IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

CR Action
No. 1:21-670

vs.

STEPHEN K. BANNON,
Defendant.

IN RE: NON-PARTY SUBPOENAS

NANCY PELOSI, et al,
Petitioner,
vs.

MC Action
No. 1:22-60

STEPHEN K. BANNON,
Respondent.

July 11, 2022
10:04 a.m.

TRANSCRIPT OF IN-PERSON MOTIONS HEARING
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

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*** Proceedings recorded by stenotype shorthand and this transcript was produced by computer-aided transcription.

DEPUTY CLERK: Good morning, Your Honor. This is -- this calendar has two cases this morning. The first case is criminal case year 2021-670, United States of America versus Stephen K. Bannon. The second case is Miscellaneous case year 2022-060, In Re: Nonparty subpoenas, Nancy Pelosi, et al., versus Stephen K. Bannon, who is not present in the courtroom.

Counsel, please come forward and introduce yourselves for the record for both cases, beginning with the government.

MS. VAUGHN: Good morning, Your Honor. Amanda Vaughn, J.P. Cooney and Molly Gaston for the United States. Also at counsel's table is FBI Special Agent Frank D'Amico.

THE COURT: Ms. Vaughn, good morning.

As before, Counsel, whoever is at the podium, please take your masks off. I think it is helpful for everyone.

MR. SCHOEN: Your Honor, Evan Corcoran, David Schoen and Keira Sherper here today for Mr. Bannon.

THE COURT: Good morning, Counsel.

MR. SCHOEN: Good morning, Your Honor.

MR. LETTER: Good morning, Your Honor. Douglas Letter, General Counsel of the U.S. House of Representatives, and presenting much of the argument today will be Michelle Kallen from the Office of General Counsel.

THE COURT: Good morning, counsel. Ms. Kallen.

So obviously we have a number of pretrial motions pending. We also have the motion to quash filed in the Miscellaneous action that Mr. Letter just mentioned. Here's how I'd like to proceed.

I would like to begin by hearing from the government, from the Department of Justice, on all pending matters. Then I will hear from the House on the Motion to Quash. Then I'll hear from Mr. Bannon on all topics.

And then I'll hear -- so obviously there are motions that have been filed. There's the Motion to Quash from the House subpoena recipients. There are the various motions that have been filed by the parties, some filed by Mr. Bannon and some by the government.

Just for the sake of efficiency, I want to deal with all of them together. It doesn't matter who the Movant is, I want to hear from the government on all topics, then the House, then Mr. Bannon on all topics, and then we'll just go back to the government. If we need to do a short surrebuttal for Mr. Bannon, we can do that.

So with that, Ms. Vaughn, will you be taking the lead?

MS. VAUGHN: Your Honor, Ms. Gaston will be taking the lead today, and I'll be addressing on the Motion to Compel.

THE COURT: Okay. Ms. Gaston.

MS. GASTON: Good morning, Your Honor.

THE COURT: Good morning.

Why don't -- let's start, if we could, with what I think is a question -- it's a little unclear to me from the papers, and that is, whether any question -- so, let me back up.

I understand the government's position as to the alleged violations of the House Resolution 503 in the composition, formation, et cetera, of the Committee to be, first, that those are defenses; those are not elements of the charge here.

And then second -- and this is where I'm a little bit unsure about the government's position. Is the government's position that those questions present pure questions of law that the jury cannot resolve, or that there is some question embedded in the arguments that Mr. Bannon has made that is for the jury to resolve?

MS. GASTON: Yes, Your Honor. The government's position with those objections, with his procedural objections, is that he waived them --

THE COURT: Understood. I recognize the government has argued that Mr. Bannon has waived them, and I understand that argument.

Imagine hypothetically, Mr. Bannon, in his letters

to the Committee, you know, asserted reliance on assertion of executive privilege and the like, had also said, By the way, I have the following fundamental problems with the House Committee composition and had raised, clearly before the return date on the Subpoena, all of the objections he now presents -- so let's put waiver to the side. So they had clearly been teed up and they are defenses in the government's view.

Who resolves the question of whether -- assuming all of those things -- whether that defense is legitimate?

MS. GASTON: In that circumstances, Your Honor, our position is that those are not things that can be submitted to the jury because that would risk a violation of the Rulemaking Clause because there is a situation in which the jury could interpret the House's rules in a different way than the House itself has interpreted it.

THE COURT: Who determines whether the House has, in fact, interpreted the rules in a particular way?

MS. GASTON: So the Court would determine whether the House has determined the rule -- whether the rules or the House's interpretation is ambiguous. In this situation, the interpretation is not ambiguous because the House has spoken, and so --

THE COURT: Expressly or implicitly?

MS. GASTON: Expressly.

THE COURT: In the filings here or somewhere else?

MS. GASTON: In the filings here and also through the Committee's practice, Your Honor. *Yellin* and other decisions stand for the proposition that the Committee's practice and the Committee's consistency with respect to that practice is something that the Court can look to, and this is how the Committee --

THE COURT: So the government's view then is, these questions present what would be defenses. Mr. Bannon waived them, and even if he didn't, they are not defenses that, in this circumstance, that can be presented to the jury because it is up to me to decide whether the rules are ambiguous and what the House's interpretation of the rules is, and to allow the jury to come up with an interpretation different than the House would be to violate the Rulemaking Clause.

Do I have all of that right?

MS. GASTON: Yes, Your Honor.

THE COURT: And so is it also the government's position that the question of whether the rules themselves, House Resolution 503, is ambiguous, that is also a legal question that I have to resolve?

MS. GASTON: Your Honor, whether the House -- whether the resolution is ambiguous, I would have to ask as to what? Because I think -- just to reiterate something

that I think the government stated in its briefs, but just to make sure that it's absolutely clear, the element of the crime of contempt that is the "authority" element, that is the element under the language "by the authority of either House" is an element that essentially means the scope of the authorized investigation.

And if you look -- if you look at the case law that sets forth what that element is, it's cases like *Gojack* that talks about whether a subcommittee to a standing committee has an authorization to conduct a specific investigation. And I think it's useful to think about why that element is the way it is.

So there are standing committees of the Congress that have incredibly broad jurisdiction. There's the Energy and Commerce Committee, the Ways and Means Committee. There are all kinds of things that fall under the jurisdictions of those committees.

So there can sometimes be a question whether that committee has commenced an authorized investigation and whether that investigation is within the scope of the authority delegated to that committee.

That is not so much an issue in the circumstance when there is a special committee that is created for a specific purpose. And if you look at *Gojack*, it speaks directly to this.

So in that case, the Court noted that a subcommittee had not defined the subject of its investigation, but *Gojack* said that it was particularly important for that to happen in a case where there is a standing committee with a broad purpose rather than "a special committee with a specific, narrow mandate."

And in this case, there is a specific committee with a specific, narrow mandate. If you look at the authorizing resolution, it describes exactly what this committee is for. If you look at the name of this committee, the name is, The Select Committee to Investigate the January 6th Attack on the United States Capitol. And so that is what this element is, is there an authorization for the House --

THE COURT: No, I get that. I get that.

I'm talking about the defense. Mr. Bannon says that House Resolution 503 also has certain procedural protections to include it requires a certain number of members.

He says, There have never been that number of members on the Committee; that's a defense in the government's view. The question is whether the jury decides any component of that.

In prior briefing, I thought the government's position was so long as the rule -- so long as House

Resolution 503 is ambiguous, you must defer to the House's later implicit or explicit interpretation of it.

My question is, who decides whether it's ambiguous?

MS. GASTON: The Court decides whether it's ambiguous. *Rostenkowski* states that the Court decides whether it's ambiguous.

THE COURT: So in no circumstance is the jury to be presented with the question of ambiguity or non-ambiguity as to the Rule?

MS. GASTON: Yes.

THE COURT: So let's turn then -- I don't need to hear anything more on the rules questions.

So I'm happy to hear from you on -- and that was one thing I wanted to make sure we focused on because it wasn't technically within motions that we've never discussed before. It's a lingering question from motions that we've already argued.

MS. GASTON: All right.

THE COURT: So feel free to address any of the other motions in the order you would like.

MS. GASTON: All right. Thank you, Your Honor.

So just very briefly, continuing on that line of thought, the defendant cannot, in our view, because of these questions of law and the Rulemaking Clause, and because he

waived them, raised these objections as defenses at trial.

Another thing the government wanted clarity on with respect to questions of law versus questions of fact for the jury is the question of executive privilege. And there are sort of two executive privilege issues floating about.

One is the legal question of whether executive privilege excused the defendant's complete noncompliance with the Subpoena, whether that was -- whether that provided him complete immunity. And then the separate question is a question I will get to second, which is whether the defendant can claim at trial that his belief --

THE COURT: Right.

MS. GASTON: -- that executive privilege provided him a defense meant that he did not --

THE COURT: Which would go to mens rea rather than, I'll put it this way, a legal excuse or something like it.

MS. GASTON: Exactly.

So the first thing -- because this doesn't seem to have been teed up directly by the defendant's Motion to Dismiss, we just wanted to point out that as a matter of law -- and this is appropriate for the Court to decide at the Rule 12 phase -- as a matter of law, the Court should decide the question of whether the defendant has a complete

privilege against conviction based here on executive privilege.

In the *United States versus Covington* Supreme Court case that the government cited in its brief, the Supreme Court found there that it was a legal issue for the trial court to decide whether the defendant had a complete defense to a crime based on his Fifth Amendment privilege.

And similarly --

THE COURT: As it stands right now, I don't know whether Mr. Bannon is even attempting to make this argument. I didn't see much response to this, and I don't know what his view on this question is.

MS. GASTON: Your Honor, I agree. I don't think it was teed up directly. And so the government is asking that -- this is -- if --

THE COURT: That I get an answer as to whether Mr. Bannon is going to make this argument?

MS. GASTON: Yes, Your Honor, because it's a legal issue that cannot be presented to the jury.

THE COURT: But it's a legal issue I can resolve, but do I have in front of me the components of the arguments to resolve that question?

MS. GASTON: You do, Your Honor.

So on the record before this Court, the determination must be that there was not an assertion of

executive privilege that allowed the defendant to engage in total noncompliance.

And to be clear, you do not have to decide whether there was an unambiguous assertion of executive privilege back at the time. And you don't have to decide whether the former President had the same ability to do that as the sitting President. Even if both of those things were true, executive privilege would not provide immunity for the defendant's total noncompliance in this situation.

So with respect to the document charge and the document part of the Subpoena, the subpoena called for documents that could not possibly implicate executive privilege. And so the defendant engaged in total noncompliance, including those provisions of the Subpoena.

And then with respect to testimony, even under the Department's articulation of testimonial immunity, which is not recognized by law, the defendant's total noncompliance is not sanctioned. That applies only to senior government employees. The defendant still did not show up and did not make question-by-question assertions.

And practically, there is no way for a jury to decide the scope of executive privilege. It's impossible to imagine fashioning jury instructions.

I'd note that in the defendant's jury instructions, he sort of mentions executive privilege as

something that the jury could consider when it's thinking about what the defendant did here. But it does not attempt to provide any instruction on how to consider executive privilege.

And I don't know if that's because it is impossible to do that, which I think it probably is with respect to a jury trying to make this legal determination of scope, or because it is confusing to the jury to have this penumbra of executive privilege without understanding how to interpret it.

THE COURT: Well, I think from the defendant's perspective, to date at least, it's relevant to two questions; one of which we haven't talked about yet at all. First of all, there is the question of whether executive privilege is essentially an excuse or a justification as a matter of law standing alone.

Then there's the question of whether it goes to mens rea. And then there's the question of whether the assertion provides him with a defense, whether it's entrapment by estoppel or public authority.

And at least as I understand it to date, the defendant has focused more on those defenses, though, to some extent, to mens rea.

MS. GASTON: Yes.

THE COURT: So I think it is, at a minimum right

now, unclear to me whether the defendant intends to argue at all that his noncompliance was excused altogether by the assertion of privilege.

MS. GASTON: And, Your Honor, the government is simply saying that that is a legal determination, that is not proper for the jury to make.

THE COURT: Fair enough.

MS. GASTON: So once we've established that that is a legal determination, then the question is whether the defendant can argue at trial that regardless of whether there was an assertion or whether -- whether it provides a complete legal defense --

THE COURT: His mens rea was such --

MS. GASTON: His mens rea was such --

THE COURT: -- that it defeats the mens rea under the statute.

MS. GASTON: And that, Your Honor, is just a mistake of law defense that is not available under --

THE COURT: That's *Licavoli*, in the government's view.

MS. GASTON: Exactly. As *Licavoli* provides, it's no different from the advice of counsel defense that the government has briefed extensively. And one of my --

THE COURT: Could it go to default?

MS. GASTON: I'm sorry, Your Honor?

THE COURT: Could the question either about executive privilege back in the day or the most recent letters that the government brought to my attention last night, could those be relevant to whether Mr. Bannon made default in October 2021?

MS. GASTON: They --

THE COURT: It's an element of the offense that the defendant has to make default.

MS. GASTON: Yes. The defendant has to make willful default. That just means that you --

THE COURT: Willful is mens rea.

MS. GASTON: Willful is mens rea. It means he --

THE COURT: We talked about that before a lot.

MS. GASTON: Exactly. I won't go over all of it now, but it simply means, he knew he had to appear and he made a deliberate decision not to.

The last thing I want to say on that is the defendant has really focused on the word "misunderstanding" in the *Licavoli* decision. I think probably because he wants to suggest that misunderstanding could be a misunderstanding of the law.

But to be clear, the misunderstanding discussed in *Licavoli* was a mistake. So the phrase in *Licavoli* that that comes from is, "But a failure to respond to a subpoena might be due to many causes other than deliberate intention; e.g.,

illness, travel trouble, misunderstanding, et cetera."

So the kind of misunderstanding that *Licavoli* is talking about there is you got the day wrong that you were supposed to appear. You got the place wrong that you were supposed to appear. You got the time wrong. There was a misunderstanding on that front. But otherwise, this is something that, like, misunderstanding could swallow the advice of counsel rule. It could swallow the willfulness.

THE COURT: Putting aside the advice of counsel, would it be relevant, in the government's view, if Mr. Bannon were to introduce evidence that he believed or had been told that the return date on the Subpoena had been moved back or would be moved back?

MS. GASTON: Um -- if he thought he was supposed to appear a week later and did not appear, then that would be a mistake.

THE COURT: What if -- and this goes to one of the government's motions, which I get we have discussed before as well.

Would testimony or evidence that I -- you know, I understood the return date was October 24th, but in my experience, return dates are always negotiable. And I thought it had been moved or I thought it was going to be moved. Would that be relevant and admissible?

MS. GASTON: It would not, as long as he was in

receipt of a subpoena that said he had to appear on a certain date and had no indication that it had actually moved.

THE COURT: But wouldn't that go to the jury's decision about whether his statement is credible rather than whether it's relevant and admissible? I understand your view is that would not be persuasive.

But what if Mr. Bannon testified or if someone testified for him, I told Mr. Bannon the return date was very likely to be moved, had been moved, was no longer operative.

MS. GASTON: If he was told that it had been moved, that would absolutely be a mistake, and we would expect to see some evidence that when he learned it had not been moved --

THE COURT: Might have to proffer some story along these lines --

MS. GASTON: Yes.

THE COURT: -- but at least hypothetically could be relevant.

MS. GASTON: Yes. And we would just say that the defendant's position throughout this litigation, his counsel have said on the record repeatedly, that that is not what happened here. It was a deliberate decision not to appear.

THE COURT: So now let's talk about the Motion to

Exclude the most recent set of letters. I get the government's view -- as I understand it, the government's view is the willful making of default was completed in October 2021 when the return date for the Subpoena came and went. And whatever has happened since then is irrelevant to that question.

What if Mr. Bannon had offered, two weeks after the return date, November 7th or something like that, to appear?

MS. GASTON: Yes, Your Honor. Ms. Vaughn is handling that one.

THE COURT: We can wait. Why don't we wait.

MS. GASTON: We'll hold that.

THE COURT: Who's going to address the question of the motion to continue the trial?

MS. GASTON: I am.

THE COURT: So I've read the papers. I think Mr. Bannon obviously argues that the press around the January 6th Committee hearings warrants moving of the trial. The fact that there are a lot of unresolved issues, at least as of 10:30 a.m. today, warrants moving the trial.

He hasn't yet argued, but I think many people are -- and I'm certainly interested in the government's view -- of whether it makes sense to have a trial on Monday when it's at least an open question whether Mr. Bannon will

be testifying in front of the Committee.

What's the government's view on that question?

MS. GASTON: The government's view on that question, Your Honor, is that the offense was completed at the time that he willfully defaulted both on documents and testimony. And his decision whether to comply now has no bearing on the criminal case.

THE COURT: As you know, and as you say in your papers, this case will not result in -- the relief sought in this case is not an order compelling Mr. Bannon's testimony. I recognized that in the first hearing in this case.

What this is is a backward-looking prosecution for, in the government's view, past and complete noncompliance, a completed criminal act that occurred nine months ago.

If that's the case, why is there a rush to try this case on Monday rather than a month or two from now, since it is altogether backward-looking in the government's view?

MS. GASTON: Your Honor, I think it is important for the purposes of vindicating the statute and Congress' authority in these matters, to quickly adjudicate the criminal matter.

And it would be bad precedent if we got into a situation where a defendant could engage in total

noncompliance with the Committee, be referred for criminal contempt, have a different branch of government expend considerable resources in preparing --

THE COURT: Branches.

MS. GASTON: Branches.

-- expend considerable resources in preparing for a criminal trial, only to have the defendant witness -- on the eve of trial, say, Well, actually, I will comply now, in hopes of the criminal case being dismissed. That's a different kind of contempt and obstruction, and it sort of -- validating it would not serve the purpose of the statute.

THE COURT: And just to round out the point, the government's view is none of the issues at trial -- let me ask the question a little bit better. Nothing about Mr. Bannon's offer or the President's most -- the former President's most recent letter or even an agreement by which Mr. Bannon hypothetically does everything the Committee asks of him, would in any way affect this case?

