269 – P000274
P000275 – P000277
P000278 – P000286
P000287 – P000290
P000291 – P000292
P000293 – P000297
P000298 – P000303
P000304 – P000306
P000307 – P000315
P000316 – P000318
P000319 – P000320
P000321 – P000325
P000326 – P000327
P000328 – P000333
P000334 – P000339
P000342 – P000343
P000344 – P000347
P000348 – P000353
P000354 – P000355
P000356 – P000358
P000359 – P000362
P000363 – P000366
P000367 – P000372
P000373 – P000374
P000375
P000376 – P000377
P000378 – P000381
P000382 – P000387
P000388 – P000391
P000392 – P000395
P000396 – P000397
P000399 – P000405
P000406 – P000407

P000408 – P000411
P000412 – P000413
P000414 – P000416
P000417 – P000420
P000421 – P000422
P000423 – P000424
P000425 – P000426
P000427 – P000432
P000433 – P000435
P000436 – P000442
P000446 – P000447
P000448
P000449 – P000450
P000451 – P000454
P000455 – P000461
P000462 – P000463
P000464 – P000467
P000468 – P000475
P000476 – P000479
P000480 – P000486
P000487 – P000489
P000490 – P000496
P000497 – P000499
P000500 – P000503
P000504 – P000510
P000511 – P000512
P000513 – P000516
P000517 – P000523
P000524 – P000529
P000530 – P000531
P000532 – P000535
P000536 – P000542
P000543 – P000544
P000545 – P000548
P000549 – P000555
P000556 – P000560
P000561 – P000562
P000563 – P000565
P000566 – P000572
P000573 – P000574
P000575 – P000580

P000581 – P000583
P000584 – P000586
P000587 – P000588
P000589 – P000591
P000592 – P000595
P000596 – P000598
P000599 – P000600
P000601
P000602
P000603
P000604 – P000605
P000606 – P000611
P000612
P000613 – P000620
P000621 – P000622
P000623 – P000630
P000631 – P000632
P000633 – P000635
P000636 – P000644
P000645 – P000648
P000649 – P000651
P000652 – P000656
P000657 – P000663
P000664 – P000671
P000672 – P000673
P000674 – P000675
P000676 – P000684
P000685 – P000686
P000687 – P000688
P000689 – P000690
P000691 – P000696
P000697 – P000704
P000705 – P000706
P000707 – P000708
P000709 – P000716
P000717 – P000718
P000719 – P000726
P000727 – P000728
P000729 – P000731
P000732 – P000741
P000742 – P000745

P000746 – P000750
P000751 – P000753
P000754 – P000756
P000757 – P000758
P000759 – P000762
P000763 – P000764
P000765 – P000773
P000774 – P000775
P000776 – P000783
P000784 – P000785
P000786 – P000789
P000790 – P000798
P000799 – P000801
P000802 – P000807
P000808 – P000811
P000812 – P000817
P000818 – P000822
P000823 – P000827
P000828 – P000836
P000837 – P000839
P000840 – P000844
P000845 – P000850
P000851 – P000852

It is my understanding that NARA has determined that records numbered P000443 – P000445 are not Presidential Records and thus have been removed from the Second Notification and will not be produced to the Committee.

On September 16, 2021, NARA noticed the third set of records for review (P000879 – P001024) (the "Third Notification"). Following a review of such records, pursuant to the Presidential Records Act, Executive Order 13489, and 36 CFR 1270.44, I have determined that the following records contain information subject to executive privilege, including the presidential communications and deliberative process privileges, and I hereby formally assert executive privilege over these records:

P000891 – P000901
P000902 – P000903
P000904 – P000926
P000927
P000935 – P000950
P000951 – P000955
P000956 – P000959

P000960 – P000962
P000986 – P000988

It is my understanding that the Committee has deferred their request for the records identified below. Although no decision with respect to executive or other privileges needs to be made now, I hereby reserve my right to make a formal assertion of executive or other privileges over these records at the appropriate time.

