No. 21-932

In The

Supreme Court of the United States

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

Petitioner

v.

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

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

REED D. RUBINSTEIN
Counsel of Record
America First Legal Foundation
600 14th Street, N.W.
Fifth Floor
Washington, DC 20005
(202) 964-3721
reed.rubinstein@aflegal.org

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

America First Legal Foundation (AFL) is a public interest law firm providing citizens with representation in cases of broad public importance to vindicate Americans' constitutional and common law rights, protect their civil liberties, and advance the rule of law. AFL employs former Department of Justice, Executive Branch, and Congressional staff lawyers who are intimately familiar with the use and abuse of Congressional oversight authority. Thus, AFL has a strong interest in the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers of our Constitution understood with absolute certainty that the accumulation of power in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, necessarily invites abuse. *I.N.S. v. Chadha,* 462 U.S. 919, 949, 960-61 (1983). Without enforced constitutional checks and balances, "free government, can never in practice be duly maintained" for the mere "demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the

---

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the amicus has made a monetary contribution to the preparation and submission of this brief. Amicus files this brief with timely notice and all parties' consent.

same hands." The Federalist 48, pp. 308, 313 (C. Rossiter ed. 1961) (J. Madison). Therefore, at times the Court must protect free government by reining in the political branches.

This is a delicate task. But the Judiciary "may not decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict" with the ruling faction. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring) (citations omitted). History teaches that grave threats to liberty often come in times of urgency, and when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, "we invariably come to regret it." *Skinner v. Ry. Lab. Executives' Ass'n,* 489 U.S. 602, 635 (1989) (Marshall, J. dissenting) citing, e.g., *Korematsu v. United States,* 323 U.S. 214 (1944); *Hirabayashi v. United States,* 320 U.S. 81 (1943).

The circuit court framed the central question as whether the Judiciary can override the agreement by a unified political faction, the Biden Administration and its Congressional allies, to disclose the records of the former President Donald J. Trump. Pet. App. 4a. On the facts of this case, not only *can* the Judiciary override the political branches, but it *must* do so to protect the separation of powers and the rule of law. Three primary reasons support this conclusion.

First, the Judiciary has one primary check on the excesses of political branches, and that is "the enforcement of the rule of law through the exercise of judicial power." *Perez v. Mortg. Bankers Ass'n*, 575

U.S. 92, 124 (2015) (Scalia, J., concurring). "The judicial Power" created by Article III, § 1, of the Constitution is the power to act in the manner traditional for English and American courts. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J.) (citations omitted). Keeping the political branches within constitutional limits through the judicial power to decide cases is one of the Court's most vital functions, because the separation of powers preserves the American people's liberty. *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring) (internal citations omitted); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (Alito, J.) (citations omitted); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (Burger, CJ.).

If executive privilege indeed resides in Article II, *United States v. Nixon,* 418 U.S. 683, 705, 708 (1974), and if executive privilege may be claimed by the former president, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977), then the circuit court should have judged whether each record subject to a claim of executive privilege by the former President was within the privilege's scope. *Accord id.* at 449 (citations omitted); *Vieth,* 541 U.S. at 278; *Watkins v. United States*, 354 U.S. 178, 197-99 (1957) (Warren, CJ.); *Public Citizen v. Burke,* 843 F.2d 1473, 1478-79 (D.C. Cir. 1988). Instead, it improperly ceded judicial power to the Biden Administration and its allies, *see* Pet. App. 4a, 12a, 32a, 37a, 40a, 41a, 44a, 58a, thereby authorizing the ruling faction to circumvent constitutional limits on Congressional investigations in the guise of executive branch oversight. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32, 2034, 2036-37 (2020)

Second, although the House of Representatives has authority to conduct executive branch oversight investigations, it may not violate legal rights or ignore its own rules. In addition to constitutional matters, *Watkins,* 354 U.S. at 198-99, the Judiciary may review and determine if legislative action transgresses identifiable textual limits. *Nixon v. United States*, 506 U.S. 224, 238 (1993); *Yellin v. United States,* 374 U.S. 109, 114 (1963). This includes Congressional rules, and the requirement is that the Congress must comply with them meticulously. *Id.* at 124; *see also Christoffel v. United States*, 338 U.S. 84, 88-89 (1949); *United States v. Smith*, 286 U.S. 6, 33 (1932) (Brandeis, J.).

The Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Select Committee") was not constituted and is not operating in meticulous compliance with its authorizing resolution, H. Res. 503, 117th Cong. (2021). Furthermore, it has not been properly delegated executive branch oversight authority. It is therefore *ultra vires* and without lawful authority to conduct executive branch oversight or to seek or obtain the records at issue in this case.

Third, the text of the Presidential Records Act does not support the circuit court's construction. Specifically, 44 U.S.C. § 2205 does not authorize a sitting president, by way of an oversight agreement with congressional allies, to have a say in a court's adjudication of a former president's executive privilege claim, much less to direct, through the White House Counsel, the Archivist to release a former president's records. The circuit court should

not have granted President Biden power the statute does not provide.

During the Cold War's darkest days, very real and concrete threats to our national security compelled "the Chief Executive and the Congress to take strong measures against any Fifth Column worming its way into government—a Fifth Column that has access to vital information and the purpose to paralyze and confuse." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 174 (1951) (Douglas, J., concurring).[2] Yet even in face of *genuine* peril, the Court struck down unlawful overreach by the political branches because ours is "a government of *laws*, not of *men*." *Id.* at 177 (emphasis in original).

The Petitioner is the duly elected 45th President, Donald J. Trump. He is entitled to equal treatment under the law. He deserves constitutional protection of the same nature and to the same extent as any other President. But the ruling faction's words and deeds, over a period of years, make it clear that now, having gained the power to do so, they intend to prosecute the former President and intimidate the seventy-four million Americans who voted for him. Now, when prejudice, hate and fear are constantly invoked to justify irresponsible smears and persecution of persons even faintly suspected of entertaining unpopular views,[3] our Nation's well-

---

[2] *See, e.g.,* David Horowitz, "Treason of the Heart", The Black Book of the American Left pp. 71-86 (2013).

[3] Ziad Jilani, "It's coups all the way down: Nonstop dramatics about the GOP threat to democracy is part of an attempt to (continued…)

being would be fostered, not hurt, by faithful adherence to our constitutional guarantees. *McGrath*, 341 U.S. at 145 (Black, J., concurring); *see also United States v. Brown*, 381 U.S. 437, 444 (1965) (citations omitted); The Federalist 51, pp. 322-23 (C. Rossiter ed. 1961) (J. Madison).

ARGUMENT

I. The circuit court erroneously ceded judicial authority to a political faction.

The Framers expected Article III judges to apply the law as a check on the political branches' excesses. *Perez,* 575 U.S. at 125. "'The judicial Power' created by Article III, § 1, of the Constitution is not *whatever* judges choose to do, or even *whatever* Congress chooses to assign them. It is the power to act in the manner traditional for English and American courts." *Vieth*, 541 U.S. at 278 (citations omitted). Consequently, if executive privilege is rooted in the separation of powers, and if a former president can claim it, then the circuit court erred by outsourcing its judicial power to a partisan faction by vesting an intra-factional oversight agreement with legal significance. *See* Pet. App. 40a-42a.

The circuit court posited that the central question in this case is "whether, despite the exceptional and imperative circumstances underlying the [Select]

---

cement Democratic Party hegemony, not ensure election integrity", Tablet (Jan. 10, 2022), https://www.tabletmag.com/sections/news/articles/coups-all-the-way-down

Committee's request and President Biden's decision, a federal court can, at the former President's behest, override President Biden's decision not to invoke privilege…" Pet. App. 4a. Then, relying on the fiction that President Biden and his allied House majority had "averted" an "interbranch conflict" over disclosing former President Trump's records, it refused to "second guess" the incumbent's judgment because of the alleged "profound interests in disclosure." *See* Pet. App. 12a, 32a, 37a, 40a, 41a, 44a, 58a. As justification, the circuit court asserted that "a rare and formidable alignment of factors supports the disclosure of the documents at issue." Pet. App. 40a.