MS. GASTON: That's correct, Your Honor.

THE COURT: Okay. And, therefore, in the government's view, I should grant the Motion to Exclude Evidence around the letters that were signed over the weekend; that's the government's view?

MS. GASTON: Yes, Your Honor.

THE COURT: And what -- could Mr. Bannon argue that -- as I recall, there was a statement or something from the Chairman, from Mr. Thompson, suggesting that they would be open to Mr. Bannon having a change of mind.

And why couldn't Mr. Bannon say, Look, I thought I wasn't making default because it was -- they were leaving the door open to my appearance. My having now accepted that open-door offer is inconsistent with being in default.

MS. GASTON: If the defendant had done that a week after his default, if the --

THE COURT: Why does that matter? The default, in the government's view, was consummated on the day the return date came and went.

MS. GASTON: It was consummated on the day the return date came and went. And the Committee gave the defendant, essentially, an opportunity to cure his noncompliance. He was in default. The Committee could have immediately referred him for contempt, and the House could have immediately voted for it.

Instead, the Committee gave him another opportunity after advising him of the risk of a referral. And so the House giving him that opportunity to cure it back at the -- close in time to his offense does not mean that he has carte blanche to spend years defying and remaining in contempt of the Subpoena only to, on the eve of trial,

change his course.

THE COURT: Okay. So again, I apologize. I've been distracting you from argument. So go ahead and address all of the issues that are otherwise pending.

MS. GASTON: Otherwise, with respect to the Motion to Continue, Your Honor, as the government stated in its briefs, in terms of the reasons that the defendant has articulated to date for a continuance, the first reason was pretrial publicity.

And the government's position is that the case law is clear that that can be handled through voir dire, and only in extreme cases can publicity not be handled through voir dire. And those cases bear no resemblance whatsoever to this.

Those are cases like *Rideau*, where the defendant's confession was played on a loop on local television in a small town. Those are cases like *Sheppard*, where the defendant's pregnant wife had been murdered and it sounds like there was chaos in the courthouse.

The media coverage that the defendant has talked about is media coverage of the January 6th hearings. And as the government stated, those are not about the defendant, and there is not the sort of focused and targeted and prejudicial coverage of the defendant that there is in those other cases where courts have found that voir dire cannot

control for prejudice.

Next, the next issue was scheduling. I think the fact that we are here having a motions hearing means that that issue is probably moot because all of the issues the defendant was concerned in his motion were not teed up or not being heard by the Court are being heard by the Court.

And then the last one last night was the government's production on Friday, and that was *Jencks* material of agent notes, that the government provided on the deadline that the defendant asked the Court to impose and that the Court imposed.

Providing, in an abundance of caution, some phone records that he confirmed in his motion are not relevant to this case, and informing the defendant that more than a decade ago, I worked on the same committee as one of the witnesses in the government's case, and that she and I were members of a book club that I have not been to in more than two years, so -- or approximately two years.

So to the extent that the defendant wants to use that in cross-examination, he has the information and he can use it. He has not articulated what prejudice he suffers from a timely *Jencks* disclosure, the production of admittedly irrelevant materials and information that he can use in cross-examination if he wishes.

THE COURT: Okay.

How about -- I mean, I have a list. What's the government's view on Mr. Costello's motion to withdraw?

MS. GASTON: The government has no objection to Mr. Costello's motion to withdraw. I assume we would have objections to various testimony that he might offer if he becomes a witness the way that he has suggested he is withdrawing to become.

THE COURT: Fair enough. Those are evidentiary questions that I'm sure we will take up.

MS. GASTON: Yes.

THE COURT: All right.

So why don't we go through, then -- well, let's go then to the Motion to Compel the Meadows and Scavino Declination Discovery? Oh, you're not going to handle that.

MS. GASTON: No, I'm sorry.

THE COURT: Are you doing the Omnibus Motion in Limine the government filed?

MS. GASTON: Yes.

THE COURT: Well, let's just tick through that. Really, I have the issues. Why don't you highlight anything that you think is particularly noteworthy or difficult there.

MS. GASTON: Absolutely.

So first on that, let me just say broadly that there seems to be this idea advanced in the defendant's

opposition that the Court can just let the jury hear all kinds of things, some of it irrelevant and prejudicial, and as long as they are instructed afterwards, there is no harm no foul; that's the adversarial process.

That is not the way a trial works under the Federal Rules of Evidence. There are rules for relevance for a reason, and Rule 103 exists for a reason, which provides that the Court should, to the extent practical, conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means; that means, like, not through argument, not through stray comments. The jury should not be hearing inadmissible evidence.

And the government's Motion in Limine, quite frankly, some of the things that the government included in its opening brief were things that seemed obvious to us and we did not expect opposition to them. So it was a surprise to receive opposition to things like no mention of the potential punishment for the defendant, because that is such a bedrock principle of law.

I will tick through very quickly.

So in terms of the cross-examination about a witness's political affiliation, we're talking about things here like asking the witness what their voter registration is, like what the party of a member they've worked for is, who they voted for. And these are not things that the

defendant has articulated would lead a witness to slant his or her testimony in the way described in *Abel* that is grounds for appropriate cross-examination for bias.

Political affiliation does not say anything about the truthfulness of factual testimony a witness might offer about things like sending a subpoena by email.

In terms of the misconduct point, government misconduct allegations, like selective prosecution allegations, are not a matter that go to a defendant's guilt or innocence, and they do not belong in front of a jury.

The *Sager* case that the defendant cited in his opposition is a different kind of case. It's a case in which it was appropriate to cross-examine a witness, a government agent witness, about inconsistencies in that agent's testimony, about evidence that he, perhaps, should have gotten and didn't.

But those are not government misconduct claims like the defendant has suggested he wants to bring before the jury in this case, claiming that the government has committed misconduct.

In terms of the -- I will not go into detail on the subject of the congressional witnesses. I will just reserve and say that we will respond to a motion on that when and if it arises.

Punishment, I think, does not bear anymore

discussion.

Ms. Vaughn will handle the information related to other contempt referrals.

And then the statements of counsel. This is -- you know, their claims about their statements is, Well, government -- the lawyers' statements are not evidence before the jury. But, again, improper bolstering or making improper comments is the kind of thing that Rule 103 says that the Court should not allow the jury to hear.

THE COURT: Thank you.

Are you also going to address the three motions for Mr. Bannon to exclude evidence regarding Mr. Costello's emails and phone records, which I've largely addressed, but the Motion in Limine about presenting the Indictment and the Motion in Limine about evidence or argument regarding the attack on the Capitol?

MS. GASTON: Ms. Vaughn is going to handle those.

THE COURT: Okay, great. So, Ms. Vaughn.

Thank you.

MS. VAUGHN: Good morning, Your Honor.

THE COURT: Good morning.

MS. VAUGHN: I can start with the defendant's motions.

THE COURT: Sure.

MS. VAUGHN: The government defers to the Court on

the Indictment issue.

And then with respect to the Motion to Exclude Evidence about January 6th, based on the defendant's reply, it doesn't seem that he's seeking to exclude evidence about the scope of the investigation and the pertinence of the defendant's subpoena to that investigation.

So the Court -- I mean, the government has no intention of introducing video of the attack or evidence about specific attacks or things like that, but it certainly plans to introduce evidence about why the Committee believed --

THE COURT: Right, it goes to pertinency.

MR. COONEY: So we just ask for clarity on that because we just don't want to be surprised with objection at trial.

With respect to Mr. Costello's information, the government doesn't intend to offer Mr. Costello's toll records unless the defendant puts them in issue somehow. For example, if he were to claim that they were not in touch or something, he had no idea that the Committee had rejected his reasons for not showing or things like that.

With respect to Mr. Costello's letters to the Committee, I don't think the defendant objects to those. And then it's not clear that he's moving to exclude any other evidence relating to Mr. Costello.

THE COURT: Okay.

MS. VAUGHN: I can also address the Motion to Compel and Motion in Limine that we filed last night with respect to the late efforts at compliance --

THE COURT: Yes.

MS. VAUGHN: -- if the Court wants to hear more on that.

THE COURT: Well, let's talk about *Meadows* and *Scavino* first. I don't think we've addressed that at all.

MS. VAUGHN: I think with respect to *Meadows* and *Scavino*, we noted in our opposition that the government doesn't have any documents laying out official policy relating to Mr. *Meadows* and Mr. *Scavino* such that they would fall within the Court's March 16th order.

So the question is, let's get back to basics, what are the rules of discovery in a criminal case and does the government's work product and decision-making about whether or not someone is subject to criminal prosecution, is that discoverable in this case. And the defendant has not shown that it has.

In fact, in his reply, he spends most of it talking about civil discovery cases, but courts are clear that civil discovery is not equal to Rule 16; and that Rule 16 is much narrower in that. The same with *Brady* and *Giglio* material.

So, one, all of these materials were generated weeks, months, well after the defendant was charged in this case. So they can't possible go to his intent at the time because there's no way he could have relied on them. They didn't exist when he defaulted.

And the defendant tries to fall back on the argument, Well, if we're allowed to put on an entrapment by estoppel argument, then it goes to reasonableness.

But, again, the reasonableness standard is whether an objective person in the defendant's position, someone truly desirous of following the law, would have still followed the course that he followed. Materials created weeks, months after that objective person acted couldn't have possibly influenced the reasonableness of that act.

So for those reasons, the defendant hasn't met his burden to show that he's entitled to these internal deliberations, and his Motion to Compel should be denied.

THE COURT: If entrapment by estoppel is a defense that goes to the jury here, and if the defendant gets to put on, say, for example, his theory about why he fits within the DOJ opinions, the OLC opinions, why wouldn't he be able to say, And DOJ actually has acted consistent with my reading, see *Meadows*, see *Scavino*?

MS. VAUGHN: *Meadows* and *Scavino* are completely differently situated. Again, this just goes --

THE COURT: Why can't he make the argument? The government would say, They're a totally differently situation. They fit within the OLC opinions in a way you don't.

MS. VAUGHN: It's confusing for the jury. He's then asking the jury -- so this is how the testimony would go. The defendant testifies, because his lawyer can't testify about what he relied on. The defendant has to testify.

The defendant testifies: I read these five, 40-page OLC opinions, and based on the "principles," which is what they said --

THE COURT: I understand the government's view of the --

MS. VAUGHN: -- I decided -- and so then he's asking the jury, Jury, you should decide whether I'm the same as Mark Meadows or Dan Scavino.

That is so far afield from what entrapment by estoppel is about. Entrapment by estoppel is about being essentially tricked by the government into committing a crime. It is not about, I read between the lines of 50 different documents and decided that surely they --

THE COURT: No, that is why the government thinks I should not allow this issue to go to the jury. But if it's going to the jury, if Mr. Bannon has an argument that

the DOJ opinions, by implication in the government's view, give him this defense, then why isn't it relevant to show that in the specific context of January 6th, the government did decline, and he would argue, presumably in reliance on prior OLC policy and statements, to not prosecute two people who he would say are similarly situated to him?

The government would have the opportunity to say, No, that's not right. He's totally differently situated. And you -- so you, jury, should conclude the defense is not available.

MS. VAUGHN: It's a temporal issue. So the issue of entrapment by estoppel is what was reasonable at the time the defendant acted. Things that happened that postdate that can't inform the reasonableness of the actor at the time.

THE COURT: So if the government had given Meadows or Scavino declination letters before, would they have been admissible? Again, assuming entrapment by estoppel goes to the jury.

MS. VAUGHN: We turned over to the defendant, earlier, letters that the Department had issued in which it referenced its official policies. Of course, those all called back to the underlying OLC opinions, but as we've told the defendant, we just don't have anything like that here.

THE COURT: Okay. I can't remember if there were other topics you were going to address.

MS. VAUGHN: Yes. I think the Court was asking whether -- in respect to our Motion in Limine we filed last night, when the default occurs.

THE COURT: Yeah.

MS. VAUGHN: And default, in plain English, is just a failure to comply. So then what defines the nature of the default that's criminal is the "willfulness" word. So a default is just not showing up as you're required or not producing documents, and that was complete at the time.

So the Court had a question if he had complied two weeks later.

THE COURT: Yes.

MS. VAUGHN: That wouldn't erase the basis for a criminal contempt.

Now, certainly could it inform, you know, Congress' decision to refer? Could it inform the government's exercise of its prosecutorial discretion? Of course.

But as far as whether the elements of the offense are satisfied, they've already been satisfied, and there's nothing that that later compliance could do to erase that.

So here we are now, nine months later, and it's the same issue. His default was complete in October 2021;

that's what he's being prosecuted for. His later efforts to comply don't change that.

It's the same in the contempt of court context. It doesn't matter if someone cures later, they're still guilty of the default at the time.

THE COURT: So obviously I haven't heard from the House yet on the Motion to Quash the Subpoena to the House Members, but does the government agree with the proposition, as a general matter, that if a motion seeking congressional testimony -- or sorry -- if a subpoena seeking congressional testimony is quashed based on Speech or Debate Clause grounds, and the effect of that would be to make unavailable to a defendant evidence that's highly relevant to his or her defense, that that could result in a dismissal of an indictment or some -- an instruction or something to the benefit of the defendant, assuming, again -- I'm not saying you agree with this but assuming that the evidence that the defendant seeks to elicit through the Subpoena that's quashed is highly relevant?

MS. VAUGHN: Is material.

THE COURT: Is material, yes.

MS. VAUGHN: Yeah. The government doesn't view it as really any different from a claim that a defendant might make if the government refuses to immunize a witness who's claiming their Fifth Amendment. So in that situation, for

there to be any adverse consequences to the government's case, the defendant has to show some form of government misconduct like it's been threatening the witness with prosecution or -- and on top of that, has to show that it's material and noncumulative. And even the *Rainey* Court recognized that.

So are there circumstances under which a witness's unavailability because of a privilege could provide a basis for some kind of adverse action, yes.

THE COURT: And analytically, is the way the government thinks about the way a Court should approach it is, first, think about the immunity question; decide whether or not to grant the Motion to Quash? If the motion is granted, hypothetically, then you take up the question of what evidence was sought to be adduced? Is it material? Is it nonduplicative, or whatever, and what is the effect of its exclusion or nonavailability, I guess, on the case?

MS. VAUGHN: Yes.

And I think just reading the briefs in the other case, it seems that the privilege issue may not even be determinative at the end of the day because the defendant hasn't met his burden under Rule 17 to show that it's relevant, admissible, material evidence.

So if that were the basis on which the motions were quashed --

THE COURT: It would necessarily mean there was no effect on the case --

MS. VAUGHN: Exactly.

THE COURT: -- if that were true.

MS. VAUGHN: Exactly.

THE COURT: Right. But if not, or if, hypothetically, I thought that one needed to resolve immunities first and were to agree that there was immunity, the immunity forecloses the defendant from evidence that he wishes to adduce. And then one has to think through, What is that evidence and what does the exclusion of that availability mean for the defendant's ability to try his case?

MS. VAUGHN: Right.

And the question there is, What is the nonspeculative basis to believe that this witness has material, exculpatory information that is noncumulative that the defendant -- you know, can't get from another source; and was there some effort on the part of the government to improperly make this an issue, which, looking ahead to the defendant's motion if this should come to pass, the government just doesn't think he'll be able to meet that.

THE COURT: Right. But it hasn't been filed yet so who knows what it will say.

MS. VAUGHN: Right.

THE COURT: Any other topics you'd like to address, Ms. Vaughn?

MS. VAUGHN: Not unless the Court has any questions.

THE COURT: No. Thank you.

I'd like to hear from the House now, Ms. Kallen, Mr. Letter?

MR. LETTER: Thank you, Your Honor. As I said earlier, Ms. Kallen will be delivering most of the presentation to Your Honor.

THE COURT: Very well.

MR. LETTER: I did, though, just want to start out with a very brief introduction.

As you know here, criminal trial subpoenas have been issued to the Speaker of the United States House of Representatives, the Majority Leader, the Majority Whip, the Chairman of the Select Committee, the Vice Chair of the Select Committee, all of the other members of the Select Committee, me and staffers for the Committee.

In calling for all of these witnesses to testify, to us it seems clear that Mr. Bannon is attempting to turn this into some sort of political circus that cannot be allowed.

But the main point I very briefly wanted to make is something I know you and I have discussed in this very

courtroom before, the speech or debate immunity. There's a key argument that is made right up front in Mr. Bannon's opposition to the Motion to Quash, which is it's so unfair, the members relying on speech or debate, when Mr. Bannon has been summoned -- is here because he defied a subpoena. And they are saying, What a double standard.

Mr. Bannon's argument is, therefore, with the Constitution itself. The framers put the Speech or Debate Clause in the Constitution as a key bulwark for our democracy, and so it's right there in the Constitution. We know why it is there.

There is no similar provision, no constitutional or legal basis that Mr. Bannon had to ignore the Subpoena from the House. And so, again, the main point I wanted to make is, his argument really is the Constitution should be different from what it is.

And so -- otherwise, I'm going to turn this over to Ms. Kallen. It may be appropriate for me to pop up again.

THE COURT: That's fine.

MR. LETTER: Thank you, Your Honor.

THE COURT: I'm happy to hear from Ms. Kallen.

MS. KALLEN: Good morning, Your Honor.

THE COURT: Good morning.

MS. KALLEN: There's a proper way to contest a

subpoena, and the members of Congress and their staff engaged in that process by moving to quash the subpoenas at issue here. They did not simply defy the judicial subpoenas.

The 16 subpoenas that the defendant issued are fatally flawed as a matter of law because, first, they do not even meet the burden under Federal Rules of Criminal Procedure 17 to establish both the testimony and the documents the defendant seeks are essential and material to his case.

The documents the defendant seeks are precisely the sort of broad requests that read more like civil discovery requests, not the targeted requests appropriate under Rule 17(c). And the Supreme Court has made clear that Rule 17(c) is not an avenue to conduct discovery.

This Court also explained in the *Libby* case that if a subpoenaing party cannot specify the information contained in the documents sought but merely hopes that something useful will show up, that is a sure sign that the Subpoena is being misused, and that is the case here.

