UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	
	:	**CRIMINAL NO. 22-cr-200 (APM)**
v.	:	
	:	
PETER K. NAVARRO,	:	
	:	
Defendant.	:	

UNITED STATES' BRIEF ON DEFENDANT NAVARRO'S UNSUPPORTED CLAIMS OF EXECUTIVE PRIVILEGE AND TESTIMONIAL IMMUNITY

The jury in Defendant Peter K. Navarro's trial should be charged with deciding only the essential elements of the charged offense, that is: whether the Defendant knew he had been subpoenaed by the Select Committee to Investigate the January 6th Attack on the United States Capitol ("the Committee") to produce documents and appear for a deposition, and nonetheless made a deliberate decision not to do either. The Defendant argues that both executive privilege and testimonial immunity excuse his noncompliance with the Committee's subpoena. This is incorrect. As set forth herein, even had former President Trump purported to invoke executive privilege or testimonial immunity – of which the Defendant has offered no evidence – those assertions would not have justified the Defendant's categorical non-compliance with the subpoena as to either the documents in his possession or his appearance at the deposition. For this reason, the Court should exclude from trial all argument and evidence relating to executive privilege and testimonial immunity and grant the United States' pending motion in limine (ECF No. 70) (Motion in Limine to Exclude Exhibits).

I. Relevant Factual Background

On June 30, 2021, the U.S. House established the Committee to investigate the facts, circumstances, and causes of the January 6, 2021, attack on the U.S. Capitol. *See* Government's Trial Exhibit (GEX) 1 (House Resolution 503).[1] As part of its investigation, the Committee identified the Defendant as someone with information relevant to its inquiry through, in -part, his own public statements. Accordingly, on February 9, 2022, a Committee staff member emailed the Defendant and asked if he would accept service of a subpoena from the Committee by email. GEX 4 (February 9, and 24, 2022, emails). The Defendant responded within three minutes and wrote only, "yes. no counsel. Executive privilege." *Id*. Later that day, the staff member emailed the Defendant the subpoena at issue in this case. *Id.* The subpoena required the Defendant to appear on February 23, 2022, and produce various documents relating to the Defendant's role in the lead-up to and events of January 6, and to appear on March 2, 2022, for deposition testimony. GEX 2 (Subpoena and attachments). In a cover letter accompanying the subpoena, the Committee gave the Defendant, the former White House Director of Trade and Manufacturing, some examples of why the Committee believed the Defendant had relevant information, including that it had been publicly reported that the Defendant had worked with various individuals outside of the Government to change the outcome of the 2020 presidential election and that the Defendant had publicly repeated discredited claims of election fraud. *Id.*

Between the time the subpoena was served and the deadline for the document production on February 23, 2022, the Defendant did not communicate with the Committee in any way, and he did not produce a single document by the deadline. On February 24, 2022, the Committee emailed the Defendant and confirmed he was in default of the subpoena's document demand. GEX 4. In

[1] The Government's Trial Exhibits are attached as Exhibit 1.

the same email, the Committee also confirmed the Defendant still was required to appear for his deposition and instructed the Defendant to contact the Committee to confirm the details. *Id*. The Defendant responded three days later and wrote that former President Donald J. Trump had "invoked Executive Privilege in this matter," that it was not his privilege "to waive," and that he would not, therefore, comply. GEX 5 (February 27, 2022 emails).[2] In response to the Defendant's email, the Committee rejected the Defendant's wholesale refusal to comply on the basis of executive privilege, instructed him to appear for his deposition as required, and directed him to invoke privilege on a question-by-question basis if appropriate. *Id*.

On February 28, 2022, the Defendant again refused to comply, asserting the "privilege is not mine to waive." GEX 6 (February 28, 2022, and March 1, 2022, emails). Also on February 28, 2022, the White House Counsel's Office sent the Defendant a letter, notifying him that President Joseph R. Biden had "determined that an assertion of executive privilege is not in the national interest, and therefore is not justified, with respect to the particular subjects within the purview of the Select Committee." *See* Exhibit 2 (US_000945). The letter further noted that "[f]or the same reasons underlying his decision on executive privilege, President Biden has determined that he will not assert immunity to preclude [Mr. Navarro] from testifying before the Select Committee." *Id.*

[2] As this Court has already determined, because the Defendant does not hold the executive privilege, he cannot assert it on behalf of himself, or personally make the decision to assert in on behalf of the Presidency. *See* Mem. Op., January 19, 2023, ECF No. 68 at 9 ("As the privilege holder, it was on President Trump to assert a formal claim of privilege…after actual personal consideration") (internal citations omitted); *see also Trump v. Thompson*, 20 F.4th 10, 26 (D.C. Cir. 2021) (noting that the privilege resides with the current President and that former presidents have been recognized to "retain for some period of time a right to assert executive privilege over documents generated during their administrations" (internal citation omitted)).

The Defendant did not appear as required for his deposition on March 2. GEX 7 (March 2, 2022, Deposition Transcript). At no time did the Defendant provide the Committee with any evidence supporting his assertion that the former President had invoked executive privilege over the information the Committee's subpoena sought from the Defendant. And at no time in his communications with the Select Committee did the Defendant raise the issue of testimonial immunity, nor even suggest that former President Trump had requested that he communicate any assertion of such immunity to the Committee.

For the Defendant's deliberate refusal to comply, a grand jury sitting in the District of Columbia returned the pending Indictment. The Indictment charges the Defendant with two counts of contempt of Congress —*i.e.,* of having "willfully" "ma[de] default" on a "summon[s]" (that is, a subpoena) duly issued by a committee of the House, in violation of 2 U.S.C. § 192. Count One charges the Defendant with refusing to provide documents and Count Two charges him with refusing to appear for testimony. *See* Indictment ¶¶ 22-23, 24-25.

II. Relevant Procedural Background

On August 17, 2022, the Defendant sought to dismiss the Indictment pursuant to Federal Rule of Criminal Procedure 12 because "when a former president invokes Executive Privilege as to a senior presidential adviser, the adviser cannot thereafter be prosecuted." ECF No. 34 at 17. As proof of former President Trump's invocation of executive privilege, the Defendant offered a November 20, 2021, press release by the former President, issued well over two months before the Committee even contacted the Defendant, and claimed it constituted an invocation of executive privilege over the information sought by the Committee's not-yet-issued subpoena. ECF No. 34 at 5. The Defendant's executive privilege claims appeared to conflate the different concepts of executive privilege and testimonial immunity.

The Government responded to the Defendant's motion on August 31, 2022. ECF No. 44. The Government agreed that it has been the Department of Justice's position that if a sitting president made a plausible assertion of privilege and directed a current adviser not to comply with a subpoena seeking testimony about presidential communications, the adviser is not in contempt of Congress, and the Executive Branch may not bring a contempt charge. *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 at 102 (May 30, 1984) ("Olson Memo"). The Government argued, however, that those circumstances were not met with regard to the Defendant because, among other reasons, there had been no actual invocation of executive privilege as to the subpoena.

The Court heard argument on the Defendant's motion on November 4, 2022. Throughout, the Court asked repeatedly for the Defendant to provide evidence of former President Trump's invocation of executive privilege. *See, e.g.,* Hrg. Tr. 11/4/22 at 8 ("So what I'm wondering is by – is there any other evidence other than that single statement in which you claim the President of the United States invoked executive privilege as to Dr. Navarro with respect to this subpoena?"). The Court evaluated the parties' pleadings and made its factual findings: there was no invocation. *See* Mem. Op., January 19, 2023, ECF No. 68 at 3-4.

On January 19, 2023, this Court denied the Defendant's motion to dismiss. In doing so, this Court emphasized that no President — sitting or former — invoked executive privilege with respect to the subpoena that the Committee issued the Defendant, or directed the Defendant not to appear for a deposition or provide documents. *See* Mem. Op., January 19, 2023, ECF No. 68 at 3 ("Defendant's testimonial immunity defense resets on an unsupported factual premise that President Trump invoked executive privilege with regard to the Select Committee's subpoena.").

During the November 4, 2022, hearing, the Court asked counsel for the Government

whether, according to the Department of Justice, a former adviser to a sitting President may "refuse[] to appear before Congress," without being subject to contempt under Section 192, based upon a "proper invocation of executive privilege." Hrg. Tr. 11/4/22 at 27. As discussed below, the Department of Justice's view is that such a proper invocation of executive privilege by the sitting President would justify the official's refusal to turn over those documents containing, or refusal to testify, regarding the particular information that is the subject of the President's privilege assertion. It would *not* justify a categorical refusal "to appear before Congress." A proper assertion by a sitting President of *testimonial immunity* for certain close advisers, by contrast, would be a basis for a refusal of such an adviser to *testify* before Congress (but not for a refusal to provide documents).

The Court then asked counsel whether a "proper invocation by a *former* President with respect to a former senior adviser of executive privilege" would likewise afford that person a basis for a "refusal to appear" before a committee and thereby preclude prosecution for contempt under Section 192. Counsel erroneously answered this second question in the affirmative, as well, albeit only with respect to information "as to official matters."[3]

[3] THE COURT: So can we back up just to make sure I understand where there are areas of disagreement. I know that's not this situation, but does the Department of Justice still take the position that the former – that a former official of a sitting President who refuses to appear before Congress, based upon the proper invocation of executive privilege, cannot be subject to contempt under 192.

AUSA: So if there were an invocation by the privilege holder, Your Honor, that is correct.

THE COURT: Okay. So does the Department of Justice also believe, or take the position, that if there is a proper invocation by a former President with respect to a former senior adviser of executive privilege, that that person's refusal to appear would not be subject to prosecution under 192?

In other words, the Government stated that it was the position of the Department of Justice that if there is a proper invocation of executive privilege by a *former* President with respect to a *former* senior adviser as to official matters, that that adviser's refusal to appear would not be subject to prosecution for contempt. This was a mistake. It is not and has never been the position of the Department of Justice that a proper invocation of either executive privilege or testimonial immunity by a former President can itself justify a former official's complete non-compliance with a congressional subpoena and thereby preclude prosecution of that person for contempt of Congress under Section 192.

On January 24, 2023, the Defendant filed a motion asking the Court to reconsider its decision denying the Rule 12 motion to dismiss. The Defendant also sought an evidentiary hearing and to compel discovery from the Government. Attached to the Defendant's motion was a letter dated January 23, 2023, from a lawyer for President Trump. The letter states that the Defendant, in general, "had an obligation to assert executive privilege." ECF No. 71-1. It does not suggest that this general obligation excused his compliance with the Committee's subpoena, nor does the letter contain evidence that former President Trump made a "formal claim of privilege" after "personal consideration" with respect to the Select Committee subpoena, in the manner this Court suggested would be required for an executive privilege assertion. Mem. Op. ECF No. 68 at 5. It also does not state that former President Trump had or would have directed the Defendant not to comply with the subpoena's requirements altogether.

AUSA: Yes, Judge, I would say that it would be an invocation by the former President as to the former official *as to official matters.*

Hrg. Tr. 11/4/22 at 41-42 (emphasis added).

