	NITED STATES DISTRICT COURT THE DISTRICT OF COLUMBIA
UNITED STATES OF AMER	RICA,
	CR Action
	No. 1:21-670
vs.	Washington, DC
	July 21, 2022
STEPHEN K. BANNON,	10.00
Defendant	10:38 a.m.
Derendant	•
	PT OF JURY TRIAL - DAY FOUR
	HE HONORABLE CARL J. NICHOLS
UNLTE	ED STATES DISTRICT JUDGE
APPEARANCES:	
For the U.S.:	AMANDA ROSE VAUGHN
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1PROCEEDINGE2Deferr CLERK: Good morning, Your Honor. This is a criminal case year 2021-0670, United States of America versus Stephen K. Bannon.5Counsel, please come forward and introduce yourselves for the record, beginning with the government.6Manda Vaughn and Molly Gaston and paralegal specialist Quiana Dunn-Gordon and FBI Special Agent Frank o'Amico.10THE COURT: Good morning, Your Honor. David13Schoen and Evan Corcoran. Steve Bannon is at the table and Ms. Riane White also.15I want to ask, logistically so I don't want to keep going back and forth. I think I know what the Court wants to cover first, but I just wanted the Court to be aware before we worry about a jury.19We drew up two additional proposed jury instructions just this morning. The government hasn't had a chance to see them, but we brought hard copies to give the government. I don't know if we should file those on ECF or24The COURT: So, clearly, I need to finalize the jury instructions before we do closings, because my plan is		Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 2 of 127 891
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1	to instruct the jury before we get to closings.
2	Even in my draft jury instructions, there were
3	some that had been flagged as "if applicable," and I need to
4	go through with the or at least in my view and with the
5	parties to see if there's agreement that they do or do not
6	apply. Then, as I imagine and as was always has been clear,
7	we need to finalize them for all purposes before we get to
8	the jury. So I agree there needs to be a step here.
9	What I would like to have happen in the first
10	instance is for the parties to confer and to submit it
11	need not be through a filing, but to submit through the
12	chambers' email that we've been using, their respective
13	positions around areas of disagreement and, frankly, areas
14	of agreement.
14 15	of agreement. MR. SCHOEN: Just on these two new ones, the Court
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1	MR. SCHOEN: Yes, Your Honor. I didn't mean to
2	make the Court jump ahead to that. I was really just asking
3	about these two new ones how the Court I get it was much
4	more informative than I asked for. Thank you very much.
5	THE COURT: Yeah. Okay.
6	MR. SCHOEN: Second thing, just logistically, as
7	the Court knows, without the jury in the box, we intend to
8	file a Rule 29 motion this morning.
9	THE COURT: Yes.
10	MR. SCHOEN: So one other issue that was
11	outstanding, I raised on July 19th, and we talked about it
12	on Page 521 and 522 of the transcript. The Court doesn't
13	need the transcript. It's a very simple issue. I had said
14	that we need a ruling on the so-called you know, the
15	Motion to Dismiss or to exclude the evidence based on the
16	quashing of the subpoenas and the filing motion number ECF
17	No. 116.
18	And I raised it with the Court, and the Court
19	said I said I need a ruling. The Court said, Well, I
20	think the proper way to handle this is, when the government
21	rests their case, then you can make a showing, make a
22	proffer to me as to what you needed Chairman Thompson to
23	testify to.
24	THE COURT: Yes.
25	MR. SCHOEN: So that was basically how we were

