No. 26-474

IN THE

Supreme Court of the United States

PETER NAVARRO,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF AMICUS CURIAE DAVID BERNHARDT, 53RD SECRETARY OF THE DEPARTMENT OF THE INTERIOR, IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

David Bernhardt served as the 53rd Secretary of the U.S. Department of the Interior during the first Trump Administration. He is the only person to have been nominated and confirmed to serve as Secretary, Deputy Secretary, and Solicitor of the United Sates Department of the Interior. As Secretary of the Interior, Bernhardt led an agency with more than 70,000 employees who are stewards for twenty percent of the nation's lands, including national parks, monuments, wildlife refuges, and other public lands. The Department oversaw the responsible development of conventional and renewable energy supplies on public lands and waters, was the largest supplier and manager of water in the seventeen Western states, and upheld trust responsibilities to the 573 federally recognized American Indian tribes and Alaska Natives.

Secretary Bernhardt's time as a cabinet secretary and trusted senior advisor to the President of the United States gave him a unique perspective into the importance of providing confidential advice to the President and the corresponding responsibility to protect and uphold the President's executive privilege to keep those communications confidential.

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[1] No counsel for a party authored this brief, in whole or in part, and no person or entity other than counsel for *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6. Timely notice was provided to all parties pursuant to Sup. Ct. R. 37.2.

SUMMARY OF THE ARGUMENT

A senior advisor to the President of the United States like Petitioner should not be exposed to criminal prosecution under 2 U.S. C. § 192 for "willfully" failing to produce confidential presidential communications to Congress where he believes the President has not waived the executive privilege. If archaic D.C. Circuit precedent permitting this result is not overturned, presidential advisors are likely to either temper or refuse to provide the type of free, candid advice that the executive privilege itself was designed to protect, thereby frustrating the separation of powers.

As the Chief Executive, the President of the United States relies on the "candid, objective, and even blunt or harsh" opinions of his advisors to "fearlessly and impartially" execute the laws of the United States. *United States v. Nixon*, 418 U.S. 683, 708 (1974); *Trump v. United States*, 603 U.S. 593, 611 (2024). One of the primary ways such advice is guaranteed is through the protections afforded to the president by the executive privilege of confidentiality. *Nixon*, 418 U.S. at 708 (1974) (holding presidential communications are "presumptively privileged") (citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973)); *see also In re Sealed Case*, 121 F.3d 729, 749-50 (D.C. Cir. 1997) (extending the executive privilege to the confidential communications of presidential advisors). Executive Branch confidentiality not only facilitates an effective and efficient presidential decision-making process but also respects separation of powers by refusing to place the president under the thumb of a co-equal branch of government. *Nixon*, 418

U.S. at 708.

As argued persuasively by Petitioner, the D.C. Circuit's stale precedent, *Licavoli v. United States*, 294 F.2d 207, 209 (D.C. Cir. 1961), misinterprets "willfulness" under the criminal contempt of Congress statute, 2 U.S.C. § 192, and improperly punishes presidential advisors like Petitioner who object to turning over confidential presidential communications where the president has not waived the executive privilege. For this reason alone, *Licavoli* should be overturned in favor of a standard that permits presidential advisors to invoke executive privilege in good faith without fear of prosecution and conviction. Given the importance of this issue to the constitutional separation of powers, this matter warrants review by this Court.

ARGUMENT

I. The President Needs Free, Candid Advice from His Advisors to Execute His Constitutional Duties: Confidentiality Is Vital.

The Constitution charges the president to "take Care that the Laws [of the United States] be faithfully executed." U.S. Const. art. II, § 3. This is the president's primary duty as Article II of the Constitution exclusively vests executive power in the president. U.S. Const. art. II, § 1, cl. 1. For the president to fully perform this most essential duty, he must be able to receive free, candid advice from his trusted advisors, which requires confidentiality. *Nixon*, 418 U.S. at 708.

As this Court has recognized, "[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." *Id.* at 705. The necessity of confidential communications between the president and his advisors "flow[s] from the nature of enumerated powers" and "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties." *Id.*[2] *See also Marshall v. Gordon*, 243 U.S. 521, 537 (1917) ("that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices to merely state it.").