The Court heard argument on the Defendant's motion for reconsideration at the pretrial conference on January 27, 2023. During the hearing, the Court rejected the idea that the January 23, 2023, letter from former President Trump's counsel conveyed information sufficient to demonstrate that former President Trump had invoked executive privilege or asked the Defendant to do so as it related to the Select Committee subpoena. Hrg. Tr. 1/27/23 at 5-7. The Court later denied the motion for reconsideration. *See* February 2, 2023, Minute Order.

At the pretrial conference on January 27, 2023, the Court suggested that, despite finding insufficient evidence of an executive privilege claim to dismiss the case on the Rule 12 motion, the Defendant could present evidence at trial that former President Trump instructed or requested him to invoke executive privilege. The Court appeared to presume that, despite all evidence to the contrary (and ample opportunity to put forth such evidence), the Defendant would testify that former President Trump instructed him to assert privilege on behalf of the Presidency. The Court suggested that if the jury found this testimony credible, an acquittal or dismissal would be appropriate because, in those circumstances, the Committee lacked the authority to compel the Defendant to comply with the subpoena. Hrg. Tr. 1/27/23 at 22-23.

This position appeared to be based on the government's mistaken statements from the November 4, 2022, hearing – that is, on the notion that if there were a proper invocation of executive privilege by a former President with respect to a former senior adviser, that that person's refusal to appear would not be subject to prosecution for contempt.

The Court further suggested that if, in the Department of Justice's view, the Defendant was the sort of close presidential adviser who is entitled to testimonial immunity before Congress, then that might also preclude the government from prosecuting him for failing to comply with the subpoena. Hrg. Tr. 1/27/23 at 68-69 (discussing *Testimonial Immunity Before Congress of the*

Assistant to the President and Senior Counselor to the President, ___ Op. O.L.C. ___, Slip. Op. (July 12, 2019)) ("Conway Opinion"). Counsel for the Government disagreed with the Court's suggestions, sought permission to brief the scope of testimonial immunity, and the January 31, 2023, trial date was continued.

III. Discussion

The Defendant has provided no evidence that the former President asserted executive privilege as to the Defendant's subpoena, and the Defendant has never even claimed that the former President asserted testimonial immunity as to the Defendant. Even if the Defendant were able to demonstrate that the former President had instructed him to assert executive privilege or testimonial immunity, however, such instructions would not preclude the Defendant's prosecution and conviction for violating 2 U.S.C. § 192. Accordingly, the Court should not permit the Defendant to raise his assertions about privilege and immunity before the jury.

As the Court is aware, it is the Department of Justice's longstanding view that when the *incumbent* President asserts executive privilege or testimonial immunity and directs an official to act in accord with that assertion, the official cannot be convicted for violating Section 192 for complying with the President's directive. For reasons explained below, however, that reasoning does not apply to an assertion of privilege or testimonial immunity by a *former* President that is not supported by the incumbent. This Court, however, need not and should not reach the question whether a former President's assertion of executive privilege or testimonial immunity could ever preclude a prosecution under Section 192 for several reasons – including that no assertion by former President Trump could have covered most of the information that the Committee asked the Defendant to produce in documents or at his deposition, and because the Defendant never raised with the Committee – and thus waived – any claim that the former President had directed him to

assert testimonial immunity. The Court should reject the Defendant's claims of privilege and immunity in advance of trial.

a. The Department of Justice Has Not Taken the Position That a Former President's Invocation of Executive Privilege, in the Face of a Contrary Assertion by a Sitting President, can Justify the Defendant's Non-Compliance with the Subpoena

As an initial matter, the Court has inquired as to whether upon "a proper invocation by a former President with respect to a former senior adviser of executive privilege, that the person's refusal to appear would not be subject to prosecution" for contempt. Hrg. Tr. 11/4/22 at 42. For the reasons described in more detail below – including that the former President could not have asserted privilege as to all material and testimony covered by the subpoena, and that the Defendant has waived any claim to testimonial immunity – the Court need not, and should not, reach that question with respect to the Defendant. Nonetheless, the answer is no; the Department of Justice has not previously taken the position and its existing Office of Legal Counsel (OLC) opinions do not state that if a former president invokes executive privilege as to a subpoena to an aide, in the face of a contrary assertion by a sitting President, that the aide's refusal to appear would not be subject to prosecution.

The Department of Justice took the position in a Statement of Interest in *Meadows v. Pelosi*, that when a congressional committee demands testimony from an immediate presidential adviser after a president's term of office has ended, at most, a form of qualified immunity applies. Civil Action No. 21-3217 (D.C.C.) (July 15, 2022), ECF No. 42, at 2 (attached as Exhibit 3). There, the issue concerned a subpoena for testimony from the Committee to Mark Meadows, the former President's former Chief of Staff, regarding whom the former President had claimed executive privilege, but regarding whom the current President had declined to invoke. *Id.* at 14-15. The Department of Justice's stated position was that the Committee's showing of need in Meadows'

case was sufficient to overcome qualified testimonial immunity. *Id*. at 11. In the Statement of Interest, the Department of Justice also asserted the view that an instruction by a former President should not, at least absent extraordinary circumstances, overcome a sitting President's conclusion that immunity is not warranted.

The OLC opinions explaining that Section 192 cannot be applied to an official for complying with a sitting President's assertion of executive privilege or testimonial immunity are inapposite when the assertion is from a former president. Executive privilege and testimonial immunity for certain close advisers to the President are not designed for the benefit of such advisers in their individual capacities, nor for the personal benefit of any particular President. They may only be invoked on behalf of the institution of the Presidency and, ultimately, "for the benefit of the Republic." *Nixon v. Administrator of General Services (GSA)*, 433 U.S. 425, 449 (1977); *see also Trump v. Thompson*, 20 F.4th 10, at 48 (D.C. Cir. 2021) ("The interests the privilege protects are those of the Presidency itself, not former President Trump individually."). Accordingly, the determination whether to invoke such immunity should be made by the singular officer who "speaks authoritatively for the interests of the Executive Branch," *Thompson*, 20 F.4th at 33—the sitting President. And here, President Biden determined not to invoke.

The Department of Justice's view that the congressional contempt statute does not (and cannot constitutionally) apply to an official who has acted in accord with an incumbent President's invocation of executive privilege or testimonial immunity depends upon two principal rationales, neither of which is implicated where, as here, a *former* President has instructed former officials to assert privilege or immunity in conflict with the incumbent President's contrary determination.

First, OLC has explained that "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." Olson Memo at 136. In particular, if Congress could wield the prospect of criminal contempt with respect to information that the incumbent President has determined should be withheld on grounds of executive privilege, that would be "inconsistent with the 'spirit of dynamic compromise'" that marks the accommodation process the Constitution requires the two political Branches to use in cases where a congressional request for information implicates Executive Branch confidentiality interests. *See id.* at 139 (*quoting United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977)). That concern, however, is inapposite when the President and Congress agree that a witness should testify. Indeed, in such a case the accommodation process has worked as designed. If a former President's claim of privilege or immunity had the effect of enabling a witness to refuse to testify without the possibility of contempt, that would "throw a wrench into the ongoing working relationship and accommodations between the Political Branches." *Thompson*, 20 F.4th 10 at 48.

Second, OLC has explained that an incumbent 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.'" *Id.* (quoting *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 at 731 (D.C. Cir. 1974). By contrast, when a *former* President invokes a presidential communications privilege claim that the incumbent President has determined should *not* be made, that claim is *not* "presumptively valid." Olson Memo at 137. To the contrary, and as the recent decision in *Trump v. Thompson* demonstrates, even if a former President were able to obtain a judicial hearing of the dispute with the incumbent President concerning the privilege claim, the courts would defer to the incumbent's determination. *See*

Thompson, 20 F.4th at 38 ("When a former and incumbent President disagree about the need to preserve the confidentiality of presidential communications, the incumbent's judgment warrants deference because it is the incumbent who is 'vitally concerned with and in the best position to assess the present and future needs of the Executive Branch'" (quoting *GSA*, 433 U.S. at 449)).

That said, however, the Government acknowledges that the D.C. Circuit's decision in *Thompson* did not "conclusively resolve whether and to what extent a court could second guess the sitting President's judgment" because it concluded that the privilege would have been overcome in that case in any event. *Id.* at n.2. And the Supreme Court, in denying former President Trump's application for an injunction, emphasized that the D.C. Circuit had analyzed his privilege claims "without regard to his status as a former President." 142 S. Ct. at 680.

This Court should follow the same course here. Because as explained below, any assertion by former President Trump could not have justified the Defendant's categorical refusal to produce documents or to testify at the deposition, and the Defendant has waived a claim of testimonial immunity, his prosecution would not be precluded even if such an assertion has occurred. The Court need not decide whether there are any circumstances in which a plausible assertion by a former President might preclude a contempt prosecution notwithstanding the sitting President's judgment that assertions of privilege and immunity were not in the interests of the United States.

b. The Defendant has Waived Any Immunity Claim

The Defendant has provided no evidence to support his claim that the former President asserted executive privilege as to the Defendant's subpoena, and the Defendant has never even claimed that the former President asserted testimonial immunity as to the Defendant. Because the Defendant failed to raise an immunity claim with the Committee, he should not now be allowed to invoke testimonial immunity after the fact to foreclose prosecution for a violation of Section 192.

Such argument has been waived. *See United States v. Bryan,* 339 U.S. 323, 330-34 (1950) ("[I]f respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ. . . . To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of authority and an obstruction of its processes." (citation omitted)); *Hutcheson v. United States*, 369 U.S. 599, 608-611 (1962) (stating that a constitutional objection "must be adequately raised before the inquiring committee if [it] is to be fully preserved for review in this Court. To hold otherwise would enable a witness to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which a witness asserts a right of refusal to answer." (internal citations omitted)); *McPhaul v. United States*, 364 U.S. 372, 378-79 (1960) (finding that the defendant could not raise a defense that he did not possess subpoenaed records because he had never made the claim before the issuing committee).

c. The Court Need Not Decide Whether a Former President's Assertion of Executive Privilege or Testimonial Immunity Could Ever Preclude Application of Section 192 Because There Not Has Been a Proper Executive Privilege Assertion in this Case

Within mere moments of receiving it, the Defendant told the Committee that he would not comply with its subpoena because of executive privilege. As it relates to the subpoena received by the Defendant, a former aide to a former president, the only type of applicable executive privilege at issue, had it actually been asserted, would be the presidential communications privilege.[4] That privilege is limited to communications "made in the process of arriving at

[4] The deliberative process privilege is not relevant here as the Supreme Court has only recognized the authority of a former President to invoke the presidential communications privilege under certain circumstances. *See GSA*, 433 U.S. 425 (1977). Moreover, the deliberative process

presidential decisions." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (emphasis added); *see also Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1 (1999) (Att'y Gen. Reno) (concluding that the President could assert executive privilege to protect information concerning deliberations regarding his decision whether to offer clemency); *In re Sealed Case,* 121 F.3d at 752 (noting that the presidential communications privilege covers not only communications directly with the President about his own governmental decision-making but also "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate"). It may be asserted by both current and former Presidents; neither did in connection with the Defendant's subpoena.

