No. 21-

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JUSTIN CLARK
ELECTIONS, LLC
1050 Connecticut Avenue, NW,
Suite 500
Washington, DC 20036
(202) 987-9944

JESSE R. BINNALL
Counsel of Record
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, VA 22314
(703) 888-1943
jesse@binnall.com

Counsel for Petitioner

309776

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The United States House of Representatives' Select Committee to Investigate the January 6th Attack on the United States Capitol issued a "sweeping" request, seeking many of President Trump's confidential presidential records. The request implicates important constitutional and statutory concerns arising from the Presidential Records Act, separation of powers, and executive privilege. Nevertheless, the Biden Administration now seeks to produce those records to the Committee, and will do so, absent court intervention.

The question presented is:

Whether the Committee's records request violates the Constitution or laws of the United States entitling President Trump to a preliminary injunction prohibiting production of the records to the Committee.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Donald J. Trump, in his capacity as the 45th President of the United States. He was the plaintiff in the district court and appellant in the court of appeals.

Respondents are Bennie G. Thompson, in his capacity as Chairman of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol; the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol; David Ferriero, in his capacity as Archivist of the United States; and the National Archives and Records Administration.

The related proceedings below are:

1. *Donald J. Trump v. Bennie G. Thompson, et al.*, No. 21-cv-2769 (TSC) (D.D.C.) – Order denying preliminary injunction entered on November 9, 2021; and

2. *Donald J. Trump v. Bennie G. Thompson, et al.*, No. 21-5254 (D.C. Cir.) – Judgment entered on December 9, 2021.

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Donald J. Trump, in his capacity as the 45th President of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's opinion denying the preliminary injunction is reported at *Trump v. Thompson*, - - - F. Supp. 3d - - -, 2021 WL 5218398 (D.D.C. Nov. 9, 2021), and is reproduced at Appendix ("App.") B, at 78a-126a. The D.C. Circuit's opinion affirming the district court is reported at *Trump v. Thompson*, - - - F.4th - - -, 2021 WL 5832713 (D.C. Cir. Dec. 9, 2021), and is reproduced at App. A, at 1a-77a.

JURISDICTION

The D.C. Circuit issued its opinion on December 9, 2021. Petitioner did not seek a rehearing. The D.C. Circuit requested that Applicant bring a petition for *certiorari* and application for stay pending appeal within 14 days of their order. Applicant now brings this petition on the 14th day. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are: U.S. Const. art I, § 8; U.S. Const. art. II, § 1, cl. 1; and the Presidential Records Act of 1978, specifically 44 U.S.C. §§ 2204-2205, appended at App. C, at 127a-148a.

INTRODUCTION

The rule of law embodied in this Court's binding precedent and our Constitution's separation of powers preserves ordered liberty and protects the rights of all Americans. This case involves important constitutional, statutory, and precedential limits placed on congressional requests for presidential records, including by the Presidential Records Act, this Court's landmark decision in *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019 (2020), and the constitutionally rooted executive privilege.

Congress limited its own access to Presidential records when it adopted the Presidential Records Act, a law it now stubbornly refuses to follow. The Executive adopted implementing regulations and an executive order reasonably regulating access to the records of former Presidents. The Select Committee, however, ignored these restrictions by sending a "sweeping" records request to the National Archives and Records Administration seeking broad swaths of confidential records created during President Trump's term of office.

The Constitution, this Court's precedent, and federal statutes invalidate the expansive request at issue here. Moreover, a former President has the right to assert executive privilege, even after his term of office. *See Nixon v. Adm'r of Gen. Servs. GSA*, 433 U.S. 425, 439 (1977) ("*GSA*"). This is so because executive privilege "safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is 'fundamental to the operation of Government.'" *Mazars*, 140 S. Ct. at 2032 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

The congressional request is untethered from any valid legislative purpose and exceeds the authority of Congress under the Constitution and the Presidential Records Act. Despite clear precedent and the unambiguous dictates of statute, the D.C. Circuit upheld the Committee's broad requests and refused to honor President Trump's well established claims of executive privilege. For example, the Committee asked for "[a]ll documents and communications within the White House on January 6, 2021, relating in any way to," among others, the President, the Vice President, over two dozen of the highest-ranking officials in the federal government (including the National Security Advisor and his Deputy, and the White House Counsel and his Deputy), any Member of Congress or congressional staff; or the Department of Defense, the Department of Justice, the Department of Homeland Security, the Department of the Interior, or any element of the National Guard. This sweeping request alone demands access to any number of records to which Congress is not–in any way–entitled. First, such records have nothing to do with the events of January 6th. Second, these records are protected by executive and other privileges. And third, and most importantly, these requests exceed the scope of the requesting committee's authority because they lack any conceivable related legislative purpose.

The records of a former President are not distributed freely upon the conclusion of his term of office, even to Congress. Except in extraordinary circumstances, records are protected from disclosure for a considerable amount of time after a President has left office. The following multistep analysis determines whether specific records are subject to production:

Step one: The general rule is access to confidential presidential records is restricted for a period not exceeding twelve years after a President leaves office. Upon Congress' request to the National Archives and Records Administration, the former President is notified and provided an opportunity to object, either pursuant to the Presidential Records Act or the constitutional principles of separation of powers and executive privilege. A threshold determination is then made as to whether the records are restricted pursuant to the Presidential Records Act or protected by executive privilege. The positions of the current and former presidents are considered in making this determination.

Step two: Next, the request must comply with limits Congress placed upon itself in the Presidential Records Act, 44 U.S.C. § 2205, which mirrors the constitutional separation of powers limitations on records requests. *See Mazars,* 140 S. Ct. at 2035-36. Specifically, Congress (or a congressional committee acting within its delineated jurisdiction) must demonstrate both a need for the record necessary for it to conduct its business and that the information in the records is not otherwise available. § 2205(2)(C). These requirements inherently demand that the request be limited in scope. If Congress fails to meet this burden, then the request is ineffective and it must be rejected by the Archivist or the courts, irrespective of the position of the incumbent President.

Step three: Should the Archivist determine that Congress met its burden under the PRA, the requests must still clear the constitutional restrictions of separation of powers and executive privilege. The separation of powers framework is defined by *Mazars.* Similarly,

whether Congress can invade the protections of a former president's executive privilege is determined by the standards explained in *Nixon* and *GSA*. Indeed, courts will not allow such an invasion absent a demonstrated specific need for the information sought. *Nixon*, 418 U.S. at 713. On this question, the incumbent President may weigh in on whether a predecessor's privilege should be protected; his determination is weighty but not determinative. Should Congress, the former President, and the incumbent President not unanimously agree on production, then a living former President can judicially challenge the production. A multitude of factors should be carefully considered before allowing such an invasion, including: the relative positions of both the incumbent and former Presidents regarding specific records, the relative need of Congress for the specific records at issue, whether the records will remain confidential, and the time that has passed since the conclusion of the former President's term of office. This review should be conducted *in camera* to ensure that the records remain confidential during the dispute.

Contrary to this analysis, the Committee and the Department of Justice contend, effectively supported by the D.C. Circuit, that a committee of Congress may request the most sensitive Oval Office communications of a President mere months after he leaves office, if the request is supported by the incumbent President. They further argue that Congress is permitted to investigate perceived wrongdoing, so long as it also promises at some point in the future to consider some amorphous remedial legislation. Their arguments, and the decisions of the courts below endorsing them, lack any limiting principle. Moreover, the decisions below effectively gut the ability

of former Presidents to maintain executive privilege over the objection of an incumbent, who is often (as is the case here) a political rival. These are profoundly serious issues the Court should resolve.

The decision of the court below substantially expands congressional power. Such expansion is at odds with the Presidential Records Act and directly contrary to this Court's precedent and the Constitution. The D.C. Circuit opinion transforms the nature of the interactions between the political branches, eroding a "[d]eeply embedded traditional way[] of conducting government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). The Constitution, this Court's precedent, and the Presidential Records Act prevent two politically-aligned branches of government from wielding unfettered power to undermine the Presidency and our Republic. This Court should grant certiorari to ensure unlawful exercises of congressional power are checked by both reason and law.

STATEMENT

I. Background

After the 2020 election, Democrats in Congress created the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol pursuant to House Resolution ("H. Res.") 503. H. Res. 503 purports to vest the Committee with unfettered power to investigate the activities of intelligence agencies, law enforcement agencies, and the Armed Forces surrounding January 6th; It also provides that the Committee will issue a final report on its activities. DDC Doc. 1.4 at 8. Pursuant to H. Res. 503, the Committee is

prohibited from holding the markup of any legislation. *Id.* at 9. Notably, this resolution never discusses the authority to investigate the Executive Office of the President. *Id.* at 1-14.

On August 25, 2021, the Committee sent a self-described "sweeping" request for presidential records to the Archivist of the United States seeking information from the Executive Office of the President and the Office of the Vice President. DDC Doc. 1.2. These requests were signed by Committee Chairman Bennie G. Thompson. *Id*. The Committee's request is startling in scope. For example, among myriad other documents requested, the Committee seeks:

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

Id. at 2. Similarly, and even more invasive, the Committee requested, "[f]rom November 3, 2020, through January 20, 2021, all documents and communications related to prepared public remarks and actual public remarks of Donald Trump." *Id.* at 9.

The Committee also requested "[a]ll documents and communications within the White House on January 6, 2021, relating *in any way* to . . . the January 6, 2021, rally . . . [or] Donald J. Trump" and countless other individuals, including close personal advisors to the President. *Id*. at 3-4 (emphasis added).

The Committee's request purports to be made "pursuant to the Presidential Records Act (44 U.S.C. § 2205(2)(C))." *See Id.* at 1. The Presidential Records Act ("PRA") of 1978, 44 U.S.C. §§ 2201–2209, governs the official records of Presidents and Vice Presidents. The Archivist and the National Archives and Records Administration ("NARA") are charged with working with a former President to administer and store presidential records, among other duties, after the President leaves office. *See generally* 44 U.S.C. §§ 2202–2208.

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

The PRA gives the Archivist the power to promulgate regulations to administer the statute. 44 U.S.C. § 2206(2). Pursuant to those regulations, the Archivist must promptly notify the former and incumbent Presidents of a request for records created during that former President's term of office. 36 C.F.R. § 1270.44(c) (2002). "The incumbent or former President must personally . . . assert a claim of constitutionally based privilege against disclosing a presidential record or a reasonably segregable portion" thereof. 36 C.F.R. § 1270.44(d). "If a

former President asserts privilege, the Archivist consults the incumbent President . . . to determine whether" he agrees. 36 C.F.R. § 1270.44(f)(1). If, as here, the incumbent President declines to uphold the claim of privilege, absent a court directing otherwise, the Archivist discloses the presidential record. 36 C.F.R. § 1270.44(f)(3).

Finally, Executive Order No. 13489 requires the Archivist to notify both Presidents of his determination to release certain records at least thirty days prior to disclosure, unless a shorter time period is allowed under the NARA regulations. Exec. Order No. 13489, 74 Fed. Reg. 4669 (Jan. 21, 2009).

Pursuant to this regulatory and statutory framework, the Archivist notified President Trump on August 30, 2021, that he intended to produce certain documents in response to the Committee's request. DDC Doc. 1.6 at 1. On October 8, 2021, the Biden White House Counsel notified the Archivist that President Biden would not be asserting executive privilege over certain documents identified as responsive to the Committee's request. DDC Doc. 1.5. That same day, President Trump notified the Archivist of his formal assertion of executive privilege with respect to a subset of documents and his protective assertion of executive privilege over any additional materials that may be requested by the Committee pursuant to the PRA, associated regulations, and the applicable executive order. DDC Doc. 1.6. Subsequently, President Trump made another assertion of executive privilege on October 21, 2021. DDC Doc. 21.1.[1]

1. NARA's review of responsive records continues on a rolling basis; on November 15, 2021, President Trump made another assertion of privilege.

The Biden White House Counsel notified the Archivist that President Biden would not assert executive privilege over the documents identified in President Trump's October 8 letter. The Biden White House then instructed the Archivist to turn the records over to the Committee thirty days from the date President Trump was notified of President Biden's decision, absent an intervening court order. DDC Doc. 1.7.

On October 13, 2021, the Archivist notified President Trump that "[a]fter consultation with Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden," the Archivist "determined to disclose to the Select Committee" all responsive records that President Trump determined were subject to executive privilege on November 12, 2021, absent an intervening court order. DDC Doc. 21.1. Likewise, the Archivist notified President Trump that further documents would be released over his privilege objections on November 26, 2021, absent a court order. *Id.*

II. Proceedings Below

President Trump filed his Complaint in the U.S. District Court for the District of Columbia on October 18, 2021, and his Motion for a Preliminary Injunction on October 19, 2021. DDC Doc. 1; DDC Doc. 5. The district court's basis for jurisdiction came from 28 U.S.C. § 1331. After briefing, the district court heard argument on November 4, 2021, and denied President Trump's motion on November 9, 2021. App. B, at 78a-126a; *Trump v. Thompson,* Civil Action No. 21-CV-2769, 2021 WL 5218398 (D.D.C. Nov. 9, 2021) (denying Plaintiff-Appellant Donald

J. Trump's Motion for Preliminary Injunction). President Trump filed his Notice of Appeal that same day, DDC. Doc. 37, and shortly thereafter moved the district court for an injunction pending appeal or an administrative injunction. DDC Doc. 38. The district court subsequently denied President Trump's Motion, DDC Doc. 43, but the U.S. Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit") granted an administrative injunction and expedited the appeal. CADC Doc. 1921975 at 1.

The D.C. Circuit heard argument on November 30, 2021. *Id.* at 2. On December 9, 2021, the Circuit affirmed the district court's order. *See Trump v. Thompson*, Civil Action No. 21-5254, 2021 WL 5832713 (D.C. Cir. Dec. 9, 2021). However, the D.C. Circuit directed the Clerk to withhold issuance of the mandate pending disposition of Petitioner's injunctive request filed contemporaneously with this Petition. *Id.* at *31 n.20; Judgment, App. A, 1a-77a. The Circuit further directed that, should this Petition and a motion for an injunction be timely filed, then its administrative injunction would remain operative until this Court decided whether to grant injunctive relief. Otherwise, should no such filing be made by December 23, 2021, the D.C. Circuit's administrative injunction would expire. *Id.* Finally, the D.C. Circuit directed the Clerk to issue the mandate immediately after the dissolution of its administrative injunction. CADC Doc. 1926126 (citing Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1)).