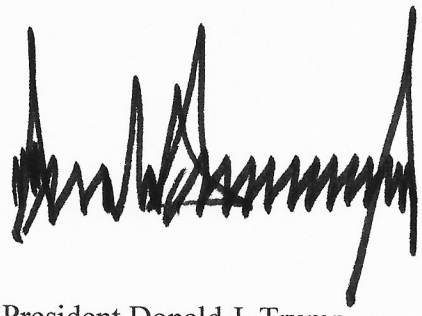
P000143 – P000179
P000398
P000879 –P000890

Additionally, certain documents included in the Second Notification and/or Third Notification may be subject to additional privileges, including without limitation the attorney-client and work-product privileges. Those records also are subject to executive privilege. To the extent required, any attorney-client or other privilege is not waived and a further review may be required depending on the outcome of the process provided for under the Presidential Records Act, 36 CFR 1270.44, and Executive Order 13489.

Remainder of Page Intentionally Left Blank

Finally, to the Presidential Records Act, Executive Order 13489, and 36 CFR 1270.44, I hereby make a protective assertion of constitutionally based privilege with respect to all additional records following the Third Notification. In cases like this, where Congress has declined to grant sufficient time to conduct a full review, there is a longstanding bipartisan tradition of protective assertions of executive privilege designed to ensure the ability to make a final privilege assertion, if necessary, over some or all of the requested material. *See Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion of Attorney General Janet Reno). This protective assertion is intended to ensure that I have the ability to make a final assertion of executive privilege, if necessary and appropriate, following a full review of the requested materials. *See Letter for the President from William P. Barr, Attorney General*, at 1-2 (May 8, 2019).

Sincerely,



President Donald J. Trump

APPENDIX K

NATIONAL ARCHIVES

Archivist *of the* United States

October 13, 2021

The Honorable Donald J. Trump

Dear President Trump:

After consultation with the Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden, I have determined to disclose to the Select Committee the pages below, which you identified as privileged in your letter of October 8, 2021. Pursuant to President Biden's subsequent instruction and my authority under 36 C.F.R. 1270.44(g), I will deliver these pages to the Select Committee in 30 days (on November 12, 2021), absent any intervening court order:

- P00001
- P00002
- P00005
- P00006
- P00007-P00009
- P00010
- P00011-P00012
- P00013-P00014
- P00015
- P00016
- P00017
- P00045-P00049
- P00051
- P00053-P00058

DAVID S. FERRIERO · T: 202.357.5900 · F: 202.357.5901 · *david.ferriero@nara.gov*
National Archives *and* Records Administration · 700 Pennsylvania Avenue, NW · Washington, DC 20408 · *www.archives.gov*

- P00060
- P00061
- P00121-P00122
- P00123-P00128
- P00131-P00132

Please note that pages P0004 and P00115-P00120 are not responsive to the Select Committee's request, and therefore I will not provide them to the Select Committee. The remaining 90 pages covered by our August 30, 2021 notification are not subject to any assertion of privilege, and therefore I intend to provide them to the Select Committee today.

Sincerely,

DAVID S. FERRIERO
Archivist of the United States

APPENDIX L

THE WHITE HOUSE
WASHINGTON

October 8, 2021

David Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Ave., N.W.
Washington, D.C., 20408

Dear Mr. Ferriero,

I write in response to your notification of September 8, 2021, regarding a set of documents requested by the House Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Documents"), and provided to the White House for review pursuant to the Presidential Records Act. After my consultations with the Office of Legal Counsel at the Department of Justice, President Biden has determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the Documents.

As President Biden has stated, the insurrection that took place on January 6, and the extraordinary events surrounding it, must be subject to a full accounting to ensure nothing similar ever happens again. Congress has a compelling need in service of its legislative functions to understand the circumstances that led to these horrific events. The available evidence to date establishes a sufficient factual predicate for the Select Committee's investigation: an unprecedented effort to obstruct the peaceful transfer of power, threatening not only the safety of Congress and others present at the Capitol, but also the principles of democracy enshrined in our history and our Constitution. The Documents shed light on events within the White House on and about January 6 and bear on the Select Committee's need to understand the facts underlying the most serious attack on the operations of the Federal Government since the Civil War.

