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APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN K. BANNON,

Appellant

No. 22-3086

Appeal from the United States District Court
for the District of Columbia
(No 1:21-cr-00670-1)

Argued: November 9, 2023
Decided: May 10, 2024

Before: PILLARD, WALKER, and GARCIA, *Circuit Judges*.

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

GARCIA, *Circuit Judge*: In September 2021, the House Select Committee to Investigate the January 6th Attack on the United States Capitol issued a subpoena to appellant Stephen Bannon to testify and provide documents. Bannon did not comply—he knew what the subpoena required but did not appear or provide a

single document. Bannon was later convicted of violating the contempt of Congress statute, 2 U.S.C. § 192, which criminalizes "willfully" failing to respond to a congressional subpoena. Bannon insists that "willfully" should be interpreted to require bad faith and argues that his noncompliance does not qualify because his lawyer advised him not to respond to the subpoena. This court, however, has squarely held that "willfully" in Section 192 means only that the defendant deliberately and intentionally refused to comply with a congressional subpoena, and that this exact "advice of counsel" defense is no defense at all. *See Licavoli v. United States*, 294 F.2d 207, 207 (D.C. Cir. 1961). As both this court and the Supreme Court have repeatedly explained, a contrary rule would contravene the text of the contempt statute and hamstring Congress's investigatory authority. Because we have no basis to depart from that binding precedent, and because none of Bannon's other challenges to his convictions have merit, we affirm.

I

On January 6, 2021, rioters attacked the United States Capitol, seeking to interfere with the certification of the 2020 presidential election results. The attack delayed the scheduled certification vote of the Joint Session of Congress. The attack also left over 140 law enforcement officers injured and resulted in several deaths.

On June 30, 2021, the House of Representatives adopted House Resolution 503, establishing the Select Committee to Investigate the January 6th Attack on

the United States Capitol. The Resolution charged the Select Committee to investigate and report on the "facts, circumstances, and causes" of the January 6th attack. H.R. Res. 503, 117th Cong. § 3 (2021). It also authorized the Select Committee to subpoena witnesses to provide testimony and documents, *id*. § 5(c)(4), and to propose any legislation the Committee deemed necessary in light of its investigation, *id*. § 4(a)(3).

Public accounts indicated that Bannon had predicted on a January 5, 2021 podcast that "all hell [wa]s going to break loose" the next day. J.A. 39. Bannon had been employed as an advisor to then-President Donald Trump for approximately seven months before leaving the White House in 2017. In addition to the podcast prediction, Bannon had reportedly participated in discussions in late 2020 and early 2021 about efforts to overturn the 2020 election results.

Based on these reports, the Select Committee believed that Bannon had information relevant to its investigation. Accordingly, on September 23, 2021, the Select Committee issued a subpoena to him. The subpoena sought documents and testimony pertaining to seventeen categories of information from 2020 and 2021, long after Bannon's 2017 departure from the White House: Three pertained to Bannon's communications with President Trump in 2020 and 2021; the rest related to Bannon's communications with White House and campaign staff, other private citizens, and related activities. The subpoena ordered Bannon to produce documents by October 7, 2021, and to appear

for a deposition on October 14. Bannon did not comply with either demand.

Instead, shortly after the first subpoena deadline passed on October 7, Bannon's lawyer informed the Select Committee that Bannon would not respond. That October 7 letter stated that Bannon had received communications from Justin Clark, counsel for former President Trump, indicating that President Trump intended to invoke executive privilege. Until those issues were resolved, the letter stated, Bannon would not respond to the request for documents or testimony.

The next day, October 8, the Select Committee responded in a letter, stating that Bannon had provided no "legal basis" for his "refusal to comply with the Subpoena." J.A. 4838. The Select Committee noted that it had received no assertion, formal or otherwise, of executive privilege from President Trump. The Select Committee also explained that such an assertion would not, in any event, justify Bannon's wholesale noncompliance with the subpoena. As the Select Committee described, "virtually all" of the material sought concerned Bannon's actions as a private citizen and pertained to subjects not covered by executive privilege. *Id*. The Committee noted that Bannon could raise any particularized privilege concerns to the Committee in response to specific questions or document requests, but that he could not categorically claim "absolute immunity" from responding to the subpoena. J.A. 4839.

Bannon's lawyer replied in an October 13 letter to the Committee, repeating that Clark "informed"

Bannon's lawyer that President Trump "is exercising his executive privilege" and that Bannon would not respond to the subpoena. J.A. 4841. In an October 15 letter, the Select Committee reiterated the points in its October 8 letter—that it had received no communication from President Trump asserting executive privilege and that such an assertion would not justify total noncompliance by Bannon. The Select Committee repeatedly warned that if Bannon continued to refuse to comply, it would consider referring Bannon for prosecution on contempt charges. The Committee gave Bannon until October 18 to submit any additional information that might bear on its contempt deliberations.

During this period, though Clark (former President Trump's counsel) did not contact the Select Committee, he did exchange several emails with Bannon's lawyer. In those exchanges, Clark warned—contrary to Bannon's position—that an assertion of executive privilege would not justify Bannon's total noncompliance. In his initial October 6 letter to Bannon's counsel, Clark described the subpoena as seeking materials "including but not limited to" information "potentially" protected by executive privilege. J.A. 444. Clark therefore instructed Bannon to invoke, "where appropriate," any immunities and privileges Bannon "may have." *Id*. In an October 14 letter to Bannon's lawyer, Clark disclaimed that President Trump had directed Bannon not to produce documents or testify until the issue of executive privilege was resolved. And on October 16, after learning of Bannon's continued claim to the Committee

that he was justified in not responding to the subpoena, Clark repeated that his previous letter "didn't indicate that we believe there is immunity from testimony for your client. As I indicated to you the other day, we don't believe there is." J.A. 448.

Bannon did not comply with the subpoena in any respect. Nor, despite the Committee's warnings, did he submit by October 18 any further information bearing on the Committee's contempt deliberations. On October 19, 2021, the Select Committee informed Bannon that it had unanimously voted to recommend that the House of Representatives find him in contempt of Congress.

On November 12, 2021, a grand jury charged Bannon with two counts of violating 2 U.S.C. § 192. Section 192 provides that "[e]very person who having been summoned as a witness by the authority of . . . any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty" of contempt of Congress. 2 U.S.C. § 192. The indictment's first count concerned Bannon's refusal to appear for the deposition; the second concerned his refusal to produce the sought-after documents and communications.

On July 22, 2022, following a five-day trial, a jury found Bannon guilty on both counts. The district court sentenced Bannon to four months' incarceration for each count to run concurrently, with a $6,500 fine. The district court stayed Bannon's sentence pending this appeal.

II

Bannon raises four challenges to his convictions. He argues that the district court erroneously defined the mental state required for a contempt of Congress charge, that his conduct was affirmatively authorized by government officials, that the Select Committee's subpoena was invalid to begin with, and that the trial court should not have quashed certain trial subpoenas that sought to develop evidence for his defense. As explained below, each challenge lacks merit.

A

In this appeal, Bannon does not dispute that he deliberately refused to comply with the Select Committee's subpoena in that he knew what the subpoena required and intentionally did not respond; his nonresponse, in other words, was no accident. Instead, Bannon challenges the contempt of Congress charges on the ground that he reasonably believed—based on advice of counsel—that he did not have to respond. He argued below and on appeal that "willfully" making default in violation of 2 U.S.C. § 192 requires bad faith—that the defendant must know that his conduct violated the law. The district court, however, concluded that Section 192 requires proof only that the defendant deliberately and intentionally did not respond. The district court thus denied Bannon's motion to dismiss the indictment based on his asserted good-faith reliance on his counsel's advice, precluded Bannon from presenting such a defense at trial, and instructed the jury consistent with those rulings. We review the district court's legal determination *de novo*.

See United States v. Sheehan, 512 F.3d 621, 629 (D.C. Cir. 2008).

Our decision in *Licavoli* directly rejects Bannon's challenge. In *Licavoli*, we concluded that "willfully" in Section 192 requires that any failure to appear in response to a congressional subpoena be only "deliberate" and "intentional." 294 F.2d at 208; *see id*. at 207–09. It does not require bad faith, evil motive, or unlawful purpose. *Id*. at 209. Indeed, *Licavoli* specifically held that an advice of counsel defense—which ultimately seeks to show the defendant acted in good faith—is unavailable under this statute. *Id*. ("Advice of counsel does not immunize that [deliberate] intention.").

Bannon does not dispute that description of *Licavoli*. See Bannon Br. 10. He instead asks us to depart from its holding. That request, however, must clear a high bar. *Licavoli* is binding upon this panel unless it was inconsistent with an earlier, on-point decision, *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011), or if it has been overturned—or its rationale "eviscerated"—by a subsequent decision of the Supreme Court or of this court sitting *en banc*, *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988). Bannon has not identified any such case. To the contrary, every case that addresses the mental state required for a contempt of Congress conviction firmly supports *Licavoli*'s holding.