REASONS FOR GRANTING THE PETITION

This case presents "an important question of federal law that has not been, but should be, settled by this Court."

Sup. Ct. Rule 10(c). At stake is the ability of Presidents—past, current, and future—to rely upon executive privilege, separation of powers, and the Presidential Records Act to protect confidential Presidential records of deliberations from premature production to political rivals. The Committee's improper records request should have been rejected out-of-hand; the D.C. Circuit's decision upholding it was wrong.

I. The Committee's request raises novel and important questions of law that the Court should resolve.

A properly functioning Executive Branch requires confidentiality in deliberations. Indeed, the Court recently recognized, "[executive] privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is 'fundamental to the operation of Government.'" *Mazars,* 140 S. Ct. at 2032 (quoting *Nixon*, 418 U.S. at 708). "[P]rotection of the presidential decision-making process requires a promise that, as a general matter, its confidentiality will not be invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 729–30 (D.C. Cir. 1974) (cleaned up).

While the protections of executive privilege and restrictions on access to presidential records are qualified, it is critical that future Presidents and their advisers understand the contours and perimeters of that privilege—and its exceptions—after the conclusion of a presidential term. Otherwise, the deliberative process of advising Presidents will be chilled, as advisers will

doubtless understand the audience of their deliberations is not simply the President in whose administration they serve but also Congress and their political rivals. The frankness of their advice will necessarily be chilled—to the nation's detriment. *See, e.g.,* Tobi M. E. Young, *Ethics After the Executive Branch: The Perspective of the Office of the Former President*, 22 Tex. Rev. L. & Pol. 237, 243 (2018) ("It is in our national interest for presidents to receive advice untainted by worries (or indeed hopes) that the confidentiality of that advice will soon be dissolved, but hasty release of former White House staffers' communication with the former president would naturally affect how current White House staffers interact with their boss.").

The Court's guidance is necessary to decide this important issue of first impression. While the Court has recognized that executive privilege is qualified, it has not explained the standard necessary to invade the privilege, especially when it is asserted by a former President after his term of office. Likewise, while the Court has recently explained the standard Congress must meet to subpoena an incumbent President's records, it has not decided the applicability of those protections to the records of former Presidents, either under the constitutional separation of powers, *see Mazars*, 140 S. Ct. at 2029-36, the principles of executive privilege, or under the statutory standard codified by the Presidential Records Act and its implementing regulations. 44 U.S.C. §§ 2204-2205.

The courts below declined to adopt an objective test providing for a reliable and politically neutral standard to decide disputes regarding access to former Presidents' confidential records, notwithstanding the protections

of executive privilege, separation of powers, and the Presidential Records Act. Instead, the decisions below support the invasion of presidential confidence on the basis that the incumbent President and one house of Congress support the involuntary waiver of the former President's constitutionally and statutorily protected rights.

The Court has granted numerous petitions of Presidents and former Presidents when those cases involve important questions about the functioning of the presidency. For example, it granted the petitions of President Nixon, years after he left office, regarding a related issue of executive privilege, *GSA*, 433 U.S. 425 (1977), and again on the question of the scope of absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding that certiorari was justified "[i]n light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers"). It granted the petition of President Clinton to address when it was proper for courts to hear civil claims against an individual predating that individual's assumption of the Office of the President. *See Clinton v. Jones*, 520 U.S. 681, 693-94 (1997) (describing that the main concern in that case was distinguishing between official and personal acts to avoid making "the President 'unduly cautious in the discharge of his official duties'"). The Court has also addressed a petition by President Trump with respect to the propriety of releasing a President's personal financial records to congressional committees. *Mazars*, 140 S. Ct. 2019 (2020).

Special considerations are inherent in safeguarding the confidentiality of presidential communications. *Cheney v. U.S. District Court for D.C.,* 542 U.S. 367, 385 (2004).

The unique interests of the presidency further support the petition regardless of whether there is a split among the Courts of Appeal on the question or whether the case is "one-of-a-kind." *Clinton*, 520 U.S. at 689.

The weighty issues here will not only affect President Trump, but all future custodians of the presidency. To properly perform their critical constitutional duties, they must reliably know the standard that could be used to invade the confidence of their communications with their advisers. This important question merits the Court's careful consideration.

II. The Committee's request is facially invalid.

A. The Presidential Records Act, its implementing regulations, and constitutional separation of powers all require a legislative purpose and the absence of alternatives prior to requesting presidential records.

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

A straightforward review of the PRA makes clear the Committee has not met the statutory requirements to demand the disputed records, to say nothing of how it has fallen short of the constitutional standard. In addition to a valid legislative purpose, Congress must also demonstrate it has tried and failed to obtain the information through all other available means.

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

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

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

Congressman Kinzinger effectively admitted on live television that the Committee was engaged in a criminal investigation to determine whether laws were broken on January 6, 2021. ABC News, *'This Week' Transcript 12-19-21: Dr. Anthony Fauci & Rep. Adam Kinzinger*, ABC News (Dec. 19, 2021), https://abcnews.go.com/Politics/week-transcript-12-12-21-dr-anthony-fauci/story?id=81833124; CNN Politics, *Kinzinger says January 6 panel is investigating Trump's involvement in insurrection,* Cable News Network (Dec. 19, 2021) https://www.cnn.com/2021 /12/19/politics/adam-kinzinger-trump-investigation-insurrection-cnntv/index.html. The public comments of Committee members make it clear that the body is acting more like an inquisitorial tribunal than a legislative committee. Its members seek a "precise reconstruction of past events" not because there are "specific legislative decisions that cannot reasonably be made without" the information it seeks, but simply for the sake of the information itself. *Select Committee,* 498 F.2d at 731-33.

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

The D.C. Circuit's decision encourages blue-penciling, where Congress will be incentivized to send broad requests for Presidential records to incumbent and former Presidents, divorced from any legislative purpose, and then allow courts to limit them (or not) later. Again, Congress can only *request information* tethered to a "valid legislative purpose." *Mazars*, 140 S. Ct. at 2031. But these requests cannot be reformed, rewritten, or redrafted by the courts to remedy inexact drafting and improper purposes; they are too hopelessly broad and devoid of legislative value.

Incredibly, the Committee did not even attempt to get the information elsewhere, as is statutorily and constitutionally required, before submitting its request to the Archivist. The Committee is moving backwards: requesting the documents first and then subpoenaing dozens of witnesses and documents afterward. The Committee has never explained why other sources of information—outside of the requested records—could not "reasonably provide Congress the information it needs in

light of its particular legislative objective." *Mazars*, 140 S. Ct. at 2035-36.

B. The request violates this Court's *Mazars* decision and the Separation of Powers

Every information request made by Congress, whether via statutory process or subpoena, must comply with the strictures of the Constitution. *See Mazars*, 140 S. Ct. at 2034-35. Therefore, any argument by the Committee that it need not comply with the constitutional requirements regarding congressional information requests because its request is ostensibly made pursuant to the PRA or supported by an incumbent President's administration is meritless. Indeed, Congress cannot arrogate to itself via statute, or other means, power beyond that which the Constitution provides. Additionally, Congress cannot use information requests to exercise "any of the powers of law enforcement." *Quinn v. United States*, 349 U.S. 155, 161 (1955). Those powers "are assigned under our Constitution to the Executive and the Judiciary." *Id.* Put simply, Congress is not "a law enforcement or trial agency," and congressional investigations conducted "for the personal aggrandizement of the investigators" or "to punish those investigated," like this one, are "indefensible." *Watkins v. United States*, 354 U.S. 178, 187 (1957) (cleaned up).

The Committee's request is not supported by a valid legislative purpose. In the request, Chairman Thompson fails to identify a single piece of legislation he or the Committee is even considering. He claims the purpose of his request is to investigate the facts, circumstances, and causes of the events at the United States Capitol on January 6, 2021. But he fails to identify anything in

the private and privileged communications between and among President Trump and his closest aides that would advance or inform a valid legislative purpose or specific legislation regarding those events. And an investigation into alleged claims of wrong-doing is a quintessential law-enforcement task reserved to the executive and judicial branches. Congress cannot engage in meandering fishing expeditions in the hopes of embarrassing President Trump or exposing the President's and his staff's sensitive and privileged communications "for the sake of exposure." *Watkins*, 354 U.S. at 200; Late Night with Seth Meyers, *Rep. Adam Schiff Says It Was Torture Listening to Kevin McCarthy's Speech*, YouTube (Nov. 22, 2021), https://www.youtube.com/watch?v=mPvKNFC615o.

The "valid legislative purpose" requirement stems directly from the Constitution. "The powers of Congress . . . are dependent solely on the Constitution," and "no express power in that instrument" allows Congress to investigate individuals or to issue boundless records requests. *Kilbourn v. Thompson*, 103 U.S. 168, 182-89 (1880). The Constitution instead permits Congress to enact certain kinds of legislation, *see*, *e.g.*, Art. I, § 8, and Congress's power to investigate "is justified solely as an adjunct to the legislative process." *Watkins,* 354 U.S. at 197. In determining the constitutionality of congressional records requests, the *Mazars* Court instructed courts to "perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President." 140 S. Ct. at 2035. The Court then provided four "special considerations" meant to guide that analysis, *id.* at 2035-36, all of which confirm that the abusive and wide-ranging request here serves no legitimate legislative purpose.

First, "the asserted legislative purpose" must "warrant[] the significant step of involving the President and his papers." *Id.* at 2035. The alleged legislative purpose underpinning the overbroad request at issue here clearly does not merit involving the President or his records. If Congress wishes to legislate regarding its own security measures, it may certainly do so, but the President's private communications with and among staff members over eleven months ago are irrelevant to that legislation. The request openly admits that the Committee seeks to "identify lessons learned, and recommend laws, policies, procedures, rules, or regulations necessary . . . in the future," effectively treating President Trump as a test subject. Nothing in the Constitution permits such a speculative and unfounded records request.

Second, the request should be "no broader than reasonably necessary to support Congress's legislative objective." *Mazars*, 140 S. Ct. at 2036. "The specificity of the . . . request 'serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.'" *Id.* (quoting *Cheney*, 542 U.S. at 387). This consideration alone counsels strongly against the constitutionality of the Committee's request. The request is incredibly broad. For example, the request asks for "[a] ll documents and communications within the White House on January 6, 2021, relating in any way to . . . the January 6, 2021 rally . . . Donald J. Trump" and over thirty other individuals and government agencies. Such a startlingly broad request cannot withstand constitutional scrutiny under the second *Mazars* factor.

Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a [request]

advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036. "[U]nless Congress adequately identifies its aims and explains why the President's information will advance its consideration of possible legislation," "it is impossible to conclude that a [request] is designed to advance a valid legislative purpose." *Id.* H. Res. 503 generally permits the Committee to investigate intelligence community and law enforcement activities surrounding January 6th but is silent regarding the records and materials of the Executive Office of the President. The lack of evidence establishing the Committee's overbroad request serves some valid legislative goal dooms the request, regardless of whether President Biden's wishes to waive privilege.

Fourth, courts should "assess the burdens imposed on the President by [the] subpoena" because "[the burdens] stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id.* As discussed above, the number of records encompassed by the Committee's overbroad request is staggering. At a minimum, the Committee must narrow its request significantly or the burden on President Trump in reviewing all responsive documents will be substantial.

C. The records at issue are protected by executive privilege and the Committee has not made a sufficient showing of need to invade that privilege

The records at issue are protected by executive privilege, and the circuit court's discretionary test effectively eviscerates executive privilege. As this Court has recognized many times, executive privilege is critical

to the proper functioning of the executive branch. *Nixon*, 418 U.S. at 708; *GSA*, 433 U.S. at 448–49. The smooth, safe, and successful leadership of the United States requires that the executive receive fulsome and frank advice from his advisors. But "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705. As a result, executive privilege is strong, and it is broad.

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

If the privilege that covered one administration were to evaporate immediately upon the transition to the next, the privilege would be rendered all but worthless. The privilege is "necessary to provide the confidentiality required for the President's conduct of office," *GSA*, 433 U.S. at 448, which is why the "privilege survives the individual President's tenure." *Id.* at 449. In *GSA*, this Court rejected the assertion that "only an incumbent President can assert the privilege of the Presidency," noting that "[a]cceptance of that proposition would, of course, end th[e] inquiry." 433 U.S. at 448.

True, a former president's claim of privilege might be weakened by a contrary determination by the incumbent. But in *GSA*, the Supreme Court confirmed that a former President retains executive privilege at least with respect to confidential communications, and that he can assert his privilege over the objections of the incumbent. That right is Constitutional, as it is the privilege that protected his deliberations while he was the sitting president. When the PRA gives the President the discretion to uphold a claim of executive privilege, it reflects *GSA*'s articulation of the scope of a former president's privilege: he may assert the presidential communications privilege, but not the executive state secrets privilege. *GSA*, 433 U.S. at 447-49 (differentiating between the two).

The District Court overread *GSA*. First, because an incumbent's decision detracts from the weight of a former president's assertion, it is not dispositive, as the Court implies. It did not give the incumbent full veto power. Second, *GSA* did not involve congressional overreach and political machinations; the question was about the processes by which the materials would be screened and catalogued by professional archivists operating within the executive branch, and the incumbent executive is, obviously, in a better position to make that determination.

There is no dispute that the documents at issue are covered by executive privilege. App. A, at 56a. They were created during President Trump's term of office and reflect presidential decisionmaking, deliberations, and communications among close advisors, attorneys, and the President. They reflect presidential communications and the deliberative process of Presidential advisers.

There is also no dispute, and the D.C. Circuit acknowledged, that "former Presidents retain for some period of time a right to assert executive privilege over documents generated during their administrations." App. A, at 26a (citing *GSA*, 433 U.S. at 449). The Respondents admitted there could be some amorphous case where the interest of a former President would control over an incumbent President, but they failed to provide any framework for making such a decision.

The D.C. Circuit, too, acknowledged a former President's statutory right, but effectively reasoned it away, finding the decision of the incumbent to waive the executive privilege of his predecessor if Congress is in agreement all but dispositive. That is not the law.