The trial testimony that the subpoenas seek is cumulative and is neither material nor essential to Mr. Bannon's defense.

THE COURT: What if the question of whether the House Committee was formed or exists in compliance with

House rules -- House Res. 503, if that's a question that goes to the jury, why wouldn't some of this testimony be relevant? Why wouldn't Speaker Pelosi's testimony about whether she believes the Committee was formed consistent with the Resolution 503, or even her testimony about how it was formed, why wouldn't that be relevant?

MS. KALLEN: So accepting Your Honor's representation that that would be a question of fact -- with which we vehemently disagree, Your Honor.

THE COURT: I'm assuming hypothetically. I know the Department's view is different. But assuming hypothetically for the question that this is a -- that there are facts here that go to the jury, I assume it's a defense. It doesn't really matter.

But assume it's a defense. Mr. Bannon has the defense that the Committee was formed inconsistent with House rules, or even just simply is not operating with the number of members required by House Res. 503. Why isn't some of the testimony sought by the Subpoena relevant?

MS. KALLEN: So, Your Honor, it's still not relevant to his defense because it does not excuse complete noncompliance with the Subpoena.

But even if he can identify some sort of relevant information, the two witnesses that will be made available at trial, Ms. Amerling and Mr. Tonolli, are perfectly

competent to testify to anything that would be relevant on that front.

THE COURT: But isn't Speaker Pelosi a much more relevant witness than the two witnesses that the House has volunteered on the question of compliance with the rules.

MS. KALLEN: Potentially, Your Honor, but the legal standard is not whether or not someone is a much more relevant witness, particularly in the context of high-ranking government officials.

The question under Rule 17 is whether the information is material and essential. And it's not essential when other people can testify. And especially if one considers the high-ranking official context. Even there, the fact that there are two witnesses who are perfectly competent to testify on these issues, which is the standard; that's sufficient to justify quashal. And all of that is assuming one sets aside the speech or debate immunity.

THE COURT: As to the speech or debate immunity, as to the two witnesses whom the House is making available, is the House or are they waiving Speech or Debate Clause immunity with respect to their testimony?

MS. KALLEN: No, Your Honor.

THE COURT: So what happens if they are cross-examined? What if Mr. Bannon seeks to ask questions

outside the scope of direct when they are here? Will they assert Speech or Debate Clause immunity at that point?

MS. KALLEN: I think, Your Honor, it depends on the parameters of this Court's ruling with regard to the various pending motions. I think it's going to depend on whether or not it applies to the sphere of issues that are relevant at trial.

So -- and we indicated to the Court that we would intend to seek a protective order, and that would be -- you know, assuming that's still necessary, that would be subject to the parameters of this Court's ruling on the various other pending motions as to what's live issues at trial.

THE COURT: So just to be clear, even the witnesses who would appear voluntarily would be doing so but not as a waiver of Speech or Debate Clause immunity. They would be appearing voluntarily. They would seek -- assuming that the Motion to Quash is otherwise granted and the like, they would seek a protective order, what prohibiting cross-examination outside of the scope of their direct or even, you know, essentially examination that goes to a defense that they don't address, or something like that?

MS. KALLEN: Essentially, Your Honor, I think it would depend on the scope of what's live with regard to the individual defenses. Our view is that some of the issues that he raises as defenses are exclusively questions of law,

not questions of fact.

And so if this Court disagrees with that and concludes that certain things are questions of fact, then the parameters that would be appropriate to the defense would be contingent on this Court's decision as to what precisely is a question of fact and what precisely is a question of law.

But I do think it's worth emphasizing to this Court that no Court has held that waiver of speech or debate immunity is even possible and so courts have hypothesized that in the event that --

THE COURT: Does the House believe that it can be waived?

MS. KALLEN: No, Your Honor.

THE COURT: Okay. So does that mean in any case in which a member or the House -- well, a member might have Speech or Debate Clause immunity, even if it's not asserted, the Court must address whether it's appropriate?

MS. KALLEN: No, Your Honor.

It's an immunity that the holder of the immunity can raise when the holder of immunity concludes that it's appropriate. And so it's in the holder of the immunity's power to decide whether or not to raise it.

That's not to say that the Court is without any power to consider that. It's not a question of, Oh, it's

not raised, therefore it's waived.

THE COURT: No, no, I think we might be talking past each other.

Does Speaker Pelosi have the constitutional authority to waive her Speech or Debate Clause immunity? Expressly waive it?

MS. KALLEN: I can't speak to that, Your Honor. I can certainly -- you know, if Mr. Letter would like --

THE COURT: We can take it up. I don't think it's material for today's purpose. So I'm happy to hear from you at the end of this, Mr. Letter.

Because no one is -- well, I guess I should say no one in the Subpoena recipient group, in your view, is attempting to waive Speech or Debate Clause immunity, it doesn't matter.

I know Mr. Bannon argues that there has been a waiver at least as to certain members, but you are not taking the position that anyone has, in fact, waived. Correct?

MS. KALLEN: That's correct, Your Honor.

THE COURT: Or could. You don't need to address that question?

MS. KALLEN: Our position is that no one has waived their immunity and no one intends to do so.

THE COURT: Does Speech or Debate Clause immunity

apply to some of the topics that Mr. Bannon asked about, like Tweets or book deals?

MS. KALLEN: So it does not apply to express communications with the press, Your Honor. But beyond that, questions about motives underlying what led to any communication with the public, those are all covered by speech or debate immunity.

THE COURT: So there's at least -- there are some topics Mr. Bannon seeks testimony about that would not be covered by Speech or Debate Clause immunity. That doesn't mean the Subpoena is valid. It just means that to the extent that you seek to quash the Subpoena, it has to be on some other basis, like Rule 17 or senior member of the government?

MS. KALLEN: That's correct, Your Honor.

And any of those topics still do not meet the Rule 17 requirement that the testimony sought being material and essential.

THE COURT: And do you agree with DOJ, or at least my colloquy earlier with Ms. Vaughn, that analytically, the way to approach this question is to decide whether there's immunity or whether the Motion to Quash should be granted?

And then if it is in part or in whole, you then have to address the question of how it affects the criminal case because that may, in fact, disable Mr. Bannon from

putting on evidence that is relevant to his case.

MS. KALLEN: So I can't speak to the second piece of that, Your Honor. Our view was that the Motion to Quash is an independent motion in and of itself with its own legal standard, and any subsequent impact that it may or may not have on the criminal trial is for the Department of Justice to weigh it on.

I do want to address, Your Honor, the that question you raised of the Department of Justice regarding whether or not the challenges to the composition of the Select Committee were that -- whether they are questions of law or questions of fact.

THE COURT: Yes.

MS. KALLEN: And they are pure questions of law, Your Honor. And I direct the Court's attention to two Supreme Court cases that support that proposition.

The first is the *Bryan* case. That's B-R-Y --

THE COURT: The old *Bryan*?

MS. KALLEN: Yes, Your Honor.

And there the questions challenging the validity of the Committee were expressly taken away from the jury and decided by the Court at trial.

I'd also direct the Court's attention to the *Wilkinson* case, which the Department of Justice raised in their response to the jury instructions at ECF 90. And in

both those cases, there were challenges to the validity of committees, and those were viewed as questions of law.

Your Honor, also, this is a situation where the House of Representatives has been crystal clear about its position as to whether or not its rules were properly followed. Not just before this Court in the amicus brief but also through subsequent actions of the House of Representatives.

So this is certainly not one of those situations where there's any ambiguity as to what the House's position is because the House has been very clear that its position is that its rules were followed, and proper rulemaking deference under the Rulemaking Clause requires deference to that conclusion.

THE COURT: Does the House have a view about whether, in light of Mr. Bannon's letter over the weekend, the trial should occur in a week or whether we should pause it?

MS. KALLEN: Your Honor, the House's view is that -- you know, we don't take -- we are here on the Motion to Quash, Your Honor, not in terms of implications for the criminal trial.

That said, by virtue of our contempt referral, the crime was completed at the time of failure to comply with the Subpoena, and that happened months ago.

I'd like to also address the high-ranking government official doctrine. These are not just any subpoenas served on any witnesses. The 16 subpoenas here were served on the Speaker of the House of Representatives, the Majority Leader, the Majority Whip, all members of the January 6th Select Committee, three of its high-level staff members and the General Counsel of the House of Representatives.

To justify subpoenas to these high-ranking officials, the defendant had to demonstrate with specificity and in concrete terms what further information only these high-ranking officials could supply that would be material and essential to his defense, and he has not done so.

This is especially true because the Select Committee has made clear that Chief Counsel and Deputy Staff Director Kristen Amerling and Senior Investigative Counsel Sean Tonolli will voluntarily be made available by the Select Committee to testify, and they can competently address any issues necessary to any of the elements or defenses in this case.

And rather than specify the precise information that the defendant seeks from each of these numerous high-ranking officials, he insists that a proper defense requires testimony from officials that he labels as having decision-making authority.

But this decision-making authority is not a prerequisite for competent trial testimony, nor does it discount the testimony that Ms. Amerling or Mr. Tonolli could provide.

In fact, if this Court took Mr. Bannon up on his offer to invent some new decision-making authority test for trial testimony, that would undermine the high-ranking official test itself and that doctrine. That's especially true for contempt charges, Your Honor, where those with decision-making authority over a contempt referral are the members of Congress themselves.

Adopting that test means that high-ranking government officials and high-ranking officials even in the private sector would spend nearly all their time dealing with litigation.

That is why the relevant question in the context of a high-ranking official is whether -- and whether the relevant question, even under the Federal Rules of Criminal Procedure, is whether a witness can offer competent testimony, not whether the actual decision maker is taking the stand.

And even setting all of that aside, Your Honor, then comes the question of speech or debate immunity. Binding Supreme Court case law and binding D.C. precedent establish that the actions at issue here squarely fall

within the sphere of legislative activity. They are thus covered by the Speech or Debate Clause, and there is absolute immunity.

Your Honor, there is a process for contesting a subpoena, a judicial subpoena is under Rule 17, and the defendant did not follow that process.

There's also a process to contest a congressional subpoena, but rather than engage in that process, the defendant decided to defy the Subpoena altogether and defy the Subpoena that he received from the Select Committee. The United States seeks to hold him accountable for defiance of that subpoena.

This is entirely different than the issue here where the recipients have followed the proper process to contest a judicial subpoena they moved to quash and the subpoenas that the defendant issued to the 12 members of Congress, three senior staff and the General Counsel of the House of Representatives in his criminal trial do not comply with the requirements for criminal trial subpoenas. And for that reason, they should be quashed.

But issuing blatantly improper subpoenas may be the point here. The defendant spends pages of his brief in the Miscellaneous case arguing that if the Subpoena recipients do not testify, the United States should be stripped of its ability to present its evidence in the

criminal trial or the entire criminal prosecution should be dismissed.

The purpose of these overbroad subpoenas appears to be trapping members of Congress into foregoing speech or debate immunity lest they deem this prosecution.

Should this Court adopt Mr. Bannon's "Heads, I win. Tails, you lose" approach to contempt proceedings, this playbook will be copied by any defendant who faces a congressional subpoena that they don't like, and Congress' subpoena power will be seriously undermined. So we ask this Court not to fall prey to that tactic.

The defendant issued sweeping subpoenas after he stood on the steps of this very courthouse and vowed to use his criminal trial as an opportunity to harass and burden members of Congress. He should not be permitted to abuse this Court's subpoena power for that purpose.

So we ask that the Motion to Quash be granted. Thank you.

THE COURT: Thank you, Counsel.

Mr. Letter, anything you'd like to address?

MR. LETTER: Thank you, Your Honor. I'll be very brief to address your questions.

First of all, on the trial point, whether the trial should be postponed, as Ms. Kallen said, our view is that's a determination for the Justice Department. But the

Committee itself has no reason to think that it is appropriate for the trial to be postponed. But, again, that's a judgment for the Executive Branch of the government to make.

On the point about waiver -- and as Your Honor knows, you have asked us to address this, which we'll be doing several days from now in *Meadows*.

THE COURT: Yes.

MR. LETTER: But to just give you a preview, because you've asked about it, at this point the position we will most certainly be taking is the privilege is not waivable. But I know you're thinking, Hmmm? That's because we say that the privilege is absolute, but it is not self-executing.

So members of Congress have the ability to choose, in particular instances, not to assert the privilege. And this is discussed at considerable length, as we will be setting out for you, in the Supreme Court decision in *Helstoski*, where the Court addressed the question of waivability.

And there, by the way, the Court just said, I quote, Explicit and unequivocal renunciation of the privilege would be necessary, even assuming that the privilege could be waived.

So as you know, there are cases like *Meadows* where

the House has chosen not to assert executive -- assert speech or debate immunity, but that does not mean that it is waivable by particular members of the House. It's just a question of it's not self-executing. And so we can choose not to assert it.

One other thing, again, just giving you a preview, one of the key cases here is *Senate Permanent Committee versus Ferrer*, and there the Senate actually brought suit in Federal District Court to enforce a subpoena pursuant to a statute that allows that.

The defendant there said, Oh, okay. I want to then raise all of these other points. The D.C. Circuit said, No, not so fast. Speech or debate immunity continues to apply to other subjects even though the Senate had --

THE COURT: Initiated a lawsuit.

MR. LETTER: Exactly, Your Honor. And so that's -- it's a 2017 opinion of the D.C. Circuit. In any event, I hope that answers -- if Your Honor has any other --

THE COURT: It does.

Thank you, Mr. Letter.

MR. LETTER: Thank you, Your Honor.

THE COURT: I look forward to seeing that brief.

Here is what I would like to do: I'd like to give the court reporter a break. So why don't we take a brief recess. Let's take 10 minutes. We'll come back at 11:20,

and then I'll hear from Mr. Corcoran and Mr. Schoen, I expect.

(Recess at 11:13 a.m. and concluded at 11:29 a.m.)

DEPUTY CLERK: We are now back on the record.

THE COURT: Mr. Corcoran.

MR. CORCORAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. CORCORAN: I am going to address the Motion to Quash first and then try to work through the Motions in Limine in workmanlike fashion. And then David Schoen will address the Motion to Continue and one of the Motions in Limine as well.

THE COURT: Sounds fine.

MR. CORCORAN: First, with regard to the two-step process for consideration of whether to grant the Motion to Quash, and then depending on that, whether to go to a remedy in a criminal case, we agree with that process and believe that the Department of Justice -- we may have to brief the issue in between and allow the Department of Justice to have their say on any remedy.

I want to address the notion of absolute immunity. You know, more than 100 years ago in the field of physics, there was a sense that time and space were absolute. But then Albert Einstein came up with an idea that things should be considered relative to one another. And that's how I

view these two constitutional issues because both are in the text of the Constitution.

Different than what Mr. Letter has said -- and I understand and respect his advocacy -- we are not trying to rewrite the Constitution. What we're saying is, Here are two explicit grants with regard to members of Congress. It's a protection, the Speech or Debate Clause, and with regard to Mr. Bannon or any defendant, it's, you know, it's --

THE COURT: What's your best case for the proposition that I could hold that Speech or Debate Clause immunity as to a topic that's covered by Speech or Debate Clause immunity can be overridden because of a criminal defendants' Fifth or Sixth Amendment right?

MR. CORCORAN: *Johnson*, 383 U.S. 178, the Supreme Court said that the Speech or Debate Clause was designed to preserve legislative independence, not supremacy.

And in our view, requiring members who have direct personal knowledge regarding an alleged contempt of Court will not infringe in the least on the legislative independence of Congress.

THE COURT: What issue, that's relevant in this case, would the testimony or documents you seek go to?

MR. CORCORAN: If I could just have one moment before I get to that --

THE COURT: Sure.

MR. CORCORAN: -- because it's -- just on the issue of the weighing of the two ideas, because I think that is an important thing.

What I've quoted from *Johnson* with regard to the need to preserve legislative independence, a contempt resolution is not a legislative act. And so there's no concern in the area of contempt under *Johnson* -- I know it doesn't deal directly with contempt of Congress. These cases come along, as we said before, every 10 or 20 years.

But the concept is that the Speech or Debate Clause is designed to preserve legislative independence. Here, you know, criminal contempt resolution, the Latin lex legis law, a contempt resolution is not a law. It's not a law.

And so there's no infringement on the legislative power of the Congress --

THE COURT: So is your argument that --

MR. CORCORAN: So it's not a waiver. It just doesn't apply.

THE COURT: So your argument is that there is no Speech or Debate Clause immunity regarding the reasons for or the fact of the contempt resolution whatsoever. So you don't even need to worry about the defendant's constitutional rights? It's just a question of whether that

evidence is relevant?

MR. CORCORAN: No, you definitely --

THE COURT: You said there's no Speech or Debate Clause immunity whatsoever because it's not a legislative act.

MR. CORCORAN: Right.

THE COURT: Okay. So immunity is out, and the only question, in your view, is whether the testimony's relevant?

MR. CORCORAN: I don't think it's a question of relevancy at all. I think from our perspective, the defendant has a right, and the Supreme Court in *Chambers versus Mississippi*, it's called one of the most fundamental rights; that a person accused of a crime can present a defense and present witnesses in his own defense.

THE COURT: Does a defendant have a constitutional right to present irrelevant evidence? Surely the answer is, No.

MR. CORCORAN: I don't know that there's any constitutional right to present irrelevant evidence, but I think a defendant has a right to present a defense. And you're going to hear that again from me as we go through the Motions in Limine, et cetera.

But I think one of the key points that separates a legislative act from a contempt is, contempt is a sword

where the Congress has pointed the sword at an individual and has asked the Executive Branch to prosecute and has asked this Court to preside.

In that circumstance, the members of Congress who have factual information about the underlying facts that constitute a contempt, they can't use as a shield --

THE COURT: What noncumulative evidence do the members you've tried to subpoena have about the contempt resolution?

MR. CORCORAN: Well, communicative --

THE COURT: Let's talk specifically. What do you want to ask the members of the Committee about that you wouldn't be able to elicit through other -- either the two people who are volunteering to appear or witnesses on Mr. Bannon's side?