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1	going to go. But some suggestion was made that, since part
2	of the relief is excluding evidence, that maybe the Court
3	wanted to hear, in connection with the Rule 29 or before the
4	Rule 29, whatever the Court wanted, I just wanted to know
5	one way or the other.
6	THE COURT: So I certainly think it's appropriate
7	to hear argument now on that question. Or it could be after
8	the close of the defense case so that the defense could say,
9	We just put on what we could put on, but here's how we have
10	been precluded from putting on additional evidence.
11	MR. SCHOEN: In fairness, Judge, the other day we
12	didn't contemplate argument. The Court just asked me to
13	make a proffer. I don't know if the government came ready
14	to discuss the motion.
15	MS. VAUGHN: The government is always ready,
16	Your Honor.
17	MR. SCHOEN: Like the Marine Corps.
18	THE COURT: Here's what I'd like to do. Because
19	the Motion for Judgment of Acquittal was mentioned in front
20	of the jury yesterday, I'd like to take that up, both the
21	question of the motion and the question of what, if
22	anything, we do to cure any potential prejudice. Let's do
23	that first.
24	I then have another issue that I need to raise
25	with the parties that would be on the husher. We'll do
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1	that. And then I'll now think about how I want to handle
2	the Thompson motion, so to speak.
3	MR. SCHOEN: Thank you, Your Honor.
4	THE COURT: Mr. Corcoran, are you going to present
5	the Motion for Judgment of Acquittal?
6	MR. CORCORAN: I am, Your Honor.
7	THE COURT: Okay.
8	MR. CORCORAN: Do you want to discuss the other
9	motion first?
10	THE COURT: I do, please.
11	So here's my question. So for the record, as I
12	recall, you indicated before the jury was excused, in the
13	presence of the jury, that you would be filing a Motion for
14	Judgment of Acquittal this morning. So the jury has heard
15	that that's at least a possibility.
16	I communicated to the parties last night that I
17	wanted to address whether there was any potential prejudice
18	from the jury having heard that and, if so, whether that
19	could be cured here this morning.
20	So I'd like to hear I actually think I need to
21	hear that issue together with the merits of the motion.
22	MR. CORCORAN: On that issue, Your Honor, we don't
23	think that that passing comment in front of the jury is
24	prejudicial to either party and don't see that there's any
25	need to do anything.

1	THE COURT: What if the jury if we get to the
2	jury today, what if the jury believes, as a result of that
3	comment, that I've denied the motion?
4	Wouldn't that mean the jury might think that I
5	have passed on something relating to the strength of the
6	government's claims in a way that's harmful to Mr. Bannon?
7	MR. CORCORAN: We don't you know, we don't see
8	that as a possibility given the discussion in the case so
9	far. But if, in an abundance of caution, the Court does
10	want to address it in some way, I think that the proper way
11	to do it and I can would be to essentially to repeat
12	in the first paragraph what's already been said to the jury.
13	And that is with a slight change just because
14	of the timing "At the start of this trial, I described my
15	responsibilities as the judge and your responsibilities as
16	the jury. My responsibility is to conduct this trial in an
17	orderly, fair and efficient manner, rule on legal questions
18	that come up in the course of the trial and instruct you
19	about the law that applies to this case."
20	That's essentially already been said. And then
21	the next part is, "During trial you may have heard reference
22	to objections, motions, briefs and the like. The
23	discussions of the lawyers on those legal issues and my
24	rulings are not evidence and are not to be considered by you
25	as you determine the facts in the case."

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1	In other words, it's simply reiterating something
2	that's already been said.
3	THE COURT: Okay. So on the motion itself?
4	MR. CORCORAN: Your Honor, we'd ask the Court to
5	grant our Motion for Judgment of Acquittal. The government
6	has rested its case, and they have not presented evidence
7	upon which a reasonable person could find beyond a
8	reasonable doubt that Mr. Bannon is guilty of the charge
9	the charges of contempt of Congress.
10	Obviously, the law is pretty straightforward, and
11	the key at this point is whether the Court, when weighing
12	the evidence introduced at trial and drawing inferences from
13	that evidence, could find that a reasonable mind could
14	fairly conclude guilty beyond a reasonable doubt.
15	And we acknowledge that that's not a high
16	threshold. But it's a threshold that needs to be considered
17	in light of the evidence in every case. And in this case,
18	it's abundantly clear that there was no evidence presented
19	that the defendant is guilty. There is no evidence
20	presented that a reasonable mind could find that Mr. Bannon
21	has committed the crimes.
22	The key, I think, is the evidence that was
23	presented was limited to two witnesses, Ms. Amerling and
24	Mr. Hart. Our Motion for Judgment of Acquittal does not
25	pertain really to Mr. Hart, because he didn't add much to
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the case at all. 1 2 It's really a one-witness case and the issue, really, is what did Ms. Amerling say on the key points? 3 4 First, with regard to whether the defendant was subpoenaed 5 by the Select Committee to provide testimony or produce 6 papers, at best, the testimony was equivocal. 7 We asked the witness what human being drafted this 8 subpoena? What human being came up with the dates in the 9 subpoena of October 7th, 2021 and October 14th, 2021, and 10 she couldn't answer. She couldn't answer. 11 She did say that it was -- in order for the 12 subpoena to be valid, it had to be signed by 13 Chairman Thompson, but she couldn't answer whether or not --14 she certainly didn't see him sign it. She relied upon the 15 general practice of the Committee that said that she thought 16 perhaps he would have signed it. So on the first element, 17 the evidence is simply barren, from which a reasonable juror 18 could find that Mr. Bannon was subpoenaed. 19 The second element is pertinence. And our motion 20 really doesn't address pertinence. The third is that 21 Mr. Bannon failed to comply or refused to comply with the 22 subpoena. And, again, I am setting forth the elements as 23 the Court has determined them under the Licavoli standard. THE COURT: I understand. 24 25 You are basing your Motion for Judgment of