To the extent there was more to the test, the court relied on the "weighty reasons" on which President Biden grounded his decision to waive the privilege. App. A, at 43a. It pointed to President Biden's invocation of the "unprecedented effort to obstruct the peaceful transfer of power" on January 6th, which it credited as "unique and extraordinary circumstances," and cited President Biden's political conclusion that "the privilege 'should not be used to shield . . . information that reflects a clear and apparent effort to subvert the Constitution.'" *Id.* (internal quotations omitted). The court failed to articulate any politically neutral standard to map out what a former president must do to jump the hurdle, other than a five-paragraph politically charged letter in which President Biden declined to assert privilege over even a single record.

At the same time, the court made clear its reasoning is fluid, remarking that it "need not conclusively resolve whether and to what extent a court could second guess the sitting President's judgment that it is not in the interests of the United States to invoke privilege." *Id.* at 40a. The events at issue present "a rare and formidable alignment of factors [that] support[] the disclosure of the documents at issue." *Id.*

The Circuit's analysis, which substantially constricts the former President's right to object, contrary to *GSA*, is a deeply subjective and discretionary one that has no solid foundation. As it stands, the standard for disclosure can easily shift depending upon the politics of the day. In short, the circuit's analysis is two parts, the first grants almost complete deference to an incumbent President, and the second is a court's evaluation of whether the incident justifying the request is "bad enough" to permit the incumbent President and Congress to rupture the former President's executive privilege.

This is not an analysis based in law; it is a subjective standard ripe for political abuse by the incumbent President and dependent upon the political perspective of jurists who will decide future disputes. The analysis is not just wrong, it is dangerous and it will unnecessarily result in a further politicized judiciary. Courts should avoid adopting rubrics that force them to make value based determinations regarding the degree of gravity assigned to political controversies. It cannot remain the method by which executive privilege stands or falls.

The court below dismissed President Trump's concern that "going forward, incumbent Presidents will

indiscriminately decline to assert executive privilege over a former President's records whenever they are of the opposite political party." *Id.* at 54a. The court said the "possibility of mutually assured destruction of the privilege cuts against the risk of heedless disclosures." *Id.* But that balance cannot be maintained after one party has already launched the first strike. It is imperative that this Court recalibrate the Circuit's flawed and subjective analysis.

Instead, the correct and legally rooted analysis is objective and includes clear factors for courts to weigh. Certainly, the incumbent President's determination is one factor that carries real weight, but other factors include the breadth of the requests (here, extremely broad), the time since the President has been out of office (here, only 10 months), and whether the documents will remain confidential (here, the records would be made public).

Then the Court should look at the specific need of the party seeking to invade the privilege[2] and ask whether the justification is significant enough to invite the serious consequences that flow from an involuntary invasion of executive privilege.

The current disagreement between an incumbent President and his predecessor highlights a serious peril to meaningful executive privilege and the ability of Presidents and their advisers to reliably make and receive full and frank advice, without concern that

2. The circuit court also misapplied *GSA* by placing the burden on President Trump to defend the privilege, when, in fact, the burden is on the parties seeking to invade it.

communications will be publicly released within a year of an administration's conclusion. Common sense, as well as case law, *United States v. Nixon*; *Nixon v. GSA*, make clear these concerns are important and very real. President Trump is entitled to an injunction, and this Republic is entitled to an objective test.

D. The equitable injunctive factors favor President Trump and weigh heavily in favor of review by the Court.

President Trump will be irreparably harmed absent an injunction. Both Congress and this Court specifically recognize the rights of former Presidents to challenge the production of privileged presidential records. *See* 44 U.S.C. § 2204; *GSA*, 433 U.S. at 439. The executive branch also recognizes the right to bring such an action through the promulgation of regulations. 36 C.F.R. § 1270.44. Both the Constitution and the Presidential Records Act give former Presidents a clear right to protect their confidential records from premature dissemination. This case presents a clear threat to that right and it's invasion would be a pedagogical example of irreparable harm.

All three branches have spoken clearly: a former President may challenge an invasion of executive privilege and the release of his presidential records. As the D.C. Circuit correctly noted, "there is no question that the former President can file suit to press his claim of executive privilege" and his assertion of privilege is of "constitutional stature." App. A, at 38a (citing *GSA*, 433 U.S. 425, 439 (1977). Further, the D.C. Circuit correctly noted the Presidential Records Act provides for assertions of executive privilege by former Presidents. App. A, at 34a-35a (citing 44 U.S.C. §2208).

Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. The assertion of executive privilege in this instance is President Trump's constitutional right, and this Court has stated that a deprivation of constitutional rights "unquestionably constitutes irreparable injury" for purposes of injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that First Amendment violations constitute irreparable injury); *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) (stating that "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm"). This harm would not only befoul President Trump's interests in maintaining the confidentiality of his presidential records, but the harm would extend to future Presidents as well. This violation would be a substantial blow to the institution of the presidency.

If the Court does not intervene, the Archivist will give the Committee confidential, privileged information. Once disclosed, the information loses its confidential and privileged nature. *See Council on American-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 76 (D.D.C. 2009). If such material is disclosed before President Trump has had a proper opportunity for appellate review, "the very right sought to be protected has been destroyed." *In re Sealed Case* No. 98-3077, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997)); *see also Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The *status quo* could never be

restored."); *PepsiCo, Inc. v. Redmond*, 1996 WL 3965, at *30 (N.D. Ill. 1996) ("[J]ust as it is impossible to unring a bell, once disclosed, . . . confidential information lose[s] [its] secrecy forever"); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 172 (D.D.C. 1976) ("Once disclosed, such information would lose its confidentiality forever."). This decision will set a precedent that will either shore up the foundations of executive privilege or shatter it. President Trump and his advisers relied upon the expectation of executive confidentiality while in office, the time when the communications and records at issue were created. That reliance interest is substantial and its evisceration would be irreparably harmful.

The D.C. Circuit's reasoning regarding irreparable harm is flawed. Much of the D.C. Circuit opinion attempts to cast President Biden's refusal to assert executive privilege as a continuation of a long line of presidential refusals to assert the privilege. *See* App. A, at 45a-46a. The D.C. Circuit opinion declares that "President Biden's judgment is of a piece with decisions made by other Presidents to waive privilege in times of pressing national need." *Id.* at 45a. The opinion cites President Nixon's waiver of privilege over records relating to the Watergate controversy, President Reagan's waiver of privilege over records relating to the Iran-Contra scandal and his personal diary, President George W. Bush's waiver of privilege over documents relating to the 9/11 attacks, and President Trump's waiver of privilege over former FBI director James Comey's testimony that included his conversations with President Trump. *Id.* All these examples concern Presidents deciding whether to exert privilege over their *own* records. None of the examples cited by the D.C. Circuit are analogous to the present case,

and even if they were, parties are free to exert privilege over some matters and waive it with respect to others. Supposed precedent of prior Presidents waiving privilege over their own records have no bearing on this question. An accommodation in one instance does not support a forced waiver in another.

The balance of the equities and public interest also favor an injunction. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Initially, it is always equitable and in the public interest to enforce the Constitution. *Gordon v. Holder*, 721 F.3d 638, 653 (2013). The D.C. Circuit "has clearly articulated that the public has an interest in the government maintaining procedures that comply with constitutional requirements." *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. FEMA*, 463 F. Supp. 2d 26, 36 (D.D.C. 2006) (citing *O'Donnell Const. Co. v. Dist. of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992)). The Constitution entrusts the courts to determine whether the Committee has exceeded its constitutional authority. Permitting the Committee to evade judicial review is not in the public interest, nor is granting Congress the ability to rifle through any and all documents of a former President merely because Congress and an incumbent President authorizes it.

The balance of equities is served by an injunction because President Trump's injury—the mootness of important constitutional and statutory rights—outweighs any injury the Committee would suffer by restriction of President Trump's personal records. Unlike the irreparable harm President Trump will suffer absent interim relief, Respondents would suffer virtually no

harm by delaying production while the parties litigate the request's validity. And while Congress is certainly free to set its own timeframe to conduct its business, the Electoral Counts Act will not be triggered for three years; Congress has time to allow the court to consider this expedited petition while it continues to legislate.

In addition, the records sought are in the custody and control of NARA and, therefore, are being preserved as a matter of law. The Committee's "interest in receiving the records immediately" thus "poses no threat of irreparable harm to them." *Shapiro v. U.S. Dep't of Justice*, 2016 WL 3023980, at *7 (D.D.C. May 25, 2016). Interim relief only "postpones the moment of disclosure . . . by whatever period of time may be required" to adjudicate the merits of President Trump's claims finally. *Providence Journal*, 595 F.2d 889, 890; see *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (rejecting the government's claim of harm in having its action "delayed for a short period of time pending resolution of this case on the merits"). The limited interest the Committee may have in immediately obtaining the requested records pales in comparison to President Trump's interest in securing judicial review before he suffers irreparable harm.

Further, the public interest is served by injunctive relief because the Republic itself has a strong interest in the effective operation of the Executive Branch without the President's political interests interfering in that operation. This political clash between an incumbent President and the former Presidents is likely why this Court provided former Presidents a right to assert executive privilege. Congress's motivations are at the heart of the test developed in *Mazars*. They are precisely why the *GSA*

Court grants the former President the "right to be heard," and why the PRA allows former Presidents a judicial remedy. *GSA*, 433 U.S at 449; *Nixon*, 418 U.S. at 713; 44 U.S.C. § 2204; see also 36 C.F.R. §1270.44 (stating the Archivist discloses records after incumbent denial of the privilege only if no court order is issued).

III. This case presents an appropriate vehicle to resolve these weighty issues

President Trump's objection to the production of his presidential records to political rivals provides the Court with a strong vehicle to address an important problem that is likely to recur in an increasingly partisan political climate. The Respondents and the courts below announced a rule giving Congress carte blanche authority to demand a former President's records, when the incumbent of their same political party consents. The lack of a meaningful limiting principle will encourage future congresses to escalate such requests, especially when at least one house of Congress and the presidency are controlled by the same political party. If the Court does not promptly confront the issue and adopt a clear and politically neutral test, this unprecedented tactic will become the new norm.

The facts here provide the Court with an opportunity to make a clean and objective ruling. The Committee's records request is sweeping and broad; it has declined to either meaningfully limit the areas of inquiry based upon a legitimate legislative purpose or seek the information elsewhere. This clear overreach can be cleanly and objectively rejected.

While the Committee has argued that its work is pressing and time sensitive, the fast paced nature of this litigation allows the Court to resolve the case expeditiously. Indeed, it could be argued this term, should the Court's docket allow. Moreover, the Committee has declined to state any specific timetable for its report or any resulting legislation, even when directly asked by the Circuit at oral argument. Since more tranches of records are expected to be in controversy, as the National Archives continues to process the records of the Trump Administration, the resolution of this matter by the Court will expedite the consideration of future disputes over the Committee's requests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN CLARK
ELECTIONS, LLC
1050 Connecticut Avenue, NW,
Suite 500
Washington, DC 20036
(202) 987-9944

JESSE R. BINNALL
Counsel of Record
BINNALL LAW GROUP, PLLC
717 King Street, Suite 200
Alexandria, VA 22314
(703) 888-1943
jesse@binnall.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED DECEMBER 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5254

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

Appellant,

v.

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

Appellees.

November 30, 2021, Argued;
December 9, 2021, Decided

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

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

Appendix A

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

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

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

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

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

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

Archivist of the United States (Oct. 8, 2021), J.A. 113 ("Second Remus Ltr."); Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 25, 2021), J.A. 173-174 ("Third Remus Ltr.").

The central question in this case is whether, despite the exceptional and imperative circumstances underlying the Committee's request and President Biden's decision, a federal court can, at the former President's behest, override President Biden's decision not to invoke privilege and prevent his release to Congress of documents in his possession that he deems to be needed for a critical legislative inquiry. On the record before us, former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents. Both Branches agree that there is a unique legislative need for these documents and that they are directly relevant to the Committee's inquiry into an attack on the Legislative Branch and its constitutional role in the peaceful transfer of power. More specifically, the former President has failed to establish a likelihood of success given (1) President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States; (2) Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations; (3) the demonstrated relevance of the documents at issue to the congressional inquiry; (4) the absence of any identified alternative source for

the information; and (5) Mr. Trump's failure even to allege, let alone demonstrate, any particularized harm that would arise from disclosure, any distinct and superseding interest in confidentiality attached to these particular documents, lack of relevance, or any other reasoned justification for withholding the documents. Former President Trump likewise has failed to establish irreparable harm, and the balance of interests and equities weigh decisively in favor of disclosure.[2]

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

I

A

On November 3, 2020, Americans elected Joseph Biden as President, giving him 306 electoral college votes. Then-President Trump, though, refused to concede, claiming that the election was "rigged" and characterized by "tremendous voter fraud and irregularities[.]" President Donald J. Trump, *Statement on 2020 Election Results* at 0:34-0:46, 18:11-18:15, C-SPAN (Dec. 2, 2020),

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

https://www.c-span.org/video /?506975-1/president-trump-statement-2020-election-results (last accessed Dec. 7, 2021). Over the next several weeks, President Trump and his allies filed a series of lawsuits challenging the results of the election. *Current Litigation*, ABA: STANDING COMM. ON ELECTION LAW (April 30, 2021), https://perma.cc/9CRN-2464. The courts rejected every one of the substantive claims of voter fraud that was raised. *See, e.g., Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020) ("[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.").

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

Shortly before noon on January 6th, President Trump took the stage at a rally of his supporters on the Ellipse, just south of the White House. J.A. 180. During his more than hour-long speech, President Trump reiterated his claims that the election was "rigged" and "stolen," and urged then-Vice President Pence, who would preside

over the certification, to "do the right thing" by rejecting various States' electoral votes and refusing to certify the election in favor of Mr. Biden. *See* Donald J. Trump, *Rally on Electoral College Vote Certification* at 3:33:05-3:33:10, 3:33:32-3:33:54, 3:37:19-3:37:29, C-SPAN (Jan. 6, 2021), https://www.c-span.org/video/?507744-1/rally-electoral-college-vote-certification (last accessed Dec. 7, 2021) ("January 6th Rally Speech"). Toward the end of the speech, President Trump announced to his supporters that "we're going to walk down Pennsylvania Avenue * * * to the Capitol and * * * we're going to try and give our Republicans * * * the kind of pride and boldness that they need to take back our country." *Id.* at 4:42:00-4:42:32. Urging the crowd to "demand that Congress do the right thing and only count the electors who have been lawfully slated[,]" he warned that "you'll never take back our country with weakness" and declared "[w]e fight like hell and if you don't fight like hell, you're not going to have a country anymore." *Id.* at 3:47:20-3:47:42, 4:41:17-4:41:33.

