ORAL ARGUMENT SCHEDULED FOR NOVEMBER 30, 2021

No. 21-5254

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP

Appellant,

v.

BENNIE G. THOMPSON, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Columbia
(Hon. Tanya S. Chutkan, United States District Judge)

BRIEF FOR APPELLEES THE HONORABLE BENNIE G. THOMPSON AND THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL

Douglas N. Letter
Todd B. Tatelman
Eric R. Columbus
Stacie M. Fahsel
Office of General Counsel
U.S. House of Representatives
5140 O'Neill House
Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Annie L. Owens
Mary B. McCord
Joseph W. Mead
Institute for Constitutional Advocacy and Protection
Georgetown Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9042

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendants-Appellees the Honorable Bennie G. Thompson and the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol respectfully submit this certificate as to parties, rulings, and related cases.

A. Parties and Amici

Plaintiff-Appellant is former President Donald J. Trump.

Defendants-Appellees are Hon. Bennie G. Thompson, the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol, David S. Ferriero, and the National Archives and Records Administration. Defendants-Appellees are sued in their official capacities.

No intervenors have appeared in this Court. The following individuals and entities have filed notices of intent to participate as amici: Government Accountability Project, Government Information Watch, National Security Counselors, Louis Fisher, Heidi Kitrosser, Mark J. Rozell, and Mitchel A. Sollenberger; Citizens for Responsibility and Ethics in Washington, Virginia Canter, and Richard Painter;

former Members of Congress (full list in notice); States United Democracy Center and individual former federal, state, and local officials; and former Department of Justice Officials (full list in notice).

Pro se litigant Kevin Cassady attempted to file documents in district court. Additional *pro se* litigants James Murray, Paul Risenhoover, and David Andrew Christenson sought leave to file amicus briefs in district court. Each of these requests was denied.

B. Rulings Under Review

The ruling under review is the District Court's Order (D. Ct. Dkt. No. 36), and Memorandum Opinion (D. Ct. Dkt. No. 35), in *Trump v. Thompson, et al.*, No. 21-cv-2769, — F. Supp. 3d —, 2021 WL 5218398 (D.D.C. Nov. 9, 2021) (Chutkan, J.). The order denied Mr. Trump's motion for a preliminary injunction.

C. Related Cases

The case on review has not previously been before this Court. Congressional Defendants-Appellees are unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). *Trump v. Mazars USA, LLP*, No. 21-5176 (D.C. Cir.) presents a similar question regarding whether the test announced by the Supreme Court in *Trump*

v. Mazars, *USA, LLP*, 140 S. Ct. 2019 (2020), applies to a former

President's challenge to a Congressional request.

/s/ Douglas N. Letter
Douglas N. Letter
Counsel for Congressional
Defendants-Appellees

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Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) 58

Barenblatt v. United States, 360 U.S. 109 (1959) 38

Comm. on the Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) 68

Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977) 44

Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899 (M.D. Pa. 2020) 10

Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) 36, 68

Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978) 68, 69, 71

Guedes v. ATF, 920 F.3d 1 (D.C. Cir. 2019) 31

Hearst v. Black, 87 F.2d 68 (D.C. Cir. 1936) 71

In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) 43, 47

In re Sealed Case, 148 F.3d 1079 (D.C. Cir. 1998) 65

Massachusetts v. Mellon, 262 U.S. 447 (1923) 70

**McGrain v. Daugherty*, 273 U.S. 135 (1927) 32, 34

Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982) 66

**Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) 4, 5, 26, 43, 44, 45, 46, 49, 50, 52, 54, 55, 58, 59, 66, 67

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Cases—Continued

Olu-Cole v. E.L. Haynes Pub. Charter Sch.,
930 F.3d 519 (D.C. Cir. 2019) 64, 68

Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960) 71

Pursuing Am.'s Greatness v. FEC, 831 F.3d 500 (D.C. Cir. 2016) 68

Quinn v. United States, 349 U.S. 155 (1955) 33

Rubin v. United States, 524 U.S. 1301 (1998) 65

Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) 45

Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725
(D.C. Cir. 1974) (en banc) 28, 53, 54

Trump v. Kemp,
511 F. Supp. 3d 1325 (N.D. Ga. 2021) 11

Trump v. Mazars USA, LLP,
140 S. Ct. 2019 (2020) 28, 33, 34, 39, 53, 55, 56, 57, 59, 60, 61, 62, 65

940 F.3d 710 (D.C. Cir. 2019) 37

380 F. Supp. 3d 76 (D.D.C. 2019) 37, 38

No. 19-01136, 2021 WL 3602683 (D.D.C. Aug. 11, 2021) 56, 59

United States v. *Burr*, 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) 60

**United States v. Nixon*, 418 U.S. 683 (1974) 43, 49

United States v. Rumely, 345 U.S. 41 (1953) 34

Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982) 70

Watkins v. United States, 354 U.S. 178 (1957) 38

Cases—Continued

Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (en banc) 64

Winter v. Nat. Res. Def. Council, Inc.,555 U.S. 7 (2008) 31, 64, 67

Constitutional and Statutory Provisions

U.S. Const. Art. II, § 1 45

U.S. Const. Art. II, § 3 45

Presidential Records Act, 44 U.S.C. §§ 2201-09

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44 U.S.C. § 2202 .... 5, 32, 59

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Legislative Authorities

167 Cong. Rec. E1151 (Oct. 27, 2021) 35

36 C.F.R. § 1270.44 .... 6, 7

74 Fed. Reg. 4669 (Jan. 21, 2009) 7

*H. Res. 503, 117th Cong. (2021) 21, 22, 35, 48

Rule XI, Rules of the U.S. House of Representatives, 117th Cong. (2021) 22, 23

Senate Committee on the Judiciary, Majority Staff Report, Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election (Oct. 7, 2021) 13

Other Authorities

Alec MacGillis, *Inside the Capitol Riot: What the Parler Videos Reveal*, ProPublica (Jan. 17, 2021), https://perma.cc/K58C-EB7C 18

Amy Gardner et al., *Trump asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, Wash. Post (Dec. 8, 2020), https://perma.cc/MUD8-DWWF 11

Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021), https://perma.cc/2E68-34EV 12

Ashley Parker et al., *Six hours of paralysis: Inside Trump's failure to act after a mob stormed the Capitol*, Wash. Post (Jan. 11, 2021), https://perma.cc/XK4C-8SZB 19

Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021), https://perma.cc/TYX3-PAFU 18

David Li & Ali Gostanian, *Georgia lawyer said he kicked in Pelosi's door, she could've been 'torn into little pieces'*, NBC News (Jan. 19, 2021), https://perma.cc/MB6M-CYUM 19

Donald Trump (@realDonaldTrump), Twitter (June 22, 2020, 7:16 AM) 8

Donald Trump (@realDonaldTrump), Twitter (June 22, 2020, 9:11AM and 2:13PM) 8

Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 AM) 9

Donald Trump (@realDonaldTrump), Twitter (Nov. 8, 2020, 9:17 AM) 9

Other Authorities—Continued

Donald Trump (@realDonaldTrump), Twitter (Nov. 21, 2020, 3:34 PM) 9

Donald Trump (@realDonaldTrump), Twitter (Dec. 18, 2020, 9:14 AM) 14

Donald Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42 AM) 14

Donald Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:51 AM) 11

Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:00 AM) 15

Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17 AM) 16

Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 6:01 PM) 20

Donald Trump 2020 RNC Speech Transcript (Aug. 24, 2020), *in* Rev, https://perma.cc/2V8P-7L47. 9

Donald Trump Rally Speech Transcript, Dalton, Georgia: Senate Runoff Election (Jan. 4, 2021), *in* Rev, https://perma.cc/VAD2-TWVQ 15

Donald Trump "Save America" Rally Speech Transcript (Jan. 6, 2021), *in* Rev, https://perma.cc/CJ76-F735 16

Donald Trump Speech on Election Fraud Claims Transcript (Dec. 2, 2020), *in* Rev, https://perma.cc/9696-PKZP 10

Jamie Gangel et al., *New details about Trump-McCarthy Shouting Match Show Trump Refused to Call off the Rioters,* CNN (Feb. 12, 2021), https://perma.cc/5R2R-95WW 19

Other Authorities—Continued

Jonathan Karl, *Inside William Barr's Breakup With Trump*, The Atlantic (June 27, 2021), https://perma.cc/W4GR-GTX9............ 12

Kaitlan Collins (@kaitlancollins), Twitter (Jan. 6, 2021, 10:34 PM), https://perma.cc/H7QW-52SG 19

Kathleen Ronayne & Michael Kunzelman, *Trump to Far-right Extremists: 'Stand back and stand by'*, Associated Press (Sept. 30, 2020), https://perma.cc/22KN-2XJR.................................. 17

Luke Broadwater & Nicholas Fandos, *'A hit man sent them.' Police at the Capitol recount the horrors of Jan. 6 as the inquiry begins*, N.Y. Times (July 27, 2021), https://perma.cc/N7UZ-XSFL 17

Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. Times (Nov. 19, 2020), https://perma.cc/B7DR-DED9.. 11

Marc Fisher et al., The Four-Hour Insurrection, Wash. Post (Jan. 7, 2021), https://perma.cc/B78N-NS92 18

Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Associated Press (Dec. 1, 2020), https://perma.cc/9DAE-WN7A.. 12

Michael Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. Times (Oct. 2, 2021), https://perma.cc/3J2V-AWBK.................. 15

Mike Pence (@Mike_Pence), Twitter (Jan. 6, 2021, 1:02 PM), https://perma.cc/FV4W-P28Jhttps://perma.cc/FV4W-P28J 17

Peter Baker et al., *Pence Reached His Limit with Trump. It Wasn't Pretty*, N.Y. Times (Jan. 12, 2021), https://perma.cc/4XND-LXNV 18