Here, the January 23, 2023, letter from former President Trump's attorney merely states that the Defendant should have asserted privilege with respect to his communications with former President Trump himself. There was no suggestion of an invocation at all with respect to the Defendant's communications with third parties. Indeed, the Committee informed the Defendant that most of the information it was seeking did not concern communications he took in his capacity as presidential adviser at all, but instead related to matters undertaken in his personal capacity with persons outside the government. Executive privilege, in this case, therefore could not justify a complete default on the Committee's subpoena.

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privilege only covers information that is pre-decisional – *i.e.*, that was prepared to assist government decisionmakers in arriving at decisions – and deliberative in the sense of reflecting the give-and-take of the consultative process antecedent to such decisions. The Committee gave no indication that it was asking the Defendant for information that would satisfy that description with respect to any executive branch decision-making.

The Department of Justice has made clear, moreover, that testimonial immunity should apply *only* with respect to questions seeking information from a close presidential adviser concerning "matters that occur[red] during the course of discharging [the adviser's] official duties." *See* Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5 at 7 (July 15, 2014) ("Simas Opinion"); *Testimony Before Congress of the Former Counselor to the President*, 43 Op. O.L.C. _ (2019) ("McGahn Opinion") at 19; Conway Opinion at 1. Arguably, no president, current or former would have the authority to make a categorical invocation of testimonial immunity over all the information sought by the Committee from the Defendant because most of the information the Committee sought did not concern matters that occurred in the course of the Defendant's discharge of his governmental duties. For example, the subpoena sought, among other things, "all documents and communications relating in any way to protests, marches, public assemblies, rallies, or speeches in Washington, D.C. on November 14, 2020," and "all communications, documents and information that are evidence of the claims of purported fraud in the three-volume report you wrote, *The Navarro Report*." *See* Ex 1 at 19-20.

Defendant was a trade adviser, and responsible in -part for the Trump administration's response to the Coronavirus crisis. In contrast, the Select Committee subpoena sought information wholly related to the attack on the Capitol on January 6, 2021, and the threat to the peaceful transition of power between administrations.[5] As with the alleged assertion of executive privilege, any such assertion of testimonial immunity therefore would have been germane only (at most) to

[5] Given his own assertions to the contrary, it is not credible to believe that the Defendant thought the subpoena related exclusively to his official responsibilities. In his own press release, announcing the results of his post-election analysis, the Defendant states he was acting in his private capacity. *See* Exhibit 4.

the Defendant's testimony about a fraction of the subjects about which the Committee informed him it wished to inquire at the deposition.

Accordingly, a reasonable assertion of executive privilege or testimonial immunity could not have been grounds for the Defendant to refuse to testify altogether; instead, the most it would have justified would have been an assertion of privilege at the former President's request regarding particular documents or testimony seeking information about communications between the Defendant and the former President himself (or, in the case of a proper immunity assertion, about testimony concerning matters related to the Defendant's official duties). Therefore, even if the Defendant could establish that former President Trump instructed him to assert privilege as to *all* questions that might be asked of him at the deposition, such an assertion would not have been proper. It follows that such an assertion could not preclude the Section 192 charge in Count Two of the Indictment.

d. Testimonial Immunity is Not Available to Defendant Navarro as Defense to Count One (Contempt of Congress – Papers)

No authority exists that suggests a witness could have absolute immunity from producing documents. The OLC opinions on testimonial immunity address only immunity from compelled testimony, and OLC has specifically explained that the doctrine does not apply to subpoenas for documents. Simas Opinion at 9. The rationales for such immunity do not justify any categorical rule with respect to a subpoena for documents and, in any event, such a rule is foreclosed by the Court of Appeals' decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc) (rejecting absolute immunity over compulsory process demanding physical items). The differing treatment of testimony and documents is consistent with the logic and holdings of these Office of Legal Counsel opinions, as many of the arguments advanced in support of testimonial immunity – such as the difficulty of trying to parse

in real time which questions would elicit privileged information – do not apply when considering a request for documents.

All OLC opinions available at the time of the Defendant's default concluded that, under certain circumstances, upon a proper invocation of executive privilege, a presidential adviser may withhold specifically identified privileged documents from his or her subpoena response. No OLC opinion concluded that a presidential adviser may ignore a subpoena's demand for documents altogether.[6] Testimonial immunity and executive privilege do not provide a defense for the Defendant's complete failure to produce a single document in response to the Committee's document demand.

e. The Question of Whether an Assertion of Executive Privilege Precludes Prosecution Must be Resolved Pretrial

The Parties, and the Court, agree in this case that it is the Court's responsibility pretrial to determine whether a valid invocation of privilege precludes prosecution. ECF No. 68 at 4 ("Defendant does not dispute that it is the court's responsibility pretrial to determine whether a valid invocation of privilege immunizes a person from prosecution"); Hrg. Tr. 11/4/22 at 10 ("The questions of immunities and privileges, I know of no precedent in any area, and I'm happy for you to provide me some, in which the question of an immunity and whether an immunity or privilege applies is a jury determination."); *see also United States v. Bulger*, 816 F.3d 137, 146-48 (1st Cir. 2016) (finding the judge was the proper factfinder to determine if the defendant had been given immunity from prosecution by the government in a pretrial decision).

[6] *See* Olson Memo; Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1 (1999); Immunity of the Former Counsel to the President From Compelled Congressional Testimony, 31 Op. O.L.C. 191, 192 (2007); Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5 (July 15, 2014); McGahn Opinion.

The question of whether executive privilege was invoked – and if there were an invocation, the implications of such an invocation – should not be submitted to the jury in this case. This Court has already resolved this legal question during the pretrial proceedings, which it can do without usurping the jury's fact-finding role. *Bulger*, 816 F.3d at 146-48 (judges make immunity determinations in criminal prosecutions pretrial without usurping the jury's fact-finding role).[7]

Moreover, while a valid assertion of executive privilege may provide a bar to prosecution, a subpoenaed witness's mistaken belief that executive privilege was asserted or excused compliance is not a defense at all. ECF No. 68 at 30 ("The government is correct that *Licavoli* forecloses a defense premised solely on the Defendant's claimed belief that former President Trump's invocation of executive privilege excused his nonappearance before the Select Committee."). This Court has already found there was no executive privilege assertion. The Defendant should not be permitted to testify about contrary and mistaken beliefs before the jury.[8]

[7] A potential conflict between the current and former president underscores why the Court should adjudicate privilege claims as a matter of law. Were a jury confronted with credible evidence both that there an invocation by the former President, and that there was not an invocation (and/or an express decision not to invoke) by the current President, there is no fact finding the jury could do that would resolve the conflict; whether the assertion precludes a contempt charge could only be adjudicated as a matter of law. Moreover – because any assertion of executive privilege would require a legal determination as to its effect rather than a factual question as to Defendant's state of mind – it is necessarily an issue for the Court, not a purely factual element for the jury to determine at trial.

[8] Even if an assertion of executive privilege by a former president could form the basis of an affirmative defense, this Court should require a proffer from the Defendant on the contours of such an assertion before submitting any such question to the jury. Absent such information, and given the complexities of the issues involved, the Government could not otherwise appropriately address the matter before the jury. And, here based on the record, any such proffer could only relate to the Defendant's mistaken belief that executive privilege was both asserted and provided a basis to completely ignore the subpoena – which is not a defense to contempt.

f. The Authority of the Committee to Subpoena Defendant Navarro Does Not Depend Upon Whether there was an Invocation of Executive Privilege

At trial, the Government must prove, among other things, that the Defendant was subpoenaed by the Committee, and that the subpoena sought testimony or information pertinent to the investigation that the Committee was authorized to conduct. *See Gojack v. United States*, 384 U.S. 702, 716 (1966) ("It can hardly be disputed that a specific, properly authorized subject of inquiry is an essential element of the offense under § 192."); *United States v. McSurely*, 473 F.2d 1178, 1203 (D.C. Cir. 1972) (describing "one of the necessary elements of [the Government's] case" as the "pertinency of its demands to the valid subject of the legislative inquiry*"); United States v. Seeger*, 303 F.2d 478, 482 (2d Cir. 1962) (requiring that the committee was "duly empowered to conduct the investigation, and that the inquiry was within the scope of the grant of authority" (citing *United States v. Rumely*, 345 U.S. 41, 42-43 (1953); *United States v. Lamont*, 236 F.2d 312, 315 (2d Cir. 1956); *United States v. Orman*, 207 F.2d 148, 153 (3d Cir. 1953)).

The Court suggested that whether executive privilege was invoked by former President Trump is a question for the jury to decide because it is a possible defense to his contempt. Hrg. Tr. 1/27/23 at 22 ("So if what you propose, Mr. Woodward, is that Dr. Navarro would get up on the witness stand or you've got independent evidence that would show an actual invocation, I suppose you could ask me to hold an evidentiary hearing now and consider that in the context of Rule 12, in which case I would be required to make factual findings and determinations. Or if I'm right that it's a potential defense, you put that issue before the jury and it will be for the jury to decide whether, in fact, there was an invocation, because I think the government's position was there was no invocation."). The Court further suggested that the Government must prove beyond a reasonable doubt that Congress had the authority to summon the Defendant as an element of the contempt offense, and that Congress could not have had such authority if the jury found, as a

factual matter, that there had been an invocation of executive privilege, because such an invocation would have triggered testimonial immunity, negating Congress's authority as a matter of law. Hrg. Tr. 1/27/23 at 62 ("The jury will decide whether Dr. Navarro is telling the truth or not, right? They will have to make that decision. They will be instructed: If you conclude that there was an invocation by the President, that means the Committee had no authority to subpoena him to appear. They lacked authority. The government has not met that element of proof.").

This view appears to be based on the Department of Justice's longstanding position that valid assertion of testimonial immunity by a sitting president precludes prosecution of the witness who follows the president's direction. However, that position is inapplicable here. The Department of Justice has never applied complete testimonial immunity to an assertion of privilege by a former president. *See*, *supra*, page 10; Meadows Litigation Statement of Interest, Exhibit 3 at 2. The Department of Justice agrees that the subpoena in such a case is valid – indeed, the President typically asserts privilege or testimonial immunity only after the Committee has issued a valid subpoena. The Department of Justice's view is, instead, that the President's assertion precludes any effort to enforce the subpoena by way of a finding of, or prosecution for, contempt of Congress, *i.e.*, that Section 192 does not apply in such a case. *See* Olson Memo at 129-42.