MR. CORCORAN: Yeah.

The testimony -- I won't go through each one of them unless the Court wants me to, but let's start with the testimony of Speaker Pelosi. Her testimony would be exculpatory. And remember the test is not what the Speaker thinks matters or what Mr. Letter or what the prosecutor thinks isn't material to guilt or punishment doesn't make it less likely, based on the evidence and testimony of Speaker Pelosi, that Mr. Bannon is not guilty of a crime.

And we're dealing with an element of the offense

here, and that is that one of the elements, as we've discussed, is that Mr. Bannon -- the government has proved beyond a reasonable doubt that Mr. Bannon was subpoenaed in accordance with the authority of the U.S. House of Representatives.

At this stage, it's not a legal question. It will be up to the jury. I disagree with the DOJ on that. And Justice Scalia has given the guidance on that in *Gaudin* that it's a fact question for the jury.

With regard to Speaker Pelosi --

THE COURT: Well, *Gaudin* is about pertinency.

MR. CORCORAN: I understand that.

THE COURT: That's not what we're talking about here unless you're arguing that -- is there testimony you would seek from one of these witnesses that goes to pertinency?

MR. CORCORAN: No.

THE COURT: So it's just about whether the House Committee complied with the rules?

MR. CORCORAN: Not really. It's not compliance with the rules. It's whether they acted within the authority that was granted --

THE COURT: That's what I mean.

MR. CORCORAN: -- to them.

THE COURT: I'm using that as a shorthand.

MR. CORCORAN: And so what Speaker Pelosi -- for instance, to get even more granular, what are her reasons for not appointing the full membership of the House? That's something that's in her personal knowledge that would be exculpatory, we believe, if the jury hears it.

What efforts has she made to obtain Mr. Bannon's testimony as required by the contempt resolution?

The contempt resolution, which is H.Res. 730, requires that she take action, all appropriate action, to enforce the Subpoena. That's after the referral has been made to the Department of Justice.

And so we want to ask the Speaker, What efforts have been undertaken? If efforts have not been undertaken, that goes to whether there was a real default, whether there were realistic attempts to reach an accommodation.

The other thing she would testify about are the reasons for not allowing a ranking minority member on the Committee. Again, that may be a disputed factual issue, but that doesn't take it away from the jury. They get to hear our idea, based on the evidence.

And Chairman Thompson, same thing. He testified -- not testified -- well, at the hearing -- at one of his hearings, he didn't testify but he spoke at the very first hearing and said, There's no ranking member. We'd like his testimony on that so that the jury can consider

that as they look through H.Res. 503, which is the resolution setting up the Select Committee.

THE COURT: Didn't *United States versus Bryan* bless -- the Supreme Court decision bless, either explicitly or implicitly, taking away from the jury, which is what the District Court judge did there, the question of whether the Committee had acted in compliance with at least one rule.

MR. CORCORAN: You called it the old *Bryan*, I think, and I agree. It's old and outdated. I mean, now it's clear --

THE COURT: I don't get to ignore old and outdated Supreme Court cases.

MR. CORCORAN: Oh, I understand that. But when we're talking about whether an element of the crime goes to the jury, I think you've got to go with more current precedent, *Apprendi* and others.

I think --

THE COURT: If the House Committee's compliance -- I mean in the general sense and whatever sense one wants to argue about its compliance with the rules -- if that's a defense rather than an element, does that mean it has to go to the jury?

MR. CORCORAN: Yes. Yeah. Yeah.

I mean, the idea is our -- what we want to do is tell the jury what happened. And we want to present the

witnesses who know what happened. And then you will provide the legal framework for how they can consider that, and counsel will argue, as we will, as to how they should consider it consistent with the law. But that doesn't mean we don't get to present it to the jury. We just want to be able to tell them what happened here.

I want to speak to the issue of the cumulative nature of the testimony and whether staff would suffice, because I think they certainly wouldn't. I mean, the issue really -- look, congressional staff play an important role as to staff or any government agency.

But the staff members do not have the authority or the power that is important to a contempt proceeding. They've got no authority to appoint members to the committee. They have no authority to issue subpoenas or sign subpoenas. And they have no authority to deny, on their own accord, an accommodation that is requested by a witness.

Nor do they have any authority, as Speaker Pelosi, does, to make further efforts -- or requirement to make further efforts to obtain Mr. Bannon's testimony and force the Subpoena after the contempt citation.

There's no question that a judicial law clerk has an important role, but he can't sign a search warrant. I mean, we want the actual member, not a designee. And while

we appreciate the House's offer to make two witnesses available, I mean, it's a little bit cold comfort, because the two witnesses that they agree to provide are the ones that the government wants and has listed on their exhibit list. We've got a whole host of others and wish they would allow us that.

The other problem is they've said that they're not going to waive Speech or Debate Clause privilege for those two staff; so the staff essentially can only testify on what they think is appropriate. That's a clash with our ability to elicit from any congressional witness or staff what's necessary to provide a defense to Mr. Bannon.

So our request is that you deny the Motion to Quash and allow us to present these witnesses at trial. If there's some question about the cumulative nature of one member over another, that could be something that is discussed at trial in terms of number of witnesses, as is often the case.

If the Court is inclined to grant the Motion to Quash, then we'd like an opportunity to discuss remedies, because it will certainly infringe upon Mr. Bannon's right to have a fair trial.

Should I move to the Motions in Limine, Your Honor?

THE COURT: Yes.

MR. CORCORAN: Okay.

I think the two that we've filed, the Presenting of the Indictment to the Jury, Document 83 and Document 84, precluding evidence or argument on the January 6th attack are essentially agreed by the parties.

THE COURT: That's the way it seems to me.

MR. CORCORAN: I think -- in terms of the omnibus government motion, I think -- my request, I guess, or suggestion is -- would be to take it under advisement. These are issues that can be resolved at trial. The government has asked for a lot of blanket restrictions that I don't think are appropriate.

Today at argument they said they think we're going to talk about possible punishment. That's not anything we would ever do. Punishment is, of course, not relevant to the jury's consideration as to whether the charges were proved.

I think one key concept is politics. You know, politics is an important part of this case from the start to finish, and in order to present -- guarantee Mr. Bannon a fair trial, we're going to have to have the ability to question witnesses and examine them as to whether politics plays any role in their actions, and obviously the exposure of a witness's motivation is constantly [sic] protected; that's *Davis*, 415 U.S. at 316 to 317.

On the issue of how we can probe the investigation that the government has undertaken, again, that's the same thing. We are not going to argue that in that form, that there was "prosecutorial misconduct."

The issue is, we're allowed to ask witnesses what was done in this investigation and what was not done, so that the jury can be in a position to analyze not just the results of the investigation but the quality of the investigation. And that's *Sager*, 227 F.3d at 1145.

On one -- one other thing that came up is essentially -- and Ms. Gaston addressed this -- the Court's questions about the rules, should they go to the jury or not. At this stage, it's our position -- of course, we fully briefed these issues --

THE COURT: Yes.

MR. CORCORAN: -- and at that stage, we asked the Court and we tried to present enough information that based on the law, we could get the Indictment dismissed, and it didn't happen. Now these are issues that go to the jury.

When it comes to issues such as -- to use your formulation, whether the House followed its own rules, we are not asking the jury to make up any rules or resolve ambiguous things.

What we want to do is go down and present to them evidence on whether or not a ranking minority member was

consulted, whether or not there were the number of committees that were required, in our view, in the continuing resolution and things like that, whether an accommodation was offered.

The arguments that Ms. Gaston made today, persuasively, she can make to the jury because they're jury arguments, because they're not arguments about whether that evidence can come in at all. And we feel that the government is inviting you into error by keeping that important information from the jury.

You know, we went back -- it's kind of interesting -- and I'm not in any way endorsing *Licavoli*, because you know our position on *Licavoli*, which is we don't agree with it. But we went back to look at it and got the trial transcript. It was a little bit like Raiders of the Lost Ark because it's in the National Archives and not online and everything.

But in that case -- and the reason that we wanted to do that is because in the opinion at the circuit level there's reference to defense lawyer testifying. And so the question is, Why is a defense lawyer testifying? What did he get into?

And in that case, that was discussed before the trial. And the judge said, "Of course, I will admit the evidence. I think that a defendant has a right to present

evidence on his theory. I can't exclude it on the ground that the theory is wrong. He has a right to make a record of his theory. Then, of course, I'll instruct the jury that that particular evidence is immaterial." There's more discussion, and the judge says, "I don't think that this is the kind of matter from which I should exclude the jury."

When the witness -- in that case, the defense lawyer testified. He testified extensively about his receipt of the Subpoena, his presence when the Subpoena was served, his communications and his advice to Mr. Licavoli.

In other words, defense gets to present the facts, and then the jury, using the legal framework provided by the judge, gets to make a decision. Is the person guilty or innocent? So that's all we are asking here.

I think with that, I'm through the Motions in Limine.

THE COURT: Very well. Thank you.

Mr. Schoen.

MR. SCHOEN: Yes, Your Honor.

Judge, what I thought I would do is deal with the -- whichever order the Court prefers, the Motion to Continue and the *Meadows* and *Scavino* Motion to Compel, and then I'd like to address the questions the Court asked sort of randomly early on.

THE COURT: I'm happy to hear those two motions in

either order.

MR. SCHOEN: Okay. Thank you, Your Honor.

Ready, Judge?

THE COURT: I'm ready. Are you?

MR. SCHOEN: Yes, Your Honor.

THE COURT: Okay.

MR. SCHOEN: All right.

Let's talk about the *Meadows* and *Scavino* motion first, Your Honor.

We kind of lay it all out in the motion, but to be clear, the declination letters is kind of the first, most fundamental, thing we're talking about here, the reasons given for not prosecuting them. There may be other things that also are not deliberative-process, covered information but we don't know. As they say in the papers, according to The New York Times, they received a copy of these declination letters.

First argument we make is that it comes within the Court's oral order, and it does reflect policy on some level. These are high-profile cases. Someone made a decision on some policy level as to whether to prosecute *Meadows* and *Scavino* and got a lot of pushback on that from the Congress, publicly and otherwise.

The most direct reason that the letters are relevant is because one of the issues here being contested

is whether the invocation of executive privilege was valid here. And now we see, from the letters last night, whether it was specific enough and so on.

One of the fundamental points we tried to make in the motion is executive privilege was invoked in *Bannon* by the same person as agent for the former President, in the same manner, with the exact same language, word for word except for one sentence on immunity in the Bannon letter, Meadows letter and Scavino letter.

If the government is challenging the invocation -- whether there was a valid invocation here -- remember, the Committee challenged, Well, it wasn't -- executive privilege wasn't ever invoked by the former President or to the Committee specifically, and they're challenging the form of that, and here we've seen it was raised in a recent hearing. The Court said it wasn't clear whether executive privilege was invoked unequivocally and so on.

To the extent that the *Meadows* and *Scavino* decisions were based in any part on the invocation of executive privilege and a finding that that was valid, therefore, that it was properly invoked, then they're directly relevant to that issue in this case. Same manner, same person, same language.

THE COURT: You heard my -- the colloquy with government counsel about the three ways in which the

invocation of executive privilege could be relevant here. It could go to mens rea. It could go to the affirmative defenses of entrapment by estoppel or public authority or it could just be -- I'll put it this way -- a freestanding defense or excuse.

I understand Mr. Bannon has clearly argued entrapment by estoppel and public authority are valid defenses that should go to the jury, relying on the OLC opinions, et cetera.

He's also argued at a minimum in the jury instructions for a different view of mens rea than the government, as to which his understanding of executive privilege and the like, as it goes to his head, would be relevant, you know, what was in his head.

Is Mr. Bannon arguing that he is -- the assertion of privilege excuses or is a defense to this prosecution by itself?

MR. SCHOEN: Yes, Your Honor.

THE COURT: Where does that appear in your papers?

MR. SCHOEN: I'm not prepared to answer that exactly right now, Your Honor. But I'll tell you this --

THE COURT: What's the argument?

MR. SCHOEN: It's at the heart of every argument we've made.

THE COURT: Does it go to something other than

entrapment by estoppel and mens rea?

MR. SCHOEN: Yes, it does. Ordinarily, Your Honor, it sounds like a crazy principle that the invocation of privilege would excuse what we call here total noncompliance; usually a privilege log, et cetera.

But the courts and the Justice Department have treated executive privilege as unique. They created -- let's say the OLC opinions, they created this idea that you don't even have to appear.

By the way, Janet Reno in 1999 clemency OLC opinion, which is cited by Cipollone and Purpura, in representing people who have never been employed by the Executive Branch, as applying to them also.

And Janet Reno says, Executive privilege is different, you don't appear. That's what all of the OLC opinions that we've cited to Your Honor say. It's because the executive privilege and the separation of powers element is different from every other kind of privilege that you don't even have to appear or comply.

The other reason -- by the way, there's a second reason offered by Mr. Costello for total -- what they're calling total noncompliance --

THE COURT: I understand. It's just argument. I understand the point. I don't think there's anything binding anyone to some concession. It wasn't total

noncompliance. We're just using that as a term for purposes of advancing the argument.

MR. SCHOEN: Thank you, Your Honor.

The other argument to that is the very specific OLC opinion that says, If agency counsel is not permitted, by rules or otherwise, to accompany the deponent, then the Subpoena is invalid, unconstitutional and can be ignored. So that's another basis for why the invocation of executive privilege itself excused any further compliance in this case.

In terms of, you know, raising executive privilege as a defense like this, again, I pointed out last time, the OLC opinion itself, for example, the Olson memo, specifically says that if one is relying -- I'm reading, Page 135, Note 34. "There is some doubt whether obeying the President's direct order to assert his constitutional claim of executive privilege would amount to a willful violation of the statute."

THE COURT: That seems to me that OLC screwed that up. No one read *Licavoli*.

MR. SCHOEN: I disagree 100 percent, respectfully, Your Honor.

THE COURT: Okay.

MR. SCHOEN: Again, it goes back to our supplemental brief. *Licavoli* did not involve executive

privilege; that changes the whole ballgame. And according to the OLC, it changes the whole ballgame because executive privilege triggers separation of powers --

THE COURT: Is *Licavoli* cited in the OLC opinions?

MR. SCHOEN: No --

THE COURT: So OLC --

MR. SCHOEN: -- because it didn't apply.

THE COURT: -- wrote a bunch of opinions and they didn't address -- I mean, I get that it's a D.C. Circuit opinion, so that rule may not apply in other circuits.

MR. SCHOEN: Judge, they cite plenty of D.C. Circuit opinions in here. And it's hard to imagine Ted Olson, Walter Dellinger -- you know, on and on and on -- luminaries in the law, weren't familiar with *Licavoli* when they were researching the contempt of Congress statute. I don't think it's fair to assume that.

THE COURT: So what's your definition of willful consistent with *Licavoli*?

MR. SCHOEN: You have to have some recognition that what you're doing is wrong, wrongful conduct or violates the law. Mr. Bannon didn't --

THE COURT: How is that consistent with *Licavoli*?

MR. SCHOEN: Pardon?

THE COURT: How is that consistent with *Licavoli*?

MR. SCHOEN: Oh, it's not consistent with

Licavoli.

THE COURT: But I'm bound by *Licavoli*.

MR. SCHOEN: I don't think so because executive privilege is in this case. We've already made that point. I know Your Honor and I disagree, respectfully. But executive privilege changes the ballgame on every level --

THE COURT: So your view then -- I mean, I know this -- we already discussed this, *is that Licavoli* mens rea, holdings and the like, mean that the mens rea under the statute means one thing in executive privilege contexts and another thing and in non.

MR. SCHOEN: Yes, Your Honor. And the cases have said -- the old cases, new cases, there's a dispute -- a question comes up in this *United States versus U.S. House*, Gorsuch wanted to raise executive privilege as a defense. Well, it arose in the civil case, and they say, Listen, this is a very difficult question. Let's not deal with it if we don't have to.

Which, by the way, that case has language in it that goes directly to one of the Court's questions earlier, Are we making a mistake dealing with all of this stuff right now when we may not have to?

I mean, there's case after case that says it's inappropriate for these kinds of issues to be determined in the criminal sphere or otherwise. There's an accommodation

process that's constitutionally mandated.

THE COURT: Why didn't you bring Mr. Bannon's letter to the Committee to my attention in your filing last night?

MR. SCHOEN: One reason is, the media response that we saw today; that is, Oh, Bannon is trying to get out of something. Mr. Bannon has taken a principled stance from day one. And by the way, Your Honor, I only saw it for the first time on Saturday night after I finished my Sabbath observance; that's when I think it came out.

In any event, Mr. Bannon has taken a principled stance. "Bannon: My hands are tied because executive privilege was invoked. My hands, for the first time now, are untied by the person who invoked executive privilege. I can now comply with the Subpoena." Period.

That's his position with Congress. And it was appropriate for him to go to Congress, because that's where the dispute was.

I would like to get into this point. I'm skipping ahead. But the Court asked before, Couldn't this issue possibly go to default? I saw a little snippet of the government's motion last night. I was traveling but I saw a friend, Kyle Cheney, excerpted a part of it in a Twitter feed today, this motion about barring testimony on this thing, and I intend to address it in the papers.

However, of course that testimony has to come in that he's now agreed to testify. The government raised it by way of their Motion in Limine. We didn't raise it. But since it's been raised, of course it comes in. Why? Because there's a factual question here on when there was a default.

On October 19th -- back up a step. The Indictment in this case charges the default on specific dates: October 14th in Count 1, and by October 18th in Count 2.

On October 19th, Chairman Thompson wrote to Mr. Bannon -- this is the 19th, after the date the government claims the default happened -- "These developments underscore the folly of any continuing defiance of the Select Committee's subpoena by Mr. Bannon. The Select Committee remains focused on expeditiously obtaining the testimony and documents necessary to meet our responsibilities, and we continue to expect immediate compliance," compliance with the Subpoena, "by Mr. Bannon."

It doesn't say with the Subpoena. I added that.

"-- compliance by Mr. Bannon. Should Mr. Bannon choose to change his posture, please notify Select Committee staff at 202-225-7800." That's October 19th, after the supposed date of the default.