Other Authorities—Continued

President Trump Video Statement on Capitol Protestors, C-SPAN (Jan. 6, 2021), https://perma.cc/7TLK-Q9QD 20

Press Briefing, Remarks by President Trump (Sept. 23, 2020), https://perma.cc/M6AA-9PW7 9

Press Briefing, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force (Apr. 7, 2020), https://perma.cc/SU9J-FJZV 8

Rosalind Helderman & Elise Viebeck, *'The last wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, Wash. Post (Dec. 12, 2020), https://perma.cc/G37P-YUV3 10

Rosalind Helderman et al., *'Trump said to do so': Accounts of Rioters Who Say the President Spurred Them to Rush the Capitol Could be Pivotal Testimony*, Wash. Post (Jan. 16, 2021), https://perma.cc/FW7Q-3CJL 38

Ryan Randazzo et al., *Arizona Legislature 'Cannot and Will Not' Overturn Election, Republican House Speaker Says*, Arizona Republic (Dec. 4, 2020), https://perma.cc/GUR8-66PD 12

Shelly Tan et al., *How one of America's ugliest days unraveled inside and outside the Capitol*, Wash. Post (Jan. 9, 2021), https://perma.cc/7LMH-4JJX... 17

The Federalist No. 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 60

The Federalist No. 37 (James Madison) (Clinton Rossiter ed., 1961) 60

Tim Kephart, *Trump Calls Ga. Secretary of State "Enemy of the People"*, CBS46 (Nov. 27, 2020), https://perma.cc/RA3J-KAY7....................... 11

Other Authorities—Continued

William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021), https://perma.cc/M52G-K3GC................. 10

GLOSSARY

JA	Joint Appendix
Select Committee	United States House Select Committee to Investigate the January 6th Attack on the United States Capitol
National Archives	National Archives and Records Administration

INTRODUCTION

In 2021, for the first time since the Civil War, our Nation did not experience a peaceful transfer of power. On January 6, while Congress was set to carry out its constitutional duty to count the electoral votes from the 2020 Presidential election, rioters stormed the U.S. Capitol building, seeking to stop the count and overturn the election. The mob attacked law enforcement officers, entered the Senate chamber just minutes after lawmakers were evacuated, and ravaged the Capitol. Several people died, and approximately 140 police officers were injured. This assault—the first breach of the Capitol since the War of 1812—was perpetrated by supporters of then-President Donald Trump, who urged his followers to assemble in Washington to "Stop the Steal" as the culmination of his months-long effort to deceive the public into believing that the election had been stolen from him.

The House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol is now studying the attack and developing remedial legislation. As a crucial part of this investigation, the Select Committee has requested Presidential records from the National Archives and Records Administration containing

White House communications relating to the events of, and leading up to, January 6.

The President has instructed the Archivist to provide certain White House records to the Select Committee. Mr. Trump now seeks to enjoin both the Executive and the Legislative Branches, and stop the Archivist from complying. The district court correctly declined this extraordinary plea, and this Court should do the same.

Far from being able to demonstrate a likelihood of success on the merits, Mr. Trump is extremely unlikely to win on his claims. The Select Committee's request is squarely within its jurisdiction and driven by a clear legislative purpose: to understand the facts and causes surrounding the January 6 attack in order to develop legislation and other measures that will protect our Nation from a future assault. The Select Committee has reasonably concluded that it needs the documents of the then-President who helped foment the breakdown in the rule of law.

Moreover, Mr. Trump's broad claims of executive privilege are unprecedented and deeply flawed. Executive privilege exists to protect the Executive Branch, and the President has declined to assert

executive privilege over the documents contested here. Mr. Trump provides no cause for this Court to override that determination.

Beyond his flawed privilege claim, Mr. Trump incorrectly relies on separation-of-powers tests announced in cases involving requests for information from *sitting* Presidents. Those tests do not apply here, and in any event they are met.

Nor can Mr. Trump satisfy the other preliminary injunction factors. Although he claims that *he* would be irreparably injured, he cannot show that releasing the documents would harm *the Executive Branch*. And the equities and public interest heavily favor the Select Committee, which needs the records to develop legislative and other measures to safeguard our democracy.

It is difficult to imagine a more critical subject for Congressional investigation, and Mr. Trump's arguments cannot overcome Congress's pressing need. Both political branches of government agree that these records should be disclosed to the Select Committee, and the district court's denial of Mr. Trump's request to preliminarily enjoin that action should be affirmed.

STATEMENT OF JURISDICTION

Mr. Trump's statement of jurisdiction is correct.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the Select Committee's Presidential records request is supported by a valid legislative purpose.

2. Whether the district court correctly held that Mr. Trump's claim of executive privilege does not bar the release of the requested records where the President has determined that the public interest in disclosure outweighs any countervailing Executive Branch confidentiality interests.

3. Whether the district court abused its discretion in holding that Mr. Trump failed to satisfy the equitable preliminary injunction factors.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions are reprinted in the Addendum.

STATEMENT OF THE CASE

A. Legal Background

In *Nixon v. Administrator of General Services* ("*GSA*"), 433 U.S. 425, 431 (1977), the Supreme Court rejected former President Nixon's challenge to the constitutionality of a statute giving custody of his records to the National Archives and prohibiting the destruction of

those materials. As relevant here, the Court determined that a former President may be "heard to assert" claims of the presidential communications privilege involving his own communications. *Id.* at 439, 449. Yet the Court emphasized that the incumbent President 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.

Congress subsequently enacted the Presidential Records Act, 44 U.S.C. §§ 2201-09, establishing a comprehensive framework for preservation and disclosure of Presidential records. Section 2202 makes clear that the United States—not the President—owns all Presidential records, even after a President leaves office.

Significantly, Section 2205(2)(C) makes Presidential records "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." Section 2204(c)(2) provides that the Act does not "confirm, limit, or expand any

constitutionally-based privilege which may be available to an incumbent or former President."

Implementing regulations allow incumbent and former Presidents to assert claims of executive privilege over Presidential records. *See* 36 C.F.R. § 1270.44(d).[1] When Congress requests such records, "either President may assert a claim of constitutionally based privilege against disclosing the record." *Id.* Should the incumbent President assert such a claim, the Archivist will not disclose the records unless a court orders disclosure. *Id.* § 1270.44(e).

If a former President raises a privilege claim, "the Archivist consults with the incumbent President … to determine whether [he] will uphold the claim." 36 C.F.R § 1270.44(f)(1). If the incumbent President upholds the privilege claim, the Archivist does not disclose the records unless the incumbent withdraws the claim or a court orders the records to be disclosed. *Id.* § 1270.44(f)(2). If "the incumbent President does not uphold the claim asserted by the former President," or "fails to decide" within a set time, the Archivist will release the

[1] One provision of the Act (Section 2208) addresses claims of privilege by former and incumbent Presidents, but that provision does not apply to Presidential records requested by Congress, *id.* § 2205. The terms of 36 C.F.R. § 1270.44(d) largely mirror Section 2208.

records unless otherwise ordered by a court. *Id.* § 1270.44(f)(3); *see* 74 Fed. Reg. 4669 (Jan. 21, 2009) (executive order imposing a similar structure for resolving executive privilege claims).

B. Facts and Procedural History

On November 3, 2020, the American people elected a President. In accordance with law, each state counted and certified its vote. On December 14, the Electoral College convened in the several states. Joseph Biden prevailed, winning 306 electoral votes. On January 6, 2021, as required by the Twelfth Amendment and the Electoral Count Act, Congress convened in a joint session, presided over by Vice President Mike Pence, to count the electoral votes.

Ever since the 1887 enactment of the Electoral Count Act, Congress's count of the electoral votes has been a formality, occurring well after the losing candidate conceded. This year, however, was different: The count in Congress followed two months of unprecedented efforts by the losing candidate, Mr. Trump, to overturn the election results.

1. *Mr. Trump's Campaign to Undermine the Results of the 2020 Election*

Long before Election Day, Mr. Trump began laying the foundation to undermine it (as described in the public record). As the Democratic primary campaign wound down, Mr. Trump began to fixate on mail-in balloting as a potential source of fraud. On April 7, he described such ballots as "corrupt," "fraudulent in many cases," and the work of "cheaters."[2] Mr. Trump would make such claims a motif of his campaign, with multiple variations. In May, for example, he threatened to "hold up" unspecified funding to Michigan and Nevada if those states mailed ballots to voters, thus "creating a great Voter Fraud scenario."[3] In June, he tweeted "RIGGED 2020 ELECTION: MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN

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[2] Press Briefing, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force (Apr. 7, 2020), https://perma.cc/SU9J-FJZV.

[3] Donald Trump (@realDonaldTrump), Twitter (June 22, 2020, 9:11AM and 2:13PM). In the wake of the January 6 attack, Twitter permanently suspended Mr. Trump's account and removed his tweets. Mr. Trump's tweets remain available at archives such as https://www.presidency.ucsb.edu/documents/app-categories/twitter, https://www.thetrumparchive.com/ and https://factba.se/trump/.

COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!"[4]

In his Republican National Convention speech, Mr. Trump claimed, "[t]he only way they can take this election away from us is if this is a rigged election."[5] Pressed in September 2020 on whether he would "commit to making sure that there is a peaceful transferal [*sic*] of power," he said only, "we're going to have to see what happens."[6]

Hours after polls closed, Mr. Trump claimed victory, tweeting, "[w]e are up BIG, but they are trying to STEAL the Election. We will never let them do it."[7] After all major media outlets reported that Mr. Biden had prevailed, Mr. Trump insisted "[t]his was a stolen election."[8] In the weeks that followed, he repeatedly implored his supporters to

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[4] Donald Trump (@realDonaldTrump), Twitter (June 22, 2020, 7:16 AM).

[5] Donald Trump 2020 RNC Speech Transcript, *in* Rev (Aug. 24, 2020), https://perma.cc/2V8P-7L47.

