**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA | : | Criminal No. 21-670 (CJN) |
| v. | : | |
| STEPHEN K. BANNON, | : | |
| *Defendant*. | : | |

**DEFENDANT'S MOTION TO COMPEL DISCOVERY**

Defendant Stephen K. Bannon, through his undersigned counsel, respectfully moves this Court for an Order compelling the Government to comply with its obligations and provide discovery that is material to the preparation of Mr. Bannon's defense, based upon the following:

**Introduction**

To prevail on a motion to compel the search for and disclosure of additional discovery, we need not prove that it would lead to admissible evidence. The burden is much lower – we need only make a threshold showing that the information sought would tend to help in preparing a defense. Mr. Bannon's discovery requests were specific and tailored to the charges in this case. *See* Exhibit 1. Our seven-page letter provided controlling legal authority and requested 30 specific categories of discoverable information. The Government's three-paragraph response contended that they have nothing more to show to the defense. Exhibit 2 at 2. That curt response mirrors a scene from John Huston's film *The Treasure of the Sierra Madre,* where an American character played by Humphrey Bogart questions the legal authority of a group posing as law enforcement agents, only to get the reply: "Badges? . . . We don't need no badges. I don't have to show you any stinking badges!"

When an accused faces federal criminal charges, however, the Government cannot ignore legitimate requests for information pertinent to the preparation of a defense. Well-settled authority, and the local criminal rules, require the disclosure of a broad range of information that could potentially add to the quantum of evidence in a defendant's favor. A key aspect of the discovery rules is that the Government must disclose to the defense information that would allow it to *prepare* a defense. *See* Fed. R. Crim. P. 16(1)(1)(E).

The Government cannot avoid its discovery obligations by declining to search files they are required to search, or by taking a narrow view of what information might be helpful to the defense. As described in greater detail below, the Government has an obligation to conduct a broad search for information that tends to: be inconsistent with a defendant's guilt; negate an element of the crime; mitigate the charged offense; establish a defense theory; or cast doubt upon the credibility or accuracy of any witness or evidence. An accused has no ability to require the Government to search its files. While the Government's failure to meet its discovery obligations can result in reversal on appeal, and sanctions, such post-trial remedies do not help an accused who seeks a fair trial. Accordingly, we respectfully request that this Court compel the Government to meet its obligations in advance of trial, so that we can prepare a defense.[1]

**The Government's Allegations**

On November 12, 2021, a grand jury charged Stephen K. Bannon in a two-count indictment. [Doc. 1] Count One charged him with Contempt of Congress, in violation of 2 U.S.C. § 192, alleging that "having been summoned as a witness by the authority of the U.S. House of Representatives to give testimony upon a matter under inquiry before a committee of the House,

[1] At the December 7, 2021, status hearing in this case, we outlined our need for discovery as it related to the preparation of pre-trial motions, and the preparation of a defense. *See* 12/7/2021 Tr. at 26-35.

did willfully make default – that is, in a matter under inquiry before the House Select Committee to Investigate the January 6th Attack on the United States Capitol, BANNON refused to appear to give testimony in response to a subpoena dated September 23, 2021, issued by the Select Committee and commanding BANNON to appear for a deposition at 10:00 a.m. on October 14, 2021." *Id*. at 8. Count Two also charged him with Contempt of Congress, in violation of 2 U.S.C. § 192, alleging that "having been summoned as a witness by the authority of the U.S. House of Representatives to produce papers upon a matter under inquiry before a committee of the House, did willfully make default – that is, in a matter under inquiry before the House Select Committee to Investigate the January 6th Attack on the United States Capitol, BANNON refused to produce documents and communications, provide a log of any withheld records, certify a diligent search for records, and comply in any way with a subpoena dated September 23, 2021, issued by the Select Committee and commanding BANNON to produce documents and communications as delineated therein." *Id*. at 9.

The statute states as follows:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192.

The Government has the burden of proving, beyond a reasonable doubt, all elements of the offenses charged. A threshold issue involves whether the subpoena seeking testimony and documents was valid and issued pursuant to lawful authority. The Supreme Court has held, in reversing a 2 U.S.C. § 192 conviction, that "Courts administering the criminal law cannot apply

sanctions for violation of the mandate of an agency – here, the Subcommittee – unless that agency's authority is clear and has been conferred in accordance with law." *Gojack v. United States*, 384 U.S. 702, 714 (1966). The Government must prove that Congress had the constitutional power to investigate the matter at issue and make the specific inquiry. *Watkins v. United States*, 354 U.S. 178, 187 (1957). The Government must also prove that the Select Committee was authorized to conduct the specific investigation, and that the actions of the Select Committee were in accordance with the authority granted, and the authorized procedures. *United States v. Rumely*, 345 U.S. 41, 42-43 (1953).

The Supreme Court has held that a defendant prosecuted under 2 U.S.C. § 192 is entitled to "every safeguard which the law accords in all other federal criminal cases." *Russell v. United States*, 369 U.S. 749, 755 (1962). Any citizen facing criminal charges is entitled to due process of law. U.S. Const. Amend. V. Consistent with that constitutional guarantee, if the government officials and employees involved in this matter did not follow the rules of the U.S. House of Representatives, or the rules applicable to the Select Committee, pertaining to the September 23, 2021, subpoena, then there can be no conviction for a violation of 2 U.S.C. § 192. *Yellin v. United States*, 374 U.S. 109 (1963) (Section 192 conviction reversed where committee did not follow rules regarding executive session); *see also Gojack*, *supra*, 384 U.S. at 716 ("[t]he legislative history of § 192 makes plain that a clear chain of authority from the House to the questioning body is an essential element of the offense"); *see generally Christoffel v. United States*, 338 U.S. 84, 85-90 (1949) (perjury conviction reversed where committee did not follow rules regarding quorum). The Government will also have the burden of proving that the questions or documents sought were pertinent to the authorized inquiry. *Barenblatt v. United States*, 360 U.S. 109 (1959).

Significantly, the Government must prove that Mr. Bannon acted with criminal intent. There is no violation of the statute unless a person "willfully makes default." 2 U.S.C. § 192. Given the plain language of the statute, and controlling Supreme Court precedent, the Government must prove beyond a reasonable doubt that Mr. Bannon acted "willfully" to violate the statute that prohibits Contempt of Congress. Specifically, the Government must prove that Mr. Bannon knew that his conduct constituted "default," *knew that his conduct was unlawful*, and intended to do something that the law forbids. *See Bryan v. United States*, 524 U.S. 184, 191-192 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *United States v. Zeese*, 437 F. Supp. 3d 86, 95 (D.D.C. 2020).

**Applicable Discovery Principles**

Federal Rule of Criminal Procedure 16(a)(1)(E) provides that:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
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> (i) the item is material to preparing the defense;
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> (ii) the government intends to use the item in its case-in-chief at trial; or
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> (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)I. The D.C. Circuit has emphasized that the prosecution must disclose evidence which is material "to *the preparation of* the defendant's defense." *United States v. Marshall,* 132 F.3d 63, 67 (D.C. Cir. 1998) (emphasis in original). The government must disclose both inculpatory and exculpatory evidence. *Id*. "Inculpatory evidence, after all, is just as likely to assist in 'the preparation of the defendant's defense' as exculpatory evidence" because "it is just as important to the preparation of a defense to know its potential pitfalls as to know its strengths."

*Marshall*, 132 F.3d at 67; *accord United States v. O'Keefe*, No. 06-0249 (PLF), 2007 WL 1239204, at *2 (Apr. 27, 2007).

The discovery obligations of Rule 16 are "intended to provide a criminal defendant 'the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case.'" *O'Keefe*, 2007 WL 1239204, at *2 (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (materiality standard "is not a heavy burden" – information is material and must be disclosed if it has the potential to play an "important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal"); *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991) (discovery materiality hurdle "is not a high one").

"As a general matter, Rule 16 establishes the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." *United States v. Apodaca*, 287 F. Supp. 3d 21, 39 (D.D.C. 2017); *see also United States v. Karake*, 281 F. Supp. 2d 302, 306 (D.D.C. 2003) Moreover, "the government cannot take a narrow reading of the term material in making its decisions on what to disclose under Rule 16." *O'Keefe*, *supra*, 2007 WL 1239204, at *2.

Government disclosure of exculpatory and impeachment evidence is essential to the constitutional guarantee to a fair trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because *Brady* and *Giglio* are constitutional obligations, *Brady/Giglio* evidence must be disclosed regardless of whether the defendant makes a request for the

information. *See Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Since it is sometimes difficult to assess the materiality of evidence before trial, prosecutors must err on the side of disclosure. *Kyles*, 514 U.S. at 439.

The Department of Justice ("DOJ") Manual, § 9-5.001, provides as follows:

> **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required**. Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is7ubjectt to disclosure.
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> **Additional exculpatory information that must be disclosed**. A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.
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> **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence — including but not limited to witness testimony — the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.
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> **Information**. Unlike the requirements of Brady and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.
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> **Cumulative impact of items of information**. While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

DOJ Manual, https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings (last visited on Feb. 4, 2022) (emphasis in original).

To ensure that prosecutors adhere to their discovery obligations, the United States District Court for the District of Columbia Local Rules of Criminal Procedure specify the types of information that must be disclosed. The rules provide, in pertinent part, that the Government must disclose to the defense:

> (1) Information that is inconsistent with or tends to negate the defendant's guilt as to any element, including identification, of the offense(s) with which the defendant is charged;
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> (2) Information that tends to mitigate the charged offense(s) or reduce the potential penalty;
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> (3) Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged;
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> (4) Information that casts doubt on the credibility or accuracy of any evidence, including witness testimony, the government anticipates using in its case-in-chief at trial; and
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> (5) Impeachment information, which includes but is not limited to: (i) information regarding whether any promise, reward, or inducement has been given by the government to any witness it anticipates calling in its case-in-chief; and (ii) information that identifies all pending criminal cases against, and all criminal convictions of, any such witness.

Local Rule Crim. P. 5.1(b).

## ARGUMENT

Given the allegations in the indictment and applicable law, the Government must expand its search for information to additional sources of potentially discoverable information and must disclose all information that is material to the preparation of Mr. Bannon's defense.

### Information That Tends To Show That The Indictment Is Invalid

The Government takes the spurious position that grand jury secrecy only counts when they want selectively to withhold information. The Government in this case requested an order allowing disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i), which allows a district

court to authorize disclosure "preliminarily to or in connection with a judicial proceeding." [Doc. 9] The Government acknowledged in its motion that "such an order is appropriate because grand jury testimony in this case constitutes material to which the defendant is entitled as part of his discovery." *Id*. at 2. The Court issued a protective order that authorized disclosure of grand jury witness transcripts and exhibits, subject to restrictions on the further disclosure of such "Sensitive Materials." [Doc. 20 at ¶¶ 10 -12]

As part of the discovery materials provided to the defense, the Government selectively included some, but not all, grand jury materials. We made additional requests for the following grand jury-related information:

> 2. All documents and information obtained in response to any subpoena or investigative request relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.
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> 3. All subpoenas or investigative requests relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.
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> 4. All documents and information used in support of any subpoena or investigative request – including but not limited to affidavits – relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.
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> * * *
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> 24. All documents and information that reflect how the grand jury was charged in this matter.
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> 25. All documents and information of any kind that were presented to the grand jury in this matter.
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> 26. All documents and information that were obtained pursuant to a grand jury subpoena, but not presented to a grand jury in this matter.
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> 27. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to negate an element of the offenses charged.

28. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to cast doubt on the credibility or accuracy of any other evidence presented to the grand jury, including witness testimony.

29. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to establish a defense to the offenses charged, including but not limited to reliance on the advice of counsel, reliance on authority of the U.S. Department of Justice Office of Legal Counsel or U.S. Attorney's Office policies or any other public authority, and/or entrapment by estoppel.

Exhibit 1 at 3, 6. The Government rejected these requests without explanation.

Federal Rule of Criminal Procedure 6(e) provides a general rule of secrecy for matters occurring before a grand jury. The purpose of the rule is to: (1) encourage grand jury witnesses to be truthful and willing to testify; (2) prevent grand jury targets from fleeing or interfering with the grand jury; and (3) protect suspects who might later be exonerated. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Where, as here, the Government has sought and obtained Court authorization for the disclosure of selective portions of the matters occurring before the grand jury, it should not be permitted to argue that secrecy concerns justify withholding additional information about matters occurring before that grand jury. The policy reasons underlying grand jury secrecy are no longer applicable. There is no chance that disclosure of the additional grand jury information in this case would discourage grand jury witnesses from testifying, cause targets to flee, or adversely affect suspects who were later exonerated. The grand jury has already returned an indictment.

Under these circumstances, the defense is entitled to a full picture of what was presented to the grand jury, what was not presented, how the prosecution team characterized the evidence and the proposed charges, and the instructions that were given on the law to be applied to the facts. There is no legitimate basis for the Government to be able to choose what material occurring before

this grand jury should be kept secret, when they have already sought authorization for, and disclosed, selective parts of the grand jury record.

Beyond that, there is a Protective Order in place that restricts defense counsel from further disclosing "Sensitive Materials" – including grand jury information received from the Government. [Doc. 20] Given those restrictions, there is no legitimate basis for the Government to withhold any additional grand jury materials. Any grand jury materials disclosed, and marked "Sensitive Material," will continue to be protected even after disclosure to the defense.

In addition, there is another particularized need for the disclosure of additional grand jury materials. Based upon information we have reviewed, grounds *may* exist to dismiss the indictment because of a matter that occurred before the grand jury. *See* Rule 6(e)(3)(E)(ii) (court may authorize disclosure "at the request of a defendant who shows that a ground *may* exist to dismiss the indictment because of a matter that occurred before the grand jury") (emphasis added).

First, as is the subject of a separate motion filed today, the Government used grand jury subpoenas to investigate Mr. Bannon's attorney, Robert J. Costello, Esquire, *at the very time* that Mr. Costello was communicating with the prosecution team and advocating on Mr. Bannon's behalf. There are stringent rules that apply to the investigation of attorneys. Such rules exist because these types of investigations may constitute an impermissible interference with the attorney-client relationship, and the effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution. If the Government failed to follow the applicable rules – which will be revealed through additional discovery – a ground may exist to dismiss the indictment. That separately filed motion explains the need for discovery on that troubling issue, so that the defense has sufficient information to evaluate whether some sanction, including dismissal, is appropriate.

Second, based upon information known to the defense that must be supplemented with additional discovery, grounds may exist to dismiss the indictment based upon the failure to properly charge the grand jury on applicable law. From the very start, this matter has involved lawyers. Mr. Bannon had no direct communication with the Select Committee. Communications were through his counsel, Robert J. Costello, Esquire. On October 7, 2021, Mr. Costello advised the Select Committee that "Mr. Bannon is legally unable to comply with your subpoena requests for documents and testimony." Exhibit 3 [US-000254]. In this and subsequent communications, Mr. Costello explained the reasons that Mr. Bannon could not legally comply with the subpoena at that time. These included, but were not limited to, the following:

- President Donald J. Trump, through his attorney, instructed Mr. Bannon to protect information covered by the executive and other privileges, to invoke these immunities and privileges, to not produce and documents concerning privileged material in response to the subpoena, and to not provide any testimony concerning privileged material in response to the subpoena. *Id*. at US-000253.

- President Donald J. Trump's attorney advised Mr. Bannon that President Donald J. Trump was "prepared to defend these fundamental privileges in court." *Id*.

- Mr. Costello advised that Mr. Bannon "will comply with the directions of the courts, when and if they rule on these claims of both executive and attorney client privileges." *Id*.

- Mr. Costello consistently informed the Select Committee that Mr. Bannon was acting in accordance with applicable law, as set forth in detailed official legal opinions issued by the Office of Legal Counsel, U.S. Department of Justice, which analyzed the legal issues under analogous circumstances. *See* Exhibit 4 (FBI Interview of Robert J. Costello, Esquire, on November 3, 2021). [US001769 to 001782]

Thus, the Select Committee knew from the outset that Mr. Bannon believed that he was acting in accordance with the law, as advised by his attorney, and that he welcomed the adjudication of any disputed interpretation of legal issues by a court of law.

On October 18, 2021, President Donald J. Trump filed a lawsuit in the U.S. District Court for the District of Columbia seeking the judicial determination of his assertion of executive

privilege in response to a request for documents from the Select Committee. The same day, Mr. Costello, on behalf of Mr. Bannon, communicated with the Select Committee seeking a one-week adjournment of the subpoena date. The communication stated, in pertinent part, as follows:

> We write on behalf of Stephen Bannon. We have just been advised of the filing of a lawsuit in federal court for the District of Columbia entitled Donald J. Trump v. Bennie Thompson, et al., 21-Civ-02769 (D.D.C. 2021). In light of this late filing, we respectfully request a one-week adjournment of our response to your latest letter so that we might thoughtfully assess the impact of this pending litigation. (US-000290)

On October 19, 2021, the Select Committee rejected Mr. Bannon's reasonable request for a one-week adjournment to assess this legal development, and instead forwarded a resolution to the full House of Representatives recommending that Steven K. Bannon be found in Contempt of Congress. [US-000607-000652].

The grand jury, in considering whether to return an indictment for a violation of 2 U.S.C. § 192, would need to consider evidence that goes to the question whether Mr. Bannon "willfully [made] default." Grand jury materials already disclosed to the defense raise significant questions as to what evidence was presented on this issue, and what legal instructions were given. Mr. Bannon was clear in conveying his position to the Select Committee – he would testify if a court considered the legal issues involved and determined that no privilege prevented his testimony or production of documents. Another plausible option actually presented itself, with the filing of a lawsuit by President Donald J. Trump seeking a judicial determination of the privilege issue by a federal judge. At that juncture, Mr. Bannon sought a short adjournment to assess this development. Mr. Bannon's request for an adjournment while a federal court considered the executive privilege invocation by President Donald J. Trump is a critical piece of evidence. The grand jury was entitled to consider that evidence. In addition, the grand jury was entitled to clear and accurate instructions on the legal framework within which to consider that evidence, particularly as the grand jury

weighed the essential element of intent. This was at the heart of any decision on whether Mr. Bannon "willfully [made] default."

The selective grand jury materials provided to the defense leave critical questions on these topics unanswered. In testimony on November 12, 2021, the lead FBI agent in the case made no mention of Mr. Bannon's request for adjournment even when specifically questioned about the topic. *See* Exhibit 5 (filed under seal in accordance with Protective Order) [US-000061 to US-000065]. It is unlikely that this involved a lapse in memory because the same lead FBI agent was aware of the request for adjournment when he testified. Robert J. Costello, Esquire, had told him about it in a November 3, 2021, interview, and it is referenced in a report of that interview that the lead FBI agent finalized on November 11, 2021 – *just one day* before his grand jury appearance. *See* Exhibit 4 at 2 (November 11, 2021, FBI Report of Interview of Robert J. Costello, Esquire).

The letter seeking an adjournment on behalf of Mr. Bannon is not among the grand jury exhibits that were provided to the defense. Additional discovery is needed to assess whether the lead agent's testimony, viewed in conjunction with the grand jury instructions and any other information provided to the grand jury by the prosecution team, may be grounds for dismissal of the indictment. This discovery may tend to negate an element of the offense, since the Government must prove beyond a reasonable doubt that Mr. Bannon knew that his conduct was unlawful and intended to do something that the law forbids.

It cannot be contested that the Select Committee was aware that from the start that Mr. Bannon was relying upon legal advice provided by his attorney. The prosecution team also knew this from the start. On November 3, 2021, Robert J. Costello, Esquire, informed the prosecution team that he "advised that BANNON should wait to respond until an agreement was reached between the Select Committee and former President TRUMP or if a court defined what was

covered under Executive Privilege." Exhibit 4 at 4 (November 11, 2021, FBI Report of Interview of Robert J. Costello, Esquire) [US-001772]. In addition, Mr. Costello consistently advised the Government that Mr. Bannon was acting in accordance with legal opinions issued by the Office of Legal Counsel, U.S. Department of Justice, which analyzed the issues under analogous circumstances. *Id*. at 3.

Given that reliance on advice of counsel is central to this case, it is essential that the grand jury was properly instructed not only on the elements of the offense, but also on how to consider the legal significance of information presented regarding the advice of counsel. Available information suggests that the prosecution team may not have accurately instructed the grand jury on applicable law, which may present grounds for dismissal of the indictment as set forth in Rule 6(e)(3)(E)(ii). The Government has taken the position that, in their view, advice of counsel is inapplicable to this case. [Doc. 25 at ¶ 2] Given the Government's position, it is reasonable to question whether the grand jury was properly instructed on this essential legal concept.

A review of the grand jury materials already provided to the defense raises questions about whether the grand jury was properly instructed on the law. For instance, the lead FBI agent in the case appears to have provided information to the grand jury which suggests that a witness cannot not validly assert executive privilege before the Select Committee unless the President himself (or his representative) *directly* communicated the assertion of executive privilege to the Select Committee. *See* Exhibit 6 (filed under seal in accordance with Protective Order) [US-000073]. This could have misled the grand jury about a material legal concept. There is no authority for the proposition that an assertion of executive privilege is not valid unless the President himself, or his representative, communicates it to the Select Committee. Mr. Costello conveyed President Donald

J. Trump's invocation of executive privilege to the Select Committee, and the Select Committee had knowledge of President Donald J. Trump's invocation of the privilege from other sources.

Failure to instruct the grand jury properly on the legal principles of advice of counsel may be grounds for dismissal of the indictment. *See United States v. Stevens*, 771 F. Supp. 556, 567 (D. Md. 2011) (dismissing indictment based upon failure to properly instruct the grand jury regarding advice of counsel, finding that "good faith reliance on the advice of counsel negates a defendant's wrongful intent, and is therefore highly relevant to the decision to indict."); *see generally United States v. Peralta*, 763 F. Supp. 14 (S.D.N.Y. 1991) (dismissal of indictment based upon grand jury instructions that did not properly state the law). In addition, some district courts have ordered the disclosure of grand jury instructions without a showing of particularized need, given that the instructions are part of the ground rules under which the grand jury conducts its proceedings, and do not reveal the grand jury's deliberations. *See United States v. Belton*, 2015 U.S. Dist. LEXIS 52426, *7 (N.D. Cal. 2015) (citing cases). Accordingly, we request an order compelling disclosure of additional grand jury materials.

**Information That Tends To Show That The Subpoena Was Not Lawfully Authorized**

The Government must prove beyond a reasonable doubt that the subpoena seeking Mr. Bannon's testimony and documents was valid and was issued pursuant to lawful authority. Under the rules of discovery, the defense is entitled to any information that tends to negate Mr. Bannon's guilt as to this element of the offense. We are also entitled to any information that tends to cast doubt on the credibility or accuracy of any evidence – including witness testimony and tangible evidence – that the Government intends to rely upon at trial.

This prosecution was set in motion by the actions of officials, members, employees, and staff of the Select Committee. They communicated with Robert J. Costello, Esquire, regarding

service of the subpoena. They communicated with Mr. Costello regarding Mr. Bannon's response to the subpoena, orally and in writing. They took actions to create a record regarding Mr. Bannon's response to the subpoena. They drafted a resolution suggesting that the U.S. House of Representatives find Mr. Bannon in Contempt of Congress. Once that resolution passed, the Speaker of the House, and her staff, took action to effectuate a criminal prosecution of Mr. Bannon.

No criminal prosecution would have followed but for their actions. Accordingly, Mr. Bannon is entitled to information in the files of those individuals, so that he can prepare a defense. The Government has an obligation to search their files for discoverable material. We specifically requested the following information.

5. All documents and information regarding the establishment of the Select Committee, its membership, its staffing, its budget, its authority and functioning, and the authority of the Select Committee to issue subpoenas.

6. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding Mr. Bannon's appearance as a witness and/or production of documents.

7. All documents and information in the possession of the U.S. House of Representatives Rules Committee, Office of General Counsel, and Office of the Speaker, or any of its officials, members, employees, or staff, regarding Mr. Bannon's appearance as a witness and/or production of documents.

8. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding the issuance of a subpoena to Mr. Bannon.

9. All documents and information in the possession of the Select Committee, the main Department of Justice, the U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding President Donald J. Trump's assertion of executive privilege in response to any request of the Select Committee.

10. All drafts of the October 8, 2021, letter from the Select Committee Chair referenced in Paragraph 17 of the Indictment.

11. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding attendance by members and staff at the October 14, 2021, hearing room, referenced in Paragraph 19 of the Indictment.

12. All drafts of the October 15, 2021, letter from the Select Committee Chair referenced in Paragraph 20 of the Indictment.

13. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding what constitutes a default by a witness in response to a subpoena, and/or what does not constitute a default by a witness in response to a subpoena.

14. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding whether the Select Committee would receive the testimony of any witness in a non-public deposition.

Exhibit 1 at 4 to 5. The Government declined to search the files or provide the information requested, contending that the officials, members, employees, and staff of the U.S. House of Representatives are not part of the prosecution team. Exhibit 2 at 1. This cramped interpretation is at odds with the Government's basic obligations in any criminal case. *See United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989) (Rule 16 intended to provide a defendant "the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case").

The Government must inquire whether witnesses are biased, and whether the tangible evidence provided by witnesses is valid. This is not limited to trial witnesses. As the Government is aware, there are numerous officials, members, employees, and staff of the U.S. House of

Representatives who were directly involved in this matter from the beginning. This criminal case was a direct result of their actions and omissions.

The limited information that the defense has received from the files of officials, members, employees, and staff of the U.S. House of Representatives indicates that the actions by the Select Committee were *not* in accordance with the authority conferred by the U.S. House of Representatives. Because valid legal authority is an element of the offense, we are entitled to any information that is inconsistent with or tends to negate the defendant's guilt as to this element. *See* Local Rule Crim. P. 5.1(b).

For instance, the Select Committee's legal authority to issue subpoenas and conduct depositions is limited by the resolution establishing the Select Committee, and the general Rules of the House of Representatives, which are incorporated by reference into that resolution. That authority limits certain actions with regard to subpoenas and depositions by requiring consultation with, and notice to, the ranking minority member of the Select Committee. *See* Exhibit 7 (H. Res. 503, Sec. 5(c)(6)(A) & (B)) [US-000268 to 000269], incorporating Exhibit 8 (procedures adopted by 117th Congress on January 4, 2021, Regulations For Use Of Deposition Authority, ¶ 2) [US-000963]. The Select Committee did not act within its legal authority with regard to the subpoena and the deposition of Mr. Bannon, because there was no consultation with the ranking minority member. Simply put, the Select Committee does *not have a ranking minority member*. *See* Exhibit 9 (November 2, 2021, FBI Interview of U.S. House of Representatives General Counsel Doug Letter). The top lawyer for the U.S. House of Representatives acknowledged this in an FBI interview, as follows:

> Paragraph one of 3(b) makes reference to ranking minority members, who are typically a part of House committees. In these House committees, there are particular rules at hearings set aside for the Chair and Ranking Member. The Ranking Member is generally the highest minority member in a House committee and typically possess [sic] procedural powers.

> LETTER explained that the Select Committee was specifically appointed by the Speaker of the House and there were no majority or ranking members. Representative LIZ CHENEY is acknowledged to be the Vice Chair of the Select Committee; since the Select Committee has a Chair and a Vice Chair, there are no express rules for the Vice Chair as there would be for a Ranking Member.

*Id*. at 4 [US-000248]. Mr. Bannon is entitled to all information along these lines, which would tend to negate an element of the offense.

Given the central role of the Select Committee, the Speaker of the House, and the U.S. House of Representatives, in initiating this prosecution, the Government is obligated to make inquiry of those whose actions precipitated this prosecution, and to disclose any information that is material to the preparation of Mr. Bannon's defense.