These are unique and extraordinary circumstances. Congress is examining an assault on our Constitution and democratic institutions provoked and fanned by those sworn to protect them, and the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities. The constitutional protections of executive privilege should not be used to shield, from Congress or the public, information that reflects a clear and apparent effort to subvert the Constitution itself.

The President's determination applies solely to the Documents as described herein, which were provided to the White House on September 8, 2021. We continue to review materials you provided to the White House after that date and will respond at an appropriate time.

We understand that the former President believes that executive privilege should be asserted with respect to a subset of the Documents. When you notify us of such an assertion, we will respond accordingly.

Sincerely,

Dana A. Remus
Counsel to the President

WHITE HOUSE COUNSEL'S OFFICE
1650 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20502
WHITEHOUSE.GOV

APPENDIX M

DONALD J. TRUMP
October 8, 2021

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
Washington, D.C.

Dear Mr. Ferriero,

I write concerning requests for documents and records sent to your office on March 25, 2021 and August 25, 2021 by the Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Committee"). The Committee requested an extremely broad set of documents and records, potentially numbering in the millions, which unquestionably contain information protected from disclosure by the executive and other privileges, including but not limited to the presidential communications, deliberative process, and attorney-client privileges.

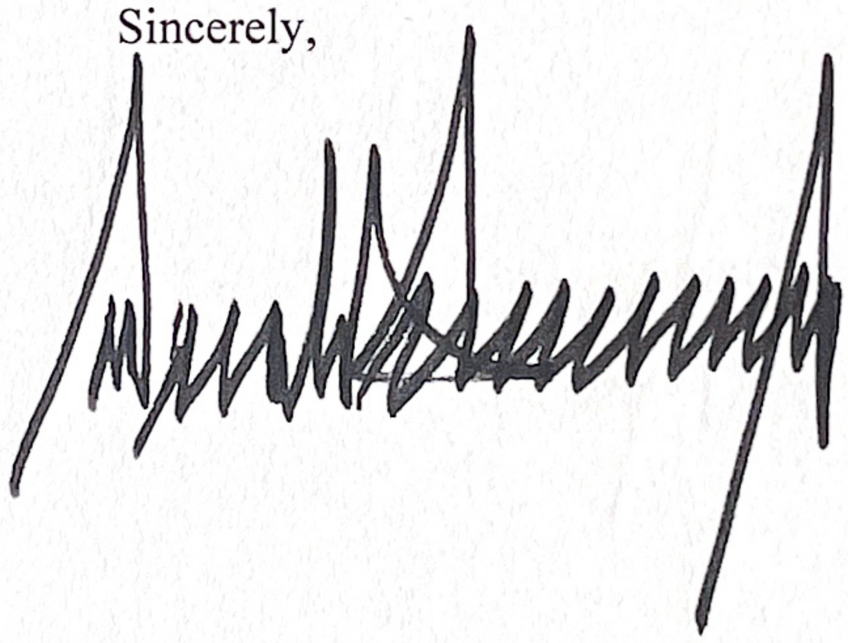
On August 30, 2021, the National Archives and Records Administration noticed the first set of records for review (P00001 – P00136) (the "First Tranche"). Following a review of such records, pursuant to the Presidential Records Act, 44 U.S.C. § 2208(b), Executive Order 13489, and 36 CFR 1270.44, I have determined that the following records contain information subject to executive privilege, including the presidential communications and deliberative process privileges, and I hereby formally assert executive privilege over these records:

P00001
P00002
P00004
P00005
P00006
P00007 – P00009
P00010
P00011 – P00012
P00013 – P00014
P00015
P00016
P00017
P00045 – P00049
P00051
P00053 – P00058
P00060
P00061
P00115 – P00120
P00121 – P00122
P00123 – P00128
P00131 – P00132

Further, pursuant to the Presidential Records Act, 44 U.S.C. § 2208(b), Executive Order 13489, and 36 CFR 1270.44, I hereby make a protective assertion of constitutionally based privilege with respect to all additional records following the First Tranche. In cases like this, where Congress has declined to grant sufficient time to conduct a full review, there is a longstanding bipartisan tradition of protective assertions of executive privilege designed to ensure the ability to make a final privilege assertion, if necessary, over some or all of the requested material. See *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) (opinion of Attorney General Janet Reno). This protective assertion is intended to ensure that I have the ability to make a final assertion of executive privilege, if necessary and appropriate, following a full review of the requested materials. See *Letter for the President from William P. Barr, Attorney General*, at 1-2 (May 8, 2019).