[6] Press Briefing, Remarks by President Trump (Sept. 23, 2020), https://perma.cc/M6AA-9PW7.

[7] Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49AM).

[8] Donald Trump (@realDonaldTrump), Twitter (Nov. 8, 2020, 9:17AM).

"Stop the Steal!"[9] He claimed that corrupt state election officials, fraudulent voters, doctored voting machines, and international conspirators deprived him of victory. For example, he alleged "tremendous voter fraud and irregularities" resulting from a late-night "massive dump" of votes; he added that certain votes were "counted in foreign countries," "[m]illions of votes were cast illegally in the swing states alone," and it was "statistically impossible" that he lost.[10]

Mr. Trump and his allies filed 62 lawsuits challenging the results in six states.[11] Every suit was dismissed (except one minor Pennsylvania challenge that did not affect that state's outcome).[12] Courts found Mr. Trump's claims "not credible" and "without merit"; a "Frankenstein's monster" of "haphazardly stitched together" theories.[13]

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[9] *See, e.g.*, Donald Trump (@realDonaldTrump), Twitter (Nov. 21, 2020, 3:34PM).

[10] Donald Trump Speech on Election Fraud Claims Transcript (Dec. 2, 2020), *in* Rev, https://perma.cc/9696-PKZP.

[11] William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021), https://perma.cc/M52G-K3GC.

[12] *Id.*

[13] Rosalind Helderman & Elise Viebeck, 'The last wall': How dozens of judges across the political spectrum rejected Trump's efforts to overturn the election, Wash. Post (Dec. 12, 2020), https://perma.cc/G37P-YUV3; *Donald J. Trump for President, Inc. v. Bookvar*, 502 F. Supp. 3d 899, 906, 910 (M.D. Pa. 2020).

As one court declared, Mr. Trump's attempt "[t]o interfere with the result of an election that … has been audited and certified on multiple occasions" would "breed confusion, undermine the public's trust in the election, and potentially disenfranchise … millions of Georgia voters."[14] The Supreme Court denied numerous emergency applications aimed at overturning the results; in response, Mr. Trump tweeted that the Court was "totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election."[15]

At the same time, Mr. Trump launched an unprecedented pressure campaign aimed at getting state officials to reverse their election results. One of the states on which he focused was Georgia, whose Secretary of State, Brad Raffensperger, he called an "enemy of the people" for stating that there was no indication of widespread voter fraud or improprieties in counting.[16] On January 2, Mr. Trump directly

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[14] *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1339 (N.D. Ga. 2021).

[15] Donald Trump (@realDonaldTrump), Twitter (Dec. 26, 2020, 8:51AM).

[16] Tim Kephart, *Trump Calls Ga. Secretary of State "Enemy of the People,"* CBS46 (Nov. 27, 2020), https://perma.cc/RA3J-KAY7. Mr. Trump pressured other states as well. *See, e.g.*, Maggie Haberman et al., *Trump Targets Michigan in His Ploy to Subvert the Election*, N.Y. Times (Nov. 19, 2020), https://perma.cc/B7DR-DED9; Amy Gardner et

asked Mr. Raffensperger to "find" enough votes to overturn the state's results,[17] warning that failure to do so would be "a criminal offense" and "a big risk to you."[18]

Mr. Trump also attempted to enlist the Department of Justice in his fight to undo his election defeat. On December 1, Attorney General William Barr announced that the Department had not seen evidence of election fraud that would have affected the outcome of the election;[19] he would later explain that Mr. Trump's fraud claims were "all bullshit."[20] Despite this, Mr. Trump repeatedly asked Department officials to initiate spurious investigations and file frivolous lawsuits—and

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al., *Trump asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, Wash. Post (Dec. 8, 2020), https://perma.cc/MUD8-DWWF; Ryan Randazzo et al., *Arizona Legislature 'Cannot and Will Not' Overturn Election, Republican House Speaker Says*, Arizona Republic (Dec. 4, 2020), https://perma.cc/GUR8-66PD.

[17] Amy Gardner & Paulina Firozi, *Here's the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021), https://perma.cc/2E68-34EV.

[18] *Id.*

[19] Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Associated Press (Dec. 1, 2020), https://perma.cc/9DAE-WN7A.

[20] Jonathan Karl, *Inside William Barr's Breakup With Trump*, The Atlantic (June 27, 2021), https://perma.cc/W4GR-GTX9.

threatened to fire them if they did not.[21] His Chief of Staff instructed the Department to investigate a panoply of conspiracy theories, including a bizarre theory that the Central Intelligence Agency and an Italian company used military satellites to alter vote totals.[22] Mr. Trump met with one of his Department political appointees (Jeffrey Clark, who was sympathetic to these baseless claims), and considered firing Acting Attorney General Jeffrey Rosen and installing Mr. Clark in his place.[23] Mr. Trump backed down only after an Oval Office meeting at which Department senior leaders, Mr. Trump's White House Counsel, and his Deputy White House Counsel all threatened to resign.[24]

On December 14, after every state certified its election results, the Electoral College met and voted, yet Mr. Trump continued to wage his battle to overturn the election. Days later, Mr. Trump implored, "@senatemajldr and Republican Senators have to get tougher, or you

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[21] Senate Committee on the Judiciary, Majority Staff Report, Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election, at 13-28 (Oct. 7, 2021).

[22] *Id.* at 3.

[23] *Id.* at 3-4.

[24] *Id.* at 38-39.

won't have a Republican Party anymore. We won the Presidential Election, by a lot. FIGHT FOR IT. Don't let them take it away!"[25]

2. The January 6 Assault on the Capitol

Mr. Trump soon fixated on the January 6 electoral vote count as his final opportunity to overturn the election. On December 19, he began an effort to assemble thousands of supporters in Washington on January 6, tweeting: "Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!"[26] Two days before the Joint Session of Congress, Mr. Trump warned, "Democrats are trying to steal the White House … [y]ou can't let it happen. You can't let it happen," and "they're not taking this White House. We're going to fight like hell, I'll tell you right now."[27]

As his desperation grew, Mr. Trump tried to pressure Vice President Pence (who as President of the Senate was to preside over the electoral count) to subvert the formal process, notwithstanding his

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[25] Donald Trump (@realDonaldTrump), Twitter (Dec. 18, 2020, 9:14AM).

[26] Donald Trump (@realDonaldTrump), Twitter (Dec. 19, 2020, 1:42AM).

[27] Donald Trump Rally Speech Transcript, Dalton, Georgia: Senate Runoff Election (Jan. 4, 2021), *in* Rev, https://perma.cc/VAD2-TWVQ.

constitutional duty. Trump aides enlisted law professor John Eastman to write a memorandum asserting that the Vice President could halt the electoral count, and Mr. Trump arranged to meet on January 4 with Mr. Pence and Mr. Eastman.[28] "If Vice President @Mike_Pence comes through for us," he tweeted early on January 6, "we will win the Presidency."[29] Mr. Trump reiterated this call on the morning of January 6: "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"[30]

Just before noon on January 6, Mr. Trump took the stage at the "Save America Rally" near the White House. He spent the next hour reiterating his claim that Democrats had "stolen" the election and exhorting the crowd to "fight much harder" to "stop the steal" and "take

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[28] Michael Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. Times (Oct. 2, 2021), https://perma.cc/3J2V-AWBK.

[29] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:00AM).

[30] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17AM).

back our country."[31] He demanded again that Vice President Pence interfere with the electoral count.

At numerous points, Mr. Trump exhorted the crowd toward the Capitol, where the Joint Session was about to start. After saying that those marching toward the Capitol should do so "peacefully," he delivered 50 minutes more of incendiary rhetoric, declaring "we fight[,] [w]e fight like Hell and if you don't fight like Hell, you're not going to have a country anymore."[32] Around the same time, an early wave of rioters surged toward the Capitol building and started to pull down barricades around its perimeter.[33] While Mr. Trump was speaking, Vice President Pence made clear that he would not participate in the effort to overturn the election.[34]

The basic contours of the events that followed are by now well known. Hordes of Trump supporters assaulted the Capitol and the law enforcement officers charged with its defense. Rioters wearing Trump

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[31] Donald Trump "Save America" Rally Speech Transcript (Jan. 6, 2021), *in* Rev, https://perma.cc/CJ76-F735.

[32] *Id.*

[33] Shelly Tan et al., *How one of America's ugliest days unraveled inside and outside the Capitol*, Wash. Post (Jan. 9, 2021), https://perma.cc/7LMH-4JJX.

[34] Mike Pence (@Mike_Pence), Twitter (Jan. 6, 2021, 1:02PM), https://perma.cc/FV4W-P28J.

paraphernalia—and in some cases Confederate or fascist symbols—struck police officers, gouged their eyes, assaulted them with chemical sprays and projectiles, and called them "traitor" and "n-----."[35] After storming through the barricades surrounding the building, rioters laid siege to the Capitol itself. The mob physically overwhelmed law enforcement officers guarding the entrances to the building and smashed through windows to gain access.[36]

The constitutionally required Joint Session of Congress was disrupted; the House and Senate Chambers were evacuated—and the latter was overrun by rioters, from whom lawmakers fled. The mob specifically hunted Vice President Pence and House Speaker Nancy Pelosi. "Once we found out Pence turned on us and that they had stolen

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[35] Luke Broadwater & Nicholas Fandos, *'A hit man sent them.' Police at the Capitol recount the horrors of Jan. 6 as the inquiry begins*, N.Y. Times (July 27, 2021), https://perma.cc/N7UZ-XSFL. During the campaign, Mr. Trump had refused to condemn white nationalist supporters. When asked in the first Presidential debate to condemn violent extremists such as the Proud Boys, he demurred and instead told them to "Stand back and stand by." Kathleen Ronayne & Michael Kunzelman, *Trump to far-right extremists: 'Stand back and stand by'*, Associated Press (Sept. 30, 2020), https://perma.cc/22KN-2XJR.