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 10 of 127 899 Acquittal based on the elements as I have defined them? 1 MR. CORCORAN: That's correct. Of course, as I 2 said many times, we're not waiving the positions that we 3 4 have taken --5 THE COURT: Well understood. 6 MR. CORCORAN: So the third point is that 7 Mr. Bannon failed to comply or refused to comply with the 8 subpoena. On that issue, again, it all hinges on 9 Ms. Amerling's testimony. And she testified, although she 10 said that these dates were not open, it was clear through 11 her testimony, first of all, that the dates were in flux. 12 And I'll describe that, especially with regard to Count 2, 13 in a moment. 14 But even the dates themselves in the subpoena, she was unable to identify why those dates were in the subpoena 15 16 at all. She was unable to identify who put those dates in 17 the subpoena and that's a critical issue. And there is 18 interplay, and I know Mr. Schoen will discuss the issue that 19 was raised with regard to the Motion to Quash the subpoena. 20 But I'll mention it in brief here because it does play into 21 our Motion for Judgment of Acquittal. 22 That is, under the Sixth Amendment, a defendant 23 has the right to confront the witnesses against them, 24 particularly through cross-examination. 25 We were provided and the government requested

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access to one witness, and that was Ms. Amerling. We were not provided with a number of other key witnesses, material witnesses, who we believe would have provided exculpatory evidence. And based upon the testimony of Ms. Amerling yesterday, clearly would have provided exculpatory evidence in a new way that we could not have conceived before trial.

And that is this: Chairman Thompson, as the
evidence in the case has indicated, Chairman Thompson is the
sole person authorized to sign the subpoena. Without his -him signing the subpoena, it is not valid. That was the
testimony of Ms. Amerling.

And yet, when we cross-examined her, she didn't know whether or not he signed it or not. She couldn't say for certain whether he signed it or not. Had he been available to us, we could have presented evidence on the topic of whether he signed the subpoena or not, whether it was a valid subpoena or not.

18 Secondly, and critically, we asked Ms. Amerling 19 about the back-and-forth between her, as the lawyer for the 20 Committee, and Bob Costello, as the lawyer for Mr. Bannon. 21 And the letters that went back and forth and were admitted 22 for a limited purpose are essentially the paper trail of the 23 communications or negotiations between the lawyers about the 24 dates and about compliance and about whether Mr. Bannon 25 committed the crime or crimes of contempt of Congress.

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We asked her at every step, with regard to each of these exhibits, who wrote the letter on behalf of the Select Committee and she couldn't answer. She said that there was essentially several different staff involved. I asked her to pinpoint language that she wrote. She was unable to do so.

7 Critically, I asked her whether she could identify 8 any word in each of the Select Committee letters that 9 Chairman Thompson had written. Essentially, identify one 10 word in this given letter, this given exhibit, which was a 11 Committee letter, that was the word of Chairman Thompson.

And she couldn't answer. She couldn't point to one word in the letter that indicated it was Mr. Thompson's word. Again, he's under subpoena. He's accepted service of subpoena. The House moved to quash his subpoena. We asked for documents, drafts and things like that of these letters, and the Motion to Quash was granted as well with regard to those materials.