Should the Committee persist in seeking other privileged information, I will take all necessary and appropriate steps to defend the Office of the Presidency.

Sincerely,



cc: U.S. House Committee on Oversight & Reform
2157 Rayburn House Office Building
Washington, DC 20515

U.S. Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC, 20510

APPENDIX N

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

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(202) 225-7800

One Hundred Seventeenth Congress

Select Committee to Investigate the January 6th Attack on the United States Capitol

August 25, 2021

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Dear Mr. Ferriero:

The Select Committee to Investigate the January 6th Attack on the United States Capitol is examining the facts, circumstances, and causes of the January 6th attack. Our Constitution provides for a peaceful transfer of power, and this investigation seeks to evaluate threats to that process, identify lessons learned, and recommend laws, policies, procedures, rules, or regulations necessary to protect our Republic in the future. Pursuant to the Presidential Records Act (44 U.S.C. § 2205(2)(C)), and House Resolution 503, the Select Committee requests that you produce the documents described in the attached schedule from the Executive Office of the President (EOP) and the Office of the Vice President (OVP) in your custody, control, or possession.

Given the urgent nature of our request, we ask that you expedite your consultation and processing times pursuant to your authority under 36 C.F.R. § 1270.44(g). We have some concern about the delay in producing documents requested this past March, and we want to assist your prompt production of materials. We look forward to discussing ways in which we can do that. Toward that end, we request that NARA meet expeditiously with Select Committee investigative staff to discuss production priorities.

This is our first request for materials, and we anticipate additional requests as our investigation continues. Please produce this information to the Select Committee no later than September 9, 2021. An attachment to this letter provides additional instructions for responding to the Select Committee's request.

If you have questions, please contact Select Committee investigative staff at 202-225-7800.

Sincerely,

Bennie G. Thompson
Chairman

DOCUMENT SCHEDULE

Pending Requests

The Select Committee reiterates the requests made in the March 25, 2021,[1] correspondence from multiple committees of the House of Representatives, which the Select Committee subsequently joined, for documents and communications received, prepared, or sent between December 1, 2020, and January 20, 2021, relating to the counting of the electoral college vote on January 6, 2021, the potential for demonstrations, violence, or attacks in the National Capital Region on or around January 6, 2021, and the events or aftermath of January 6, 2021.

Those March 25, 2021, requests include but are not limited to:

1. All documents and communications relating in any way to remarks made by Donald Trump or any other persons on January 6, including Donald Trump's and other speakers' public remarks at the rally on the morning of January 6, and Donald Trump's Twitter messages throughout the day.

2. All calendars, schedules, and movement logs regarding meetings or events attended by President Trump, including the identity of any individuals in attendance, whether virtual or in-person, on January 6, 2021.

3. All documents and communications regarding the movements and protection of Vice President Pence on January 6, 2021.

4. All video communications recorded of the President speaking on January 6, 2021, and all documents and communications related thereto, including communications involving the President or any other officials or employees in the Executive Office of the President or the Office of the Vice President. This request specifically includes videos of communications released to the public and communications recorded but not released to the public, any documents or other communications identifying or discussing the content of those videos.

5. All photographs, videos, or other media, including any digital time stamps for such media, taken or recorded within the White House on January 6, 2021, or taken of the crowd assembled for the rally on the morning of January 6, and all communications or other documents related to that media.

[1] Letter from Chairwoman Carolyn B. Maloney, House Committee on Oversight and Reform, et al., to David Ferriero, Archivist, National Archives (March 25, 2021) (online at https://oversight house.gov/sites/democrats.oversight.house.gov/files/2021-03-25.House%20Committees%20to%20Agencies%20re%20Jan%206%20Attack.pdf).