Further, subsequent invocations of immunity do not divest Congress of its subpoena authority. Rather, the invocation of immunity limits Congress's authority to seek compliance with a validly issued subpoena for testimony. It is such an effort to enforce a subpoena where the Executive has properly asserted a privilege or immunity that trigger Separation of Powers concerns, not the initial issuance of a subpoena. Congress frequently issues subpoenas consistent with its oversight authority. Congress cannot know, when it identifies individuals with information

pertinent to its investigation, when such information will be subject to a privilege assertion – yet it retains the "authority" to issue the subpoena.

For this reason, courts in previous contempt prosecutions required that the government prove the Committee's authority to conduct the investigation pertinent to the information sought by the subpoena. *See United States v. Bannon*, D.D.C. Case No. 1:21-cr-670, ECF No. 129, at 27-28 (Final Jury Instructions). This analysis is done at the time the subpoena is issued. The Court previously referenced in two cases with regard to Congress's subpoena authority: *Gojack v. United States*, 384 U.S. 702 (1966) and *Shelton v. United States*, 404 F.2d 1292, 1300 (D.C. Cir. 1968). *See* ECF No. 68 at 18 n.4; Hrg. Tr. 1/27/23 at 62-63. Neither case held that the Committee's authority to issue a subpoena is negated when the subpoena recipient asserts a valid privilege claim.

In *Gojack*, the Court reversed Gojack's contempt conviction because Congress had attempted to compel information unrelated to any inquiry that the relevant committee had been authorized to conduct. *See Gojack*, 384 U.S. at 704–05 & n.1. This issue does not exist here where the subpoena falls squarely within the issues delegated to the Committee. The Court did not opine on the scope of Congress's subpoena power, when, as here, there has been a specific delegation of authority to the relevant Committee by the House of Representatives.

Shelton similarly addressed the need for Congress to follow its own rules. In *Shelton*, the relevant subpoena was issued by counsel to the Committee chairman. However, the rules governing the Committee's investigation required that the Committee itself authorize any subpoenas. Shelton's conviction was reversed because the subpoena was issued without the Committee's authorization. *See Shelton*, 327 F.2d 601, 607 (D.C. Cir. 1963) ("Shelton had a right under the Subcommittee charter to have the Subcommittee responsibly consider whether or not he should be subpoenaed before the subpoena issued. Shelton's rights were abridged when the

subpoena was issued without Subcommittee authorization."). The Shelton Court did not opine that the Executive could somehow divest a Congressional Committee of its authority to issue a subpoena when it was acting within the scope of its delegated authority and pursuant to its own rules.

Because the Court has an obligation to decide the Defendant's claims of privilege and immunity, these claims should never reach the jury – either because the Court finds for the Defendant and dismisses the case, or because the Court has rejected the claims. Accordingly, the Defendant should be precluded from presenting all evidence and argument regarding any purported privilege or immunity – including through his own testimony – if the Court holds that they did not excuse the Defendant's complete noncompliance with a validly issued subpoena.

g. The Entrapment by Estoppel Defense Remains Unavailable to the Defendant

The entrapment by estoppel affirmative defense "arises when an individual criminally prosecuted for an offense reasonably relied on statements made by a government official charged with 'interpreting, administering, or enforcing the law defining the offense' and those statements actively misled the individual to believe that his or her conduct was legal." *United States v. Chrestman*, 525 F. Supp. 3d 14, 29–30 (D.D.C. 2021) (quoting *United States v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018)). Before presenting an entrapment by estoppel defense to the jury, a Defendant must make a threshold showing that: "(1) that a government agent actively misled [the defendant] about the state of the law defining the offense; (2) that the government agent was responsible for interpreting, administering, or enforcing the law defining the offense; (3) that the defendant actually relied on the agent's misleading pronouncement in committing the offense; and (4) that the defendant's reliance was reasonable in light of the identity of the agent, the point of

law misrepresented, and the substance of the misrepresentation." *Chrestman*, 525 F. Supp. 3d 14, at 31.

On August 17, 2022, the Defendant gave notice of his intention to raise an entrapment by estoppel defense. ECF No. 36. He stated that, with respect to the Committee's subpoena, he had a "correct and reasonable understanding that he was not required to comply, and was unable to comply, in light of the instructions he had received from President Trump." *Id*. at 2-4. He noted that he believed his actions to be consistent with OLC opinions but offered no evidence of reliance upon them at the time of default. *Id.* The Government responded to the Defendant's notice, and moved in limine to exclude the defense altogether. ECF Nos. 47 and 58.

The Court, on January 19, 2023, agreed, stating that, without a more precise factual proffer, the entrapment by estoppel defense is not available to the Defendant, both as it relates to any instruction he received from former President Trump, and regarding any claimed reliance on OLC opinions. ECF No. 68 at 34 ("This court finds that, without a more precise factual proffer, the entrapment by estoppel defense is not available to Defendant."). The Court gave a deadline of February 28, 2023, for the Defendant to provide a more precise factual proffer. Hrg. Tr. 1/27/23 at 77. The Defendant has failed to provide anything responsive by this deadline. The Defendant has not – and on the facts in this case, cannot – make the required showing for an entrapment by estoppel defense. Therefore, he should not be permitted to present evidence or argument regarding it at trial.

h. The Government's Pending Motion in Limine Should be Granted

This Court has broad discretion to determine whether evidence or argument can properly be presented at trial. *See United States v. Morgan*, 581 F.2d 933, 936 (D.C. Cir. 1978) ("The district court has wide discretion to admit or exclude evidence where the question is one of

relevancy or materiality"); *United States v. Tarantino*, 846 F.2d 1384, 1410 (D.C. Cir. 1988). This includes excluding evidence or argument whose only purpose is to encourage the jury to nullify. *See United States v. Gorham*, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975) (affirming trial court's exclusion of evidence relevant only to jury nullification) (citing *Sparf v. United States*, 156 U.S. 51, 106 (1895); *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006) ("[A] juror . . . who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role.").

For this reason, on September 28, 2022, the Government moved in limine to exclude the Defendant from offering any evidence or argument that executive privilege excused his total non-compliance with the Committee's subpoena. Consistent with the Court's January 19, 2023, Order, agreeing that there had been no invocation of executive privilege, on January 24, 2023, the Government filed a motion in limine to exclude from trial exhibits on matters it understood the Court had found inadmissible. ECF No. 70. This motion remains pending. The Government respectfully requests that this Court grant the pending motion because – as noted above – the Defendant cannot properly assert a defense based on the concepts of executive privilege or testimonial immunity.

IV. Conclusion

For the reasons stated above, the Government respectfully requests that the Court preclude the Defendant from introducing evidence or making legally unsupported arguments to the jury based on executive privilege, any purported testimonial immunity, or any claim of entrapment by estoppel.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: */s/Elizabeth Aloi*
John Crabb
Elizabeth Aloi (D.C. Bar No. 1015864)
Assistant United States Attorneys
United States Attorney's Office
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Washington, D.C. 20530
(202) 252-7212 (Aloi)
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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.

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Peter K. Navarro

You are hereby commanded to be and appear before the

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

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 1540A Longworth House Office Building, Washington, DC 20515

Date: February 23, 2022 Time: 10:00 AM

☑ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: United States Capitol Building, Washington, DC 20515, or by videoconference

Date: March 2, 2022 Time: 10:00 AM

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the United States Marshals Service

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 9th day of February, 2022.

Bennie G. Thompson

Chairman or Authorized Member

Attest:

Clerk

GOVERNMENT EXHIBIT 2

PROOF OF SERVICE

Subpoena for

Peter K. Navarro

Address 801 Pennsylvania Ave., NW, Apt. 1021

Washington, DC 20004

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

U.S. House of Representatives
117th Congress

Served by (print name) _____

Title _____

Manner of service _____

Date _____

Signature of Server _____

Address _____

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

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

February 9, 2022

VIA ELECTRONIC MAIL

Peter Navarro
801 Pennsylvania Ave NW
Apt. 1021
Washington, DC 20004

Dear Mr. Navarro:

Pursuant to the authorities set forth in House Resolution 503 and the rules of the House of Representatives, the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") hereby transmits a subpoena that compels you to produce the documents set forth in the accompanying schedule by February 23, 2022, and to appear for a deposition on March 2, 2022.

The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations. The inquiry includes examination of how various individuals and entities coordinated their activities leading up to the events of January 6, 2021.

Based on publicly available information and information produced to the Select Committee, we believe that you have documents and information that are relevant to the Select Committee's investigation. For example, you, then a White House trade advisor, reportedly worked with Steve Bannon and others to develop and implement a plan to delay Congress's certification of, and ultimately change the outcome of, the November 2020 presidential election.[1] In your book, you reportedly described this plan as the "Green Bay Sweep" and stated that it was designed as the "last, best chance to snatch a stolen election from the Democrats' jaws of deceit."[2] In an interview, you reportedly added that former President Trump was "on board with the strategy", as were "more than 100" members of Congress including Representative Paul Gosar and Senator Ted Cruz.[3] That, of course, was not the first time you publicly addressed purported fraud in the election. You also released on your website a three-part report, dubbed the "Navarro

[1] Tim Dickinson, ROLLING STONE, *Trump Adviser Worried He's Not Getting Enough Credit for Trying to Ruin American Democracy* (December 28, 2021) available at https://www.rollingstone.com/politics/politics-news/jan6-peter-navarro-ted-cruz-green-bay-sweep-1276742/.
[2] *Id.*
[3] Jose Pagliery, THE DAILY BEAST, *Trump Adviser Peter Navarro Lays Out How He and Bannon Planned to Overturn Biden's Electoral Win* (December 27, 2021) available at https://www.thedailybeast.com/trump-advisor-peter-navarro-lays-out-how-he-and-steve-bannon-planned-to-overturn-bidens-electoral-win.

Report", repeating many claims of purported fraud in the election that have been discredited in public reporting, by state officials, and courts.[4] And, because you have already discussed these and other relevant issues in your recently published book, in interviews with reporters, and, among other places, on a podcast,[5] we look forward to discussing them with you, too.

Accordingly, the Select Committee seeks documents and a deposition regarding these and other matters that are within the scope of the Select Committee's inquiry. A copy of the rules governing Select Committee depositions, and document production definitions and instructions are attached. Please contact staff for the Select Committee at 202-225-7800 to arrange for the production of documents.

Sincerely,

Bennie G. Thompson
Chairman

[4] Peter Navarro, *The Navarro Report* available at https://peternavarro.com/the-navarro-report/; *see also* Joe Walsh, FORBES, *White House Advisor Peter Navarro Releases Dubious Voter Fraud Report* (December 17, 2020) available at https://www.forbes.com/sites/joewalsh/2020/12/17/white-house-advisor-peter-navarro-releases-dubious-voter-fraud-report/?sh=23b88c221205.

[5] Ewan Palmer, *Steve Bannon Was 'The Heron on Jan. 6,' Says Peter Navarro* (December 17, 2021) available at https://www.newsweek.com/peter-navarro-steve-bannon-hero-january-6-capitol-riots-1660421.