Shortly after the speech, a large crowd of President Trump's supporters—including some armed with weapons and wearing full tactical gear—marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results. *See Capitol Attack* Senate Report at 23, 27-29. The mob quickly overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol. *Id.* at 24-25. Police officers were attacked with chemical agents, beaten with flag poles and frozen water bottles, and crushed between doors and throngs of rioters. *Id.* at 28-29; *Hearing on the Law*

Enforcement Experience on January 6th Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, 117th Cong., at 2 (July 27, 2021) (statement of Sgt. Aquilino A. Gonell, U.S. Capitol Police).

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

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

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3. 167 Cong. Rec. E1133 (daily ed. Oct. 22, 2021) (statement of Rep. Sheila Jackson Lee); 167 Cong. Rec. H2347 (daily ed. May 14, 2021) (statement of Rep. Steve Cohen); Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. Times (Feb. 13, 2021), https://perma.cc/2Z47-5XHX.

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

B

On June 30, 2021, the United States House of Representatives created the Select Committee to Investigate the January 6th Attack on the United States Capitol. H.R. Res. 503. The House directed the Committee to (1) "investigate the facts, circumstances, and causes relating to the domestic terrorist attack on the Capitol, including * * * influencing factors that contributed to" it; (2) "identify, review, and evaluate the cause of and

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

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

the lessons learned" from the attack, including "the structure, coordination, operational plans, policies, and procedures of the Federal Government, * * * particularly with respect to detecting, preventing, preparing for, and responding to targeted violence and domestic terrorism"; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures * * * as it may deem necessary." *Id.* § 4(a). Those "corrective measures" include "changes in law, policy, procedures, rules, or regulations" to (1) "prevent future acts of violence * * * targeted at American democratic institutions"; (2) "improve the security posture of the United States Capitol Complex"; and (3) "strengthen the security and resilience" of the United States' "democratic institutions[.]" *Id.* § 4(c).

The resolution expressly incorporates Rule XI of the Rules of the House of Representatives, which empowers the Committee "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary," including from "the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or Executive Office of the President[.]" Rules of the U.S. House of Reps. (117th Cong.) XI.2(m)(1)(B) & (m)(3)(D) (2021); *see also* H.R. Res. § 5(c).

Appendix A

C

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

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

Appendix A

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

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

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

> [T]he insurrection that took place on January 6, and the extraordinary events surrounding

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

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

First Remus Ltr., J.A. 107-108.

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

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

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

Appendix A

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

Former President Trump subsequently claimed privilege over 724 pages in the second and third tranches combined. J.A. 127, 165-171. Those documents cover "pages from multiple binders containing proposed talking points for the Press Secretary * * * principally relating to allegations of voter fraud, election security, and other topics concerning the 2020 election[,]" "presidential activity calendars and a related handwritten note for January 6, 2021, and for January 2021 generally," the "draft text of a presidential speech for the January 6, 2021, Save America March[,]" "a handwritten note from * * * Meadows' files listing potential or scheduled briefings and telephone calls concerning the January 6 certification and other election issues[,]" and "a draft Executive Order on the topic of election integrity[.]" J.A. 130. They also include "a memorandum apparently originating outside the White House regarding a potential lawsuit by the United States against several states President Biden won[,]" "an email chain originating from a state official regarding election-related issues[,]" "talking points on alleged election irregularities in one Michigan county[,]" "a document containing presidential findings concerning the security of the 2020 presidential election and ordering various actions[,]" and "a draft proclamation honoring the Capitol Police and deceased officers Brian Sicknick and Howard Liebengood, and related emails[.]" J.A. 130-131.

Several days later, President Biden advised the Archivist that he would not assert executive privilege

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

The letter to the Archivist also advised that, "[i]n the course of an accommodation process between Congress and the Executive Branch," the Committee had agreed to defer its request as to fifty pages of responsive records. J.A. 128; Third Remus Ltr., J.A. 174.

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

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

Appendix A

D

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

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

would suffer irreparable harm if the records were released. Mem. in Supp. of Pl.'s Mot. for Prelim. Inj. at 5-6 ("Prelim. Inj. Mem."), D. Ct. Dkt. 5-1.

The district court denied the motion for a preliminary injunction, ruling that former President Trump's "assertion of privilege is outweighed by President Biden's decision not to uphold the privilege," and declining to "second guess that decision by undertaking a document-by-document review[.]" J.A. 197. The court also said that the Committee acted within its legislative authority because its request involves "multiple subjects on which legislation 'could be had[.]'" J.A. 204 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177, 47 S. Ct. 319, 71 L. Ed. 580 (1927)). The court added that the Committee needs the documents to understand the "circumstances leading up to January 6[,]" and to "identify effective reforms," and that "President Biden's decision not to assert the privilege alleviates any remaining concern that the requests are overly broad." J.A. 207.

As for irreparable injury, the district court found that the former President had not identified any personal interest threatened by production of the records, and that his claim that disclosure would "gravely undermine the functioning of the executive branch" was overtaken by President Biden's determination that the records could safely be released, as well as the long history of past Presidents waiving privilege when it was in the interests of the United States to do so. J.A. 212-213. Lastly, with respect to the balance of harms and public interest, the court concluded that "discovering and coming to terms

with the causes underlying the January 6 attack is a matter of unsurpassed public importance[,]" and that "the public interest lies in permitting—not enjoining—the combined will of the legislative and executive branches[.]" J.A. 214-215.

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

E

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

II

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

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

We review the district court's denial of a preliminary injunction for an abuse of discretion, its legal conclusions *de novo*, and its factual findings for clear error. *Make the Road New York v. Wolf*, 962 F.3d 612, 623, 447 U.S. App. D.C. 352 (D.C. Cir. 2020).

III

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

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

constitutional conflict[.]" *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 444-445, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-348, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.") (internal quotation marks and citation omitted); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (courts should take "the narrower ground for adjudication of the constitutional questions").[7]

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

Congress's Investigative Power

Congress's power to conduct investigations appears nowhere in the text of the Constitution. Yet it is settled law that Congress possesses "the power of inquiry" as "an essential and appropriate auxiliary to the legislative

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

function." *McGrain*, 273 U.S. at 175. That is because "[w]ithout information, Congress would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031, 207 L. Ed. 2d 951 (2020) (quoting *McGrain*, 273 U.S. at 174). Congress's power to obtain information is "broad" and "indispensable[,]" *Watkins v. United States*, 354 U.S. 178, 187, 215, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio Law Abs. 225 (1957), and "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them,'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187).

Congress's power to investigate has limits, however. Because it is "justified solely as an adjunct to the legislative process[,]" *Watkins*, 354 U.S. at 197, "a congressional subpoena is valid only if it is 'related to, and in furtherance of, a legitimate task of Congress[,]'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187). That generally means it must "concern[] a subject on which 'legislation could be had.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) (quoting *McGrain*, 273 U.S. at 177).

Relatedly, "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn v. United States*, 349 U.S. 155, 161, 75 S. Ct. 668, 99 L. Ed. 964 (1955)). Likewise, "there is no congressional power to expose for the sake of exposure." *Watkins*, 345 U.S. at 200.

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

Because "Congress's responsibilities extend to 'every affair of government[,]'" its "inquiries might involve the President in appropriate cases[.]" *Mazars*, 140 S. Ct. at 2033 (quoting *United States v. Rumely*, 345 U.S. 41, 43, 73 S. Ct. 543, 97 L. Ed. 770 (1953)).

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

But when disputes between the President and Congress over records requests have made their way to court, courts have employed carefully tailored balancing tests that weigh the competing constitutional interests. *See Mazars*, 140 S. Ct. at 2035-2036 (asking whether a subpoena for a President's personal records is "related to, and in furtherance of, a legitimate task of Congress" in that (1) the legislative purpose warrants a request for a President's records in particular, (2) the subpoena is not overbroad, (3) Congress has adequately identified a valid legislative purpose, and (4) the subpoena would not unduly burden the President) (quoting *Watkins*, 345 U.S.

at 187); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731, 162 U.S. App. D.C. 183 (D.C. Cir. 1974) (weighing a President's assertion of privilege against whether "subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions"); *cf. United States v. Nixon*, 418 U.S. 683, 713, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) ("The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."). None of those tests, though, have been applied to resolve a privilege dispute between a former President and the joint judgment of the incumbent President and the Legislative Branch.

Executive Privilege

The canonical form of executive privilege, and the one at issue here, is the presidential communications privilege. That privilege allows a President to protect from disclosure "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d 729, 744, 326 U.S. App. D.C. 276 (D.C. Cir. 1997); *see United States v. Nixon*, 418 U.S. at 705. The privilege applies not only to materials viewed by the President directly, but also to records "solicited and received by the President or [the President's] immediate White House advisers who have broad and significant responsibility" for advising the President. *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1114, 361 U.S. App. D.C. 183 (D.C. Cir. 2004) (internal quotation marks and citation omitted).

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

The executive privilege is just that—a privilege held by the Executive Branch, "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449 (citation omitted). Because "[a] President and those who assist him must be free to explore alternatives in the process of shaping polices and making decisions and to do so in a way many would be unwilling to express except privately," *United States v. Nixon*, 418 U.S. at 708, the privilege "safeguards the public interest in candid, confidential deliberations within the Executive Branch," *Mazars*, 140 S. Ct. at 2032.

But the executive privilege is a qualified one; it is not "absolute[.]" *United States v. Nixon*, 418 U.S. at 707. Executive privilege may be overcome by "a strong showing of need by another institution of government[.]" *Senate Select Comm.*, 498 F.2d at 730; *see also United States*

v. Nixon, 418 U.S. at 707. And the privilege may give way in the face of other "strong constitutional value[s,]" *Dellums v. Powell*, 561 F.2d 242, 247, 182 U.S. App. D.C. 244 (D.C. Cir. 1977), such as "the fundamental demands of due process of law" in criminal trials, *United States v. Nixon*, 418 U.S. at 713; *see also Protect Democracy Project, Inc. v. National Security Agency*, 10 F.4th 879, 886 (D.C. Cir. 2021).

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

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

In addition, when it comes to evaluating the impact on the Executive Branch of disclosing presidential materials, the Supreme Court was explicit that the incumbent President is "in the best position to assess the present and future needs of the Executive Branch[.]" *Nixon v. GSA*, 433 U.S. at 449.[8]

8. Like the Supreme Court, we treat the terms "presidential privilege," "presidential communications privilege," and "executive

Appendix A

The Management of Presidential Records*: *Statutory Provisions

Starting with George Washington, "Presidents exercised complete dominion and control over their presidential papers" after leaving office. *Nixon v. United States*, 978 F.2d 1269, 1277, 298 U.S. App. D.C. 249 (D.C. Cir. 1992). This tradition "made for a highly idiosyncratic if not entirely unhappy record of preserving the papers of United States Presidents." National Study Comm'n on Records & Documents of Fed. Officials, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 3 (undated), *reprinted in Presidential Records Act of 1978: Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the H. Comm. on Gov't Operations*, 95th Cong. 467, 469 (1978).

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

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privilege" as interchangeable for purposes of this case. *See Nixon v. GSA*, 433 U.S. at 446 n.9; *see also Dellums,* 561 F.2d at 245 n.8.

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

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

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

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

9. The Archivist of the National Archives and Records Administration replaced the Administrator of the General Services Administration in 1984. *See Public Citizen v. Burke*, 843 F.2d 1473, 1475, 269 U.S. App. D.C. 145 (D.C. Cir. 1988); National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 103(b)(2), 98 Stat. 2280, 2283.

the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President[,]" are excluded from regulation. *Id.* § 2201(3).

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

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

The Act tasks the Archivist with properly designating "[a]ny Presidential record or reasonably segregable

portion thereof containing information within a category restricted by the President[,]" and preventing public access to those documents until the appropriate time. 44 U.S.C. § 2204(b)(1); *see also* 36 C.F.R. § 1270.40(c). The Presidential Records Act precludes judicial review of the Archivist's designations "[d]uring the period of restricted access[,]" except for "any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. § 2204(b)(3), (e).

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

- subpoenaed or subjected to other judicial process by a court as part of a civil or criminal proceeding;

- requested by an incumbent President "if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available"; or

- requested by either House of Congress or a committee acting within its jurisdiction and the information is "needed for the conduct of its business and [is] not otherwise available[.]"

44 U.S.C. § 2205(2)(A)-(C). Disclosure under this section is "subject to any rights, defenses, or privileges which the

United States or any agency or person may invoke[.]" *Id.* at § 2205(2).

The Management of Presidential Records*: *Regulatory Provisions

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

The Department of Justice's Office of Legal Counsel interpreted those regulations as requiring that "the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, * * * [and] that the Archivist must and will treat any claim by a former President" in accordance with "the supervision and control of the incumbent President." Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, Office of Management. and Budget 23-24, 26 (Feb. 18, 1986), *reprinted in Review of Nixon Presidential Materials Access Regulations: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 99th Cong. 263-292 (1986) ("1986 OLC Memorandum"); *see Public Citizen v. Burke*, 843 F.2d 1473, 1476-1477, 269 U.S. App. D.C. 145 (D.C. Cir. 1988).

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

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

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

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

Shortly after those regulations were promulgated, President Ronald Reagan issued an Executive Order that expanded on the process for responding to a former President's invocation of privilege. *See* Exec. Order No. 12,667, 54 Fed. Reg. 3403 (Jan. 18, 1989); *see also* 44 U.S.C. § 2204 note. Under that Executive Order, when the incumbent President invoked executive privilege, the Archivist was prohibited from disclosing

the records "unless directed to do so by an incumbent President or by a final court order." Exec. Order No. 12,667 § 3(d). If a former President invoked executive privilege, but the incumbent did not, the Archivist was charged with determining "whether to honor the former President's claim of privilege[.]" *Id.* § 4(a). In making that determination, though, the Archivist was bound to "abide by any instructions given him [or her] by the incumbent President or [the President's] designee unless otherwise directed by a final court order." *Id.* § 4(b).