19 If he was here -- and again, I'm just giving a 20 shortened version of what will be presented in a separate 21 motion by Mr. Schoen. But if he was here, we would have 22 presented evidence to the jury, I believe, that he did 23 not -- he was not the author of those letters based on what 24 we heard yesterday. And so that they were not, in fact, an 25 official position of the Select Committee. Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 13 of 127

1	In light of that and in light of the
2	information the evidence that was presented from
3	Mr. Costello which indicated at every step of the way we've
4	got an objection I'm just talking about the way it's
5	presented as evidence in the case.

6 There's an objection based on privilege that's 7 been presented to the Committee. Work it out. Here are two 8 options. Option one, communicate with President Trump and 9 seek an executive privilege. Option two, go to a court with 10 a civil action to try to remove this obstacle of privilege 11 so that I can testify. That's been the consistent message 12 all along.

13 So given that, no reasonable juror could find that 14 Mr. Bannon refused to comply with dates that we understand 15 now are in flux, are open, such that he committed a crime.

16 Finally, on the fourth element, which is that his 17 failure or refusal to comply was willful, there's simply no 18 evidence that the jury could consider right now that bears 19 on whether or not the intent that Mr. Bannon had on 20 October 14th, with regard to the testimony and October 18th 21 with regard to the documents, was a willful default. A 22 default -- and again, I don't think that -- I'm not certain 23 here, but I don't think that the default has been -- has yet 24 been defined.

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But default, in our view, is not meeting a legal

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1	obligation. And in this case, there has been no showing
2	that, on the 14th of December of October 2021 or the 18th
3	of October '21, Mr. Bannon had a legal obligation to comply
4	with the subpoena.
5	In fact and this goes specifically to whether
6	the Court should dismiss Count 2 on our Motion for Judgment
7	of Acquittal. The dates are moving. In other words, the
8	date on the subpoena for the production of documents is
9	October 7, 2021.
10	The jury the indictment alleges a different
11	date; and that is that Mr. Bannon has committed the offense
12	of contempt of Congress and he is essentially guilty of
13	Count 2 if he has not provided documents by a different
14	date, October 18, 2021.
15	That's a difference. That's a variance. And no
16	reasonable juror could find that, based on the testimony
17	presented by Ms. Amerling, that Mr. Bannon committed the
18	crime of contempt of Congress with regard to the production
19	of documents on October 18th. And I use the word "on"
20	because many times indictments use the words "on or about",
21	and there are instructions to the jury that would describe
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22 what that means.

That's not what happened here. In the indictment, in Count 2, there is a precise date that the jury would have to find beyond a reasonable doubt that, on October 18th,

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1	2021, Mr. Bannon committed a crime.
2	No reasonable juror could conclude that he
3	committed a crime on that date because the date on the
4	subpoena is October 7th, and there was no testimony at all
5	that indicates that, on October 18th, Mr. Bannon did
6	anything
7	THE COURT: The word is actually "by".
8	MR. CORCORAN: Is it "by"? Okay.
9	THE COURT: It is "by".
10	MR. CORCORAN: "By" in the indictment?
11	THE COURT: The indictment says "by October 18th,
12	2021".
13	MR. CORCORAN: Okay. Still.
14	THE COURT: Still?
15	MR. CORCORAN: I buy that.
16	THE COURT: I buy it too.
17	MR. CORCORAN: My point is the same that the date
18	couldn't have shifted. We didn't hear any evidence.
19	THE COURT: I understand. The point isn't really
20	about on or by. Your point is, the date. Is it October 7th
21	or is it October 18th?
22	MR. CORCORAN: Yeah.
23	That's under the Supreme Court case of U.S. versus
24	Bryan, 339 U.S. 323 at 330, holds that default, you know,
25	does not mature until the return date. And so, in our view,

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the return date is, in terms of the government's meeting its 1 2 burden, either the date on the subpoena or it's open. It's 3 an open date. 4 And, of course, our position, as you heard through 5 our questioning and as we expect will be the position we 6 take throughout, is that this was an ongoing negotiation. 7 The last piece of evidence, Your Honor, that I want to reference in terms of our Motion for Judgment of 8 9 Acquittal are pieces of evidence, but I think the key one --10 if I could grab it -- is Defendant's Exhibit No. 32 which is 11 in evidence. 12 **THE COURT:** Can I just note a housekeeping thing? 13 MR. CORCORAN: Yes, Your Honor. 14 THE COURT: I don't recall having received copies 15 of at least some of the defendant's trial exhibits, 16 including the most recent ones, and maybe even any exhibit above number 16. I just want to ask if you could provide 17 18 Ms. Lesley with copies of all of the defendant's trial 19 exhibits. 20 MR. CORCORAN: Absolutely. THE COURT: Thank you. 21 22 MR. CORCORAN: And just as a --23 THE COURT: I recall the letter. MR. CORCORAN: Yeah. You recall the letter. 24 25 Again, just so the record is complete on that,