SCHEDULE

In accordance with the attached definitions and instructions, you, Peter Navarro, are hereby required to produce all documents and communications in your possession, custody, or control—including any such documents or communications stored or located on personal devices (e.g., personal computers, cellular phones, tablets, etc.), in personal accounts, and/or on personal applications (e.g., email accounts, contact lists, calendar entries, etc.)— referring or relating to the following items. If no date range is specified below, the applicable dates are for the time period September 1, 2020, to present.

1. All documents and communications referring or relating in any way to plans, efforts, or discussions regarding challenging, decertifying, delaying the certification of, overturning, or contesting the results of the 2020 Presidential election.

2. All communications, and documents related to communications, in which you were a participant or witness, relating in any way to the security of election systems in the United States.

3. All communications, documents, and information that are evidence of the claims of purported fraud in the three-volume report you wrote, *The Navarro Report*.

4. All documents and communications referring or relating to, Steve Bannon, Members of Congress, state and local officials, White House officials/employees, representatives of the Trump reelection campaign, and national and local party officials relating to election fraud or malfeasance, as well as delaying or preventing the certification of the November 2020 election. This includes all documents and communications related to the creation or implementation of what you have described publicly as the "Green Bay Sweep."

5. Final or draft press releases, letters, reports, or other documents that you, or someone on your behalf, released addressing election fraud or malfeasance, as well as delaying or preventing the certification of the election.

6. All documents and communications referring or relating in any way to electoral votes in the 2020 presidential election, including, but not limited to, drafts or final versions of documents purporting to be or related to Electoral College votes, meetings and preparations for meetings of purported electors for former President Trump and former Vice President Pence on or about December 14, 2020, and the actual or potential selection of an alternate slate of electors by any state legislature or executive.

7. All documents and communications referring or relating in any way to John Eastman, Rudolph Giuliani, Boris Epshteyn, Bernard Kerik, Jenna Ellis, or Mark Martin.

8. All documents and communications relating in any way to protests, marches, public assemblies, rallies, or speeches in Washington, D.C., on November 14, 2020, December 12, 2020, January 5, 2021, or January 6, 2021 (collectively, "Washington Rallies").

9. All documents and communications referring or relating to the financing or fundraising associated with the Washington Rallies and any individual or organization's travel to or accommodation in Washington, D.C., to attend or participate in the Washington Rallies.

10. All documents and communications related to the January 6, 2021, attack on the U.S. Capitol.

DOCUMENT PRODUCTION DEFINITIONS AND INSTRUCTIONS

1. In complying with this request, produce all responsive documents, regardless of classification level, that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee').

3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.

4. The Committee's preference is to receive documents in a protected electronic form (i.e., password protected CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions. With specific reference to classified material, you will coordinate with the Committee's Security Officer to arrange for the appropriate transfer of such information to the Committee. This includes, but is not necessarily limited to: a) identifying the classification level of the responsive document(s); and b) coordinating for the appropriate transfer of any classified responsive document(s).

5. Electronic document productions should be prepared according to the following standards:

   a. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   b. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

      BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.

9. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.

10. The pendency of or potential for litigation shall not be a basis to withhold any information.

11. In accordance with 5 U.S.C.§ 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.

12. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.

13. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production, as well as a date certain as to when full production will be satisfied.

14. In the event that a document is withheld on any basis, provide a log containing the following information concerning any such document: (a) the reason it is being withheld, including, if applicable, the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the withholding.

15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control. Additionally, identify where the responsive document can now be found including name, location, and contact information of the entity or entities now in possession of the responsive document(s).

16. If a date or other descriptive detail set forth in this request referring to a document

is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

17. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
(2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of classification level, how recorded, or how stored/displayed (e.g. on a social media platform) and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, computer or mobile device screenshots/screen captures, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, through a social media or online platform, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.

4. The term "including" shall be construed broadly to mean "including, but not limited to."

5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.

6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.

7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.

8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, assignee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.

9. The term "individual" means all natural persons and all persons or entities acting on their behalf.

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.

H. Res. 8

In the House of Representatives, U. S.,

January 4, 2021.

Resolved,

SECTION 1. ADOPTION OF THE RULES OF THE ONE HUNDRED SIXTEENTH CONGRESS.

The Rules of the House of Representatives of the One Hundred Sixteenth Congress, including applicable provisions of law or concurrent resolution that constituted rules of the House at the end of the One Hundred Sixteenth Congress, are adopted as the Rules of the House of Representatives of the One Hundred Seventeenth Congress, with amendments to the standing rules as provided in section 2, and with other orders as provided in this resolution.

SEC. 2. CHANGES TO THE STANDING RULES.

(a) CONFORMING CHANGE.—In clause 2(i) of rule II—

(1) strike the designation of subparagraph (1); and

(2) strike subparagraph (2).

(b) OFFICE OF DIVERSITY AND INCLUSION AND OFFICE OF THE WHISTLEBLOWER OMBUDS.—

SEC. 3. SEPARATE ORDERS.

(a) MEMBER DAY HEARING REQUIREMENT.—During the first session of the One Hundred Seventeenth Congress, each standing committee (other than the Committee on Ethics) or each subcommittee thereof (other than a subcommittee on oversight) shall hold a hearing at which it receives testimony from Members, Delegates, and the Resident Commissioner on proposed legislation within its jurisdiction, except that the Committee on Rules may hold such hearing during the second session of the One Hundred Seventeenth Congress.

(b) DEPOSITION AUTHORITY.—

(1) During the One Hundred Seventeenth Congress, the chair of a standing committee (other than the Committee on Rules), and the chair of the Permanent Select Committee on Intelligence, upon consultation with the ranking minority member of such committee, may order the taking of depositions, including pursuant to subpoena, by a member or counsel of such committee.

(2) Depositions taken under the authority prescribed in this subsection shall be subject to regulations issued by the chair of the Committee on Rules and printed in the Congressional Record.

(c) WAR POWERS RESOLUTION.—During the One Hundred Seventeenth Congress, a motion to discharge a measure introduced pursuant to section 6 or section 7 of the War

PROOF OF SERVICE

Subpoena for
Peter K. Navarro

Address 801 Pennsylvania Ave., NW, Apt. 1021

Washington, DC 20004

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

U.S. House of Representatives
117th Congress

Served by (print name) DANIEL GEORGE

Title SENIOR INVESTIGATIVE COUNSEL

Manner of service EMAIL TO MR. PETER NAVARRO
(CONFIRMED EMAIL SERVICE EARLIER FEB 9)

Date FEB. 9, 2022.

Signature of Server

Address SELECT COMMITTEE TO INVESTIGATE THE JAN 6 ATTACK
1540A LONGWORTH HOB WASHINGTON DC 20515

GOVERNMENT
EXHIBIT
3

From: George, Dan
To: pknavarro
Subject: RE: U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol
Date: Thursday, February 24, 2022 4:06:00 PM

Mr. Navarro –

I'm following up on the Select Committee's subpoena to you.

The subpoena required you to produce documents to the Select Committee by yesterday, February 23, 2022. We have not received any documents or an indication that you have no documents that are responsive to the subpoena's document schedule.

Also, the date for your deposition is Wednesday, March 2, 2022, at 10:00 AM, and we will convene in a room in the House office buildings. Please contact me at your earliest convenience to discuss the details. Alternatively, please let me know if you do not plan to appear on March 2.

Thank you,
Dan

Daniel George
Senior Investigative Counsel
Select Committee to Investigate the January 6th Attack
on the United States Capitol
U.S. House of Representatives

From: George, Dan
Sent: Wednesday, February 9, 2022 4:21 PM
To: pknavarro <pknavarro@protonmail.com>
Subject: RE: U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol

Mr. Navarro –

As promised, attached is a subpoena from the Select Committee, issued today.

Please let me know if you have any questions or would like to discuss.

Thanks,
Dan

Daniel George
Senior Investigative Counsel
Select Committee to Investigate the January 6th Attack

GOVERNMENT EXHIBIT 4

on the United States Capitol
U.S. House of Representatives

From: George, Dan
Sent: Wednesday, February 9, 2022 2:20 PM
To: pknavarro <pknavarro@protonmail.com>
Subject: RE: U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol

Thank you for the quick response. I'll send you the subpoena shortly at this email address and please let me know if you'd prefer service another way.

Thanks again,
Dan

From: pknavarro <pknavarro@protonmail.com>
Sent: Wednesday, February 9, 2022 2:19 PM
To: George, Dan <Dan.George@mail.house.gov>
Subject: Re: U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol

yes. no counsel.
Executive privilege

Sent with ProtonMail Secure Email.

------- Original Message -------
On Wednesday, February 9th, 2022 at 2:16 PM, George, Dan <Dan.George@mail.house.gov> wrote:

> Mr. Navarro –
>
> I am a Senior Investigative Counsel for the U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol. The Select Committee is seeking your deposition testimony and documents relevant to issues it is examining. Please confirm whether you are willing to accept service of a subpoena over email. If you are represented by counsel, please let me know his or her name and contact information and we will reach out as soon as possible.
>
> Thank you,
> Dan
>
> Daniel George
> Senior Investigative Counsel
> Select Committee to Investigate the January 6th Attack
> on the United States Capitol
> U.S. House of Representatives

From: George, Dan
To: pknavarro
Subject: RE: Navarro
Date: Sunday, February 27, 2022 6:13:00 PM

Mr. Navarro –

No, it will not be public or open to the press. It will be a staff-led deposition, which members of the Select Committee may also join and in which they may participate.

If you have a scheduling conflict with that date, please let me know and we would be happy to work with to find a date to be scheduled within a reasonable time. Also, please let me know when you anticipate providing documents that are responsive to the subpoena schedule, or a log of specific documents that you are withholding and the basis for withholding, such as executive privilege.

Thank you,
Dan

From: pknavarro <pknavarro@protonmail.com>
Sent: Sunday, February 27, 2022 4:43 PM
To: George, Dan <Dan.George@mail.house.gov>
Subject: RE: Navarro

Will this event be open to the public and press?

Sent with ProtonMail Secure Email.

------- Original Message -------
On Sunday, February 27th, 2022 at 4:27 PM, George, Dan <Dan.George@mail.house.gov> wrote:

> Mr. Navarro –
>
> Thank you for your email. There are topics, including those discussed in the Chairman's letter, that the Select Committee believes it can discuss with you without raising any executive privilege concerns at all. In any event, you must appear to assert any executive privilege objections on a question-by-question basis during the deposition. This will enable the Select Committee to better understand your objections and, if necessary, take any additional steps to address them.
>
> With that in mind, can you please let us know whether you intend to appear for deposition testimony on Wednesday, March 2, 2022, at 10:00 AM as scheduled by the subpoena? For convenience, I'm also attaching my email to you dated Thursday, February 24, 2022.
>
> Thank you again for your email.