**Information That Tends To Negate Willfulness**

The Government has an obligation to disclose information that tends to negate the intent element of this offense. Specifically, we believe that the Government is in possession of documents and communications which tend to establish that a person in Mr. Bannon's position – asserting a privilege in response to a Congressional subpoena – should not be criminally prosecuted under 2 U.S.C. § 192. Accordingly, we requested that the Government search for and disclose the following information:

19. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), and U.S. Attorney's Office, or any of its officials, members, employees, or staff, regarding the factors to be considered in determining whether to bring a civil or criminal action or other sanction for an alleged failure to comply with a Congressional subpoena, involving Mr. Bannon or any other individual.

20. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice – including but not limited to the Office of Legal Counsel – and the U.S. Attorney's Office, or any of its officials, members, employees,

> or staff, regarding the applicability of the advice of counsel defense to an alleged failure to comply with a Congressional subpoena, involving Mr. Bannon or any other individual.

Exhibit 1 at 5.

Given that the United States Attorney General made a personal statement about the case on the day that Mr. Bannon was indicted, there is reason to believe that main Justice was involved with the prosecution team in initiating this case. We understand that the files at main Justice, the U.S. Attorney's Office, and the White House all contain documents analyzing the assertion of privilege in response to a congressional subpoena, and determining that a prosecution of someone in Mr. Bannon's position cannot be sustained.

For instance, in a memorandum explaining why the U.S. Attorney's Office would not pursue a under 2 U.S.C. § 192 prosecution of a former executive branch official who asserted privilege and refused to answer any questions based upon privilege, the U.S. Attorney for the District of Columbia at the time stated, in pertinent part, that:

> It has long been the position of the Department, across administrations of both political parties, that we will not prosecute an Executive Branch official under the contempt of Congress statute for withholding subpoenaed documents pursuant to a presidential assertion of executive privilege.

Exhibit 10 at 6 (Letter from Ronald C. Machen Jr., United States Attorney, to Speaker of the House John A. Bohner, (March 31, 2015)). Likewise, the Office of Legal Counsel, U.S. Department of Justice, has similar documents that tend to negate Mr. Bannon's guilt or establish a defense to the charges. For example, Theodore Olson, Assistant Attorney General, Office of Legal Counsel, wrote that:

> We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege is sound, and we concur with it.

Exhibit 11 at 129 (*Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984)).

Another example of an Office of Legal Counsel document that tends to negate the element of willfulness involved a former White House employee who was subpoenaed to testify before a House Committee and who anticipated questions that were protected by executive privilege. In that matter, the Committee's rules allowed the former White House employee to be accompanied by private counsel, but did not allow the presence of agency counsel, who would represent the interests of the Executive Branch – the same procedure employed by the Select Committee here, to which Mr. Bannon objected through his attorney Robert J. Costello, Esquire. Under those circumstances, Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, concluded that:

> Congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement.

Exhibit 12 at 1 (*Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, slip op. (May 23, 2019)).

Because the defense does not have the ability to search the files of the government actors involved in this prosecution that may possess additional such documents, we respectfully request that the Court compel the Government to meet its obligations in this regard.[2]

**Information That Tends To Show Bias Or The Invalidity Of Evidence**

Available information suggests that political considerations played an impermissible role in the events leading to the prosecution of Mr. Bannon. Under Local Rule Crim. P. 5.1(b), Mr.

[2] Additional discovery will tend to support several defenses to the charges, such as a public authority defense, including the defenses of actual authority, implied authority, and entrapment by estoppel.

Bannon is entitled to information that tends to show the bias of any witness against him. Such information would tend to cast doubt on the credibility or accuracy of the Government's evidence. Mr. Bannon is also entitled to any information that tends to show that this prosecution was initiated or pursued because of political considerations. Such information would tend to establish an articulated and legally cognizable defense theory or recognized affirmative defense. Thus, the information must be disclosed pursuant to Local Rule of Criminal Procedure 5.1(b).

We requested the following information from the Government:

2. Any private or public statement by any member of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, or any of its officials, members, employees, or staff, regarding Mr. Bannon's interaction with the Select Committee.

3. Any private or public statement by any official, employee, or staff of the U.S. Department of Justice regarding Mr. Bannon's interaction with the Select Committee.

4. Any private or public statement by any official, employee, or staff of the U.S. Attorney's Office for the District of Columbia regarding Mr. Bannon's interaction with the Select Committee.

5. Any private or public statement by any official, employee, or staff of the White House regarding Mr. Bannon's interaction with the Select Committee.

* * *

22. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice – including but not limited to the Office of Legal Counsel – the U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, that reference making an example of Mr. Bannon, punishing him, hoping to influence or affect the conduct of other potential witnesses before the Select Committee, or words of similar meaning and effect.

23. All documents and information in the possession of any Member of the Select Committee, or any Member of the U.S. House of Representatives, who voted in favor of a criminal referral of the matter involving Mr. Bannon, which tend to show that Member's bias (including animosity toward Mr. Bannon, or animosity toward a group with which Mr. Bannon is affiliated), or conflict of interest.

Exhibit 1 at 5-6. The Government declined to provide any such information, or even make the requested search for responsive documents.

Information obtained by the defense provides the basis for these discovery requests, as follows:

- Select Committee members were selected by the Speaker of the House, a Democrat, after she declined to appoint key Republican members recommended by the Republican Leader. *See* Lindsay Wise, *Pelosi Rejects Two GOP Picks for Jan. 6 Capitol Riot*, THE WALL STREET JOURNAL, updated July 21, 2021, https://www.wsj.com/articles/pelosi-rejects-two-gop-selections-for-jan-6-capitol-riot-committee-11626889294.

- The Select Committee noted that Mr. Bannon was the Chief Executive Officer of President Donald J. Trump's 2016 presidential campaign. [US-000611]

- The Select Committee noted that Mr. Bannon served in the White House as President Donald J. Trump's chief strategist. *Id*.

- The Select Committee noted that after Mr. Bannon left the White House, he remained active in media and politics. [US-000612]

- The Select Committee noted that Mr. Bannon was the host of a radio show and podcast focused on "rallying supporters" of President Donald J. Trump. *Id*.

- The Select Committee noted that before the 2020 Presidential election, Mr. Bannon made public efforts to explain "his belief that the Democrats are plotting to steal the 2020 election." *Id*.

- The Select Committee rejected Mr. Bannon's reasonable request for a judicial determination of his assertion of executive privilege. [US-000291 to 000294]

- The Select Committee rejected Mr. Bannon's reasonable request for a one-week adjournment of his appearance, after President Donald J. Trump filed a lawsuit seeking a judicial determination of the assertion of executive privilege. [US-000275]

- The U.S. House of Representatives voted largely along party lines in approving a resolution finding Mr. Bannon in contempt of Congress. *See* Claudia Grisales, *The House votes to hold Steve Bannon in contempt for defying a subpoena*, NPR, Oct. 21, 2021, https://www.npr.org/2021/10/21/1048051026/u-s-house-approves-criminal-contempt-referral-for-steve-bannon.

- Members of the Select Committee have made public statements regarding their desire to set an example through the criminal prosecution of Mr. Bannon. *See*, *e.g.*,

    - Mychael Schnell, *Schiff says holding Bannon in criminal contempt 'a way of getting people's attention*,' The Hill (Oct. 17, 2021) https://www.msn.com/en-us/news/politics/schiff-says-holding-bannon-in-criminal-contempt-a-way-of-getting-people-s-attention/ar-AAPDsOV

    - Jordan Williams, *Kinzinger says he hopes Bannon indictment sends 'chilling message*,' The Hill (Nov. 13, 2021) https://www.msn.com/en-us/news/politics/kinzinger-says-he-hopes-bannon-indictment-sends-chilling-message/ar-AAQFsJs "So, this is certainly a good thing, and I hope it sends a chilling message to anybody else who was going to follow through like this."

- The Speaker of the House, a Democrat, made a public statement regarding her desire to have Mr. Bannon criminally prosecuted. *See* "On Sunday, Pelosi addressed the issue during an interview on CNN's State of the Union, answering 'yes' when asked if Bannon should be prosecuted and jailed for refusing to submit documents and testimony for the investigation." Natalie Colarossi, *Steve Bannon's 1/5 Comments Resurface as Pelosi Says He Should Be Jailed Over Subpoena Refusal*, NEWSWEEK, https://www.newsweek.com/steve-bannons-1-5-comments-resurface-pelosi-says-he-should-jailed-over-subpoena-refusal-1642016.

- The President of the United States, a Democrat, made a public statement stating that those in Mr. Bannon's position should be criminally prosecuted. *See* Amy B. Wang, *Biden says Justice Department should prosecute those who refuse Jan. 6 Committee subpoenas*, WASHINGTON POST, Oct. 15, 2021, https://www.washingtonpost.com/politics/2021/10/15/biden-says-justice-department-should-prosecute-those-who-refuse-jan-6-committees-subpoenas/. "When asked Friday if the Justice Department should prosecute those who refuse the committee's subpoenas, Biden responded, 'I do. Yes.'"

- In indicting Mr. Bannon, the U.S. Department of Justice ignored long-standing policies that: (1) a former executive branch official cannot be prosecuted for contempt of Congress after asserting executive privilege; and (2) congressional subpoenas seeking the testimony of executive branch employees – where the committee does not allow the presence of agency counsel – are invalid and unenforceable.

- The Attorney General of the United States, nominated by the President, a Democrat, took the unusual step of including his personal opinion in a press release announcing Mr. Bannon's indictment. *See* Press Release, United States Department of Justice, *Stephen K. Bannon Indicted for Contempt of Congress* (Nov. 12, 2021) https://www.justice.gov/opa/pr/stephen-k-bannon-indicted-contempt-congress.

- To date, Mr. Bannon is the only individual who has been criminally prosecuted for interactions with the Select Committee.

Given these facts, Mr. Bannon is entitled to the disclosure of information tending to show the bias of any of individual who set in motion his criminal prosecution, and information tending to show that this prosecution is politically motivated.

## CONCLUSION

Wherefore, for the reasons set forth above, Mr. Stephen K. Bannon respectfully requests an Order compelling the Government to produce the requested discovery materials so that he may prepare a defense to the charges in this matter.

Dated: February 4, 2022

Respectfully submitted,

**SILVERMAN|THOMPSON|SLUTKIN|WHITE, LLC**

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*Counsel for Defendant Stephen K. Bannon*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of February 2022, a copy of the foregoing DEFENDANT'S MOTION TO COMPEL DISCOVERY was served *via* the Court's CM/ECF system on registered parties and counsel.

/s/ M. Evan Corcoran
M. Evan Corcoran (D.C. Bar No. 440027)

# EXHIBIT 1

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January 14, 2022

***VIA – ELECTRONIC DELIVERY***

Amanda Vaughn, Esquire
J.P. Cooney, Esquire
Molly Gaston, Esquire
U.S. Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530

Re: *United States v. Stephen K. Bannon,* Criminal No. 21-670 (CJN)

Dear Counsel:

We make the following discovery requests pursuant to the Court's January 3, 2022, Scheduling Order (Doc. 25).

Our requests are based, without limitation, upon Federal Rule of Criminal Procedure 16, Local Rule of Criminal Procedure 5.1(b), the Jencks Act, Federal Rule of Evidence 404(b), the *Brady/Giglio/Kyles* line of cases, the United States Department of Justice's policies governing discovery, and the United States Attorney's Office for the District of Columbia's policies governing discovery.

**A. Scope of Review**

U.S. Department of Justice policy states that:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

JM 9-5.001.

It is your responsibility to search for exculpatory and impeachment information in the custody and control of the attorneys, agents, and other employees of the U.S. Attorney's Office. Because employees of the main U.S. Department of Justice participated in the investigation and prosecution of this case, it is also your responsibility to search for exculpatory and impeachment information in the custody and control of the officials, attorneys, agents, and other employees of the main U.S. Department of Justice. In addition, because Members of Congress, staff, and employees of the U.S. House of Representatives participated in the investigation and prosecution of this case – and in some instances may be witnesses in this case – it is your responsibility to search for exculpatory and impeachment information in the custody and control of the attorneys, agents, and other employees of the U.S. House of Representatives. This includes individuals associated with the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol (hereinafter "Select Committee"), the Rules Committee, Office of General Counsel, and Office of the Speaker of the House. In addition, since both the U.S. Attorney General and the President of the United States commented publicly upon the prosecution of Mr. Bannon, it is your responsibility to search for discoverable information within the Office of the Attorney General, and the White House.

**B. Materials To Review**

You are required to review all potentially discoverable materials within the custody or control of the governmental organizations set forth above. This includes, without limitation: the FBI's entire investigative files; confidential informant, witness, human source, and source files; information gathered during the investigation; and all case-related communications.

In addition, you are required to obtain, review, and disclose all prior statements of individuals at the U.S. Attorney's Office, the main U.S. Department of Justice, the FBI, the U.S. House of Representatives, and the White House, who participated in any way in this matter. You are responsible for disclosing potentially inconsistent prior statements (including potentially inconsistent attorney proffers), statements or reports reflecting witness statement variations, and conditions that could affect a person's bias (including animosity toward Mr. Bannon, or animosity toward any group with which Mr. Bannon is affiliated).

**C. Local Rule of Criminal Procedure 5.1(b)**

As you are aware, the local rules for the United States District Court for the District of Columbia make explicit your obligations as to each piece of information that you review for discovery purposes. You are required to consider how a given piece of information might add to the quantum of evidence in favor of the defendant, and to disclose any information which has any weight at all in a defendant's favor. You are required to disclose any information that would make conviction less likely, or a lower sentence more likely. This includes any information that is inconsistent or tends to negate any element of the offense charged. It also includes any

information that would tend to support any defense to the offense charged. It further includes information that has not been documented. With regard to such information, it is your responsibility to reduce it to writing so that it can be produced to us.

The local rules provide, in pertinent part, that you are obligated to disclose to us, without limitation:

> (1) Information that is inconsistent with or tends to negate the defendant's guilt as to any element, including identification, of the offense(s) with which the defendant is charged;
>
> (2) Information that tends to mitigate the charged offense(s) or reduce the potential penalty;
>
> (3) Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged;
>
> (4) Information that casts doubt on the credibility or accuracy of any evidence, including witness testimony, the government anticipates using in its case-in-chief at trial; and
>
> (5) Impeachment information, which includes but is not limited to: (i) information regarding whether any promise, reward, or inducement has been given by the government to any witness it anticipates calling in its case-in-chief; and (ii) information that identifies all pending criminal cases against, and all criminal convictions of, any such witness.

LCrR 5.1(b).

**D. <u>Additional Requests</u>**

1. All statements of Mr. Bannon, and/or any person acting on his behalf or associated with him.

2. All documents and information obtained in response to any subpoena or investigative request relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.

3. All subpoenas or investigative requests relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.

4. All documents and information used in support of any subpoena or investigative request – including but not limited to affidavits – relating to Mr. Bannon, and/or any person acting on his behalf or associated with him.

5. All documents and information regarding the establishment of the Select Committee, its membership, its staffing, its budget, its authority and functioning, and the authority of the Select Committee to issue subpoenas.

6. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding Mr. Bannon's appearance as a witness and/or production of documents.

7. All documents and information in the possession of the U.S. House of Representatives Rules Committee, Office of General Counsel, and Office of the Speaker, or any of its officials, members, employees, or staff, regarding Mr. Bannon's appearance as a witness and/or production of documents.

8. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding the issuance of a subpoena to Mr. Bannon.

9. All documents and information in the possession of the Select Committee, the main Department of Justice, the U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding President Donald J. Trump's assertion of executive privilege in response to any request of the Select Committee.

10. All drafts of the October 8, 2021, letter from the Select Committee Chair referenced in Paragraph 17 of the Indictment.

11. All documents and information in the possession of the Select Committee, or any of its officials, members, employees, or staff, regarding attendance by members and staff at the October 14, 2021, hearing room, referenced in Paragraph 19 of the Indictment.

12. All drafts of the October 15, 2021, letter from the Select Committee Chair referenced in Paragraph 20 of the Indictment.

13. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding what constitutes a default by a witness in response to a subpoena, and/or what does not constitute a default by a witness in response to a subpoena.

14. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, regarding whether the Select Committee would receive the testimony of any witness in a non-public deposition.

15. Any private or public statement by any member of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, or any of its officials, members, employees, or staff, regarding Mr. Bannon's interaction with the Select Committee.

16. Any private or public statement by any official, employee, or staff of the U.S. Department of Justice regarding Mr. Bannon's interaction with the Select Committee.

17. Any private or public statement by any official, employee, or staff of the U.S. Attorney's Office for the District of Columbia regarding Mr. Bannon's interaction with the Select Committee.

18. Any private or public statement by any official, employee, or staff of the White House regarding Mr. Bannon's interaction with the Select Committee.

19. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice (including but not limited to the Office of Legal Counsel), and U.S. Attorney's Office, or any of its officials, members, employees, or staff, regarding the factors to be considered in determining whether to bring a civil or criminal action or other sanction for an alleged failure to comply with a Congressional subpoena, involving Mr. Bannon or any other individual.

20. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice – including but not limited to the Office of Legal Counsel – and the U.S. Attorney's Office, or any of its officials, members, employees, or staff, regarding the applicability of the advice of counsel defense to an alleged failure to comply with a Congressional subpoena, involving Mr. Bannon or any other individual.

21. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice – including but not limited to the Office of Legal Counsel – and the U.S.

Attorney's Office, or any of its officials, members, employees, or staff, regarding the meaning of the term "papers" in Title 2, United States Code, Section 192.

22. All documents and information in the possession of the Select Committee, Rules Committee, Office of General Counsel, and Office of the Speaker, main Department of Justice – including but not limited to the Office of Legal Counsel – the U.S. Attorney's Office, and the White House, or any of its officials, members, employees, or staff, that reference making an example of Mr. Bannon, punishing him, hoping to influence or affect the conduct of other potential witnesses before the Select Committee, or words of similar meaning and effect.

23. All documents and information in the possession of any Member of the Select Committee, or any Member of the U.S. House of Representatives, who voted in favor of a criminal referral of the matter involving Mr. Bannon, which tend to show that Member's bias (including animosity toward Mr. Bannon, or animosity toward a group with which Mr. Bannon is affiliated), or conflict of interests.

24. All documents and information that reflect how the grand jury was charged in this matter.

25. All documents and information of any kind that were presented to the grand jury in this matter.

26. All documents and information that were obtained pursuant to a grand jury subpoena, but not presented to a grand jury in this matter.

27. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to negate an element of the offenses charged.

28. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to cast doubt on the credibility or accuracy of any other evidence presented to the grand jury, including witness testimony.

29. All documents and information reflecting consideration of, and/or the presentation of, any information to a grand jury in this matter which would tend to establish a defense to the offenses charged, including but not limited to reliance on the advice of counsel, reliance on authority of the U.S. Department of Justice Office of Legal Counsel or U.S. Attorney's Office policies or any other public authority, and/or entrapment by estoppel.

30. All documents previously requested in our January 6, 2022, letter regarding the Government's investigative activities.

Please provide the information requested above by January 28, 2022, in accordance with the Court's Scheduling Order.

Thank you for your attention to this request.

Sincerely,

David I. Schoen
Robert J. Costello
M. Evan Corcoran

*Counsel for Stephen K. Bannon*

# EXHIBIT 2

**U.S. Department of Justice**

Matthew M. Graves
United States Attorney

*District of Columbia*

*Judiciary Center*
*555 Fourth St., N.W.*
*Washington, D.C. 20530*

January 28, 2022

**DELIVERY VIA EMAIL**

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RE: *United States v. Stephen K. Bannon*, 21-cr-670 (CJN)

Dear Counsel:

We write in response to your letter of January 14, 2022, making certain discovery requests. As we have stated previously, we understand our obligations under Rule 16, the Jencks Act, and *Brady*, *Giglio*, and their progeny. To date, we have provided discovery that exceeds our obligations.

We have carefully reviewed all of your requests and the materials in our possession, custody, and control. As an initial matter, your letter asserts that the U.S. House of Representatives and the White House are part of the prosecution team in this case. They are not. We have provided all discoverable materials we have received from those parties and thus have nothing more to provide in response to requests in which you seek information in their possession.

Regarding your remaining requests, either we have already provided you with any discoverable materials that are in the possession, custody, or control of the prosecution team, or your requests call for documents and information that are not discoverable.

Please do not hesitate to contact us with any questions.

Sincerely,

MATTHEW M. GRAVES
United States Attorney

By: /s/ *Amanda R. Vaughn*

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# EXHIBIT 3

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October 7, 2021

Kristin Amerling, Esq.
Chief Counsel/Deputy Staff Director
House Select Committee to Investigate
The January 6th Attack on the United States Capitol
1540A Longworth HOB
Washington, DC 20515

Re: The Subpoena for Stephen K. Bannon dated September 23, 2021

Dear Ms. Amerling:

I write today on behalf of Stephen K. Bannon with respect to the above referenced subpoena, which I accepted on behalf of Mr. Bannon. On the afternoon of October 6, 2021, I received a letter from Justin Clark, as counsel for then President of the United States Donald J. Trump. That letter references the subpoena that your Committee served upon Mr. Bannon, and notes that the subpoena:

> "seeks records and testimony purportedly related to the events of January 6th, 2021, including but not limited to information which is potentially protected from disclosure by executive and other privileges, including among others the presidential communications, deliberative process, and attorney-client privileges. President Trump is prepared to defend these fundamental privileges in court.
>
> Therefore, to the fullest extent permitted by law, President Trump instructs Mr. Bannon to: (a) where appropriate, invoke any immunities and privileges he may have from compelled testimony in response to the Subpoena; (b) not produce any documents concerning privileged material in response to the Subpoena; and (c) not provide any testimony concerning privileged material in response to the Subpoena."

It is therefore clear to us that since the executive privileges belong to President Trump, and he has, through his counsel, announced his intention to assert

those executive privileges enumerated above, we must accept his direction and honor his invocation of executive privilege. As such, until these issues are resolved, we are unable to respond to your request for documents and testimony.

We will comply with the directions of the courts, when and if they rule on these claims of both executive and attorney client privileges. Since these privileges belong to President Trump and not to Mr. Bannon, until these issues are resolved, Mr. Bannon is legally unable to comply with your subpoena requests for documents and testimony.

Very truly yours,

/s/ Robert J. Costello

RJC/nc
None

**FEDERAL BUREAU OF INVESTIGATION**

Date of entry 11/11/2021

ROBERT COSTELLO, Partner, Davidoff Hutcher & Citron, LLP, 605 Third Avenue, New York, New York, was interviewed via Webex. COSTELLO was joined in the interview via Webex by his associate ADAM KATZ. COSTELLO was interviewed by Assistant United States Attorney (AUSA) J.P. Cooney, U.S. Attorney's Office for the District of Columbia (USAO-DC), AUSA Molly Gaston USAO-DC, AUSA Amanda Vaughn USAO-DC, Paralegal Chad Byron USAO-DC, FBI Special Agent Katherine E. Pattillo, FBI Special Agent Frank G. D'Amico, FBI Special Agent Matthew Lariccia, and FBI Special Agent Stephen R. Hart. There were no agreements or conditions governing the conversation between COSTELLO and representatives of USAO-DC or FBI. After being advised of the identities of the interviewing AUSAs and Agents and the nature of the interview, COSTELLO provided the following information:

COSTELLO had initiated contact with the U.S. Attorney's Office (USAO) because he was not certain what had been provided to them regarding his interactions with the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol (the Select Committee) regarding their subpoena to his client, STEPHEN BANNON (BANNON). COSTELLO was willing to provide USAO additional written correspondence between him and the Select Committee.

The Select Committee subpoena requested a number of different categories of information from BANNON. Among them, the Select Committee sought copies of BANNON's podcast. COSTELLO found this request odd because the podcasts are available to the public online. COSTELLO and BANNON discussed the categories and were preparing to respond to Chairman Thompson on October 19, 2021, when they received a letter on October 18, 2021, from the Select Committee notifying of a deadline to respond. However, just that afternoon, COSTELLO had learned of a lawsuit filed by attorneys for former President DONALD TRUMP in US District Court in Washington, DC, challenging the Select Committee. COSTELLO had not had communication with attorneys for TRUMP

prior to that date. After learning of the lawsuit filed by the attorneys for former President TRUMP, COSTELLO wrote a short letter to the Select Committee requesting an adjournment from the proceedings. COSTELLO did not expect the Select Committee to give him a full seven days adjournment, but he did expect the Select Committee to give him 24-48 hours to review the lawsuit and whether or not it applied to the subpoena served on BANNON.

With regards to responding to the Select Committee's request for documents, COSTELLO planned to send a link to the website hosting all of BANNON's publicly accessible podcasts. COSTELLO and BANNON had also identified five other categories for which BANNON had no responsive documents. COSTELLO believed the request listed as number 17 involved information over which BANNON could assert attorney-client privilege given it included a request for communications between BANNON and RUDOLPH GIULIANI, JENNA ELLIS, and other attorneys who were working for former President TRUMP. COSTELLO did not want to assert Executive Privilege over items BANNON didn't possess or were publicly available, like the podcasts. Former President TRUMP's attorneys were the first to say they were invoking Executive Privilege. COSTELLO believed he first heard this asserted in a letter dated October 6, 2021.

At approximately 5:59pm on October 18, 2021, COSTELLO sent a letter to the Select Committee requesting an adjournment. However, COSTELLO received a letter from White House Counsel's Office at 6:55pm advising former President TRUMP's use of Executive Privilege in regards to activities on January 6, 2021, was not valid and could therefore not be asserted by BANNON. COSTELLO assumed the Select Committee forwarded his letter to the White House generating the response. The Select Committee responded on October 19, 2021. However, per Select Committee rules, COSTELLO was not allowed to respond.

The following day, the Select Committee held a press conference regarding their vote and to make an example out of BANNON. The Select Committee had served subpoenas to BANNON, MARK MEADOWS, PATEL, and SCAVINO (writer's note: PATEL and SCAVINO are KASH PATEL and DAN SCAVINO). COSTELLO reminded interviewing agents and attorneys that nothing had happened to any of the other subpoena recipients although the Select Committee was reportedly engaging with MEADOWS and PATEL. But, it was believed that neither MEADOWS

nor PATEL had been brought before the Select Committee nor had they produced documents as required in their subpoenas.

COSTELLO informed BANNON that BANNON did not have the ability to waive Executive Privilege since that authority belongs to the President.

COSTELLO spoke with an attorney on the Select Committee the night before BANNON was scheduled to appear. (Writer's note: This attorney was SEAN TONOLLI.) The attorney informed COSTELLO he was checking to see if COSTELLO and/or BANNON was going to appear. The attorney stated he had young kids at home and preferred to be at home with them rather than preparing for a deposition if they had no plans to appear. COSTELLO told the attorney he could go home for the night as they would not be appearing before the Select Committee. COSTELLO brought up to the attorney the unusual Select Committee rule that the only lawyer allowed to be present with a witness was the witness's attorney. The Committee attorney responded those were the rules of the Select Committee and offered no further explanation or discussion.

COSTELLO viewed the whole issue as a "battle" between the Select Committee and former President TRUMP. Per the DOJ Office of Legal Counsel (DOJ-OLC), BANNON did not have to be a government employee to receive protections under Executive Privilege. COSTELLO believed BANNON was covered under Executive Privilege and that former President TRUMP had to the right to claim it for BANNON. COSTELLO stated, similar to DOJ-OLC's opinion, the Supreme Court has held since 1977 that a person does not need to be a government employee to receive protections under Executive Privilege. COSTELLO believed the Executive Privilege issue should be worked out between the Select Committee and former President TRUMP and not by BANNON. In regards to Executive Privilege, COSTELLO and BANNON would follow any agreements made by former President TRUMP and the Select Committee or legal ruling of a court. BANNON was not a contemptuous person in regards to the Select Committee's proceedings.

The Select Committee told COSTELLO the issue of Executive Privilege was not to be decided by BANNON. COSTELLO pointed out BANNON had testified on four previous occasions. Each of these instances involved discussions regarding BANNON's communications with former President TRUMP and the possible issue of Executive Privilege. BANNON had previously testified once

before the Mueller Special Counsel's Office, once before the Senate Intelligence Committee, and twice before the House Intelligence Committee. Representative ADAM SCHIFF is on the Select Committee and SCHIFF should be aware that BANNON knows the processes.