Recall that Section 192 criminalizes not only "willfully mak[ing] default"—the clause at issue in

Licavoli and this case—but also—in a second clause—the conduct of one "who, having appeared, refuses to answer any question pertinent to the question under inquiry." 2 U.S.C. § 192. As *Licavoli* itself observed, the Supreme Court had already held that the latter clause requires only a deliberate and intentional refusal to answer. *See* 294 F.2d at 207–08. For example, in *Sinclair v. United States*, 279 U.S. 263 (1929), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court held that a conviction under that clause requires only an "[i]ntentional violation"; no "moral turpitude" is required and assertions that a defendant "acted in good faith on the advice of competent counsel" are "no defense." *Id*. at 299. *Quinn v. United States*, 349 U.S. 155 (1955), reached the same result: Section 192's latter clause requires only "a deliberate, intentional refusal to answer." *Id*. at 165; *see also Yellin v. United States*, 374 U.S. 109, 123 (1963); *Watkins v. United States*, 354 U.S. 178, 208 (1957); *United States v. Helen Bryan* ("*Helen Bryan*"), 339 U.S. 323, 330 (1950); *Fields v. United States*, 164 F.2d 97, 101 (D.C. Cir. 1947). Although the "refusal to answer" clause does not use the term "willfully," *Licavoli* rejected the argument that the presence of the adverb in one clause but not the other counseled any different approach to the mental state required when a subpoena recipient refuses to appear altogether instead of appearing but refusing to answer pertinent questions. *See* 294 F.2d at 208. Bannon offers no challenge to that rationale—which would bind us in any event—in this appeal.

Moreover, cases addressing Section 192 have explained why, as a practical matter, requiring evidence of bad faith would undermine the statute's function. The ability to effectively enforce subpoenas is critical to Congress's power of inquiry, which is in turn essential to Congress's ability to legislate "wisely and effectively." *Quinn*, 349 U.S. at 160–61. And effectively enforcing congressional subpoenas would be exceedingly difficult if contempt charges required showing that a failure to appear or refusal to answer questions was not just deliberate and intentional, but also done in bad faith. Otherwise, any subpoenaed witness could decline to respond and claim they had a good-faith belief that they need not comply, regardless of how idiosyncratic or misguided that belief may be. As the Supreme Court has colorfully put it, a "subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." *Helen Bryan*, 339 U.S. at 331. "If that were the case, . . . the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity." *Id*.

In the face of that authority, Bannon cites cases that do not undermine *Licavoli*, much less to the degree required for this panel to even consider departing from that decision. Importantly, the cases Bannon cites do not address Section 192 or contempt charges at all, but instead interpret the word "willfully" in *other* criminal statutes to require more than a deliberate and intentional act. For example, in some criminal statutes, "willful" conduct requires that the defendant act with

a "bad purpose," meaning with "knowledge that his conduct was unlawful." *Sillasse Bryan v. United States* ("*Sillasse Bryan*"), 524 U.S. 184, 191–92 (1998) (quotation omitted) (interpreting 18 U.S.C. § 924(a)(1)(D), which criminalizes unlawfully dealing in firearms without a license); *Ratzlaf v. United States*, 510 U.S. 135, 140–50 (1994) (interpreting 31 U.S.C. §§ 5322, 5324, which prohibit willfully structuring cash transactions for the purpose of evading reporting requirements); *United States v. Burden*, 934 F.3d 675, 680, 689–93 (D.C. Cir. 2019) (interpreting the "willful[]" violation of a provision prohibiting the export of defense articles without a license). But that is at most a "general" rule. *Sillasse Bryan*, 524 U.S. at 191. As those same cases explain, "willful" "is a 'word of many meanings,'" and "'its construction is often . . . influenced by its context.'" *Ratzlaf*, 510 U.S. at 141 (alteration omitted) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)); *see also Sillasse Bryan*, 524 U.S. at 191 (noting that construction of word "willfully" in statutes "is often dependent on the context in which it appears"). Because statutory context is critical, nothing in the authorities Bannon relies upon calls into question this court's longstanding interpretation of "willfully" in Section 192 as requiring a deliberate, intentional failure to respond to a subpoena.[1]

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[1] At oral argument, Bannon's counsel identified our pre-*Licavoli* decision in *Townsend v. United States*, 95 F.2d 352 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938), as the strongest reason why we should not apply *Licavoli*. Oral Arg. Tr. 5:10–7:8; 35:3–14. Unlike the cases interpreting "willfully" that Bannon cited in his briefs, that decision does address Section 192. But it only further

Finally, Bannon argues that applying *Licavoli* to disallow his advice of counsel defense would raise constitutional concerns because his counsel's advice was that then-former President Trump had asserted executive privilege. This case, however, provides no occasion to address any questions regarding the scope of executive privilege or whether it could have excused Bannon's noncompliance in these circumstances. President Trump did not communicate an intent to invoke executive privilege to the Committee, and Bannon never raised executive privilege as an affirmative defense to the contempt charges in district court. *See* J.A. 3017 (district court similarly observing that whether executive privilege excused Bannon from complying with the subpoena was "unteed-up").[2] The argument Bannon preserved and presses on appeal is confined to disputing the mental state required for a contempt of Congress conviction. It raises no constitutional question to reaffirm *Licavoli*'s holding that a deliberate and intentional refusal to honor a congressional subpoena violates federal law.

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confirms *Licavoli*'s holding and ours. *Townsend* acknowledged that the meaning of "willfully" depends on the specific "statute in which it is used," and concludes, contrary to Bannon's position, that "deliberately" refusing to comply with a congressional subpoena violates Section 192. 95 F.2d at 361.

[2] In a July 2022 letter to Bannon, President Trump claimed that he had previously invoked executive privilege, but that letter was written long after Bannon had already failed to comply with the subpoena in October 2021.

B

Bannon also sought to mount what he parses as three affirmative defenses—all based on the assertion that the government authorized his default—which he labels entrapment by estoppel, public authority, and apparent authority. Bannon advanced a common theme to support those defenses: that his noncompliance was justified because he relied on directives from then-former President Trump and a collection of opinions from the Department of Justice's Office of Legal Counsel ("OLC"). The district court concluded that none of the defenses supported dismissing the indictment and that Bannon was not entitled to a jury instruction on the defenses either. Our review is again *de novo*. *See United States v. Williamson*, 903 F.3d 124, 132 (D.C. Cir. 2018).

These defenses stem from fairness concerns with prosecuting someone who reasonably relies on a government official's advance assurance that their conduct would be legal or on a government official's authorization of illegal conduct. For example, where a federal agency "affirmatively misled" regulated entities into believing certain specific conduct was lawful, the Supreme Court held that prosecuting the entities for that very conduct would offend "traditional notions of fairness inherent in our system of criminal justice." *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973). Accordingly, these government authorization defenses require the defendant to show (in addition to other elements we need not address) that the government affirmatively authorized the defendant's conduct—here, Bannon's refusal to produce

any documents or testify in response to the Select Committee's subpoena. *See Cox v. Louisiana*, 379 U.S. 559, 569–71 (1965); *Raley v. Ohio*, 360 U.S. 423, 424–25 (1959); *United States v. Alvarado*, 808 F.3d 474, 484–85 (11th Cir. 2015); *United States v. W. Indies Transp., Inc.*, 127 F.3d 299, 313 (3d Cir. 1997).

Bannon cannot show such authorization here. Neither the communications from former President Trump's counsel nor the OLC opinions purported to authorize Bannon's refusal to produce any documents or appear for his deposition.

First, the statements from President Trump's counsel, Justin Clark. We need not decide if a former government official can provide the requisite authorization because, as the record demonstrates, President Trump did not, in fact, authorize Bannon's refusal to respond to the subpoena. Clark's initial October 6 letter to Bannon's counsel nowhere suggested that Bannon should categorically refuse to respond to the subpoena. It stated that the subpoena "includ[ed]" requests for information "potentially" protected by executive privilege and instructed Bannon to, "where appropriate," invoke any privileges he "may have." J.A. 444. When Clark learned that Bannon was refusing to comply with the subpoena entirely, he followed up on October 14, disclaiming that President Trump had directed Bannon to do so. Most pointedly, Clark reiterated on October 16 that his earlier letter "didn't indicate that we believe there is immunity from testimony for your client" and concluded: "As I indicated to you the other day, we don't believe there is." J.A. 448. The letters, in short, explicitly

communicate the opposite of what Bannon asserted to the Committee.

Second, the OLC opinions. We similarly need not decide whether and in what circumstances OLC opinions can support a government authorization defense because none of the cited opinions license Bannon's refusal to produce any documents or appear to testify. Cases finding government authorization of criminal conduct have typically involved a single government statement directed to the defendant, or at least to a class of individuals that includes the defendant, authorizing a specific course of conduct. *See, e.g.*, *Pa. Indus. Chem. Corp.*, 411 U.S. at 674.

Here, the OLC opinions Bannon cites involve a variety of situations where OLC concluded executive privilege could be properly invoked. But, as the district court correctly observed, none of the opinions address a situation resembling Bannon's: a congressional committee subpoena for communications "between a nongovernmental employee and a President who, at the time of the Subpoena, was no longer in office and had not clearly directed the Subpoena recipient to decline to comply altogether." J.A. 2351–52. Further, none of the opinions addressed communications between a private citizen subpoena recipient and other private citizens. Here, only a small subset of the subpoena topics even referenced communications with President Trump or his staff—the rest concerned Bannon's communications with individuals outside the White House not even arguably subject to executive privilege.

Reflecting the fact that the OLC opinions are meaningfully distinguishable from this situation, Bannon resorts to arguing that his lawyer concluded his nonresponse was authorized by interpreting the "principles" and "rationale underlying" at least fifteen different OLC opinions and statements. Reply Br. 11, 15; *see also id*. 10–18. That Bannon can point only to his lawyer's interpretation of underlying principles and rationales, rather than any specific statement from the government, confirms that Bannon's government authorization defenses are each essentially a repackaged advice of counsel defense. As we have explained, Section 192 permits no such defense.

C

Bannon also argued that his contempt charges should be dismissed because the Select Committee's subpoena was invalid for both substantive and procedural reasons. The district court concluded that these challenges did not warrant dismissing the indictment and precluded Bannon from introducing evidence he claimed supported them. We review the denial of the motion to dismiss *de novo, United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005), and the district court's exclusion of evidence for abuse of discretion, *United States v. Hall*, 945 F.3d 507, 514 (D.C. Cir. 2019). Bannon's challenges fail.