The contempt referral, Mr. Corcoran referred to it, resolved that the Speaker of the House shall otherwise

take all appropriate action to enforce the Subpoena. The subpoena is still out there to be enforced. So there's a real fact question for the jury on whether there was any default in this case or if compliance with the Subpoena, as Congressman Thompson urged -- (brief pause) -- yeah, Thompson urged, is still compliance with the Subpoena today.

And before, the government, I think, said something like, Well, for a week after, or something like that. That's not relevant. It doesn't matter if it was a week after or a day after, as long as that question is open.

There is a principle in the law that conduct can waive a default. If the parties act like a question is still open and they're still negotiating or they're still urging compliance, then there is a reasonable basis for a jury to find there was no default.

THE COURT: So that goes to the question of whether these letters would be admissible.

MR. SCHOEN: I don't know about the admissibility of letters. Testimony about --

THE COURT: Testimony --

MR. SCHOEN: -- Bannon's willingness now to testify and produce documents.

THE COURT: Whatever evidence is going to be proffered about Bannon's willingness to testify now would, in your view, be relevant at a trial, but it doesn't tell me

one way or the other whether the trial should start on Monday.

MR. SCHOEN: The trial shouldn't -- well, I haven't gotten that continued.

THE COURT: No, but I understand your motion and the arguments you made before about continuance.

MR. SCHOEN: Right.

THE COURT: But while we're on the topic --

MR. SCHOEN: Yeah. Yeah.

THE COURT: -- are you arguing that the trial should be postponed because Mr. Bannon has now made an offer, such that it is, to testify; and it would be inefficient or improper to have a trial while that offer is extant?

MR. SCHOEN: I think, number one, it would be contrary to the constitutionally-mandated accommodation process.

Here's my answer: There's no reason to have this trial starting on Monday when there are two things -- one thing that infringes, in my view without question, on the defendant's constitutional rights. That's the publicity risk that only exists in June and July and doesn't exist in October, when we've proposed, in a case that's never been continued before. And the second reason is this development.

Now, the government posed this development as -- and I saw it in the media also -- cynics. Well, the last minute before trial, to avoid trial. That's the other reason I didn't bring the letters to the Court's attention directly. It's a matter I brought it to Congress' attention. Let's see what they have to say about it. So far they have indicated they would like to hear his testimony.

But this isn't a last-hour move by Mr. Bannon. His principled position has been, My hands are tied. His hands were tied under his understanding of executive privilege, his respect for the invocation of executive privilege by a former President. His hands were now untied for the first time, and that's what he told Congress.

You know, the government mocks this idea about respecting the invocation of privilege by a former President. And, of course -- and I see, again, in the media it's misreported. That's not the status. The status is uncertain at best.

Justice Kavanaugh wrote extensively in his comment on the denial of cert in *Trump versus Thompson*. Certainly *Nixon versus GSA* recognizes a former President can have executive privilege and can invoke executive privilege, but it may be that the current President supersedes that.

So here's another thing: Why no default? On

October 18th, a letter comes from the Office of current President Biden from a guy named Mr. Su, I think, S-U. And it says they've reviewed it and they don't see any reason further for Mr. Bannon to avoid testimony, complying with the Subpoena.

I'm paraphrasing obviously. That's October 18th. That's after the deadline had passed; and that's his view of things, that there's no reason for you not to comply now.

So what does Bannon's lawyer do? He writes to the Committee and says, Listen, I've seen this case, *Trump versus Thompson*. I'd like a week extension to study that.

What's the issue in that case? Exactly this issue -- one of the issues. Again, the Supreme Court took it away from them. But one of the issues is, Can the current President supersede the former President. Or I think it's well settled that he or she can. The question is, Under what circumstances can it be superseded? And so, again, Bannon is trying to find out. And in terms of this, Is the guy seriously trying to comply with the law?

Look at every communication from Bannon's lawyer to the Committee. Bannon will comply with the Subpoena if you work out privilege with former President Trump or you take me before a Court and the Court says, This privilege I'm relying on wasn't valid or orders me to testify otherwise.

So that's why I say it's a principled position. He's offered to comply. He's not a guy who said, Get lost; I'm not complying, and so on. He said very specifically, I will comply but my hands are tied.

I got myself a little disorganized now trying to skip around to the questions.

And again, I know we've made this position to the Court. I don't know if I've made it clear, but I've tried to make it clear, that in terms of the entrapment by estoppel argument, it doesn't matter whether executive privilege was properly invoked; the question is, Did he have a reasonable belief?

And in terms of that argument of whether that would have excused total noncompliance, absolutely. That's his -- the fundamental underlying principle of Mr. Bannon's understanding and his lawyer's understanding and reasonable belief in then OLC opinions is that it's the underlying principles that make clear that once executive privilege is invoked for communications or deliberations between a President and another person, current employee, former employee, outside advisor, that triggers the whole panoply of rights, duties and obligations that are described in the OLC opinions because they flow from the invocation of executive privilege and separation of powers' concerns and the presumption that privilege is valid once it's invoked;

and that executive privilege is different.

By the way, Judge, I think -- I mean, there's an additional argument besides just the jury question on the Indictment. This is not an on-or-about indictment. This is an indictment' that charges the default on the specific dates, October 14th and by October 18th.

There is a legal argument to be made, I believe, that given his willingness to comply now, there can't be a default as a matter of law; and that's based on the conduct that showed that wasn't a drop-dead default date. It no longer existed as a default date by waiver by conduct. But it's, at a minimum, a jury question.

The *Meadows* and *Scavino* thing, to return to that for a moment, by the way, is also relevant. I mean, I cover this to some degree, and we cover this to some degree in the motion. It's relevant because of the -- again, Bannon's underlying belief on the applicability of the OLC opinions. Which I think, by the way, the idea that the Justice Department doesn't consider there to be a distinction between former, current and outside people is also highlighted by the fact that Navarro was indicted. And that's a sort of backwards way of looking at it. But I think that emphasizes it. And some members of Congress have made this statement publicly. They don't see what the distinction was between Meadows, Scavino, Bannon, Navarro.

So it's -- I mean, the Court may disagree with me. I understand this. And I hope, you know, we're going to get a ruling on it today, I'm sure. But it would be unreasonable for someone to read these opinions, especially a layperson, and not believe -- if you look at all of the reasoning in them and all of the language in them, and not believe that they would apply to a person when executive privilege is involved based -- invoked based on communications with the President or deliberations with the President. And, you know, Henry Kissinger, again, is one of the best examples I can think of.

But certainly the question meets the threshold. I'm -- call me crazy. I'm shocked that this is a question that we're still dealing with, quite frankly.

In the Picco case, P-i-c-c-o, there's a real question there whether the regulations the person relied on applied at all or they were outdated regulations and so on. But the Court said this is -- they reversed it and said, This is a question that has to go to the jury --

In *Abecassis*, does anybody really believe that that agent gave Abecassis the right to bring in a heroin deal in one town, while telling him about another town? Was it reasonable to believe in that? But the error the Court made was in not letting us put on the defense, not letting the jury consider it. The threshold is just not that high.

It's not so high that when we see here White House counsel, Cipollone and Purpura, citing to an OLC opinion that deals with Executive Branch advisors, and they're citing it in the context of people never before employed by the Executive Branch, I'd suggest it's not unreasonable for Mr. Bannon to think that those OLC opinions apply also. (Brief pause) Discussed in the papers, you know, why the *Meadows* and Scavino business would be *Brady* and *Giglio*.

And I suppose, you know, if these recent filings, last night's filings, are relevant to this question at all, it is that, again, the government appears to be taking issue through this Justin Clark as to what was invoked, you know, on executive privilege and so on.

And so, again, since he uses the same language, were those same questions asked in the *Meadows* and *Scavino* consideration, and the idea that I read in the Twitter post that the government is complaining, through Justin Clark, that there were no assertions as to specific documents and all that, this was a protective assertion; that's recognized as a matter of law. It's recognized in the OLC opinions, a protected or prophylactic assertion. And some of the cases say, even before privilege is invoked, if we are dealing with communications, then they could be treated as privileged. But there is no impediment here or deficiency because it supposedly wasn't specific enough. Anyway,

Meadows and *Scavino*, Judge.

I think I covered it. It's not deliberative processes. It is *Brady* material, potentially. The fact that executive privilege is invoked in the same manner by the same person and so on is directly relevant to that.

Continuance motion, Judge.

THE COURT: Thank you, Mr. Schoen.

MR. SCHOEN: I was going to get into the continuance motion.

THE COURT: Oh, I thought we discussed it.

MR. SCHOEN: No, Your Honor.

THE COURT: Well, we discussed, at least, the implications of the events over the weekend.

MR. SCHOEN: That's right.

THE COURT: So I don't think anything is rocket science with respect to your motion, but your argument is --

MR. SCHOEN: That might be because I was involved with it, Judge. I'm not close to a rocket scientist. I don't think anything I write is.

THE COURT: But, I mean, it's not complex. How's that?

The argument, as I understand it is, it's really two things. One is, there is currently a lot of public information flowing out of the January 6th Committee, and that would be prejudicial to have a trial now.

MR. SCHOEN: And Bannon has been cited, and specifically we have important, I think, facts and specific details about his mentions. Those mentions are -- those are just mentions of Bannon with respect to the January 6th events, and they skyrocket after the hearings.

THE COURT: How do we know that there won't be similar hearings in October?

MR. SCHOEN: We don't know that. What we do know is, the hearings are scheduled, publicly announced, for tomorrow and the 14th, and they've said they want to report in the fall. But the fact that we don't know that they will continue then, I don't think, is a good enough reason. There are fundamental rights of the defendant at issue here.

THE COURT: Why can't I take those considerations -- why isn't the appropriate course to see whether we can, through voir dire, seat a jury that is appropriately unbiased and the like, and if we can't, because of this reason among others, then we would postpone?

MR. SCHOEN: Well, here's an answer in Mr. Justice Jackson's words: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction, one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may

confidently exclude even the unconscious influence of his preconceptions as to probable guilt engendered by a pervasive pretrial publicity." That's why, Judge. We can't weed that out.

First of all, people come into a political --

THE COURT: So what if the Boston Bomber -- to use an example -- the Boston Marathon Bomber didn't get to move his trial, notwithstanding the unique effects that that conduct had on the City of Boston and the like with all the publicity about both him and the trial, and the judge there didn't move it, and that was not reversed, why is the publicity here substantially worse such that either delay or -- I know you haven't asked to move the trial physically, but why is delay warranted here if not --

MR. SCHOEN: I don't think, Judge, that it has to be worse than another case. I think this case stands on its own facts. This is the seminal event in the country right now, by design. I don't -- by design? They were horrific events that happened.

But the design is to influence as many people on a daily basis as possible; that's their stated purpose in hiring a television producer and in conducting these hearings in prime time and otherwise; that's their purpose. To effect potential jurors, anybody and everybody out there, to change their minds for political reasons and others.

They've said this publicly. So that's one thing, Judge.

But I think another is this principle. Due process requires that the accused receive a trial by an impartial jury, free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

And that's the point here, Judge. There is nothing magic about this block in July, and there are risks that are unique to this block in July. I mean, Judge Kelly found it. The Justice Department from a different office, apparently, consented that there was a risk from that. So why take the risk when we have these fundamental rights at issue?

And I'd say this --

THE COURT: What's the magic behind October?

MR. SCHOEN: Nothing about October, just --

THE COURT: What about August?

MR. SCHOEN: -- it's just a date. I mean, if the question is -- I mean, I didn't pick August because August was when the Judge Kelly trial was scheduled, the end of August, and they moved that. They felt that was still too close in proximity, apparently.

So I don't know that there's a magic date but

October -- from October on, from what we know now --

THE COURT: What is it specifically? Is it the fact that there are these hearings that are happening right now on the eve of trial? And how long between those hearings and the trial date is it, in your view, going to cure it? Because there has to be a cure if --

MR. SCHOEN: Sure. I think that's credible. We picked three months. I think that's a relatively arbitrary date. I don't have any science that show that it would have sufficiently dissipated by then. Based on what we know now, we're willing to accede to the point that that would be a date by which it was sufficiently dissipated.

I would say this, Judge, without any commentary on the current players, but I would say a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. A scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial.

If forcing a defendant to an early trial date substantially impairs his ability to effectively present evidence to rebut the prosecution's case or to establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purposes in the criminal justice system than the delay of a few days or weeks that

may be sought.

I think the overarching principle is, Why now? Yes, we set a trial date of now. We didn't know any of these factors then.

And the other thing, Judge, you know, I understand the government took exception to it because it was raised in a Reply, but we are closer now to the date.

I'm saying, Your Honor -- and I don't say this lightly -- I believe firmly that if forced to trial in a week, we would be providing ineffective assistance of counsel to our client.

And I say that because today, a week ahead of time, we don't know what defenses are permitted in the case. I don't say this is the Court's doing. There have been a rash of Motions in Limine, which in my view have been directed towards simply blocking the jury from finding out what actually happened here. Why did Bannon not comply from Bannon's perspective? Period.

But, anyway, when we develop a defense theory of the case, Judge, that then means plugging in all of the other elements that will be consistent with it from opening to examinations, voir dire, exhibits, witnesses, testimony, exercising the right of compulsory process, exercising the right of confrontation. We can't do that in a week.

Now, sure, we've had time to prepare, but we can't

prepare alternate theories, not know which witnesses to prepare and so on. And we are a week away from trial.

The other thing is, Judge, the government has said here they anticipate their case taking one day, their case-in-chief taking one day. That's not a major lift then to move that trial for that reason alone.

THE COURT: Do you have a sense -- I suspect it depends on some of my pretrial rulings, but assuming that they go largely your way, how long would your case be?

MR. SCHOEN: We've discussed it at some length to try to give the Court -- we said originally two weeks. I happen to think that's longer than it will take. It depends 100 percent on the Court's rulings.

You know, for example, we will -- we would certainly call Mr. Costello as a witness, and he would testify about the events that happened here. But there's, you know, got to be significant cross-examination, which will depend, in part, on what issues the Court says can go before the jury. That cross-examination -- all of these examinations and the development of the theory cannot constitutionally effectively be done on the fly.

I am going to say this, Judge, just as an aside. I know I was mocked last time for saying I have some experience with entrapment by estoppel. But I wasn't led to a government Motion in Limine. We shouldn't brag to the

jury about who we are. Mine was a response to their arguments on entrapment by estoppel. I'm not in the habit of blowing my own horn.

But I will say this, Judge, I bring ineffectiveness cases against lawyers all around the country, and have for about 30 years. The number one problem I see is the lawyer's unwillingness before the trial to recognize the problems. And then the defensiveness and the ego that comes in after the fact in defending practices that clearly were a function of a lack of preparation or a lack of thought.

We've worked on this case 8, 10, 12 hours a day, sometimes 20 hours a day. There's not been a lack of preparation here. But we can't formulate a cogent defense theory and plug everything else into it a week from now, given the things that are outstanding and that wouldn't change from rulings today. I have to say that, Judge. I think I'm duty-bound to say it. The Court may reject it, but that's my perspective on it.

I don't think the Court needs anything else from me.

THE COURT: Thank you, Mr. Schoen.

MR. SCHOEN: Thank you, Your Honor.

THE COURT: Ms. Gaston or Ms. Vaughn? I am happy to hear from either or both of you.

MS. VAUGHN: I will address the arguments defense counsel made, Your Honor.

Actually, even though the Motion to Quash is not ours, a couple of evidentiary issues came up during the argument that I think we'd like to address as the government, since they're related to the trial in this case.

THE COURT: Sure.

MS. VAUGHN: So the Court asked, I think, What would happen if the question was submitted to the jury about whether the rules were followed with respect to someone like Speaker Pelosi? And so I thought it would be helpful to share the government's view of how that would work.

So let's say, for example, Mr. Corcoran cited the rule about whether there was a conferral with a ranking member before a subpoena for deposition testimony.

A conferral is the sort of internal rule requirement that could be at issue in a trial. So if that were an issue, they could present evidence or ask witnesses, Was there a conference between --

THE COURT: Are you conceding this is a question for the jury or are you just saying, assuming it's a question for the jury?

MS. VAUGHN: Assuming it's a question for the jury.

THE COURT: Okay.

MS. VAUGHN: Well, I should make clear that we view the question of whether there has to be someone with a ranking minority title as different from whether Representative Cheney as the Vice Chair needed to be notified under the rules that there was going to be a subpoena for a deposition or something like that.

THE COURT: Okay.

MS. VAUGHN: So let's say that internal rule were at issue. So Kristen Amerling is testifying. The defendant is free to ask her, This rule here that requires that notice be sent to all the members, or whatever the rule is, was that followed? Ms. Amerling, to the extent that she has personal knowledge of something, is a competent witness under the rule so she testifies to that. Then we get to the end of the case, and it's time to instruct the jury.

Because of the Rulemaking Clause, the Court could not submit to the jury the question of whether Ms. Cheney qualifies as a ranking minority member, because the House has spoken on that. The Court could submit to the jury the question of was she, as the ranking minority member, consulted as required by the rules, whatever that rule might be.

So that's how it would actually play out. And that, I think, is dictated by *Rostenkowski*, where it's the Court deciding if there's ambiguity. And *Rostenkowski* and

Barker v. Conroy, I think, is the case. It's the Court deciding whether there's ambiguity and the Court deciding where the House has spoken on a rule, and then it can't leave to the jury to potentially come up with a different conclusion than what the House has come up with.

So when you think about it that way, the defendant can't really show that testimony -- thinking ahead to their request for relief, should it result in a certain way -- the defendant really can't show the testimony they're seeking is materially exculpatory if the witnesses that are already testifying have personal knowledge of what happened.

They would have to then somehow not speculatively establish that there was some kind of material difference that that person was going to testify to as to what occurred. And they just haven't done that.

THE COURT: So I guess I'm -- forgive me, maybe I'm missing something.

Is it the government's position that I have to decide, because it would be unconstitutional to allow the jury to decide, that a House rule is X, if the House has said it's Y? And those are legal questions that I cannot leave to the jury.