The circuit court's decision pronounces merely a purposive set of adjectives, not an intelligible legal standard. "[J]udicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth,* 541 U.S. at 278 (emphasis in original). And it must be acknowledged, as the circuit court did not, that the "alignment of factors [supporting] disclosure" in this case was the alignment of a unified political faction to destroy a despised opponent and consolidate power. This is not rare at all.

In truth, the Biden Administration and its allies pounced on "interbranch accommodation" to circumvent constitutional limits, *see Mazars USA,* 140 S. Ct. at 2031, and thereby disclose the former President's records. Congress may not issue a subpoena for the purpose of law enforcement or to

try someone before a committee for any crime or wrongdoing, and investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. 140 S. Ct. at 2032 (citations omitted). But these are precisely the things that the Select Committee is doing,[4] and it is precisely why the Biden Administration directed the Archivist to disclose former President Trump's records.

"Interbranch accommodation" is not a Trojan Horse for a unified political faction to breach a former president's executive privilege and to subvert the separation of powers. Accordingly, the circuit court should not have given the intra-factional oversight agreement waiving former President Trump's executive privilege such dispositive weight. *See* Pet. App. 40a-42a.[5] Instead, acting in the

---

[4] Tom Hamburger, Jacqueline Alemany, Josh Dawsey, and Matt Zapotosky, "Thompson says Jan. 6 committee focused on Trump's hours of silence during attack, weighing criminal referrals," The Washington Post (Dec. 23, 2021), https://www.washingtonpost.com/politics/january-6- thompson-trump/2021/12/23/36318a92-6384-11ec-a7e8-3a8455b71fad_story.html; Pet. App. 12a-14a citing J.A. 107-108; CNN Politics, Kinzinger says January 6 panel is investigating Trump's involvement in insurrection, Cable News Network (Dec. 19, 2021) https://www.cnn.com/2021/12/19/politics/adam-kinzinger-trump-investigation-insurrection-cnntv/index.html..

[5] Congress, to its credit, anticipated and addressed the unified faction problem in the Presidential Records Act, 44 U.S.C. § 2201 et seq. Section 2205, titled "Exceptions to restricted access", governs the disclosure of presidential records pursuant (continued…)

manner traditional for English and American courts, the circuit court should have judged and decided whether each given record for which the former President claimed privilege was within the privilege's scope. *See Vieth,* 541 U.S. at 278; *Nixon v. Adm'r of Gen. Servs.* 433 U.S. at 449.

This conclusion follows from three propositions:

- First, the separation of powers and checks and balances provide practical and real protection for individual liberty. *Perez,* 575 U.S. at 118 (Scalia, J., concurring) (citation omitted); *Bond v. United States*, 564 U.S. 211, 222 (2011).
- Second, executive privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers. *United States v. Nixon,* 418 U.S. at 708.
- Third, a former president can claim executive privilege. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 449. The privilege is does not solely belong to the incumbent president. *Accord* 44 U.S.C. § 2205. But if a former president's executive privilege is waivable by an

---

to subpoena or other judicial process; to an incumbent President for conducting current business if the information is not otherwise available; and to Congress for oversight. 44 U.S.C. § 2205(2). Section 2205 provides records are available "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." It does *not* provide a process through which an incumbent president may waive a former president's privilege through an oversight agreement with congressional allies. *See generally* Part III, *infra.*

> incumbent president through an oversight agreement with congressional allies, then it does not truly exist.

By deferring to a political faction and substituting idiosyncratic, subjective, and standardless views regarding "President Biden's careful and cabined assessment," Pet. App. 41a, and the "uniquely compelling need of Congress for the information," Pet. App. 51a, for the hard and delicate work of judging the former President's privilege claim, document by document, using principled and rational standards and rules based on reasoned distinctions, the circuit court failed to properly exercise its judicial power and unhinged the statutory scheme.[6] *Vieth,* 541 U.S. at 278; *Burke,* 843 F.2d at 1478-79.