1

A congressional committee may use its investigative power only for a "valid legislative purpose." *Quinn*, 349 U.S. at 161. Bannon contends that the Select Committee lacked such a purpose in issuing its

subpoena to him. We have already held that the Select Committee, as a general matter, "plainly has a valid legislative purpose" because "its inquiry concerns a subject on which legislation could be had." *Trump v. Thompson*, 20 F.4th 10, 41–42 (D.C. Cir. 2021) (quotation marks and alteration omitted) (quoting *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020)), *cert. denied*, 142 S. Ct. 1350 (2022); *see also id*. at 24–25. As we explained in *Thompso*n, the Committee's investigation into the events of January 6 could inform a range of legislation, and House Resolution 503 explicitly authorizes the Select Committee to propose legislation in light of its investigation. *Id*. at 41–42.

Bannon makes no argument that the subpoena's subject matter is unrelated to that authorized investigation. Nor could he. As the indictment explains, based on public reports, the Committee believed Bannon had information "relevant to understanding important activities that led to and informed" the events of January 6, and the information the subpoena sought was relevant to those events. J.A. 39–40.

Instead, Bannon argues that even if the Select Committee *could* have had a valid legislative purpose in seeking this information from him, his subpoena was invalid because the Select Committee's members *actually* acted for assertedly improper reasons, namely to target him and send a message to other potential witnesses. But this argument too runs headlong into settled law. The Supreme Court has made "clear that in determining the legitimacy of a congressional act[,] we do not look to the motives alleged to have prompted it." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508

(1975); *accord Barenblatt v. United States*, 360 U.S. 109, 133 (1959) (declining to inquire into motives of committee members); *Watkins*, 354 U.S. at 200 (same). What matters is whether the subpoena is objectively related to a valid legislative purpose. This one was.

2

Bannon also raised several procedural objections to the subpoena: that the Select Committee lacked the thirteen members and ranking minority member required by House Resolution 503, and that he should have received a copy of House Rule 3(b) (describing committee deposition authority) with the subpoena. These objections suffer from a common defect: Bannon did not raise them before the Select Committee and therefore forfeited them.

It is undisputed that the first time Bannon raised these arguments was in district court, long after his deadline for responding to the subpoena had passed. Bannon Br. 54–56. A witness cannot defend against a contempt of Congress charge based on an affirmative defense that they were able, but failed, to raise at the time they were ordered to produce documents or appear. *Helen Bryan*, 339 U.S. at 332–35. This rule promotes "a decent respect for the House of Representatives" and ensures that a committee has an appropriate opportunity to remedy any claimed procedural deficiencies in its subpoenas. *Id*. at 332. As the Supreme Court has observed: "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *Id*. at 333.

Bannon argues that his failure to raise these objections at the time he was ordered to appear and produce documents should nevertheless be excused on either of two grounds. Neither applies here.

First, objections going to the elements of the contempt offense—the facts that the government must prove to secure a conviction—cannot be forfeited. *See id*. at 328–29; *Deutch v. United States*, 367 U.S. 456, 468–72 (1961). But none of the procedural defects Bannon alleges are elements of the Section 192 offense. As the district court instructed the jury here, to establish a Section 192 violation, the government was required to prove that Bannon was subpoenaed by the Select Committee to testify or produce papers, the subpoena sought testimony or information pertinent to the investigation the Select Committee was authorized to conduct, Bannon failed to comply with the subpoena, and his failure to comply was willful. A committee's compliance with procedural rules is not an aspect of any of these elements. *See Helen Bryan*, 339 U.S. at 330–35. Bannon's procedural arguments are therefore at best affirmative defenses that he failed to preserve by not raising them to the Committee. *See, e.g., id*. at 328–29 (government need not prove committee quorum as an element of contempt); *Liveright v. United States*, 347 F.2d 473, 475 (D.C. Cir. 1965) (committee's failure to comply with authorizing resolution is "valid defense" to contempt); *see also Yellin*, 374 U.S. at 123 (refusing to answer committee question based on rule violation would be a "defense").

Bannon suggests that compliance with procedural rules is part of the second element: congressional

authority and pertinency. Not so. Authority is a question of whether a committee was "duly empowered" to investigate and "the inquiry was within the scope of the grant of authority." *United States v. Seeger*, 303 F.2d 478, 482 (2d Cir. 1962). And pertinency is a question of whether witness questions in fact related to a matter the committee was authorized to investigate. *Bowers v. United States*, 202 F.2d 447, 448 (D.C. Cir. 1953). None of Bannon's procedural contentions bear on whether House Resolution 503 gave the Select Committee the authority to investigate the January 6th attack or whether the subpoena issued to Bannon related to that investigation. Because Bannon's contentions about compliance with procedural rules are not elements of the offense, they can be—and have been— forfeited.

Second, Bannon's failure to raise these arguments before the Select Committee could be excused if the grounds for them were not apparent at the time he was ordered to appear and produce documents. *Cf. Yellin*, 374 U.S. at 122–23 (excusing failure to raise procedural objection where defendant was "unable" to discern violation prior to trial); *Shelton v. United States*, 404 F.2d 1292, 1300 (D.C. Cir. 1968). But that exception has no application here either. Bannon never contests the government's assertion that the composition of the Select Committee was widely reported at the time. And if Bannon wished to argue that he was entitled to a copy of Rule 3(b) with the subpoena, he was indisputably aware of the fact that it had not been provided—indeed, the subpoena's attachments explained that he would receive a copy of that rule when he appeared to testify.

Because the subpoena advanced a valid legislative purpose and Bannon forfeited his procedural objections to it, the district court did not err in denying the motion to dismiss the indictment and excluding evidence supporting those objections as irrelevant. Accordingly, the district court also did not err in instructing the jury to disregard a reference that Bannon's counsel made in his closing argument to Rule 3(b).

D

Finally, Bannon challenges the district court's rulings quashing trial subpoenas that he served on Select Committee members, staffers, counsel, and three House leaders. The district court held that most of the testimony and documents sought were protected by the Constitution's Speech or Debate Clause and that any information not covered by the Clause was irrelevant. Bannon then moved to dismiss, arguing that quashing resulted in a one-sided presentation of evidence that violated his Fifth and Sixth Amendment rights. The district court, after considering Bannon's detailed proffer, denied his motion because the information Bannon sought was not material to the charges or defenses properly before the jury. We again review the denial of Bannon's motion to dismiss *de novo, Yakou*, 428 F.3d at 246, and the district court's evidentiary rulings for abuse of discretion, *Hall*, 945 F.3d at 514.

We conclude that none of the information sought in the trial subpoenas was relevant to the elements of the contempt offense, nor to any affirmative defense Bannon was entitled to present at trial. We accordingly

need not consider whether the Speech or Debate Clause also protects the sought-after information from disclosure.

As discussed above, Bannon sought to put to the jury several arguments that the district court properly excluded: that the underlying subpoena was invalid because of the political motives of Select Committee members and procedurally flawed based on the Select Committee's composition and Bannon's non-receipt of a copy of Rule 3(b). Bannon's trial subpoenas sought information related to those arguments. He sought, for example, information about the subjective motives or bias of Select Committee members and their thinking behind issuing the subpoena to Bannon and communicating with his counsel. Because the district court properly concluded those arguments were irrelevant, it made no error in quashing trial subpoenas seeking information to support them.

At oral argument, when asked to identify Bannon's strongest example of purportedly relevant information sought in the trial subpoenas, Bannon's counsel identified a request for testimony from Select Committee Chairman Bennie Thompson about his letters to Bannon urging Bannon to comply with the subpoena even after the initial deadline for a response. Oral Arg. Tr. 8:22–9:8. The district court reasonably concluded that any testimony from Chairman Thompson about his letters to Bannon would be irrelevant. The district court acknowledged that Bannon could argue to the jury that he believed the subpoena dates were malleable, such that his noncompliance by the specified dates was not a

deliberate and intentional default. But what an individual member of the Select Committee thought—even the chairman—does not go to Bannon's state of mind. As the district court observed, it is *Bannon's* understanding of the dates that matters. Bannon's counsel conceded that all the information Bannon had from the Select Committee was reflected in the letters themselves, which were entered into evidence. That this is Bannon's strongest example illustrates the broader conclusion that none of what Bannon sought in the trial subpoenas went to elements of the contempt offense or any affirmative defense Bannon was entitled to present.

Bannon's arguments that the district court violated his rights to compulsory process or due process by quashing his trial subpoenas and denying his motion to exclude all congressional testimony also fail for the same reasons. Both claims require Bannon to show that "the evidence lost would be . . . material" to his defense. *United States v. Verrusio*, 762 F.3d 1, 23 (D.C. Cir. 2014) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982)). As explained, he cannot make that showing.[3]

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[3] We decline to reach Bannon's wholly undeveloped argument that quashing the trial subpoenas violated his rights to effective assistance of counsel and confrontation. *See, e.g., Ramsey v. U.S. Parole Comm'n*, 840 F.3d 853, 863 n.6 (D.C. Cir. 2016) (even assuming a claim was preserved in district court, "perfunctory appellate briefing does not suffice to raise it in this Court").

III

The judgment of conviction and sentence under 2 U.S.C. § 192 is affirmed.

So ordered.

APPENDIX B

United States District Court
for the District of Columbia

UNITED STATES OF AMERICA,

v.

STEPHEN K. BANNON,

Defendant.