But once I decide what the House rules are or once I decide what constitutionally they have to be deferred to, the jury actually gets to decide whether the rules were, as

interpreted by me, actually complied with?

MS. VAUGHN: Yes.

THE COURT: Okay.

So what if I -- imagine hypothetically I say that the House has said there has to be some -- I'm struggling with the question that in this case, in the government's view, would go to the jury.

MS. VAUGHN: Well, because I think, like, there's just no -- no one disputes that there were nine members on the Committee. But just to make up a rule -- let's say there was a rule that the Committee has to have lunch, to talk about the testimony, two days before the deposition.

Well, that obviously raises more factual questions like, Was everyone at lunch? Did they discuss the deposition? There could be factual issues there. So I think it's just difficult in the rules that the defendant has been challenging here -- which, again, he's waived, in our view but -- because there's just no factual dispute. It's almost like there could be judicial notice of the fact that there's only nine members on the Committee.

The problem for the defendant is once -- if he hadn't waived it, the jury would still have to be instructed that you have to accept the House's interpretation of its rule that it's not required to have 13 members.

And so if there were a factual question on how

many members there were on the Committee, they could decide that. I guess the defendant could still argue to the jury if there's some factual question.

THE COURT: I mean, put differently, let's use the inverse of that. If the rule was clear, unambiguous, and the House had adopted the view that there had to be 13 members of the Committee, and there's a factual dispute about whether there were, that would be a jury question?

MS. VAUGHN: In the government's view, yes.

THE COURT: Okay.

MS. VAUGHN: That's the kind of sort of mixed question of law and fact that would go to the jury.

THE COURT: Uh-huh. Yep.

Let's go through the -- let's just, really briefly, go through the other alleged rule violations here. Can you just tick through, with each of the alleged rule violations, what the government thinks is the line between the law and the question for the jury?

MS. VAUGHN: So we've addressed the number of members.

THE COURT: Yes.

MS. VAUGHN: The ranking minority member issue.

THE COURT: Okay.

MS. VAUGHN: So I don't think we -- I mean, we've disclosed in discovery that -- evidence that the

consultation requirements were followed, so it's not clear to me that the defendant is challenging that.

It seems to be what the defendant is challenging is that Ms. Cheney can't qualify because she's not the ranking minority member. But I think, as we talked about last time, the House has made clear that its ranking minority member is like a functional title, if not an official title. So for whatever purposes they need her under the rules, that's what she's doing.

And then providing Rule 3b, I think that that's the kind of rule, under *Rostenkowski*, where it's just clear on its face it has to be provided before there's testimony. And the defendant could elicit testimony that he never got it, and the government would obviously offer testimony that it's because he never showed up and that the Committee was prepared to provide it.

THE COURT: So let's just use that as an example. If I say the rule required the defendant to be provided, no later than his deposition, with these -- with the piece of paper that says X, Y, Z, then it actually would be a question for the jury what the plan was?

MS. VAUGHN: Well, I think in that case, I don't -- that rule, I don't think anyone is arguing there's ambiguity in it.

I think the issue with the other --

THE COURT: No, it's not about ambiguity. It's whether it was complied with.

MS. VAUGHN: Right. So whether --

THE COURT: The rule could be clear but the jury -- I understand your view to be, You, Judge Nichols, need to decide, What does the rule mean? Because to allow the jury to have a view different than the House's view would be unconstitutional.

I say as to this rule, it required X, whatever X was. There's a fact question about whether X occurred.

MS. VAUGHN: Yeah.

THE COURT: And here the X would be, the government's view is, as to this specific rule, the rule allows the provision of this information as late as the day of the deposition. Imagine I agree with that based on the government's argument.

The question, I guess, is -- doesn't the jury then still have to decide, Why was it not provided to Mr. Bannon; and there would have to be some sliver of evidence, at least, in front of the jury about what the House's plan had been?

MS. VAUGHN: Yes.

So if the defendant wants to challenge being provided -- that he was never provided with it, and there was a factual question about that, of whether they followed

the rule, that would be a jury question.

THE COURT: Okay.

MS. VAUGHN: But, again, this was an issue that was known to him at the time and so under --

THE COURT: I understand the view about waiver, yep.

MS. VAUGHN: So I say all that because it's kind of looking ahead to when they start to seek a remedy, should the subpoenas be quashed, that there really isn't -- because of the rules that he is arguing are at issue -- there just really isn't the kind of factual question that's going to make any of these witnesses' testimony materially exculpatory to that question that Ms. Amerling and Mr. Tonolli aren't already addressing.

I think, as well, just looking ahead, to the extent that the defendant wants to seek this remedy, the government just wants to note -- if the subpoenas are quashed, the government just wants to note to the Court that we think that all can be resolved within a day or two.

The defenses and the elements issues have been fully briefed. We've been arguing them for months. If the defendant cannot articulate at this point why what he seeks is materially exculpatory, after he's issued the subpoenas, that's not a showing he's going to be able to make.

So to the extent that the Court quashes the

subpoenas and the defendant wishes to make a motion, the government is happy to come back tomorrow and argue that issue. We don't think that there's any reason to delay addressing that.

THE COURT: What about the general point that Mr. Schoen made, which is there is no magic to July 18th. And to the extent that July is a month where he has -- he, Mr. Bannon -- both particular concerns about publicity and particular concerns about preparation, because there's no magic to July 18th, there's really no reason not to delay, perhaps not for three months, but for some reasonable period of time, just the beginning of trial, almost for reasons altogether unrelated to Mr. Bannon's offer.

What is the magic to July 18th?

MS. VAUGHN: Well, the magic is that the defendant's not the only one with speedy trial concerns. The public has one too. And there has to be a basis under the Speedy Trial Act to push this and exclude time.

So I'll start with the publicity. Courts are uniform that a defendant being named in a news article, even a lot, is not sufficient to either move venue or engage in a lengthy continuance.

Here the defendant's cited to less than 30 seconds of mentions of him in the hearings. He has cited in a number of mentions in the media within a day but has

provided no information about what those mentions are.

I mean, the defendant is a public figure. He seeks publicity himself. The Court can't just look at a number that the defendant has provided and say, Well, that's clearly pretrial publicity about this case, which is the next issue.

The question of whether there's prejudicial pretrial publicity is about whether the publicity is about this case, whether the publicity is aimed at shaping potential jurors' views of this case.

The fact that it's not an automatic continuance for actual January 6th defendants, when these hearings are going on, means it is -- it definitely should not be an automatic continuance for someone whose case is sort of ancillary to the subject matter on which the hearings are focused.

The cases that Mr. Schoen cited, they all assume that we already have jurors that are prejudiced beyond an ability to be fair. That is not the kind of publicity that's at issue here, and there's no reason to think that --

THE COURT: Okay. What about their argument that there is a lot going on. There are lots of motions, including a motion that was filed last night at midnight. And because of that, there's only a week to -- assuming I decide a bunch of motions today, there is only a week to

figure out openings and directs and cross and, you know, maybe in a simple case that would be enough but in a difficult, complicated case, that's not enough. And, again, there is no magic to July 18th. What's your response to that?

MS. VAUGHN: Your Honor, my response is that the defendant purposefully manufactured this. He requested this schedule. In his initial request, he didn't want any of the Motions in Limine to be filed until the later date on which we filed them.

THE COURT: But to be fair, to go back to the original discussion about scheduling, the government wanted to move faster, and Mr. Bannon wanted to move more slowly. And I didn't, like, split the baby so to speak, just to split the baby. But I arrived on this date, which was faster than Mr. Bannon had requested originally. He wanted a later trial date.

MS. VAUGHN: Mr. Bannon has provided us his witness list. We've done our jury instructions. We've exchanged objections to witnesses. We've exchanged potential voir dire.

They -- they're experienced attorneys, Your Honor, and this claim that they haven't been planning for contingencies, the government just doesn't find credible. To the extent that the Court is entertaining this, we submit

that the Court should engage in a questioning, in camera, with defense counsel to evaluate exactly what it is they don't think that they have done, that they have to do, to provide effective assistance.

This claim is coming at the end of filing a Motion to Continue for Pretrial Publicity, a motion to -- a suggestion to this Court that they also wanted to continue at some point to build their legislative purpose record, a suggestion now in that the motions schedule they requested isn't working for them, and a last-minute effort to comply with the Subpoena.

It's just not -- I understand the defense has to advocate for their client. Their client doesn't want to go to trial. But it's just very telling that they are making this claim at noon on Monday after they've had argument on all of these other issues.

So the government would submit that at least the Court should inquire as to specifically what it is they think they still need to do. And, again, balance that against -- especially if the defendant -- all these extraneous defenses are excluded, the issues in this case, as they should be, are very narrow. It's about whether he got a subpoena, whether he knew about it and whether he showed up when he knew he was supposed to be there. Which I can go to the Motion to Exclude and the *Meadows/Scavino*

issue from there.

THE COURT: Sure. Briefly. I have the arguments so I don't think you need to --

MS. VAUGHN: One thing I just want to point out is the Court asked Mr. Schoen how executive privilege independently provides a defense to this case, and Mr. Schoen only just kept citing back to DOJ opinions. But DOJ opinions, one, they don't provide an excuse but even if they did, they're not the law. And he has not shown that under the law executive privilege provided a basis for total noncompliance.

They talk a lot about showing up for testimony. What they don't talk about is the document demand. How are communications with the Proud Boys and the Oath Keepers possibly relevant to executive privilege? How are communications on his podcast possibly relevant to executive privilege? They don't address any of that.

So to the extent that they now are making an independent claim that this case should be dismissed based on executive privilege, the law just simply isn't that broad when it comes to executive privilege.

I have to go back to the entrapment by estoppel point one more time, because Mr. Schoen continually just discusses about how he had a reasonable belief, reasonable belief, reasonable belief. He completely ignores the first

element that there has to be an affirmative statement. The government submitted with its proposed jury instructions an example instruction out of the Ninth Circuit. There are several others.

It is not just the defendant's reasonable belief; that's a mistake of law defense. It is, There has to be an affirmative statement. And this notion that a defendant can piece together statements that he's pulled out of five different documents is just completely without limit.

I don't see why any defendant couldn't find some 20-year-old pleading and say, Well, I read this line out of a pleading. I therefore have an entrapment defense. The defendant just keeps ignoring that requirement and has not, to this day, identified a single statement, which is why he can't even begin to show that the *Meadows* and *Scavino* issues are relevant.

I think, unless the Court has anything else, that's everything.

THE COURT: Thank you, Counsel.

Mr. Corcoran, briefly.

MR. CORCORAN: Yeah, 30 seconds on the rulemaking issue. And this may be self-evident, but the suggestion was that the jury would have some sort of a view on the House Rules that would somehow create an unconstitutional conflict with what's been expressed as the House of Representatives'

position on the meaning of the Rules; that's not going to happen.

There's a jury verdict form that's going to have two questions: Guilty or not guilty on Count 1 and Count 2. We don't impeach the verdict of the jury. Whatever their verdict is in the case, it is not going to be a statement on what the meaning of the House Rules are, and so there could never be a constitutional violation based on that.

MR. SCHOEN: (Inaudible)

THE COURT: Okay. Mr. Schoen?

MR. SCHOEN: The idea that we should move forward because we provided our witness and exhibit list is just an outrageous statement to make. The government was told clearly, and we filed in our papers, that we're not in a position to make out an exhibit or witness list.

The government filed this motion to file separately. It's true. It is misery for us to have to deal with them in this meet and confer process. It is misery. But the Court ordered us to do it, so we crafted together a potential witness and exhibit list while reserving the rights. It's outrageous to say that's a reason to move forward because we provided it. That's just not honest. It's not honest to say we haven't identified a single OLC opinion that we've relied on. They say two things --

THE COURT: No, I understand your argument there.

I get it.

MR. SCHOEN: Okay. Yeah. And the last thing is I don't know what argument they're saying we're making Monday at noon. We said in our papers why we can't be prepared for this thing. It's not -- I understand. They would like to go to trial, you know, November 13th last year if they could.

But we have an obligation to our clients, and we have an obligation to the Constitution. And the Constitution provides for fair trial rights and the right to effective assistance of counsel, and we have the obligation to speak up otherwise.

So all of this, you know, casting it off. I don't know what it takes. I don't know what could happen here, what they need this for. A lot of it; that's what we need. They want to know what we need specifically, we need to know what defenses we're going to have and then build a case around that. We need to know all of the outstanding things that are pending before the Court. And, again, we don't sit at home doing modeling, Well, let's plan a defense and then jump into action depending on what that's going to be.

It's simply not fair. Believe me, I don't say it lightly when I have to say publicly we cannot provide effective assistance of counsel.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Schoen.

I'm just looking at the clock. My goal is today to resolve orally at least a number of the pending motions. I would like some time to reflect upon what I've heard this morning.

I think the most appropriate course is to reconvene at 2 p.m., but it need not be in person. That is to say, I am happy to -- if people have things they need to do or would rather not stick around in the courthouse for an hour and 20 minutes and the like -- do this by phone if people would prefer, because I don't intend to have anymore argument on the questions that I'll be resolving. I suppose there may be some issues we should be discussing, but it could be done as well by phone.

So I guess I'm willing to either come back into the courtroom and for people who would rather just listen by phone to open a public line or I'm willing to just do it by phone, if that's everyone's preference. I am open to either.

Ms. Vaughn? Ms. Gaston? Do you have a view? Would you rather just do it by phone?

MS. VAUGHN: We're fine to come back in person, Your Honor.

THE COURT: Okay. Counsel?

MR. SCHOEN: In person, Your Honor.

THE COURT: All right. So let's do that then.

Why don't we make it 1:30? I was thinking 2:00 only because, if we were going to do it by phone, then I would be keeping people around for less time, but 1:30 means 50 minutes from now. So let's do that. Let's go to a recess. I'll come back at 1:30 and issue an oral decision on these questions. Thank you.

DEPUTY CLERK: All rise.

(Court recessed from 12:44 p.m. until 1:35 p.m.)

DEPUTY CLERK: We are now back on the record.

THE COURT: Thank you, Ms. Lesley.

Thank you for the argument this morning, Counsel, and for all of the briefs that have been filed on all of the pending motions.

Before me are multiple motions from two related matters. Obviously, *United States versus Bannon*, but also *In re Nonparty Subpoenas*, the miscellaneous action filed to quash the subpoenas to various House members and staff. I will resolve all or at least a number of the pending motions today.

A number of those motions turn on three key issues in this case. The first is the mens rea required for a violation of the statute. That is, what does it mean to willfully make default? The second is whether Mr. Bannon can present to the jury his affirmative defenses of

entrapment by estoppel or public authority. And the third is whether and to what extent Mr. Bannon can present his claims that the Select Committee or at least the Subpoena issued to him is not in compliance with the House Rules.

I'll discuss each of those three sort of overarching issues in turn, along with how, in my view, the resolution of those questions resolves the pending motions. So, as I indicated, the first question is what does the mens rea willfully in 2 U.S. Code, Section 192 mean? That is, what does it mean to willfully make default?

In their proposed jury instructions and various briefs, the parties present very different definitions of willfully. The government argues that it means deliberate and intentional. The government contends that willfully "does not mean that the defendant's failure or refusal to comply with the Select Committee Subpoena must necessarily be for an evil or bad purpose. The reason or purpose of failure or refusal to comply is immaterial so long as the failure or refusal was deliberate and intentional and was not a mere inadvertence or accident."

Mr. Bannon, on the other hand, as we discussed earlier, argues that to prove he acted willfully, the government must show that he "was conscious of wrongdoing." He argues therefore that it must be shown that he "acted on his own volition and knew or should reasonably have known

that his conduct was unlawful."

Thus, in his proposed jury instruction, Mr. Bannon proposes that the Court instruct the jury that willful default "means that Mr. Bannon knew or should reasonably have known that his conduct was unlawful, was conscious of wrongdoing, and that his actions were deliberate and intentional and not the result of accident, mistake or misunderstanding or the assertion of a valid privilege."

In my view the precedent from the Court of Appeals and the Supreme Court on this question is unequivocal and on point. In order to demonstrate that Mr. Bannon acted willfully, as that term is used in Section 192, the government need only prove beyond a reasonable doubt that Mr. Bannon acted deliberately and intentionally in failing to comply with the Subpoena.

As the Court of Appeals explained in *Licavoli*, "It was established by the *Bryan* and *Fleischman* cases that he who deliberately and intentionally fails to respond to a subpoena willfully makes default. Evil motive is not a necessary ingredient of willfulness under this clause of the statute. A deliberate intention not to appear is sufficient."

It was established by the *Quinn* case that a deliberate intentional refusal is an element of the offense of refusing to answer a pertinent question under the other

clause of the statute. We discussed this in *United States versus Deutch*. So it is established that the intent essential to constitute an offense under these two clauses is the same in nature of deliberate, intentional failure without more, in each case.

And there are other relevant quotes. I'll just read one more. "It has been established since the *Sinclair* case that reliance upon advice of counsel is no defense to a charge of refusing to answer a question. Such reliance is not a defense to a charge of failure to respond. The elements of intent are the same in both cases. All that is needed in either event is a deliberate intention to do the act. Advice of counsel does not immunize that simple intention. It might immunize if evil motive or purpose were an element of the offense, but such motives or purpose is not an element of either of these offenses. We are of opinion that the doctrine laid down in *Sinclair* applies also to a charge of willfully making default. Advice of counsel cannot immunize a deliberate intentional failure to appear pursuant to a lawful subpoena lawfully served."

And then it goes on to summarize the holding, which I think is important here. In the case at bar there can be no serious dispute about the deliberate intention of *Licavoli* not to appear before the Committee pursuant to its subpoena. That he meant to stay away was made abundantly

clear. That he did so upon the advice of a lawyer is no defense. The trial judge correctly instructed the jury.

And it's worth noting that the arguments made by Mr. Licavoli in that care are much the same as Mr. Bannon's. And again, to quote the *Licavoli* decision, *Licavoli*'s principal point here is that the trial judge erred in refusing to instruct the jury that if the accused acted upon the advice of counsel, they should acquit.