GOVERNMENT EXHIBIT 5

Dan

Daniel George
Senior Investigative Counsel
Select Committee to Investigate the January 6th Attack
on the United States Capitol
U.S. House of Representatives

From: pknavarro <pknavarro@protonmail.com>
Sent: Sunday, February 27, 2022 4:00 PM
To: George, Dan <Dan.George@mail.house.gov>
Cc: pknavarro <pknavarro@protonmail.com>
Subject: Navarro

March 1, 2022

Daniel George
Senior Investigative Counsel
Select Committee to Investigate the January 6 Attack
US House of Representatives

Dear Mr. George:

Please be advised that President Trump has invoked Executive Privilege in this matter; and it is neither my privilege to waive or Joseph Biden's privilege to waive. Accordingly, my hands are tied.

Your best course of action is to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter.

In closing, I note that the United States government is in possession of all my official White House communications which your committee has requested. While I do not give my permission for your Select Committee to access this information as it involves privilege, I am at least advising you of this fact.

Thank you,

Peter Navarro

From: George, Dan
To: pknavarro
Subject: RE: Navarro
Date: Tuesday, March 1, 2022 9:43:00 PM
Attachments: RE Navarro.msg
RE U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol.msg

Mr. Navarro –

Thank you for your email. As I mentioned to you in the attached emails, there are topics that the Select Committee believes it can discuss with you without raising any executive privilege concerns at all, including, but not limited to, questions related to your public three-part report about purported fraud in the November 2020 election and the plan you described in your book called the "Green Bay Sweep." If there are specific questions that raise executive privilege concerns, you can assert your objections on the record and on a question-by-question basis.

It is unclear from your correspondence whether you plan attend tomorrow's deposition, as required by the subpoena. We plan to proceed with the deposition at 10 AM in the O'Neill House Office Building at 200 C Street SW, Washington DC 20024. Please feel free to contact me when you arrive so someone can escort you to the conference room.

Thank you,
Dan

From: pknavarro <pknavarro@protonmail.com>
Sent: Monday, February 28, 2022 11:32 AM
To: George, Dan <Dan.George@mail.house.gov>
Subject: RE: Navarro

Please be advised I have been clear in my communications on this matter. Below is my response. As I note, privilege is not mine to waive and it is incumbent on the Committee to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter.

March 1, 2022

Daniel George
Senior Investigative Counsel
Select Committee to Investigate the January 6 Attack
US House of Representatives

Dear Mr. George:

Please be advised that President Trump has invoked Executive Privilege in this matter; and it is neither my privilege to waive or Joseph Biden's privilege to waive. Accordingly, my hands are tied.

GOVERNMENT EXHIBIT 6

Your best course of action is to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter.

In closing, I note that the United States government is in possession of all my official White House communications which your committee has requested. While I do not give my permission for your Select Committee to access this information as it involves privilege, I am at least advising you of this fact.

Thank you,

Peter Navarro

SELECT COMMITTEE TO INVESTIGATE THE
JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

DEPOSITION OF: PETER K. NAVARRO (NO-SHOW)

Wednesday, March 2, 2022

Washington, D.C.

The deposition in the above matter was held in room 5480, O'Neill House Office Building, commencing at 10:04 a.m.

Appearances:

For the SELECT COMMITTEE TO INVESTIGATE
THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

MARGARET EMAMZADEH, STAFF ASSOCIATE
MARC HARRIS, SENIOR INVESTIGATIVE COUNSEL
EVAN MAULDIN, CHIEF CLERK
DENVER RIGGLEMAN, SENIOR TECHNICAL ADVISOR
GRANT SAUNDERS, PROFESSIONAL STAFF MEMBER

Mr. Harris. We are on the record. Today is March 2nd, 2022. The time is 10:04. We're convened in the Longworth House Office Building -- excuse me, we're in the O'Neill House Office Building for the deposition of Peter Navarro to be conducted by the House Select Committee to Investigate the January 6th Attack on the United States Capitol. My name is Mark Harris. I am the designated select committee senior investigative counsel for this proceeding. I am accompanied by Grant Saunders, staff of the select committee.

For the record, it's 10:04 a.m. Mr. Peter Navarro is not present. The person transcribing this proceeding is the House stenographer and notary public authorized to administer oaths.

I want to put on the record, briefly, the facts with respect to Mr. Navarro being given notice of this proceeding.

On February 9th, Chairman Bennie Thompson issued a subpoena to Mr. Navarro both to produce documents by February 23rd, 2022, and to testify at a deposition on March 2nd, 2022, at 10 a.m. The subpoena pertains to the select committee's investigation into the facts, circumstances, and causes of the January 6th attack and issues related to the peaceful transfer of power in order to identify and evaluate lessons learned, and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations.

On February 9th, 2022, Dan George, senior investigative counsel for the select committee, reached out to Mr. Navarro by email and asked whether he would be willing to accept the service -- accept service of a subpoena for deposition and documents by email. Mr. George's email also asked Mr. Navarro if he was represented by counsel.

Mr. Navarro responded to Mr. George on the same day, stating that he would be

willing to accept service of the subpoena by email and that he was not represented by counsel in the matter. Mr. Navarro also wrote in the email, quote "executive privilege," close quote. He did not explain what he meant by that.

Mr. George, following up on Mr. Navarro's email, served Mr. Navarro with the subpoena, which we will attach to the record as exhibit 1.

[Navarro Exhibit No. 1

Was marked for identification.]

Mr. Harris. And the subpoena called for, as I noted, production of documents by February 23rd, 2022, and testimony on March 2nd, 2022, at 10 a.m.

On February 24th, 2022, having not heard back from Mr. Navarro in response to the subpoena and having received no documents in response to subpoena, Mr. George reached out for Mr. Navarro, again, reminded him of the subpoena compliance date and indicated we had not received any documents. Mr. George also reminded Mr. Navarro that his deposition was set for March 2nd, 2022, at 10 a.m., and that we would be convening in one of the House Office Buildings.

Mr. Navarro wrote back on February 27th, 2022, and advised Mr. George that President Trump had invoked executive privilege in this matter, and it was neither his privilege to waive nor President Biden's privilege to waive. He stated, quote, "Accordingly, my hands are tied," close quote.

Mr. George responded the same day, Sunday, the 27th, to Mr. Navarro and stressed to him that there were topics that would be included in the deposition and were referenced in the chairman's letter that he, Mr. Navarro, could discuss without raising any potential claim of executive privilege.

Mr. George also reminded Mr. Navarro that he would have to assert executive privilege on a question-by-question basis during the deposition and that he was expected

to comply with the deposition and appear on March 2nd, at 10 a.m., as noted in the subpoena.

Mr. Navarro responded that same afternoon asking, will this event be open to the public and press?

Mr. George responded by email the same afternoon answering Mr. Navarro's questions.

On the next day, February 28th, Mr. Navarro emailed Mr. George: Please be advised, I have been cleared in my communications on this matter. Below is my response. As I note, privilege is not mine to waive. And it is incumbent on the committee to directly negotiate with President Trump and his attorneys regarding any and all things related to this matter.

And Mr. Navarro included some further comments, dated March 1st, in that February 28th letter, along the lines of what I just stated that was in the email.

On Tuesday, March 1st, Mr. George again emailed Mr. Navarro thanking him for his email, reminding him that there were topics that we would be talking about at the deposition that did not implicate any executive privilege concerns. And Mr. George provided examples to Mr. Navarro of some of those types of questions, again reminding him that he could assert objections on the record on a question-by-question basis.

Mr. George asked Mr. Navarro to clarify whether he intended to appear at the deposition scheduled for March 2nd, as required by the subpoena. He advised Mr. Navarro that the deposition would begin at 10 a.m. at the O'Neill House Office Building, provided the address, and asked Mr. Navarro to contact him when he arrives so that he could be escorted to the conference room. That email was sent on the night of March 1st -- last night. Now, March 2nd, after 10 a.m., Mr. Navarro has not appeared for his deposition.

With that, I will note for the record that the current time is 10:11. Mr. Navarro still has not appeared or communicated to the select committee that he will appear today, as required by the subpoena. Accordingly, the record is now closed. And we can go off the record.

[Whereupon, at 10:13 a.m., the deposition was concluded.]

THE WHITE HOUSE
WASHINGTON

February 28, 2022

Peter K. Navarro
pknavarro@protonmail.com

Dear Mr. Navarro:

I write regarding a subpoena issued to you by the Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Select Committee").

As you are aware, in light of unique and extraordinary nature of the matters under investigation, President Biden has determined that an assertion of executive privilege is not in the national interest, and therefore is not justified, with respect to particular subjects within the purview of the Select Committee. These subjects include: events within the White House on or about January 6, 2021; attempts to use the Department of Justice to advance a false narrative that the 2020 election was tainted by widespread fraud; and other efforts to alter election results or obstruct the transfer of power. President Biden accordingly has decided not to assert executive privilege as your testimony regarding those subjects, or any documents you may possess that bear on them. For the same reasons underlying his decision on executive privilege, President Biden has determined that he will not assert immunity to preclude you from testifying before the Select Committee.

In light of President Biden's determination not to assert executive privilege with respect your testimony, we are not requesting that agency counsel be permitted to attend the deposition. Should you have any questions about the issues addressed in this letter, please contact me at (202) 456-1414.

Sincerely,

Jonathan C. Su
Deputy Counsel to the President

cc: Kristin L. Amerling
Chief Counsel and Deputy Staff Director
Select Committee to Investigate the January 6th Attack on the United States Capitol

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK MEADOWS,	)	
Plaintiff,	)	
v.	)	Case No. 21-cv-3217 (CJN)
NANCY PELOSI, et al.,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States, through the Department of Justice, files this Statement of Interest pursuant to the Court's invitation and 28 U.S.C. § 517. The Court's Minute Order noted that "Plaintiff's arguments rely, in part, on certain opinions of the Office of Legal Counsel" ("OLC"), and the Court therefore invited the United States to state its view "as to whether Plaintiff is entitled to absolute or qualified testimonial immunity from the subpoena at issue in this case." Minute Order (June 23, 2022). The OLC opinions cited by the Court concluded that Congress may not compel current and former immediate advisers to a sitting President to testify about their official duties.[1] Plaintiff, by contrast, is a former adviser to a former President. The cited OLC opinions do not address that situation, and the Department of Justice has not previously taken a position on the extent

[1] *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); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1 (1999); *Immunity of the Former Counsel to the President From Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192 (2007); *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5 (July 15, 2014); *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __ (May 20, 2019).

to which separation-of-powers principles limit the circumstances in which an immediate adviser to a former President may be required to comply with a congressional subpoena to testify about official duties.[2]

When a congressional committee demands testimony from an immediate presidential adviser after the President's term of office has ended, the relevant constitutional concerns are lessened. Accordingly, the Department does not believe that the absolute testimonial immunity applicable to such an adviser continues after the President leaves office. But the constitutional concerns continue to have force. The need to safeguard the confidentiality of presidential communications continues, as do the separation-of-powers principles requiring respect for the independence and dignity of the Office of the President.