6. All photographs, videos, or other media, including any digital time stamps for such media, taken or recorded of Vice President Mike Pence or any individuals accompanying him, on January 6, 2021.

7. All documents and communications within the White House on January 6, 2021, relating in any way to the following:

    - the January 6, 2021, rally;
    - the January 6, 2021, march to the Capitol;
    - the January 6, 2021, violence at the Capitol;
    - any aspect of the Joint Session where Congress was counting electoral votes;
    - any legal, political, or other strategy regarding the counting of electoral votes;
    - Donald J. Trump;
    - Vice President Pence;
    - the President's tweets, speech, any other public communications on that date;
    - the President's recording of video for release on that date and any outtakes;
    - reactions, summaries, or characterizations of any public speeches or other communications by Donald Trump or other public speakers on that date;
    - efforts to persuade the President to deliver any particular message to people at or near the Capitol;
    - Sarah Matthews;
    - Hope Hicks;
    - Mark Meadows;
    - Dan Scavino;
    - Pat Cipollone;
    - Marc Short;
    - Patrick Philbin;
    - Eric Herschmann;
    - Stephan Miller;
    - Greg Jacob;
    - Matthew Pottinger;
    - Keith Kellogg;
    - Robert O'Brien;
    - Peter Navarro;
    - Ben Williamson;
    - Cassidy Hutchinson;
    - Molly Michael;
    - Nicholas "Nick" Luna;
    - Judd Deere;
    - Kayleigh McEnany;

- Ivanka Trump;
- Eric Trump;
- Lara Trump;
- Donald Trump, Jr.;
- Jared Kushner;
- Melania Trump;
- Kimberly Guilfoyle;
- Steve Bannon;
- Michael Flynn;
- Rudolph "Rudy" Giuliani;
- Roger Stone;
- any Member of Congress or congressional staff; or
- the Department of Defense, the Department of Justice, the Department of Homeland Security, the Department of the Interior, or any element of the National Guard.

8. All White House visitor records on January 6, 2021.

9. All documents and communications regarding the movement of the President on January 6, 2021.

10. All call logs and telephone records identifying calls placed to or from any individuals identified in (7) above.

11. All schedules for any individuals identified in (7) above on January 6, 2021, and all documents relating to such meetings, including memoranda, read-aheads, and summaries of such meetings.

12. All documents and communications received, prepared, or sent by any official within the White House Situation Room and the White House Operations Center on January 6, 2021, including but not limited to any communication logs, situation reports, and watch officer notes.

Additional Requests

In addition, to the extent not included in the scope of the March 25, 2021, request, and as a supplement to the requests previously made on March 25, 2021, we hereby make the following additional requests.

(a) Planning by the White House and Others for Legal or Other Strategies to Delay, Halt, or Otherwise Impede the Electoral Count

1. From April 1, 2020, through January 20, 2021, all documents and communications related to efforts, plans, or proposals to contest the 2020 Presidential election results.

2. From April 1, 2020, through January 20, 2021, all documents and communications related to plans, efforts, or discussions regarding the electoral count (including plans, efforts, or discussions regarding delaying or impeding the electoral count).

3. All documents and communications concerning the role of the Vice President as the Presiding Officer in the certification of the votes of the electoral college.

4. From November 3, 2020, through January 20, 2021, all documents and communications referring or relating to the 2020 election results between White House officials and officials of State Governments. This includes, but is not limited to, communications with the following individuals and their staff and subordinates:

    - Doug Ducey,
    - Brian Kemp,
    - Brad Raffensperger,
    - Ken Paxton,
    - Frances Watson,
    - Mike Shirkey,
    - Lee Chatfield, or
    - Monica Palmer.

5. From April 1, 2020, through January 20, 2021, all documents and communications related to the 2020 election results, to or from one or more of the following individuals: Rudolph "Rudy" Giuliani, Justin Clark, Matt Morgan, Sidney Powell, Kurt Olsen, or Cleta Mitchell.