In *Burke*, the panel rejected the Office of Legal Counsel's argument that an incumbent president was obligated to support a former president's privilege claim because even if an incumbent president were to determine that certain documents over which former president asserted executive privilege should be disclosed, when the former president sued a "federal court would do the 'judging.'" 843 F.2d at 1478-79. Although the circuit

---

[6] Section 2205 does not contain standards for resolving interbranch disputes or provide for a privilege waiver process by the incumbent president. Instead, it assumes judicial review. And if a former president may indeed claim executive privilege, then the notion Congress limited both its own and the sitting president's access to a former president's records with the expectation that an Article III court would simply defer to the faction in power makes no sense.

court cited *Burke* for other propositions, Pet. App. 31a, 32a, 37a, it incorrectly failed to follow this one and do a court's work, judging whether each record for which the former President claimed privilege was within scope. *Vieth,* 541 U.S. at 278 (Scalia, J.); *Watkins,* 354 U.S. at 198-99 (Warren, CJ.); *Maloney v. Murphy*, 984 F.3d 50, 59 (D.C. Cir. 2020) (Millett, J.) (judging and deciding House Democrats had standing to seek and obtain records from the Trump Administration).

The Constitution charges the Judiciary with acting as an intermediate body to keep the political branches within the limits assigned to their authority. *See* The Federalist 78, pp. 465-67 (C. Rossiter ed. 1961) (A. Hamilton). Policing the "enduring structure" of constitutional government by way of the judicial power to decide cases is "one of the most vital functions of this Court." *Noel Canning*, 573 U.S. at 572 (Scalia, J., concurring) (internal citations omitted). Yet the circuit court avoided judging by resorting to the political fiction that the Biden Administration and its congressional allies represent distinct institutional interests, not a unitary political faction. Pet. App. 40a-42a; *but compare* H. Res. 503 ("insurrectionists attempted to impede Congress's Constitutional mandate"); Pet. App. 43a (executive privilege should not be used to shield "information that reflects a clear and apparent attempt to subvert the Constitution") (citations omitted). Constitutional law should not be based on such a risible distortion.

A former president's executive privilege claim should not depend on how much he or she is despised by the ruling faction. If there are no principled,

rational, or reasoned standards or rules for judging a former president's executive privilege claim, and what matters instead, as a constitutional matter, is the political alignment of the branches, then the Court should qualify or overrule *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 449, and make that clear.

II. The Select Committee lacks authority to seek or obtain presidential records.

It is well-established that the House of Representatives may not violate legal rights or ignore its own rules in conducting executive branch oversight, and that questions relating thereto are for the Judiciary to decide. *See Watkins,* 354 U.S. at 198-99; *see also Nixon v. United States*, 506 U.S. at 238; *Yellin,* 374 U.S. at 114, 124; *Smith*, 286 U.S. at 33.

The Select Committee lacks authority to seek or obtain the records at issue in this case for two reasons. First, it does not comply with H. Res. 503, § 2(a), providing that "the Speaker shall appoint thirteen Members, five of whom shall be appointed after consultation with the minority leader." The Select Committee has only nine members because the Speaker, for her own reasons, chose not to appoint thirteen. *See* Olivia Beavers, Heather Caygle, and Nicholas Wu, "Pelosi vetoes Banks, Jordan for Jan. 6 select committee", Politico (July 21, 2021), https://news.yahoo.com/pelosi-vetoes-banks-jordan-jan-113648689.html. Because the Select Committee is improperly constituted, its agreements, demands, and subpoenas lack legal force or effect. *Yellin,* 374 U.S. at 124; *Christoffel,* 338 U.S. at 90.

Second, the circuit court lodged the Select Committee's authority for executive branch records

in House Rule XI.2(m)(1)(B) and (m)(3)(D). Pet. App. 10a.[7] It was correct to do so, for congressional executive branch oversight is subject to Article I, § 5, cl. 2, the Rules of Proceedings clause, while the Article I, § 8 Necessary and Proper clause applies to the private sphere. *See* Daniel Z. Epstein, "Congressional Oversight Disputes as Political Questions, Part I: The Decline of the Interbranch Accommodation Doctrine," Yale J. Reg. (June 8, 2020) https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-i-the-decline-of-the-interbranch-accommodation-doctrine-by-daniel-epstein/. But the circuit court failed to follow through and fully develop the analysis.