DOJ-OLC had previously reviewed a similarly constructed House committee which operated under the same rules as the Select Committee. COSTELLO did not know who or what was covered under Executive Privilege but that decision was up to former President TRUMP and the courts. COSTELLO believed the Select Committee was purposely going after BANNON because of who he was and the Select Committee wanted to use the USAO to force people to reply to the Select Committee. COSTELLO believed that based upon the DOJ-OLC guidance, BANNON would not have to reply to the Select Committee subpoena.

COSTELLO believed that ten of the topics listed in the schedule attachment of the Select Committee subpoena were protected by Executive Privilege leaving seven which were not. COSTELLO advised BANNON not to respond to the Select Committee subpoena. Instead, COSTELLO advised that BANNON should wait to respond until an agreement was reached between the Select Committee and former President TRUMP or if a court defined what was covered under Executive Privilege. COSTELLO requested USAO decline prosecution of BANNON and for the U.S. House of Representatives to attempt to settle the matter civilly. COSTELLO believed under the legal argument *void ab initito* there was no civil recourse for the Select Committee. BANNON was fully engaged with COSTELLO throughout the entire subpoena process.

COSTELLO could not recall the exact date and time, but a Select Committee staffmember had called him prior to the subpoena issue to confirm COSTELLO still represented BANNON. The following day, KRISTIN AMERLING called COSTELLO to ask if he would accept the service of the Select Committee subpoena on behalf of BANNON. AMERLING sent the Select Committee subpoena to COSTELLO before COSTELLO had a chance to speak with BANNON. COSTELLO was contacted by various press outlets before he agreed to accept service of the Select Committee subpoena. The Select Committee held a press conference about the subpoena before COSTELLO had the opportunity to reply to the Select Committee.

COSTELLO did not know who was representing SCAVINO, PATEL, MEADOWS, or former President TRUMP. COSTELLO later learned which attorney was representing MEADOWS. COSTELLO attempted to contact the attorney he believed was representing former President TRUMP, but that attorney advised him that former President TRUMP was being represented by JUSTIN CLARK. COSTELLO first had contact with CLARK on approximately October 4 or October 5, 2021. COSTELLO could not recall the exact date, but recalled it was a day or two before he received the letter from the Select Committee on October 6, 2021. COSTELLO believed he may have attempted to contact CLARK first but the first substantive contact occurred when CLARK responded to COSTELLO. Throughout the subpoena response process, COSTELLO, KATZ, and BANNON have operated independently of others who have received subpoenas from the Select Committee and their respective attorneys.

COSTELLO sent the Select Committee subpoena to BANNON to review. BANNON did not think he had documents for all 17 items listed in the schedule attachment BANNON was certain he had no documents for five of the categories. COSTELLO did not inform the Select Committee of BANNON's position on the 17 items in the schedule. However, on October 18, 2021, COSTELLO was in the process of drafting a letter to the Select Committee about that when he was informed of the lawsuit filed on behalf of former President TRUMP. COSTELLO was surprised he was not given a courtesy 24-48-hour adjournment by the Select Committee to review the lawsuit. COSTELLO believed the adjournment was intentionally not given by the Select Committee in order to be able to send the matter to the House for a vote. Per DOJ-OLC's opinion, the Select Committee knew the subpoenas were illegal and unenforceable.

After AMERLING contacted COSTELLO, he may have contacted her the following day. COSTELLO did not have any additional contact with AMERLING subsequent to the subpoena service. COSTELLO also spoke with SEAN TONOLLI at the Select Committee. Outside of AMERLING and TONOLLI, COSTELLO has not spoken with anyone else at the Select Committee. COSTELLO was not sure of the exact date, but recalled TONOLLI first called COSTELLO between 7:30pm and 8:00pm. TONOLLI advised he was staff counsel at the Select Committee and would be the one person asking questions during the deposition. TONOLLI called to verify neither COSTELLO nor BANNON were going

to appear at the deposition. TONOLLI said he had kids and would prefer to be at home with them instead of at work if COSTELLO confirmed neither he nor BANNON would appear at the deposition. COSTELLO brought up the issue of Executive Privilege and informed TONOLLI the Select Committee could either agree to it or litigate. COSTELLO told TONOLLI he noticed in the Select Committee's rules the only attorney who could attend the deposition would be an attorney representing the witness and no outside attorneys. COSTELLO believed this would be a secret deposition since, unlike other depositions, neither the witness nor the witness's attorney could review the transcript. TONOLLI told COSTELLO's those are the Select Committee's rules. COSTELLO did not ask TONOLLI to change the rules. COSTELLO noted TONOLLI was not in a position to change the Select Committee's rules anyway.

COSTELLO did not communicate his issues with the Select Committee's rules to anyone in the Select Committee who actually had the ability to change the rules. COSTELLO did not tell Chair Bennie Thompson, who is not an attorney, about COSTELLO's objections to the Select Committee's rules. COSTELLO was surprised the Select Committee didn't know it's own rules. COSTELLO and BANNON were waiting for additional instructions from the Select Committee on how to proceed, but neither COSTELLO nor BANNON received any additional instructions, even though the Select Committee made media statements that BANNON could not be covered under Executive Privilege.

COSTELLO believed there were seven items in the attachment that could be disposed of quickly. BANNON did not possess any responsive documents for these items. For example, BANNON did not have any communication with the Proud Boys, the Oathkeepers, Three Percenters, ALEX JONES, or SCOTT PERRY. COSTELLO acknowledged it might have put BANNON in a better light had COSTELLO responded to the Select Committee there were no documents or communications for the seven items and that those items were not covered under Executive Privilege. COSTELLO stated Executive Privilege doesn't cover items a person doesn't possess. The podcasts requested could be obtained by the Select Committee off the internet, and since they were in the public domain, the podcasts also were not covered under Executive Privilege.

COSTELLO knew the Select Committee was going to refer the matter to DOJ

and believed Congress was overstepping its authorities and was doing the job of the FBI. COSTELLO did not believe the actions were appropriate under the Constitution. COSTELLO and BANNON were willing to reply to the Select Committee subpoena but they needed someone from the Select Committee to advise them of the proper rules.

COSTELLO did not discuss disposing of any documents requested in the Select Committee subpoena with any attorneys who represented former President TRUMP.

COSTELLO had "an email or two" with CLARK, who COSTELLO believed was the attorney who filed the lawsuit on behalf of former President TRUMP. However, COSTELLO subsequently learned the lawsuit was filed by a Virginia-based attorney named First Name Unknown (FNU) BINNALL.

COSTELLO again stated he did not inform the Select Committee about disposing of the seven items in the Select Committee subpoena because the Select Committee would not respond to COSTELLO.

COSTELLO did not request any other adjournments. The House of Representatives voted quickly after COSTELLO's request for adjournment. COSTELLO believed that was done in order to make an example of BANNON. COSTELLO didn't raise the adjournment issue after the House's vote because he knew he'd eventually have to deal with the USAO anyway.

COSTELLO was not prepared to respond on BANNON's behalf on October 7, 2021. At that time, COSTELLO did not know what BANNON possessed that would have been responsive to the Select Committee's subpoena. Once COSTELLO learned of what items BANNON possessed or didn't possess, COSTELLO believed they would be able to dispose of those items. COSTELLO felt BANNON's history of testifying should have been known to Representative SCHIFF.

COSTELLO did not provide any documents to attorneys representing former President TRUMP for review to determine if Executive Privilege covered the documents. At the time, COSTELLO did not know what attorneys were representing others who had received Select Committee subpoenas.

COSTELLO asked CLARK to reach out to the Select Committee and to directly

express to the Select Committee what COSTELLO and BANNON were confused about in regards to Executive Privilege. COSTELLO estimated he requested this of CLARK approximately two or three times; however, CLARK did not reach out to the Select Committee. COSTELLO did not have prior knowledge of the lawsuit on behalf of former President TRUMP.

COSTELLO again stated that on October 7, 2021, he did not know what BANNON possessed that may have been responsive to the Select Committee subpoena, so COSTELLO was not in a position to attempt to dispose of those documents. COSTELLO did not request the Select Committee grant a production deadline extension, but he had hoped the Select Committee would have come to an agreement with attorneys representing former President TRUMP or the Executive Privilege issue would have been resolved prior to the production deadline. COSTELLO stated it was not BANNON's responsibility to determine what was covered under Executive Privilege.

COSTELLO admitted he would not have handled the situation the way he had if he had known in advance of the lawsuit filed on behalf of former President TRUMP. Attorneys representing former President TRUMP informed COSTELLO all those who received a Select Committee subpoena would be given Executive Privilege.

The Select Committee did not receive a copy of the letter from CLARK nor did the Select Committee request more than the two paragraphs of CLARK's letter provided by COSTELLO.

Neither COSTELLO nor BANNON appeared on the record before the Select Committee. While BANNON lived in Washington, DC, COSTELLO lived in New York, and had issues about COVID. COSTELLO believed BANNON could not respond to issues about Executive Privilege when BANNON did not possess the ability to grant or waive Executive Privilege.

COSTELLO noted the Select Committee did not seem to be in a hurry to make the other three recipients of Select Committee subpoenas testify or produce documents. COSTELLO believed the Select Committee was trying to make an example out of BANNON.

There were no separate communications between KATZ and the Select Committee or attorneys representing former President TRUMP.

COSTELLO identified the seven items of the 17 in the subpoena attachment that could be deposed as: 1, 4, 5, 6, 15, 16, and 17. COSTELLO said item 5 dealt with the War Room podcasts and were available in the public domain. COSTELLO felt Executive Privilege did not cover item 16 and it would take a "creative argument" to apply Executive Privilege to that particular item. COSTELLO believed item 17 was covered by attorney-client privilege or by attorney work product protections. Even though MICHAEL FLYNN was not an attorney, he was present during attorney-client-protected discussions. Those particular attorneys represented former President TRUMP and CLARK informed COSTELLO not to respond to item 17.

COSTELLO admitted he did not have a good answer as to why he didn't disclose to the Select Committee that the podcasts were in the public domain and BANNON was not required to respond to that particular item. COSTELLO believed the particular requests regarding the podcasts was just a "bad request" by the Select Committee.

COSTELLO advised he didn't understand how Executive Privilege would apply to any communications BANNON had with the Proud Boys or others if those communications existed.

CLARK would not identify for COSTELLO what would be covered under Executive Privilege and that CLARK left that determination up to those who had received the Select Committee subpoena. CLARK also refused to reach out to the Select Committee on behalf of COSTELLO or BANNON.

COSTELLO sent copies of Chair THOMPSON's letters to the Virginia-based attorney representing former President TRUMP. COSTELLO did not believe the lawsuit applied to the Select Committee subpoena. COSTELLO could not recall how he found out about the lawsuit, but believed he may have heard about it from a reporter, not from attorneys representing former President TRUMP.

COSTELLO did not provide or offer any documents to attorneys representing former President TRUMP to review for Executive Privilege.

COSTELLO believed BANNON possessed some documents that would be responsive to the other ten items in the Select Committee subpoena attachment.

COSTELLO stated he also represented RUDOLPH GIULIANI and on January 7, 2021, COSTELLO sent documents to the USAO related to activities on January 6, 2021. However, COSTELLO did not know who at the USAO had received those documents.

COSTELLO opined if BANNON had been working with attorneys who were working with former President TRUMP on January 6, 2021, any documents may be covered under attorney work product privilege. COSTELLO admitted he was not certain if former President TRUMP could assert that privilege or not.

COSTELLO could not recall if it was he or CLARK that first brought up the idea of Executive Privilege, but COSTELLO stated he could have been the one to have initiated the discussion. COSTELLO was hoping to get guidance on Executive Privilege from attorneys representing former President TRUMP to see if BANNON should assert Executive Privilege. COSTELLO recalled explaining Executive Privilege to BANNON.

COSTELLO said he would send to the USAO all memorializations of communications he had with the Select Committee, CLARK, and former President TRUMP's attorneys.

COSTELLO was surprised to have received the letter from the White House since he had no communication with anyone in the White House.

COSTELLO did not want to speak with anyone at the Select Committee after the House vote because he knew he would eventually end up speaking with USAO.

COSTELLO did not ask CLARK to attend the Select Committee hearing since CLARK wouldn't even contact the Select Committee on COSTELLO's behalf.

**FEDERAL BUREAU OF INVESTIGATION**

Date of entry 11/11/2021

Robert J. Costello (Costello) and Adam Katz (Katz), legal counsel of Steven Kevin Bannon (Bannon), were interviewed via Webex. The following representatives of the investigative team were present for the interview: Federal Bureau of Investigation (FBI) Special Agents Matthew U. Lariccia, Katherine E. Pattillo, and Stephen R. Hart; and District of Columbia Assistant United States Attorneys Joseph Cooney, Molly Gaston, and Amanda Vaughn.

Agent Note: This was a scheduled, voluntary interview of Costello and Katz, as a follow-up to the November 03, 2021 interview of Costello and Katz.

Costello stated their defense was not solely advice of counsel, but their position regarding advice of counsel was based on legal opinions of the Office of Legal Counsel. There was mixed case law regarding advice of counsel, but the Office of Legal Counsel's opinion was clear.

Costello stated the original subpoena was illegal, invalid, and unconstitutional. He told Bannon, verbally, they did not have to respond to the subpoena.

Costello stated the Legislature was using the Department of Justice (DOJ) and FBI. This was a game and Bannon was the "whipping boy."

Costello stated Congress set up the rules improperly. He believed, based on his interpretation of the opinion, the rules were that a Congressional committee could not compel a member of the Executive Branch to testify about potentially privileged matters without legal counsel. Further, based on his interpretation of the opinion, current or former White House Employees could not be prosecuted.

Costello stated he was aware, historically, DOJ did not prosecute contempt of Congress cases. He believed the subpoena was invalid, based on an opinion

Investigation on 11/08/2021 at Manassas, Virginia, United States (, Other (Webex))

File # 72-WF-3513323 Date drafted 11/09/2021

by Matthew U. Lariccia, HART STEPHEN R, Katherine E. Pattillo

of the Office of Legal Counsel. He advised Bannon of the same. He believed Congress usurped DOJ's authority.

Katz stated they were asking for a court ruling, or decision, regarding executive privilege.

Costello stated they asserted executive privilege in his letter. He acknowledged executive privilege was not appropriate for seven of the seventeen items requested in the subpoena.

Costello stated Justin Clark (Clark) was trying to be intentionally vague; however, Costello was clear former President Donald Trump (President Trump) asserted executive privilege with regard to Bannon.

Costello stated he was not told who represented former President Trump, Mark Meadows (Meadows), nor the others subpoenaed by the Select Committee. He found out on his own who represented former President Trump and Meadows, but still did not know who represented the others.

Costello stated neither he, nor Bannon, had to be present in Washington D.C. because of executive privilege. Further, neither he nor Bannon were going to attend a deposition where former President Trump could not have representation with regard to executive privilege, as executive privilege belonged to former President Trump, not Bannon.

Costello stated they were trying to setup Bannon. He had conversations with Bannon, because Bannon was not a lawyer and did not understand the process. Bannon knew about executive privilege and thought he had executive privilege, but he explained to Bannon executive privilege belonged to former President Trump. Bannon also thought he was subpoenaed for open testimony, but Costello explained it was for a private deposition.

Costello stated he knew, once before, the Office of Legal Counsel said this was illegal. The Select Committee did not consider the Office of Legal Counsel opinion. He told Bannon he did not believe Bannon had to go and, as such, they were not going to appear.

Costello stated he sent a letter to Congressman Bennie G. Thompson (Congressman Thompson), where he explained it did not make sense for

Bannon to appear for a private deposition where former President Trump was not represented. He and Bannon did not know what was protected by privilege. From day one, they "were spectators at this event."

Costello stated once there was a court ruling or decision regarding executive privilege, they would abide by the decision. He stated, "I don't think I'm at fault or read opinions wrong."

Costello stated they did not have a court ruling or decision by the deadline and were denied a request for extension. On October 19, 2021, the Select Committee closed the door to communication. He referred to the draft letter he composed on October 18, 2021.

Costello stated he quickly read former President Trump's lawsuit. Clark was not cooperative and cut-off communication. The lawsuit did not impact his decision to not comply with the subpoena. This was a fight between the Select Committee, their counsel, and former President Trump and his counsel. Again, he stated once there was a court ruling or decision regarding executive privilege, they would comply. He explained this in his letters.

Costello stated Bannon asserted executive privilege through him. He reiterated, "not our privilege to waive."

Costello stated he was sure he sent the Select Committee letters to Bannon. He stated, "did he read it? I doubt it." He did not quote lines from Congressman Thompson but explained the letters to Bannon.

Costello stated he was not trying to be an obstructionist, but was abiding by privileges as he understood. The Select Committee wanted him to present Bannon where justice was not involved. He never heard of a private deposition where there was no transcript nor interested parties involved.

Costello stated he advised Bannon not to appear before the Select Committee. The fault lies with him, not Bannon; however, he did not believe there was fault. This does not change Bannon's position. He did write, at the conclusion of an email to Bannon, "beware" in capital letters to warn Bannon his failure to comply could result in a referral to DOJ.

Costello stated Clark did not have to interfere, Clark just had to say they

asserted executive privilege. He told Clark they should do this.

Costello stated Bannon was innocent, as Bannon was following directions from him. His directions to Bannon were based on his interpretations of Office of Legal Counsel opinions.

Costello stated that had the Select Committee taken this matter seriously, they would have gone to court or to former President Trump's counsel regarding executive privilege.

Costello stated his decisions were based on Office of Legal Counsel opinions. Costello read Office of Legal Counsel opinions and explained them to Bannon. The opinions said Bannon did not have to be a government employee to assert executive privilege. The Select Committee was aware they were asserting executive privilege, received from Clark. He reiterated, "I made the decision, not Bannon."

Costello stated Clark was playing some games. Clark placed Bannon in an awkward position.

Costello stated he did not want to waive executive privilege, which belonged to former President Trump. He and Bannon, referring to Clark's email, never claimed immunity. He acknowledged that immunity does not mean not showing up.

# EXHIBIT 5

FILED UNDER SEAL

# EXHIBIT 6

FILED UNDER SEAL

# EXHIBIT 7

# H. Res. 503

***In the House of Representatives, U. S.,***

*June 30, 2021.*

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 oper-

ational 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 vi-

olence 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 Metropolitan 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 institutions 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 applies 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 remain 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.

Attest:

*Clerk.*

# EXHIBIT 8

health, safety, and well-being of others present in the Chamber and surrounding areas. Members and staff will not be permitted to enter the Hall of the House without wearing a mask. Masks will be available at the entry points for any Member who forgets to bring one. The Chair views the failure to wear a mask as a serious breach of decorum. The Sergeant-at-Arms is directed to enforce this policy. Based upon the health and safety guidance from the attending physician and the Sergeant-at-Arms, the Chair would further advise that all Members should leave the Chamber promptly after casting their votes. Furthermore, Members should avoid congregating in the rooms leading to the Chamber, including the Speaker's lobby. The Chair will continue the practice of providing small groups of Members with a minimum of 5 minutes within which to cast their votes. Members are encouraged to vote with their previously assigned group. After voting, Members must clear the Chamber to allow the next group a safe and sufficient opportunity to vote. It is essential for the health and safety of Members, staff, and the U.S. Capitol Police to consistently practice social distancing and to ensure that a safe capacity be maintained in the Chamber at all times. To that end, the Chair appreciates the cooperation of Members and staff in preserving order and decorum in the Chamber and in displaying respect and safety for one another by wearing a mask and practicing social distancing. All announced policies, including those addressing decorum in debate and the conduct of votes by electronic device, shall be carried out in harmony with this policy during the pendency of a covered period.

## 117TH CONGRESS REGULATIONS FOR USE OF DEPOSITION AUTHORITY

COMMITTEE ON RULES,
HOUSE OF REPRESENTATIVES,
*Washington, DC, January 4, 2021.*

Hon. NANCY PELOSI,
*Speaker, House of Representatives,*
*Washington, DC.*

MADAM SPEAKER: Pursuant to section 3(b) of House Resolution 8, 117th Congress, I hereby submit the following regulations regarding the conduct of depositions by committee and select committee counsel for printing in the Congressional Record.

Sincerely,

JAMES P. MCGOVERN,
*Chairman, Committee on Rules.*

REGULATIONS FOR THE USE OF DEPOSITION AUTHORITY

1. Notices for the taking of depositions shall specify the date, time, and place of examination. Depositions shall be taken under oath administered by a member or a person otherwise authorized to administer oaths. Depositions may continue from day to day.

2. Consultation with the ranking minority member shall include three days' notice before any deposition is taken. All members of the committee shall also receive three days written notice that a deposition will be taken, except in exigent circumstances. For purposes of these procedures, a day shall not include Saturdays, Sundays, or legal holidays except when the House is in session on such a day.

3. Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights. Only members, committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel are permitted to attend. Observers or counsel for other persons, including counsel for government agencies, may not attend.

4. The chair of the committee noticing the deposition may designate that deposition as part of a joint investigation between committees, and in that case, provide notice to the members of the committees. If such a designation is made, the chair and ranking minority member of the additional committee(s) may designate committee staff to attend pursuant to regulation 3. Members and designated staff of the committees may attend and ask questions as set forth below.

5. A deposition shall be conducted by any member or committee counsel designated by the chair or ranking minority member of the Committee that noticed the deposition. When depositions are conducted by committee counsel, there shall be no more than two committee counsel permitted to question a witness per round. One of the committee counsel shall be designated by the chair and the other by the ranking minority member per round.

6. Deposition questions shall be propounded in rounds. The length of each round shall not exceed 60 minutes per side, and shall provide equal time to the majority and the minority. In each round, the member(s) or committee counsel designated by the chair shall ask questions first, and the member(s) or committee counsel designated by the ranking minority member shall ask questions second.

7. Objections must be stated concisely and in a non-argumentative and non-suggestive manner. A witness's counsel may not instruct a witness to refuse to answer a question, except to preserve a privilege. In the event of professional, ethical, or other misconduct by the witness's counsel during the deposition, the Committee may take any appropriate disciplinary action. The witness may refuse to answer a question only to preserve a privilege. When the witness has refused to answer a question to preserve a privilege, members or staff may (i) proceed with the deposition, or (ii) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer. If a member of the committee chooses to appeal the ruling of the chair, such appeal must be made within three days, in writing, and shall be preserved for committee consideration. The Committee's ruling on appeal shall be filed with the clerk of the Committee and shall be provided to the members and witness no less than three days before the reconvened deposition. A deponent who refuses to answer a question after being directed to answer by the chair may be subject to sanction, except that no sanctions may be imposed if the ruling of the chair is reversed by the committee on appeal.

8. The Committee chair shall ensure that the testimony is either transcribed or electronically recorded or both. If a witness's testimony is transcribed, the witness or the witness's counsel shall be afforded an opportunity to review a copy. No later than five days after the witness has been notified of the opportunity to review the transcript, the witness may submit suggested changes to the chair. Committee staff may make any typographical and technical changes. Substantive changes, modifications, clarifications, or amendments to the deposition transcript submitted by the witness must be accompanied by a letter signed by the witness requesting the changes and a statement of the witness's reasons for each proposed change. Any substantive changes, modifications, clarifications, or amendments shall be included as an appendix to the transcript conditioned upon the witness signing the transcript.

9. The individual administering the oath, if other than a member, shall certify on the transcript that the witness was duly sworn. The transcriber shall certify that the transcript is a true record of the testimony, and the transcript shall be filed, together with any electronic recording, with the clerk of the committee in Washington, DC. Depositions shall be considered to have been taken in Washington, DC, as well as the location actually taken once filed there with the clerk of the committee for the committee's use. The chair and the ranking minority member shall be provided with a copy of the transcripts of the deposition at the same time.

10. The chair and ranking minority member shall consult regarding the release of deposition testimony, transcripts, or recordings, and portions thereof. If either objects in writing to a proposed release of a deposition testimony, transcript, or recording, or a portion thereof, the matter shall be promptly referred to the committee for resolution.

11. A witness shall not be required to testify unless the witness has been provided with a copy of section 3(b) of H. Res. 8, 117th Congress, and these regulations.

## REMOTE COMMITTEE PROCEEDINGS REGULATIONS PURSUANT TO HOUSE RESOLUTION 8, 117TH CONGRESS

COMMITTEE ON RULES,
HOUSE OF REPRESENTATIVES,
*Washington, DC, January 4, 2021.*

Hon. NANCY PELOSI,
*Speaker, House of Representatives,*
*Washington, DC.*

MADAM SPEAKER: Pursuant to section 3(s) of House Resolution 8, 117th Congress, I hereby submit the following regulations regarding remote committee proceedings for printing in the CONGRESSIONAL RECORD.

Sincerely,

JAMES P. MCGOVERN,
*Chairman,*
*Committee on Rules.*

REMOTE COMMITTEE PROCEEDINGS REGULATIONS PURSUANT TO HOUSE RESOLUTION 8

A. PRESENCE AND VOTING

1. Members participating remotely in a committee proceeding must be visible on the software platform's video function to be considered in attendance and to participate unless connectivity issues or other technical problems render the member unable to fully participate on camera (except as provided in regulations A.2 and A.3).

2. The exception in regulation A.1 for connectivity issues or other technical problems does not apply if a point of order has been made that a quorum is not present. Members participating remotely must be visible on the software platform's video function in order to be counted for the purpose of establishing a quorum.

3. The exception in regulation A.1 for connectivity issues or other technical problems does not apply during a vote. Members participating remotely must be visible on the software platform's video function in order to vote.

4. Members participating remotely off-camera due to connectivity issues or other technical problems pursuant to regulation A.1 must inform committee majority and minority staff either directly or through staff.

5. The chair shall make a good faith effort to provide every member experiencing connectivity issues an opportunity to participate fully in the proceedings, subject to regulations A.2 and A.3.

# EXHIBIT 9

**FEDERAL BUREAU OF INVESTIGATION**

Date of entry 11/10/2021

KRISTIN AMERLING, Chief Counsel and Deputy Staff Director, U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol, was interviewed at the Thomas P. O'Neill Jr. Federal Building, 200 C Street SW, Washington, DC. AMERLING was accompanied by U.S. House of Representatives General Counsel DOUG LETTER, and by U.S. House of Representative Deputy General Counsel TODD TATELMAN, who joined via phone. AMERLING was interviewed by Assistant United States Attorney (AUSA) J.P. Cooney, US Attorney's Office for the District of Columbia (USAO-DC), AUSA Molly Gaston USAO-DC, AUSA Amanda Vaughn USAO-DC, FBI Special Agent Katherine E. Pattillo, FBI Special Agent Frank G. D'Amico, and FBI Special Agent Stephen R. Hart. After being advised of the identity of the interviewing AUSAs and Agents and the nature of the interview, AMERLING provided the following information (AMERLING was shown various numbered exhibits during the interview. These will be referenced when shown during the interview and will be maintained in the 1A section of the file.):

AMERLING's current role was as the Chief Counsel and Deputy Staff Director for the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol (the Select Committee). In her role she worked directly with Staff Director DAVID BUCKLEY to staff the Select Committee. Also, as a part of the investigative team, she oversaw any legal issues which arose during the investigation process.

AMERLING was previously the legislative assistant for Representative Ted Weiss from 1988-1990. AMERLING was then the press secretary for Senator George Mitchell from 1990-1991. AMERLING then attended law school and worked for a private firm subsequent to graduation. From 1997-2012, AMERLING worked for Representative Henry Waxman on the House Committee for Reform and Oversight. During her tenure with Representative Waxman's office, Representative Waxman moved to the Energy and Commerce Committee

Investigation on 11/02/2021 at Washington, District Of Columbia, United States (In Person)

File # 72-WF-3513323 Date drafted 11/02/2021

by HART STEPHEN R, SA FRANK G. DAMICO, Katherine E. Pattillo

where he eventually became the Ranking Member. From 2013-2014, AMERLING was the Director of Investigations for the Senate Commerce Committee which was chaired by Senator Rockefeller. AMERLING then went to work in the Administration of President Obama and then separately became the General Counsel for the Senate Energy and the House Oversight Committees.