[36] Marc Fisher et al., *The Four-Hour Insurrection*, Wash. Post (Jan. 7, 2021), https://perma.cc/B78N-NS92.

the election, like, officially, the crowd went crazy," said one person.[37] Rioters chanted, "Hang Mike Pence!"[38] Another picked up a phone in the corridor and said, "Can I speak with Pelosi? Yeah, we're coming for you, bitch. Mike Pence? We're coming for you too, fucking traitor."[39] One rioter bragged that he and others kicked in the door to the office of the House Speaker and that she would have been killed had she been there.[40]

Meanwhile, Mr. Trump was described by those around him at the White House as "borderline enthusiastic because it meant the certification was being derailed."[41] As a wide range of Republican officials tried to convince him to call off his supporters, he refused to act, other than to tweet that "Mike Pence didn't have the courage to do

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[37] Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, Wash. Post (Jan. 15, 2021), https://perma.cc/TYX3-PAFU.

[38] Peter Baker et al., *Pence Reached His Limit with Trump. It Wasn't Pretty*, N.Y. Times (Jan. 12, 2021), https://perma.cc/4XND-LXNV.

[39] Alec MacGillis, *Inside the Capitol Riot: What the Parler Videos Reveal*, ProPublica (Jan. 17, 2021), https://perma.cc/K58C-EB7C.

[40] David Li & Ali Gostanian, *Georgia lawyer said he kicked in Pelosi's door, she could've been 'torn into little pieces,'* NBC News (Jan. 19, 2021), https://perma.cc/MB6M-CYUM.

[41] Kaitlan Collins (@kaitlancollins), Twitter (Jan. 6, 2021, 10:34PM), https://perma.cc/H7QW-52SG.

what should have been done to protect our Country and our Constitution."[42] He was advised to announce publicly that his supporters should leave the Capitol immediately, but he did not do so for hours, instead sending a pair of tepid and ineffectual tweets asking his supporters to be "peaceful."[43] When House Minority Leader Kevin McCarthy asked Mr. Trump to call off the rioters who were trying to break into his office in the Capitol, the latter reportedly responded: "Well, Kevin, I guess these people are more upset about the election than you are."[44]

At his aides' behest, as additional law enforcement resources were assembling and arriving at the scene, Mr. Trump finally issued an apparently scripted video that called for "peace" and "law and order," but claimed that he won in a "landside" and concluded by telling the rioters: "[W]e love you. You're very special. … I know how you feel, but

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[42] Ashley Parker et al., *Six hours of paralysis: Inside Trump's failure to act after a mob stormed the Capitol*, Wash. Post (Jan. 11, 2021), https://perma.cc/XK4C-8SZB.

[43] *Id.*

[44] Jamie Gangel et al., *New details about Trump-McCarthy Shouting Match Show Trump Refused to Call off the Rioters,* CNN (Feb. 12, 2021), https://perma.cc/5R2R-95WW.

go home and go home at peace."[45] At 6:01 p.m. he tweeted, "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"[46]

The Joint Session of Congress resumed in the evening and finished its constitutionally mandated responsibility that night.

On January 20, Mr. Trump departed the White House and President Biden assumed the Presidency.

3. The Select Committee's Investigation and Presidential Records Act Requests

On March 25, the chairs of six House committees issued a document request to the National Archives, under the Congressional access provision of the Presidential Records Act, 44 U.S.C. § 2205(2)(C), for documents and communications related to Mr. Trump's remarks, movements, calendars, and schedules on January 6, as well as other

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[45] President Trump Video Statement on Capitol Protestors, C-SPAN (Jan. 6, 2021), https://perma.cc/7TLK-Q9Q.

[46] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 6:01PM).

White House communications and documents related to the events of that day. JA46-48.

On June 30, the House adopted House Resolution 503, which established the Select Committee and authorized it to investigate the January 6 attack to learn what happened, assess the causes, and propose remedial legislation to ensure such an assault on American democracy never happens again. H. Res. 503, 117th Cong. (2021). The resolution empowers the Select Committee to (1) "investigate the facts, circumstances, and causes" as well as the "influencing factors" 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 "findings, conclusions, and recommendations for corrective measures." *Id.* § 4(a).

Such corrective measures may include "changes in law, policy, procedures, rules, or regulations" designed to prevent future acts of violence "including acts targeted at American democratic institutions," "improve the security posture of the United States Capitol Complex," and "strengthen the security and resilience of the United States and American democratic institutions." *Id.* § 4(c). In addition, Resolution

503 authorizes the Select Committee to publish interim reports, which may include "legislative recommendations as it may deem advisable." *Id.* § 4(b)(1).

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." Rule XI.2(m)(1)(B), Rules of the U.S. House of Representatives, 117th Cong. (2021) ("House Rules");[47] *see* H. Res. 503 § 5(c), JA100-01 (incorporating House Rule XI by reference unless otherwise specified). Under House Rule XI, the Committee may issue requests to "any person or entity … including … the President, … whether current or former … as well as the White House, the Office of the President, [and] the Executive Office of the President." House Rule XI.2(m)(3)(D).

Speaker Pelosi appointed Rep. Bennie Thompson as Select Committee Chairman. On August 25, the Select Committee issued a document request to the National Archives under the Presidential Records Act. JA33-44. The request reiterated the other committees'

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[47] *Available at* https://perma.cc/QM5L-E9GL.

March 25 request, and added additional requests, which fell into six categories: (1) planning by the White House and others for strategies to impede the electoral count; (2) recruitment, planning, coordination, and other preparations for the rallies leading up to and including January 6 and the violence on January 6; (3) information Mr. Trump received following the election regarding the election outcome, and what he told the American people about the election; (4) what Mr. Trump knew about the election's likely outcome before the results and how he characterized the validity of the Nation's election system; (5) responsibilities in the transfer of power and the obligation to follow the rule of law; and (6) other materials relevant to the challenges to a peaceful transfer of power.

On October 8, responding to a notification from the Archivist providing a tranche of responsive documents for review, White House Counsel Dana Remus wrote to the Archivist that "President Biden has 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 that tranche. JA107. She explained that "Congress has a compelling need in service of its legislative functions to

understand the circumstances that led to the[] horrific events" of January 6, and "[t]he 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." JA107-08.

That same day, Mr. Trump wrote the Archivist, asserting executive privilege over certain pages of certain documents. JA110-11. Mr. Trump stated in a conclusory way that the enumerated "records contain information subject to executive privilege, including the presidential communications and deliberative process privileges." JA110. He provided no explanation, including why any specific documents were privileged or why withholding them served the public interest.

The Archivist informed White House Counsel Remus of Mr. Trump's letter, and she responded that "President Biden has considered the former President's assertion," but for the reasons in her previous letter "does not uphold the former President's assertion of privilege." JA113. Accordingly, she notified the Archivist that the President

instructed him to provide the Select Committee the pages in question. JA113.

On September 9 and 16, the Archivist sent notifications regarding two additional tranches of responsive documents. Mr. Trump once more claimed privilege over certain documents, and President Biden again rejected these privilege claims. JA164-76.

4. District Court Proceedings

On October 18, Mr. Trump filed this action against Chairman Thompson, the Select Committee, the Archivist, and the National Archives. The complaint seeks, *inter alia*, a declaratory judgment that the Select Committee's requests are invalid and unenforceable, an injunction against the Congressional Defendants-Appellees' enforcement of the requests or use of any information thus obtained, and an injunction against the production of the requested information. JA30-31. The next day, Mr. Trump moved for a preliminary injunction "prohibiting Defendants from enforcing or complying with the Committee's request." D. Ct. Dkt. No. 5, at 3.

The district court denied Plaintiffs' motion. JA177-216. Beginning with Mr. Trump's assertion of executive privilege, the court

recognized that, although the privilege "survives the end of a President's term," JA192, it "can be overcome by an appropriate showing of public need by the judicial or legislative branch," JA190.

The court rejected Mr. Trump's privilege assertion. "At bottom," the court reasoned, "this is a dispute between a former and incumbent President." JA193. In such circumstances, "the incumbent's view is accorded greater weight" because the incumbent "is 'in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.'" JA193-94 (quoting *GSA*, 433 U.S. at 449).

The court emphasized that President Biden decided 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,'" and that his decision "is consistent with historical practice and his constitutional power." JA196. The court declined Mr. Trump's invitation "to act as a tiebreaker, reviewing each disputed record *in camera*," recognizing that the court "is not best situated to determine executive branch interests." *Id.* Accordingly, the court held that Mr. Trump's assertion of privilege

was "outweighed by President Biden's decision not to uphold the privilege." JA197.

The court likewise rejected Mr. Trump's argument that the Presidential Records Act is unconstitutional. JA197-99. The court noted that the Act applies only to "Presidential records," not personal records, and concluded that the Act does not disrupt the balance between the branches of government. JA197-98.

Next, the district court rejected Mr. Trump's argument that the Select Committee's request exceeded its Constitutional powers. JA199-212. The court noted that Congress's power to obtain information is broad but "not without limit," and that a Congressional inquiry "must serve a valid legislative purpose." JA201 (quoting *Trump v. Mazars, USA, LLP*, 140 S. Ct. 2019, 2031 (2020)). Reviewing the Select Committee's request, the court "ha[d] no difficulty discerning multiple subjects on which legislation 'could be had.'" JA204. The court recognized that the Select Committee had cast a "wide net," JA205, but dismissed Mr. Trump's argument that the breadth exceeded the Select Committee's powers. JA206-08.

The district court then rejected Mr. Trump's arguments that the Select Committee's request fails to satisfy the standards announced in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc), or *Mazars*, 140 S. Ct. 2019. The court agreed with Defendants that the tests in those cases did not apply to a request for the Presidential records of a former President where the political branches together agreed that the records should be produced. JA209. The court nonetheless applied the four *Mazars* factors "conscious of the fact" that Mr. Trump is a former President, and held that all four factors weighed against him. JA208-12.