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

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

For disclosures to Congress or one of its committees under 44 U.S.C. § 2205(2)(C), the new Executive Order provided that the "Archivist shall not permit access to the records unless and until * * * the former President *and* the incumbent President agree to authorize access" or a "final and nonappealable court order" requires it. Exec. Order No. 13,233 § 6 (emphasis added). While that new procedure reflected President Bush's view of proper policy, the Administration was explicit that such deference to a former President was not constitutionally compelled and would not affect a court's disposition of a lawsuit by the former President. *See Hearings on Executive Order 13,233*

and the Presidential Records Act Before the Subcomm. of the H. Comm. on Gov't Reform, 107th Cong. 20, 108 (2001-2002) ("*Executive Order 13,233 Hearings*") (statement of M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice); *id.* at 21 ("Let me emphasize, moreover, that the Executive order is wholly procedural in nature." It does not "in any respect purport to redefine the substantive scope of any constitutional privilege.").[10] In addition, the incumbent President need not "support that privilege claim" in the "forum in which the privilege claim is challenged." Exec. Order No. 13,233 § 4.[11]

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

In 2014, Congress largely codified the approach of the Reagan Executive Order. The Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003, provided detailed procedures for protecting and asserting claims of "constitutionally based privilege" against disclosure "to the public" of presidential records. *Id.* § 2; 44 U.S.C. § 2208 (procedures for public disclosure).

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

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

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

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

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

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

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

IV

With that background in mind, we turn to the merits of former President Trump's appeal. Our starting point is the Supreme Court's admonition that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The movant must: (1) establish a likelihood of "succe[ss] on the merits"; (2) show "irreparable harm in the absence of preliminary relief"; (3) demonstrate that the equities

favor issuing an injunction; and (4) persuade the court that "an injunction is in the public interest." *Id.* at 20. The likelihood of success and irreparability of harm "are the most critical" factors. *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). The balance of harms and the public interest factors merge when the government is the opposing party. *Id.* at 435.

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

A

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

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

B

While former President Trump can press an executive privilege claim, the privilege is a qualified one, as he agrees. *See Nixon v. GSA*, 433 U.S. at 446; *United States v. Nixon*, 418 U.S. at 707; Appellant Opening Br. 35. Even a claim of executive privilege by a sitting President can be overcome by a sufficient showing of need. *See United States v. Nixon*, 418 U.S. at 713; *In re Sealed Case*, 121 F.3d at 742. The right of a former President certainly enjoys no greater weight than that of the incumbent.

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

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

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

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

1

On this record, a rare and formidable alignment of factors supports the disclosure of the documents at issue. President Biden has made the considered determination

that an assertion of executive privilege is not in the best interests of the United States given the January 6th Committee's compelling need to investigate and remediate an unprecedented and violent attack on Congress itself. Congress has established that the information sought is vital to its legislative interests and the protection of the Capitol and its grounds. And the Political Branches are engaged in an ongoing process of negotiation and accommodation over the document requests.

a

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

To start, as the incumbent, President Biden is the principal holder and keeper of executive privilege, and he speaks authoritatively for the interests of the Executive Branch. Under our Constitution, we have one President at a time. Article II is explicit that "[t]he executive Power shall be vested in *a* President of the United States of America." U.S. CONST. Art. II, § 1, cl. 1 (emphasis added); *see Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191, 207 L. Ed. 2d 494 (2020) ("[T]he 'executive Power'—all of it—is 'vested in *a* President[.]'") (emphasis added) (quoting U.S. CONST., Art. II, § 1, cl. 1). As between a former and an incumbent President, "only the incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448.

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

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

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

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

The record also shows that, for the documents over which the former President asserted privilege, President Biden and his staff took at least a month to review each tranche. *See* J.A. 125-128. During that time, former President Trump's views were obtained. J.A. 13. In

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

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

That is not to say, of course, that an incumbent President *must* provide a written explanation for a former President's claim of privilege to fail. In *Nixon v. GSA*, the incumbent President had not provided such an explanation, but instead had simply chosen to defend the facial constitutionality of the Preservation Act in court. *See* 433 U.S. at 441. And in *Dellums*, the incumbent was silent as to privilege. 561 F.2d at 247.

Still, when the head of the Executive Branch lays out the type of thoroughgoing analysis provided by President Biden, the scales tilt even more firmly against the contrary views of the former President. For Article III courts are generally ill-equipped to superintend or second guess the expert judgment of the sitting President about the current

needs of the Executive Branch and the best interests of the United States on matters of such gravity and so squarely within the President's Article II discretion.

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

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

before Congress, despite (borne out) expectations that the testimony would include Comey's recollections of confidential conversations with President Trump.[14]

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

b

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

The very essence of the Article I power is legislating, and so there would seem to be few, if any, more imperative interests squarely within Congress's wheelhouse than ensuring the safe and uninterrupted conduct of its

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

constitutionally assigned business. Here, the House of Representatives is investigating the single most deadly attack on the Capitol by domestic forces in the history of the United States. Lives were lost; blood was shed; portions of the Capitol building were badly damaged; and the lives of members of the House and Senate, as well as aides, staffers, and others who were working in the building, were endangered. They were forced to flee, preventing the legislators from completing their constitutional duties until the next day.

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

The White House is also the hub for intelligence about threats of violent action against the government, and the Executive Branch is in charge of federal law enforcement and mobilizing the National Guard to defend the Capitol. *See* U.S. CONST. Art. II, § 2, cl. 1; D.C. Code

§ 49-409. So information from within the White House is critical to understanding what intelligence failures led the government to be underprepared for such a violent attack, and what can be done to expedite the mobilization of law enforcement forces in a crisis on Capitol Hill going forward. H.R. Res. 503 § 4(a)(2)(A)-(B), (c). Given all of that, the Committee has sound reasons for seeking presidential documents in particular as part of its investigation into the causes of the attack on the Capitol.

The Supreme Court's decision in *Nixon v. GSA* makes clear that Congress's interests go far in outweighing the former President's privilege claim. In *Nixon v. GSA*, the Court found a "substantial public interest[]" in "Congress' need to understand how those political processes [in the Watergate scandal] had in fact operated in order to g[au]ge the necessity for remedial legislation" and "to restore public confidence in our political processes[.]" 433 U.S. at 453. In that way, the Court explained, Congress's efforts to preserve and afford access to presidential records "may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power[.]" *Id.* These "important" congressional interests in coming to terms with the Watergate scandal supported the Court's conclusion that the former President's claims of executive privilege "must yield[.]" *Id.* at 454.

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

Keep in mind that the "presumptive privilege" for presidential communications "must be considered in light of our historic commitment to the rule of law." *United States v. Nixon*, 418 U.S. at 708. In *United States v. Nixon*, the particular component of the rule of law that overcame a *sitting* President's assertion of executive privilege was the "right to every [person]'s evidence" in a criminal proceeding. *Id.* at 709 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)). Allowing executive privilege to prevail over that principle would have "gravely impair[ed] the basic function of the courts." *Id.* at 712.

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

c

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

an ongoing process of accommodation and negotiation between the President and Congress, and instigate an interbranch dispute.

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

In that "tradition of negotiation and compromise[,]" the Executive and Legislative Branches have reached an accommodation here. *Mazars*, 140 S. Ct. at 2031. President Biden and Congress have come to an agreement that the pressing needs of the January 6th Committee and the interests of the United States warrant a limited disclosure of the documents for which privilege has been asserted. That arrangement reflects give-and-take, as the Committee agreed to defer its request for fifty pages of responsive records from the second and third tranches. J.A. 170, 176.

Appendix A

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

In short, confronting former President Trump's claim of privilege is the hydraulic constitutional force of not only a reasoned decision by the President that a limited release is in the interests of the United States, and the uniquely compelling need of Congress for this information, but also this court's "duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that those [Political] branches themselves have reached.'" *Mazars*, 140 S. Ct. at 2031 (formatting modified; quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524-526, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)).

2

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

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

a

Because Mr. Trump has sued solely in his "official capacity" as the "45th President of the United States[,]" Compl. ¶ 20, J.A. 16, he does not assert that disclosure of the documents before us would harm any personal interests in privacy or confidentiality. His sole objection is that disclosure would "burden[] the presidency generally[,]" in light of the need for "candid advice" and the potential for a "chilling effect[.]" Appellant Opening Br. 29. In support

of this claim, he presses the undisputed points that the confidentiality of presidential communications protects "the proper functioning of the government" and "ensure[s] full and frank advice" for future Presidents. Appellant Opening Br. 14, 36.

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

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

Former President Trump's bare allegations of partisan motives do not move the needle either. *See*

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

Appellant Opening Br. 3, 5-6, 15-17, 21-22, 35, 47; Appellant Reply Br. 1-2, 5-8, 11, 19, 25-27, 32; Prelim. Inj. Mem. at 1-4, 8, 17, 33-34. They are unsupported by any plausible factual allegations and cannot stand up to President Biden's substantive explanation for not asserting privilege and Congress's distinct interest in investigating and legislating in response to an attack on itself. To that same point, the presumption of executive regularity "has been recognized since the early days of the Republic." *American Fed'n of Gov't Employees v. Reagan*, 870 F.2d 723, 727, 276 U.S. App. D.C. 309 (D.C. Cir. 1989). When, as here, "the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law." *Id.* (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32-33, 6 L. Ed. 537 (1827)) (alteration in original).

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

More to the point, the greatest protection for executive privilege is the natural self-interest of each new occupant of the White House. Presidents of both parties have long jealously guarded the powers and prerogatives of the office. And every incumbent President will be the next former President. That gives the incumbent every incentive to afford robust protection to the confidentiality

of presidential communications, even if only to assure receipt of the best possible advice during his or her tenure. *See Nixon v. GSA*, 433 U.S. at 448 ("[A]n incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers."). There are, in other words, "obvious political checks against an incumbent's abuse of the privilege." *Id.*

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

The problem is that he has not pointed to a single record in the existing tranches that implicates a delicate matter of foreign affairs or other "complex and sensitive" topics. Appellant Opening Br. 46. He also puts the cart before the horse. For even if the Archivist later were to conclude that such a document was responsive to the Committee's request, it "must be presumed" that the sitting President would factor a document's sensitivity, foreign policy or otherwise, into a future decision whether to assert executive privilege. *Nixon v. GSA*, 433 U.S. at 449.[16]

16. Anyhow, given the Article III courts' general "lack of competence" in matters of national security policy, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010) (internal quotation marks and citations omitted), former President Trump does not explain how a court could override

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

First of all, in briefing and at oral argument, counsel for former President Trump was inconsistent in explaining his request for *in camera* review. *See* Appellant Opening Br. 38-39; Appellant Reply Br. 14-15; Oral Arg. Tr. 62:18-63:7, 65:1-6. To the extent that the former President proposes that the court determine whether each document constitutes a privileged presidential communication, that would be a meaningless exercise. *See* Oral Arg. Tr. 62:19-23. President Biden does not dispute that the particular documents at issue qualify for executive privilege. He instead has made the deliberate decision not to invoke that privilege. Therefore, the issue in this case is not whether executive privilege could be asserted for each document. It is whether a court can override President

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the sitting President's judgment that release of a document does not imperil, or perhaps advances, foreign relations. *See also id.* at 34 ("[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.") (quoting *Boumediene v. Bush*, 553 U.S. 723, 797, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008)); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 2 L. Ed. 60 (1803) (Presidential decisions that implicate "foreign affairs" are "entrusted to the executive, [and] the decision of the executive is conclusive").

Biden's reasoned decision to forgo privilege as to them and Congress's compelling need for them. So even if the court were to examine each document *in camera* and determine that every single one is privileged, we would simply end up right back where we started.

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

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

c

Having provided nothing to surmount President Biden's considered judgment, former President Trump pivots to arguing that the January 6th "Committee lacks a specific need for the requested information," Appellant Opening Br. 16, and so its disclosure violates the separation of powers.

Former President Trump sets forth several formulations of the test he believes this court should

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

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

F.2d at 726 (addressing a congressional subpoena issued to a sitting President). Those separation of powers concerns necessarily have less traction when the request is for records from a former administration, since the objecting former President no longer occupies the "unique position of the President," *Mazars*, 140 S. Ct. at 2035 (internal quotation marks and citation omitted). And they have less salience when the Political Branches are in agreement. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J., concurring).

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

To be sure, *Nixon v. GSA* did not involve a direct document request by Congress. But neither did former

President Nixon ask the Court to disrupt an ongoing accommodation and negotiation process between the Political Branches—a process that courts historically have stayed out of.

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

(i)

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

Former President Trump argues that the Committee has an "improper law enforcement purpose[,]" Appellant

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

Mazars also requires that the "asserted legislative purpose warrant[] the significant step of involving the President and his papers." 140 S. Ct. at 2035. As President Biden stated, the January 6th Committee has a "sufficient factual predicate" for obtaining these presidential records, First Remus Ltr., J.A. 107, because of the President's direct role in rallying his supporters, directing them to march to the Capitol, *see* January 6th Rally Speech at 3:47:02-3:47:21, and propagating the underlying false narrative of election fraud. The House has also presented evidence indicating that, leading up to January 6th, individuals encouraging "dramatic action" on that day were in frequent contact with the White House. *See* H.R. Rep. No. 117-152, 117th Cong., 1st Sess. 6 (2021). And as the Commander-in-Chief and Chief Law Enforcement Officer on January 6th, President Trump had control over

the sharing of any intelligence concerning a potential riot and, once the mob attacked, the decision to deploy (or not) the National Guard and other federal law enforcement resources to quell the riot.

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

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

the * * * duties of the President" on and around January 6, and those records are exclusively within the control of the Archivist, 44 U.S.C. §§ 2201(2), 2202.

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

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

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

the Executive Branch advising district court that such documents would not be "appropriate for production").

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

In short, the "congressional power of inquiry * * * [and] the right of resistance to it are to be judged in the concrete, not on the basis of abstractions." *Barenblatt v. United States*, 360 U.S. 109, 112, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959). Former President Trump's speculation about possible problems with possible future disclosures does nothing to establish a likelihood of success as to these documents actually slated for disclosure.

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

staff is within reasonable bounds and consonant with the grave matters before the January 6th Committee.

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

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

accommodate records requested under this section."). In fact, the Archivist has provided additional time for review once already. J.A. 127. Were the burden to become unduly demanding at some point in the future, it could very well be that President Biden—who is simultaneously juggling all manner of presidential responsibilities—would object, to the benefit of former President Trump. Indeed, the previous extension was initiated by President Biden and afforded to him and former President Trump alike. J.A. 127.