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 17 of 127 906 these are things that only came up in cross-examination so 1 2 we didn't see --THE COURT: I understand. 3 4 MR. CORCORAN: Of course some were created after 5 the date of the filing of our exhibits. 6 THE COURT: Yes. It is not a -- I'm not 7 suggesting that you should have provided a copy of the letter that was dated as late as that letter. I just need 8 9 copies of them. 10 MR. CORCORAN: Absolutely. 11 The key point with regard to our Motion for 12 Judgment of Acquittal is Exhibit 32 provided in evidence in 13 the limited way that it is, which is simply to show that 14 notice has been provided from the Chairman of the Select 15 Committee to Mr. Bannon through his lawyer, Robert Costello. 16 That evidence, together with everything that was 17 said by Ms. Amerling in testimony, leaves no possibility 18 that a reasonable juror could find that Mr. Bannon committed 19 a crime back in October of 2021 with regard to his position 20 on the subpoena. 21 Defendant's Exhibit 32, which is in evidence, 22 specifically talks about the subpoena dated September 23, 23 2021. So the evidence shows this is oriented towards 24 exhibit -- Government's Exhibit No. 2, the subpoena in this 25 case. It's not a new subpoena. It's not a new invitation.

It's not a new communication.

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And the letter, in pertinent part, states: I am 2 3 in receipt of your letter dated July 9, 2021 in which you 4 indicate your client, Stephen K. Bannon, is now willing to 5 comply with the Select Committee's subpoena. That letter, 6 which is also in evidence, is Mr. Costello's notice to the 7 Committee, a change has occurred, attached is President Trump's letter and, because of that change, we are willing 8 9 to speak with you about documents and testimony.

10 The response of Chairman Thompson on July 14th 11 was, "With respect to the Select Committee's demand for 12 documents, Mr. Bannon should begin producing responsive 13 documents today to the Select Committee and provide a 14 complete response by July 21, 2022. And then, after he has 15 produced all of the requested documents, we will identify 16 dates soon following that production on which he must then 17 appear in person in the O'Neill House office building for 18 deposition. We anticipate that the deposition will occur in 19 the near future."

The importance is that, even with the limited purpose that this -- I'm sorry, the limited use of this evidence by the jury, they will be able to understand that compliance with the January 23, 2021 subpoena is still allowed. That's the use of the word by the Chairman in Defendant's 32, "comply". Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 19 of 127

1	And compliance can involve production of documents
2	now and testimony on a later date to be determined. We
3	believe that that exhibit, together with Ms. Amerling's
4	testimony, leaves a no reasonable juror could find beyond
5	a reasonable doubt the elements of the crimes charged.
6	Thank you, Your Honor.
7	THE COURT: Thank you, Mr. Corcoran.
8	Ms. Vaughn?
9	MS. VAUGHN: Good morning, Your Honor.
10	Trying all inferences in favor of the government,
11	the defendant has failed to meet his burden that no
12	reasonable juror could find the defendant guilty in this
13	case.
14	I'll start with element 1. The defendant claims
15	that the government has not provided sufficient evidence for
16	a reasonable juror that the defendant was subpoenaed.
17	There's a subpoena. It's signed by Chairman Thompson. We
18	presented evidence that it was sent to defendant's lawyer,
19	and we presented evidence that his lawyer sent it to the
20	defendant.
21	It seems that Mr. Corcoran's argument, with
22	respect to this element, is that the government also was
23	required to prove who made the initial decision on the
24	dates, why the dates were chosen or who wrote the letters.
25	That's not an element of the offense and it's irrelevant.

The Committee acts as a body. Ms. Amerling 1 testified that she is familiar with Chairman Thompson's 2 signature and recognized it as such on the subpoena. He's 3 authorized the letters before they went out. He authorized the subpoena before it went out. The body of the Committee subpoenaed the defendant.