The Select Committee was composed of three primary teams: the investigative teams, the admin teams, and the communications teams. The investigative teams were led by Chief Investigative Counsel TIM HEAPHY. The various Chief Counsels had subject matter expert roles and the teams were staffed with additional attorneys and research staff. The Communications Director had an assistant and the Admin staff facilitated the personnel assignments. The Staff Director and the investigative teams were comprised of non partisan staff who worked collaboratively on subpoenas and other tasks. AMERLING was not sure if she could further describe the upper hierarchy or committee processes, but stated that all senior staff, which included herself and the Staff Director, worked together.

(AMERLING was shown Exhibit 1.) This document, House Resolution 503 (HR 503), along with the U.S. House of Representative Rules describe where the Select Committee get its authorities. HR 503 is the main source of the Select Committee's authority. This document is the primary source in which the purpose of the Select Committee is articulated. House Resolution 8 (HR 8) also contains rules for guiding the Select Committee's actions and authorities.

For document requests or subpoenas issued by the Select Committee, AMERLING reviews the initial proposal and provides input to the Staff Director and the Chair of the Select Committee. In the case of the Select Committee's subpoena to STEPHEN BANNON (BANNON), AMERLING served the subpoena to the attorney representing BANNON. AMERLING worked together with the investigative staff to put together the substantive request and with the administrative staff to "get the subpoena out the door."

LETTER advised all subpoenas issued by the Select Committee are reviewed by himself or members of the General Counsel's office as well as leadership of the U.S. House of Representatives. This process applies to subpoenas issued by every House committee. All subpoenas issued by all House

committees are issued and signed by the Clerk for the U.S. House of Representatives. The Clerk will only sign subpoenas if they have been reviewed by LETTER. AMERLING explained the subpoenas were first signed by the Chair of the Select Committee, then reviewed by the General Counsel's Office, and then sent on to the Clerk for signature. LETTER further explained subpoenas were prepared by committee staff, signed by the Chair, reviewed by the Office of General Counsel, logged in, and then walked over to the Clerk.

(AMERLING was shown Exhibit 2.) AMERLING noted the subpoena called for BANNON to appear and testify, not just to appear. Document production is not always required to be done in person. Typically, after a subpoena is issued, document production from the recipient can be provided by hand, mail service, or via email. The subpoena commanded document production be completed by 10am on October 7, 2021, and that BANNON appear for a deposition on October 14, 2021. The subpoena was signed by both the Chair of the Select Committee and the Clerk of the U.S. House of Representatives. AMERLING confirmed she sent the subpoena via email to BANNON's defense attorney, ROBERT COSTELLO (COSTELLO). The letter that accompanied the subpoena was designed to inform the witness of the subpoena and to describe the range of information being requested in the subpoena. The letter summarizes the information commanded, whereas the attachment gives a detailed list of records and documents requested.

Neither the letter nor the attachment described the full accounting of the public records the Select Committee possesses and / or has reviewed. The subpoena schedule reflected a broad set of categories of information requested from BANNON, but the categories were not an exhaustive list of topics which might be covered in his depostion. Many of the categories had nothing to do with former President DONALD TRUMP. All of these categories were listed in the contempt report issued by the U.S. House of Representatives and covered a wide range of topics not dealing with former President TRUMP. AMERLING advised the last page of Exhibit 2, which described the Select Committee Regulations for Use of Deposition Authority, was provided to BANNON and COSTELLO so they would have a full understanding of BANNON's rights in regards to depositions and other proceedings of the Select Committee. The Select Committee was aware the email was sent to

COSTELLO.

Paragraph one of 3(b) makes reference to ranking minority members, who are typically a part of House committees. In these House committees, there are particular rules at hearings set aside for the Chair and Ranking Member. The Ranking Member is generally the highest minority member in a House committee and typically possess procedural powers. LETTER explained that the Select Committee was specifically appointed by the Speaker of the House and there were no majority or ranking members. Representative LIZ CHENEY is acknowledged to be the Vice Chair of the Select Committee; since the Select Committee has a Chair and a Vice Chair, there are no express rules for the Vice Chair as there would be for a Ranking Member.

A copy of Section 3(b) was not provided to COSTELLO with the subpoena. However, the section would have been provided to the witness at deposition when the witness was reminded of their rights. COSTELLO received a copy of 117th Congress Regulations For Use of Deposition Authority with the letter accompanying the subpoena. COSTELLO never raised any objections related to the requirement stipulated in paragraph 11.

(AMERLING was shown Exhibit 3.) JENNA HOPKINS was a professional staff member of the Select Committee assigned to assist the research staff of the investigative teams. AMERLING did not recall anyone from the Select Committee directly contacting BANNON or an attorney representing BANNON before September 22, 2021. "Tim, Yoni, and Jacob" mentioned in Exhibit 3 were likely TIM HEAPHY, senior investigative counsel; YONI MOSKOWITZ, staff attorney; and JACOB NELSON, research assistant. Nothing outside of what was included in the email was discussed between AMERLING and HOPKINS.

(AMERLING was shown Exhibit 4.) AMERLING did not recall much of the conversation beyond what she cited in the email to COSTELLO. COSTELLO did not raise any objections during their phone call and advised he would get back to her after confirming with BANNON that COSTELLO was authorized to accept subpoena service. AMERLING sent the subpoena in a subsequent email to COSTELLO. At that time, AMERLING believed COSTELLO represented BANNON based upon COSTELLO's reply email.

(AMERLING was shown Exhibit 5.) AMERLING first became aware of COSTELLO's objections to the subpoena through his correspondence with the Select Committee. AMERLING was not sure if COSTELLO's objection was public at that time.

(AMERLING was shown Exhibit 6.) To date, neither AMERLING nor the Select Committee had received the letter from JUSTIN CLARK referenced in the exhibit. AMERLING had not herself received nor was she aware of any objections or privilege assertions submitted to the Select Committee from former President TRUMP or his representatives.

(AMERLING was shown Exhibit 7.) The letter was specifically sent to remind BANNON of his obligation to respond to the subpoena as well as the requirement for a privilege log if warranted. The letter also fully identified the criminal statutes BANNON would violate if he failed to comply with the Select Committee's subpoena. AMERLING was not aware of any additional communications with COSTELLO leading up to the October 7, 2021, document deadline.

(AMERLING was shown Exhibit 8.) SEAN TONOLLI (TONOLLI) was responsible for conducting BANNON'S deposition. TONOLLI is the leader of one of the investigative subgroups. It would be logical for someone in TONOLLI's position to reach out to COSTELLO to confirm logistical arrangements prior to the scheduled appearance. LETTER interjected that different House committees use different processes; there were no standardized procedures in place governing the logistics of these arrangements. AMERLING stated that different teams within the Select Committee handled different subjects and it would be logical for senior staff, like TONOLLI, to lead depositions and testimony. The Chair of the Select Committee was aware of work assignments. AMERLING could not recall the process by which TONOLLI was designated as the staff member to cover BANNON, but it was normally done with the knowledge of the Chair and other Members. KEVIN ELLIKER, referenced in Exhibit 8, was a staff attorney on one of the investigative teams.

AMERLING believed she and TONOLLI discussed TONOLLI's conversations with COSTELLO. She could not recall the precise details of those discussions but believed, based on her communication with TONOLLI in Exhibit 8, the

discussions were confined to the logistics of BANNON's arrival and testimony. LETTER noted AMERLING was currently managing subpoenas to a number of different individuals, some of whom were going to appear before the Select Committee and some of whom may not appear before the Select Committee. AMERLING did not know the TOM KAVALER referenced in a separate email between TONOLLI and COSTELLO. AMERLING did not think there was any other correspondence memorializing any additional interactions between TONOLLI and COSTELLO. AMERLING was not certain but she believed she had been made aware of the discussions between TONOLLI and COSTELLO prior to the email sent by TONOLLI to AMERLING, BUCKLEY, and HEAPHY on October 13, 2021 (Exhibit 8).

In Exhibit 8, TONOLLI referred to COSTELLO's "two questions for future reference." AMERLING confirmed that neither BANNON nor COSTELLO were provided with other or alternative dates on which BANNON could testify. It was AMERLING's understanding that these questions did not prompt negotiation or discussion about alternate deposition dates. AMERLING believed COSTELLO was suggesting a general discussion point regarding a future appearance related to the subpoena, but no discussion ever occurred. TONOLLI was not authorized to offer or to say anything different than what had been sent in the October 8, 2021 email. AMERLING did not recall any other communications with TONOLLI about this issue. AMERLING did not formally accept COSTELLO's letter to Chairman THOMPSON as it was sent via email.

(AMERLING was shown Exhibit 10.) The Select Committee communicated with COSTELLO prior to receiving this particular letter. This letter offered no new objections and failed to address the Chair's points made on October 8, 2021, about testimony on topics unrelated to former President TRUMP.

(AMERLING was shown Exhibit 12.) Both AMERLING and TONOLLI attended the depostion on October 14, 2021. AMERLING believed Representative ADAM SCHIFF attended the hearing virtually. Other Select Committee staff who attended the hearing were: HEAPHY, ELLIKER, BARRY POMP, Select Committee parliamentarian, and EVAN MALDER, clerk. AMERLING advised she should be able to get interviewing agents and attorneys an un-redacted copy of the transcript. The Select Committee was prepared to proceed with the

deposition had BANNON appeared. AMERLING's role for the hearing would have been to serve as a consultative legal resource. AMERLING was highly confident the Select Committee's Parliamentarian, POMP, would have brought the House Rules to the hearing.

AMERLING did not have any communication with BANNON or any party representing him on October 14, 2021. No one from the Select Committee suggested to BANNON or anyone representing him that he did not have to appear before the Select Committee. In fact, the Select Committee did quite the opposite. No staff member told BANNON or anyone representing him they could work out privilege issues prior to BANNON being deposed. The letters sent to BANNON and his counsel made it clear that BANNON had to appear at the hearing where he would be permitted to vocalize and memorialize his objections. The Chair was available for contact during the scheduled hearing in case BANNON had arrived and voiced objections. However, it was not required to resolve the objections during the hearing, it was only required to document them for the record.

(AMERLING was shown Exhibit 11.) There was no communications between the Select Committee and BANNON or his representatives indicating that the prospect of a Contempt of Congress charge would change their response to the subpoena. The email sent by AMERLING to COSTELLO on October 19, 2021, was the only communication subsequent to the depostion date.

(AMERLING was shown Exhibit 14.) AMERLING received the letter from the White House via email. AMERLING did not know if either BANNON or COSTELLO also received the letter from the White House. AMERLING also did not receive any letters from the Department of Justice. AMERLING was not aware of any sort of communication between the White House and BANNON or COSTELLO. Correspondence from COSTELLO described a letter from an attorney representing former President TRUMP, however, AMERLING has not received a copy of that letter. AMERLING believed the extent of President JOE BIDEN's knowledge of the proceedings was in Exhibit 14. AMERLING was not aware of any other requests from COSTELLO to JUSTIN CLARK.

(AMERLING was shown Exhibit 13.) She was aware of this letter and of the adjournment request.

(AMERLING was shown Exhibit 15.) The Select Committee issued two letters to COSTELLO; one before and one after the Select Committee hearing on October 19, 2021 (Exhibits 15 and 16). AMERLING was not aware of any other communication or correspondence with COSTELLO after those letters. AMERLING was not aware of any additional objections raised by COSTELLO not captured by correspondence between COSTELLO and the Select Committee.

# EXHIBIT 10

U.S. Department of Justice

Ronald C. Machen Jr.
United States Attorney

*District of Columbia*

*Judiciary Center*
*555 Fourth St., N.W.*
*Washington, D.C. 20530*

March 31, 2015

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

On May 7, 2014, you referred the matter of Lois G. Lerner, former Director, Exempt Organizations, Internal Revenue Service (IRS), to the United States Attorney's Office for the District of Columbia, after the U.S. House of Representatives voted to hold Ms. Lerner in contempt of Congress under 2 U.S.C. § 192. *See* H.R. Res. 574, 113th Cong. (2014). As you know, the House did so after Ms. Lerner, on March 5, 2014, asserted her Fifth Amendment privilege not to testify at a hearing held by the House Committee on Oversight and Government Reform. The Committee had previously determined that Ms. Lerner waived this privilege when she made an opening statement during an appearance before the Committee on May 22, 2013. *See* H.R. Rep. No. 113-415, at 11-12 (2014) (the "Committee Report").

Under 2 U.S.C. § 192, a person is guilty of contempt of Congress if he or she, "having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully . . . refuses to answer any question pertinent to the question under inquiry." Where the House of Representatives has voted to find a witness in contempt, 2 U.S.C. § 194 directs the Speaker of the House to "certify" the matter "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

Upon receipt of your referral, a team of experienced career prosecutors in this United States Attorney's Office was assigned to assess the matter. As discussed in more detail below, after extensive analysis of the facts of this matter and the applicable law, it was the team's conclusion that the Committee followed proper procedures in notifying Ms. Lerner that it had rejected her claim of privilege and gave her an adequate opportunity to answer the Committee's questions. Thus, Ms. Lerner's refusal to answer would be "willful" under Section 192 unless otherwise excused. However, the team also concluded that Ms. Lerner did not waive her Fifth Amendment privilege by making an opening statement on May 22, 2013, because she made only general claims of innocence. Thus, the Fifth Amendment to the Constitution would provide Ms.

Lerner with an absolute defense should she be prosecuted under Section 192 for her refusal to testify.

Given this assessment, we have further concluded that it is not appropriate for a United States Attorney to present a matter to the grand jury for action where, as here, the Constitution prevents the witness from being prosecuted for contempt. We respectfully inform you that we will therefore not bring the Congressional contempt citation before a grand jury or take any other action to prosecute Ms. Lerner for her refusal to testify on March 5, 2014.

## I. Factual and Procedural Background

The proceedings at issue arose from the Committee's investigation of complaints that IRS employees had delayed for partisan political reasons the approval of applications by certain organizations for status as tax-exempt entities. On May 14, 2013, the chairman of the Committee, Representative Darrell E. Issa, sent a letter inviting Ms. Lerner to testify at a hearing on May 22, 2013. After Ms. Lerner's counsel informed Committee staff members that Ms. Lerner would refuse to answer questions on Fifth Amendment grounds, Chairman Issa issued a subpoena on May 20, 2013, compelling Ms. Lerner to testify two days later.

Ms. Lerner appeared at the hearing on May 22, 2013, and gave an opening statement that included the following:

> I have not done anything wrong. I have not broken any laws. I have not violated any IRS rules or regulations, and I have not provided false information to this or any other congressional committee.
>
> And while I would very much like to answer the Committee's questions today, I've been advised by my counsel to assert my constitutional right not to testify or answer questions related to the subject matter of this hearing. After very careful consideration, I have decided to follow my counsel's advice and not testify or answer any of the questions today.

Chairman Issa responded that he believed Ms. Lerner had waived her Fifth Amendment privilege and asked her to reconsider her position on testifying. Ms. Lerner, however, continued to refuse to answer any questions, and the chairman excused her, reserving the right to recall her as a witness at a later date.

On June 28, 2013, the Committee held a business meeting at which it approved a resolution determining that the opening statement offered by Ms. Lerner constituted a waiver of her Fifth Amendment privilege. On February 25, 2014, Chairman Issa sent a letter informing Ms. Lerner that the Committee had rejected her Fifth Amendment privilege claim, and that she was expected to appear and answer the Committee's questions at a reconvened hearing on March 5, 2014. Ms. Lerner's counsel responded by letter, stating that although he and his client understood that the Committee believed that Ms. Lerner waived her rights, Ms. Lerner would

continue to assert her Fifth Amendment privilege at any subsequent hearing. The Committee, however, insisted that Ms. Lerner appear at the reconvened hearing.

When the hearing reconvened on March 5, 2014, with Ms. Lerner and her counsel present, Chairman Issa stated for the record that the Committee had voted and found that Ms. Lerner had waived her Fifth Amendment privilege by making a voluntary opening statement on May 22, 2013. *See The IRS: Targeting Americans for Their Political Beliefs, Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 2 (Mar. 5, 2014) ("March 5, 2014 Hearing"). Chairman Issa added that "if Ms. Lerner continued to refuse to answer" the Committee's questions, the Committee "may proceed to consider whether she should be held in contempt." *Id.* at 3.

Chairman Issa then proceeded to ask a series of factual questions about the matters under investigation by the Committee. To each question, Ms. Lerner stated that she declined to answer based on the advice of her counsel that she had not waived her Fifth Amendment privilege. Each time Ms. Lerner provided such a response, Chairman Issa proceeded to his next question. Eventually, Chairman Issa adjourned the hearing upon determining that Ms. Lerner would not cooperate with the Committee. The May 7, 2014, referral to this Office followed.

## II. Legal Analysis

### A. The Committee Followed Proper Procedures in Notifying Ms. Lerner That It Had Rejected Her Claim of Privilege, and Thereafter Gave Her an Adequate Opportunity to Answer the Committee's Questions.

The Supreme Court has held that Section 192 "requires a criminal intent – in this instance, a deliberate, intentional refusal to answer." *Quinn v. United States*, 349 U.S. 155, 165 (1955). Thus, where a witness objects to a question, *e.g.*, by asserting a privilege, the questioning committee may either "sustain the objection and abandon the question, even though the objection might actually be without merit," or "disallow the objection and thus give the witness the choice of answering or not." *Id.* However, "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under [Section] 192 for refusal to answer that question." *Id.* at 166.

Both Ms. Lerner's counsel and some Members of the Committee have argued that Ms. Lerner cannot be prosecuted under Section 192 because the Committee did not follow procedures designed to ensure that a witness is "clearly apprised" that her testimony is required. Specifically, they have argued that when a witness asserts a claim of privilege, the questioning committee should, with respect to each question, specifically overrule the claim, warn the witness that she will be held in contempt if she continues to refuse to answer, and then give the witness another opportunity to answer.

We agree with the view of the Committee majority, however, that Ms. Lerner was given notice that her claim of privilege had been rejected and sufficient opportunity to answer the Committee's questions after receiving that notice. In three Supreme Court cases relied upon by Ms. Lerner, the relevant Congressional committee never actually made a ruling disallowing the

claim of privilege. *See Quinn*, 349 U.S. at 166; *Emspak v. United States*, 349 U.S. 190, 202 (1955); *Bart v. United States*, 349 U.S. 219, 222 (1955). As the Court explained in *Quinn*, this meant the witness "was never confronted with a clear-cut choice between compliance and noncompliance, between answering the question and risking prosecution for contempt. At best he was left to guess whether or not the committee had accepted his objection." 349 U.S. at 166. The Court went on to state, however, that

> [j]ust as the witness need not use any particular form of words to present his objection, so also the committee is not required to resort to any fixed verbal formula to indicate its disposition of the objection. So long as the witness is not forced to guess the committee's ruling, he has no cause to complain.

*Id.* at 170.

The Supreme Court and other federal courts have accordingly reversed contempt convictions where defendants were not informed that their objections had been rejected before the relevant questions were asked, but generally affirmed them where defendants were so informed. *Compare, e.g.*, *Raley v. Ohio*, 360 U.S. 423, 437-42 (1959), and *Grossman v. United States*, 229 F.2d 775, 776 (D.C. Cir. 1956) *with Barenblatt v. United States*, 240 F.2d 875, 879-80 (D.C. Cir. 1957), *vacated and remanded on other grounds*, *Barenblatt v. United States*, 354 U.S. 930 (1957); *Davis v. United States*, 269 F.2d 357, 362-63 (6th Cir. 1959); *Wollam v. United States*, 244 F.2d 212, 215 (9th Cir. 1957), *rev'd on other grounds, Simpson v. United States*, 355 U.S. 7 (1957). In this matter, the Committee (1) informed Ms. Lerner, both in writing and in person, that it had rejected her claim of privilege; (2) warned Ms. Lerner that she could be held in contempt if she continued to refuse to answer; and (3) then posed questions to her (which she continued to refuse to answer on grounds of privilege). Thus, at the time the Committee posed the questions, Ms. Lerner was not "forced to guess" the Committee's position on her claim of privilege, and it would have been an unnecessary "form of words" for the Chairman to continue to repeat the Committee's ruling and warning for each question. Ms. Lerner's refusal thereafter to answer was accordingly "willful" under Section 192.

**B. Ms. Lerner Did Not Waive Her Fifth Amendment Privilege.**

The Supreme Court has made clear that witnesses who testify before Congress are protected by the Fifth Amendment to the Constitution. *See Quinn*, 349 U.S. at 161. Thus, it is undisputed that Ms. Lerner had the right not to testify at the Committee hearing, given the possibility that her answers could be used against her in a subsequent criminal proceeding. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); *United States v. Balsys*, 524 U.S. 666, 672 (1998). The only question is whether she waived that right by giving her opening statement on May 22, 2013.

In finding that Ms. Lerner waived her Fifth Amendment privilege, the Committee focused on her assertions that she had done nothing wrong, had broken no laws, had violated no IRS rules, and had provided no false information to Congress. Citing the Supreme Court's decisions in *Brown v. United States*, 356 U.S. 148, 154-55 (1958), and *Mitchell v. United States*,

526 U.S. 314, 321 (1999), the Committee found that these "four specific denials" amounted to voluntary testimony about the subject matter of the hearing, which Ms. Lerner could not then refuse to be questioned about. *See* Committee Report, at 11, 36-37.

We respectfully disagree with this conclusion, however, because case law establishes that Ms. Lerner's general denials of wrongdoing did not amount to "testimony" about the actual facts under the Committee's review. In *Brown*, the defendant in a civil immigration proceeding voluntarily took the stand and gave substantive testimony on direct examination, but refused to answer pertinent questions about that testimony on cross-examination. 356 U.S. at 150-52. The Court upheld the defendant's contempt conviction for that refusal, noting that a party may not put a "one-sided account of the matters in dispute" before the trier of fact, which could not be tested by adversarial cross-examination. *Id.* at 155. *See also Mitchell*, 526 U.S. at 321 (noting that "a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details").

Where witnesses do not offer *substantive* testimony, however, and instead merely make general denials or summary assertions, federal courts have been unwilling to infer a waiver of the Fifth Amendment privilege. *See, e.g., Isaacs v. United States*, 256 F.2d 654, 656-57, 660-61 (8th Cir. 1958) (witness before grand jury who repeatedly stated that he had committed no crime did not waive his Fifth Amendment privilege); *Ballantyne v. United States*, 237 F.2d 657, 665 (5th Cir. 1956) (concluding that "the United States Attorney could not, by thus skillfully securing from appellant a general claim of innocence, preclude him from thereafter relying upon his constitutional privilege when confronted with specific withdrawals"); *United States v. Hoag*, 142 F. Supp. 667, 669 (D.D.C. 1956) (witness who generally denied being a spy or saboteur before Congressional committee did not waive Fifth Amendment privilege).

In her opening statement before the Committee, Ms. Lerner offered no account or explanation of what occurred and revealed no facts about the matters under the Committee's review. Instead, she made general assertions lacking substantive content. She did not purport to explain why she believed she was innocent or why any information she had previously provided was not false. This matter therefore appears materially indistinguishable from cases like *Isaacs*, *Ballantyne*, and *Hoag*, in which defendants were held not to have waived Fifth Amendment protection simply by asserting general innocence or even denying guilt of specific offenses.

There is likely an additional barrier to finding that Ms. Lerner waived her Fifth Amendment privilege through her general denials of wrongdoing. Unlike the civil defendant in *Brown* and defendants in criminal cases (who similarly subject themselves to wide-ranging cross-examination if they voluntarily take the stand), Ms. Lerner was an ordinary witness who had been compelled to testify by subpoena. The Supreme Court has held that "where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him." *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923); *see also, e.g., United States v. Powell*, 226 F.2d 269, 276 (D.C. Cir. 1955); *accord Rogers v. United States*, 340 U.S. 367, 368, 373 (1951). Ms. Lerner did not testify to any incriminatory facts during her opening statement but, to the contrary, asserted her innocence. Thus, like the defendant in *Arndstein*, she had the right to "stop[] short" after making her self-exculpatory statement.

The Committee found that Ms. Lerner's opening statement was the equivalent of the "voluntary" testimony at issue in *Brown*, presumably because she did not have to make the statement at all. Although in theory this could render the *Arndstein* line of cases inapplicable, that conclusion is doubtful. Ms. Lerner was compelled by subpoena to appear before the Committee on May 22, 2013 after she declined an invitation to appear voluntarily and informed the Committee that she would invoke her Fifth Amendment privilege. Courts have not found waiver under such circumstances. *See, e.g.*, *Hoag*, 142 F. Supp. at 669-71.

### C. A United States Attorney Retains Discretion To Decline To Present a Matter to the Grand Jury Under 18 U.S.C. § 194 When He Determines that a Witness Is Shielded From Prosecution by the Constitution.

Because Ms. Lerner did not waive her Fifth Amendment privilege before refusing to answer the Committee's questions, a conviction under Section 192 for that refusal would be unconstitutional. The question thus arises whether Section 194 requires this matter to be presented to a grand jury even though no prosecution can constitutionally proceed. We have concluded that it does not.

This conclusion follows from the Justice Department's longstanding interpretation of Section 194 as preserving the exercise of prosecutorial discretion in the Executive Branch. It has long been the position of the Department, across administrations of both political parties, that we will not prosecute an Executive Branch official under the contempt of Congress statute for withholding subpoenaed documents pursuant to a presidential assertion of executive privilege. The fullest explanation of the legal basis for the Department's position was provided during the Reagan Administration by Assistant Attorney General for the Office of Legal Counsel Theodore Olson. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984) (the "1984 Opinion"). Although the 1984 Opinion was issued to address the specific question of contempt citations made against Executive Branch officials asserting executive privilege, the opinion addressed the more general question of whether the United States Attorney is required to refer every contempt of Congress citation to a grand jury. As to that question, the opinion concluded that "as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury." *Id.* at 128.

The 1984 Opinion reached this conclusion for several reasons. First, the opinion noted that the Department had previously taken the position, in a case where the President's executive privilege was not at issue, that it was not required to refer a contempt-of-Congress matter to a grand jury. *Id.* at 119-20. Second, the opinion noted that a number of judicial decisions implicitly recognized that a United States Attorney retained discretion not to make a referral to a grand jury, despite the apparently mandatory language of Section 194. *Id.* at 120-22. The opinion explained that the cited cases indicate that "prosecutorial discretion serves a vital purpose in protecting the rights of the accused in contempt cases by mitigating the otherwise stern consequences of asserting a right not to respond to a congressional subpoena." *Id.* at 122. Third,

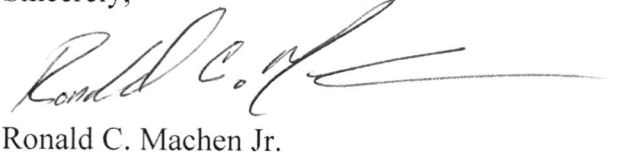
the opinion cited the common-law doctrine of prosecutorial discretion, which precludes an interpretation that the statute requires automatic referral. *Id.* Because the "general rule is that 'the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case[,]'" the opinion noted that "courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated." *Id.* Finally, the opinion noted that interpreting Section 194 to require referral to a grand jury would raise serious constitutional problems in light of separation-of-powers principles. *Id.* at 124-25. The opinion cited cases in which courts had refused to issue, or overturned on appeal, orders purporting to compel United States Attorneys to prosecute individuals. *Id.* at 125-26. Noting the Supreme Court's admonition that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," the opinion further stated that "[a] legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based." *Id.* at 126-27 (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

Thus, for at least three decades it has been the Department's position that Section 194 does not eliminate a United States Attorney's traditional prosecutorial discretion not to bring a specific matter before a grand jury. And, in light of the Department's criminal charging policy, which provides that a federal prosecutor should "commence or recommend Federal prosecution" of a person only "if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction," *see* United States Attorneys' Manual § 9-27.220A, we have concluded it would not be proper to commence grand jury proceedings against a witness whose prosecution for contempt is barred by the Constitution.