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

(ii)

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

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

In *United States v. Nixon*, the Court held that President Nixon's "generalized assertion of privilege" had to "yield to the demonstrated, specific need for evidence in a pending criminal trial." 418 U.S. at 713. Here, the Committee has—as President Biden agrees—demonstrated a specific and compelling need for these presidential records because they provide a unique and critically important window into the events of January 6th that the Committee cannot obtain elsewhere.

d

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

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

Mr. Trump argues in his reply brief, for the first time in this litigation, that the Presidential Records Act

confines an incumbent President to deciding only the "legal correctness" of the former President's privilege claim, without any ability to make a determination as to whether an assertion of privilege is in the best interests of the United States. Appellant Reply Br. 10-11. Former President Trump forfeited this statutory argument by failing to raise it before the district court and before this court in his opening brief. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1001, 382 U.S. App. D.C. 78 (D.C. Cir. 2008) (stating that issues not argued in the opening brief are forfeited on appeal); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419, 294 U.S. App. D.C. 198 & n.5 (D.C. Cir. 1992) (Absent exceptional circumstances, "it is not our practice to entertain issues first raised on appeal[.]"). Principles of constitutional avoidance further counsel against entertaining, without adversarial briefing, the notion that a statute shuts the sitting President out of any meaningful role in an exercise of executive privilege over Executive Branch documents in response to a congressional request. *See Burke*, 843 F.2d at 1479 (citing *Nixon v. GSA*, 433 U.S. at 449).

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

Anyhow, the Presidential Records Act is explicit that "[n]othing in [the] Act shall be construed to confirm, limit,

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

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

e

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

But the former President does not make this argument. He only makes an unelaborated reference to

the fact of the timing in his opening brief. *See* Appellant Opening Br. 36. In this court, "mentioning an argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones is tantamount to failing to raise it." *Maloney v. Murphy*, 984 F.3d 50, 68, 450 U.S. App. D.C. 261 (D.C. Cir. 2020) (internal quotation marks and citation omitted). He certainly does not present the argument in a manner that gets him any closer to demonstrating a likelihood of success on the merits. That is especially so given Congress's demonstrated need for the information now because it is investigating a last-ditch effort to thwart the peaceful transfer of power from former President Trump to President Biden. In light of the regularity of federal elections, we credit the Committee's assertion that its work is "urgent[,]" Thompson Ltr., J.A. 33, as it seeks to understand the violence that marked the end of the last Presidency and to prevent any recurrence. First Remus Ltr., J.A. 107; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173-174.[17]

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

Appendix A

V

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

A

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

The difficulty for Mr. Trump's claim of irreparable harm is that President Biden has already determined that disclosure of the privileged documents in the first three tranches advances the interests of the Executive Branch and is affirmatively in the interests of the United

States. Having weighed the interests of the privilege against the January 6th Committee's compelling need for this information, President Biden made a deliberate decision to forgo executive privilege and to disclose the documents. Given the "unprecedented" attack on the Capitol and the tradition of peaceful transfers of power, as well as the "unique and extraordinary circumstances" precipitating and surrounding the attack, President Biden explained that "an assertion of executive privilege is not in the best interests of the United States[.]" First Remus Ltr., J.A. 107-108; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173-174.

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

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

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

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

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

This case is materially different from the mine-run of privilege cases. The privilege being asserted is not a personal privilege belonging to former President Trump; he stewards it for the benefit of the Republic. The interests the privilege protects are those of the Presidency itself, not former President Trump individually. And the President has determined that immediate disclosure will promote, not injure, the national interest, and that delay here is itself injurious.[18]

B

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

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

That public interest is heightened when, as here, the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power. Importantly, the Supreme

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

Court has instructed that Congress's "desire to restore public confidence in our political processes" by "facilitating a full airing of the events leading to" such political crises constitutes a "substantial public interest[.]" *Nixon v. GSA*, 433 U.S. at 453.

Reinforcing that public interest, President Biden has concluded on behalf of the Executive Branch that disclosure is "in the best interests of the United States[.]" First Remus Ltr., J.A. 107; *see also* Second Remus Ltr., J.A. 113; Third Remus Ltr., J.A. 173-174.

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

* * * * *

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

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

But our Constitution divides, checks, and balances power to preserve democracy and to ensure liberty. For that reason, the executive privilege for presidential

communications is a qualified one that Mr. Trump agrees must give way when necessary to protect overriding interests. *See* Oral Arg. Tr. 33:18-21, 34:23-25. The President and the Legislative Branch have shown a national interest in and pressing need for the prompt disclosure of these documents.

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

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

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19. Papers of Dr. James Mchenry on the Federal Convention of 1787 (1787), *in* Documents Illustrative of the Formation of the Union of the American States 952 (Charles C. Tansill ed., 1927).

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

So ordered.

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

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED NOVEMBER 9, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-cv-2769 (TSC)

DONALD J. TRUMP,

Plaintiff,

v.

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

Defendants.

MEMORANDUM OPINION

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

The question of how that day's events came about and who was responsible for them is not before the court. Instead, the present dispute involves purely legal questions that, though difficult and important to our government's functioning, are comparatively narrow in scope. Plaintiff—former President Donald J. Trump—challenges the legality of a U.S. House of Representatives Select Committee's requests for certain records maintained by the National Archives and Records Administration ("NARA") pursuant to the Presidential Records Act. Plaintiff argues that the Committee's requests are impermissible because at least some of the records sought are shielded by executive privilege and because the requests exceed Congress' constitutional power. He seeks an injunction prohibiting Defendants—the House Select Committee, the Chairman of the House Select Committee, NARA, and the Archivist of NARA—from enforcing or complying with the Committee's requests. For the reasons explained below, the court will deny Plaintiff's requested relief.

I. BACKGROUND

A. The 2020 Presidential Election and January 6, 2021

While not material to the outcome, some factual background on the events leading up to and including January 6, 2021, offers context for the legal dispute here. In the months preceding the 2020 presidential election, Plaintiff declared that the only way he could lose would be if the election were "rigged." *See, e.g.*, Donald J. Trump, Speech at Republican National Convention Nomination

Vote at 22:08 (Aug. 24, 2020) *in* C-SPAN, https://www.c-span.org/video/?475000-103/president-trump-speaks-2020-republican-national-convention-vote. In the months after losing the election, he repeatedly claimed that the election was rigged, stolen, and fraudulent. For example, in a December 2 speech, he alleged "tremendous voter fraud and irregularities" resulting from a late-night "massive dump" of votes. *See* President Donald J. Trump, Statement on 2020 Election Results at 0:39, 7:26 (Dec. 2, 2020) *in* C-SPAN, https://www.c-span.org/video/?506975-1/president-trump-statement-2020-election-results. He also claimed that certain votes were "counted in foreign countries," that "millions of votes were cast illegally in the swing states alone," and that it was "statistically impossible" he lost. *Id.* at 12:00, 14:22, 19:00.

After losing the election, Plaintiff and his supporters filed a plethora of unsuccessful lawsuits seeking to overturn the results. *See, e.g.*, *Current Litigation*, American Bar Association: Standing Committee on Election Law, Apr. 30, 2021, https://www.americanbar.org/groups/public_interest/election_law/litigation/. The United States Supreme Court also denied numerous emergency applications aimed at overturning the results. *Id.* In response, Plaintiff tweeted that the Court was "totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election." Donald J. Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 1:51 PM), https://www.presidency.ucsb.edu / documents/tweets-december-26-2020.[1] He continued

1. Plaintiff was permanently suspended from Twitter on January 8, 2021. *See* Press Release, Twitter, Inc., Permanent

his claim that "We won the Presidential Election, by a lot," and implored Republicans to "FIGHT FOR IT. Don't let them take it away." *Id.* (Dec. 18, 2020, 2:14 PM), https://www.presidency.ucsb.edu/documents/tweets-december-18-2020.

A Joint Session of Congress was scheduled to convene on January 6, 2021, to count the electoral votes of the 2020 presidential election and to officially announce the elected President, as required by the Twelfth Amendment to the U.S. Constitution and the Electoral Count Act, 3 U.S.C. § 15. In the days leading up to January 6, Plaintiff began promoting a protest rally to take place hours before the Joint Session convened. On December 19, 2020, he tweeted "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!" Donald J. Trump (@realDonaldTrump), TWITTER (December 19, 2020, 6:42am), https://www.presidency.ucsb.edu/documents/tweets-december-19-2020. During a rally, he warned that "Democrats are trying to steal the White House . . . you can't let that happen. You can't let it happen," and promised that "[w]e're going to fight like hell, I'll tell you right now." *See* Donald J. Trump,

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

Remarks at Georgia U.S. Senate Campaign Event at 8:40, 14:19 (Jan. 4, 2021) *in Campaign 2020*, C-SPAN, https://www.c-span.org/video/?507634-1/president-trump-campaigns-republican-senate-candidates-georgia.

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

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

B. The Select Committee and its Presidential Records Act Request

On June 30, 2021, the U.S. House of Representatives passed House Resolution 503, creating the Select Committee. ECF No. 5, Pl. Mot., Ex. 3, H.R. 503, § 3, 117th

Cong. (2021). H.R. 503 empowers the Select Committee to (1) "investigate the facts, circumstances, and causes relating to" the January 6 attack; (2) "identify, review, and evaluate the causes of and the lessons learned from" the attack; and (3) "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures . . . as it may deem necessary." *Id.* § 4(a). Such corrective measures may include:

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

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

The Select Committee is authorized "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it

considers necessary." 47 Rule XI.2(m)(1)(B), Rules of the U.S. House of Rep., 117th Cong. (2021) ("House Rules"); *see also* H.R. 503, § 5(c) (unless otherwise specified, Rule XI applies to the Select Committee). Under House Rule XI:

> Subpoenas for documents or testimony may be issued to any person or entity, whether governmental, public, or private, within the United States, including, but not limited to, the President, and the Vice President, whether current or former, in a personal or official capacity, as well as the White House, the Office of the President, the Executive Office of the President, and any individual currently or formerly employed in the White House, Office of the President, or Executive Office of the President.

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

On August 25, 2021, pursuant to section 2205(2)(C) of the Presidential Records Act ("PRA"), the Committee issued a document request to NARA seeking several categories of records from the Executive Office of the President and the Office of the Vice President. Compl., Ex. 1. Specifically, the Select Committee sought written communications, calendar entries, videos, photographs, or other media relating to Plaintiff's January 6 speech, the January 6 rally and subsequent march, the violence at the Capitol, and the response within the White House. *See id.* at 2-4. The Committee also requested materials

from specific time periods relating to any planning by the White House and others regarding the January 6 electoral count, *id.* at 4-7; preparations for rallies leading up to the January 6 violence, *id.* at 7-8; information Plaintiff received regarding the election outcome, *id.* at 9-10; Plaintiff's public remarks regarding the election outcome and the validity of the election system more broadly, *id.*; and for a specified timeframe surrounding the 2020 election, documents and communications of the Plaintiff and certain of his advisors relating to the transfer of power and obligation to follow the rule of law, including with respect to actual or potential changes in personnel at certain executive branch agencies, and relating to foreign influence in that election, *id.* at 10-12. These requests are the subject of this lawsuit.

C. Presidential Records in the Nixon Era

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

Four years later, after the Supreme Court's ruling in *Nixon v. Adm'r of Gen. Servs.* (*Nixon v. GSA*), 433 U.S. 425, 448, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977),[2] Congress passed the PRA, which changed the legal ownership of

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

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

The PRA defines "Presidential records" as records reflecting "the activities, deliberations, decisions, and policies" of the Presidency. 44 U.S.C. § 2203(a). Under the Act, when a President leaves office, the Archivist "assume[s] responsibility for the custody, control, and preservation of, and access to" the Presidential records of the departing administration. *Id.* § 2203(g)(1). The Archivist must make Presidential records available to the public under the Freedom of Information Act five years after the President leaves office. *Id.* § 2204(b)(2), (c)(1); *see also* 36 C.F.R. § 1270.38. However, the outgoing President can restrict access to especially sensitive materials for a period of up to 12 years. 44 U.S.C. § 2204(a); *see also* 36 C.F.R. § 1270.40(a). One exception is that "Presidential

records shall be made available . . . to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available." 44 U.S.C. § 2205(2)(C).

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

D. Response to Select Committee's Request

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

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

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

Id. at 1-2.

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

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

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

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

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

E. Procedural History

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

accelerated briefing schedule and heard argument on the motion on November 4, 2021. *See* Min. Order (Oct. 22, 2021).

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

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary" remedy that "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258, 364 U.S. App. D.C. 2 (D.C. Cir. 2004). To prevail on a motion for preliminary injunction, the movant bears the burden of showing that: (1) "he is likely to succeed on the merits"; (2) "he is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in his favor"; and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Where the federal government is the opposing party, the balance of equities and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009). In the past, courts in this jurisdiction have evaluated the

four preliminary injunction factors on a "sliding scale"—a particularly strong showing in one factor could outweigh weakness in another. *Sherley v. Sebelius*, 644 F.3d 388, 393, 396 U.S. App. D.C. 1 (D.C. Cir. 2011). However, it is unclear if this approach has survived the Supreme Court's decision in *Winter. See, e.g., Banks v. Booth*, 459 F. Supp. 3d 143, 149-50 (D.D.C. 2020) (citing *Sherley*, 644 F.3d at 393 (D.C. Cir. 2011)). Despite this uncertainty, each factor must still be present. Thus, if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief on that basis alone. *See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (citing *CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747, 313 U.S. App. D.C. 178 (D.C. Cir. 1995)).

III. ANALYSIS

A. Likelihood of Success on the Merits

1. Executive Privilege

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

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

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

i. The Executive Power and the Origins of Executive Privilege

The Constitution vests all "executive Power" in the President, who "must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191, 207 L. Ed. 2d 494 (2020) (quoting U.S. Const. art. II, § 1, cl. 1 & § 3)). Only the "incumbent is charged with performance of the executive

duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448. It is the incumbent President who is best situated to protect executive branch interests; the incumbent has "the information and attendant duty of executing the laws in the light of current facts and circumstances." *Dellums v. Powell*, 561 F.2d 242, 247, 182 U.S. App. D.C. 244 (D.C. Cir. 1977). And only the incumbent remains subject to "political checks against . . . abuse" of that power. *Nixon v. GSA*, 433 U.S. at 448.