Under 2 U.S.C. § 190d(a)(2) and House Rule XI, only standing committees, or one of their subcommittees, may conduct executive branch oversight. H. Res. 503 does not expand these limits and the Rules of the 117th Congress do not explicitly delegate executive branch oversight authority to the

---

[7] On the other hand, the circuit court used the "legislative purpose" language of Article I, § 8 repeatedly. Pet. App. 60a, 69a. This may reflect authorities, including *Watkins v. United States,* addressing the post-World War II congressional inquiry, "unknown in prior periods of American history" and involving "broad-scale intrusion into the lives and affairs of private citizens," that required *courts* to balance congressional inquiries and constitutional rights. However, "legislative purpose" is only the beginning of the analysis, the threshold requirement for Congress to demand disclosure from an unwilling witness. Then, courts must undertake the "arduous and delicate task" of judging the constitutional and textual particulars of each given case. *Watkins*, 354 U.S. at 198.

Select Committee. While the Committee on Oversight and Reform has express authority to seek records from the executive branch, *see* House Rule X, cl.3(l), the Select Committee does not.

The House must comply with its own rules meticulously. *Yellin*, 374 U.S. at 124, and congressional resolutions derived under authority of the Rules and Proceedings clause are not enforceable against the executive branch in any event. *See Marshall v. Gordon,* 243 U.S. 521 (1917). Therefore, the Select Committee lacks the authority to lawfully conduct oversight of the executive branch, and to seek or obtain the presidential records at issue in this case.

III. The circuit court misconstrued the Presidential Records Act.

It is axiomatic that courts should interpret statutes in accord with the ordinary public meaning of the terms at the time of enactment, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020), that the words must be read in their context and with a view to their place in the overall statutory scheme, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007), and that the relevant provisions must be harmonized and given full effect, *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). However, the circuit court failed to follow these authorities and misconstrued the Presidential Records Act.

44 U.S.C. §§ 2204, 2205, and 2208 are relevant here. Section 2204, titled "Restrictions on access to Presidential records", permits a former president to restrict records from being disclosed under the

Freedom of Information Act ("FOIA") for twelve years. 44. U.S.C. § 2204(a)(1). Thereafter, the records are agency records under 5 U.S.C. § 552 subject to disclosure under the FOIA.

Section 2205, titled "Exceptions to restricted access" governs disclosure of Presidential records pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding; to an incumbent President for conducting current business if the information is not otherwise available; and to Congress for oversight. 44 U.S.C. § 2205(2).[8]

Section 2205 does not provide any authority, process, or standards for waiving a former president's executive privilege. It grants an incumbent president no say in the matter of a former president's privilege, whether for the incumbent's access to a former president's records for the purpose of conducting current business or for inter-branch oversight accommodation. If a former president sues claiming executive or other privilege with respect to

---

[8] Section 2205(2)(C) provides in relevant part that "Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title" and " subject to any rights, defenses, or privileges which the United States or any agency or person may invoke," presidential records shall be made available "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available".

an oversight request, then, as required by this Court's precedent and Article III, it is up to a court to determine whether a given record is within scope, i.e., communications in performance of a president's responsibilities, of his office, and made in the process of shaping policies and making decisions. *Burke*, 843 F.2d at 1478-79.

Section 2208, titled "Claims of constitutionally based privilege against disclosure" only obtains when the Archivist determines to make available "to the public" any presidential record that has not previously been made available "to the public." *See* 44 U.S.C. § 2208(a)(1). And only here, in the context of a *public* disclosure pursuant to FOIA, may an incumbent president reverse a privilege claim by a former president. This has always been the rule for agency records raising White House equities. *See Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 72-73 (D.D.C. 2016).[9]

Accordingly, a sitting president has legally meaningful say in the matter of a former president's executive privilege *only* in the context of *public* disclosure once the former president's restrictions have expired. 44 U.S.C. § 2203(g); 44 U.S.C.

---

[9] This makes sense because the former president's confidentiality interests have largely dissipated over the twelve-year restricted access period, and the incumbent president is in the best position *at that time* to determine whether records should be subject to automatic release as agency records or remain privileged. But until that time, 44 U.S.C. § 2205 controls, and courts alone should make the call.

§ 2204(C)(1). "Public" disclosure is not the same thing as disclosure by subpoena, request of a sitting president to conduct current business, or congressional oversight demand. That § 2205 applies "Notwithstanding" § 2204 and § 2208 underlines the separation.