## III. Conclusion

We wish to assure you that the Department of Justice does not question the authority of Congress "to summon witnesses before either House or before their committees," or "to pass laws 'necessary and proper' to carry into effect its power to get testimony." *See Adams v. Maryland*, 347 U.S. 179, 183 (1954) (citing U.S. Const. art. I, § 8). Thus, in appropriate circumstances, a United States Attorney's Office will refer to a grand jury under Section 192 witnesses who contumaciously withhold testimony or other information that Congress has legitimately sought to compel in the exercise of its legislative or oversight responsibilities. Because, however, the authority of any branch of the United States government to compel witness testimony is limited by the protections of the Constitution, and Ms. Lerner did not waive those protections in this matter, the United States Attorney's Office will not bring the instant contempt citation before a grand jury.

Sincerely,



Ronald C. Machen Jr.
United States Attorney

# EXHIBIT 11

# Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege

As a matter of statutory construction and separation of powers analysis, a United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before a committee of Congress.

May 30, 1984

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

## I. Introduction

This memorandum memorializes our formal response to your request for our opinion whether, pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194, a United States Attorney must prosecute or refer to a grand jury a citation for contempt of Congress issued with respect to an Executive Branch official who has asserted a claim of executive privilege in response to written instructions from the President of the United States. Your inquiry originally arose in the context of a resolution adopted by the House of Representatives on December 16, 1982, during the final days of the 97th Congress, which instructed the Speaker of the House of Representatives to certify the report of the Committee on Public Works and Transportation concerning the "contumacious conduct of [the] Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee . . . to the United States Attorney for the District of Columbia, to the end that the Administrator . . . may be proceeded against in the manner and form provided by law." H.R. Res. 632, 97th Cong., 2d Sess. (1982).[1] Section 192 of Title 2, United States Code, provides, in general, that willful failure to produce documents in response to a congressional subpoena shall be a misdemeanor. Section 194 provides that if such a failure is reported to either house of Congress it "shall" be certified to the "appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action."

[1] Although the December 1982 dispute is now a matter of history, it raises recurring issues.

Your inquiry presents a number of complex issues that will be considered in this memorandum. The first issue is whether the Executive retains some discretion with respect to referral of a contempt of Congress citation to a grand jury. This issue raises questions of statutory construction and the separation of powers with respect to the scope of the Executive's exercise of prosecutorial discretion. The second issue is whether the criminal contempt of Congress statute applies to an Executive Branch official who, on the orders of the President, asserts the President's claim of executive privilege. This issue also involves questions of statutory interpretation and the constitutional separation of powers.

As we have previously discussed with you, and as we explain in detail in this memorandum, we have concluded that, as a matter of both statutory construction and the Constitution's structural separation of powers, a United States Attorney is not required to refer a contempt citation in these circumstances to a grand jury or otherwise to prosecute an Executive Branch official who is carrying out the President's instruction in a factual context such as that presented by the December 16, 1982, contempt citation. First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

Our conclusions are predicated upon the proposition, endorsed by a unanimous Supreme Court less than a decade ago, that the President has the authority, rooted inextricably in the separation of powers under the Constitution, to preserve the confidentiality of certain Executive Branch documents. The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.

Before setting out a more detailed explanation of our analysis and conclusions, we offer the caveat that our conclusions are limited to the unique circumstances that gave rise to these questions in late 1982 and early 1983.

Constitutional conflicts within the federal government must be resolved carefully, based upon the facts of each specific case. Although tensions and friction between coordinate branches of our government are not novel and were, in fact, anticipated by the Framers of the Constitution, they have seldom led to major confrontations with clear and dispositive resolutions.

> The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To speak of *lines* of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory.

Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1016 (1924) (emphasis in original). "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). Therefore, although we are confident of our conclusions, prudence suggests that they should be limited to controversies similar to the one to which this memorandum expressly relates, and the general statements of legal principles should be applied in other contexts only after careful analysis.

## II. Background

Because the difficult and sensitive constitutional issues that we consider in this opinion could conceivably be resolved differently depending upon the specific facts of a controversy, this analysis is presented in the context of the December 16, 1982, actions of the House of Representatives. The facts surrounding this dispute will be set out in detail in the following pages.

### *A. EPA's Enforcement of the Superfund Act*

On December 16, 1982, the House of Representatives cited the Administrator of the Environmental Protection Agency (EPA) because she declined to produce, in response to a broad subcommittee subpoena, a small portion of the subpoenaed documents concerning the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, 9657 (Supp. V 1981) (Superfund Act). The Superfund Act, adopted in December of 1980, authorizes the federal government to take steps to remedy the hazards posed by abandoned and inactive hazardous waste sites throughout the United States.[2] The EPA, which was delegated part of the President's authority to enforce the Superfund Act in August of 1981,[3] has considerable flexibility with respect to

[2] Another statute, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, provides federal authority to deal with the current disposal of hazardous industrial wastes.

[3] See Executive Order No. 12316, "Responses to Environmental Damage" (Aug. 14, 1981).

how this goal may be accomplished. EPA may request the Department of Justice to proceed immediately against those responsible for the hazardous waste sites to "secure such relief as may be necessary to abate" an "imminent and substantial endangerment to the public health or welfare or the environment." *See* 42 U.S.C. § 9606. Alternatively, EPA may initiate clean-up efforts itself by using funds from the $1.6 billion Superfund. *See* 42 U.S.C. § 9631. If EPA itself implements the clean-up efforts, it may subsequently sue those responsible for the hazardous waste to recover the clean up cost and, in some instances, may obtain treble damages. *See* 42 U.S.C. § 9607. These two basic enforcement mechanisms are supplemented by other broad enforcement powers, which authorize the issuance of administrative orders "necessary to protect the public health and welfare and the environment" and to require designated persons to furnish information about the storage, treatment, handling, or disposal of hazardous substances. *See* 42 U.S.C. §§ 9606, 9604(e)(1). Finally, the Superfund Act imposes criminal liability on a person in charge of a facility from which a hazardous substance is released, if that person fails to notify the government of the release. *See* 42 U.S.C. § 9603.

Prior to the initiation of judicial proceedings, EPA must undertake intensive investigation and case preparation, including studying the nature and the extent of the hazard present at sites, identifying potentially responsible parties, and evaluating the evidence that exists or that must be generated to support government action. *See* Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel, EPA, filed in *United States* v. *House of Representatives*, Civ. No. 82–3583 (D.D.C. Jan. 14, 1983). Many sites apparently involve hundreds of waste generators; hence, the initial investigation of a site can take months and involve the examination of tens of thousands of documents. *Id.*

Based on its initial investigations of hazardous waste sites throughout the country, EPA created a comprehensive national enforcement scheme and developed during 1982 an interim priorities list, which identified the 160 sites that posed the greatest risk to the public health and welfare and the environment.[4] EPA also promulgated enforcement guidelines to direct the implementation of the Superfund Act against these potentially hazardous sites. *See* 47 Fed. Reg. 20664 (1982).

Under this basic enforcement scheme, EPA commenced actual enforcement of the Superfund Act. As part of the enforcement effort with respect to each site, EPA generally develops a strategy for conducting negotiations and litigation consistent with its overall enforcement goals and the individual facts of each particular case. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at a site unless the parties undertake an adequate clean up program on their own. Following the issuance of notice letters, EPA typically negotiates with responsible parties to agree on a

[4] Subsequently, EPA published a proposed national priorities list (to replace the interim list), which identified the 418 sites that, in EPA's judgment, required priority in use of the Superfund to effect clean up. *See* 47 Fed. Reg. 58476 (1982)

clean up plan. These negotiations may involve hundreds of potentially responsible parties and millions of dollars in clean up costs. Depending upon the strengths and weaknesses of individual cases and the effect on the overall enforcement effort, EPA may decide to settle with some but not all parties and proceed to litigation with a certain number of potential defendants. If EPA decides to bring a lawsuit, it refers the case to the Land and Natural Resources Division of this Department, which is responsible for conducting the actual litigation.[5]

During EPA's enforcement of the Superfund Act, the agency created or received hundreds of thousands of documents concerning various aspects of the enforcement process. Many of these documents concerned the facts relating to specific hazardous waste sites; others involved general agency strategy and policies with respect to the Superfund Act; still others, a small portion of the enforcement files, were attorney and investigator memoranda and notes that contained discussions of subjects such as EPA's enforcement strategy against particular defendants, analyses of the strengths and weaknesses of the government's case against actual or potential defendants, consideration of negotiation and settlement strategy, lists of potential witnesses and their anticipated testimony, and other litigation planning matters. Enforcement officials at both the career and policy level at EPA and in the Land and Natural Resources Division at the Department of Justice determined that some of those documents, which concerned the legal merits and tactics with respect to individual defendants in open enforcement files, were particularly sensitive to the enforcement process and could not be revealed outside the agencies directly involved in the enforcement effort without risking injury to EPA's cases against these actual and potential defendants in particular and the EPA enforcement process in general.[6]

*B. The House Subcommittee's Demands for Enforcement Files*

In the midst of EPA's ongoing enforcement efforts under the Superfund Act, the Subcommittee on Oversight and Investigations of the House Committee on Public Works and Transportation (Public Works Subcommittee), chaired by Rep. Levitas, began hearings to review EPA enforcement of the Act. In the course of these hearings, the Public Works Subcommittee first demanded access to, and then subpoenaed, a wide range of documents concerning enforcement of the Superfund Act with respect to the 160 sites that were on the

[5] We understand that as of January 14, 1983, EPA had sent more than 1,760 notice letters, undertaken Superfund financed action at 112 sites involving the obligation of in excess of $236 million, instituted Superfund claims in 25 judicial actions, and obtained one criminal conviction. As of the early months of 1983, EPA and the Department of Justice had reached settlements in 23 civil actions providing for the expenditure of more than $121 million to conduct clean up operations and were actively negotiating with responsible parties concerning the clean up of 56 sites throughout the country. *See* Amended Declaration of Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the EPA, filed in *United States* v. *House of Representatives*, Civ. No. 82-3583 (D.D.C. Jan. 14, 1983).

[6] *Id.*

agency's interim priorities list. The documents demanded by the Public Works Subcommittee included not only documents concerning the facts relating to these sites and EPA's general policies, but also the sensitive material contained in open case files that set out discussions concerning case strategy with respect to actual and potential defendants.[7] The Public Works Subcommittee subpoena was dated November 16, 1982, and was served on November 22, 1982. It called for production of the subpoenaed documents eleven days later on December 2, 1982. The EPA Administrator responded to the Public Works Subcommittee's subpoena by offering to provide the Public Works Subcommittee with access to an estimated 787,000 pages of documents within the scope of the subpoena.[8] The EPA and the Land and Natural Resources Division officials responsible for conducting EPA enforcement litigation determined, however, that release outside the enforcement agencies of a limited number of the most sensitive enforcement documents contained in open files concerning current and prospective defendants would impair EPA's ongoing enforcement efforts and prevent EPA and the Department of Justice from effectively implementing the Superfund Act.

Therefore, in accordance with the explicit guidelines adopted by the President to govern possible claims of executive privilege, *see* Memorandum re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), EPA suggested that some of the documents be withheld under a claim of executive privilege and consulted with this Office and the Office of the Counsel to the President in order to determine whether such a claim might be asserted to avoid impairing the constitutional responsibility of the President to take care that the laws be faithfully executed. A further review of the documents in question by enforcement officials at EPA and the Land and Natural Resources Division was then undertaken to confirm that the particular documents selected for consideration for an executive privilege claim were, in the judgment of those officials, sufficiently sensitive that their disclosure outside the Executive Branch might adversely affect the law enforcement process. The documents were then reviewed by officials in this Office and officials in the Office of the Counsel to the President to confirm that the documents were of the type described by the enforcement officials. Various unsuccessful efforts were thereafter made to resolve the dispute short of a final confrontation. The President, based upon the unanimous recommendation of all Executive Branch officials involved in the process, ultimately determined to assert a claim of executive privilege with respect to 64 documents from open enforcement files that had been identified as sufficiently enforcement sensitive

[7] The subpoena required the EPA Administrator to produce: all books, records, correspondence, memoranda, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, the date of enactment of the Superfund Act, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of the Superfund Act. *See United States v. House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983).

[8] *See* Testimony of Administrator Gorsuch before the Public Works Subcommittee, attached as Exhibit C to Declaration of Robert M. Perry, *supra*.

as of the return date of the subpoena that their disclosure might adversely affect pending investigations and open enforcement proceedings. The President implemented this decision in a memorandum dated November 30, 1982, to the EPA Administrator, which instructed her to withhold the particularly sensitive documents from disclosure outside the Executive Branch as long as the documents remained critical to ongoing or developing enforcement actions. The legal basis for this decision was explained in letters from the Attorney General on November 30, 1982, to the House Public Works Subcommittee and one other House subcommittee.[9] On December 2, 1982, 64 of the most sensitive documents were withheld from the Subcommittee.[10]

*C. The Contempt of Congress Proceedings in the House of Representatives*

The President's assertion of executive privilege, and the Attorney General's explanation of the law enforcement considerations and constitutional justification for the decision not to release the documents outside the Executive Branch while enforcement proceedings were ongoing, did not dissuade the congressional subcommittees from pressing their demands for the withheld material. After the EPA Administrator asserted the President's claim of privilege at a December 2, 1982, Public Works Subcommittee hearing, the Subcommittee immediately approved a contempt of Congress resolution against her. The full Committee did likewise on December 10, 1982, and rejected a further proposal by the Department of Justice to establish a formal screening process and briefings regarding the contents of the documents.[11] The full House adopted the contempt of Congress resolution on December 16, 1982,[12] and the follow-

[9] *See* Letters to Hon. Elliott H. Levitas and Hon. John D. Dingell from Attorney General William French Smith (Nov. 30, 1982). The Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee (Energy and Commerce Subcommittee), chaired by Representative John D. Dingell, was pursuing a parallel demand for similar documents relating to enforcement of the Superfund Act with respect to certain specific sites that were among the 160 on the interim priorities list. While the Energy and Commerce Subcommittee sought documents relative to three specific hazardous waste sites, the Public Works Subcommittee subpoena demanded production of virtually all documents for all 160 sites. The President's assertion of executive privilege applied to both subpoenas. Although the Energy and Commerce Subcommittee approved a contempt of Congress resolution against the EPA Administrator, this resolution never reached the full Committee or the floor of the House of Representatives.

[10] As of that date, EPA had been able to examine only a portion of the hundreds of thousands of pages of documents that had been subpoenaed. The 64 documents that were withheld were those among the subpoenaed documents that had been reviewed and determined to fall within the President's instruction not to produce documents the release of which would adversely affect ongoing enforcement proceedings *See* Amended Declaration of Robert M. Perry, *supra*

[11] *See* Letter to Hon. Elliott H. Levitas from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (Dec. 9, 1982).

[12] The contempt resolution stated:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in

Continued

ing day Speaker O'Neill certified the contempt citation to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute.

*D. The Criminal Contempt of Congress Statute*

The criminal contempt of Congress statute contains two principal sections, 2 U.S.C. §§ 192 & 194.[13] Section 192, which sets forth the criminal offense of contempt of Congress, provides in pertinent part:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 194 purports to impose mandatory duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain actions leading to the prosecution of persons certified by a house of Congress to have failed to produce information in response to a subpoena. It provides:

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported and filed with the President of the Senate or the Speaker of the House, *it shall be the duty of the said President of the Senate or the Speaker of the House*, as the case may be, *to certify, and he shall so certify, the statement of facts* aforesaid under the seal of the

[12] (. . . continued)
connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

128 Cong. Rec. 31754 (1982).

[13] A third provision, 2 U.S.C. § 193, which denies the existence of any testimonial privilege for a witness to refuse to testify on the ground that this testimony would disgrace him, is not relevant to the issues discussed in this memorandum.

> Senate or House, as the case may be, *to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.*

(Emphasis added.)

*E. The Department of Justice Civil Suit*

Immediately after the House passed the resolution adopting the finding that the EPA Administrator was in contempt of Congress, the Department of Justice filed a civil suit in the United States District Court for the District of Columbia to obtain a ruling that "insofar as [the EPA] Administrator . . . did not comply with the Subpoena, her non-compliance was lawful" because of a valid Presidential claim of executive privilege.[14] The House moved to dismiss the Department's complaint on jurisdictional grounds, and the Department cross moved for summary judgment on the merits. In a letter to Speaker O'Neill dated December 27, 1982, the United States Attorney indicated that during the pendency of the lawsuit, he would take no further action with respect to the Speaker's referral of the contempt citation. The Speaker responded in a letter dated January 4, 1983, in which he took the position that the United States Attorney must, as a matter of law, immediately refer the matter to a grand jury.

The trial court responded to the cross-motions for dismissal and summary judgment by exercising its discretion under equitable rules of judicial restraint not to accept jurisdiction over the lawsuit, and it dismissed the suit. The court concluded:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. . . .
>
> The difficulties apparent in prosecuting [the] Administrator . . . for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement.

*United States* v. *House of Representatives*, 556 F. Supp. 150, 152–53 (D.D.C. 1983). No appeal was taken.[15]

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[14] *See* Amended Complaint in *United States* v. *House of Representatives*, Civ. No. 82–3583 (D.D.C. Dec. 29, 1982).

[15] Although the United States Court of Appeals for the District of Columbia Circuit previously had been willing to entertain a civil action to resolve a conflict between a congressional subpoena for documents and a Presidential claim of executive privilege when the action was brought by a congressional committee, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir 1974) (en banc), the trial court decision in the EPA matter casts some doubt on the viability of such an action when Congress, as in this case, does not wish to resolve the controversy in a civil suit. We must assume, for the purpose of this opinion, that a civil suit is an avenue that is open to Congress, but closed to the Executive, absent a legislature willing to have the matter resolved in a civil proceeding.

Of course, the courts might be more amenable to a civil action challenging a contempt citation if they felt that a criminal prosecution in this context was untenable. The district court judge in the EPA matter noted but did not attempt to consider in depth the "difficulties" of prosecuting an executive official for carrying out the President's constitutional responsibility.

*F. Resolution of the EPA Dispute*

Subsequent to the trial court decision, the two branches engaged in negotiations to reach a compromise settlement. The parties eventually reached an agreement under which the Public Works Subcommittee would have limited access to the withheld documents and would sponsor a resolution to "withdraw" the contempt citation against the EPA Administrator. Pursuant to the agreement, the Subcommittee reviewed the documents, and the House later adopted a resolution withdrawing the contempt citation. H.R. Res. 180, 98th Cong., 1st Sess. (Aug. 3, 1983). The issue whether the House of Representatives in the 98th Congress could "withdraw" the contempt citation of the House during the 97th Congress was never resolved.

During the pendency of the lawsuit and the subsequent settlement negotiations, the United States Attorney for the District of Columbia refrained from referring the contempt citation to the grand jury. The United States Attorney took the position that referral would have been inappropriate during that period and that the statute left him with discretion to withhold referral. *See* Testimony of Stanley S. Harris before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. 100–07 (June 16, 1983). Following the passage of the resolution withdrawing the contempt citation, "the relevant facts and documents were presented . . . to a federal grand jury, which voted unanimously not to indict [the EPA Administrator]." Letter from Stanley S. Harris, United States Attorney, District of Columbia, to Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Aug. 5, 1983).

## III. Generally Applicable Legal Principles: The Separation of Powers, the Duties of the Executive to Enforce the Law, and the Derivation and Scope of the Principles of Prosecutorial Discretion and Executive Privilege

*A. The Separation of Powers*

The basic structural concept of the United States Constitution is the division of federal power among three branches of government. Although the expression "separation of powers" does not actually appear in the Constitution, the Supreme Court has emphasized that the separation of powers "is at the heart of our Constitution," and has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." *Buckley* v. *Valeo*, 424 U.S. 1, 119–20 (1976). It needs little emphasis that the separation of powers doctrine is vital to any analysis of the relative responsibilities of the branches of our government, *inter se*. In *The Federalist* No. 47, James Madison, who believed that "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty" than the concept of the separation of powers, defended this tripartite arrangement in the Constitution by citing

Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."

*The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961); *see Buckley* v. *Valeo*, 424 U.S. at 120–21.[16]

Of the three branches of the new government created in Philadelphia in 1787, the legislature was regarded as the most intrinsically powerful, and the branch with powers that required the exercise of the greatest precautions.

Madison warned that the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48, *supra*, at 309. He admonished that because of their experiences in England, the founders of the thirteen colonies had focused keenly on the danger to liberty from an "overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority," but had tended to ignore the very real dangers from "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." *Id.* Reflecting the views of many of his colleagues, Madison believed that although the risk of tyranny would naturally come from the King in an hereditary monarchy, in a representative republic, like that created by the constitutional convention, in which executive power was "carefully limited, both in the extent and duration of its power," the threat to liberty would come from the legislature,

> which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

*Id.*

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[16] Madison characterized Montesquieu as the "oracle who is always consulted and cited on [the] subject [of the separation of powers]." *See The Federalist* No. 47, *supra*, at 301.

The Framers feared that the legislature's power over the purse would foster a dependence by the executive departments on the legislature "which gives still greater facility to encroachments" by the legislature on the powers of the Executive. *Id.* at 310. The concerns of the Framers with respect to the power of the legislature have been recognized by the Supreme Court. The Court, citing many of the above statements, has observed that because of the Framers' concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform functions of the other departments." *United States* v. *Brown*, 381 U.S. 437, 444 (1965). Justice Powell noted that "during the Confederation, the States reacted by removing power from the executive and placing it in the hands of elected legislators. But many legislators proved to be little better than the Crown." *INS* v. *Chadha*, 462 U.S. 917, 961 (1983) (Powell, J. concurring). After citing several specific legislative abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* at 962.

Thus, the careful separation of governmental functions among three branches of government was a very deliberate and vital structural step in building the Constitution. The Framers understood human nature and anticipated that well-intentioned impulses would lead each of the branches to attempt to encroach on the powers allocated to the others. They accordingly designed the structure of the Constitution to contain intrinsic checks to prevent undue encroachment wherever possible. Particular care was taken with respect to the anticipated tendency of the Legislative Branch to swallow up the Executive. The Framers did not wish the Legislative Branch to have excessive authority over the individual decisions respecting the execution of the laws: "An *elective despotism* was not the government we fought for." T. Jefferson, *Notes on the State of Virginia* 120 (Univ. N.C. Press ed. 1955)[17] The constitutionally prescribed separation of powers creates enforceable abuses that had been of particular concern to the Framers, Justice Powell concluded that it "was to prevent the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* The division of delegated powers was designed "to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS* v. *Chadha*, 462 U.S. at 951. The doctrine of separated powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its consti-

[17] It is noteworthy, at least from an historical perspective, that the House of Representatives, because of its immense powers, was considered to be the governmental body least vulnerable to encroachments by other segments of government and, at the same time, because of its popular origin and frequent renewal of authority by the people, the body whose encroachment on the other branches would be least distrusted by the public. The Supreme Court later noted:

> It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.

*Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (1881).

tutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another. *Id.* at 963 (Powell, J. concurring) (citations omitted). Although the Supreme Court has recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," it has also emphasized that the Court "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." *Buckley* v. *Valeo*, 424 U.S. at 121, 123. Therefore, although the Constitution does not contemplate "a complete division of authority between the three branches," each branch retains certain core prerogatives upon which the other branches may not transgress. *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Each branch must not only perform its own delegated functions, but each has an additional duty to resist encroachment by the other branches. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, *must* be resisted." *INS* v. *Chadha*, 462 U.S. at 951 (emphasis added).

*B. The Duties of the Executive to Enforce the Law*

The fundamental responsibility and power of the Executive Branch is the duty to execute the law. Article II, § 1 of the Constitution expressly vests the executive power in the President. Article II, § 3 commands that the President "take Care that the Laws be faithfully executed." Enforcement of the laws is an inherently executive function, and by virtue of these constitutional provisions, the Executive Branch has the exclusive constitutional authority to enforce federal laws. Since the adoption of the Constitution, these verities have been at the heart of the general understanding of the Executive's constitutional authority. During the debates on the Constitution, James Wilson noted that the "only powers he conceived strictly executive were those of executing the laws." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65–66 (1937). During the first Congress, James Madison stated that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 *Annals of Congress* 481 (1789). The Supreme Court has recognized this fundamental constitutional principle. In *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928), the Court observed:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

*Id.* at 202. More recently, Judge Wilkey, writing for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit in a decision later affirmed by the Supreme Court, recognized that the Constitution

prevents Congress from exercising its power of "oversight, with an eye to legislative revision," in a manner that amounts to "shared administration" of the law. *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425, 474 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Group* v. *Consumer Energy Council of America*, 43 U.S. 1216 (1983). It thus seems apparent that the drafters of the Constitution intended clearly to separate the power to adopt laws and the power to enforce them and intended to place the latter power exclusively in the Executive Branch.[18] As a practical matter, this means that there are constitutional limits on Congress' ability to take actions that either disrupt the ability of the Executive Branch to enforce the law or effectively arrogate to Congress the power of enforcing the laws.

### *C. The Derivation and Scope of Prosecutorial Discretion and Executive Privilege*

The issues addressed by this memorandum involve two important constitutional doctrines that spring from the constitutional limits imposed by the separation of powers and the Executive's duty to enforce the laws: prosecutorial discretion and executive privilege.

#### 1. Prosecutorial Discretion

The doctrine of prosecutorial discretion is based on the premise that because the essential core of the President's constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress. That principle was reaffirmed by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in which the Court invalidated the provision of the Federal Election Act that vested the appointment of certain members of the Federal Election Commission in the President *pro tempore* of the Senate and the Speaker of the House. In so holding, the Court recognized the exclusively executive nature of some of the Commission's powers, including the right to commence litigation:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the laws be faithfully executed." Art. II, § 3.

424 U.S. at 138.

[18] Of equal concern was the need to separate the judicial power from the executive power. The drafters intended to preserve the impartiality of the judiciary as "neutral arbiters in the criminal law" by separating the judiciary from the prosecutorial function. *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C Cir. 1974).

The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. This principle was explained in *Smith* v. *United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive's prosecutorial discretion was rooted in the separation of powers under the Constitution:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take Care that the Laws be faithfully executed." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States. . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . . This discretion is required in all cases.
>
> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246–47. The court went on to state that this prosecutorial discretion is protected "no matter whether these decisions are made during the investigation or prosecution of offenses." *Id.* at 248.

The limits and precise nature of the Executive's prosecutorial discretion are discussed in greater detail below. At this point in our examination of the issues considered in this memorandum, it is sufficient to observe that meaningful and significant separation of powers issues are raised by a statute that purports to direct the Executive to take specified, mandatory prosecutorial action against a specific individual designated by the Legislative Branch.

2. Executive Privilege

The doctrine of executive privilege is founded upon the basic principle that in order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch. If disclosure of certain documents outside the Executive Branch would impair the President's ability to fulfill his constitutional duties or result in the impermissible involvement of other branches in the enforcement of the law, then the President must be able to claim some form of privilege to preserve his constitutional preroga-

tives. This "executive privilege" has been explicitly recognized by the Supreme Court, which has stated that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). We believe that it is beyond peradventure that the constitutionally mandated separation of powers permits the President to prevent disclosure of certain Executive Branch documents under the doctrine of executive privilege and that the ability to assert this privilege is fundamental to the President's ability to carry out his constitutionally prescribed duties.