Indeed, the judge instructed to the contrary. The Court of Appeals, of course, concluded that this contrary instruction was proper. These are clear and express holdings that, in my view, are binding here.

As I've stressed many times, I have serious reservations that the Court of Appeals' interpretation of willfully is consistent with the modern understanding of the word. It's not consistent with modern case law surrounding the use of that term, let alone the traditional definition of the word. But as I've previously held and I reiterate again today, I am bound by *Licavoli* and its holdings.

So what does that mean for the pending motions? First, as I've previously held, Mr. Bannon cannot present evidence that he relied on advice of counsel as the reason for declining to appear or produce documents. The same goes with the OLC opinions and other DOJ writings.

Mr. Bannon cannot present evidence regarding those

documents to demonstrate that he believed he was not required to comply with the Subpoena, since that question is irrelevant to whether Mr. Bannon deliberately and intentionally failed to comply with the Subpoenas. So too with his assertions of privilege. As a general matter, none of that evidence can justify his failure to appear or produce documents under *Licavoli*.

But that does not necessarily mean that all evidence covered by the government's motions is irrelevant. In my view, Mr. Bannon is entitled to offer evidence that would tend to show he was not aware of the return date on the Subpoenas, for example, or that he did not otherwise intentionally fail to comply with them for a similar reason.

For such evidence to be relevant, however, Mr. Bannon would need to demonstrate at trial that such evidence would tend to establish that his failure to appear or produce documents was either not deliberate or not intentional, as the Court of Appeals has used those terms. If Mr. Bannon cannot make such a proffer with some showing that would tend to go to his mens rea so defined, then the evidence would be altogether irrelevant and excluded.

Take an example: If Mr. Bannon were to introduce evidence at trial that he did not believe that the date for complying with the Subpoena was the operative one, that evidence would likely be admissible. After all, Rule of

Evidence 401, which renders evidence relevant, unless admissible under Rule 402 -- excuse me.

After all, Federal Rule of Evidence 401 renders evidence relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

I note that this is not a method through which Mr. Bannon can argue that he thought, for example, that he was legally excused from responding to the Subpoena or that the Subpoena was invalid, be it from the composition of the Select Committee or some other alleged flaw.

Such arguments would not go to any aspect of willfully, as the Court of Appeals has defined it. It would not show that the failure to attend was not deliberate and intentional. Thinking one is legally excused from responding to a subpoena or that a subpoena is not valid is not the same as thinking that the date had been put on hold. While such evidence, that is, thinking that one is legally excused from responding to a subpoena or that a subpoena is not valid would be admissible under a more common understanding of willfully, that is not the operative one here.

So to the specific motions, the government's Motion in Limine to Exclude Evidence of Department of Justice Subpoenas and Writings, ECF No. 52, is granted in

part and denied in part.

This evidence is excluded to the extent that Mr. Bannon would offer it to show that he was legally excused from responding to the Subpoena or that he believed that he was; that the Subpoena was invalid or he believed it was; or that he was not otherwise required to respond to it.

But such evidence might, and I stress might, be relevant if Mr. Bannon was prepared to offer evidence that he did not think the date on the Subpoenas was operative. It might be that Mr. Bannon cannot proffer that he intends to introduce such evidence. If not, then this evidence would be entirely irrelevant and excluded.

But before such a proffer is made or not, and I will not require Mr. Bannon to make one before trial begins, granting this motion in its entirety is premature. I do note, however, that this decision says nothing about whether such evidence -- talking about the evidence covered by the government's motion, ECF No. 52, can be introduced to support an entrapment by estoppel or other affirmative defense, which I will discuss later.

Next is the government's Motion in Limine to exclude evidence of the defendant's prior experience with subpoenas, ECF No. 56. I will also grant this motion in part and deny it in part as well.

To the extent that Mr. Bannon would attempt to

introduce such evidence for the purposes of explaining that he did not think he had to comply with the Subpoena or that his understanding of privilege exempted him from following the Subpoena's commands, then it cannot be admitted.

Again, if Mr. Bannon can proffer that he intends to show that he did not believe the return dates on the subpoenas were operative, perhaps because his prior experience led him to believe that the return date had been or maybe would be moved, then the evidence may be relevant.

I stress, once again, however, that such evidence is only relevant so long as it would go to one of the narrow aspects of mens rea element so defined by the Court of Appeals. If Mr. Bannon cannot proffer that he would intend to make that showing, this evidence would be entirely irrelevant.

These thoughts also resolve one part of the government's Omnibus Motion in Limine, ECF No. 85, Section I.F of the Omnibus Motion seeks to exclude testimony from defense counsel based on their "claimed experience." Again, that motion is granted in part and denied in part or that portion of the motion.

The motion is granted to the extent that such testimony would be offered to show that the advice that counsel gave Mr. Bannon included that he had a justification not to comply with the subpoenas. To the extent it tries to

show that privilege or OLC documents justified Mr. Bannon in not complying or to the extent that it was offered to show that the subpoenas were invalid, or to the extent that this testimony might shed light on Mr. Bannon's subjective belief as it relates to the narrow mens rea requirement. If, for example, counsel had told Mr. Bannon that they were in negotiations with the Select Committee, and that the date on the subpoenas was no longer the operative one, then the evidence might be relevant.

In light of what I've just said, it's also worth clarifying, if necessary, my previous order, ECF No. 49, on the United States' Motion in Limine to Exclude Evidence or Argument Relating to Good-Faith Reliance on Law or Advice of Counsel, which was ECF No. 29.

To the extent that Mr. Bannon seeks to argue that his failure to comply with the Subpoena should be excused because he relied in good faith on the advice of his counsel -- and thus that he did not comply with the Subpoena because he did not think it was valid as it applied to him or he had a justification for not doing so -- such evidence is clearly irrelevant in light of *Licavoli*.

But as I just noted, to the extent that discussions with counsel might go to Mr. Bannon's subjective belief about whether the date on the subpoenas was operative, that evidence could be relevant. Advice of

counsel that the Subpoena was invalid or that he was excused from attending, of course, would remain barred.

It's worth repeating, again, how relatively low the bar is for satisfying the mens rea of the statute. Under *Licavoli*, which binds me, the only question is whether the failure to appear was deliberate and intentional and not due to inadvertence or accident.

If evidence is irrelevant to that question, if, for example, it doesn't go to the question of whether Mr. Bannon understood the date for compliance with the Subpoena or something similar, then it is inadmissible.

I do want to reiterate my concerns with the mens rea standard as held by *Licavoli*. Evidence regarding the reasons that Mr. Bannon did not comply with the Subpoena here, for example, because he didn't believe the Subpoena was valid or because he was -- he believed he was legally excused from showing up as a result of the former President's implication of executive privilege or because he relied on his lawyers' advice on these topics, these are relevant to the criminal charges here and therefore inadmissible.

Such evidence would likely be admissible, however, under a different definition of willfully. It's likely, for that reason, this dynamic created by this low bar of willfully, I think is one reason that Mr. Bannon may seek to

introduce this evidence through the affirmative defenses of entrapment by estoppel and public authority, which I will discuss now.

So, as I indicated, the second sort of overarching, relevant issue is whether the affirmative defenses of entrapment by estoppel or public authority can go to the jury. I conclude that they cannot.

Begin with the defense of entrapment by estoppel. As I explained at the June 15th hearing, none of the OLC opinions or other DOJ statements concern a situation involving communications by a nongovernment employee with the President who, at the time of the Subpoena, was no longer in office.

That dooms any invocation of entrapment by estoppel. While neither the Supreme Court nor the D.C. Circuit has laid out the precise elements required by this defense, I agree with the following statement from the Eighth Circuit. "Entrapment by estoppel arises when a government official tells a defendant that certain conduct is legal and the defendant commits what otherwise would be a crime in reasonable reliance on that official representation."

That's the *Peithman* case, 917 F.3d at 648. So assuming that this defense could even extend to documents, like OLC opinions -- and I do believe the government

appeared during the last hearing to concede that it could, none of the documents Mr. Bannon points to deals with his situation specifically, and none of them is equivalent therefore to a government official telling him that his conduct is legal such that the government would be estopped from pursuing the charges here.

At best, Mr. Bannon can draw inferences from the opinions to his situation combining the underlying legal principles from those opinions to the specific factual situation here.

But because none of those opinions deals with this precise factual situation, none standing on its own could guide his decision. Entrapment by estoppel requires a much more precise showing than one by inference, and there are a number of cases to that effect, including *United States versus West Indies Transportation*, 127 F.3d 299, Third Circuit. So too here.

While the OLC opinions might, by their own terms, apply to somewhat similar situations, they do not cover the precise one here. Because of that, I will not instruct the jury on this defense. And since I will not instruct the jury on this defense, any evidence related to it is irrelevant.

Turning next to the defense of public authority. Again, the D.C. Circuit has not laid out the precise

contours of this defense. But I agree with the Eleventh Circuit that: "A defendant may assert a public authority affirmative defense when he has knowingly acted in violation of federal criminal law but has done so in reasonable reliance on the authorization of a government official." That's the *Alvarado* case, 808 F.3d 474, Eleventh Circuit 2015.

The Court went on to say, "The public authority defense is narrowly defined, however, and a defendant will not be allowed to assert the defense or to demand that the jury be instructed on it unless he meets certain evidentiary prerequisites. First, as the name of the defense implies, a federal law enforcement officer must have actually authorized the defendant to commit the particular criminal act at issue, and the defendant must have reasonably relied on that authorization when engaging in that conduct.

"Second, the government official, on whom the defendant purportedly relied, must have actually had the authority to permit a cooperating individual to commit the criminal act in question. If, contrary to the defendant's genuine belief, the official possessed no such authority, then the public authority defense cannot be asserted."

As I understand it, Mr. Bannon seeks to base this defense not on the OLC opinions or not specifically but also at least on the instructions on former President Trump. The

former President, in his civilian capacity, is by definition not a federal official. This defense simply does not fit the circumstances of this case.

Especially true, given under these circumstances, the former President never instructed Mr. Bannon to not show up altogether. The letter from President Trump's counsel, on which Mr. Bannon relies, instructed Mr. Bannon to, "(a) where appropriate, invoke any immunities and privileges he may have from compelled testimony in response to the Subpoena; (b) not produce any documents concerning privileged material in response to the Subpoena; and (c) not provide any testimony concerning privileged material in response to the Subpoena."

President Trump's counsel later clarified in an email to Mr. Bannon's counsel that, "Just to reiterate, our letter referenced below didn't indicate that we believe there is immunity from testimony for your client." The lawyer continued, "As I indicated to you the other day, we don't belief there is."

I will therefore not instruct the jury on a defense of public authority, and I will exclude the evidence that would go to that defense. It is also worth noting Mr. Bannon seeks to have me instruct the jury on the defense of apparent authority, which I will not do, because the defense has never been authorized in this or any other

circuit.

I'm repeating myself to some extent, but it is worth acknowledging that this outcome, together with my decisions relating to willfulness, might seem anomalous. After all, it seems like the jury should hear the defendant's side of the story that, for example, he was acting on advice of counsel about OLC opinions or that he thought that his conduct was consistent with the former President's invocation of executive privilege.

But this evidence cannot establish the affirmative defenses of entrapment by estoppel or actual authority. Instead, those defenses are something of a round hole into which Mr. Bannon seeks to fit evidence that would be more naturally relevant to determining whether his alleged noncompliance was willful. But, again, *Licavoli* makes such evidence irrelevant. So the government's motion as to the defenses of entrapment by estoppel and public authority is granted.

The third major issue relates to whether and to what extent questions regarding whether the Select Committee is operating consistent with House Rules are questions for the jury. Mr. Bannon has raised challenges to the composition of the Select Committee as well as particular challenges to the alleged failure of his subpoena to comply with certain House Rules. Many were presented in his Motion

to Dismiss the case. But as I explained at our last hearing, those arguments did not warrant dismissal of the Indictment.

The question now is whether these arguments go to issues that must be decided by the jury. As an initial matter, I conclude that they are not relevant to an element of the offense. Rather, Mr. Bannon's challenges, based on noncompliance with House Rules, are best characterized as defenses to the charge at issue.

I think that's the clear implication in *United States v. Bryan*, and it would be odd at the very least to say that something can be waived. And it is the case that challenges to House Rules can in certain circumstances be waived. It would be odd to say that something that can be waived is an essential element of the defense.

But as I discussed, Supreme Court precedent on this matter is clear, challenges to a committee's failure to comply with House Rules can be waived. And the Supreme Court has stated in other cases that rules, compliance challenges, are defenses not elements of the offense. For example, in *Yellin*, at 374 U.S. at 123, the Court stated that the defendant, "would be entitled to acquittal were he able to prove his defense."

In my view, therefore, compliance with the House Rules is not therefore an element of the offense. But can

Mr. Bannon present these defenses and evidence regarding them to the jury?

As the Court of Appeals has made clear, a defendant may only present a defense to the jury "if the record contains sufficient evidence from which a reasonable jury could find for the defendant on his theory." That's *Akhigbe*, 642 F.3d at 1083. I conclude that, for the most part, this evidence is excludable and will not be presented to the jury for two different though somewhat related reasons.

First, Mr. Bannon has waived his arguments, at least some of them. The Supreme Court held in several decisions in the 1950s and 1960s that claims that a congressional committee is in violation of a rule -- and therefore defenses based on such alleged violations -- can be waived by failing to make them to the Committee.

As the Supreme Court put it in *United States versus Bryan*, "if respondent had legitimate reasons for failing to produce the records, a decent respect for the House of Representatives by whose authority the subpoenas issued would have required that she state her reasons for noncompliance upon the return of the writ."

As the *Bryan* Court continued: "To deny the Committee the opportunity to consider the objection or remedy is in itself a contempt to its authority and an

obstruction of its process."

As the Court of Appeals explained in *Shelton*, "Contempt which might be avoided if valid and timely objection is made and denied is not avoided by refusing to produce what one lawfully could not be required to produce if such objection had been made and denied." And the Supreme Court reiterated the *Bryan* rule a decade later in the cause of *McPhaul versus U.S.*, 364 U.S. 372.

To be sure, the Court in *Bryan* did note that the alleged defect there, the alleged lack of quorum, "was one which could easily have been remedied." That's a quote. And here the alleged rule violations that Mr. Bannon points to are ones that would not be so easily remedied. But even *Bryan* itself seemed to walk away from a suggestion that waiver occurs only with respect to rules/violations that are easily remedied.

To take a hypothetical the Court itself offered: "Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason, may he defend a prosecution for willful default many months later on the ground that he had not been given a sufficient time to gather the papers? We think such a contention hardly tenable."

Courts have suggested that such defenses are not waived when the claimed violation of the rules could not

have been known by the subpoena recipient at the time. As the Court of Appeals has phrased it, "the objection which the Court held should have been raised was one which the witness had fully perceived at the time he appeared." That's *Liveright*, 347 at 475.

But here, there's no serious argument that Mr. Bannon could not have known of the alleged rules violation he now points to. The composition of the Select Committee, the alleged lack of a ranking minority member and the like were publicly known and discussed and was readily available to Mr. Bannon as an objection at the time as they are now. Mr. Bannon "had reason to be aware," in the language of *Liveright* of, these violations.

I indicated there were two reasons that I think most of this evidence is excluded. And the second is, waiver aside, as the government has correctly argued, the question of what the House Rules require is a legal question. That includes the question of whether a particular rule is ambiguous and whether the House has taken a view on a particular rule.

So those are questions what I must resolve as a legal matter. And I conclude that the rules Mr. Bannon alleges violations of were, at a minimum, ambiguous and the House has indicated its views of those rules. In other words, I must defer to the House's own interpretation of its

rules. Any other rule, a rule that would allow me or the jury to second guess the House's own view of the meaning of its own rules and resolutions, would raise serious separation of powers concerns.

The Rulemaking Clause vests exclusive control over the House's rules with the House. As it says, "Each House may determine the rules of its proceedings." To allow a jury to say that the House's rules mean something different than the House understands them would be to wrest that Constitutionally-prescribed power from the Legislative Branch and to bring it into the Judicial Branch. Thus, separation-of-powers concerns require me to decide these questions as a matter of law and to defer to the House on its own interpretations of its rules.

I conclude that, as to almost all issues, the House's rules were -- or that Mr. Bannon could not present evidence that the House's rules were not complied with. By making several contempt referrals to the Department of Justice and in various briefs it is filed in this court, including in this case, the entire House has, on multiple occasions, ratified that the Committee is validly constituted and operating. That really resolves questions about the number of members and whether Ms. Cheney is acting as the ranking minority member.

But as we discussed earlier, if there is some rule

on which the House's view is apparent but a factual dispute about whether that rule was complied with, that might be an appropriate question for the jury. If, for example, the House rule required Mr. Bannon to be provided with information before his deposition began but a question about whether it did so, including the question of whether the Committee intended to give Mr. Bannon that information on the day of his deposition, in that context the jury might need to reach that mixed question of law and fact. But as I understand it, there is not really such a defense pending before me.

I therefore conclude that rules-based objections to the composition of the Select Committee are not an element of the charge but are a defense. And subject to the kind of rules-based defense being presented at trial that includes an open question of fact, such evidence is excluded from the trial here.

Note, however, this is a separate question from whether the Select Committee has a valid legislative purpose. As I've previously indicated, that is a question of law that the Court of Appeals has already answered in the affirmative.

So how does that leave us on some of the other pending motions? The first is the government's Motion in Limine to Exclude Evidence Relating to Objections to

Subpoena that Defendant Waive; that's ECF No. 53. For the reasons discussed, I'll grant this motion.

The defenses discussed in that motion that Mr. Bannon might wish to raise were ones that he either was or reasonably should have been aware of at the time of his alleged noncompliance. Since he did not communicate these objections to the Select Committee at the time, I must conclude that the defenses are waived. In any event, such evidence is irrelevant to questions that will go to the jury.

As to Section II.A of the government's Omnibus Motion in Limine, the government contends that the Select Committee's constitutional and statutory legitimacy are not factual questions for the jury. They seek to exclude evidence relating to them as a result. The government is correct, at least as the issues discussed in that motion.