Criminal Action No. 1:21-cr-00670 (CJN)

ORDER

Pending before the Court is the government's Motion in Limine to Exclude Evidence or Argument Relating to Good-Faith Reliance on Law or Advice of Counsel, ECF No. 29. For the reasons given on the record at the March 16 hearing and discussed below, the Court grants the Motion.

In *Licavoli v. United States*, the Court of Appeals held:

> Since, as we have remarked, it has been established since the *Sinclair* case, *supra*, that reliance upon advice of counsel is no defense to a charge of refusing to answer a question, *such reliance is not a defense to a charge of failure to respond [to a Congressional subpoena]. The elements of intent are the same in both cases. All that is needed in either event is a deliberate*

> *intention to do the act*. *Advice of counsel does not immunize that simple intention*. *It might immunize if evil motive or purpose were an element of the offense*. *But such motive or purpose is not an element of either of these offenses*. We are of opinion that the doctrine laid down in *Sinclair* applies also to a charge of willfully making default. *Advice of counsel cannot immunize a deliberate, intentional failure to appear pursuant to a lawful subpoena lawfully served*.
>
> In the case at bar there can be no serious dispute about the deliberate intention of Licavoli not to appear before the Committee pursuant to its subpoena. That he meant to stay away was made abundantly clear. That he did so upon the advice of a lawyer is no defense. The trial judge correctly instructed the jury.

294 F.2d 207, 209 (D.C. Cir. 1961) (emphasis added).

In his opposition to the government's Motion, Bannon argued that *Licavoli* was no longer binding on this Court. *See* Def.'s Opp. to Gov't Mot. in Limine, ECF No. 30, at 13–14. At the March 16 hearing, the Court rejected these arguments, holding that:

> The defendant offered two reasons in his brief why this Court should ignore the holding of *Licavoli*, but neither of those arguments is persuasive.
>
> First, defendant claims *Licavoli* relied on bad law, specifically the now- disavowed Supreme

> Court case of *Sinclair v. United States*. It is true that subsequent Supreme Court cases have cut back on some of the holdings of *Sinclair*, but not the holding that *Licavoli* relies on.
>
> And even if the Supreme Court had done so, the defendant has cited to no authority[,] and the Court has located none of its own, that would allow me to ignore otherwise binding precedent, just because some of the cases on which it relied are no longer good law.
>
> Second, the defendant notes that in the six [ ] decade[s] since *Licavoli*, the Supreme Court has provided clarity on the meaning of 'willfully' in criminal statutes. Clarity that favors defendant. That might very well be true. But none of that precedent dealt with the charge under 2 U.S. Code. Section 192. *Licavoli* did. Thus, while this precedent might furnish defendant with arguments to the Court of Appeals on why *Licavoli* should be overruled, this court has no power to disregard a valid and on-point or seemingly on-point holding from a higher court.

Trans. of Oral Arg., March 16, 2022 ("Trans."), at 88:15–89:12.

But at the hearing, Bannon also raised a new argument: that *Licavoli* is inapplicable because it did not involve a claim of executive privilege. *See id*. at 89:13–90:16. Since this argument had not been briefed, the Court asked the parties for supplemental briefing. *See* Def.'s Supp, Br. in Opp. (Def.'s Supp."), ECF No.

41; United States' Resp. to Def.'s Supp. Br. ("Gov't Resp."), ECF No. 43.

In his supplemental brief, Bannon notes the differences between his reliance on a claimed invocation of executive privilege and *Licavoli*, which included no claim of privilege. *See* Def.'s Supp. at 1–7. And Bannon argues that, because this case involves an inter-branch dispute, while *Licavoli* did not, it is not binding here. *See id*. at 7–10. The government disagrees. It argues that *Licavoli*'s rejection of the advice of counsel defense turned on the *mens rea* element of 2 U.S.C. § 192, which cannot be different depending on the specific circumstances of the case, and which requires proof only of a deliberate and intentional failure to appear or produce records. *See* Gov't Resp. at 2–4.[1] As the government puts it, "[b]y advocating to allow him to raise an advice-of- counsel defense in his case, even though it is not available to others charged with contempt of Congress, the Defendant necessarily is advocating that the intent element of the offense should change depending on the factual circumstances of the crime." *Id*. at 4. And, the government argues, the differences that Bannon points to do not relate to the *mens rea* element or an advice- of-counsel defense. *See id*. at 5–9.

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[1] Other courts have held that 2 U.S.C. § 192 requires only a deliberate and intentional failure to appear or produce records. *See, e.g., United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Fleischman*, 339 U.S. 349 (1950); *Dennis v. United States*, 171 F.2d 986, 990–91 (D.C. Cir. 1948); *Fields v. United States*, 164 F.2d 97, 99–100 (D.C. Cir. 1947).

The Court agrees with the government. As the Court noted at the March 16 hearing, "[i]f this were a matter of first impression, the Court might be inclined to agree with defendant and allow this evidence in." Trans. at 87:11–13. But for the reasons stated on the record during the March 16 hearing, *Licavoli* remains binding, and Bannon has failed to demonstrate that it is inapplicable here. After all, *Licavoli* involved a prosecution under the exact statute that Bannon is charged with violating, *see Licavoli*, 294 F.2d at 207, and the Court of Appeals expressly held that an advice-of-counsel defense is unavailable for that charge. *See id* at 207–09. Just as important, the Court of Appeals rejected the availability of that defense because of the *mens rea* required for a violation of 2 U.S.C. § 192, and Bannon has provided no reason to believe that the *mens rea* element can or should be different depending on the circumstances of specific cases.[2]

Accordingly, it is

ORDERED that the government's Motion in Limine to Exclude Evidence or Argument Relating to Good-Faith Reliance on Law or Advice of Counsel, ECF No. 29, is **GRANTED**.

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[2] Because the Court concludes that the government is correct, it need not reach the question whether Bannon waived the arguments in his supplemental brief by failing to include them in his original opposition to the government's Motion.

DATE: April 6, 2022

/s/ Carl J. Nichols
CARL J. NICHOLS
United States District Judge

APPENDIX C

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN K. BANNON,

Appellant

No. 22-3086

September Term, 2023
(No 1:21-cr-00670-1)
Filed On: June 20, 2024

ORDER

BEFORE: Pillard, Walker*, and Garcia, Circuit Judges

Upon consideration of appellant's emergency motion for release pending appeal, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Stephen Bannon's ground for requesting release does not

* A statement by Circuit Judge Walker, dissenting from this order, is attached.

warrant a departure from the general rule that a defendant "shall . . . be detained" following conviction and imposition of a sentence of imprisonment. 18 U.S.C. § 3143(b)(1). In addition to other requirements not in dispute, a stay applicant must raise "a substantial question of law or fact likely to result in (i) reversal [or] (ii) an order for a new trial." 18 U.S.C. § 3143(b)(1). Only "a close question or one that very well could be decided the other way" counts as substantial. *United States v. Perholtz*, 836 F.2d 554, 556 (D.C. Cir. 1988). Our unanimous panel opinion explains why no such close question is present here.

Bannon was convicted of the misdemeanor of "willfully making default" in response to a congressional subpoena in violation of 2 U.S.C. § 192. He argues that the Supreme Court, or this court sitting en banc, is likely to overrule our squarely applicable decision in *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), for failure to impose a sufficiently stringent requirement of proof that the summoned witness "willfully" refused to appear. Under *Licavoli*, proof of a deliberate and intentional default establishes the requisite willfulness. That standard precludes Bannon's sole asserted defense—that he relied in good faith on advice of counsel. *Id.*; *United States v. Bannon*, 101 F.4th 16, 21–23 (D.C. Cir. 2024). It was enough that Bannon knew what the subpoena required yet intentionally refused to appear or to produce any of the requested documents.

Bannon observes that *Licavoli* does not bind the Supreme Court, but much more than *Licavoli* stands between Bannon and the requested stay. As our

unanimous opinion explains in more detail, the Supreme Court has treated the willfulness requirement of the contempt of Congress statute in ways that "firmly support[] *Licavoli*'s holding." 101 F.4th at 21. Indeed, the Supreme Court has interpreted Section 192 in the same way this court did in *Licavoli*, requiring only that a defendant act "deliberately and intentionally" to be guilty of willful default. *United States v. Helen Bryan*, 339 U.S. 323, 328 (1950); *see also Flaxer v. United States*, 358 U.S. 147, 151 (1958).

The distinct wording and functional relationship of two clauses of the contempt statute further supports the established understanding of "willfully." The first clause (at issue here) applies to those who "willfully make[] default" by refusing to respond to a subpoena at all, and the second clause applies to a witness who appears but "refuses to answer any question," without specifying that it be done willfully. 2 U.S.C. § 192. The Supreme Court has repeatedly held that a conviction under the latter clause requires only a "deliberate, intentional refusal to answer" questions. *Quinn v. United States*, 349 U.S. 155, 165 (1955); *see also Bannon*, 101 F.4th at 21–22 (collecting cases). The first clause imposes no higher burden despite its use of the term "willfully"; as we explained in *Licavoli*, the varied wording reflects the practical reality that a physically present witness's refusal to answer a question posed is necessarily willful, whereas a failure to appear or provide responsive documents could be attributed to various "causes other than deliberate intention," such as "illness, travel trouble, [or] misunderstanding." 294 F.2d at 208.

Bannon's proposal—that to prove willful default the government must establish that the witness knew that his conduct was unlawful—cannot be reconciled with the Supreme Court's approach to the statute. If an assertion of good-faith reliance on advice of counsel excused a witness's wholesale noncompliance, even as it is plainly unavailable to a more cooperative witness who appears but refuses to answer certain questions, Congress's power of inquiry would be "nulli[fied]." *Helen Bryan*, 339 U.S. at 331.