The Supreme Court has suggested that in some areas the President's executive privilege may be absolute and in some circumstances it is a qualified privilege that may be overcome by a compelling interest of another branch. *United States* v. *Nixon*, 418 U.S. at 713; *see also Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). Nevertheless, the unanimous Supreme Court decision in *Nixon* clearly stands for the proposition that there is a privilege, that it stems from the separation of powers, and that it may be invoked (although perhaps overridden by a court) whenever the President finds it necessary to maintain the confidentiality of information within the Executive Branch in order to perform his constitutionally assigned responsibilities.[19]

The scope of executive privilege includes several related areas in which confidentiality within the Executive Branch is necessary for the effective execution of the laws. First, as the Supreme Court has held, the privilege protects deliberative communications between the President and his advisors. The Court has identified the rationale for this aspect of the privilege as the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. *United States* v. *Nixon*, 418 U.S. at 705 (footnotes omitted).

Another category of Executive Branch material that is subject to a President's claim of privilege is material necessary "to protect military, diplomatic, or sensitive national security secrets." *United States* v. *Nixon*, 418 U.S. 683, 706 (1974). In *Nixon*, the Court stated:

> As to those areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C.& S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111

[19] Presidents have invoked the privilege throughout our history for a variety of reasons. *See, e.g.*, "History of Refusals by Executive Branch to Provide Information Demanded by Congress," 6 Op. O.L.C. 751 (1982); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert Lipschutz, Counsel to the President (June 8, 1977); Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45 (1941).

(1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In *United States* v. *Reynolds*, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

418 U.S. at 710–11.

An additional important application of executive privilege, which, as noted earlier, relates centrally to the discharge of the President's constitutional duties, involves open law enforcement files. Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature.[20] The basis for this application

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[20] As explained by Attorney General (later, Supreme Court Justice) Robert Jackson in April 1941:

> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon.

40 Op. Att'y Gen. 45, 46 (1941). As similarly expressed a few years later by Deputy Assistant Attorney General Kauper:

> Over a number of years, a number of reasons have been advanced for the traditional refusal of the Executive to supply Congress with information from open investigational files. Most impor-

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of the privilege is essentially the same as for all aspects of executive privilege; the Executive's ability to enforce the law would be seriously impaired, and the impermissible involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files.

## IV. The Duty of the Executive Branch When an Executive Official Has Been Cited for Contempt of Congress for Asserting the President's Claim of Executive Privilege

### *A. Prosecutorial Discretion*

The first specific question that is presented by the circumstances that gave rise to this memorandum is whether the United States Attorney is required to refer every contempt of Congress citation to a grand jury. This question raises issues of statutory construction as well as the constitutional limits of prosecutorial discretion. We deal first with the statutory questions.

As a preliminary matter, we note that § 194 does not on its face actually purport to require the United States Attorney to proceed with the prosecution of a person cited by a house of Congress for contempt; by its express terms the statute discusses only referral to a grand jury. Even if a grand jury were to return a true bill, the United States Attorney could refuse to sign the indictment and thereby prevent the case from going forward. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965); *In re Grand Jury, January, 1969*, 315 F. Supp. 662 (D. Md. 1970). *See* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. on Legis. 145, 155 (1984). Thus, as a matter of statutory interpretation, there is no doubt that the contempt of Congress statute does not require a prosecution; the only question is whether it requires referral to the grand jury.[21]

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[20] (. . . continued)

> tant, the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.

Memorandum for the Deputy Counsel to the President from Deputy Assistant Attorney General Kauper re: Submission of Open CID Investigation Files (Dec. 19, 1969). This significant constitutional privilege provides a foundation for our discussion below of the penalties that Congress may attach to the President's assertion of the privilege in response to a congressional subpoena.

[21] Although it is by no means certain as a matter of law, if the case were referred to a grand jury, the United States Attorney might be required to take certain steps short of signing the indictment, and the grand jury's decision might well become public. In *Cox*, a majority of the court (made up of the three dissenting judges and one concurring judge) took the view that the United States Attorney could be required to prepare an indictment for use by the grand jury. In addition, the district court in *In re Grand Jury*, *supra*, held that even though the United States Attorney could not be required to sign an indictment, in the circumstances of that case "the substance of the charges in the indictment should be disclosed, omitting certain portions as to which

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1. Previous Department of Justice Positions Concerning Prosecutorial Discretion Under the Contempt of Congress Statute

In the past, the Department of Justice has taken the position that if Congress cited an executive officer for contempt because of an assertion of executive privilege and "the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury." Testimony of Assistant Attorney General (now Solicitor General) Rex Lee, *Hearings on Representation of Congress and Congressional Interests in Court, Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary*, 94th Cong., 2d Sess. 8 (1976).

This principle of prosecutorial discretion under the contempt of Congress statute was followed by the Department in the cases of three officials of the Port of New York Authority who were cited for contempt of Congress in 1960 for refusing to produce documents to the House Judiciary Committee. As a part of an investigation of the Port Authority, which had been established by an interstate compact approved by Congress, the Judiciary Committee subpoenaed a large number of documents concerning the Port Authority's operations, most of which the Port Authority declined to produce on the orders of the governors of New York and New Jersey (the states within which the Port Authority was located). Because of the failure to produce the documents, the Committee recommended, and the House adopted, contempt resolutions against three principal officials of the Port Authority.[22] On August 23, 1960, these resolutions were referred to the United States Attorney for prosecution. *See* N.Y. Times, Aug. 24, 1960, at 1. The United States Attorney never referred any of these citations to the grand jury. On November 16, 1960, the Department of Justice announced that it would proceed against the officials by information

[21] (. . . continued)
the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment." 315 F Supp. at 678–79. Under this analysis, if the contempt citation were to reach a grand jury and the grand jury were to vote a true bill, a court might be able to require the United States Attorney to prepare an indictment and then might order the disclosure of that indictment as voted by the grand jury. For the reasons set out in our discussion of prosecutorial discretion, the court could not, however, order the United States Attorney to prosecute.

Because the contempt of Congress statute does not require the United States Attorney to refer to a grand jury a citation for contempt of Congress issued to an executive official who has asserted the President's claim of executive privilege, we have not attempted to determine definitively what additional steps, if any, the United States Attorney could be required to take if such a matter were referred to a grand jury.

[22] See 106 Cong. Rec. 17313 (1960) (citation against Austin J. Tobin, Executive Director of the Authority); *id.* at 17316 (citation against S. Sloan Colt, Chairman of the Board); *id.* at 17319 (citation against Joseph G. Carty, Secretary). The contempt resolution in each case read as follows:

> Resolved, That the Speaker of the House of Representatives certify the report of the Committee on the Judiciary as to the contumacious conduct of [name] in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon him and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that [name] may be proceeded against in the manner and form provided by law.

rather than indictment, and therefore would not present the citations to a grand jury. *See* N.Y. Times, Nov. 17, 1960, at 1. On November 25, 1960, the Department announced that it would file an information against only one of the Port Authority officials, Executive Director Austin Tobin, and would not prosecute the remaining two officials. *See* N.Y. Times, Nov. 26, 1960, at 1. The trial began in January 1961 and continued under the supervision of the new Attorney General, Robert F. Kennedy, who never altered the decision not to prosecute the two remaining officials, in spite of a congressional request to do so. Ultimately Tobin's conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit. *Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).[23]

In the foregoing instance, the Department (under two administrations) exercised its prosecutorial discretion not to refer contempt of Congress citations to a grand jury, notwithstanding the seemingly mandatory phrasing of the statute.[24] For the reasons set forth more fully below, we continue to adhere to the conclusion that the Department retains prosecutorial discretion not to refer contempt citations to a grand jury.

2. Judicial Opinions Interpreting the Language of § 194

Section 194 imposes similarly worded, nominally mandatory, referral obligations on both the Speaker of the House (or the President of the Senate) and the United States Attorney once a contempt of Congress resolution has been adopted by the House or Senate:

> *it shall be the duty* of the said President of the Senate or the Speaker of the House as the case may be, to certify, *and he shall so certify*, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, *whose duty it shall be* to bring the matter before the grand jury for its action.

(Emphasis added.)

Although the language, "it shall be the duty of" and "whose duty it shall be," might suggest a nondiscretionary obligation, the United States Court of Appeals for the District of Columbia Circuit has expressly held, at least with respect to the Speaker of the House, that the duty is *not* mandatory, and that, in fact, the Speaker has an obligation under the law, at least in some cases, to exercise his discretion in determining whether to refer a contempt citation. *Wilson* v. *United States*, 369 F.2d 198 (D.C. Cir. 1966). In *Wilson*, the court reversed a conviction for contempt of Congress on the ground that the Speaker had assumed that the statute did not permit any exercise of discretion by him

[23] The Court of Appeals ruled that the documents requested by the Committee went beyond the investigative authority delegated to the Committee by the House.

[24] We know of at least two other individuals who were cited for contempt of Congress, but whose cases were not referred to a grand jury by the Department of Justice. *See* Department of Justice File No. 51–51–484 (1956). The file was closed because the Department concluded that there was an insufficient basis for prosecution.

and he had therefore automatically referred a contempt citation to the United States Attorney while Congress was not in session. The court based its conclusion that the Speaker was required to exercise his discretion on the longstanding practice of both the House and Senate and on congressional debates on contempt citations in which the houses had recognized their own discretion not to approve a contempt resolution. The court concluded that because full House approval of a contempt citation is necessary when Congress was in session, the Speaker is required to exercise some discretion when the House is not in session. 369 F.2d at 203–04.

Although the reasons underlying the court's decision not to impose a mandatory duty on the Speaker in *Wilson* do not necessarily require the same conclusion with respect to the United States Attorney, the decision at least supports the proposition that the seemingly mandatory language of § 194 need not be construed as divesting either the Speaker or the United States Attorney of all discretion.[25]

In several cases, the United States Court of Appeals for the District of Columbia Circuit has at least assumed that the United States Attorney retains discretion not to refer a contempt of Congress citation to a grand jury. In these cases, the court refused to entertain challenges to congressional subpoenas, at least in part on the ground that the prospective witnesses would have adequate subsequent opportunities to challenge a committee's contempt finding, including the opportunity to persuade the United States Attorney not to refer the case to a grand jury. For example, in *Ansara* v. *Eastland*, 442 F.2d 751 (D.C. Cir. 1971), the court declined to entertain a suit to quash a congressional subpoena on the ground that it would be inappropriate, as a matter of the exercise of its equitable power, to interfere with an ongoing congressional process. The court stated that protections were available "within the legislative branch or elsewhere," and then in a footnote indicated that these protections resided "perhaps in the Executive Branch *which may decide not to present the matter to the grand jury* (as occurred in the case of the officials of the New York Port Authority); or perhaps in the Grand Jury which may decide not to return a true bill." 442 F.2d at 754 n.6 (emphasis added).[26] *See also Sanders* v. *McClellan*,

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[25] In this respect, we believe that *Wilson* implicitly disapproved the *dictum* of *Ex parte Frankfeld*, 32 F. Supp. 915 (D.D.C. 1940), in which the district court stated:

> It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.

*Id* at 916. The *Frankfeld* court expressly linked the responsibilities of the Speaker and the United States Attorney *Wilson* ruled that the Speaker's duty is discretionary, at least when the House is not in session. Therefore, since the Speaker's duty is *in pari materia* with the duty of the United States Attorney, the law, at least in the District of Columbia Circuit, seems to be that both duties should be viewed as containing some elements of discretion.

[26] *Ansara* v. *Eastland* was cited with approval three times by Judge Smith in *United States* v. *House of Representatives*, 556 F. Supp. 150, 152–53 (D.D.C 1983). Thus, although the opinion made a passing reference to the mandatory nature of referral, Judge Smith must have recognized that the United States Attorney retained prosecutorial discretion.

463 F.2d 894 (D.C. Cir. 1972). In *United States Servicemen's Fund* v. *Eastland*, 488 F.2d 1252 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1974), the court agreed to review a challenge to a congressional subpoena brought by a third party, and it distinguished *Ansara* and *McClellan* on the ground that, because the congressional subpoena was issued to a third party, the plaintiffs had no alternative means to vindicate their rights. 488 F.2d at 1260. Among the alternative means the court cited was the right to "seek to convince the executive (the attorney general's representative) not to prosecute." *Id.*

These cases emphasize the particular significance of prosecutorial discretion in the context of the contempt of Congress statute. In general, with respect to any criminal allegation, prosecutorial discretion plays an important role in protecting the rights of the accused by providing an additional level of review with respect to the factual and legal sufficiency of the charges. This role is even more important when dealing with the contempt of Congress statute because, as the above cases demonstrate, witnesses generally have no opportunity to challenge congressional subpoenas directly. Thus, as the cases indicate, prosecutorial discretion serves a vital purpose in protecting the rights of the accused in contempt cases by mitigating the otherwise stern consequences of asserting a right not to respond to a congressional subpoena.

Thus, the practice of the Congress and the available judicial authority support the proposition that the seemingly mandatory duties imposed on congressional officials by 2 U.S.C. § 194 are and were intended to be discretionary. The practice of the Executive Branch and the court decisions reflect a similarly discretionary role under the statute for the United States Attorney. Because, as the balance of this memorandum reveals, these interpretations are consistent with other common-law principles and avoid conclusions that would be at odds with the separation of powers, we believe that a correct reading of 2 U.S.C. § 194 requires recognition of the prosecutor's discretion with respect to referral to a grand jury.

3. Common-Law Prosecutorial Discretion

In addition to the court decisions that suggest that the United States Attorney may decide not to refer a contempt citation to a grand jury, the common-law doctrine of prosecutorial discretion weighs heavily against and, in our opinion, precludes an interpretation that the statute requires automatic referral. Because of the wide scope of a prosecutor's discretion in determining which cases to bring, courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated. The general rule is that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974). *See also Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869). The Attorney General and his subordinates, including the United States Attorneys, have the authority to exercise this discretion reserved to the Executive. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1888); *The Gray*

*Jacket*, 72 U.S. (5 Wall.) 370 (1866). In general, courts have agreed with the view of Judge (now Chief Justice) Burger:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

*Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). *See also United States* v. *Batchelder*, 442 U.S. 114 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

Courts have applied this general principle of prosecutorial discretion in refusing to interfere with a prosecutor's decision not to initiate a case, despite the specific language of 28 U.S.C. § 547, which states in part that "each United States Attorney, within his district, *shall* . . . prosecute *for all* offenses against the United States." (Emphasis added.) For example, in *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), the court denied a mandamus petition that sought to force the Attorney General to prosecute a national bank. The court ruled: "It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion." *Id.* at 234. *See also United States* v. *Brown*, 481 F.2d 1035 (8th Cir. 1973); *Bass Anglers Sportsman's Society* v. *Scholze Tannery, Inc.*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *United States* v. *Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945).

Courts exhibit the same deference to prosecutorial discretion even when the specific statute involved uses words that would otherwise have mandatory, nondiscretionary implications. For example, 42 U.S.C. § 1987 states that United States Attorneys are "authorized *and required* . . . to initiate prosecutions against all persons violating any of the provisions of [the federal criminal civil rights statutes]." (Emphasis added.) Although a number of cases have been initiated to force a United States Attorney to bring civil rights actions on the ground that this statute imposes a nondiscretionary duty to prosecute, *see* Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 Yale L.J. 1297 (1965), the courts uniformly have rejected the contention that the statute limits a prosecutor's normal discretion to decide not to bring a particular case. For example, in *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973), the court ruled that the "mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." 477 F.2d at 381. The court noted that although similar mandatory language was contained in other statutes, "[s]uch language has never been thought to preclude the exercise of prosecutorial discretion." *Id.* *Accord Peek* v. *Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses* v. *Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). The language employed in 2 U.S.C. § 194 is neither stronger

nor more clearly mandatory than the language of § 1987, which the courts have decided is insufficient to limit the normal prosecutorial discretion.

In fact, there is nothing to distinguish the contempt of Congress statute from any other statute where the prosecutor retains discretion with respect to who shall be prosecuted. Since the early part of the 19th century, it has been recognized that offenses against Congress that are punishable by Congress through its inherent contempt power may also be violations of the criminal laws and, as such, offenses against the United States, with respect to which the normal rules governing criminal prosecutions apply. *See* 2 Op. Att'y Gen. 655 (1834) (concluding that an assault against a congressman could be prosecuted consistent with the Double Jeopardy Clause under the criminal laws, even if the defendant had already been punished by Congress, because the act created two separate offenses, one against Congress and one against the United States). This principle was adopted by the Supreme Court when it upheld the constitutionality of the contempt of Congress statute. *In re Chapman*, 166 U.S. 661 (1897). In *Chapman*, the Court held that the contempt statute did not violate the Double Jeopardy Clause even though a defendant could be punished through Congress' inherent contempt power as well as under the contempt statute. The Court concluded that a refusal to testify involved two separate offenses, one against Congress and one against the United States, and that

> it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together.

166 U.S. at 672.

The import of the Court's conclusion in this context is clear. Congress' inherent contempt power is the remedy for the offense against Congress, and that remedy remains within Congress' control. The crime of contempt of Congress, like any other federal statutory crime, is an offense against the United States that should be prosecuted as is any other crime. This criminal offense against the United States properly remains subject to the prosecutorial control of the Executive Branch. Therefore, because the contempt statute should be treated as are other federal criminal statutes, we do not believe that § 194 should be read to limit the common law prosecutorial discretion of the United States Attorney. There is nothing in the legislative history of the contempt of Congress statute that is inconsistent with this conclusion. *See* 42 Cong. Globe, 34th Cong., 3d Sess. 4030–44 (1857).

4. Constitutional Considerations

Our construction of § 194 is reinforced by the need to avoid the constitutional problems that would result if § 194 were read to require referral to a

grand jury. As discussed above, the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law. Although most cases expressly avoid this constitutional question by construing statutes not to limit prosecutorial discretion, the cases that do discuss the subject make it clear that common law prosecutorial discretion is strongly reinforced by the constitutional separation of powers. *See, e.g., Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966).

A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, in *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961), the court declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was

> clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties.
>
> Article II, § 3 of the Constitution, provides that "[the President] shall take Care that the Laws [shall] be faithfully executed." The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.

193 F. Supp. at 634. *See also Goldberg* v. *Hoffman*, 225 F.2d 463, 464–65 (7th Cir. 1955).[27]

The Fifth Circuit, sitting en banc, has underscored the constitutional foundations of prosecutorial discretion. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). In *Cox*, the court overturned a district court's order that a United States Attorney prepare and sign an indictment that a grand jury had voted to return. The plurality opinion stated:

> The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceed-

[27] These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is intended primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. *See Rinaldi* v. *United States*, 434 U.S. 22 (1977); *United States* v. *Hamm*, 659 F.2d 624 (5th Cir. 1981); *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). The United States Court of Appeals for the Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, a court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F. Supp. 483 (S.D.N.Y. 1964).

> ings and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171 (footnotes omitted). *See also id.* at 182–83 (Brown, J. concurring); *id.* at 190–93 (Wisdom, J., concurring). Even the three dissenting judges in *Cox* conceded that, although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward." *Id.* at 179. *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (citing, *inter alia*, *Cox*).

Although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision not to prosecute an individual may not be controlled because it is fundamental to the Executive's prerogative. For example, the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies. *See Nader* v. *Saxbe*, 497 F.2d 676 (D.C. Cir. 1974); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *NAACP* v. *Levi*, 418 F. Supp. 1109 (D.D.C. 1976). In these cases the courts accepted jurisdiction to rule whether an entire enforcement program was being implemented based on an improper reading of the law. The cases expressly recognize, however, both that a decision to prosecute in an individual case involves many factors other than merely probable cause, and that "the balancing of these permissible factors in individual cases is an executive, rather than a judicial function which follows from the need to keep the courts as neutral arbiters in the criminal law generally . . . and from Art. II, § 3 of the Constitution, which charges the President to 'take Care that the Laws be faithfully executed.'" *Nader* v. *Saxbe*, 497 F.2d at 679 n.18. Similarly distinguishable are the cases concerning the constitutional limits on selective prosecution, which hold that prosecutorial discretion may not be exercised on the basis of impermissible factors such as race, religion, or the exercise of free

speech. *See, e.g., Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980); *Oyler* v. *Boles*, 368 U.S. 448 (1962).

If the congressional contempt statute were interpreted to divest the United States Attorney of discretion, then the statute would create two distinct problems with respect to the separation of powers. "The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches while others say that a given task is *not* to be performed by a given branch." *United States* v. *Brown*, 381 U.S. 437, 443 (1965). Divesting the United States Attorney of discretion would run afoul of both aspects of the separation of powers by stripping the Executive of its proper constitutional authority and by vesting improper power in Congress.

First, as the cases cited above demonstrate, Congress may not deprive the Executive of its prosecutorial discretion. In areas where the President has specific executive authority, Congress may establish standards for the exercise of that authority, but it may not remove all Presidential authority. For example, Congress may require the President to make appointments to certain executive positions and may define the qualifications for those positions, but it may not select the particular individuals whom the President must appoint to those positions. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976). Similarly, Congress may adopt the criminal provisions for which individuals may be prosecuted and impose certain qualifications on how the Executive should select individuals for prosecution, but it may not identify the particular individuals who must be prosecuted. The courts have declared that the ultimate decision with respect to prosecution of individuals must remain an executive function under the Constitution.

Second, if Congress could specify an individual to be prosecuted, it would be exercising powers that the Framers intended not be vested in the legislature. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. *See United States* v. *Brown*, 381 U.S. 437 (1965); *United States* v. *Lovett*, 328 U.S. 303 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *see United States* v. *Brown*, 381 U.S. 437, 446 (1965). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in *Lovett*:

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment.

328 U.S. at 317. Justice Powell has echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'" *INS* v. *Chadha*, 462 U.S. 917, 961 (1983) (Powell, J. concurring). As we have shown above, courts may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. *A fortiori*, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual guilt or innocence, may not decide on an individual basis who will be prosecuted.

These constitutional principles of prosecutorial discretion apply even though the issue here is referral to the grand jury and not commencement of a criminal case after indictment. A referral to a grand jury commences the criminal prosecution process. That step is as much a part of the function of executing the laws as is the decision to sign an indictment. The cases expressly recognize that prosecutorial discretion applies at any stage of the investigative process, even to the decision whether to begin an investigation at all. *See Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Smith* v. *United States*, 375 F.2d 243, 248 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). In the latter case, the court emphasized that prosecutorial discretion was protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248. Moreover, if the Executive has already determined that, as a matter of law, no violation of the law has occurred, it would serve no practical purpose to refer a case to the grand jury. Given the importance of these constitutional principles and the fundamental need to preserve the Executive's power to enforce the laws, we see no reason for distinguishing between the decision to prosecute and the decision to refer to the grand jury in this case.[28]

For all of the above reasons, as a matter of statutory construction strongly reinforced by constitutional separation of powers principles, we believe that the United States Attorney and the Attorney General, to whom the United States Attorney is responsible, retain their discretion not to refer a contempt of Congress citation to a grand jury. It follows, of course, that we believe that even if the provision of a statute requiring reference to a grand jury were to be upheld, the balance of the prosecutorial process could not be mandated.

[28] A statute giving one house of Congress the power to *direct* an Executive Branch official to take any particular action also raises a separate issue under the Supreme Court's decision in *INS* v. *Chadha*, 462 U.S. 917 (1983). Under the current contempt statute, the role of the House or Senate in simply referring a matter to the United States Attorney for possible prosecution raises no substantial issue under *Chadha* because the House or Senate is acting, in a sense, as a private citizen would — by reporting a possible violation of federal criminal law. Thus, *Chadha's* proscription of actions by one house (or two houses or a congressional committee) that are designed to have "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" would be inapplicable. *Id* at 952. If the contempt statute precluded prosecutorial discretion, however, one house would be empowered to impose on the United States Attorney an affirmative legal duty to initiate a prosecution and to take certain steps in that prosecution. To empower one house of Congress in that manner would appear to be contrary to the clear language and rationale of *Chadha*. This is not, of course, to say that Congress' attempt to impose such an obligation on the United States Attorney by plenary legislation in a specific case would be constitutional; it is to say that a permanent mechanism to be triggered by the vote of one house raises a significant additional constitutional concern.

*B. Whether the Criminal Contempt of Congress Statute Applies to an Executive Official Who Asserts, On Direct Orders of the President, the President's Claim of Executive Privilege*

We next consider, aside from the issue of prosecutorial discretion, whether the criminal contempt of Congress statute is intended to apply, or constitutionally could be applied, to Presidential claims of executive privilege.

1. Previous Department of Justice Interpretations of the Contempt of Congress Statute

The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President. In 1956, Deputy Attorney General (subsequently Attorney General) William P. Rogers took this position before a congressional subcommittee investigating the availability of information from federal departments and agencies. In a lengthy memorandum of law, Deputy Attorney General Rogers set forth the historical basis of executive privilege and concluded that in the context of Presidential assertions of the privilege, the contempt of Congress statute was "inapplicable to the executive departments." *See Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong., 2d Sess. 2933 (1956).[29] We are not aware of any subsequent Department position that reverses or weakens this conclusion, and we have found no earlier Department position to the contrary.

We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege is sound, and we concur with it. Our conclusion is based upon the following factors: (1) the legislative history of the contempt of Congress statute demonstrates that it was not intended to apply to Presidential assertions of executive privilege; and (2) if the statute were construed to apply to Presidential assertions of executive privilege, it would so inhibit the President's ability to make such claims as to violate the separation of powers.

2. The Legislative History of the Contempt of Congress Statute

Neither the legislative history nor the historical implementation of the contempt statute supports the proposition that Congress intended the statute to apply to executive officials who carry out a Presidential assertion of executive privilege. The criminal contempt statute was originally enacted in 1857 during proceedings in the House of Representatives to consider a contempt of Congress citation against a New York Times correspondent who had refused to

[29] The memorandum cited, *inter alia*, a 1909 Senate debate over the issue of executive privilege in which Senator Dolliver questioned "where Congress gets authority either out of the Constitution or the laws of the United States to order an executive department about like a servant." 43 Cong. Rec. 3732 (1909) Other historical examples cited by the report are discussed below.

answer questions put to him by a select committee appointed by the House to investigate charges of bribery of certain Representatives. As a result of the committee's unavailing efforts to obtain the reporter's testimony, the committee chairman introduced a bill designed "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to deliver testimony." 42 Cong. Globe 404 (1857). The bill was supported as a necessary tool in the House's efforts to investigate the allegations of bribery. *See id.* at 405 (remarks of the Speaker), 426 (remarks of Sen. Toombs), 427 (remarks of Rep. Davis), 445 (remarks of Sen. Brown). The bill was rushed through Congress in less than a week in order to permit the House to bring greater pressure on the reporter to reveal the alleged source of the congressional corruption. That the bill was sponsored by the select committee, and not the Judiciary Committee, further demonstrates that the bill was not the result of a general consideration of Congress' contempt power, but was enacted as an expedient to aid a specific investigation. Thus, the circumstances of the bill's passage certainly do not affirmatively suggest that Congress anticipated application of the statute to instances in which the President asserted a claim of executive privilege.

In fact, the sponsor of the bill disclaimed any such far-reaching implications. Representative Dunn asked the sponsor, Representative Orr, what impact the proposed bill would have on diplomatic secrets, one of the principal areas in which the President had historically asserted a privilege of confidentiality. Representative Dunn stated that use of the contempt statute by Congress to force disclosure of such material "might be productive of great mischief, and in time of war of absolute ruin of the country." 42 Cong. Globe 431 (remarks of Rep. Dunn). Representative Orr replied, "I can hardly conceive such a case" and emphasized that the bill should not be attacked "by putting instances of the extremest cases" because the "object which this committee had in view was, where there was corruption in either House of Congress, to reach it." *Id.* at 431 (remarks of Rep. Orr). The implication is that Congress did not intend the bill to apply to Presidential assertions of privilege.[30]

[30] The legislative history contains one reference to the application of the statute against executive officials. During the floor debates, Representative Marshall attacked the bill by claiming that it "proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people." 42 Cong. Globe at 429. This statement does not, however, suggest that the statute was intended to apply to Presidential assertions of executive privilege. Indeed, virtually all previous assertions of executive privilege against Congress had been made by the President himself, and Congress expressed no intent to utilize the criminal contempt provisions against the President. Representative Marshall's statement, therefore, simply lends support to the proposition, with which we agree, that there are certain circumstances in which the congressional contempt statute might be utilized against an executive official, such as instances in which an executive official, acting on his own, engaged in disruptive and contumacious conduct during a congressional hearing, or in which an executive official, acting on his own, committed an offense. *See Marshall* v. *Gordon*, 243 U.S. 521 (1917). As the remainder of Representative Marshall's remarks demonstrate, the principal force driving the bill was Congress' desire to obtain an expeditious method for investigating questions regarding the integrity of Congress and not to provide Congress with a statute requiring the President to prosecute criminally those who had asserted the President's constitutionally based claim of executive privilege. We have found no evidence in the legislative history that supports an intention to apply the proposed statute in such a context.