Whether the Select Committee has a valid legislative purpose is a pure question of law, one that the Court of Appeals has endorsed, Mr. Bannon cannot offer contrary evidence to this point. It's a question of law that won't go to the jury. And I've already discussed the questions about the Select Committee's compliance with House rules. Therefore, part II.A of the government's omnibus Motion in Limine is granted.

So having addressed those three, sort of, general

overarching legal questions, there are still a number of outstanding motions for me to deal with. I'll turn to those.

First is Mr. Bannon's Motion to Exclude Evidence, ECF No. 56, relating to evidence that the government acquire from subpoenas of cell phone and email records for and interviews with and letters with Mr. Bannon's attorney, Robert Costello. I've effectively already granted part of this motion.

As I noted in the prior hearing, I do not expect the government to introduce any evidence obtained through subpoenas relating to Mr. Costello's phone records or email addresses, certainly not regarding the email addresses of random people named Robert Costello that the government incorrectly subpoenaed. The former evidence about Mr. Costello's emails and phone records I anticipate being entirely unnecessary, and the latter of course is wholly irrelevant.

Should at trial the government truly believe it is necessary to introduce such evidence, it will need to make a proffer outside of the presence of the jury, and I will be very skeptical that any such proffer will be sufficient. But until then, I'll grant the motion as to that information with the understanding that I may consider this decision if truly necessary and raised by the government.

As to evidence gleaned from interviews with Mr. Costello or letters of the Committee however, the motion is denied. Mr. Costello knowingly engaged in those interviews, and the evidence is thus not appropriate to exclude, at least not at this stage, although it must go, regardless of the party introducing it, to an element of the offense as I've defined them.

The second is Mr. Bannon's Motion in Limine on Presenting the Indictment to the Jury. The motion is granted. This matter is within my discretion and given the speaking nature of the Indictment, I find it inappropriate to have it read or otherwise presented to the jury in its totality.

I note that the government doesn't oppose this motion. When it comes to jury instructions, when we get there, I do think it would be appropriate to advise the jury of the specific charges that Mr. Bannon faces, but I don't think it's appropriate to read the indictment in this matter.

The next motion is Mr. Bannon's Motion in Limine to Preclude Evidence or Argument Regarding the Attack on the U.S. Capitol. That's ECF 84. I'll grant this motion as well, to the extent that it covers general or specific discussions of the nature of the January 6th events.

That being said, I won't prohibit the government

from using, at least sometimes, the full title of the Select Committee. I do admonish the government that unnecessary invocation of the full title might lead me to reconsider that decision. And, of course, the government must prove that the Select Committee's subpoena sought testimony and records from Mr. Bannon that were pertinent to the topics that the Select Committee was investigating. That will necessarily require some mentions of the events of January 6th generally. I'll allow such evidence, but I intend to police this line tightly.

Now to the remaining portions of the government's Omnibus Motion in Limine with the caveats to be mentioned, I'll grant the motion as to these remaining points with the understanding that I might consider any of the rulings on this motion as necessary during trial.

The government asks me to preclude Mr. Bannon from making improper arguments that politicize the case. I agree that such arguments would be inappropriate. This is not a forum for partisan politics. I will not allow it to become one, but I also will not prevent Mr. Bannon from attempting to show bias when cross-examining the witnesses.

It's a fine line to draw here, and I expect the parties to respect it. It goes without saying that a witness cannot be called for the sole purpose of impeaching him or her. But a witness who is testifying is subject to

appropriate cross-examination, and bias is one such appropriate topic.

Now, the government argues in Section I.B that claims about government misconduct relating to its efforts to procure Mr. Costello's email and phone records are not proper issues for trial. As I previously held, I agree with that. No evidence or arguments on this topic will be permitted at the trial, either from Mr. Bannon or from the government. As I already indicated, if the government believes it must introduce such evidence at trial, it needs to make a proffer to me. And just know that I will be skeptical.

Questions about the government's conduct regarding the subpoenas or subpoena for Mr. Costello's email and phone records or efforts to procure that information, questions about that conduct in my mind remain a matter for resolution after trial not during it.

The government argues in Section I.C of its Omnibus Motion that if Mr. Bannon's subpoenas to members of Congress and their staff are quashed, the Court should preclude him from arguing that this provides a basis for acquittal or some adverse inference against the government. I'll discuss in a moment whether the subpoenas will be quashed. But if they are, I agree with the government's argument and will grant their motion conditionally in that

sense.

As the Court of Appeals has explained, "The rule authorizing this inference referred to as applicable, in the language of the Supreme Court, 'when a party has it peculiarly within its power to produce witnesses whose testimony would elucidate the transaction' and fails to do so." I find that, in these circumstances if I grant the Motion to Quash, that the United States has no more power than Mr. Bannon to compel the attendance of members of the House and their staff to this trial.

The government asks, in part I.D of its motion, that evidence or arguments relating to the misdemeanor, nature of the charges or the potential punishment is improper. I heard defense counsel to agree that it would be improper to discuss the potential punishments in front of the jury. And I certainly agree, as a result, that any evidence relating to the potential penalties of the conviction are improper. It won't be allowed.

The government asks me in part I.E to preclude Mr. Bannon from making claims about other individuals who have not been prosecuted for contempt of Congress. I agree and will not allow such evidence. It does not go, in my view, to any of the elements of the charged offenses or defenses and is thus irrelevant.

The final point in the Omnibus Motion is a little

tricky. We discussed this earlier. The government argues that whether executive privilege excused Mr. Bannon from compliance with the subpoenas altogether is not a factual question for the jury.

We discussed at this hearing whether Mr. Bannon is really making this argument, which is not an argument about mens rea. It's not an argument about entrapment by estoppel. It's really an argument that, I think in its simplest form, would be that Mr. Bannon was excused from responding to the Subpoena because it covered privileged information.

I haven't really received briefing on this question. I think it is an unteed-up issue and it therefore seems premature to rule on it now. I don't think Mr. Bannon really grappled with the government's argument on this question, but I do think it's a distinct issue.

And just to be really clear, one question in this case is did Mr. Bannon act with the requisite mens rea in declining to appear for his deposition or producing documents? That's one question as to which I've already reached a series of holdings about what that standard is and what's relevant or not to it.

Another set of issues is whether the government is estopped, as a result of, for example, the entrapment by estoppel argument from prosecuting this case. Those are not

the same questions, I believe, because the information here was actually privileged, executive privilege, whether Mr. Bannon was excused altogether from complying with the Subpoena. And whether that's a valid argument in this case and whether it's being advanced is not clear to me, and therefore, I am going to not resolve the government's motion on that point.

The next pretrial motion is Mr. Bannon's Motion to Compel the Meadows and Scavino Declination Discovery, Motion for Discovery and Motion for Release of *Brady* Materials, which is ECF No. 86. I'll deny this motion.

My previous discovery order mandated the government provide documents reflecting official DOJ policy. The government has represented that no such records exist in connection with the government's consideration of the Congressional contempt referrals of Meadows or Scavino. To the extent it requires further clarification, my previous order was never intended to mandate the disclosure of internal work product by the Department. Such an order would be inappropriate for a myriad of reasons.

It was also not intended to mandate the disclosure of specific declination decisions as to particular persons unless they stated broader DOJ policy. And given my previous ruling on the unavailability of the entrapment by estoppel defense, none of these declination documents would

be relevant in any event.

I will note Mr. Bannon hints in his brief some of this information could be relevant to a selective prosecution claim. To an extent that Mr. Bannon wishes to raise such a claim, he must move separately for it. I will not treat the passing mention of selective prosecution as sufficient.

Also pending, as we all know, is the Motion to Quash, which is ECF No. 1, in Miscellaneous Case 22-MC-60. I'll grant this motion.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators or Representatives shall] not be questioned in any other place."

The language of the Speech or Debate Clause is absolute. It bars the questioning of any member of Congress in court, so long as that questioning relates to any speech or debate in either House.

The Supreme Court has given speech or debate a broad reading. As the Court has put it: "Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purpose." That's *Eastland*. Thus, the Clause reaches not only the conduct of Congress people but their staff too. Nor is it limited to literal speech and debate. Rather, the question is whether the particular

activities about which testimony is sought fall within "the legitimate legislative sphere." That requires me to determine whether the activities are "an integral part of the deliberative and communicative processes by which members participate in Committee and House proceedings with respect to the consideration or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." As the Supreme Court has also explained, "The power to investigate and to do so through a compulsory process plainly falls within that definition." Again, that's *Eastland*. It specifically blessed, the Supreme Court did, the issuance of subpoenas.

I conclude that much of the testimony that Mr. Bannon would seek from the individuals he has subpoenaed and most of the documents are barred by the Speech or Debate Clause. Questions as to the motivations of the Committee, its internal deliberations, its reasons for subpoenaing him, or the personal views of its members on internal House Rules would all require testimony on an integral part of the deliberative and communicative process by which the members participate in the Committee. The Speech or Debate Clause bars such testimony.

To the extent that Mr. Bannon seeks non-Congressional testimony from these members and to the

extent that he seeks documents not covered by the Speech or Debate Clause, I do not believe such evidence is relevant here. As we discussed earlier, comments made to the press or posted on social media are not covered by the Clause, so too with documents relating to book deals and the like. But evidence on these topics is also not relevant to this case.

As I've already concluded, there will be little, if any, evidence that will go to the jury about whether the Select Committee complied with the House Rules. And therefore any nonspeech or debate testimony or documents from the members of Congress at issue in the Subpoena or their staff would be irrelevant to the trial. And, of course, under Rule 17, a subpoena must seek relevant evidence.

Mr. Bannon argues that some members waived their Speech or Debate Clause immunity by filing an amicus brief in this case. Assuming such immunity is waivable, and obviously I discussed that topic to some extent with Mr. Letter, such waiver would require an explicit and unequivocal renunciation of the protection. But the amicus brief contains no such language and many courts have concluded that the filing of an amicus brief waives no privilege no matter what the privilege may be. In any event, the amicus brief was filed on behalf of the House as a whole. We would not provide a waiver as to the

individuals that Mr. Bannon seeks to subpoena.

One final point, as we discussed before, Mr. Bannon has suggested that if he cannot subpoena these members of Congress and therefore that this information is not available to him, then he may move for dismissal of the charges against him.

As we discussed, Mr. Bannon is, of course, now free to file such a motion now that I've quashed the Subpoena. But I will note that Mr. Bannon must show that the testimony he seeks would be relevant to an issue at trial which, in my view, seems unlikely.

Since the question whether the Select Committee complied with House Rules is not a defense, at least generally speaking, that will be submitted to the jury. And in light of my decision about the other issues in this case, the Motion to Quash in case number 22-mc-60 is thus granted.

That brings me to the final pending motion, Mr. Bannon's Motion to Continue Trial, which is ECF No. 88. I am cognizant -- and which is really, at this point, based on three different though not unrelated grounds. The first is pretrial publicity. The second is the status of the case as the case exists. And the third is, to some extent at least, the fact of the letter that Mr. Bannon sent to the Committee over the weekend.

I am certainly cognizant of Mr. Bannon's concerns

regarding publicity but, in my view, the correct mechanism at this time for addressing that concern is through the voir dire process. It may very well be that, in light of the ongoing Select Committee hearings, that we will be unable to pick a jury, though I find that unlikely. But should that be the case, the motion may be renewed again then. And if we can't pick a jury and we have to suspend the trial, we will do that.

Mr. Bannon also notes that discovery is outstanding and, at the time of filing his Reply brief, it was both unclear which defense witnesses or at least the House witnesses would comply with the Subpoena. It was uncertain which defenses would be allowed at trial or the scope of the Motions in Limine. Those issues have now largely been resolved by me.

If they were resolved in a way that would greatly expand or complicate this case, perhaps all that might favor an extension, but the motions did not pan out that way. As a result, I see no reason, based on preparation, for extending this case any further.

And finally, as it relates to the letter that Mr. Bannon sent over the weekend and the letter Mr. Bannon received from former President Trump, I am not deciding one way or the other today whether that evidence might be relevant.

As we discussed, it's possible that it might come in with respect to the arguments that Mr. Schoen made about default and whether and to what extent Mr. Bannon's compliance was left open by the Committee. But even if that's going to come in, that's a discrete issue and it doesn't seem to me that we are incapable of taking that up in the next week.

So with that, we have a pretrial conference on Thursday. What time? Morning I think. I forget when it is, but I look forward to seeing everyone then.

Thank you, Counsel.

Mr. Schoen, would you like to say something?

MR. SCHOEN: A couple of things that I don't understand about the order. I don't understand -- it's a long time ago now so I'm not sure how to direct the Court to it, but it was something about it would permit testimony that Mr. Bannon believed that the date wasn't really the date. I'm not sure what that means. Was that what we were talking about today, whether there was a default or not?

THE COURT: No, it goes to whether his failure to appear was deliberate and intentional. If he was mistaken about the date or actually believed that the date had been moved, I think that would go to mens rea.

MR. SCHOEN: Had been moved or that that wasn't the date anymore because the default had been waived?

THE COURT: I think it could go to both, but he cannot introduce evidence that he thought he was legally excused from complying with the Subpoena because of the exertion of executive privilege because he had been advised by his counsel to that effect and the like.

MR. SCHOEN: I got that.

THE COURT: The question in the trial -- it's really simple.

MR. SCHOEN: I just want to be clear --

THE COURT: Mr. Schoen, hold on a second. The question in the trial on mens rea is whether he failed to appear, as *Licavoli* says, whether his failure to appear was deliberate and intentional as to mens rea. Did he make a mistake? Was it the result of inadvertence or, I suppose hypothetically, because he did not believe the return date was the return date? I'm leaving open that possibility. I'm not sure that you can make a proffer that he would introduce such evidence. I'm just leaving open that possibility.

MR. SCHOEN: And I'm not clear about what Costello, if anything, can testify about.

THE COURT: Well, not advice of counsel he gave to Mr. Bannon but, to the extent that his discussions with the Committee go to either, for example, whether it was left open -- you've argued today that you might want to make an

argument that the Committee, you know, waived any default or something like that, or left open his future compliance and that Mr. Costello, I assume, would be able to testify about that.

MR. SCHOEN: Yeah.

THE COURT: I'm not saying that this is true but, if Mr. Costello, for example, told Mr. Bannon the return date on the Subpoena is no longer October 18th, then that testimony might be relevant. Again, I'm not saying he did.

MR. SCHOEN: Let me ask this, Judge: Is there a way -- if we were to respond to the government's motion to bar that evidence by tomorrow or Wednesday, is there a way the Court could resolve that issue?

THE COURT: Are you talking about the letter?

MR. SCHOEN: Yeah. About raising this issue that it is default? I'd like --

THE COURT: Yes. Yes. I have not resolved --

MR. SCHOEN: Well --

THE COURT: I have not resolved the government's motion that they filed last night at midnight.

MR. SCHOEN: I understand that, Judge. I'm asking whether it can be resolved. In other words, we have to make a decision. What's the point in going to trial here if there is no defenses? So we have to make a decision about that --

THE COURT: Agreed.

MR. SCHOEN: -- and have to do it very quickly.

THE COURT: Yes. Would you like to respond by tomorrow to that motion?

MR. SCHOEN: The question is I have to travel and stuff back home. I don't know if I could finish it by tomorrow but I think we can.

THE COURT: I'm happy to give you whatever time you think you need.

MR. SCHOEN: I think we can do it by Wednesday.

THE COURT: Sure. You say Wednesday, what time?

MR. SCHOEN: I was going to say end of the day Wednesday, but if you want to pick a time in the middle of the day --

THE COURT: No, it's just we're running out of time.

MR. SCHOEN: Yeah. I'm traveling Wednesday to come back up here also. So I guess noon Wednesday.

THE COURT: Fair enough.

MR. SCHOEN: Listen, okay, last thing is, I didn't understand -- two other things I didn't understand. I think I understood it, but I didn't hear it clearly enough. The Court said that the reason the OLC opinions don't apply that's because Bannon wasn't employed at the time?

THE COURT: Well, for all the reasons I said

before, there is no OLC opinion that says, We will not prosecute someone in the situation that Mr. Bannon found himself in.

MR. SCHOEN: What was that situation? That's my question, I think, not being an Executive Branch employee at the time?

THE COURT: So I think there is a number of them. One is not being an Executive Branch employee at the time and the assertion of privilege by someone who was no longer the President at the time of the Subpoena. You don't have -- there is no opinion that covers the circumstances. I understand your view is that the President still has privilege. I'm just saying there is no opinion that addresses the specific circumstances we find ourselves in here.

MR. SCHOEN: Even though the conversation --

THE COURT: I don't want to hear argument on this again --

MR. SCHOEN: No, I am asking you a question. Clearly the conversations occurred while he was still President --

THE COURT: I understand that. I understand that.

MR. SCHOEN: Okay.

The last thing I didn't understand was the Court said that it didn't understand what we had raised -- I may

have just heard it wrong -- that we had raised the issue that Rule 3b had to be given before the deposition and it wasn't given. I understood the Court to say it didn't understand that issue to be presented to it.

THE COURT: I don't think I said it that way. What I meant to say is, if that is an issue at the trial, then that might actually present a mixed question of law and fact that the jury would get. That is to say, I would have to decide what the rule meant, but the jury might have to decide whether the rule was complied with. That's what I meant to say.

MR. SCHOEN: When the Court said it didn't have the issue before it, I wanted to be clear that we raised that issue. Thank you.

THE COURT: Thank you. Anything else?

MR. SCHOEN: [SHAKES HEAD]

THE COURT: Okay.

MS. VAUGHN: Nothing from the government.

THE COURT: Okay. So will the government want to file a reply brief in support of its motion regarding the letter/letters?

MS. VAUGHN: We can file by Wednesday night, if we appear on Thursday morning.

THE COURT: It may not be long, and we can take it up on Thursday if necessary. Thank you, all.

(Proceedings concluded at 2:29 p.m.)

C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter,** certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

July 12, 2022
DATE

/s/
Lorraine T. Herman