Bannon's argument reduces to the observation that the Supreme Court has read the word "willful" in other criminal statutes to call for different proof. *See Bannon*, 101 F.4th at 22. But the Supreme Court has also consistently recognized that "'willful[]' . . . is 'a word of many meanings,' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). He provides no basis to conclude that a higher court is likely to upend the established understanding of "willfully" in the context of contempt of a clear duty to respond to congressional subpoenas.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

WALKER, *Circuit Judge*, dissenting:

For the following reasons, I respectfully dissent from the order denying the emergency motion for release pending appeal.

* * *

Stephen Bannon did not respond to a congressional subpoena. He was then convicted of contempt of Congress. *See* 2 U.S.C. § 192 ("Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry . . . willfully makes default . . . shall be deemed guilty of a misdemeanor.").

On appeal, Bannon challenged his conviction "on the ground that he reasonably believed — based on advice of counsel — that he did not have to respond [to the subpoena]. He argued below and on appeal that 'willfully' making default in violation of 2 U.S.C. § 192 requires bad faith — that the defendant must know that his conduct violated the law." *United States v. Bannon*, 101 F.4th 16, 21 (D.C. Cir. 2024).

Bannon's appeal failed because "*Licavoli* directly rejects Bannon's challenge." *Id*. (citing *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961)). *Licavoli* held that "deliberate" and "intentional" conduct is "willful[ ] " under Section 192. *Licavoli*, 294 F.2d at 208. And Bannon's conduct was "intentional" and "deliberate."

Now, Bannon plans to file a petition for certiorari with the United States Supreme Court. In the motion

before us, he argues that he should not begin his prison sentence before that certiorari process plays out.

For support, Bannon observes that the panel discussed more recent Supreme Court precedents that interpret "willfully" to require proof that a defendant acted with a "'bad purpose,' meaning with 'knowledge that his conduct was unlawful.'" *Bannon*, 101 F.4th at 22 (quoting *Sillasse Bryan v. United States*, 524 U.S. 184, 191-92 (1998)). Those subsequent Supreme Court decisions arguably establish "a 'general' rule" in some tension with this circuit's earlier decision in *Licavoli*. *Id*. (quoting *Sillasse Bryan*, 524 U.S. at 191).

At least in part, as Bannon correctly says in this emergency application, "the panel felt obliged to disregard the Supreme Court's '"general" rule' because *Licavoli* remained binding in this Circuit. The Supreme Court itself will have no such obstacle, however." Bannon Br. 4 (citing *Bannon*, 101 F.4th at 22).

For a court unbound by *Licavoli*, like the Supreme Court, the proper interpretation of "willfully" in Section 192 is "a 'close' question or one that very well could be decided the other way." *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987).

That close question may well have mattered at Bannon's trial. The district court described *Licavoli* as a case "on which at least some of my trial determinations about mens rea and the like have turned." Transcript of Motion Hearing at 6, Dkt. 199, *United States v. Bannon*, No. 1:21-CR- 670 (D.D.C. June 6, 2024); *cf. United States v. Sheehan*, 512 F.3d 621, 631 (D.C. Cir. 2008) ("eliminat[ing] the

prosecutor's burden of proving *mens rea*" is "a serious constitutional error").

Because the Supreme Court is not bound by *Licavoli*, because *Licavoli*'s interpretation of "willfully" is a close question, and because that question may well be material, Bannon should not go to prison before the Supreme Court considers his forthcoming petition for certiorari. *Cf. McDonnell v. United States*, 576 U.S. 1091 (2015).

APPENDIX D

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN K. BANNON,

Appellant

No. 22-3086

Appeal from the United States District Court
for the District of Columbia
(No 1:21-cr-00670-1)

Filed: May 27, 2025

On Petition for Rehearing En Banc

Before: SRINIVASAN, *Chief Judge*; HENDERSON***, MILLETT, PILLARD**, WILKINS**, KATSAS*, RAO***, WALKER***, CHILDS, PAN**, and GARCIA**, *Circuit Judges*

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, the amicus curiae brief filed by the U.S. House of

Representatives in support of neither party, and appellant's 28(j) letter, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* A statement by Circuit Judge Katsas respecting the denial of rehearing en banc, is attached.

** A statement by Circuit Judge Garcia, joined by Circuit Judges Pillard, Wilkins and Pan, concurring in the denial of rehearing en banc, is attached.

*** Circuit Judges Henderson, Rao, and Walker would grant the petition for rehearing en banc.

A statement by Circuit Judge Rao, joined by Circuit Judge Henderson in full, and Circuit Judge Walker with respect to Part II (limited to the question of whether to overrule *Licavoli*), dissenting from the denial of rehearing en banc, is attached.

Statement of *Circuit Judge* KATSAS respecting the denial of rehearing *en banc*: Congress has made it a crime for any person to "willfully" default on a congressional subpoena. 2 U.S.C. § 192. This case presents the question whether that offense reaches individuals who default on congressional subpoenas without knowledge of wrongdoing, such as those who honestly but mistakenly believe that a privilege protects the subpoenaed items from compelled disclosure.

When interpreting criminal statutes, the Supreme Court "consistently" has construed the term *willfully* to require that a defendant "acted with knowledge that his conduct was unlawful." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 n.9 (2007) (cleaned up); *see, e.g., Sillasse Bryan v. United States*, 524 U.S. 184, 191–92 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200–01 (1991). These decisions cast significant doubt on *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), which held that good-faith "reliance upon advice of counsel" does not foreclose criminal liability under section 192. *See id.* at 207–09 ("Evil motive is not a necessary ingredient of willfulness under this clause of the statute."). As the dissent persuasively explains, *post* at 15–18, the prosecution of former Executive Branch officials for good-faith but mistaken privilege assertions raises questions that are troubling, important, and likely to recur. That concern, plus the significant tension between *Licavoli* and more recent Supreme Court decisions, supports a plausible case for rehearing *en banc*.

Nonetheless, *Licavoli* finds support in an earlier Supreme Court decision, *United States v. Helen Bryan*, 339 U.S. 323 (1950). There, a defendant refused to comply with a congressional subpoena because, "after consulting with counsel," she "came to the conclusion" that the committee at issue "had no constitutional right" to issue the subpoena. *See id.* at 325 (cleaned up). Yet the Supreme Court upheld the conviction, stating that the government makes out "a *prima facie* case of wilful default" by showing that the defendant "intentionally failed to comply" with a congressional subpoena. *Id.* at 330. Moreover, the Court did so without probing either the sincerity or the reasonableness of the defendant's belief that the subpoena was unconstitutional.

If section 192 authorizes criminal liability for good-faith but mistaken assertions of unconstitutionality, then it likewise must authorize liability for good-faith but mistaken assertions of privilege. In other words, the current breadth of section 192 traces as much to *Helen Bryan* as to *Licavoli*. So, any problematic overbreadth is something that only the Supreme Court can fix.

GARCIA, *Circuit Judge*, with whom Circuit Judges PILLARD, WILKINS, and PAN join, concurring in the denial of rehearing en banc: Stephen Bannon did not respond to a congressional subpoena and was convicted of "willfully mak[ing] default" in violation of 2 U.S.C. § 192, the contempt-of-Congress statute. *See United States v. Bannon,* 101 F.4th 16, 18–20 (D.C. Cir. 2024). Bannon argued that his default was not "willful" because he acted in good-faith reliance on his counsel's advice that the subpoena sought privileged information. *See id.* at 21. A panel of our court rejected that argument as foreclosed by *Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961), which held that any "deliberate, intentional failure" to respond constituted "willful[]" default under Section 192. *Id.* at 208. Bannon now asks the en banc court to revisit that long-settled interpretation.

As Judge Katsas describes, *Licavoli*'s holding stems from the Supreme Court's earlier opinion in *United States v. Helen Bryan*, 339 U.S. 323 (1950). Thus, if there are any doubts about the proper interpretation of "willful" in this statute, they are for the Supreme Court to resolve. I write separately only to briefly explain that there are compelling arguments that *Helen Bryan* and *Licavoli* were correctly decided.

Bannon is right that in criminal statutes the word "willful" is usually construed to require bad faith. *See Bannon*, 101 F.4th at 22–23 (collecting cases). "Willful," however, "is a word of many meanings, and its construction is often influenced by its context." *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (cleaned up). Thus, "willful" can at times "denote[] an intentional as distinguished from an accidental act." *Browder v. United States*, 312 U.S. 335, 342 (1941); *see*

Cheek v. United States, 498 U.S. 192, 208–09 (1991) (Scalia, J., concurring in the judgment) ("One may say, as the law does in many contexts, that 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful.").

Here, statutory context indicates that "willful" default requires only deliberate conduct. Section 192 criminalizes two acts: (1) "willfully mak[ing] default" by failing to respond to a congressional subpoena and (2) "appear[ing]" before a congressional committee but "refus[ing] to answer any [pertinent] question." 2 U.S.C. § 192. The first offense includes a "willfulness" requirement, but the second does not. As Bannon sees it, then, a conviction for failing to appear at all would require a showing of bad faith, but a conviction for appearing and refusing to answer relevant questions would not.

I am skeptical that Congress intended to enact such a scheme. Imagine a witness who genuinely believed his lawyer's advice that a privilege justified refusing to testify on subjects listed in a subpoena. On Bannon's reading, that witness could not be convicted if he declined to appear before a congressional committee altogether. Yet he could be convicted if he appeared but declined to answer specific questions based on the same advice. That construction makes little sense. Why would Congress have made it harder to convict a witness for the more obstructive conduct of categorically refusing to appear, but easier to convict a witness who appears but declines to answer certain questions? Worse, why would such a witness ever appear, when doing so would place him at higher risk of prosecution and conviction? By simply declining to participate, the subpoenaed witness would put the

government to the added burden of disproving his subjective belief that a privilege applied.*

Bannon has not tenably explained why Congress would pass a law that encourages less-cooperative conduct. His reading is especially perplexing given that the purpose of the contempt-of-Congress statute is to facilitate congressional inquiry. *See, e.g., Helen Bryan*, 339 U.S. at 329, 331.