In the years preceding the adoption of the statute, the President had, on a number of occasions, withheld documents from Congress under a claim of executive privilege, and many of these instances had been hotly contested in the public arena, and at least five of these instances occurred within the decade immediately preceding the enactment of the congressional contempt statute. *See supra* note 19 (collecting authorities). In spite of these highly visible battles over the subject of executive privilege, we have located no indication in the legislative history of the criminal contempt statute that Congress intended the statute to provide a remedy for refusals to produce documents pursuant to a Presidential claim of executive privilege.

The natural inference to be drawn from this vacuum in the legislative history is reinforced by Congress' failure, as far as we know, *ever* to utilize its inherent power of arrest to imprison Executive Branch officials for contempt of Congress for asserting claims of executive privilege, even though Congress had previously asserted and exercised its clearly recognized right to do so with respect to other instances of contempt by private citizens. *See Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821); *Ex Parte Nugent*, 18 F. Cas. 471 (C.C.D.C. 1848). The absence of any congressional discussion of the use of the contempt power against Presidential claims of executive privilege and Congress' previous failure ever to attempt to use its inherent contempt power in such cases, strongly suggest that the statute was not intended to apply to such assertions.

This conclusion is supported by the subsequent history of the congressional contempt statute. Since enactment of the statute in 1857, there have been numerous instances in which the President has withheld documents from Congress under a claim of executive privilege. Despite the fact that many of these disputes were extraordinarily controversial, until the citation of the EPA Administrator in December 1982, 125 years after the contempt statute was enacted, neither house of Congress had ever voted to utilize the contempt statute against a Presidential assertion of executive privilege. In fact, during congressional debates over Presidential refusals to produce documents to Congress, there have been express acknowledgements by members of Congress that Congress had no recourse against the Executive if the President asserted executive privilege. In 1886, the Senate engaged in a prolonged debate over President Cleveland's order to his Attorney General not to produce to Congress documents concerning the dismissal of a United States Attorney. The debate was intense, controversial, and memorable; 23 years after the debate a Senator termed it the "most remarkable discussion which was ever had upon this question [of the President's right to withhold documents from Congress]." 43 Cong. Rec. 841 (1909) (remarks of Sen. Bacon). During this debate, even Senators who insisted upon the Senate's right to receive the documents recognized that if the President ordered them not to be produced, "there is no remedy." 17 Cong. Rec. 2800 (1886) (remarks of Sen. Logan); *see also id.* at 2737 (1886) (remarks of Sen. Voorhees).[31]

[31] The only remedy then recognized by the Senators was the ultimate sanction of impeachment. *See* 17

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Congress' failure to resort to the contempt statute during any of the multitude of robust conflicts over executive privilege during the previous century and one quarter and Congress' own explicit recognition that it was without a remedy should the President order the withholding of documents, strongly suggest that Congress never understood the statute to apply to an executive official who asserted the President's claim of executive privilege.[32]

3. Prudential Reasons for Construing the Contempt Statute Not To Apply to Presidential Assertions of Privilege

Courts traditionally construe statutes in order to avoid serious doubts about a statute's constitutionality. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). As stated by the United States Court of Appeals for the District of Columbia Circuit, "when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of contrary legislative intent." *United States* v. *Brown*, 483 F.2d 1314, 1317 (D.C. Cir. 1973) (quoting *United States* v. *Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972)).

When a possible conflict with the President's constitutional prerogatives is involved, the courts are even more careful to construe statutes to avoid a constitutional confrontation. A highly significant example may be found in the procedural history and holding of *United States* v. *Nixon*, 418 U.S. 683 (1974), in which the Court construed the limitation in 28 U.S.C. § 1291 (that appeals be taken only from "final" decisions of a district court) in order to permit the President to appeal an adverse ruling on his claim of executive privilege without having to place himself in contempt of court. Although the plain language of that statute seemed to preclude an appeal of a lower court's

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[31] (. . . continued)
Cong. Rec. 2737, 2800 (1886). As we note below, a much more effective and less controversial remedy is available — a civil suit to enforce the subpoena — which would permit Congress to acquire the disputed records by judicial order. *See also Senate Select Committee on Presidential Campaign Practices* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

[32] Congress' practices with respect to the contempt statute and the absence of any previous application of the statute to an Executive Branch official in these circumstances are highly probative of the meaning and applicability of the statute. In general, the Supreme Court has examined historical practice to determine the scope of Congress' powers. For example, in determining the scope of Congress' power to call and examine witnesses, the Court looked to the historical experience with respect to investigations and concluded:

> when [Congress'] practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers; and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

*McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927); *see also Fairbank* v. *United States*, 181 U.S. 283, 308 (1901). Moreover, the Court traditionally gives great weight to a contemporaneous construction of a statute by the agency charged with its execution. *See Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U S. 143, 153 (1946). In this instance, Congress is responsible for taking the first step in implementing the contempt statute. Therefore, Congress' previous interpretations and past uses of the statute are analogous to the contemporaneous construction of the agency charged with implementation of the statute, and are of significance in determining the meaning of the statute.

interlocutory ruling on an evidentiary matter, the Court construed the statute to permit an immediate appeal, without going through the otherwise required contempt proceeding:

> The traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the government.

418 U.S. at 691–92.

Congress itself has previously recognized the impropriety of resolving executive privilege disputes in the context of criminal contempt proceedings. During the dispute over the Watergate tapes, Congress provided a civil enforcement mechanism through which to test the President's claim of executive privilege. Senator Ervin, the sponsor of the bill, noted in his explanatory statement to the Senate that the use of criminal contempt "may be inappropriate, unseemly, or nonefficacious where executive officers are involved." 119 Cong. Rec. 35715 (1973). In defending the civil enforcement procedure before the district court, Congress argued that in that case the contempt procedures would be "inappropriate methods for the presentation and resolution of the executive privilege issue," and that a criminal proceeding would be "a manifestly awkward vehicle for determining the serious constitutional question here presented." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, Civ. No. 1593–73, at 5 (D.D.C. Aug. 28, 1973).

The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity. In *Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962), the court reversed a contempt of Congress conviction on the ground that the congressional subpoena had gone beyond the investigative authority delegated to the committee that issued the subpoena. After deciding this issue, however, the court felt "inclined to add a few words in conclusion" concerning the problems involved in a criminal contempt of Congress case against a public official. In *dictum*, the court noted that the "conflicting duality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be," and it cited the "eloquent plea" of District Judge Youngdahl in the case below, which read in part:

> Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights.

> Moreover, to raise these issues in the context of a contempt case is to force the courts to decide many questions that are not really relevant to the underlying problem of accommodating the interest of two sovereigns.

306 F.2d at 276. *See also United States* v. *Fort*, 443 F.2d 670, 677–78 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

The analysis contained in *United States* v. *Nixon* demonstrates that principles of the separation of powers compel the application of special rules when a Presidential claim of a constitutional privilege is in tension with the request of another branch for confidential Executive Branch records. In discussing the issue of executive privilege in that case in response to a judicial subpoena, the Court stressed that the President's assertion of privilege was not to be treated as would a claim of a statutory or common law privilege by a private citizen. 418 U.S. at 708, 715. The President's constitutional role as head of one of three separate branches of government means that special care must be taken to construe statutes so as not to conflict with his ability to carry out his constitutional responsibilities. *See, e.g., Myers* v. *United States*, 272 U.S. 52 (1926) (upholding the President's removal power against limitations Congress sought to impose). The same special attention is provided, of course, to the other two branches when they assert responsibilities or prerogatives peculiar to their constitutional duties. *See, e.g., Gravel* v. *United States*, 408 U.S. 606 (1972) (extending immunity of Speech and Debate Clause to congressional assistants); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (granting absolute civil immunity for judges' official actions).

In this case, the congressional contempt statute must be interpreted in light of the specific constitutional problems that would be created if the statute were interpreted to reach an Executive Branch official such as the EPA Administrator in the context considered here.[33] As explained more fully below, if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.[34]

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[33] The same principle applies to protect the constitutional functions of the other branches. The separation of powers would similarly seem to require that a statute that made it a crime to disregard a statute passed by Congress be read not to apply to a judge who struck down a congressional enactment as unconstitutional.

[34] In addition to the encroachment on the constitutionally required separation of powers that prosecution of an Executive Branch official in this context would entail, there could be a serious due process problem if such an official were subjected to criminal penalties for obeying an express Presidential order, an order which was accompanied by advice from the Attorney General that compliance with the Presidential directive was not only consistent with the constitutional duties of the Executive Branch, but also affirmatively necessary in order to aid the President in the performance of his constitutional obligations to take care that the law was faithfully executed. *See Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Raley* v. *Ohio*, 360 U.S. 423 (1959).

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4. The Constitutional Implications of Application of the Contempt of Congress Statute to Executive Branch Officials Who Assert the President's Claim of Privilege

The Supreme Court has stated that, in determining whether a particular statute

> 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. *United States* v. *Nixon*, 418 U.S. at 711–712. 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.

*Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). Thus, in analyzing this separation of powers issue, one must look first to the impact that application of the congressional contempt statute to Presidential assertions of executive privilege would have on the President's ability to carry out his constitutionally assigned functions. Then, if there is a potential for disruption, it is necessary to determine whether Congress' need to impose criminal contempt sanctions in executive privilege disputes is strong enough to outweigh the impact on the Executive's constitutional role.

In this instance, at stake is the President's constitutional responsibility to enforce the laws of the United States and the necessarily included ability to protect the confidentiality of information vital to the performance of that task. As explained earlier in this memorandum, the authority to maintain the integrity of certain information within the Executive Branch has been considered by virtually every President to be essential to his capacity to fulfill the responsibilities assigned to him by the Constitution. Thus, as discussed above, and as the Supreme Court has recognized, the capacity to protect the confidentiality of some information is integral to the constitutional role of the President.

For these reasons, the Supreme Court has ruled that the President's assertion of executive privilege is *presumptively valid* and can be overcome only by a clear showing that another branch cannot responsibly carry out its assigned constitutional function without the privileged information. *United States* v. *Nixon*, 418 U.S. at 708. In *Nixon*, the Court stated that "upon receiving a claim

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[34] (. . . continued)

Furthermore, a person can be prosecuted under § 192 only for a "willful" failure to produce documents in response to a congressional subpoena. *See United States* v. *Murdock*, 290 U.S. 389, 397–98 (1933); *Townsend* v. *United States*, 95 F.2d 352, 359 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938). There is some doubt whether obeying the President's direct order to assert his constitutional claim of executive privilege would amount to a "willful" violation of the statute. Moreover, reliance on an explicit opinion of the Attorney General may negate the required *mens rea* even in the case of a statute without a willfulness requirement. *See* Model Penal Code § 2.04(3)(b); *United States* v. *Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) (Mehrige J., concurring).

of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged." 418 U.S. at 713. The United States Court of Appeals for the District of Columbia Circuit has stated that this presumptive privilege initially protects documents "even from the limited intrusion represented by *in camera* examination of the conversations by a court." *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court went on to note:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired.

*Id.* at 730. In order to overcome the presumptively privileged nature of the documents, a congressional committee must show that "the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." *Id.* at 731 (emphasis added). Thus, the President's assertion of executive privilege is far different from a private person's individual assertion of privilege; it is entitled to special deference due to the critical connection between the privilege and the President's ability to carry out his constitutional duties.

Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility that he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated with respect to the policy justifications for a prosecutor's immunity from civil liability for official actions,

> to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to [sic] satisfy a jury of his good faith.

*Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The Supreme Court has noted, with respect to the similar issue of

executive immunity from civil suits, that "among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 n.32 (1982); *see also Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Butz* v. *Economou*, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk of civil liability places a pronounced burden on the ability of government officials to accomplish their assigned duties, and have restricted such liability in a variety of contexts. *Id.*[35] The even greater threat of criminal liability, simply for obeying a Presidential command to assert the President's constitutionally based and presumptively valid privilege against disclosures that would impair his ability to enforce the law, would unquestionably create a significant obstacle to the assertion of that privilege. *See United States* v. *Nixon*, 418 U.S. 683 (1974).

By contrast, the congressional interest in applying the criminal contempt sanctions to a Presidential assertion of executive privilege is comparatively slight. Although Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena.[36] Congress' use of civil enforcement power instead of the criminal contempt statute would not adversely affect Congress' ultimate interest in obtaining the documents. Indeed, a conviction of an Executive Branch official for contempt of Congress for failing to produce subpoenaed documents would not result in any order for the production of the documents.[37] A civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them. Thus, even if criminal sanctions were not available against an executive official who asserted the President's claim of privilege, Congress would be able to vindicate a legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive's interest in preserving confidentiality.

The most potent effect of the potential application of criminal sanctions would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process. Although

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[35] *See also Barr* v. *Matteo*, 360 U.S. 564 (1959), *Spalding* v. *Vilas*, 161 U.S. 483 (1896) Some officials, such as judges and prosecutors, have been given absolute immunity from civil suits arising out of their official acts. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), *Pierson* v. *Ray*, 386 U.S. 547 (1967).

[36] It is arguable that Congress already has the power to apply for such civil enforcement, since 28 U.S C. § 1331 has been amended to eliminate the amount in controversy requirement, which was the only obstacle cited to foreclose jurisdiction under § 1331 in a previous civil enforcement action brought by the Senate. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973). In any event, there is little doubt that, at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C Cir. 1974) (en banc); Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J on Legis. 145 (1984).

[37] *See* Hamilton and Grabow, *supra*, 21 Harv J. on Legis. at 151.

this significant *in terrorem* effect would surely reduce claims of executive privilege and, from Congress' perspective, would have the salutary impact of virtually eliminating the obstacles to the obtaining of records, it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility. The *in terrorem* effect may be adequate justification for Congress' use of criminal contempt against private individuals, but it is an inappropriate basis in the context of the President's exercise of his constitutional duties. In this respect it is important to recall the statement of Chief Justice Marshall, sitting as a trial judge in the *Burr* case, concerning the ability of a court to demand documents from a President: "In no case of this kind would a court be required to proceed against the President as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807).[38] This fundamental principle, arising from the constitutionally prescribed separation of powers, precludes Congress' use against the Executive of coercive measures that might be permissible with respect to private citizens. The Supreme Court has stated that the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential equality. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629–30 (1935).

Congress' use of the coercive power of criminal contempt to prevent Presidential assertions of executive privilege is especially inappropriate given the presumptive nature of the privilege. In cases involving congressional subpoenas against private individuals, courts start with the presumption that Congress has a right to all testimony that is within the scope of a proper legislative inquiry. *See Barenblatt* v. *United States*, 360 U.S. 109 (1959); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927). As noted above, however, the President's assertion of executive privilege is presumptively valid, and that presumption may be overcome only if Congress establishes that the requested information "is demonstrably critical to the responsible fulfillment of the Committee's functions." *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d at 731; *see also United States* v. *Nixon*, 418 U.S. at 708–09. If Congress could use the power of criminal contempt to coerce the President either not to assert or to abandon his right to assert executive privilege, this clearly established presumption would be reversed and the presumptive privilege nullified.

Congress has many weapons at its disposal in the political arena, where it has clear constitutional authority to act and where the President has corresponding political weapons with which to do battle against Congress on equal terms. By wielding the cudgel of criminal contempt, however, Congress seeks to invoke

[38] The *Nixon* Court thought this statement significant enough in the context of an executive privilege dispute to quote it in full at two separate places in its decision *United States* v. *Nixon*, 418 U.S. at 708, 715.

the power of the third branch, not to resolve a dispute between the Executive and Legislative Branches and to obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried out the President's constitutionally authorized commands,[39] for asserting a constitutional privilege. That effort is inconsistent with the "spirit of dynamic compromise" that requires accommodation of the interests of both branches in disputes over executive privilege. *See United States* v. *American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). In the AT&T case, the court insisted on further efforts by the two branches to reach a compromise arrangement on an executive privilege dispute and emphasized that

> the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

*Id.* at 130. Congress' use of the threat of criminal penalties against an executive official who asserts the President's claim of executive privilege, flatly contradicts this fundamental principle.[40]

The balancing required by the separation of powers demonstrates that the contempt of Congress statute cannot be constitutionally applied to an executive official in the context under consideration. On the one hand, Congress has no

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[39] One scholar (former Assistant Attorney General for the Civil Division, and now Solicitor General, Rex Lee) has noted that

> when the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of executive privilege by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make him the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y U. L Rev. 231, 259.

[40] Even when a privilege is asserted by a cabinet official, and not the President, courts are extremely reluctant to impose a contempt sanction and are willing to resort to it only in extraordinary cases and only after all other remedies have failed. In *In re Attorney General*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979), the court granted the government's mandamus petition to overturn a district court's civil contempt citation against the Attorney General for failing to turn over documents for which he had asserted a claim of privilege. The court recognized that even a *civil* contempt sanction imposed on an Executive Branch official "has greater public importance, with separation of powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." 596 F.2d at 64. Therefore, the court held that holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted. *Id.* at 65. In the case of a Presidential claim of executive privilege, there is even more reason to avoid contempt proceedings because the privilege claim has been made as a constitutionally based claim by the President himself and the sanction involved is criminal and not civil contempt. The use of criminal contempt is especially inappropriate in the context under discussion because Congress has the clearly available alternative of civil enforcement proceedings.

compelling need to employ criminal prosecution in order to vindicate its rights. The Executive, however, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance. Thus, when the major impact on the President's ability to exercise his constitutionally mandated function is balanced against the relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs,[41] we believe that the constitutionally mandated separation of powers requires the statute to be interpreted so as not to apply to Presidential assertions of executive privilege.[42]

The construction of the statute that is dictated by the separation of powers is consistent with the legislative history of the statute and the subsequent legislative implementation of the statute. Although at the time the criminal statute was enacted, Congress was well aware of the recurring assertions of the right to protect the confidentiality of certain Executive Branch materials, it gave no indication that it intended the contempt statute to tread upon that constitutionally sensitive area. In the many debates on executive privilege since the adoption of the statute, Congress at times has questioned the validity of a Presidential assertion of privilege, but, until December of 1982, it never attempted to utilize the criminal contempt sanction to punish someone for a President's assertion of privilege. Regardless of the merits of the President's action, the fundamental balance required by the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution. We therefore conclude that the contempt of Congress statute does not apply to an executive official who carries out the President's claim of executive privilege.

Nearly every President since George Washington has found that in order to perform his constitutional duties it is necessary to protect the confidentiality of certain materials, including predecisional Executive Branch deliberations, national security information, and sensitive law enforcement proceedings, from disclosure to Congress. No President has rejected the doctrine of executive privilege; all who have addressed the issue have either exercised the privilege, attested to its importance, or done both. Every Supreme Court Justice and every Judge of the United States Court of Appeals for the District of Columbia Circuit who has considered the question of executive privilege has recognized its validity and importance in the constitutional scheme. Executive privilege, properly asserted, is as important to the President as is the need for confidenti-

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[41] *See* Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. on Legis. 145 (1984).

[42] We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). *See* 42 Cong. Globe 406 (remarks of Rep. Davis). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well.

ality at certain times in the deliberations of the Justices of the Supreme Court and in the communications between members of Congress and their aides and colleagues. Congress itself has respected the President's need for confidentiality; it has never arrested an executive official for contempt of Congress for failing to produce subpoenaed documents and never, prior to the heated closing moments of the 97th Congress in December of 1982, did a House of Congress seek to punish criminally an executive official for asserting a President's claim of privilege.

Naturally, Congress has and always will resist claims of executive privilege with passion and vigor. Congress aggressively asserts its perceived institutional prerogatives, and it will surely oppose any effort by the President to withhold information from it. If it could eliminate claims of executive privilege by requiring that an official who asserts such a claim on behalf of the President be prosecuted criminally, it would surely be in favor of doing so. Thus, the tension between the relative strengths and institutional prerogatives of Congress and the President necessarily reaches a high level of intensity in any case involving a claim of executive privilege. The specter of mandatory criminal prosecution for the good-faith exercise of the President's constitutional privilege adds a highly inflammatory element to an already explosive environment. We believe that the courts, if presented the issue in a context similar to that discussed in this memorandum, would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution. The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual.

In some respects, the tensions between the branches, which become exacerbated during these conflicts, and the pressure placed on the President and his subordinates in this context, call to mind the comments of Chief Justice Chase concerning the impeachment trial of President Andrew Johnson, over which the Chief Justice presided. One of the charges against President Johnson was that he had fired Secretary of War Stanton in violation of the Tenure of Office Act, which purported to strip the President of his removal power over certain Executive Branch officials.[43] Chief Justice Chase declared that the President had a duty to execute a statute passed by Congress which he believed to be unconstitutional "precisely as if he held it to be constitutional." However, he added, the President's duty changed in the case of a statute which

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

[43] The Tenure of Office Act was, of course, later declared to have been unconstitutional. *Myers* v. *United States*, 272 U.S. 52 (1926).

* * *

> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress, sincerely believed by him to have been passed in violation of it?[44]

If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him both to resist a congressional demand for documents and to refuse to prosecute those who assist him in the exercise of his duty. To yield information that he in good conscience believes he must protect in order to perform his obligation, would abdicate the responsibilities of his office and deny his oath. To seek criminal punishment for those who have acted to aid the President's performance of his duty would be equally inconsistent with the Constitution.

In the narrow and unprecedented circumstances presented here, in which an Executive Branch official has acted to assert the President's privilege to withhold information from a congressional committee concerning open law enforcement files, based upon the written legal advice of the Attorney General, the contempt of Congress statute does not require and could not constitutionally require a prosecution of that official, or even, we believe, a referral to a grand jury of the facts relating to the alleged contempt. Congress does not have the statutory or constitutional authority to require a particular case to be referred to the grand jury. In addition, because the Congress has an alternative remedy both to test the validity of the Executive's claim of privilege and to obtain the documents if the courts decide that the privilege is outweighed by a valid and compelling legislative need, a criminal prosecution and the concomitant chilling effect that it would have on the ability of a President to assert a privilege, is an unnecessary and unjustified burden that, in our judgment, is inconsistent with the Constitution.

THEODORE B. OLSON
*Assistant Attorney General*
*Office of Legal Counsel*

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[44] R. Warden, *An Account of the Private Life and Public Services of Salmon Portland Chase* 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id. See* M. Benedict, *The Impeachment and Trial of Andrew Johnson* 154–55 (1973). Ultimately, the Senate did admit evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

# EXHIBIT 12

(Slip Opinion)

# Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees

Congress may not constitutionally prohibit agency counsel from accompanying agency employees called to testify about matters that potentially involve information protected by executive privilege. Such a prohibition would impair the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with Congress.

Congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement.

May 23, 2019

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL AND THE COUNSEL TO THE PRESIDENT

On April 2, 2019, the House Committee on Oversight and Reform (the "Committee") issued subpoenas seeking to compel testimony in two separate investigations from two witnesses: John Gore, Principal Deputy Assistant Attorney General for the Department's Civil Rights Division, and Carl Kline, the former head of the White House Personnel Security Office. The Committee sought to question both witnesses about matters that potentially involved communications that were protected by executive privilege. Although the Committee's Rule 15(e) permitted the witnesses to be accompanied at the depositions by private counsel, who would owe duties to the witnesses themselves, the rule purported to bar the presence of agency counsel, who would represent the interests of the Executive Branch.[1] Despite some efforts at accommodation on both sides, the Committee continued to insist that agency counsel could not attend the witnesses' depositions. In response to your requests, we advised that a congressional committee may not constitutionally compel an executive branch witness to testify about potentially privileged matters while depriving the witness of the assistance of agency counsel. Based upon our advice, Mr. Gore and Mr. Kline were directed not to appear at their depo-

[1] Tracking the text of the Committee's rule, which excludes "counsel . . . for agencies," we speak in this opinion of "agency counsel," but our analysis applies equally to all counsel representing the interests of the Executive Branch, no matter whether the witness works for an "agency," as defined by statute. *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that the Office of the President is not an "agency" for purposes of the Freedom of Information Act).

sitions without agency counsel. This memorandum explains the basis for our conclusions.

When this issue last arose, during the Obama Administration, this Office recognized "constitutional concerns" with the exclusion of agency counsel, because such a rule "could potentially undermine the Executive Branch's ability to protect its confidentiality interests in the course of the constitutionally mandated accommodation process, as well as the President's constitutional authority to consider and assert executive privilege where appropriate." *Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee Before Congressional Committees*, 41 Op. O.L.C. __, *5 n.6 (Jan. 18, 2017) ("*Authority to Pay for Private Counsel*"). This Office, however, was asked to address only the retention of private counsel for a deposition and thus did not evaluate these constitutional concerns.

Faced squarely with the constitutional question here, we concluded that Congress may not compel an executive branch witness to appear without agency counsel and thereby compromise the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities. The "Executive Branch's longstanding general practice has been for agency attorneys to accompany" agency employees who are questioned by congressional committees conducting oversight inquiries. *Id.* at *3. When an agency employee is asked to testify about matters within the scope of his official duties, he is necessarily asked to provide agency information. The agency must have the ability to protect relevant privileges and to ensure that any information provided on its behalf is accurate, complete, and properly limited in scope. Although private counsel may indirectly assist the employee in protecting privileged information, counsel's obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. The Committee, therefore, could not constitutionally bar agency counsel from accompanying agency employees called to testify on matters within the scope of their official duties. In light of this constitutional infirmity, we advised that the Committee subpoenas purporting to require the witnesses to appear without agency counsel were legally invalid and not subject to civil or criminal enforcement.

## I.

Congress generally obtains the information necessary to perform its legislative functions by making requests and issuing subpoenas for docu-

ments and testimony through its organized committees. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 116 (1959); *Watkins v. United States*, 354 U.S. 178, 187–88 (1957). Committees typically seek the information they need from the Executive Branch first by requesting documents and sometimes voluntary interviews. Following such requests, a committee may proceed with a hearing at which Members of Congress ask questions of the witness, and such a hearing is usually open to the public. When executive branch employees appear—either at a voluntary interview or a hearing—agency counsel or another agency representative traditionally accompany them. *See, e.g.*, *Representation of White House Employees*, 4B Op. O.L.C. 749, 754 (1980).

Congressional committees have only rarely attempted to collect information by compelling depositions conducted by committee staff. *See* Jay R. Shampansky, Cong. Research Serv., 95-949 A, *Staff Depositions in Congressional Investigations* 1–2 & n.3 (updated Dec. 3, 1999) ("*Staff Depositions*"). Historically, these efforts were confined to specific investigations that were limited in scope. *See, e.g.*, *Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the S. Comm. on the Judiciary*, 96th Cong. 1708–10, 1718–27, 1742 (1980) (discussing issues related to Senate resolution authorizing depositions by staff members). Recently, however, committees have made increasing use of depositions, and the House of Representatives has adopted an order in the current Congress that permits depositions to go forward without the presence of any Member of Congress. *See* H. Res. 6, 116th Cong. § 103(a)(1) (2019).