6. From April 1, 2020, through January 20, 2021, all documents and communications related to the 2020 Presidential election, including forecasting, polling, or results, and which are authored, presented by, or related in any way to the following individuals: Anthony "Tony" Fabrizio, Brad Parscale, Bill Stepien, Corey Lewandowski, or Jason Miller.

7. All documents and communications to or from David Bossie relating to questioning the validity of the 2020 election results.

8. All documents and communications referring or relating to court decisions, deliberations, or processes involving challenges to the 2020 Presidential election.

9. From November 3, 2020, through January 20, 2021, all documents and communications relating to the State of Texas and litigation concerning the 2020 Presidential election.

10. From November 3, 2020, through December 31, 2020, all documents and communications relating to an amicus brief concerning litigation involving the State of Texas.

11. All documents and communications relating to decisions of the United States Supreme Court issued on December 8, 2020, and December 11, 2020.

12. From November 3, 2020, through January 20, 2021, all documents and communications relating to Justin Riemer and the electoral count or litigation concerning the 2020 Presidential election.

13. All documents and communications referring or relating to QAnon, the Proud Boys, Stop the Steal, Oath Keepers, or Three Percenters concerning the 2020 election results, or the counting of the electoral college vote on January 6, 2021.

14. Any documents and communications relating to election machinery or software used in the 2020 election, including but not limited to communications relating to Dominion Voting Systems Corporation.

15. From November 3, 2020, through January 19, 2021, all documents and communications concerning the resignation of any White House personnel or any politically appointed personnel of any Federal department or agency (including the resignation of any member of the President's Cabinet) and mentioning the 2020 Presidential election or the events of January 6, 2021.

16. All documents and communications concerning prepared remarks for a speech by Donald Trump on November 3, 2020, or November 4, 2020.

17. All documents and communications to or from John Eastman from November 3, 2020, through January 20, 2021.

18. All documents and communications relating to allegations of election fraud or to challenging, overturning, or questioning the validity of the 2020 Presidential election, and involving personnel of the Department of Justice, including any one or more of the following individuals: Jeffrey Rosen, Richard Donoghue, Steven Engel, Jeffrey Wall, Patrick Hovakimian, Byung J. "BJay" Pak, Bobby Christine, or Jeffrey Clark.

19. All documents and communications relating to allegations of election fraud or to challenging, overturning, or questioning the validity of the 2020 Presidential election and Chris Christie.

20. All documents and communications relating to the results of the 2020 Presidential election and Peter Navarro.

21. All documents and communications relating to challenging, overturning, or questioning the validity of the 2020 Presidential election and William Barr.

(b) Recruitment, Planning, Coordination, and Other Preparations for the Rallies Leading up to and Including January 6th and the Violence on January 6th

1. All documents and communications relating to planned protests, marches, public assemblies, rallies, or speeches in Washington, DC, on November 14, 2020, December 12, 2020, January 5, 2021, and January 6, 2021.

2. All documents and communications related to security of the Capitol or other Federal facilities on January 5, 2021, and January 6, 2021.

3. All documents and communications concerning Donald Trump's statement on September 29, 2020, for the Proud Boys to "stand back and stand by."

4. From December 1, 2020, through January 20, 2021, any documents and communications involving White House personnel and any Member of Congress, referring or relating to (a) civil unrest, violence, or attacks at the Capitol; (b) challenging, overturning, or questioning the validity of the 2020 election results; (c) the counting of the electoral college vote on January 6, 2021; or (d) appealing the decisions of courts related to the 2020 Presidential election.

5. All documents and communications related to social media information monitored, gathered, reviewed, shared, or analyzed by White House personnel on January 6, 2021.

6. All documents and communications related to any plan for the President to march or walk to the Capitol on January 6, 2021. This request includes any such documents or communications related to a decision not to march or walk to the Capitol on January 6, 2021.