Finally, the court determined that Mr. Trump could not demonstrate irreparable harm, and that the balance of the equities and the public interest favored Defendants. JA212-15.

Mr. Trump sought an injunction pending appeal, which the district court denied. This Court granted an administrative stay and set the case for expedited briefing and argument.

SUMMARY OF THE ARGUMENT

I. The district court correctly held that the Select Committee has a valid legislative purpose. The Select Committee needs the requested records to complete a thorough investigation into how the actions of the

former President, his advisers, and other government officials may have contributed to the attack on Congress to impede the peaceful transfer of Presidential power. The Select Committee's purpose is manifestly legitimate, and the request at issue is critical to its investigation and the ability to propose remedial legislation and other corrective measures.

II. The district court correctly held that Mr. Trump's claims of executive privilege fail. As the Supreme Court has recognized, the incumbent President is best positioned to evaluate the interests of the Executive Branch, and Mr. Trump provides no specific or compelling reasons for this Court to upset President Biden's determination. In any event, the privilege is not absolute, and here it is outweighed by Congress's compelling need for information about the assault on the Capitol. Further, Mr. Trump's attack on the constitutionality of the Presidential Records Act fails because it misinterprets the statute and the district court's decision.

III. The more searching inquiries announced in *Senate Select Committee* and *Mazars* do not apply here, where a former President

challenges a Congressional request for Presidential materials. Even if those standards apply, the Select Committee's request satisfies them.

IV. The district court did not abuse its discretion in holding that Mr. Trump failed to establish irreparable harm, and that the equities and public interest favor Defendants. The only harm that Mr. Trump asserts is that the release of the requested records will compromise the interests of the Executive Branch, but that assertion of harm is far outweighed by the surpassing public interest in a complete and timely investigation of the attack on the Capitol, as President Biden has determined.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Guedes v. ATF*, 920 F.3d 1, 10 (D.C. Cir. 2019). In doing so, the Court "review[s] the district court's legal conclusions *de novo* and any findings of fact for clear error." *Id.*

ARGUMENT

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. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To succeed, a plaintiff must show: (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." *Id.* at 20. This Court should affirm the district court's well-reasoned judgment that Mr. Trump has failed to satisfy this demanding standard.

I. THE SELECT COMMITTEE'S REQUEST SERVES A VALID LEGISLATIVE PURPOSE

The district court correctly determined that the Select Committee's request serves a valid legislative purpose. As a threshold matter, Mr. Trump has no capacity to challenge the Select Committee's legislative purpose. The request was not addressed to him, and it covers materials that the Presidential Records Act establishes are owned and controlled by the United States. 44 U.S.C. § 2202.

Mr. Trump surprisingly contends (Br. 9 n.1) that the Executive Branch's position on whether Congress has a valid legislative purpose is "immaterial." In fact, as the recipient of the request and as the custodian of the requested records, the position of the Executive Branch matters greatly. To the extent Mr. Trump can be heard in this case, it is, as he puts it, "solely in his official capacity as a former President," JA16, and therefore solely to assert, as he does, that his claim of

executive privilege should be recognized over President Biden's contrary determination.

In any event, Mr. Trump's arguments are wrong, and the Select Committee manifestly has a valid legislative purpose supporting its request for information related to the January 6 attack on the Capitol.

Congress's broad power of investigation is firmly established. The Supreme Court has confirmed that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). "This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate." *Quinn v. United States*, 349 U.S. 155, 160 (1955). "Without the power to investigate … Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Id.* at 160-61. This "broad" and "indispensable" power "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 (internal quotation marks omitted).

Nevertheless, Congress's power to investigate has limits: It must "concern[] a subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031 (internal quotation marks omitted). Congress "may not issue a subpoena for the purpose of law enforcement," nor is there "congressional power to expose for the sake of exposure." *Id.* at 2032 (internal quotation marks omitted). At the same time, though,

> [i]t 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.

Id. at 2033 (quoting *United States v. Rumely*, 345 U.S. 41, 43 (1953)). 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.

Mr. Trump wrongly criticizes the Select Committee's request (Br. 21) on the ground that it "fails to identify anything in the privileged communications that could advance or inform any legitimate *legislative* purpose." The Select Committee cannot, of course, "identify anything" in communications that it has yet to see. The governing question is

instead whether the Select Committee's inquiry is "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.

The inquiry here easily meets this test. The resolution that established the Committee specifically articulated its legislative purview, *see* H. Res. 503, 117th Cong. § 4(c), and Mr. Trump wisely does not dispute that legislation "could be had" on such topics.

Although it would be premature to set forth proposed corrective measures before the investigation is completed, there are numerous areas of potential legislation the Select Committee could recommend. The following examples—which Select Committee Vice Chair Liz Cheney described in a floor statement, with which Chairman Thompson associated himself[48]—are merely illustrative.

First, the January 6 attack attempted to disrupt Congress's exercise of its responsibilities under the Electoral Count Act. The investigation may yield recommendations as to whether and how Congress should pass legislation to revise the mechanics of the electoral

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[48] 167 Cong. Rec. E1151 (Oct. 27, 2021) (extensions of remarks).

counting. *Second*, during the attack, President Trump reportedly knew it was occurring yet took no action to stop it. Congress may wish to enhance the legal consequences for any such dereliction of duty by a President or other Executive Branch official in the future. *Third*, President Trump pressured the Department of Justice to take extraordinary steps to support his false claims about the election. The investigation may produce legislative recommendations for how to prevent a future President from enlisting federal resources in such a manner. *Fourth*, President Trump took steps to convince state election officials to "find votes" for his campaign. Congress may choose to review the laws applicable to such activity in order to deter it.

Of course, before the completion of the investigation, it is impossible to predict its outcome: "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 v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975).

And even if the Select Committee were required to "identify anything" in the documents at issue, the topical descriptions of the

documents in the declaration submitted by the National Archives establish their relevance to the Select Committee's work: The documents consist of daily Presidential diaries, schedules, appointment information, drafts of speeches and correspondence, handwritten notes, call logs, talking points, memoranda, and email chains, all specifically on or encompassing January 6 or election-related issues. JA129-31. Such documents are unquestionably relevant to Congressional efforts to prevent a repeat of that day's events.

Mr. Trump incorrectly declares (Br. 21) that "the Committee's request has an improper law enforcement purpose" and that the request seeks to try him for "wrongdoing." As this Court recently explained, Congressional "interest in past illegality can be wholly consistent with an intent to enact remedial legislation." *Trump v. Mazars USA, LLP*, 940 F.3d 710, 728-29 (D.C. Cir. 2019) (citing cases), *rev'd on other grounds*, 140 S. Ct. 2019 (2020). Indeed, "[h]istory has shown that congressionally-exposed criminal conduct by the President or a high-ranking Executive Branch official can lead to legislation." *Trump v. Mazars USA, LLP*, 380 F. Supp. 3d 76, 98 (D.D.C. 2019), *rev'd on other grounds*, 140 S. Ct. 2019 (2020). Numerous statutes emerged from

Congress's investigation of Presidential or Executive Branch wrongdoing in Watergate, and, earlier, in the Teapot Dome Scandal. *Id.* at 99.

Mr. Trump's attempt to impugn the Select Committee's motives is unavailing: first, because it is plainly false, and second, because "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt v. United States*, 360 U.S. 109, 132 (1959); *see also Watkins v. United States*, 354 U.S. 178, 200 (1957).

Mr. Trump remarkably also asserts (Br. 25-26) that the Select Committee has "never explained why other sources of information—outside of the requested records—could not" suffice. The lengthy *public* record of Mr. Trump's statements and actions discussed above provides an abundant basis to seek the *nonpublic* records of the person whom the attackers sought to maintain in the White House, and whom many have claimed sent them to attack Congress.[49] Any inquiry that did not insist

[49] Rosalind Helderman et al., *'Trump said to do so': Accounts of Rioters Who Say the President Spurred Them to Rush the Capitol Could be Pivotal Testimony*, Wash. Post (Jan. 16, 2021), https://perma.cc/FW7Q-3CJL.

on examining Mr. Trump's documents and communications would be worse than useless—the equivalent of staging a production of "Hamlet" without the Prince of Denmark. For the same reason, Mr. Trump is wrong to claim (Br. 33-34) that the requested records do not "contain information that is needed for the conduct of its business and that is not otherwise available." 44 U.S.C. § 2205(2)(C).

Equally baseless is Mr. Trump's claim (Br. 26) that Congress is improperly looking to a former President as a "'case study' for general legislation" (quoting *Mazars*, 140 S. Ct. at 2036). Mr. Trump is—as of now—a case of one. He is—as of now—the only failed Presidential candidate not to concede, to spend months spreading lies about the election, to encourage a self-coup that would illegally keep him in office, or to inspire a mob to attack the Capitol. There is no one more important to study to develop legislation that will prevent the repetition of such acts.

In addition, Mr. Trump's allegation (Br. 32) that "H. Res. 503 does not permit the Committee to request presidential records" is flatly wrong. The Resolution incorporates by reference House Rule XI, which

expressly authorizes the Select Committee to obtain documents from the President. *See supra* p. 23.

Finally, Mr. Trump's overbreadth arguments are mistaken.[50] Significantly, the Executive Branch, to whom the request is made, and whose records (not Mr. Trump's) are sought, disagrees. In addition, Mr. Trump's specific allegations of overbreadth do not hold up. It is perfectly reasonable for the Select Committee to reach back to April 2020, when Mr. Trump began to ramp up his groundless allegations that the election would be fatally marred by voter fraud. *See supra* pp. 9-10. The Committee needs information relating to various individuals involved in the messaging during that period to determine when and how the seeds for the violence on January 6 were planted, which may aid Congress's consideration of remedial legislation.