In the Department of Justice's view, a form of *qualified* immunity is appropriate to address those continuing and significant separation-of-powers concerns: Congress's implied authority to investigate does not extend to compelling immediate advisers to a former President to testify about their official duties—and, correspondingly, those advisors are immune from such compelled testimony—unless Congress has made a sufficient

[2] Plaintiff suggests that OLC has concluded that absolute immunity extends to former immediate advisers to former Presidents. *See* Pl.'s Mem. of P. & A in Supp. of Mot. for Judg. on the Pleadings, ECF # 29-1 at 6. But the opinion on which Plaintiff relies addressed the immunity of a former immediate adviser to a *sitting* President (former counsel to then-President Bush, Harriet Miers). *See Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192–93 (2007). In addition, the Department has never taken the position that the relevant immunity extends to the production of documents. *See* Pl.'s Mem. of P. & A in Supp. of Mot. for Judg. on the Pleadings, ECF # 29-1 at 19. The OLC opinions address only immunity from compelled testimony. The rationales for such immunity do not justify any such categorical rule with respect to a subpoena for documents and, in any event, such a rule is foreclosed by the Court of Appeals' decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

showing of need or the immunity has been waived. Courts should, in other words, "carefully assess" whether Congress's "asserted legislative purpose warrants the significant step," *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020), of compelling an immediate adviser to a former President to testify about his or her official duties.

Courts have developed a variety of standards to address analogous separation-of-powers questions. *See Mazars*, 140 S. Ct. at 2035-36; *In re Sealed Case*, 121 F.3d 729, 742-45 (D.C. Cir. 1997); *Senate Select Committee*, 498 F.2d at 732. But as in *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021), however, this Court "need not conclusively resolve" the contours of the standard that applies here because the Select Committee has satisfied "any of the tests," *id*. at 33, that might define the qualified testimonial immunity of an immediate adviser to a former President. And for the same reason, the Court need not determine whether the sitting President's determination that an assertion of testimonial immunity is not warranted here independently precludes any assertion of such immunity by the former President. *Cf. Trump v. Thompson*, 142 S. Ct. 680 (2022).

ARGUMENT

I. A QUALIFIED IMMUNITY PROTECTS AN IMMEDIATE ADVISER TO A FORMER PRESIDENT FROM COMPELLED CONGRESSIONAL TESTIMONY ABOUT HIS OR HER OFFICIAL DUTIES

The Executive Branch has long taken the position that separation-of-powers concerns preclude Congress from compelling immediate advisers to a sitting President to testify about their official duties.[3] Those concerns do not disappear when the President

[3] OLC has understood this category of advisers to be limited to senior members of the White House staff who meet regularly with the President to advise him on the exercise of his constitutional and statutory functions. *See Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 16 (2014). It does not include officers and employees in executive branch agencies whose duties are to implement federal statutes, even if some

leaves office. But the calculus does change, and the Constitution requires only a qualified testimonial immunity for immediate presidential advisers once the President is no longer in office.

A. The Supreme Court has "long recognized the unique position in the constitutional scheme that the Office of the President occupies." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 382 (2004) (brackets and internal quotation marks omitted). And it has likewise recognized the "singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article." *United States v. Nixon*, 418 U.S. 683, 715 (1974). The constitutional separation of powers thus protects the President, as the head of a co-equal branch of government, from congressional encroachments on this aspect of the independence of his Office. *See Cheney*, 542 U.S. at 385 ("[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.").

The President is also "entitled to confidentiality in the performance of his 'responsibilities' and 'his office,' and 'in the process of shaping policies and making decisions.'" *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("*AAPS*") (quoting *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 449 (1977). Both the Supreme Court and the D.C. Circuit have emphasized the manifest importance "to the operation of Government" of allowing the President to keep communications regarding the exercise of his duties confidential, and the "constitutional underpinnings" of

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such officials also may occasionally advise the President. A President's Chief of Staff plainly qualifies.

that authority in the separation of powers. *United States v. Nixon*, 418 U.S. at 705-06, 708; *see In re Sealed Case*, 121 F.3d at 742 (reaffirming the "great public interest in preserving the confidentiality of conversations that take place in the President's performance of his official duties because such confidentiality is needed to protect the effectiveness of the executive decision-making process") (internal quotation marks omitted) (quoting *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)).

B. Many of the same principles that preclude Congress from summoning the President to appear before a legislative committee also require immunity from compelled congressional testimony for a sitting President's immediate advisers. *See Ctr. for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 843 (D.C. Cir. 2008) ("When the Legislature purports to affect the prerogatives of the President *or his subordinates*, we must ask whether it 'impermissibly undermines the powers of the Executive Branch, or . . . prevent[s] [it] from accomplishing its constitutionally assigned functions.'") (emphasis added) (quoting *Morrison v. Olson,* 487 U.S. 654, 685 (1988)). OLC and the courts have often described that principle as a form of testimonial "immunity," but it can also be described as a limit on Congress's investigative authority that is required by the Constitution's separation of powers.

First, and most importantly, testimonial immunity for a sitting President's immediate advisers is necessary to protect the President's independence and autonomy from Congress. *See* 23 Op. O.L.C. at 4; *cf. Cheney*, 542 U.S. at 385. Given the vast responsibilities of the President's office, this Circuit has recognized that "[t]he President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisors." *In re Sealed Case*, 121 F.3d at 750. If a congressional

committee could compel testimony from the President's immediate advisers, it could wield that power to harass and interrogate them in an effort to influence their future advice or other actions they take in the course of advising or assisting the President in the discharge of the President's constitutional and statutory responsibilities. The obligation to appear and testify at a time and place of Congress's choosing could also unduly distract such advisers from their critical work assisting the President in the discharge of his Article II duties.

In addition, allowing Congress to interrogate the President's immediate advisers could jeopardize the President's constitutionally protected interests in obtaining and preserving the confidentiality of frank counsel. Invocation of executive privilege may be inadequate to prevent inadvertent disclosure of confidential and privileged communications when congressional questions repetitively probe areas of protected communications. Moreover, the invocation of privilege represents a breakdown in negotiations between co-equal branches that "should be avoided whenever possible." *Cheney*, 542 U.S. at 390. If a President's immediate advisers were compelled to appear before congressional committees in situations where they would frequently and legitimately refuse to answer questions about presidential communications on privilege grounds, the likely result would be a series of contentious incidents in proceedings before the committee—and potentially endless resort to the courts to resolve specific privilege disputes, thereby continually "embroiling the federal courts in . . . power contest[s]" between the political branches, *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring). Committees also would be free to make efforts to embarrass the adviser or the President—or both—by forcing public invocations of privilege, with very little likelihood that the committee would learn anything of value. That spectacle would

undermine the separation of powers in its own right. And the prospect of such contentious hearings would also threaten to make advisers reluctant to serve or to engage in candid exchanges of ideas, to the detriment of the greater public interest.

For these reasons, Presidential administrations of both parties have consistently taken the view that a sitting President's immediate advisers—current and former—cannot be compelled to testify before Congress about their official duties. *See, e.g.*, *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. __, slip op. at 3-12 (May 20, 2019); *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. at 5-16 (July 15, 2014). We acknowledge that some judges have disagreed with that view.[4] But neither the Supreme Court nor the D.C. Circuit has addressed the question, and we submit that the Executive Branch's longstanding position is firmly grounded in separation-of-powers principles. This Court, however, need not address that question here, because this case does not involve a subpoena to an immediate adviser to a sitting President.

C. The constitutional concerns described above are in some respects less acute when Congress seeks to compel testimony from immediate advisers to a former President about their official duties while in office. Accordingly, the Constitution does not require the continuation of absolute testimonial immunity for such advisers. But it would still pose a serious threat to the separation of powers to give Congress unchecked authority to compel

[4] *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 100-06 (D.D.C. 2008) (Bates, J.); *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 200-14 (D.D.C. 2019) (Jackson, K.B., J.), *rev'd and remanded on other grounds*, 973 F.3d 121 (D.C. Cir), *rehearing en banc granted, judgment vacated* (Oct. 15, 2020); *Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 537-42 (D.C. Cir. 2020) (Henderson, J., concurring), *rev'd and remanded on other grounds*, 973 F.3d 121 (D.C. Cir), *rehearing en banc granted, judgment vacated* (Oct. 15, 2020); *id.* at 558 (Rogers, J., dissenting).

the testimony of a former President's immediate advisers as soon as he or she left office. In this context, therefore, the constitutional separation of powers requires a qualified, rather than absolute, testimonial immunity.[5]

Once the President becomes a private citizen, Congress cannot use the questioning of his immediate advisers to extract promises from the witnesses about, or unduly influence, their future official conduct, or to otherwise "'exert an imperious controul' over the Executive Branch" in its current operations. *Mazars*, 140 S. Ct. at 2034 (quoting The Federalist No. 71, at 484 (A. Hamilton)). And compelling testimony from immediate advisers to a former President obviously does not prevent them (or him) from performing any official duties.

On the other hand, the interest of future Presidents in obtaining candid advice from immediate advisers would still be jeopardized to some degree by the prospect of compulsory congressional questioning, regardless of when the questioning occurs. The interest in maintaining the confidentiality of presidential communications thus continues even after the end of a President's term in office, although that interest may diminish to a degree over time and can also be safeguarded, at least in part, by executive privilege. *Cf. Thompson*, 142 S. Ct. at 681 (statement of Kavanaugh, J., respecting denial of application).

Significantly, moreover, unchecked congressional authority to compel a former President's immediate advisers to testify about their official duties would threaten the

[5] That testimonial "immunity" could also be understood as a limit on Congress's implied investigative power in the form of a requirement that Congress must make a specific showing—above and beyond what would be required to subpoena an ordinary witness—to demonstrate that its "asserted legislative purpose warrants the significant step," *Mazars*, 140 S. Ct. at 2035, of compelling a former immediate adviser to testify about his or her official duties.

separation-of-powers principles that serve as a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). "Congress could perhaps use the threat of a post-Presidency pile-on to try and influence the President's conduct while in office" and "thus could wield the threat of intrusive post-Presidency subpoenas to influence the actions of a sitting President 'for institutional advantage.'" *Trump v. Mazars USA, LLP*, No. 21-5176, 2022 WL 2586480, at *19 (D.C. Cir. July 8, 2022) (quoting *Thompson*, 20 F.4th at 44, and *Mazars*, 140 S. Ct. at 2036). Or a house of Congress could employ its investigative powers to interrogate or embarrass immediate advisers to a former President to attack the former President solely for partisan gain. Such tactics could weaken the Presidency even if the advisers never disclosed privileged information and even if no future advisers censored candid advice out of a fear of being subjected to such a spectacle.

Accordingly, in our view the application of what might be called a qualified, rather than absolute, immunity from compelled testimony is appropriate after a President leaves office. Such a qualified immunity would protect the separation of powers by preventing Congress from compelling a former President's immediate advisers to testify about their official duties when such testimony is not necessary to the exercise of Congress's investigative authority. But at the same time, qualified testimonial immunity—unlike the absolute immunity that the Department has argued is applicable to immediate advisers to a sitting President—would allow Congress to obtain such testimony when it can make a sufficiently strong showing of need.