The Constitution does not expressly define a President's right to confidential communications. The executive privilege "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibility." *Id.* at 447. Indeed, as far back as George Washington's presidency, it has been established that Presidents may "exercise a discretion" over disclosures to Congress, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. *Trump v. Mazars USA, LLP* (*Mazars*), 140 S. Ct. 2019, 2029-30, 207 L. Ed. 2d 951 (2020) (quoting 1 Writings of Thomas Jefferson 189-90 (P. Ford ed. 1892)). The notion of executive privilege is "inextricably rooted in the separation of powers under the Constitution," and is meant to protect the President's ability to have full and unfettered discussions with advisors, liberated by the veil of confidentiality. *United States v. Nixon*, 418 U.S. 683, 708, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). The privilege "belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party." *United States v. Reynolds*, 345 U.S. 1, 7, 73 S. Ct. 528, 97 L. Ed. 727 (1953).

Appendix B

Presidential conversations are presumptively privileged, but the privilege is not absolute. *Nixon v. GSA*, 433 U.S. at 447. It exists for the benefit of the Republic, not any individual, and accordingly, the presumption can be overcome by an appropriate showing of public need by the judicial or legislative branch. *See, e.g., Nixon v. GSA*, 433 U.S. at 447, 449; *Nixon*, 418 U.S. at 707; *Senate Select Committee on Presidential Campaign Activities v. Nixon* (*Senate Select Committee*), 498 F.2d 725, 730, 162 U.S. App. D.C. 183 (D.C. Cir. 1974).

a) Senate Select Committee

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

ii. Former President's Ability to Assert Privilege

a) *Nixon v. GSA*

In 1974, shortly after he resigned from office, former President Nixon indicated that he intended to destroy tape recordings he made during his presidency. *See Nixon v. GSA*, 433 U.S. at 432. The legislative and executive branches, recognizing the public interest in such materials, intervened. Congress enacted, and President Ford signed, the PRMPA, to give custody of Nixon's records to the National Archives and to prohibit the destruction of the tapes or any other presidential materials. *See* H.R. Rep. No. 95-1487 at 5 (1978). Nixon sued, arguing that the PRMPA violated the separation of powers, presidential privilege, and several personal rights. *Nixon v. GSA*, 433 U.S. at 439-55. The Supreme Court rejected each of his arguments, holding that the PRMPA was constitutional on its face. As to the separation of powers, the Court noted that the "Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter . . . vigorously supports . . . sustaining its constitutionality." *Id.* at 441. The Court further explained that "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443 (citing *Nixon*, 418 U.S. at 711-12).

The Supreme Court also examined whether Nixon could assert privilege over his presidential records and

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

But the Court also found that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, . . . a former President is in less need of it than an incumbent." *Id.* at 448. Consequently, the fact that neither former President Ford nor then-President Carter supported Nixon's contention that the PRMPA undermined the presidential communications privilege "detract[ed] from the weight" of Nixon's argument. *Id.* at 449. The Court found that while the privilege may extend beyond the term of any one President, "the incumbent President is . . . vitally concerned with and in the best position to assess the present and future needs of the executive branch, and to support invocation of the privilege accordingly." *Id.*

The Court further held that Nixon's claim of privilege was outweighed by Congress' intent in enacting the PRMPA, noting that Congress had "substantial public interests" in enacting the statue, including Congress'

"need to understand how [the] political processes [leading to former President Nixon's resignation] had in fact operated in order to gauge the necessity for remedial legislation." *Id.* at 453. The Court also observed that the "expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office." *Id.* at 451.

b) The Presidential Records Act

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

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

At bottom, this is a dispute between a former and incumbent President. And the Supreme Court has already made clear that in such circumstances, the incumbent's view is accorded greater weight. This principle is grounded in "the fact that the privilege is seen as inhering in the institution of the Presidency, and not in the President personally." *Dellums*, 561 F.2d at 247 n.14 (citing *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 343 (D.D.C.

1976), *aff'd*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)). Only "the incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. GSA*, 433 U.S. at 448. And it is the incumbent who is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." *Id.* at 449.

Plaintiff does not acknowledge the deference owed to the incumbent President's judgment. His position that he may override the express will of the executive branch appears to be premised on the notion that his executive power "exists in perpetuity." Hearing Tr. at 19:21-22. But Presidents are not kings, and Plaintiff is not President. He retains the right to assert that his records are privileged, but the incumbent President "is not constitutionally obliged to honor" that assertion. *Public Citizen v. Burke*, 843 F.2d 1473, 1479, 269 U.S. App. D.C. 145 (D.C. Cir. 1988).[4] That is because Plaintiff is no longer situated to

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

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

Moreover, contrary to Plaintiff's assertion that President Biden's decision not to invoke executive privilege is "unprecedented," Pl. Mot. at 2, history is replete with examples of past Presidents declining to assert the privilege. From President Nixon permitting the unrestricted congressional testimony of present and former White House staff members,[5] to President Ronald Reagan's decision to authorize testimony and

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In any event, Plaintiff does not elaborate on these claims with sufficient detail for this court to assess them, nor would any such claim be convincing, because the records maintained by the Archivist, by definition, only include those records reflecting the "activities, deliberations, decisions, and policies" of the Presidency, 44 U.S.C. § 2203(a), and not private communications. Plaintiff offers no evidence that the records contain anything of a personal nature; in fact, he concedes that the responsive records do not involve private conversations between him and a personal attorney. *See* Hearing Tr. at 60:21-61:6. The court need not credit Plaintiff's concern in the abstract. *See Barenblatt v. United States*, 360 U.S. 109, 112, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959) (the congressional "power [of inquiry] and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions.").

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

the production of documents related to the Iran-Contra affair, including information about his communications and decision-making process,[6] to President George W. Bush's decision to sit for an interview with the 9/11 Commission to answer questions about his decision-making process in the wake of the attack,[7] past Presidents have balanced the executive branch's interest in maintaining confidential communications against the public's interest in the requested information. The Supreme Court noted that this tradition of negotiation and compromise between the legislative and executive branches extends back to the administrations of Washington and Jefferson. *See Mazars*, 140 S. Ct. at 2029-31. President Biden's decision not to assert executive privilege because "Congress has a compelling need in service of its legislative functions to understand the circumstances" surrounding the events of January 6, *see* Pl. Mot., Exs. 4, 6, is consistent with historical practice and his constitutional power.

Plaintiff appears to view the dispute as resulting in some sort of equipoise, and asks the court to act as a tiebreaker, reviewing each disputed record *in camera*. The court, however, is not best situated to determine executive branch interests, and declines to intrude upon the executive function in this manner. It must presume

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

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

that the incumbent is best suited to make those decisions on behalf of the executive branch. *See Nixon v. GSA*, 433 U.S. at 449. As the Supreme Court noted in *Mazars*, decisions about whether to accommodate congressional requests for information are best "hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Mazars*, 140 S. Ct. at 2029 (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (A. Scalia, Assistant Attorney General, Office of Legal Counsel). When the legislative and executive branches agree that the nation's interest is best served by a disclosure to Congress, as they do here, then the court has a "duty of care to ensure that [it] does not needlessly disturb 'the compromises and working arrangements that [those] branches . . . themselves have reached." *Mazars*, 140 S. Ct. at 2031 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524-26, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)). Plaintiff has pointed to no legal authority mandating a different outcome.

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

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

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

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

Nor does the Act disrupt the balance between the branches of government. "Congress and the President have an ongoing institutional relationship as the 'opposite and rival' political branches." *Mazars*, 140 S. Ct. at 2033 (quoting THE FEDERALIST NO. 51, at 349 (James Madison)). It is assumed that these two branches, guided by ambition, will act in furtherance and preservation of their own constitutional power, helping to ensure a balance of power between them. *See* THE FEDERALIST NO. 51, at 349. The executive branch became a party to the PRA's regulations over forty years ago when President Carter signed the Act into law. As President Carter said at the time, the PRA was enacted to "make the Presidency a more open institution," and to "ensure that Presidential papers remain public property after the expiration of a President's term." Presidential Statement on Signing the Presidential Records Act of 1978, 14 Weekly Comp. Pres. Doc. 39, 1965 (Nov. 6, 1978). President Carter's decision to sign the Act into law, and each subsequent President's—including Plaintiff's—acquiescence to its framework, demonstrates that the PRA does not prevent the executive branch from accomplishing its constitutionally assigned functions. Each "branch of Government has the duty initially to interpret the Constitution for itself, and that interpretation of its powers is due great respect from the other branches." *Nixon v. GSA*, 433 U.S. at 442-43 (citing *Nixon*, 418 U.S. at 708). *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-637, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (Jackson, J.,

concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.") (footnote omitted). And finally, by interpreting the PRA's framework as consistent with *Nixon v. GSA*'s constitutional principle, the court adheres to the canon of constitutional avoidance. *See Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 27 L. Ed. 408 (1883) ("Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established.").

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

1. Congress' Power to Request Presidential Records

Plaintiff argues that the Select Committee has ventured beyond its constitutionally allotted "legislative Powers" by requesting records that are unrelated to the events of January 6, and by failing to articulate any valid legislative purpose that could be served by its requests. *See* Pl. Mot. at 15-19. He further argues that the court must scrutinize the Select Committee's requests either by using the D.C. Circuit's balancing test in *Senate Select Committee*, 498 F.2d 725, 162 U.S. App. D.C. 183 (D.C. Cir. 1974), or the four-factor evaluation articulated by the Supreme Court in *Trump v. Mazars*, 140 S. Ct. 2019, 207

L. Ed. 2d 951 (2020), and that the Committee's requests, having no valid legislative purpose, cannot survive such scrutiny.

Defendants counter that the Select Committee's legislative purpose is legitimate and compelling. Specifically, they contend that the Select Committee is investigating the facts, circumstances, and causes of the events of January 6, 2021, and that the requests are intended to support remedial legislation. *See* ECF No. 19, Comm. Br. at 18-22; NARA Br. at 15-27. Defendants also maintain that neither the *Senate Select Committee* balancing test nor the four-factor *Mazars* test apply.

i. Legislative Powers

Article I of the Constitution grants Congress all "legislative Powers," U.S. Const. art. I, § 1, encompassed in which is the power to secure "needed information." *McGrain v. Daugherty*, 273 U.S. 135, 161, 47 S. Ct. 319, 71 L. Ed. 580 (1927). Indeed, the power to secure "needed information" is deeply rooted in the nation's history: "It was so regarded in the British Parliament and in the colonial Legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state Legislatures." *Id.* While the powers of the British Parliament and Congress are clearly not the same, there is "no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation." *Quinn v. United States*, 349 U.S. 155, 160, 75 S. Ct. 668, 99 L. Ed. 964 (1955).

That power permits "Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins v. United States*, 354 U.S. 178, 200 n.33, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio Law Abs. 225 (1957). "From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* (citing James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 168-194 (1926)). In the words of one former President—words later adopted by the Supreme Court:

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

United States v. Rumely, 345 U.S. 41, 43, 73 S. Ct. 543, 97 L. Ed. 770 (1953) (quoting Woodrow Wilson, *Congressional*

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

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

Watkins, 354 U.S. at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.* at 187. On the other hand, an inquiry is not illegitimate simply because it calls for information that is private or confidential, might be embarrassing, or could have law enforcement implications. *See, e.g., id.* at 198; *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938) (the fact that a congressional inquiry might seem "incompetent, irrelevant," "embarrass[ing]," or even "impertinent" is generally immaterial).

When a court is asked to decide whether Congress has used its investigative power improperly, its analysis must be highly deferential to the legislative branch. Courts "are bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed." *McGrain*, 273 U.S. at 178. *See also Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 619, 49 S. Ct. 452, 73 L. Ed. 867 (1929) (holding that "the proceedings of the houses of Congress, when acting upon matters within their constitutional authority" are entitled to a "presumption in favor of regularity"). Moreover, the Supreme Court has repeatedly held that courts may not "test[ ] the motives of committee members" to negate an otherwise facially valid legislative purpose. *Watkins*, 354 U.S. at 200; *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). Accordingly, it is not this court's role to decide whether Congress is motivated to aid legislation

or exact political retribution; rather, the key factor is whether there is some discernable legislative purpose. *See Watkins*, 354 U.S. at 200.

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

The Supreme Court considers congressional resolutions a primary source from which to determine whether information "was sought . . . in aid of the legislative function." *McGrain*, 273 U.S. at 176; *see also Shelton v. United States*, 404 F.2d 1292, 1297, 131 U.S. App. D.C. 315 (D.C. Cir. 1968) (observing that relevant sources of evidence to "ascertain whether [an inquiry] is within the broad investigative authority of Congress" include "the resolution authorizing the inquiry"). Accordingly, the court begins its inquiry with the resolution stating the Select Committee's intended purpose. H.R. 503, which established the Select Committee and the subject matter within its purview, outlines several purposes and functions of the Select Committee, including:

- Obtaining information and reporting on (1) "the facts, circumstances, and causes relating to" the January 6 attack and "the interference with the peaceful transfer of power"; (2) the "activities of intelligence agencies, law enforcement agencies, and the Armed Forces, . . . with respect to intelligence collection, analysis, and dissemination" surrounding the attack; and (3) the "influencing factors that contributed

to the" attack, including how "online platforms, financing, and . . . campaigns may have factored into [its] motivation, organization, and execution," *id.* §§ 3, 4(a)(1);

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

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

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

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

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

Plaintiff contends that the Select Committee "fails to identify a single piece of legislation[] the Committee is considering." This claim is a straw man. Congress need not (and usually does not) identify specific legislation within the context of a request for documents or testimony, nor must it do so when establishing a select committee or when that committee requests documents. For instance, the Supreme Court has upheld the validity of a select committee subpoena even though the Senate's "resolution directing the investigation d[id] not in terms avow that it is intended to be in aid of legislation." *McGrain*, 273 U.S. at 177; *see also In re Chapman*, 166 U.S. 661, 669-70, 17 S. Ct. 677, 41 L. Ed. 1154 (1897) ("[I]t was certainly not necessary that the resolutions should declare in advance what the [S]enate meditated doing when the investigation was concluded."). The Court found the subpoena valid because the investigation's subject "was one on which

legislation *could be had* and would be materially aided by the information which the investigation was calculated to elicit." *McGrain*, 273 U.S. at 177 (emphasis added).