Likewise, contrary to Mr. Trump's argument (Br. 37), the Select Committee reasonably seeks documents and communications within the White House on January 6 relating to Mr. Trump and numerous other

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[50] Contrary to Mr. Trump's assertion (Br. 44-45), the Select Committee never conceded that its request is "overbroad." Rather, at the hearing in district court counsel stated only that the request is "broad," JA257—as is Congress's power to obtain information. The district court did not say "overbroad" either. *Compare* Br. 45 *with* JA257.

individuals and government agencies. That request is specific to the date of the attack itself, and the listed individuals and agencies had a reported connection to those who attacked the Capitol on January 6; were involved in the stop-the-steal messaging in the weeks leading up to January 6; were serving in positions in the Legislative Branch the day it was attacked; were present in the White House on or before January 6 and were likely to have engaged with Mr. Trump and other senior leaders who reacted to the attack; or had security-related roles related to the attack. Indeed, the broad scope of the inquiry into communications on January 6 itself simply reflects the unprecedented nature of the events of that day, and the need not to lodge an underinclusive request.

II. EXECUTIVE PRIVILEGE DOES NOT BAR RELEASE OF THE RECORDS

Mr. Trump's assertion of privilege also does not shield the requested records from disclosure. The Select Committee and President Biden both agree that Mr. Trump's executive privilege claim is overcome by the Select Committee's need, and the district court correctly rejected Mr. Trump's invitation to enjoin the release of the requested records over the unified position of the political branches.

A. The District Court Correctly Rejected Mr. Trump's Privilege Claim

1. *At most, a former President retains a vestigial interest in asserting a qualified Presidential communications privilege*

As the district court recognized, a former President retains, at most, a vestigial interest in the confidentiality of Presidential communications created during his Presidency.[51] JA191-93. He may be "heard to assert" privilege only over "communications in performance of [a President's] responsibilities of his office, and made in the process of shaping policies and making decisions." *GSA*, 433 U.S. at 439, 449 (quoting *United States v. Nixon*, 418 U.S. 683, 708, 711, 713 (1974) (internal quotation marks omitted)). The privilege protects "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," allowing a President and his advisers to communicate "in a way many would be unwilling to express except privately." *Nixon*, 418 U.S. at 708. The Supreme Court has explained

[51] The Select Committee maintains, for preservation purposes, that the Constitution and the Presidential Records Act foreclose a former President from asserting executive privilege over the disagreement of the incumbent President, and foreclose a claim of executive privilege to thwart a Congressional request. To rule in the Select Committee's favor, however, this Court need not decide those issues.

that the privilege "survives the individual President's tenure" because it is "not for the benefit of the President as an individual, but for the benefit of the Republic." *GSA*, 433 U.S. at 449.

As the district court also correctly recognized, JA190, the Presidential communications privilege is a qualified privilege that requires balancing a President's interests in maintaining confidentiality with the need for disclosure. *See, e.g.*, *GSA*, 433 U.S. at 456; *Nixon*, 418 U.S. at 711-12; *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). A privilege assertion therefore "can be overcome by an appropriate showing of public need by the judicial or legislative branch." JA190.

2. The incumbent President is in a superior position to assess the Executive Branch's interest in asserting executive privilege

The district court correctly held that Mr. Trump's privilege claim in this case is exceedingly weak and is overcome by President Biden's decision to disclose the documents. As the district court explained, Supreme Court precedent directs that "the incumbent's view is accorded greater weight" than a former President's. JA193. It is therefore "of cardinal significance" in this case "that the claim of privilege is being

urged solely by a former president, and there has been no assertion of privilege by an incumbent president." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977).[52]

Although Mr. Trump contends (Br. 38) that the incumbent is "poorly situated to resolve the dispute," that position contravenes the Supreme Court's view in *GSA* that the President is "in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." 433 U.S. at 449; *see, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" (quoting U.S. Const. Art. II, §§ 1, 3)). Indeed, that principle applies with special force in this case, where the White House reviewed the contested documents and the President considered Mr. Trump's contentions, but agreed with the Select Committee that disclosure is in the public interest and outweighs any countervailing Executive Branch interest in confidentiality. JA157-60, 173-74.

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[52] Mr. Trump objects (Br. 40) to the district court's citation of this Court's opinion in *Dellums* because that case was decided shortly before *GSA*. But the propositions for which the district court cited *Dellums* are entirely consistent with the Supreme Court's later analysis in *GSA*.

Therefore, President Biden's rejection of Mr. Trump's claim "detracts from the weight of [Mr. Trump's] contention" that disclosing the records would "impermissibly intrude[] into the executive function and the needs of the Executive Branch." *GSA*, 433 U.S. at 449. As the Supreme Court has explained, an incumbent President has access to more information and a better institutional perspective than a former President about whether invoking executive privilege would be "for the benefit of the Republic." *Id.* at 449. And, as the Court observed, the President is likely to proceed cautiously before "disclosing confidences of a predecessor" given the risk that it may "discourage candid presentation of views by his contemporary advisers." *Id.* at 448.

The district court also correctly concluded that Mr. Trump provides no specific or compelling reason that his privilege assertion should override President Biden's eminently rational determination. Mr. Trump fails to support his claims beyond general, conclusory assertions that the records contain Presidential communications (Br. 35), and that maintaining the confidentiality of those communications is necessary to protect "the proper functioning of the government" (Br. 14) and "to ensure full and frank advice" (Br. 36). But, as already

explained, the Supreme Court has recognized that the incumbent is best positioned to make those determinations, and President Biden has properly and sensibly concluded that "an assertion of executive privilege is not in the best interests of the United States" in this matter, investigating a violent effort to stop Congress from carrying out a key constitutional responsibility. JA157.

President Biden's assessment is particularly appropriate in this case, where, as the White House has recognized, "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities." JA157. Accordingly, any risk that disclosing those communications would impermissibly chill legitimate Presidential decision making is negligible. Likewise, where (as here) "there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the ground[] that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d at 738 (internal quotation marks omitted).

In sum, Mr. Trump fails to state any overriding need for maintaining confidentiality of the requested documents. The district court thus correctly upheld the President's decision not to assert executive privilege.

3. The Select Committee's need for the information far outweighs any countervailing interest in confidentiality

Given that the Select Committee and the Executive Branch agree that the public interest favors disclosure of the records, and Mr. Trump has provided no valid reason to upset that determination, no further balancing is necessary. Regardless, however, the Select Committee has a compelling, specific interest in the Presidential records at issue that outweighs any countervailing interest in maintaining confidentiality. As explained already, *see supra* pp. 22, 35-37, the Select Committee is charged with investigating the facts and circumstances of the January 6 attack; identifying the causes and lessons learned; and reporting back to the House recommendations, including "changes in law, policy, procedures, rules, or regulations." H. Res. 503, 117th Cong. § 4. The Select Committee needs the requested information to reconstruct the extraordinary events of that day—as well as Mr. Trump's extensive

efforts to undermine confidence in the election before and after Election Day, without which it is impossible to imagine the horrific attack occurring.

President Biden found that the Select Committee has a substantial need for this information. JA157-58. Although Mr. Trump dismisses President Biden's conclusion as "executed pursuant to political calculations" (Br. 35), the White House's stated reasons disprove that contention. As the White House emphasized, "[t]he 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." JA157.

In addition, Mr. Trump wrongly claims that the Supreme Court's rulings in *GSA* and *Nixon* place "a premium on the question of whether the records at issue would remain protected from public disclosure." But *GSA* and *Nixon* actually support the Select Committee's position. In *GSA*, former President Nixon based his assertion of privilege in part on the relevant statute's provision for eventual public disclosure of his communications; the Supreme Court, though, noted that "[a]n absolute barrier to all outside disclosure is not practically or constitutionally

necessary." 433 U.S. at 450-51. Further, as here, the records in both *Nixon* and *GSA* were being disclosed (at least most immediately) to a government entity, and the Court emphasized that the disclosure was necessary to facilitate the functioning of the government. *See GSA*, 433 U.S. at 453; *Nixon*, 418 U.S. at 713.

For the reasons described above, the records at issue in this case are crucial to the Select Committee's ability to carry out its Article I legislative and oversight functions. Moreover, here, unlike in those cases, the current President has specifically determined that executive privilege should not prevent Congress *or* the public from learning the truth about what happened on January 6. JA157. To the extent some of the information may become public incidental to the Select Committee's investigation, the President has already taken that possibility into account in weighing the relative interests.

The political branches are thus united in their conclusion: The Select Committee's compelling need for the records at issue outweighs any countervailing interest in keeping them secret. For this reason, too, Mr. Trump's claim of privilege must yield. *See* JA212.

B. Mr. Trump's Contention That the Presidential Records Act Violates the Separation of Powers Is Wrong

Mr. Trump's challenge to the constitutionality of the Presidential Records Act (Br. 47-48) is similarly mistaken.

1. As an initial matter, that argument is based on a false premise. The district court did not hold, nor do Defendants suggest, that the President has "unfettered discretion to waive former Presidents' executive privilege." Br. 47. As explained above, the Supreme Court in *GSA* said that, at most, a former President may be "heard to assert" a vestigial executive privilege claim over information implicating the Presidential communications privilege. *GSA*, 433 U.S. at 439. And the Presidential Records Act does not expand that constitutional rule. *See* 44 U.S.C. § 2204(c)(2).

Here, Mr. Trump has been "heard to assert" his privilege claims several times over. After White House review of the records Mr. Trump believes are privileged, President Biden made a considered determination not to uphold his claim. Mr. Trump then sued, and the district court rejected his contentions in a thorough and well-reasoned opinion. JA177-215. That Mr. Trump's privilege claims have been rejected does not mean that President Biden has exercised "unfettered

discretion" to override Mr. Trump's claims or that those claims have not been subject to meaningful judicial review—it means that those claims are flawed.