Although executive branch witnesses have sometimes appeared and testified at staff depositions, the Executive Branch has frequently objected to the taking of compelled testimony by congressional staff members. These objections have questioned whether committees may properly authorize staff to depose senior executive officials, whether Members of Congress must be present during a committee deposition, and whether the procedures for such depositions adequately protect the President's ability to protect privileged executive branch information. *See, e.g.*, H. Comm. on International Relations, 104th Cong., Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia 54–56 (Comm. Print 1997) (summarizing the White House's position that its officials would not "be allowed to sit for staff depositions, because to do so would intrude upon the President's 'deliberative process'"); *see also* Letter for Henry Waxman, Chairman, Commit-

tee on Oversight and Government Reform, U.S. House of Representatives, from Dinah Bear, General Counsel, Council on Environmental Quality at 1 (Mar. 12, 2007) ("Allowing Committee staff to depose Executive Branch representatives on the record would be an extraordinary formalization of the congressional oversight process and would give unelected staff powers and authorities historically exercised only by Members of Congress participating in a public hearing."); Letter for Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, from Stephanie Daigle, Associate Administrator, U.S. Environmental Protection Agency at 2 (Apr. 12, 2007) ("[T]he use of formal interviews by Committee counsel, transcribed by a court reporter, rather than the customary informal briefings, have the potential to be overly adversarial and to intimidate Agency staff."). No court has addressed whether Congress may use its oversight authority to compel witnesses to appear at staff depositions conducted outside the presence of any Member of Congress. Courts have recognized, however, that Congress's ability to "delegate the exercise of the subpoena power is not lightly to be inferred" because it is "capable of oppressive use." *Shelton v. United States*, 327 F.2d 601, 606 n.14 (D.C. Cir. 1963); *cf. United States v. Bryan*, 339 U.S. 323, 332 (1950) (concluding, in the context of a criminal contempt-of-Congress citation, that "respondent could rightfully have demanded attendance of a quorum of the Committee and declined to testify or to produce documents so long as a quorum was not present").

The question we address here arose out of the Committee's effort to compel two executive branch witnesses, Mr. Gore and Mr. Kline, to appear at depositions subject to the restrictions of Committee Rule 15(e). In relevant part, Rule 15(e) provides as follows:

> No one may be present at depositions except members, committee staff designated by the Chair of the Committee or the Ranking Minority Member of the Committee, an official reporter, the witness, and the witness's counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend.

H. Comm. on Oversight & Reform, 116th Cong., Rule 15(e). In both instances, the Committee sought executive branch information, including matters that implicated executive privilege, but it asserted the authority to compel the witness to answer questions without the assistance of agency counsel. We summarize here the efforts at accommodation made by the Executive Branch and the Committee in connection with the disputes.

**A.**

The Committee subpoenaed Mr. Gore to testify about privileged matters concerning the Secretary of Commerce's decision to include a citizenship question on the 2020 United States Census. On March 7, 2019, Mr. Gore voluntarily appeared before the Committee, with the assistance of Department counsel, for a transcribed interview on the same topic. Mr. Gore answered all of the Committee's questions, except for those that were determined by Department counsel to concern confidential deliberations within the Executive Branch. The Department's interest in protecting this subject matter was particularly acute because the Secretary of Commerce's decision was subject to active litigation, and those challenges were pending in the Supreme Court. *See Dep't of Commerce v. New York*, No. 18-966 (U.S.) (argued Apr. 23, 2019). Some of the information sought by the Committee had previously been held by a federal district court to be protected by the deliberative process privilege, as well as other privileges, in civil discovery.

On April 2, the Committee served Mr. Gore with a deposition subpoena in an effort to compel responses to the questions that he did not answer during his March 7 interview. Committee staff advised that Committee Rule 15(e) required the exclusion of the agency counsel who had previously represented Mr. Gore. On April 9, the Department explained that the Committee's effort to bar Department counsel would unconstitutionally infringe upon the prerogatives of the Executive Branch. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 2–3 (Apr. 9, 2019). Because the Committee sought information from Mr. Gore relating to his official duties, the Department explained that agency counsel must be present to ensure appropriate limits to Mr. Gore's questioning, to ensure the accuracy and completeness of information provided on behalf of the Department, and to ensure that a Department official was not pressed into revealing privileged information. *Id.* The Attorney General determined that Mr. Gore would not appear at the deposition without the assistance of Department counsel. *Id.* at 3.

On April 10, 2019, the Committee responded by disputing the Department's constitutional view, contending that Committee Rule 15(e) had been in place for more than a decade and reflected an appropriate exercise of Congress's authority to determine the rules of its own proceedings. *See* Letter for William P. Barr, Attorney General, from Elijah E. Cummings,

Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 2–3 (Apr. 10, 2019) ("April 10 Cummings Letter") (citing U.S. Const. art. I, § 5, cl. 2). The Committee advised that Mr. Gore could be accompanied by his private counsel, *id.* at 2, and offered to allow Department counsel to wait in a separate room during the deposition, *id.* at 3. The Committee stated that, if necessary, Mr. Gore could request a break during the deposition to consult with Department counsel. *Id.*

On April 24, 2019, the Department reiterated its constitutional objection and explained that the Committee's proposed accommodation would not satisfy the Department's need to have agency counsel assist Mr. Gore at the deposition. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 1 (Apr. 24, 2019). Mr. Gore therefore did not appear on the noticed deposition date.

**B.**

The Committee subpoenaed Mr. Kline to testify concerning the activities of the White House Personnel Security Office in adjudicating security clearances during his time as head of the Office. On March 20, 2019, the current White House Chief Security Officer, with representation by the Office of Counsel to the President ("Counsel's Office"), briefed the Committee's staff on the White House security clearance process for nearly 90 minutes and answered questions from a Member of Congress and staff. On April 1, 2019, the White House offered to have Mr. Kline appear voluntarily before the Committee for a transcribed interview.

Instead, the Committee subpoenaed Mr. Kline on April 2, 2019. The Committee indicated that Committee Rule 15(e) would bar any representative from the Counsel's Office from attending Mr. Kline's deposition. On April 18, 2019, the Counsel's Office advised the Committee that a representative from that office must attend to represent the White House's interests in any deposition of Mr. Kline. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 2 (Apr. 18, 2019). The Counsel's Office relied on the views concerning the exclusion of agency counsel that were articulated by the Department in its April 9, 2019 letter to the Committee. *Id.* The Counsel's Office explained that the President has the authority to raise privilege

concerns at any point during a deposition, and that this could occur only if an attorney from the Counsel's Office accompanied Mr. Kline. *Id.*

On April 22, 2019, the Committee responded, stating, as it had in correspondence concerning Mr. Gore, that its rules were justified based upon Congress's constitutional authority to determine the rules of its proceedings. *See* U.S. Const. art. I, § 5, cl. 2. The Committee asserted that Committee Rule 15(e) had been enforced under multiple chairmen. *See* Letter for Pat Cipollone, Counsel to the President, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 3 (Apr. 22, 2019) ("April 22 Cummings Letter"). The Committee advised that Mr. Kline could be accompanied by his private counsel, and, as with Mr. Gore, offered to permit attorneys from the Counsel's Office to wait outside the deposition room in case Mr. Kline requested to consult with them during the deposition. *Id.*

In an April 22, 2019 reply, the Counsel's Office explained that, in light of the Committee's decision to apply Rule 15(e), the Acting Chief of Staff to the President had directed Mr. Kline not to attend the deposition for the reasons stated in the April 18, 2019 letter. *See* Letter for Elijah Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 1 (Apr. 22, 2019). The Committee and the Counsel's Office subsequently agreed to a voluntary transcribed interview of Mr. Kline with the participation of the Counsel's Office. Mr. Kline was interviewed on May 1, 2019. He answered some of the Committee's questions, but at the direction of the representative from the Counsel's Office, he did not address particular matters implicating privileged information.

## II.

Under our constitutional separation of powers, both Congress and the Executive Branch must respect the legitimate prerogatives of the other branch. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127, 130–31 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). Here, the Committee sought to apply Committee Rule 15(e) to compel executive branch officials to testify about poten-

tially privileged matters while barring agency counsel from the room. We concluded that the Committee could not constitutionally compel such an appearance for two reasons. First, the exclusion of agency counsel impairs the President's ability to exercise his constitutional authority to control privileged information of the Executive Branch. Second, the exclusion undermines the President's ability to exercise his constitutional authority to supervise the Executive Branch's interactions with Congress.

**A.**

Committee Rule 15(e) unconstitutionally interferes with the President's right to control the disclosure of privileged information. Both the Supreme Court and this Office have long recognized the President's "constitutional authority to protect national security and other privileged information" in the exercise of the President's Article II powers. *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004) ("*Authority of Agency Officials*"); *see Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President's "authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President [as Commander in Chief] and exists quite apart from any explicit congressional grant"); *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) ("Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."). That authority is "not limited to classified information, but extend[s] to *all* . . . information protected by [executive] privilege," including presidential and attorney-client communications, attorney work product, deliberative process information, law enforcement files, and national security and foreign affairs information. *Authority of Agency Officials*, 28 Op. O.L.C. at 81 (emphasis added).[2] Protection of such information is "fundamental to the operation of Government and inextri-

[2] Although some of these components, such as deliberative process information, parallel aspects of common law privileges, each falls within the doctrine of executive privilege. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 101–102 n.34 (1998); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Janet Reno) (observing that "[e]xecutive privilege applies" to certain White House documents "because of their deliberative nature, and because they fall within the scope of the attorney-client privilege and the work-product doctrine").

cably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. It ensures that "high Government officials and those who advise and assist them in the performance of their manifold duties" can engage in full and candid decisionmaking, *id.* at 705, 708, and it is necessary to protect sensitive security and other information that could be used to the public's detriment.

The President may protect such privileged information from disclosure in the Executive's responses to congressional oversight proceedings. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974). As we have explained, "[i]n the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information" or other forms of privileged information "must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998) ("*Whistleblower Protections*"). Thus, "'Congress may not vest lower-ranking personnel in the Executive branch with a "right" to furnish national security or other privileged information to a member of Congress without receiving official authorization to do so.'" *Authority of Agency Officials*, 28 Op. O.L.C. at 80 (quoting March 9, 1998 Statement of Administration Policy on S. 1668, 105th Cong.); *see Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 43 (2008) ("*Direct Reporting Requirement*") ("We have long concluded that statutory provisions that purport to authorize Executive Branch officers to communicate directly with Congress without appropriate supervision . . . infringe upon the President's constitutional authority to protect against the unauthorized disclosure of constitutionally privileged information."). Because "statutes may not override the constitutional doctrine of executive privilege," they may not "prohibit the supervision of the disclosure of any privileged information, be it classified, deliberative process or other privileged material." *Authority of Agency Officials*, 28 Op. O.L.C. at 81. It necessarily follows that congressional committees' rules of procedure may not be used to override privilege or the Executive's ability to supervise the disclosure of privileged information.

The foregoing principles governed our analysis here. In order to control the disclosure of privileged information, the President must have the discretion to designate a representative of the government to protect this interest at congressional depositions of agency employees. When employ-

ees testify about information created or received during their employment, they are disclosing the Executive Branch's information. The same thing is true for former employees.[3] Yet, in many cases, agency employees will have only limited experience with executive privilege and may not have the necessary legal expertise to determine whether a question implicates a protected privilege. Moreover, the employees' personal interests in avoiding a conflict with the committee may not track the longer-term interests of the Executive Branch. Without an agency representative at the deposition to evaluate which questions implicate executive privilege, an employee may be pressed—wittingly or unwittingly—into revealing protected information such as internal deliberations, attorney-client communications, or national security information. *See Nixon*, 418 U.S. at 705–06; *Senate Select Comm.*, 498 F.2d at 731. Or the agency employee may be pressed into responding to inquiries that are beyond the scope of Congress's oversight authority. *See Barenblatt*, 360 U.S. at 111–12 ("Congress may only investigate into those areas in which it may potentially legislate or appropriate [and] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.").

Even if the President has not yet asserted a particular privilege, excluding agency counsel would diminish the President's ability to decide whether a privilege should be asserted. The Executive Branch cannot foresee every question or topic that may arise during a deposition, but if questions seeking privileged information are asked, agency counsel, if present, can ensure that the employee does not impermissibly disclose privileged information. *See* Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding* at 2 (July 23, 1982) ("A witness before a Congressional committee may be asked—under threat of contempt—a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He therefore may be unable to confine his remarks only to those which do not impair the deliberative process."). The President, through his subordinates, must be able to intervene *before* that information is disclosed, lest the effectiveness of the

[3] *See, e.g.*, *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1 (2007) (opinion of Acting Attorney General Paul D. Clement) (concluding that the President may assert executive privilege with respect to testimony by two former White House officials).

privilege be diminished. *See* Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 8, 1986) (agency counsel attending congressional interviews can advise "about the sensitivity of particular information and, if need be, to terminate the interview to avoid disclosure of privileged information"). Accordingly, Committee Rule 15(e) unduly interferes with the President's supervision of the disclosure of privileged information by barring agency counsel from the deposition of an agency employee concerning official activities.

These concerns were readily apparent in connection with the subpoenas of Mr. Gore and Mr. Kline. In both instances, the Committee sought information about communications among senior executive branch officials regarding official decisions. There was no doubt that the depositions would implicate matters in which the Executive Branch had constitutionally based confidentiality interests. Indeed, in Mr. Gore's March 7 interview, the Committee repeatedly asked him questions concerning potentially privileged matters—some of which a federal court had already held were protected by privilege in civil discovery. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 548 n.19 (S.D.N.Y. 2019) (summarizing discovery orders). And the Committee then noticed the deposition precisely to compel answers to such questions. *See* April 10 Cummings Letter at 3 ("The Department is well aware of the scope of the deposition, based on the issues raised at Mr. Gore's March 7 interview and the list of 18 [previously unanswered] questions provided by Committee staff."). In Mr. Kline's May 1 interview, the witness was similarly instructed not to answer a number of questions implicating the Executive Branch's confidentiality interests. Prohibiting agency counsel from attending the depositions would have substantially impaired the Executive Branch's ability to continue to protect such privileged information and to make similar confidentiality determinations in response to new questions. The Committee's demands that the witnesses address questions already deemed unanswerable by agency counsel indicated that the exclusion of agency counsel would have been intended, in no small part, to circumvent executive branch mechanisms for preserving confidentiality.

**B.**

Committee Rule 15(e) also interferes with the President's authority to supervise the Executive Branch's interactions with Congress. The Constitution vests "[t]he executive Power" in the President, U.S. Const.

art. II, § 1, cl. 1, and requires him to "take Care that the Laws be faithfully executed," *id.* § 3. This power and responsibility grant the President the "constitutional authority to supervise and control the activity of subordinate officials within the executive branch." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992)); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 637 (1982) ("*Constitutionality of Reporting Statute*"). As we have previously explained, "'the right of the President to protect his control over the Executive Branch [is] based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities.'" *Authority of HUD's Chief Financial Officer to Submit Final Reports on Violations of Appropriations Laws*, 28 Op. O.L.C. 248, 252 (2004) ("*Authority of HUD's CFO*") (quoting *Constitutionality of Reporting Statute*, 6 Op. O.L.C. at 638–39).

The President's authority to supervise his subordinates in the Executive Branch includes the power to control communications with, and information provided to, Congress on behalf of the Executive Branch. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 31, 39; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–81; *cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951) (upholding "a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate [wa]s prohibited from making such submission by" a valid order of the Attorney General). At a minimum, this responsibility includes the power to know about, and assert authority over, the disclosures his subordinates make to Congress regarding their official duties.

Congressional efforts to prevent the President from supervising the Executive Branch's interactions with Congress interfere with the President's ability to perform his constitutional responsibilities. We have long recognized that statutes, "if construed or enforced to permit Executive Branch officers to communicate directly with Congress without appropriate supervision by the President or his subordinates, would violate the constitutional separation of powers and, specifically, the President's Article II authority to supervise Executive Branch personnel." *Direct Reporting Requirement*, 32 Op. O.L.C. at 31–32, 39 (citing *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984); *Authority of HUD's*

*CFO*, 28 Op. O.L.C. at 252–53; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–82). It is on this basis that the Department has consistently resisted congressional attempts to require, by statute, that executive branch officials submit information to Congress in the form of reports without prior opportunity for review by their superiors. *See, e.g.*, *id.* at 34–39 ("[S]tatutory reporting requirements cannot constitutionally be applied to interfere with presidential supervision and control of the communications that Executive Branch officers . . . send to Congress."); *Authority of HUD's CFO*, 28 Op. O.L.C. at 252–53; *Access to Classified Information*, 20 Op. O.L.C. 402, 403–05 (1996); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977).

Information sought in congressional depositions is no different. An agency employee testifying about official activities may be asked to disclose confidential information, yet the employee may lack the expertise necessary to protect privileged information on his own. Nor will an employee's private counsel always adequately protect such information. Private counsel may not have the expertise to recognize all situations raising issues of executive privilege, and in any event, recognizing such situations and protecting privileged information is not private counsel's job. Private counsel's obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. An agency representative, by contrast, is charged with protecting the Executive Branch's interests during the deposition—ensuring that the information the employee provides to Congress is accurate, complete, and within the proper scope, and that privileged information is not disclosed. The Committee's rule prohibiting agency counsel from accompanying an agency employee to a deposition would effectively, and unconstitutionally, require that employee to report directly to Congress on behalf of the Executive Branch, without an adequate opportunity for review by an authorized representative of the Executive Branch.

**C.**

Having concluded that the Committee could not constitutionally bar agency counsel from accompanying Mr. Gore or Mr. Kline to depositions, we further advised that the subpoenas that required them to appear without agency counsel, over the Executive Branch's objections, exceeded the Committee's lawful authority and therefore lacked legal effect. The Committee could not constitutionally compel Mr. Gore or Mr. Kline to appear under such circumstances, and thus the subpoenas could not be

enforced by civil or criminal means or through any inherent contempt power of Congress.

This conclusion is consistent with our treatment of referrals to the Department of contempt-of-Congress citations for criminal prosecution under 2 U.S.C. §§ 192 and 194. We have opined that "the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege." *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995); *see also Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. O.L.C. 65, 65–69 (2008) (concluding that the Department cannot take "prosecutorial action, with respect to current or former White House officials who . . . declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege"); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 101–102 (1984) ("*Prosecution for Contempt*") (finding that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official" who followed presidential instructions to "assert[] the President's claim of executive privilege"). Nor may Congress "utilize its inherent 'civil' contempt powers to arrest, bring to trial, and punish an executive official who assert[s] a Presidential claim of executive privilege." *Prosecution for Contempt*, 8 Op. O.L.C. at 140 n.42. The fundamental constitutional principles underlying executive privilege would be vitiated if any executive branch employee following a direction to invoke the privilege could be prosecuted for doing so.

Similarly, we believe it would be unconstitutional to enforce a subpoena against an agency employee who declined to appear before Congress, at the agency's direction, because the committee would not permit an agency representative to accompany him. As discussed above, having an agency representative present at a deposition of an agency employee may be necessary for the President to exercise his authority to supervise the disclosure of privileged information, as well as to ensure that the testimony provided is accurate, complete, and properly limited in scope. Therefore, agency employees, like Mr. Gore and Mr. Kline, who follow an agency instruction not to appear without the presence of an agency representative are acting lawfully to protect the constitutional interests of the Executive Branch.

## III.

In reaching this conclusion, we considered the contrary arguments advanced by the Committee in its April 10 and April 22 letters. The Committee's principal argument was that prohibiting agency counsel from attending depositions of agency employees poses no constitutional concern because Congress has the authority to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2; *see* April 10 Cummings Letter at 2–3; April 22 Cummings Letter at 3. But congressional rulemaking authority "only empowers Congress to bind itself." *Chadha*, 462 U.S. at 955 n.21 (positing that the Constitution's provision of several powers like procedural rulemaking where each House of Congress can act alone reveals "the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances"). Such rulemaking authority does not grant Congress the power to compel testimony from agency officials under circumstances that interfere with the legitimate prerogatives of the Executive Branch.

Congress's authority to make rules governing its own procedures does not mean that the constitutional authorities of a co-equal branch of government are checked at the door. *See Barenblatt*, 360 U.S. at 112 (noting that when engaging in oversight, Congress "must exercise its powers subject to the limitations placed by the Constitution on governmental action"). To the contrary, Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892). Congress may not, by statute, override the President's constitutional authority to control the disclosure of privileged information and to supervise executive branch employees. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 43–44; *Whistleblower Protections*, 22 Op. O.L.C. at 100. It necessarily follows that a committee may not accomplish the same result by adopting a rule governing its own proceedings.

The Committee also justified Committee Rule 15(e) on the ground that it has been in place for a decade. *See* April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. But congressional committee use of depositions is a relatively recent innovation, and historically such "[d]epositions have been used in a relatively small number of major congressional investigations." *Staff Depositions* at 1. Moreover, committees proposing the use of depositions have previously faced objections that they may improperly "'circumvent the traditional committee process'" of hearings and staff interviews and may "compromise the rights of

deponents." *Id.* at 2; *see supra* pp. 3–4. Accordingly, the Committee's limited previous use of depositions from which agency counsel were excluded does not reflect a "long settled and established practice," much less one that has been met by acquiescence from the Executive Branch. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (internal quotation marks and brackets omitted).

In addition, the Committee claimed that Rule 15(e) serves the purpose of "ensur[ing] that the Committee is able to depose witnesses in furtherance of its investigations without having in the room representatives of the agency under investigation." April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But that assertion does no more than restate the rule's effect, without advancing any legitimate rationale for excluding the agency's representatives, much less one sufficient to alter the constitutional calculus. The Committee here did not seek information concerning the private affairs of agency employees or articulate any particularized interest in excluding agency counsel. In fact, agency counsel appeared at the staff interviews of both Mr. Gore and Mr. Kline. In view of the President's clear and well-established interests in protecting privileged information and supervising the Executive Branch's interactions with Congress, the Committee offered no countervailing explanation for why it would be necessary to exclude any agency representative from these two depositions.

Indeed, the Committee has not explained why, as a general matter, the House needs to exclude agency counsel from depositions of agency officials. Agency representatives routinely accompany and support agency employees during congressional hearings and staff interviews. *See Authority to Pay for Private Counsel*, 41 Op. O.L.C. at *3 ("When congressional committees seek to question employees of an Executive Branch agency in the course of a congressional oversight inquiry of the agency, the Executive Branch's longstanding general practice has been for agency attorneys to accompany the witnesses."); *Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions*, 14 Op. O.L.C. 132, 133 (1990) ("[W]hen Department employees are asked in their official capacities to give oral testimony for a congressional investigation (whether at a hearing, interview or deposition), a Department counsel or other representative will normally accompany the witness."); *Representation of White House Employees*, 4B Op. O.L.C. at 754 ("[L]egitimate governmental interests" are "[o]rdinarily . . . monitored by agency counsel who accompany executive branch employees called to testify before congressional commit-

tees."). There is no basis for believing that this routine practice diminishes the Committee's ability to acquire any information it may legitimately seek.[4]

In defending the exclusion of agency counsel, the Committee pointed out that the witnesses may bring their private counsel to the depositions. April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But allowing agency employees to be accompanied by private counsel is no substitute for the presence of agency counsel. In addition to imposing unnecessary burdens on agency employees by requiring the retention of private counsel, the practice does not adequately protect the agency's interests. As explained above, the President must be able to supervise who discloses executive branch information and under what conditions. An employee's private counsel, however, represents the interests of the employee, not the agency, and "the attorney owes a fiduciary duty and a duty of confidentiality to the employee, not the agency." *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at *5; *see also Representation of White House Employees*, 4B Op. O.L.C. at 754 ("[A]ny counsel directed to represent governmental interests must be controlled by the Government, and private counsel retained by employees to represent personal interests should not be permitted to assert governmental interests or privileges."). Even if the private counsel may sometimes assist the agency employee in protecting agency information, the Committee cannot require the Executive Branch to rely upon the private counsel to make such judgments. Private counsel is not likely to know as well as agency counsel when a line of questioning, especially an unanticipated one, might intrude upon the Executive Branch's constitutionally protected interests.

Finally, we concluded that the Committee's proposed accommodation—to make a separate room available for agency counsel at the two depositions—was insufficient to remedy these constitutional concerns. *See* April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. That

[4] In a similar vein, agency employees are routinely represented by agency counsel in connection with depositions in civil litigation and, where appropriate, agency counsel will instruct agency employees not to answer questions that implicate privilege. Further, as the Supreme Court recognized in *Touhy*, 340 U.S. 462, the head of an agency may properly bar subordinate officials from disclosing privileged agency information, and departments have accordingly enacted so-called *Touhy* regulations to ensure that privileged information is appropriately protected by agency officials in civil discovery. *See, e.g.*, 28 C.F.R. §§ 16.21–16.29 (Department of Justice *Touhy* regulations). Just as agency counsel may properly participate in ensuring appropriate disclosures in depositions in civil litigation, agency counsel may properly do so in congressional depositions.

practice would put the onus on the agency employee and his private counsel to divine whether the agency would have privilege concerns about each question, and then "request a break during the deposition to consult with" agency counsel. April 10 Cummings Letter at 3; *see* April 22 Cummings Letter at 3. Because this practice would leave such judgments entirely up to the employee and his private counsel, as well as depend on the discretion of the Committee's staff to grant the requested break, it would not adequately ensure that the agency could make the necessary decisions to protect privileged information during the course of the deposition. It also would prevent the Executive Branch from ensuring that the testimony provided was accurate, complete, and properly limited in scope.

We recognize that there is at least one circumstance—an appearance before a grand jury—where a witness's attorney must remain in a separate room during questioning. *See* Fed. R. Crim. P. 6(d)(1); *United States v. Mandujano*, 425 U.S. 564, 581 (1976). However, grand juries can hardly provide a model for congressional depositions, because they operate under conditions of extreme secrecy, and there is a long-established practice of excluding *all* attorneys for witnesses before the grand jury. *See, e.g.*, *In re Black*, 47 F.2d 542, 543 (2d Cir. 1931); *Latham v. United States*, 226 F. 420, 422 (5th Cir. 1915). Committee Rule 15(e) not only lacks the historical pedigree of grand-jury proceedings, but the information collected in congressional depositions is not inherently confidential. Indeed, the Committee does not even have a categorical objection to allowing witnesses to be accompanied by counsel. Rather, the rule permits witnesses to be accompanied by counsel of their choice, provided that counsel does not represent the agency as well. This targeted exclusion underscores the separation of powers problems.[5]

[5] Indeed, the federal courts have recognized that "[t]here is a clear difference between Congress's legislative tasks and the responsibility of a grand jury." *Senate Select Comm.*, 498 F.2d at 732; *see also Nixon*, 418 U.S. at 712 n.19 (distinguishing the "constitutional need for relevant evidence in criminal trials," on the one hand, from "the need for relevant evidence in civil litigation" and "congressional demands for information," on the other). Congressional depositions appear more akin to depositions in civil litigation, rather than grand juries, and in civil litigation it is well established that attorneys "representing the deponent" and attorneys representing "any party to the litigation" have "the right to be present" at a deposition. Jay E. Grenig & Jeffrey S. Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 5:29 (4th ed. 2018).

## IV.

For the foregoing reasons, we concluded that the Committee's prohibition on agency counsel's attendance at depositions impermissibly infringed on the President's constitutional authority to protect information within the scope of executive privilege and to supervise the Executive Branch's communications with Congress. Although the Executive Branch must facilitate legitimate congressional oversight, the constitutionally mandated accommodation process runs both ways. *See Am. Tel. & Tel. Co.*, 567 F.2d at 127, 130–31. Just as the Executive must provide Congress with information necessary to perform its legislative functions, Congress through its oversight processes may not override the Executive Branch's constitutional prerogatives. *See Barenblatt*, 360 U.S. at 112. Here, the constitutional balance requires that agency representatives be permitted to assist agency officials in connection with providing deposition testimony, including on matters that implicate privileged information. Thus, we advised that the subpoenas purporting to compel Mr. Gore and Mr. Kline to appear without agency counsel exceeded the Committee's authority and were without legal effect.

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