7. From April 1, 2020, through January 20, 2021, all documents and communications concerning the 2020 election and relating to the following individuals:

    - Cindy Chafian,

- Greg Locke,
- Robert Patrick Lewis,
- Chris Lippe,
- Tracy Diaz,
- Alex Phillips,
- Bianca Gracia,
- Ali Alexander,
- Brandon Straka,
- Rose Tennet,
- Ed Martin,
- Vernon Jones,
- Cordie Williams,
- Michael Flynn,
- Alex Jones,
- Owen Schroyer,
- Karyn Turk,
- Scott Presler,
- Rogan O'Handley,
- Christie Hutcherson,
- Gina Loudon,
- Jack Posobiec,
- Bryson Grey,
- Angela Stanton King,
- Brian Gibson,
- George Papadopoulos,
- Julio Gonzalez,
- Bernard Kerik,
- Mark Burns,
- Roger Stone,
- George Flynn,
- Tom Van Flein,
- Doug Logan,
- Katrina Pierson,
- Amy Kremer,
- Dustin Stockton,
- Enrique Tarrio,
- Kenneth Harrelson,
- Caroline Wren, or
- Michael Coudrey.

(c) Information Donald Trump Received Following the Election Regarding the Election Outcome, and What He Told the American People About the Election

1. From November 3, 2020, to January 20, 2021, all documents and communications reporting, summarizing, or detailing the voting returns and election results of the 2020 Presidential election.

2. All documents and communications related to Donald Trump's response to the election results of the 2020 Presidential election, including but not limited to any planned public remarks.

3. All documents and communications regarding a November 9, 2020, memorandum from Attorney General William Barr concerning investigation of voter fraud allegations.

4. All documents and communications relating to voting machines or software used in the 2020 election and their control or manipulation through thermostats.

5. From April 1, 2020, through January 20, 2021, all documents and communications relating to challenging the validity of the 2020 election, to, from, or mentioning Mike Lindell.

6. From April 1, 2020, through January 20, 2021, all documents and communications relating to challenging the validity of the 2020 election, to, from, or mentioning Doug Logan.

7. From November 3, 2020, through January 20, 2021, all documents and communications related to prepared public remarks and actual public remarks of Donald Trump.

(d) What the President Knew About the Election's Likely Outcome Before the Election Results and How He Characterized the Validity of the Nation's Election System

1. From April 1, 2020, through November 3, 2021, all documents and communications provided to Donald Trump or Mark Meadows containing information predicting that Donald Trump would or might lose the 2020 Presidential election.

2. From April 1, 2020, through January 20, 2021, all documents and communications provided to Donald Trump or Mark Meadows relating to mail-in ballots and their effect or predicted effect on results of the election or the timing of election-related news or decisions.

3. From November 3, 2020, through November 5, 2020, all documents and communications provided to Donald Trump or Mark Meadows relating to projected election results of the 2020 Presidential election.

4. From April 1, 2020, through January 20, 2021, all documents provided to Donald Trump or Mark Meadows reviewing, assessing, or reporting on the security of election systems in the United States.

5. From April 1, 2020, through January 20, 2021, all documents and communications provided to Donald Trump or Mark Meadows regarding purported election irregularities, election-related fraud, or other election-related malfeasance.

6. From April 1, 2020, through January 20, 2021, all documents and communications provided to Donald Trump or Mark Meadows referring to a stolen election, stealing the election, or a "rigged" election.

(e) Responsibilities in the Transfer of Power and the Obligation to Follow the Rule of Law

1. All documents and communications relating to legal advice or legal analysis of, or compliance with, the constitutional process for certifying the electoral vote. This includes, but is not limited to, communications with and from the following individuals:

    - Pat Cipollone,
    - Patrick Philbin,
    - Eric Herschmann,
    - John Eastman, or
    - Greg Jacobs.

2. All documents and communications on January 6, 2021, related to Mark Milley, Christopher Miller, Kashyap "Kash" Patel, or Ryan McCarthy.

3. From January 6, 2021, through January 20, 2021, all documents and communications related to the events of January 6, 2021, and Mark Milley, Christopher Miller, Kashyap "Kash" Patel, or Ryan McCarthy.