Respecting the expectation of confidentiality is therefore vital "for protection of the public interest in candid, objective, and even blunt or harsh opinion in Presidential decisionmaking." *Nixon*, 418 U.S. at 708. This is why this Court has ruled that confidential communications between the president and his advisors are "presumptively privileged." *Nixon*, 418 U.S. at 708.

II. Executive Privilege Belongs to the President and May Be Invoked by His Advisors.

As "the only person who alone composes a

[2] This Court in *Nixon* also indicated that the confidentiality of judicial deliberations is likewise constitutionally valid, 418 U.S. at 708, and noted the Constitutional Convention was conducted in "complete privacy." 418 U.S. at 705 n. 15.

branch of government," *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020), the president "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982). "The Framers 'sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.'" *Trump*, 603 U.S. at 610 (quoting *Clinton v. Jones*, 520 U.S. 681, 712 (1997)). To the Framers, a "vigorous" and "energetic" executive was the antidote to a "feeble executive" which "implies a feeble execution of the government." *Id*. Thus, there is "the greatest public interest" in allowing the president to carry out his duties "fearlessly and impartially." *Id*. at 611 (quoting *Fitzgerald*, 457 U.S. at 752).

Executive privilege derives from "the independence of the Executive Branch within its own sphere" and it insulates the president and his advisors from non-compliance with judicial and congressional subpoenas. *Nixon*, 418 U.S. at 706; *Mazars*, 591 U.S. at 866. Executive privilege is not a single privilege but a suite of privileges with different scopes. Todd Garvey, *Executive Privilege and Presidential Communications: Judicial Principles*, Cong. Rsch. Serv., R47102 (May 12, 2022).[3]

The presidential communications privilege protects presidential communications from public disclosure in order that these communications receive "the greatest protection consistent with the fair

[3] https://www.congress.gov/crs-product/R47102#ifn15.

administration of justice" so that the president and his advisors may engage in "full and frank deliberation upon which effective discharge of the President's duties depends." *Nixon*, 418 U.S. at 706, 715; *Trump v. Thompson*, 142 S.Ct. 680, 681 (2022) (Kavanaugh, J., respecting denial of application). This protection is presumptive insofar as it is assumed to attach to official communications and, while not inviolable, requires disclosure only when there is "a strong showing of need by another institution of government" such that the "responsibilities of that institution cannot responsibly be fulfilled without access" to the privileged communications. *Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974). Absent such a showing, there is no offense for failure to comply with a demand by another branch for confidential presidential communications. *Id.* In this way, executive privilege functions as a bulwark against intrusions by one branch into the affairs of another, consistent with the separation of powers. *Nixon*, 418 U.S. at 708 ("The privilege [of confidentiality] is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.").

The same protections apply to the communications of presidential advisors where the president has not waived the executive privilege. Just as "the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office," so too must presidential advisors have protections for the advice they render in their official capacities. *Trump*, 603 U.S. at 606; *Congressional*

Oversight of the White House, 45 Op. O.L.C., slip op. at 50 (Jan. 8, 2021). This Court has extended executive privilege protections to presidential advisors where there is a "valid need for protection of communications between high Government officials and those who advise them in the performance of their manifold duties." *Nixon*, 418 U.S. at 705. This "need" derives from the president's reliance on free, candid advice from his advisors during the decision-making process. After all, "[i]f [pre-decisional communications] are not protected by the presidential privilege, the President's access to candid and informed advice could well be significantly circumscribed." *In re Sealed Case*, 121 F.3d at 750.

Without extending to advisors "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." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448-49 (1977) (internal quotations omitted). Thus, the confidential communications of presidential advisors like Petitioner are also presumptively covered by executive privilege.

III. *Licavoli* Is Inconsistent with Separation of Powers Principles and Must Be Overturned.

Disputes between Congress and the president over access to presidential communications were once resolved through compromise and negotiation.