The strongest response would be that the statute's plain text nonetheless requires Bannon's reading, despite the perverse incentives it creates. After all, the term "willfully" appears in only the make-default portion of the statute, we presume Congress's selective usage of the term was intentional, and we must give that choice effect. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983). So, the argument goes, if the make-default and refuse-to-answer prongs have the same mens rea requirement, Congress may as well have not included the word "willfully" at all.

I am unpersuaded. "Willfully" does work in Section 192 even if it includes "deliberate, intentional" acts, because it precludes reading the make-default prong as creating criminal exposure for inadvertent defaults. There are any number of reasons a subpoenaed witness might unintentionally fail to appear and thus

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* To be clear, a defendant facing a contempt prosecution may surely raise a privilege claim as an affirmative defense. But Bannon did not raise such an affirmative defense here; that would have required him to show that the subpoenaed topics were *in fact* protected by executive privilege. This case concerns only whether, to prove an element of the crime, the government bears the burden of disproving a defendant's subjective (but potentially mistaken) belief that a privilege applied.

"default"—"illness, travel trouble, [or] misunderstanding," to name a few. *Licavoli*, 294 F.2d at 208. Without the "willfully" qualifier, the statute could have been read to criminalize those defaults too. But there would have been no similar need to clarify the scope of liability for a witness's "refus[al] to answer" pertinent questions. Unlike a "default," a "refusal" is necessarily intentional; no one would say a witness "refused" to answer a question because he did not hear it. *See id*.

Common-sense arguments support the long-settled interpretation of "willfully" in this statute. And Bannon's reading is not necessary to give that term meaning. Those considerations further support our denial of rehearing en banc.

RAO, *Circuit Judge*, with whom Circuit Judge HENDERSON joins in full and Circuit Judge WALKER joins with respect to Part II, dissenting from the denial of rehearing en banc: Stephen Bannon, a former advisor to President Donald Trump, invoked executive privilege and refused to comply with a legislative subpoena seeking information about the events of January 6. He was convicted of criminal contempt of Congress and imprisoned. A panel of this court affirmed Bannon's convictions. I would grant rehearing en banc because Bannon's petition raises questions of exceptional importance.

The Supreme Court has repeatedly recognized that individuals prosecuted for contempt of Congress are entitled to "every safeguard which the law accords in all other federal criminal cases." *Russell v. United States*, 369 U.S. 749, 755 (1962); *see also Gojack v. United States*, 384 U.S. 702, 707 (1966). One fundamental safeguard is the government's burden to prove every element of the crime beyond a reasonable doubt. In Bannon's case, however, the government was not required to prove all the elements of criminal contempt of Congress under 2 U.S.C. § 192

Section 192 requires proof the defendant "willfully" defaulted on a congressional subpoena. But over sixty years ago, this court read the willfulness requirement out of the statute. *See Licavoli v. United States*, 294 F.2d 207, 208 (D.C. Cir. 1961). The full court should overturn *Licavoli* because it is at odds with the plain meaning of section 192 and longstanding Supreme Court precedent interpreting willfulness in criminal statutes. Bannon's convictions must be vacated because he was not allowed to argue at trial that he

resisted the subpoena on grounds of executive privilege.

Section 192 also requires proof the defendant defaulted on a lawful subpoena issued "by the authority of either House of Congress." Bannon maintains the committee that issued the subpoena was not constituted in accordance with its authorizing resolution, and he raises a novel and important question about whether the committee's defective composition undermined its authority to issue lawful subpoenas. If Bannon is right, this provides an independent ground for reversing his convictions.

This contempt of Congress prosecution against a former Executive Branch official asserting executive privilege raises serious separation of powers concerns. I would grant rehearing en banc to ensure we apply the exacting standards of the criminal law and protect the important individual and constitutional interests at stake.

I.

In June 2021, the House of Representatives established the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee"). H.R. Res. 503, 117th Cong. §§ 1, 3(1) (2021) ("Resolution"). The Resolution prescribed the Select Committee's composition, providing that "[t]he Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader." *Id.* § 2(a). The chairman of the Select Committee was authorized to order depositions "upon consultation with the ranking minority member." *Id.* §§ 5(c)(4), (6)(A).

Notwithstanding the Resolution, the Speaker appointed only nine members to the Select Committee and never appointed a ranking minority member. The Select Committee subpoenaed dozens of individuals and organizations thought to be connected to January 6.

Stephen Bannon, a former senior advisor to President Trump, received a subpoena for documents and testimony relating to, among other things, his "communications with President Donald J. Trump" in 2020 and 2021 and with White House and campaign staff concerning the events on January 6. Based on reports that Bannon had discussed the election certification with members of Congress on January 5 and had predicted "[a]ll hell" would "break loose" the following day, the Select Committee believed Bannon had information relevant to its investigation. Bannon declined to respond to the subpoena based on advice from counsel that the documents and testimony were protected by executive privilege. Only two weeks after Bannon's refusal to respond, the House voted to find Bannon in contempt of Congress and refer him to the Department of Justice for prosecution. Bannon was charged with two counts of "willfully mak[ing] default" on a congressional subpoena in violation of section 192.

At trial, Bannon argued section 192 requires the government to prove he defaulted willfully, that is, with knowledge that his default was unlawful. To negate willfulness, Bannon asked to present evidence that he relied in good faith on advice from counsel that he was not required to comply with the subpoena because the materials sought were protected by executive privilege. Moreover, Bannon argued *Licavoli* should not control because in the six decades since the

case was decided, the Supreme Court has clarified that "willfully" in criminal statutes requires the government to prove a defendant knew his actions were unlawful. The district court rejected Bannon's request and explained that while it "might be inclined to agree with [Bannon] and allow this evidence in" if this were a matter of first impression, *Licavoli* foreclosed Bannon's defense.

Bannon also moved to dismiss the indictment on the ground that the subpoena was not lawfully issued. Among other things, Bannon argued the Select Committee was improperly constituted because the Speaker did not appoint thirteen members, as required by the Resolution. Bannon further claimed the subpoena was not issued in consultation with the ranking minority member because the Select Committee had no ranking minority member. These defects, Bannon alleged, undermined the Select Committee's authority and rendered the underlying subpoena invalid. The district court dismissed the motion and barred Bannon from presenting evidence about the Select Committee's composition.

A jury convicted Bannon of violating section 192, and he was sentenced to four months of incarceration. Upholding Bannon's convictions, the panel reaffirmed *Licavoli* and held the government needed to prove only that Bannon's default was deliberate and intentional. *United States v. Bannon*, 101 F.4th 16, 21–23, 28 (D.C. Cir. 2024). Moreover, the panel found Bannon's objections to the Select Committee's composition were "procedural arguments" that did not go to any element of section 192. *Id.* at 26. As such, Bannon first had to present these arguments to the Select Committee, and his failure to do so resulted in forfeiture. *Id.*

Bannon spent four months in prison.[1] He now seeks rehearing en banc.

II.

I would grant rehearing en banc to overrule *Licavoli*. Consistent with Supreme Court precedent, the best reading of section 192 is that a defendant willfully defaults on a congressional subpoena only when he knows his default is unlawful. If the district court had applied this interpretation, the government would have been required to prove Bannon had the requisite knowledge of wrongdoing, and Bannon would have been entitled to present evidence that he lacked such knowledge because he believed, in good faith, that the House sought information protected by executive privilege. Because the government was not required to prove all the elements of section 192, Bannon's convictions must be reversed. *See Gojack*, 384 U.S. at 716 (reversing section 192 conviction because the government failed to prove "an essential element of the offense").

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[1] The panel denied Bannon's request for release pending his petition for a writ of certiorari. Judge Walker dissented, explaining that Bannon should have been released pending appeal because "[f]or a court unbound by *Licavoli*, like the Supreme Court, the proper interpretation of 'willfully' in Section 192 is a close question or one that very well could be decided the other way." *United States v. Bannon*, No. 22-3086, 2024 WL 3082040, at *3 (D.C. Cir. June 20, 2024) (Walker, J., dissenting) (cleaned up).

A.

The criminal contempt of Congress statute provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers . . . willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor.

2 U.S.C. § 192 (emphasis added). Section 192 includes two distinct offenses: (1) "willfully mak[ing] default" after being summoned by the House or Senate, and (2) appearing before the House or Senate and "refus[ing] to answer any [pertinent] question." Bannon was convicted under the first offense, which includes an explicit mens rea element—default must be made "willfully."

Because section 192 is a criminal statute, the "usual standards of the criminal law must be observed." *Gojack*, 384 U.S. at 707; *see also Russell*, 369 U.S. at 755. In criminal statutes, "the word 'willfully' … generally means an act done with a bad purpose." *United States v. Murdock*, 290 U.S. 389, 394 (1933); *see also Felton v. United States*, 96 U.S. 699, 702 (1877) ("The word 'willfully,' … in the ordinary sense … means not merely 'voluntarily,' but with a bad purpose.") (cleaned up); *Sillasse Bryan v. United States*, 524 U.S. 184, 191 (1998) ("As a general matter, when used in the criminal context, a willful act is one undertaken with a bad purpose.") (cleaned up). In other words, to be convicted of a crime that requires

willfulness, the defendant must have had "knowledge that his conduct was unlawful." Sillasse Bryan, 524 U.S. at 192 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). Because section 192's first offense requires willfulness, knowledge of wrongdoing is a necessary element of defaulting on a congressional subpoena.