2. Moreover, Mr. Trump's contention (Br. 38-39) that the Constitution requires "judicial review on a document-by-document basis" is baseless and impractical. Nothing in Supreme Court precedent requires this approach. At any rate, Mr. Trump cannot show that a document-by-document review by a court is warranted here. There is no disagreement that the documents subject to Mr. Trump's claims contain presumptively privileged Presidential communications, and thus the only relevant question is whether the public interest in disclosure of each document outweighs the Executive Branch's interest in confidentiality. Given that President Biden is in the best position to make that determination, *see GSA*, 433 U.S. at 448-51, and that Mr. Trump provides no valid reason to question it, further judicial review of that determination on a document-by-document basis would unnecessarily burden the court and immensely delay the Select Committee's urgent investigation.

3. Finally, if anything, it is Mr. Trump's approach that violates

the separation of powers by "disrupt[ing] the proper balance between the coordinate branches" and "prevent[ing them] from accomplishing [their] constitutionally assigned functions." *GSA*, 433 U.S. at 443. Bogging down the Select Committee's investigation for months by requiring document-by-document judicial review, where the political branches agree that disclosure of the records is warranted, would needlessly encroach on Congress's Article I authority to conduct oversight in aid of legislation.

Moreover, such intrusive judicial second-guessing of the President's determination not to assert privilege over Executive Branch documents would undercut the President's Article II authority to make decisions about disclosure of Executive Branch information. And Mr. Trump's document-by-document approach would mire Article III courts in a lengthy exercise in micromanaging Congressional oversight where there is no dispute between the political branches over whether the documents are appropriate for disclosure.

III. THE STANDARDS IN *MAZARS* AND *SENATE SELECT COMMITTEE* DO NOT APPLY, AND EVEN IF THEY DID, THE SELECT COMMITTEE SATISFIES THEM

Mr. Trump contends that the Select Committee's request fails the heightened standards announced in *Senate Select Committee*, 498 F.2d

725, and *Mazars*, 140 S. Ct. 2019. The district court correctly recognized that those tests do not govern here, and, in any event, the Select Committee satisfies those tests too.

A. *Senate Select Committee*

Mr. Trump suggests (Br. 22-23) that the Select Committee must satisfy the standard articulated in *Senate Select Committee*, which requires a showing that records are "demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731. But Mr. Trump's reliance on *Senate Select Committee* is misplaced. That case—decided before *GSA*—involved an executive privilege assertion by a sitting President. *Id.* at 730. For the reasons explained above, Mr. Trump's status as a *former* President "detracts from the weight" of his privilege assertion. *GSA*, 433 U.S. at 449; *see supra* pp. 43-47. That difference is critical. Because Mr. Trump is no longer President, the analysis in *GSA* controls.

Even if *Senate Select Committee* did apply here, for the reasons previously discussed, *see supra* pp. 22, 35-37, the Select Committee easily satisfies that standard. Unlike in *Senate Select Committee*, the Select Committee's need is substantial and not "merely cumulative." 498 F.2d at 732. It cannot obtain this information through other

means. If the Select Committee does not receive the requested records, Congress may never know what led to and culminated in the January 6 attack, and will be hamstrung in its ability to legislate effectively to prevent a similar future assault on American democracy.

B. *Mazars*

Mr. Trump also erroneously contends (Br. 23-24) that the request violates the separation of powers because it does not satisfy the four-factor test announced by the Supreme Court in *Mazars*. Consistent with *GSA*, however, a former President's right to assert a separation-of-powers challenge to the release of Presidential records is confined to an assertion of the presidential communications privilege. *See* 433 U.S. at 446-47. As already explained, that claim is overridden here by the reasoned determination of the incumbent President, who has recognized the Select Committee's strong interest in obtaining the records, *see supra* pp. 43-47, and no further inquiry is required. In any event, even if the four-factor *Mazars* test did apply, the Select Committee's request satisfies it.

1. The **Mazars** *test does not apply*

a. In *Mazars*, the Supreme Court analyzed Congressional subpoenas issued while Mr. Trump was in office for his personal, non-

privileged financial information. 140 S. Ct. at 2026-28. The Court held that such "Congressional subpoenas for information from the President" raise "significant separation of powers issues" because "Congress and the President have an *ongoing institutional relationship* as the 'opposite and rival' political branches established by the Constitution." *Id.* at 2033-34, 2036 (emphasis added).

The Court accordingly identified four "special considerations" that should inform a court's analysis when evaluating a subpoena directed at a sitting President's personal information: (1) "whether the asserted legislative purpose warrants the significant step of involving the President and his papers"; (2) whether a subpoena is "broader than reasonably necessary to support Congress's legislative objective"; (3) whether Congress has offered "detailed and substantial" evidence "to establish that a subpoena advances a valid legislative purpose"; and (4) the "burdens imposed on the Presidency by a subpoena." 140 S. Ct. at 2035-36. The case was remanded for further proceedings, and amid those proceedings Mr. Trump lost the 2020 election.

On remand, the district court in *Mazars* held that Mr. Trump's status as a former President "affect[ed] the foundations of the *Mazars*

test." *Trump v. Mazars USA LLP,* No. 19-01136, 2021 WL 3602683 at *13 (D.D.C. Aug. 11, 2021). The court thus applied what it called "*Mazars* lite": an application of 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." *Id.*

b. The *Mazars* test does not apply here because the "significant" separation-of-powers concerns raised by a subpoena for a sitting President's "personal information" are unquestionably absent here. *See* 140 S. Ct. at 2033-34.

First, the district court correctly recognized that "Plaintiff's status as a former President … reduce[d] the import of the *Mazars* test." JA209. The "ongoing relationship" between the Legislative and Executive Branches that "necessarily inform[ed]" the Supreme Court's analysis in *Mazars* is nonexistent here. 140 S. Ct. at 2026. The Congressional request neither "pit[s] the political branches against one another" nor occurs in a context where there are political incentives for the parties to engage in "negotiation and compromise." *Id.* at 2031, 2034.

Moreover, unlike in *Mazars*, the request here was first made when

Mr. Trump was no longer President. In *Mazars* and analogous litigation, Mr. Trump has repeatedly argued that the Supreme Court's *Mazars* test should apply because the request was initially made *when he was still President*.[53] The House has maintained in those cases that the *Mazars* test is inapplicable given Mr. Trump's status as a former President*, regardless* of when the request was first made. But, at the very least, the Supreme Court's test cannot possibly apply here, when the request was not made or even contemplated until *after* Mr. Trump had left office.

Second, the district court correctly recognized that because "the legislative and executive branches agree that the records should be produced," the concerns identified in *Mazars* have "little, if any, force here." JA209; *see GSA*, 433 U.S. at 449. Relatedly, the Select Committee's request was made under the Presidential Records Act, a statute enacted through bicameralism and presentment that was designed to address the very separation-of-powers concerns that Mr.

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[53] *See, e.g.*, Intervenor's Combined Opp'n to the Mots. to Dismiss at 24-32, *Comm. on Ways & Means v. Treasury*, No. 1:19-cv-1974 (D.D.C. Oct. 36, 2021), D. Ct. Dkt. No. 140; Appellants' Br. at 25-26, *Trump v. Mazars USA LLP*, Nos. 21-5176, 21-5177 (D.C. Cir. Sept. 2, 2021).

Trump raises. *See Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991). President Carter approved the balance Congress struck, and the Executive Branch's participation in the legislative process that resulted in the statute at issue further alleviates any separation-of-powers concerns. *See GSA*, 433 U.S. at 441; *Mazars*, 2021 WL 3602683, at *18 n.30.

Third, the Select Committee's request to the National Archives does not seek Mr. Trump's personal, private information. It seeks official records relating to Mr. Trump's communications and actions while President, which have now been placed in the complete "ownership, possession, and control" of the United States. 44 U.S.C. §§ 2201(1), 2202. In *Mazars*, the Supreme Court emphasized that the subpoenas at issue sought a sitting President's private papers, which the Court thought could pose a "heightened risk" of impermissible purpose because of the documents' "personal nature" and "less evident connection to a legislative task." 140 S. Ct. at 2035. The Select Committee's request for official papers does not present those concerns.

Accordingly, this Court should reject Mr. Trump's attempt to "transplant[]" the *Mazars* standard "root and branch" to the Select

Committee's distinct request for a former President's official documents. 140 S. Ct. at 2033. Indeed, Mr. Trump's arguments would result in a remarkable expansion of a former President's constitutional interests, contravening not only *GSA* but also the Constitution. As Chief Justice Marshall explained, our Constitution reflects an "essentia[l] ... difference" from the British monarchy: The President "is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again." *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807); *see* The Federalist No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961); The Federalist No. 69, at 416, 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Mr. Trump's sprawling separation-of-powers assertions flout this historical understanding of the Presidency.

2. *Even if the* **Mazars** *test applies, the request satisfies that test*

If this Court nonetheless concludes that *Mazars* applies here, it should, for all the reasons discussed above, apply the test with reduced scrutiny and cognizant of Mr. Trump's status as a former President, as the district court did here and on remand in *Mazars*. The district court below correctly held that, when applying the *Mazars* factors "conscious

of the fact" that Mr. Trump is a former President, "all four *Mazars* factors weigh against [his] position." JA209, JA212. Indeed, the Select Committee's request satisfies any version of the Supreme Court's four-factor test.

First, Congress's legislative purpose here "warrants" the involvement of the President's papers. *Mazars*, 140 S. Ct. at 2035. As explained above, the Select Committee seeks to identify and examine the causes of the January 6 attack to enact legislation relating to the Presidential election process and to ensure future peaceful transfers of power. *See supra* pp. 22, 35-37. To do so, the Committee needs to know what, if anything, Mr. Trump, his advisers, and others close to him knew or publicly communicated relating to the efforts to undermine or overturn the results of the 2020 election.