D. Courts and OLC have developed various tests to address analogous separation-of-powers questions or to balance analogous competing interests. In *Senate Select*

Committee, the D.C. Circuit held that a congressional committee's subpoena for recordings of conversations between the President and his Counsel could overcome an assertion of executive privilege only if "the subpoenaed evidence [wa]s demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731. Similarly, OLC has suggested that if an immediate adviser to a sitting President were entitled only to qualified rather than absolute immunity, that immunity could be overcome only by a showing that satisfied the *Senate Select Committee* standard. *Immunity of the Assistant to the President and Director of the Office Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 17-18 (2014).

In *Sealed Case*, the D.C. Circuit held that, "to overcome a claim of presidential privilege raised against a *grand jury* subpoena, it is necessary to specifically demonstrate why it is likely that evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source." 121 F.3d at 757 (emphasis added); *see also United States v. Nixon*, 418 U.S. at 713 (stating that a "demonstrated, specific need for evidence in a pending criminal trial" may overcome an assertion of presidential privilege).

In *Mazars*, the Supreme Court rejected those standards as too "demanding" when a congressional subpoena seeks "nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations." 140 S. Ct. at 2032-33. But even in that context, the Court held that courts must "perform a careful analysis that takes adequate account of the separation of powers principles at stake." *Id.* at 2035. The Court explained, for example, that "Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs" and that "courts

should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Id.* at 2035-2036.

This Court need not decide on the exact contours of the qualified testimonial immunity that applies in this context: All of the various potential standards take into account similar considerations, and the Select Committee's showing is sufficient to satisfy any of them.

II. THE SELECT COMMITTEE HAS ADEQUATELY JUSTIFIED THE SUBPOENA IN THIS CASE

The standards articulated in *Senate Select Committee*, *Sealed Case*, and *Mazars* ask whether the subpoena seeks evidence in service of a valid and sufficiently important legislative interest; whether that evidence is sufficiently relevant to that interest, and whether the party seeking the evidence has shown that it could not reasonably be obtained elsewhere. In another case involving the Select Committee's investigation of the events of January 6, the D.C. Circuit held that the Select Committee's showing of need for the requested information satisfied "any of the tests" put forward in that case, including the standards from *Senate Select Committee*, *Sealed Case*, and *Mazars*. *Thompson*, 20 F.4th at 33; *see id.* at 41-45. The same is true here.

First, this Court and others have repeatedly recognized that the events of January 6, 2021, are of immense importance and that investigating those events is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). As the D.C. Circuit wrote,

> The events of January 6, 2021 marked the most significant assault on the Capitol since the War of 1812. The building was desecrated, blood was shed, and several individuals lost their lives. Approximately 140 law enforcement officers were injured, and one officer who had been attacked died the next day. In the aftermath, workers labored to sweep up broken glass, wipe away blood, and clean feces off the walls. Portions of the

> building's historic architecture were damaged or destroyed, including 'precious artwork' and '[s]tatues, murals, historic benches and original shutters[.]'

Thompson, 20 F.4th at 18-19 (citations omitted). The D.C. Circuit emphasized the Select Committee's "uniquely weighty interest in investigating the causes and circumstances of the January 6th attack so that [Congress] can adopt measures to better protect the Capitol Complex, prevent similar harm in the future, and ensure the peaceful transfer of power." *Id.* at 35. And President Biden has likewise determined that Congress "has a compelling need in service of its legislative functions to understand the circumstances that led to . . . the most serious attack on the operations of the Federal Government since the Civil War." Letter from Deputy Counsel to the President Jonathan C. Su to George J. Terwilliger III, at 1 (Nov. 11, 2021), ECF #1-12 ("Su Letter"). There can thus be no real dispute that the investigation at issue is of critical importance and within Congress's implicit investigatory authority. *See Watkins*, 354 U.S. at 187; *McGrain v. Daugherty*, 273 U.S. 135, 161-175 (1927).

Second, the Select Committee has demonstrated that such information is critical to its investigation. The Select Committee has set forth in detail the information it seeks from Plaintiff, and the importance of that evidence to the Select Committee's work. *See* Mem. of P. & A in Supp. of Defs.' Mot. for Summ. Judg., ECF #15, at 27-41. The Select Committee seeks information about seven specific topics. *Id.* Those topics fall within the scope of the issues that President Biden recognized as central to the Select Committee's work when he determined "that an assertion of executive privilege is not in the public interest, and is therefore not justified, with respect to particular subjects within the purview

of the Select Committee." Su Letter 1. And Plaintiff has not seriously disputed the importance of his testimony to the Select Committee's investigation.

Finally, the Select Committee has sufficiently shown that the information it seeks from Plaintiff is not reasonably available from other sources. The Select Committee has narrowed its original request to Plaintiff in response to information it has acquired elsewhere. Mem. of P. & A in Supp. of Defs.' Mot. for Summ. Judg., ECF #15 at 27-41, 51. And the Select Committee also sought and received testimony from Plaintiff's assistant in the White House, Cassidy Hutchinson, describing additional relevant meetings and conversations in which Plaintiff participated but she did not. *See* Tr. of Jan. 6 Committee Hearing, June 28, 2022, https://www.rev.com/blog/transcripts/day-6-of-jan-6-committee-hearings-6-28-22-transcript (describing, *inter alia*, a conversation with Rudolph Giuliani about his January 2, 2021, meeting with Plaintiff [16:10]; a conversation between Deputy Chief of Staff Anthony Ornato and Plaintiff about intelligence reports of potential violence on January 6 [24:51]; a possible conversation between National Security Advisor Robert O'Brien and Plaintiff about potential violence on Jan. 6 [23:16]; and a conversation between Plaintiff, Roger Stone and retired Lt. General Michael Flynn on the evening of January 5 [1:18:32]). The Select Committee, of course, is best positioned to demonstrate that the information it requires from Plaintiff is not practically available from another source. From its representations, however, *see* Mem. of P. & A. in Supp. of Defs.' Mot. for Summ. Judg., ECF #15, at 27-41, and recent testimony, the Select Committee has met that requirement.

III. THE COURT NEED NOT DECIDE WHETHER THE SITTING PRESIDENT'S DETERMINATION THAT PLAINTIFF SHOULD TESTIFY INDEPENDENTLY PRECLUDES PLAINTIFF'S ASSERTED TESTIMONIAL IMMUNITY

The OLC opinions cited in the Court's Minute Order addressed situations that differed from this one not only because they involved immediate advisers to a sitting President, but also because they involved circumstances where the sitting President had decided that the advisor in question should not testify in order to preserve the interests of the Presidency. Testimonial immunity for immediate advisers to the President is not designed for the benefit of such advisers in their individual capacities, nor for the personal benefit of any particular President. It may only be invoked on behalf of the institution of the Presidency and, ultimately, "for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449; *see Thompson*, 20 F.4th at 48 ("The interests the privilege protects are those of the Presidency itself, not former President Trump individually."). Accordingly, the determination whether to invoke such immunity should be made by the singular officer who "speaks authoritatively for the interests of the Executive Branch," *Thompson*, 20 F.4th at 33—the sitting President.

In this case, President Biden has determined that, given the "unique and extraordinary circumstances" of the Select Committee's investigation into the events of January 6, he will neither "assert executive privilege" with respect to Plaintiff's testimony on specified topics within the Select Committee's purview nor "assert immunity to preclude [Plaintiff] from testifying before the Select Committee." Su Letter 1-2. Such a determination by the sitting President would ordinarily resolve the matter without the need for the Select Committee to make the sort of showing we describe above. Indeed, presidential advisers have often voluntarily testified before Congress without objection

from the President. *See* Cong. Research Serv., RL31351, *Presidential Advisers' Testimony Before Congress Committees: An Overview* 6–18 (Dec. 15, 2014) (collecting examples).

This case differs in one respect from the past cases in which Presidents have allowed their immediate advisers to testify before Congress: Former President Trump has purported to instruct Plaintiff to "invoke any immunities and privileges he may have" in response to the Select Committee's subpoena. *See* Letter from Justin Clark to Scott Gast, Oct. 6, 2021; Compl, ECF #1, ¶ 54 (quoting letter). In the Department's view, such an instruction by a former President should not—at least absent extraordinary circumstances—overcome the sitting President's conclusion that an assertion of immunity is not warranted. "Article II 'makes a single President responsible for the actions of the Executive Branch,'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-497 (2010) (citation omitted), and allowing a former President to override the decisions of the incumbent would be an extraordinary intrusion into the latter's ability to discharge his constitutional responsibilities. It would also "derail an ongoing process of accommodation and negotiation between the President and Congress." *Thompson*, 20 F.4th at 37. That "give-and-take of the political process" is the traditional means by which congressional demands for Executive Branch documents and testimony are resolved, *Mazars*, 140 S. Ct. at 2029, and only the sitting President can engage in the accommodation process on behalf of the Executive Branch. *See id.* at 2031 ("Congress and the President [have] maintained this tradition of negotiation and compromise" throughout the Nation's history).[6]

[6] The President's decision about whether to assert immunity would ordinarily be informed by an array of considerations in the "flexible, dynamic [accommodation] process," *Thompson*, 20 F.4th at 37. A former President has no ongoing institutional

As in *Thompson*, therefore, the Department believes that "[a] court would be hard-pressed under these circumstances to tell the [sitting] President that he has miscalculated the interests of the United States, and to start an interbranch conflict that the President and Congress have averted." 20 F.4th at 32-33; *see also id.* at 33. In *Thompson*, the D.C. Circuit did not "conclusively resolve whether and to what extent a court could second guess the sitting President's judgment" because it concluded that the privilege would have been overcome in any event. *Id.* at 33. And the Supreme Court, in denying former President Trump's application for an injunction, emphasized that the D.C. Circuit had analyzed his privilege claims "without regard to his status as a former President." 142 S. Ct. at 680.

This Court should follow the same course here: Because the Select Committee has made a showing that would be sufficient to justify its subpoena even if the incumbent President had supported an assertion of qualified testimonial immunity, the Court need not decide "whether and to what extent a court could second guess the sitting President's judgment that it is not in the interests of the United States" to assert immunity. *Thompson*, 20 F.4th at 33.

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Respectfully, submitted,

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relationship with Congress and has neither the ability nor the incentive to evaluate the many factors that must influence the incumbent President's judgments as part of the accommodation process.

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Dr. Peter Navarro Releases Report on 2020 Election

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Dr. Peter Navarro →
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WASHINGTON, Dec. 17, 2020 /PRNewswire/ -- Today, Dr. Peter K. Navarro released a new report which provides a comprehensive, objective assessment of the fairness and integrity of the 2020 election, obtained through evidence including more than 50 lawsuits around the nation, thousands of affidavits and testimonies, published analyses, media reports, and more.

Dr. Navarro will be hosting a press briefing call today at 1:00 PM EST in his capacity as a private citizen to discuss his findings.

REGISTER: https://register.gotowebinar.com/#register/5389121415303379470

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SOURCE Dr. Peter Navarro