The text and structure of section 192 reinforce that willful default means willful default. The statute's first offense explicitly requires willfulness. By contrast, the second offense does not specify a mens rea requirement. The Supreme Court has held that the second offense requires only intentional or deliberate action. *Sinclair v. United States*, 279 U.S. 263, 299 (1929). We ordinarily presume that when Congress uses a term in one place and omits it in another, the choice is intentional and the variation meaningful. *See Russello v. United States*, 464 U.S. 16, 23 (1983). Considering the variation in mens rea requirements for the two section 192 offenses, "willfully" must mean something beyond intentional or deliberate action. *See Potter v. United States*, 155 U.S. 438, 446 (1894) (explaining that when "'willful' is omitted from the description of offences in the latter part of [the] section," "[i]ts presence in the first cannot be regarded as mere surplusage; it means something").

This straightforward interpretation also accords with *United States v. Murdock*, in which the Supreme Court distinguished the two section 192 offenses and explained that the second offense does not require "bad purpose or evil intent" because it lacks a willfulness requirement. 290 U.S. at 397–98. The necessary implication of *Murdock* is that section 192's first offense requires a bad purpose. Reading the statute as

a coherent whole, knowledge of wrongdoing must be an element of willful default on a congressional subpoena.

More than sixty years ago, however, our court in *Licavoli* read the willfulness requirement out of the statute. We relied principally on *United States v. Helen Bryan*, which asserted that the government can establish "a *prima facie* case of wil[l]ful default" under section 192 if it proves a defendant "intentionally failed to comply" with a valid subpoena. 339 U.S. 323, 330 (1950). But the Court did not explain how this statement comports with the text of section 192, *Murdock*, or the long line of criminal cases construing "willfully" to require knowledge of wrongdoing. Perhaps this is because the Court discussed willful default only to address the narrow question on which it had granted certiorari: whether the presence of a quorum of the committee was a material question of fact for the jury. *Id.* at 327. That was the sole issue we decided in the one-paragraph decision reversed by the Supreme Court. *Helen Bryan v. United States*, 174 F.2d 525, 526 (D.C. Cir. 1949) (per curiam). And the Court expressly stated it was not addressing any issues "not

passed upon by the Court of Appeals."[2] *Helen Bryan*, 339 U.S. at 343.

Moreover, the narrowness of *Helen Bryan* was confirmed in a case decided the same day, in which the Supreme Court did not rule out the possibility that evidence of good faith could overcome the government's prima facie showing of intentional default. *See United States v. Fleischman*, 339 U.S. 349, 363 (1950); *see also McPhaul v. United States*, 364 U.S. 372, 379 (1960). There is no reason for this court to cling to an overbroad reading of *Helen Bryan* that stands in tension with the Supreme Court's consistent understanding that "willfully" in criminal statutes requires more than merely intentional or deliberate action.

Under the best interpretation of section 192, the government must prove an individual defaulted on a congressional subpoena *willfully*, that is, with knowledge that his conduct was unlawful. *Licavoli* cannot be reconciled with the text or structure of section 192, and the decision runs counter to the overwhelming weight of Supreme Court precedent. *See Bondi v. VanDerStok*, 145 S. Ct. 857, 877 (2025)

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[2] I therefore disagree with Judge Katsas that *Helen Bryan* compels the result in *Licavoli* and this case. *See* Katsas Statement 1–2. In a section of her brief raising "additional reasons not passed upon by the Court of Appeals," Bryan argued her refusal to comply with the subpoena was based on advice from counsel that the committee's authorizing resolution was unconstitutional. Brief for Respondents at 31, *United States v. Helen Bryan*, 339 U.S. 323 (1950) (No. 99). But the Supreme Court did not grant review on this question and explicitly declined to consider any of Bryan's additional arguments. *Helen Bryan* poses no barrier to overruling *Licavoli*.

(Kavanaugh, J., concurring) ("To prove 'willfulness,' the Government must demonstrate that an individual knew that his conduct was unlawful, not merely that he knew the facts that made his conduct unlawful."). *Licavoli* should be overruled.

B.

Restoring the correct meaning of section 192 would have significant consequences for this case. Bannon sought to introduce evidence that his default was not willful because he believed the requested information was protected by executive privilege. The Supreme Court has recognized that recipients of legislative subpoenas "retain common law and constitutional privileges with respect to certain materials," including "communications protected by executive privilege." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (citing *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730–31 (D.C. Cir. 1974) (en banc)); *see also Garner v. United States*, 424 U.S. 648, 663 n.18 (1976) (explaining "a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith" under a statute requiring willfulness). If Bannon believed in good faith that executive privilege protected the subpoenaed materials, his default was not willful because it was not made with knowledge of wrongdoing. Bannon should have had the opportunity to raise these arguments at trial. The government then could have offered evidence to rebut this argument.

For purposes of rehearing, this court need not decide whether Bannon's claim of executive privilege was made in good faith or would have ultimately prevailed. The important issue raised in this petition

is the government's burden in a criminal prosecution under section 192. Because the district court and the panel followed *Licavoli*, the government was not required to prove an essential element of the crime—willful default. The full court should interpret section 192 to mean what it says, overrule *Licavoli*, and vacate Bannon's convictions.

III.

Rehearing is also warranted to consider a question of first impression: Is the proper composition of a congressional committee essential to its authority to issue a subpoena, or is it merely a "procedural" requirement that can be forfeited in a criminal contempt of Congress prosecution, as the panel held? The full court should address this question because committee authority is an element of a section 192 violation, and it is an open question whether a committee's proper composition is an aspect of its authority. There are good reasons to conclude that a subpoena is issued by the authority of the House only when the issuing committee is constituted in accordance with its authorizing resolution.

A.

It is undisputed that "a clear chain of authority from the House to the [committee] is an essential element" of a section 192 charge. *Gojack*, 384 U.S. at 716; *see also Bannon*, 101 F.4th at 26 (recognizing "congressional authority" is an element of section 192). To prove this element, the government was required to establish beyond a reasonable doubt that the Select Committee's "authority [was] clear and [was] conferred in accordance with law." *Gojack*, 384 U.S. at 714. While courts ordinarily will not inquire into the

"appropriateness of [a] procedure as a method of conducting congressional business," the Supreme Court has repeatedly emphasized the importance of evaluating legislative procedures in the "administration of criminal justice, and specifically the application of [a] criminal statute." *Id.*; *see also Christoffel v. United States*, 338 U.S. 84, 88 (1949).

The question Bannon raises is whether the Select Committee's defective composition rendered any subpoena it issued invalid for purposes of criminal contempt because it was not issued "by the authority of either House of Congress." 2 U.S.C. § 192. There is no serious dispute that the Select Committee was not composed in accordance with the plain terms of the authorizing resolution. The Resolution provides that "[t]he Speaker shall appoint 13 Members to the Select Committee, 5 of whom shall be appointed after consultation with the minority leader." H.R. 503, 117th Cong. § 2(a) (2021). The Speaker appointed only nine members, however, and did not appoint a ranking minority member. This violated the Resolution, as the House now acknowledges. See Brief for the U.S. House of Representatives as Amicus Curiae in Support of Neither Party at 11, *United States v. Bannon*, No. 22-3086.

The panel held that any defects in the Select Committee's composition were merely "procedural" and did not undermine its authority to issue subpoenas. *Bannon*, 101 F.4th at 26–27. Such "procedural arguments," the panel concluded, are "at best affirmative defenses" that Bannon failed to preserve by not raising them before the Select Committee. *Id.* at 26.

Labeling Bannon's objections as "procedural" does not resolve the question presented. Neither the Supreme Court nor this court has considered whether a committee must be constituted in accordance with its authorizing resolution to issue a lawful subpoena. If proper composition is a prerequisite, then the government was required to prove this aspect of the Select Committee's authority beyond a reasonable doubt, and Bannon could not have forfeited his objection by failing to raise it to the Select Committee. *See id.*; *Gojack*, 384 U.S. at 707. Bannon raises an open and important question about the Select Committee's authority that should be decided by the full court.

B.

There are serious arguments that defects in the Select Committee's composition undermined its authority to issue a valid subpoena under section 192. Although no court has addressed this precise question, several principles can be drawn from Supreme Court and circuit precedent assessing congressional authority in the context of criminal prosecutions.

First, a committee has authority to issue subpoenas only when acting within its delegated authority. Because a committee may wield only the investigative power delegated to it from the House or Senate, its power "to exact testimony and to call for the production of documents must be found in [the] language" of its authorizing resolution. *United States v. Rumely*, 345 U.S. 41, 44 (1953). Congressional committees "are restricted to the missions delegated to them," and "[n]o witness can be compelled to make disclosures on matters outside that [delegated] area." *Watkins v. United States*, 354 U.S. 178, 206 (1957).

Thus, a "[c]ourt[] administering the criminal law cannot apply sanctions for violation of the mandate of [a committee] unless that [committee]'s authority is clear and has been conferred in accordance with law." *Gojack*, 384 U.S. at 714. The Supreme Court has policed the boundaries of committee delegations and reversed section 192 convictions when a committee exceeded the authority conferred by its resolution. *See, e.g., Rumely*, 345 U.S. at 47; *Gojack*, 384 U.S. at 716 (holding that "[a]bsent proof of a clear delegation to the subcommittee" to issue a subpoena, "the subcommittee was without authority which can be vindicated by criminal sanctions under [section] 192").