4. From November 3, 2020, through January 20, 2021, all documents and communications concerning the potential or actual changes in personnel at the following departments and agencies:

    - The Department of Defense, within the Office of the Secretary and the Joint Chiefs of Staff. This should include, but is not limited to, such documents and communications concerning the following individuals:

        - Mark Esper,
        - Mark Milley,
        - Christopher Miller,

- Kashyap "Kash" Patel,
- James Anderson,
- Anthony Tata,
- Ezra Cohen-Watnick,
- Joseph Kernan, or
- John McEntee

- The Department of Justice. This should include, but is not limited to, such documents and communications concerning the following individuals:

    - Jeffrey Rosen,
    - Richard Donoghue,
    - Jeffrey Clark, or
    - John McEntee

- The Federal Bureau of Investigation. This should include, but is not limited to, such documents and communications concerning the following individuals:

    - Kashyap "Kash" Patel,
    - Christopher Wray, or
    - John McEntee.

- The Central Intelligence Agency. This should include, but is not limited to, such documents and communications concerning the following individuals:

    - Kashyap "Kash" Patel,
    - Gina Haspel,
    - Vaughn Bishop, or
    - John McEntee.

- The Department of Homeland Security (including the United States Secret Service). This should include, but is not limited to, such documents and communications concerning the following individuals:

    - Chad Wolf, or
    - John McEntee.

5. From November 3, 2020, through January 20, 2021, all documents and communications relating to Jeffrey Clark.

6. From November 3, 2020, through January 20, 2021, all documents and communications related to the Twenty-Fifth Amendment to the U.S. Constitution.

7. From January 6, 2021, through January 20, 2021, all documents and communications related to the mental stability of Donald Trump or his fitness for office.

8. Any documents and communications relating to instructions to stop or delay preparation for the transition of administrations.

9. All communications between White House personnel and General Services Administration (GSA) Administrator Emily Murphy or other GSA officials relating to "ascertainment" under the Presidential Transition Act. This includes but is not limited to communications discussing the recognition of Joseph Biden as the winner of the 2020 Presidential election.

10. All documents and communications concerning the potential invocation of the Insurrection Act.

11. From November 3, 2020, through January 20, 2021, all documents and communications related to martial law.

12. All documents and communications concerning the use of Federal law enforcement or military personnel during voting in the 2020 Presidential election.

13. From November 3, 2020, through January 20, 2021, all documents and communications related to Kashyap "Kash" Patel.

14. From November 3, 2020, through January 20, 2021, all documents and communications related to John McEntee.

(f) Other Materials Relevant to the Challenges to a Peaceful Transfer of Power

1. Any documents and communications relating to foreign influence in the United States 2020 Presidential election through social media narratives and disinformation.

2. All documents and communications related to the January 3, 2021, letter from 10 former Defense Secretaries warning of use of the military in election disputes.

Responding to the Select Committee to Investigate the January 6th Attack on the United States Capitol's Document Requests

1. In complying with this request, produce all responsive documents, regardless of classification level, that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee').

3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.

4. The Committee's preference is to receive documents in a protected electronic form (i.e., password protected CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions. With specific reference to classified material, you will coordinate with the Committee's Security Officer to arrange for the appropriate transfer of such information to the Committee. This includes but is not necessarily limited to: a) identifying the classification level of the responsive document(s); and b) coordinating for the appropriate transfer of any classified responsive document(s).

5. Electronic document productions should be prepared according to the following standards:

    a. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

    b. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

        BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.

9. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.

10. The pendency of or potential for litigation shall not be a basis to withhold any information.

11. In accordance with 5 U.S.C.§ 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.

12. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.

13. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production, as well as a date certain as to when full production will be satisfied.

14. In the event that a document is withheld on any basis, provide a log containing the following information concerning any such document: (a) the reason it is being withheld, including, if applicable, the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the withholding.

15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control. Additionally, identify where the responsive document can now be found including name, location, and contact information of the entity or entities now in possession of the responsive document(s).

16. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

17. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
(2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of classification level, how recorded, or how stored/displayed (e.g. on a social media platform) and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, computer or mobile device screenshots/screen captures, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, through a social media or online platform, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.

4. The term "including" shall be construed broadly to mean "including, but not limited to."

5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.

6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.

7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.

8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, assignee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.

9. The term "individual" means all natural persons and all persons or entities acting on their behalf.