Mazars, 591 U.S. at 859-62[4]. Regrettably, that time has passed and we must now confront the reality of Congress' weaponization of our legal system, particularly when political opponents of the serving Executive use congressional subpoena power not as a legislative tool, but rather as a political bludgeon to interfere with executive operations and punish presidential advisors. *Compare* Cong. Rsch. Serv., RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas* (2017) (only six Executive Branch officials between 1980 and 2017 were referred for prosecution) *with United States v. Bannon*, No. 22-3086, slip op. at 17 (D.C. Cir. May 27,

[4] *Mazars* cites Washington, Reagan, and Clinton as examples of this process. In 1792, a House committee requested documents concerning General St. Clair's Northwest Territory campaign against the Indians. President Washington called a cabinet meeting where they decided while Congress had the power to request the materials the president had the prerogative to refuse disclosures. President Washington then sent Thomas Jefferson to speak to individual congressmen, the House narrowed its request, and President Washington supplied the newly requested documents. During the Reagan administration, a House subcommittee subpoenaed all documents related to the administration's decision to designate Canada a reciprocal country in connection with the Mineral Lands Leasing Act. President Reagan had some documents withheld but otherwise attempted to accommodate the request, the committee threatened to hold the Secretary of the Interior in contempt, and a compromise was reached where committee-members could access the documents for one day with minimal notetaking and no participation by non-Members of Congress. Finally, during the Clinton presidency, a Senate committee subpoenaed notes taken by a White House Attorney during a meeting with the president. President Clinton claimed privilege and while the Senate threatened judicial enforcement, eventually President Clinton turned over the notes with the concession that he had not waived privilege.

2025) (Roa, J., dissenting from denial of rehearing *en banc*) (highlighting six citations of Executive Branch officials for criminal contempt of Congress between 2019 and 2023).

If indeed the era of compromise and interbranch negotiation is dead, then the likelihood is high that Congress will continue to abuse its subpoena authority and refer its political opponents for prosecution under 2 U.S.C. § 192. This means that senior presidential advisors like Petitioner will continue to be subject to, and prosecuted under, the D.C. Circuit's stale *Licavoli* precedent, which erroneously exposes the advisor to criminal prosecution under 2 U.S.C. § 192 for "willfully" failing to produce confidential presidential communications to Congress where the President has not waived the executive privilege.[5] Because "[t]he privilege [of confidentiality] is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," *Nixon*, 418 U.S. at 708, Congress does not and should not have unfettered access to confidential communications between the president and his advisors where the president has not waived the executive privilege.

As advocated by Petitioner, *Licavoli* should be overturned in favor of the traditional construction of

[5] 2 U.S.C. § 194 requires certification of a criminal contempt of Congress charge be directed to "the appropriate United Sates attorney." Because witnesses are commanded to appear before Congress in the District of Columbia, criminal contempt charges are brought almost exclusively by the United States Attorney for the District of Columbia and appeals go before the D.C. Circuit.

the word "willfully" preferred by this Court, which requires the correct *mens rea*: that a willful act be undertaken with the knowledge the conduct was unlawful.[6] In other words, when a presidential advisor invokes the executive privilege to avoid the disclosure of privileged information to Congress, and where the president has not waived the executive privilege, the advisor's refusal to comply with Congress cannot be "willful," and he therefore should not be subject to prosecution under 2 U.S.C. § 192.

If *Licavoli* stands, Congress will persist in transgressing the long-established boundaries established by executive privilege and the separation of powers, effectively chilling the ability of the Executive to function as the Founders intended. *See Trump*, 603 U.S. at 613 ("the threat of trial, judgment, and imprisonment" is a significant deterrent as "[p]otential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking").

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[6] *See Spies v. United States*, 317 U.S. 492, 498 (1943) (willfulness "includes[s] some element of evil motive and want of justification"); *Sillasse Bryan v. United States*, 524 U.S. 184, 191-93 (1998) ("willfully" necessitates a "bad purpose or evil intent"); *Wooden v. United States*, 595 U.S. 360, 378 (2022) (Kavanaugh, J., concurring) ("with respect to federal crimes requiring 'willfulness,' the Court generally requires the Government to prove that the defendant was aware that his conduct was unlawful.").

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* and reverse the lower court's ruling to permit presidential advisors like Petitioner the ability to invoke executive privilege without fear of prosecution when faced with a congressional subpoena seeking confidential presidential communications.

Respectfully submitted,

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