If Congress had intended the incumbent to decide whether a former president's executive privilege should be waived for congressional oversight, or to have the authority to instruct his White House Counsel to "direct" the Archivist to release records, then the Presidential Records Act would say so. It does not. And the circuit court erred in ruling as if it does. *See* Pet. App. 12a-16a.

IV. The Court should rein in the Select Committee.

When feelings run high, it is a temptation to take constitutional shortcuts. "But when we do, we set in motion a subversive influence of our own design that destroys us from within." *McGrath*, 341 U.S. at 174 (Douglas, J., concurring). The very real threat of communist subversion did not justify the federal government abusing its power during the Cold War. The January 6, 2021, riot, which pales into insignificance by comparison, does not justify it now. *See* Alexander Solzhenitsyn, "Live Not by Lies" (Feb. 12, 1974), https://www.solzhenitsyncenter.org/live-not-by-lies. The Select Committee, and the political branches, must be reined in.

To put this case into proper perspective, it is necessary first to recall the shock and dismay of the "managerial class"[10] when the former President defeated Hilary Clinton in 2016. Former President Trump won on the strength of tens of millions of votes from the "forgotten Americans" – those citizens discarded as detritus from the factories, plants, mines, and mills closed in favor of China's cheap labor and lax environmental standards; slandered as bitterly clinging to guns and religion; and tarred as deplorable.[11] In response to the former President's victory, the managerial faction fostered violence,[12]

---

[10] *See* Michael Lind, "The New National American Elite", Tablet (Jan. 19, 2021), https://www.tabletmag.com/sections/news/articles/new-national-american-elite; Michael Lind, "The new class war", American Affairs Journal (Summer 2017), https://americanaffairsjournal.org/2017/05/new-class-war/; *see generally* James Burnham, The Managerial Revolution (Putnam and Co., 1944), https://archive.org/details/in.ernet.dli.2015.17923/page/n9/mode/2up.

[11] Amy Chozick, "Hillary Clinton Calls Many Trump Backers 'Deplorables', and GOP Pounces", The New York Times (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/us/politics/hillary-clinton-basket-of-deplorables.html; "Obama angers midwest voters with guns and religion remark", The Guardian (Apr. 14, 2008), https://www.theguardian.com/world/2008/apr/14/barackobama.uselections2008.

[12] *See* Conservapedia.com, "Leftwing violence in the Trump era", https://www.conservapedia.com/Left-wing_violence_in_the_Trump_era#2017 (last accessed Jan. 8, (continued…)

subverted the orderly operations of the federal government,[13] and, through baseless, cynical, and manufactured lies of "Russia collusion"[14] inflamed passions beyond all reason.

2022); *see also* House Judiciary GOP, "The video Chairman Nadler doesn't want you to see!", You Tube (Jul. 28, 2020), https://www.youtube.com/watch?v=BbKvhnLoV0Q&t=6s; Republican National Committee., "The Left is Unhinged", You Tube (June 26, 2018), https://www.youtube.com/watch?v=eFRHX6glTSM&t=4s; Phil McCausland, Emmanuelle Saliba, Euronews, Erik Ortiz and Corky Siemaszko, "More Than 200 Arrested in D.C. Protests on Inauguration Day," NBC News (Jan. 20, 2017), https://www.nbcnews.com/storyline/inauguration-2017/washington-faces-more-anti-trump-protests-after-day-rage-n709946 ("The legions of protesters still seething over the Manhattan mogul's unexpected victory threatened more disruptions.")