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The defendant concedes that the government has 7 provided sufficient evidence on element 2. On element 3, 8 9 that the defendant failed to comply or refused to comply, 10 the government has presented sufficient evidence.

11 Mr. Corcoran made similar arguments with respect 12 to this element as he did with the first, but again, the 13 reason for the dates are irrelevant. The dates are on the 14 subpoena. The Committee made clear in its letters to the defendant that those were the dates and that he had violated 15 16 them. And the evidence is clear the defendant did not 17 provide documents by October 7th and did not come for his 18 deposition on October 14th.

19 With respect to the defendant's intent, the 20 government, again, has provided sufficient evidence on this 21 The defendant did not provide any records by point. October 7th at 10 a.m. The fact that that was not a mistake 22 23 was made clear in his letter later that day that he did not 24 intend to comply, and it was made clear by Mr. Costello's 25 admission that they had not gathered a single document to

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provide to the Committee by that time.

The defendant also showed his willfulness in failing to comply with the October 14th date. He posted on GETTR, "I will not comply" on October 8th. He did not come for his deposition. And in case there was any doubt left, he sent another letter the night before saying, "I'm not coming". So the government has provided sufficient evidence and the defendant's motion should be denied.

9 **THE COURT:** What about the question of prejudice 10 and the fact that the jury heard about the Motion for 11 Judgment of Acquittal? What, if anything, should I do?

12 MS. VAUGHN: I think most jurors probably don't 13 know what a Motion for Judgment of Acquittal, and I think, 14 drawing their attention back to it, could create prejudice. 15 I think we can move forward without it.

16 If the Court's inclined, I agree with Mr. Corcoran 17 that the Court can just give the instruction it gave -- I'm 18 not sure what the proposed instruction was that Mr. Corcoran 19 provided, but the Court already has instructions on --

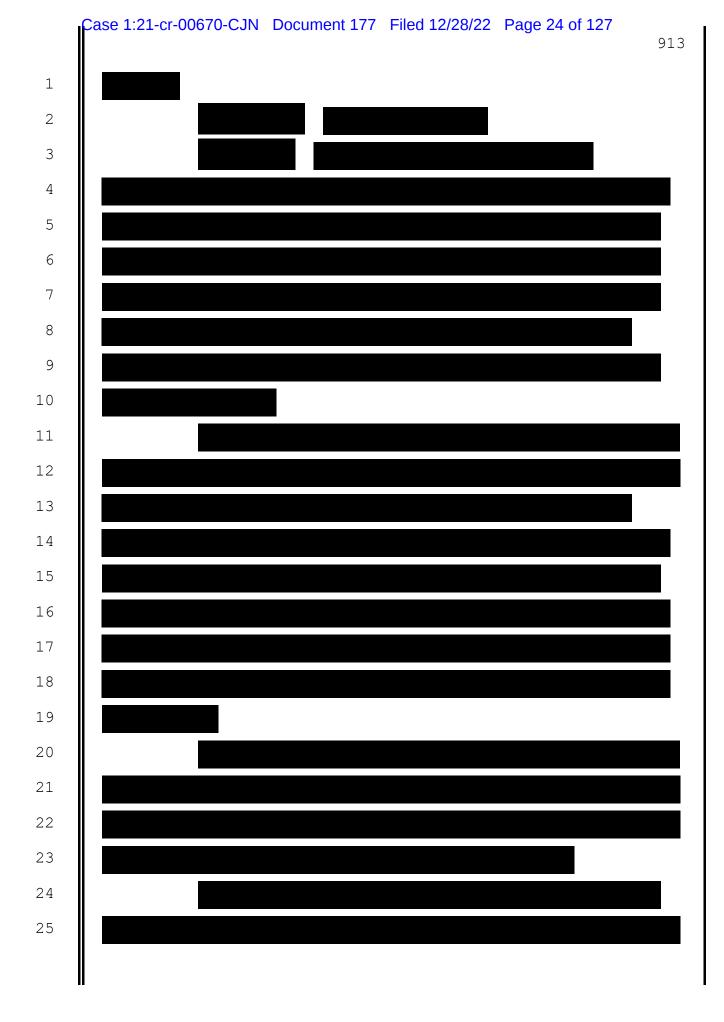
THE COURT: He basically read it. It says as follows: "At the start of this trial, I described my responsibilities as the judge and your responsibilities as the jury. My responsibility is to conduct this trial in an orderly, fair and efficient manner, to rule on legal questions that come up in the course of the trial and