The court has no difficulty discerning multiple subjects on which legislation "could be had" from the Select Committee's requests. *Id.* at 177. Some examples include enacting or amending criminal laws to deter and punish violent conduct targeted at the institutions of democracy, enacting measures for future executive enforcement of Section 3 of the Fourteenth Amendment against any Member of Congress or Officer of the United States who engaged in "insurrection or rebellion," or gave "aid or comfort to the enemies thereof," U.S. Const. amend. XIV, § 3, imposing structural reforms on executive branch agencies to prevent their abuse for antidemocratic ends, amending the Electoral Count Act, and reallocating resources and modifying processes for intelligence sharing by federal agencies charged with detecting, and interdicting, foreign and domestic threats to the security and integrity of our electoral processes. *See* Comm. Br. at 20; NARA Br. at 18; ECF No. 25, Amicus Br. by Former Members of Congress at 7. These are just a few examples of potential reforms that Congress might, as a result of the Select Committee's work, conclude are necessary or appropriate to securing democratic processes, deterring violent extremism, protecting fair elections, and ensuring the peaceful transition of power. Of course, other forms of legislation not currently imagined may also follow. The critical fact is that Congress reasonably might consider the requested records in deciding whether to legislate in a host of legitimate areas.

To be sure, the Committee has cast a wide net. While some of the requests pertain to Plaintiff's communications and actions, the former Vice President, and other former executive officials on January 6, 2021, other requests more broadly seek information regarding events leading up to January 6, including communications concerning the election, conversations between Plaintiff and Department of Justice and state government officials regarding Plaintiff's allegations that the election was "rigged," records relating to the recruitment, planning, and preparation for rallies leading up to and including January 6, and conversations regarding the process for transferring power to the incumbent. For example, one of the Committee's requests is for all documents and communications from April 1, 2020, through January 20, 2021, related to the 2020 presidential election, including forecasting, polling, or results, which were authored or presented by, or relate in any way to one of five specific individuals who the Committee presumably believes were involved in strategies to delay, halt, or otherwise impede the electoral count. Pl. Mot., Ex. 1 at 5. Another similarly broad request seeks all documents and communications concerning the 2020 election and relating to any of one of forty named individuals who the Committee presumably believes participated in the recruitment, planning, and preparations for rallies on days leading up to and including January 6. *Id.* at 7-8.

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

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

Second, while some of the Select Committee's requests are indeed broad, so too is Congress' power to obtain information. *See Watkins*, 354 U.S. at 187. The Select Committee appears to be operating under the theory that January 6 did not take place in a vacuum, and instead was the result of a months-long groundswell. *See* Hearing Tr. at 41:4-7; 42:22-23. Defendants argue that to identify effective reforms, Congress must first understand the circumstances leading up to January 6 and how the actions of Plaintiff, his advisors, and other government officials contributed or responded to that groundswell. NARA Br. at 18. The court notes that the Select Committee reasonably could find it necessary to investigate the extent to which the January 6 attack on the Capitol may have been an outgrowth of a sustained effort to overturn the 2020 election results, involving individuals both in

and outside government. But the "very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Eastland*, 421 U.S. at 509. In fact, the Committee need not enact any legislation at all. *Trump v. Mazars USA, LLP*, 940 F.3d 710, 727, 444 U.S. App. D.C. 142 (D.C. Cir. 2019) (explaining that the "House is under no obligation to enact legislation after every investigation"). Nor is it problematic that some requests might ultimately return records that are "irrelevant," or "impertinent" to its stated goals. *Townsend*, 95 F.2d at 361. It is not for this court to decide whether the Select Committee's objective is prudent or their motives pure. *See Watkins*, 354 U.S. at 200; *Eastland*, 421 U.S. at 508. Instead, the pertinent question is whether Congress could legitimately legislate in these areas, and, as explained above, it can.

Third, President Biden's decision not to assert the privilege alleviates any remaining concern that the requests are overly broad. In cases such as *Mazars*, which involved separation of powers concerns, limitations on the breadth of a congressional inquiries serve as "important safeguards against unnecessary intrusion into the operation of the Office of the President." *Mazars*, 140 S. Ct. at 2036. Plaintiff argues that the requests at issue here are burdensome because they are "unbelievably broad" and that their breadth is "striking" because they could "be read to include every single e-mail sent in the White House" on January 6. *See* Pl. Mot. at 21-24. But upon whom is the burden imposed? President Biden has determined

that the requests are not so intrusive or burdensome on the Office of the President as to outweigh Congress' "compelling need in service of its legislative functions." Pl. Mot., Ex. 4 at 1-2. Unlike the circumstances presented in *Mazars*, here, the legislative and executive branches are in harmony and agree that the requests are not unduly intrusive, thus extinguishing any lingering concerns about the breadth of the requests.

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

Plaintiff urges the court to apply either the balancing test from *Senate Select Committee*, 498 F.2d 725, 162 U.S. App. D.C. 183 (1974), or the four-factor standard from *Trump v. Mazars*, 140 S. Ct. 2019, 207 L. Ed. 2d 951 (2020). In the alternative, Plaintiff argues that the court could apply a "*Mazars* lite" test by applying the four *Mazars* factors, but using "reduced judicial scrutiny," "cognizant of the fact that this case now involves a subpoena directed at a former President." *Trump v. Mazars, USA, LLP*, No. 19-cv-01136, 2021 U.S. Dist. LEXIS 152966, 2021 WL 3602683, at *13 (D.D.C. Aug. 11, 2021), *appeal pending*, No. 21-5176 (D.C. Cir.).

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

inappropriate because, unlike the situation when *Mazars* was decided on remand, "the executive branch has agreed to provide the requested documents under the PRA, and compulsory process is not at issue." NARA Br. at 23.

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

Under the first *Mazars* factor, "the asserted legislative purpose" must warrant "the significant step of involving the President and his papers." *Id.* at 2035. "Congress may not rely on the President's information if other sources could reasonably provide" the information Congress needs in light of its legislative objective. *Id.* at 2035-36. The court starts with the obvious: the concerns raised by the "significant step" in *Mazars* are plainly not present here, where Plaintiff is no longer President, and the incumbent President has decided that Congress' legislative purpose

warrants production. *See* Pl. Mot., Ex. 4. Moreover, the Select Committee has demonstrated that its asserted legislative purpose is indeed significant. It seeks to learn about what, if anything, Plaintiff, his advisors, other government officials, and those close to him knew about efforts to obfuscate or reverse the results of the 2020 election, recruitment, planning, and coordination of the January 6 rally, the likelihood of the protest turning violent, and what actions they took in response. *See* Pl. Mot., Ex. 1. Plaintiff has not identified any source from which the Select Committee could gain answers to these questions other than the Presidential records they seek. *See* Pl. Mot. at 19 (offering only the conclusory statement that the Select Committee "could obtain any and all of the information it seeks" from non-privileged sources); Hearing Tr. at 16:10-13 (suggesting without evidence or explanation that non-privilege documents should be sufficient). Accordingly, the Select Committee clears the first hurdle.

Second, under *Mazars*, the congressional inquiry should be "no broader than reasonably necessary to support Congress' legislative objective." *Id.* This limitation is necessary, the Court explained, to "safeguard against unnecessary intrusion into the operation of the Office of the President." *Id.* (cleaned up); *see also Nixon v. GSA*, 433 U.S. at 443 (explaining that "the proper inquiry" for courts is to consider the extent to which a congressional act "prevents the Executive Branch from accomplishing its constitutionally assigned functions"). Here, President Biden has not objected to any of the requests as being overly broad or unnecessarily intrusive. His counsel has

reviewed the first three tranches of responsive records and stated that President Biden supports their production because of Congress' compelling interest in them. *See* Pl. Mot., Exs. 4, 6. Plaintiff's argument to the contrary, that the Select Committee's "broad" requests are overly intrusive into the operations of an office he no longer occupies, is therefore unpersuasive.

Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036. "[U]nless Congress adequately identifies its aims and explains why the President's information will advance its consideration of possible legislation," "it is impossible to conclude that a subpoena is designed to advance a valid legislative purpose." *Id.* The Select Committee has adequately identified its aims and indicated why the requested records may support a valid legislative purpose. As noted above, the Select Committee was created to investigate the facts and circumstances of the January 6 attack, including "influencing factors that contributed to the attack." H.R. 503 § 4(a)(1)(B). Defendants tie this aim to the Committee's Presidential records requests by pointing to Plaintiff's statements claiming the election was "rigged," promoting the January 6 rally, and calling on his supporters to "walk down to the Capitol" to "take back our country," Comm. Br. at 7, public reports regarding Plaintiff's efforts to pressure Department of Justice and state officials to reverse the election results, *id.* at 5-7, and the Committee's findings about the effort of Plaintiff's former aides to stop or delay the counting of election results, H.R. Rep. No. 117-152, at 6 (Oct. 19, 2021). The

Committee could reasonably expect the requested records to shed light on any White House planning and strategies concerning public messaging about the election, any efforts to halt or delay the electoral count, and preparations for and responses to the January 6 rally and attack. *See* Pl. Mot., Ex. 1 at 4, 7-9. Such information would be plainly material to the Select Committee's mandate to discover and report on "the facts, circumstances, and causes relating to the January 6 [attack]," H.R. 503, § 3(1), and to pass remedial legislation in any number of previously identified areas within their legislative purview.

Fourth, courts should "assess the burdens imposed on the President by [the] subpoena" because "[the burdens] stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Mazars*, 140 S. Ct. at 2036. Defendants satisfy this factor as well, because the "burdens imposed on the President" by the Committee's request are of considerably less significance when the Presidential records sought pertain to a former President and when the incumbent President favors the production. *Mazars*, 2021 U.S. Dist. LEXIS 152966, 2021 WL 3602683, at *13. Moreover, unlike the compulsory nature of the subpoena in *Mazars*, here, the Select Committee made its request pursuant to a statutory framework to which the executive branch is a party and has long acquiesced. This fact, too, undermines any notion that the office of the President is unduly burdened by the requests.

Having found that all four *Mazars* factors weigh against Plaintiff's position, the court concludes that the

Select Committee's requests are a valid use of legislative power and refuses to enjoin what the legislative and executive branches agree is a vitally important endeavor.

B. Irreparable Harm

A party seeking preliminary injunctive relief must show an imminent threat of irreparable harm by the challenged action or inaction. The "injury must be both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555, 415 U.S. App. D.C. 295 (D.C. Cir. 2015) (cleaned up).

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

Second, Plaintiff's argument that the executive branch will suffer injury is similarly unavailing. Plaintiff invokes the executive privilege protecting presidential communications, contending that compliance with the Select Committee's requests "will undoubtedly cause

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

Plaintiff also contends that an injunction is needed to protect against a risk of inadvertent disclosure of privileged documents, allegedly due to the "short time periods" provided under the PRA for review of potentially large volumes of records whose sensitivity may not be apparent if their authors or custodians cannot be readily ascertained. *See* Pl.'s Mot. at 37. This too is not a convincing injury. Thus far, Plaintiff's PRA representatives have successfully reviewed the records in the first three tranches, and Plaintiff has invoked privilege over many of

them. Moreover, NARA routinely accommodates requests from former Presidents for additional time to complete their reviews when the volume or complexity of records requires. NARA Br., Laster Decl. ¶ 11. NARA maintains the records in the same order and manner of organization as they were transmitted by the outgoing administration. *Id.* ¶ 6. To the extent practicable and necessary, NARA informs the PRA representatives where the responsive records came from, such as from a staff member's office files. *Id.* And when asked, NARA also assists former Presidents in identifying records' authors and custodians. *Id.* ¶ 11. These accommodations are sufficient to mitigate any claim by Plaintiff that he is prejudiced by the PRA statutory process.

C. Balance of the Equities and the Public Interest

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

Defendants contend that discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance because such information relates to our core democratic institutions and the public's confidence in them. NARA Br. at 41. The court agrees. As the Supreme Court has explained, "the American people's ability to reconstruct and come to

terms" with their history must not be "truncated by an analysis of Presidential privilege that focuses only on the needs of the present." *Nixon v. GSA*, 433 U.S. at 452-53. The desire to restore public confidence in our political process, through information, education, and remedial legislation, is of substantial public interest. *See id.*

Plaintiff argues that the public interest favors enjoining production of the records because the executive branch's interests are best served by confidentiality and Defendants are not harmed by delaying or enjoining the production. Neither argument holds water. First, the incumbent President has already spoken to the compelling public interest in ensuring that the Select Committee has access to the information necessary to complete its investigation. And second, the court will not give such short shrift to the consequences of "halt[ing] the functions of a coordinate branch." *Eastland*, 421 U.S. at 511 n.17. Binding precedent counsels that judicially imposed delays on the conduct of legislative business are often contrary to the public interest. *See id.; see also Exxon Corp. v. F.T.C.*, 589 F.2d 582, 589, 191 U.S. App. D.C. 59 (D.C. Cir. 1978) (describing *Eastland* as emphasizing "the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress").

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

IV. CONCLUSION

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

Date: November 9, 2021

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

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution

Article I, Section 8

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

To borrow Money on the credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

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

To constitute Tribunals inferior to the supreme Court;

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

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

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

To provide and maintain a Navy;

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

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

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

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all

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Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

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

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U.S. Constitution

Article II, Section 1, Clause 1

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

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

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44 U.S.C. 2204-2206

§ 2204. Restrictions on access to Presidential records

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

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

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

(2) relating to appointments to Federal office;

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

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

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

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

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

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

(b)

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

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

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

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably

segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

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

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

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

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file

an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)

(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

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

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

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated

by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

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

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§ 2205. Exceptions to restricted access

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

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

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

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

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

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

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

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§2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

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36 CFR § 1270.44 - Exceptions to restricted access.

§ 1270.44 Exceptions to restricted access.

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

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

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

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

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

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

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

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

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

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

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

(f)

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

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

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

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

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in paragraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days

after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

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

Appendix C

The White House

January 21, 2009

EXECUTIVE ORDER 13489 -- PRESIDENTIAL RECORDS

Executive Order -- Presidential Records

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

Section 1. Definitions. For purposes of this order:

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

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

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

(d) "NARA regulations" refers to the NARA regulations implementing the Presidential Records

Act, 36 C.F.R. Part 1270.

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

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

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

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

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

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, using any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of executive privilege. However, nothing in this order is intended to affect the right of the incumbent or former Presidents to invoke executive privilege with respect to materials not identified by

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

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

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

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

deem appropriate concerning whether invocation of executive privilege is justified.

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

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

(d) If the President decides to invoke executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

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

(a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive agencies

as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

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

Sec. 5. General Provisions.

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

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

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

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

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

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

BARACK OBAMA

THE WHITE HOUSE,

January 21, 2009