Second, the Select Committee's request is tailored to what is "reasonably necessary" to serve the Select Committee's legislative purpose. *Mazars*, 140 S. Ct. at 2036. On their face, the requests are connected to the events of January 6, and the information Mr. Trump and those surrounding him knew and conveyed about the election outcome and the transfer of power. *See* JA33-34. And Mr. Trump's

contention (Br. 27) that certain of the requests are too broad is wrong. *See supra* pp. 40-41. Especially in light of Mr. Trump's extraordinary attempts to undermine and then overturn the 2020 election—and the serious threats to our system of government—the scope of the request is reasonable.

Third, the Select Committee has "adequately" supported its request with "detailed and substantial" evidence of its legislative objective. *Mazars*, 140 S. Ct. at 2036. Mr. Trump proclaims (Br. 28) that the Select Committee has provided "no evidence" to establish that its request advances a legitimate legislative purpose. That is demonstrably false. The Select Committee's legislative objectives are plainly articulated in its authorizing resolution, its letter to the Archivist requesting the documents at issue, and various public statements. *See supra* pp. 22, 35-37. That is more than sufficient.

Fourth, Mr. Trump cannot plausibly claim that the Archivist's compliance with the Select Committee's request will unduly "burden[]" the Office of the President. *Mazars*, 140 S. Ct. at 2036. Mr. Trump contends that the request will burden *him* "in reviewing all potentially responsive documents" (Br. 29), but fails to explain why such a

burden—with no impact on the Office of the President—matters in the separation-of-powers analysis. It does not.

Mr. Trump asserts (Br. 29) that the request also burdens the Presidency "generally" because, if Congress is permitted to issue such requests, "every President's close aides will fear disclosure and thus provide less than candid advice." But the Executive Branch has already determined that any privilege interest is outweighed by the Select Committee's legislative need. *See supra* pp. 43-47. Of course, the incumbent President is the next former President, and is thus best positioned to evaluate any "chilling effect" that will result from releasing the requested documents. Moreover, executive privilege is not absolute, as demonstrated by the fact that its invocation was overridden in both *GSA* and in *United States v. Nixon*. Therefore, close advisers to the President should be well aware that materials quoting or describing the advice they give is indeed subject to later disclosure.

Mr. Trump also speculates (Br. 29) that "partisans in Congress will seek to relitigate past grievances perpetually." Even if that were true, Mr. Trump never explains how such relitigation would burden the *Presidency*, as opposed to merely him as a former President.

The request thus does not violate the separation of powers under *Mazars* or any other potentially applicable standard.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT EQUITABLE RELIEF IS NOT APPROPRIATE

A. Mr. Trump Has Not Established Irreparable Harm

The Supreme Court "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. This Court "has said time and again that the degree of proof required for 'irreparable harm' is 'high,' and that a failure to surmount it provides 'grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.'" *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019). "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 887 (D.C. Cir. 1973) (en banc). A showing of irreparable harm is necessary (but not sufficient) for an injunction to be granted. *Winter*, 555 U.S. at 23.

Mr. Trump claims he will suffer irreparable harm if the Archivist discloses the contested documents because "[o]nce disclosed, the

information loses its confidential and privileged nature." Br. 50. Although "any privileged information would be lost forever," that does not automatically mean that the "harm caused by the [disclosure] will be irreparable" without also showing harm to the purposes behind the privilege. *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, J., in chambers); *In re Sealed Case*, 148 F.3d 1079, 1080 (D.C. Cir. 1998).

The district court found no showing of irreparable harm to the Executive Branch's privilege interest given "the incumbent President's direction to the Archivist to produce the requested records," and "the actions of past Presidents who similarly decided to waive executive privilege when dealing with matters of grave public importance." JA213. This decision was well within the court's discretion. Executive privilege exists to "safeguard[] the public interest in candid, confidential deliberations within the Executive Branch." *Mazars*, 140 S. Ct. at 2032. President Biden—who is best situated "to assess the present and future needs of the Executive Branch," *GSA*, 433 U.S. at 449—has determined that relying on the privilege is not warranted here. "[W]hether disclosure will affect the flow of executive discussion [is] a complex

judgment best made by the incumbent President," *Nixon v. Freeman*, 670 F.2d 346, 359 (D.C. Cir. 1982), and President Biden's determination significantly "detracts" from Mr. Trump's claim of harm, *GSA*, 433 U.S. at 449.

On appeal, Mr. Trump again fails to show that disclosure of these Presidential records would irreparably harm the Executive Branch or the public. Instead, he argues (Br. 51) that he "*personally* relied on the expectation of executive confidentiality while in office" and "[t]he attempted destruction of those rights by Defendants is *personal* to him." (emphases added). But, as noted earlier, Supreme Court precedent makes clear that executive privilege is not absolute, and Mr. Trump and his close advisers should have been well aware that their communications could be disclosed.

Furthermore, executive privilege "is not for the benefit of the President as an individual." *GSA*, 433 U.S. at 449. Rather, the only relevant injury is whether disclosure "would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking." *Id.* at 450. Mr. Trump makes no effort to explain how disclosure here would harm those interests, particularly given the

President's decision, and the district court did not abuse its discretion in rejecting Mr. Trump's irreparable-harm argument. Those are sufficient grounds to affirm. *See Winter*, 555 U.S. at 22.

B. The Select Committee and the Public Interest Would Be Harmed by Injunctive Relief

The district court properly exercised its discretion to find "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." JA215. An injunction would cause direct, substantial, and immediate harm to the Select Committee and ongoing legislative activities. The Select Committee's work is of the highest importance and urgency: It is investigating one of the darkest episodes in our Nation's history, a deadly assault on the United States Capitol, the Vice President, and Congress, and an unprecedented disruption of the peaceful transfer of power.

When weighing equities, "the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Because the Constitution vests resolving the public interest in the political branches, "[a]ny judicial decision to override that

congressional judgment would be both extraordinary and drastic." *Olu-Cole*, 930 F.3d at 529 (internal quotation marks omitted). This Court has recognized a "clear public interest in maximizing the effectiveness of the investigatory powers of Congress." *Exxon Corp. v. FTC*, 589 F.2d 582, 594 (D.C. Cir. 1978). And the information is sought here pursuant to "Congress's discharge of its primary constitutional responsibilities[, including] legislating [and] conducting oversight of the federal government." *Comm. on the Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 764 (D.C. Cir. 2020) (en banc). Without this information, the Select Committee "may not be able to do the task assigned to it by Congress." *Eastland*, 421 U.S. at 505.

Delay itself would inflict a serious constitutional injury on the Select Committee by interfering with its legislative duty. *See Exxon*, 589 F.2d at 594. The Select Committee needs the documents *now* because they will shape the direction of the investigation. For example, the documents could inform which witnesses to depose and what questions to ask them, as well as whether further subpoenas should be issued to others.

Mr. Trump contends (Br. 52-53) that delay would not harm Congress because "[t]here will not be another Presidential transition for more than three years; Congress has time to allow the courts to consider this expedited appeal while it continues to legislate." But future elections are imminent and there could be future attacks on democracy rooted in conduct occurring well before the election. The Select Committee's task to study and suggest legislation to ensure that January 6 is not repeated, and that our Nation's democracy is protected from future attacks, is urgent.

Both political branches agree where the public interest lies. The Select Committee has concluded that review of the requested records will best further its critical investigation and the American people's interests. The Executive Branch, acting through the President, concurs. The district court correctly found that the public interest lies in furthering—not interfering with—the political branches' ongoing cooperation to study and learn from the assault on democracy.

C. The Separation-of-Powers Doctrine Bars the Court from Issuing an Injunction Against Legislative Defendants

Mr. Trump asks this Court for unprecedented relief: to enjoin both the Legislative and Executive Branches from "enforcing or complying

with the Committee's request" until the Court can issue a final judgment. JA 187. "The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). The requested injunction is "a startlingly unattractive idea," *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1176 (D.C. Cir. 1982) (internal quotation marks omitted), that would create "nothing less than a revolution in the judiciary's relationship to the political branches," *id.* at 1181 (Bork, J., concurring). "For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress … could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality." *Exxon*, 589 F.2d at 588. This Court has thus consistently refused injunctions against Congressional defendants exercising the legislature's investigative power because such relief "would be an illegal impingement by the judicial branch upon the duties of the legislative branch." *Pauling v. Eastland*, 288 F.2d 126, 129-30 (D.C. Cir. 1960); *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936).

This Court should reject Mr. Trump's request for such extraordinary and novel relief.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter
Todd B. Tatelman
Eric R. Columbus
Stacie M. Fahsel
Office of General Counsel
U.S. House of Representatives
5140 O'Neill House
Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Annie L. Owens
Mary B. McCord
Joseph W. Mead
Institute for Constitutional Advocacy and Protection
Georgetown Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9042

Counsel for Appellees Bennie G. Thompson and the Select Committee to Investigate the January 6th Attack on the United States Capitol of the U.S. House of Representatives

November 22, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 12,999 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Century Schoolbook type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on November 22, 2021, I filed one copy of the foregoing Brief for Appellees via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter

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44 U.S.C. § 2201 Definitions

As used in this chapter--

(1) The term "documentary material" means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.

(2) The term "Presidential records" means documentary 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. Such term--

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion [thereof,] of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes--

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term "former President", when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

44 U.S.C. § 2202 Ownership of Presidential records

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

44 U.S.C. § 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); 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 the Archivist's 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.

44 U.S.C. § 2205 Exceptions to restricted access

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

(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.

36 C.F.R. § 1270.44 (2017) 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.

Exec. Order No. 13,489, 3 C.F.R. 13,489 (Jan. 21, 2009)

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.