Second, even when a committee possesses delegated authority to issue subpoenas, it must issue those subpoenas in conformity with the procedures contained in the committee (and House or Senate) rules. Under section 192, the government must prove beyond a reasonable doubt that a defendant was "validly served with a *lawful subpoena*." *Helen Bryan*, 339 U.S. at 330 (emphasis added). "To issue a valid subpoena … a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers." *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978).

When a committee rule relates to an element of the section 192 offense, "it must be strictly observed." *Gojack*, 384 U.S. at 708. Ensuring a committee follows its rules is part of the judicial role in the "administration of criminal justice, and specifically the application of the criminal statute which has been invoked." *Id.* at 714; *see also Yellin v. United States*, 374 U.S. 109, 122–24 (1963) (reversing a section 192 conviction despite the defendant's failure to object

before the committee because the defendant reasonably thought the committee was adhering to its rules). Following these principles, this circuit has reversed convictions under section 192 when a subpoena was not issued in accordance with the committee's rules. *See Shelton v. United States*, 327 F.2d 601, 607 (D.C. Cir. 1963) (reversing a section 192 conviction because the defendant "had a right under the Subcommittee charter to have the Subcommittee responsibly consider whether or not he should be subpoenaed before the subpoena issued"); *Liveright v. United States*, 347 F.2d 473, 475–76 (1965) (reversing a section 192 conviction because the subpoena was not issued in accordance with the committee's authorizing resolution). Section 192 requires the issuance of a lawful subpoena, and a subpoena is lawful only if a committee follows the governing rules in issuing it.[3]

Finally, a committee must follow the rules governing its composition in order to be a "competent tribunal." *Christoffel*, 338 U.S. at 89. *Christoffel* involved a perjury prosecution under a statute that required a "competent tribunal" as an element of the offense. *Id.* at 85. The Supreme Court held that competency required the committee to satisfy the House quorum rules, and therefore the government was required to prove the quorum requirements were

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[3] In *Shelton* and *Liveright*, we treated the subpoena's invalidity as an affirmative defense to, not an element of, section 192's *second offense*, because one could appear before a committee without being summoned and still unlawfully refuse to answer a pertinent question. *See Liveright*, 347 F.2d at 475 n.5. Whether an element of section 192's first offense, or an affirmative defense to the second, the lawfulness of a subpoena depends on compliance with a committee's rules for issuing subpoenas.

met. *Id*. at 89–90; *see also id*. at 90 ("A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction."). As the Court explained, "[t]he question is [not] what rules Congress may establish for its own governance" but "rather what rules the House has established and whether they have been followed." *Id*. at 88–89. *Christoffel* provides a helpful analogy for interpreting section 192, which requires the committee to act by the authority of the House. Such authority, like competency, may depend on the committee following House rules governing its composition.

As this discussion demonstrates, the Supreme Court and this circuit carefully assess a committee's authority when reviewing criminal convictions under section 192. The questions Bannon raises about the Select Committee's defective composition are important and require similar consideration. The Select Committee's authorizing resolution required the appointment of thirteen members and a ranking member, neither of which occurred. Were these composition requirements essential to the Select Committee's exercise of delegated authority from the House? That is, to issue a lawful subpoena for purposes of section 192, was the Select Committee required to be constituted in accordance with the Resolution? In light of Supreme Court and circuit precedent, proper composition of a committee may well be critical to a committee's authority and, therefore, a necessary condition for issuing a lawful subpoena.

The government maintains the Select Committee was properly constituted because the Resolution did not strictly require appointment of thirteen members. But this factual issue is irrelevant to the legal

question, namely, whether the Committee's proper composition is an element of its authority to issue a lawful subpoena. The full court should resolve this question because it is "unthinkable" that a committee without authority "can be the instrument of [a] criminal conviction." *Id*. at 90.

* * *

When adjudicating criminal contempt of Congress, courts must ensure "that the congressional investigative power, when enforced by penal sanctions, [is] not … abused." *Gojack*, 384 U.S. at 707. Rehearing is warranted to maintain the exacting standards of the criminal law, which protect individual liberty and preserve the separation of powers.

Bannon's petition first implicates the essential safeguards for individual liberty in criminal cases. The Supreme Court has repeatedly held that the protections of the criminal law apply to section 192 prosecutions. Courts must hold the government to its burden of proving every element of criminal contempt of Congress. *See id*. Yet our decision in *Licavoli* allows a person to be convicted of willful default without any showing of willfulness. We should overrule *Licavoli* and vacate Bannon's convictions.

Moreover, this case presents a question of first impression: whether the proper composition of a committee is an essential aspect of its delegated authority to issue lawful subpoenas, as required by section 192. When seeking to impose criminal sanctions, a committee must be "meticulous in obeying its own rules." *Yellin*, 374 U.S. at 124. In this political and partisan context, rules about a committee's

composition should not be lightly disregarded by courts as merely "procedural."

Finally, this case threatens the separation of powers because it involves the criminal prosecution of a former Executive Branch official invoking executive privilege in the face of a congressional subpoena. Congress may gather information and issue subpoenas in furtherance of its legislative powers. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *Mazars*, 140 S. Ct. at 2031. But the President is entitled to assert executive privilege to protect the confidentiality of his communications and the independence of the Executive Branch.[4] *United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution"). These constitutional prerogatives come into conflict when a committee seeks information the Executive considers privileged.

While such disputes between the political branches are usually resolved through accommodation and compromise without involving the courts, *Mazars*, 140 S. Ct. at 2030–31, this case involves a rare instance in which Congress recommended criminal contempt.

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[4] The Executive Branch has long asserted the right to withhold privileged information from congressional committees and has maintained that the President and his immediate advisors cannot be compelled to testify. *See Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 2 (2007); *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4–5 (1999); *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192–93 (2007).

Even more uncommon, the Executive Branch pursued the prosecution, breaking from its longstanding position that section 192 "does not apply to executive branch officials who resist congressional subpoenas in order to protect the prerogatives of the Executive Branch." *Congressional Oversight of the White House*, 45 Op. O.L.C., slip op. at 50 (Jan. 8, 2021); *see also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984) ("The Executive . . . must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance.").

In the past, Congress rarely referred Executive Branch officials for criminal contempt, and the Executive generally refused to prosecute officials who invoked executive privilege. Between 1980 and 2017, Congress referred only six Executive Branch officials for prosecution. *See* CONG. RSCH. SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS 31, 47, 52–53,74–85 (2017). When executive privilege was at stake, the Department of Justice declined to press charges.

Recently, however, the floodgates have opened. Between 2019 and 2023, the House cited six former or current Executive Branch officials for criminal contempt of Congress. The Department of Justice proceeded with charges against two of those officials, including Bannon. Last year, the House approved a criminal contempt citation against then-Attorney General Merrick Garland for his refusal to produce audio recordings related to President Biden's alleged mishandling of classified materials. *See* H.R. Res.

1292, 118th Cong. (2024). With this acceleration in contempt of Congress prosecutions against Executive Branch officials—prosecutions almost always brought in this circuit—the issues raised here are likely to recur and should be resolved now.

The uptick in criminal contempt of Congress prosecutions against former Executive Branch officials is further reason to clarify that section 192 requires proof of willful default. If Bannon invoked executive privilege in good faith, he would be shielded from criminal sanction under section 192 because any default would not be willful. Courts must assess this element and any protections for executive privilege even when the Executive Branch proceeds with a prosecution despite the claims of privilege. *Cf. In re Search of Info. Stored at Premises Controlled by Twitter, Inc.*, No. 23-5044, 2024 WL 158766, at *2 (D.C. Cir. Jan. 16, 2024) (statement of Rao, J., respecting denial of rehearing en banc) (explaining presidential materials may be presumptively privileged "even in the absence of an assertion of executive privilege").

When criminal contempt of Congress is pursued, "[t]he jurisdiction of the courts cannot be invoked to impose criminal sanctions in aid of a roving commission." *Gojack*, 384 U.S. at 715. Because the questions presented in this petition are vital to individual liberty and implicate the separation of powers between Congress and the Executive, I respectfully dissent from the denial of rehearing en banc.

APPENDIX E

Letter from President Trump Confirming Executive Privilege Was Asserted

DONALD J. TRUMP

July 9, 2022

Stephen K. Bannon
c/o Robert J. Costello, Esquire
Davidoff Hutcher & Citron LLP
605 Third Avenue
New York, New York 10158

Dear Steve,

I write about the Subpoena that you received in September 2021 from the illegally constituted Unselect Committee, the same group of people who created the Russia Russia Russia scam, Impeachment hoax # 1, Impeachment hoax #2, the Mueller Witch-Hunt (which ended in no "Collusion"), and other fake and never-ending yarns and tales.

When you first received the Subpoena to testify and provide documents, I invoked Executive Privilege. However, I watched how unfairly you and others have been treated, having to spend vast amounts of money on legal fees, and all of the trauma you must be going through for the love of your Country, and out of respect for the Office of the President.

Therefore, if you reach an agreement on a time and place for your testimony, I will waive Executive Privilege for you, which allows for you to go in and testify truthfully and fairly, as per the request of the Unselect Committee of political Thugs and Hacks, who

have allowed no Due Process, no Cross-Examination, and no real Republican members or witnesses to be present or interviewed. It is a partisan Kangaroo Court.

Why should these evil, sinister, and unpatriotic people be allowed to hurt and destroy the lives of so many, and cause such great harm to our Country?

It has been, from the time I came down the escalator at Trump Tower, a political hit job against the overwhelming majority of Americans who support the concept and policy of Making America Great Again and putting America First.

Good luck in all of your future endeavors.

Sincerely,

/s/ Donald J. Trump