[13] "Less than two weeks into Trump's administration, federal workers are in regular consultation with recently departed Obama-era political appointees about what they can do to push back against the new president's initiatives." Juliet Eilperin, Lisa Rein and Marc Fisher, "Resistance from within: Federal workers push back against Trump," The Washington Post (Jan. 31, 2017), https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html

[14] *See United States v. Michael A. Sussmann*, No.1:21-cr-00582 (D.D.C. Sept. 16, 2021); *see also United States v. Igor Y. Danchenko*, No. 1:21-CR-245 (E.D. Va. Nov. 3, 2021); *see also* J. Peder Zane, "Investigative Issues: Russiagate, America's Greatest Scandal", Real Clear Politics (Dec. 8, 2021), https://www.realclearinvestigations.com/articles/2021/12/08/inv

(continued…)

The Select Committee's current show trial is another link in this chain.[15] Key drivers of the Russia collusion narrative now serve on the Select Committee and hold high level Biden Administration

---

estigative_issues_russiagate_americas_greatest_scandal_80697 1.html; Lee Smith, "Here Comes the Limited Hangout", Tablet (Dec. 2, 2021), https://www.tabletmag.com/sections/news/articles/limited-hangout-lee-smith; Jonathon Turley, "'A Means of Distracting the Public': Brennan Briefed Obama on Clinton 'Plan' to Tie Trump to Russia," Res Ipsa Loquitor (Oct. 7, 2020), https://jonathanturley.org/2020/10/07/a-means-of-distracting-the-public-brennan-briefed-obama-on-clinton-plan-to-lie-trump-to-russia/; Matt Taibbi, "It's official: Russiagate is this generation's WMD", TK News by Matt Taibbi (Mar. 23, 2019) https://taibbi.substack.com/p/russiagate-is-wmd-times-a-million.

[15] *See,* Letter to the Hon. Nancy Pelosi from Ranking Member Rodney Davis, Committee on Administration at 3 (Jan. 3, 2022), https://twitter.com/HouseAdmnGOP/status/1478097371779248132. Tom Hamburger, Jacqueline Alemany, Josh Dawsey, and Matt Zapotosky, "Thompson says Jan. 6 committee focused on Trump's hours of silence during attack, weighing criminal referrals," The Washington Post (Dec. 23, 2021), https://www.washingtonpost.com/politics/january-6- thompson-trump/2021/12/23/36318a92-6384-11ec-a7e8-3a8455b71fad_story.html; Pet. App. 12a-14a citing J.A. 107-108; CNN Politics, Kinzinger says January 6 panel is investigating Trump's involvement in insurrection, Cable News Network (Dec. 19, 2021) https://www.cnn.com/2021/12/19/politics/adam-kinzinger-trump-investigation-insurrection-cnntv/index.html;.

positions.[16] That many of the loudest voices claiming Russia collusion are now also the loudest voices claiming that the January 6, 2021, riot was an "insurrection" requiring extraordinary measures against fellow citizens is chilling.

The collective disorder on January 6, 2021, was a tragic and terrible day for our Nation. However, political violence was a daily fact of life in Washington, D.C., and across the nation during the *annus horribilis* of 2020.[17] Empirically, the January 6 riot was not comparable in organization, funding, sophistication, size, scope, or damage, to the riots of the preceding months in Minneapolis, New York

---

[16] Tim Harris, "Intelligence Committee Ranking Republican Turner: Chairman Schiff Is 'Largely Discredited' After Russia Hoax", Real Clear Politics (Jan. 2, 2022), https://www.realclearpolitics.com/video/2022/01/02/intelligence_committee_ranking_republican_turner_chairman_schiff_is_largely_discredited.html; Jerry Dunleavy, "Jake Sullivan repeatedly promoted Alfa Bank story at the center of Durham indictment," The Washington Times (Sept. 25, 2021), https://www.washingtonexaminer.com/news/jake-sullivan-promoted-alfa-bank-story-center-durham-indictment

[17] Jennifer A. Kingson, Exclusive: $1 billion-plus riot damage is most expensive in insurance history, Axios (Sept. 20, 2020), https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html; *see also* Major Cities Chiefs Association Intelligence and Commanders Group, "Report on the 2020 Protests & Civil Unrest" (Oct. 2020) https://majorcitieschiefs.com/wp-content/uploads/2021/01/MCCA-Report-on-the-2020-Protest-and-Civil-Unrest.pdf.

City, Kenosha, and other cities.[18] Rather, the data suggests that the January 6, 2021, riot is more comparable in scale to the riot on January 20, 2016, against President Trump's inauguration, and, perhaps, to the 2020 Portland Federal courthouse siege.[19]

Furthermore, the evidence is that the January 6 riot is far from the first destructive attack against the Capital, and the claims to the contrary are, at best, hyperbolic. Leftist Puerto Rican terrorists opened fire in the House Chamber and wounded five in 1954 (President Carter later pardoned them as "a humanitarian gesture to the international

---

[18] *See* Updated and Reposted: RCI's Jan. 6-BLM Riots Side-by-Side Comparison, Real Clear Investigations (Jan. 4, 2022), https://www.realclearinvestigations.com/articles/2021/09/09/realclearinvestigations_jan_6-blm_comparison_database_791370.html; Mark Hosenball and Sarah N. Lynch, "Exclusive: FBI finds scant evidence U.S. Capitol attack was coordinated – sources", Reuters (Aug. 20, 2021), https://www.reuters.com/world/us/exclusive-fbi-finds-scant-evidence-us-capitol-attack-was-coordinated-sources-2021-08-20/; *see also* Byron York, "'Armed insurrection': What weapons did the Capitol rioters carry?", The Washington Examiner (Oct. 11, 2021), https://www.washingtonexaminer.com/news/armed-insurrection-what-weapons-capitol-rioters-carry.

[19] Mike Balsamo and Gillian Flaccus, "On Portland's streets, Anger, fear, and a fence that divides", AP (July 27, 2020), https://apnews.com/article/virus-outbreak-ap-top-news-race-and-ethnicity-music-or-state-wire-1dd1bb39093a3691f4e78093787ab877. Obviously, the Portland siege was far lengthier and more rioters were likely involved.

community"). Weather Underground communists planted a bomb in the washroom below the Senate Chamber in support of America's North Vietnamese enemies in 1971. Violent Marxists bombed it again in 1983 to protest U.S. action in Grenada and Lebanon.[20] Oddly, the memory of these and other similar attacks has been obscured.[21]

The point is not that the January 6, 2021, riot was appropriate or justified. It was not. The point, rather, is that the riot provides no legitimate pretext for constitutional shortcuts or extreme measures. Suggesting otherwise demonstrates either profound historical ignorance or dangerous partisan amnesia.

In 1951, Justice Black warned that two things only are certain: first, that power is abused in much the same way in every age and country; and second, that what has happened before can happen again. *McGrath,* 341 U.S. at 145 (Black, J., concurring).[22]

---

[20] Chris Iorfida, "4 historic attacks at the U.S. Capitol", CBC (Jan. 6, 2021), https://www.cbc.ca/news/world/us-capitol-attack-history-1.5863856.

[21] *See generally* Kylee Zemple, "8 times left-wing protesters broke into government buildings and assaulted democracy," The Federalist (Jan. 07, 2022), https://thefederalist.com/2022/01/07/8-times-left-wing-protesters-broke-into-government-buildings-and-assaulted-democracy/.

[22] The irony in the fact that the ideological descendants and heirs of the petitioners in cases such as *McGrath* and *Brown* are now using government and corporate power to destroy their conservative political and cultural opponents with such gusto, and doing so in ways far more objectionable than when it was

(continued…)

His warning should be urgently heeded. It is almost certain that the political pendulum will swing back, and it may swing back hard, so the need now for vigilance against unconstitutional excess is great. What the Court does in this case will certainly have implications for future presidents.

CONCLUSION

No doubt that the Court would gladly avoid deciding this question presented if it could, but it cannot. *Zivotofsky,* 566 U.S. at 205. Protecting the Constitution and preserving individual liberty from the high passions of political factions, whether raised by momentous events such as a World War or, as here, by the desire to crush a hated political opponent and tighten its grip on power, requires perspective and reason. On the facts of *this* case, the Court should rein in the Select Committee, hold the partisan faction now running the political branches accountable, and protect constitutional principles. The petition for a writ of certiorari should be granted.

---

the communists and socialists (dedicated to overthrowing or subverting and replacing, respectively, our government, civic, and religious institutions) on the receiving end, should not be lost.

Respectfully submitted.

REED D. RUBINSTEIN
Counsel of Record
America First Legal Foundation
600 14th Street, N.W.
Fifth Floor
Washington, DC 20005
(202) 964-3721
reed.rubinstein@aflegal.org

Counsel for *Amicus Curiae*

JANUARY 11, 2022