instruct you about the law that applies to this case." 1 "During trial, you may have heard reference to 2 objections, motions, briefs and the like. The discussions 3 4 of the lawyers on those legal issues and my rulings are not evidence and are not to be considered by you as you 5 6 determine the facts in this case or in the case." 7 MS. VAUGHN: Yes. It looks like the first part is taken from Instruction 2.101, the function of the Court. 8 9 The second part -- I'm not sure if that's 2.105. 10 MR. CORCORAN: Your Honor, the second part is 11 original product. 12 MS. VAUGHN: Ah. Thank you. 13 To the extent that the Court wants to give an 14 instruction, there is -- the last paragraph of 2.102 describes the Court's function and 2.105 describes the 15 16 attorneys' functions and how the jury should judge all of 17 these things. 18 In our view, if the Court were concerned, it could 19 give these instructions that it's also going to give again 20 at the end of the case. We would respectfully suggest that 21 we not tell the jury why they're being instructed on this 22 again, because it would just draw attention back to it. 23 THE COURT: So both parties, it seems to me, are 24 agreeing that, as to this motion, the fact that the jury 25 learned there might be this motion submitted today, that I

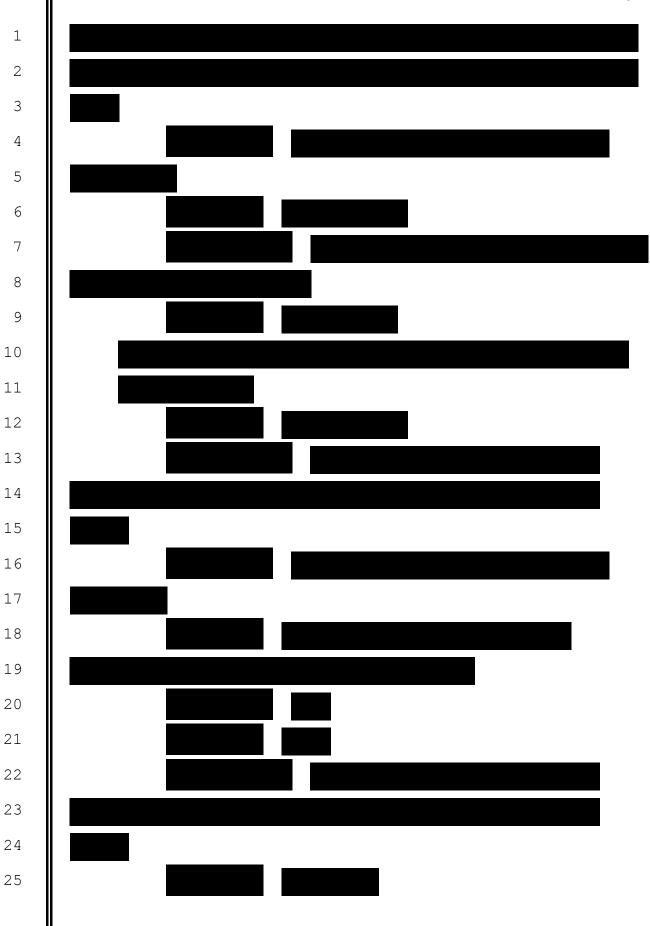
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should not remind them of that motion. I shouldn't attempt 1 to cure prejudice by saying something like, you heard about 2 3 this motion yesterday. I don't want you to think that I've 4 decided in any way that would indicate that I have a view of Basically, both parties agree I shouldn't mention 5 the case. 6 it at all. 7 And then the other question is whether and to what extent I give a fairly generic instruction about the 8 9 respective roles and responsibilities of me and them and the 10 fact that, you know, I shouldn't take -- they shouldn't take 11 anything that I've said as a view of the case, some version 12 of that. I know there's a disagreement about exactly what I 13 say but a fairly generic instruction. 14 MS. VAUGHN: To clarify, the government doesn't 15 think there has been any prejudice, such that an instruction 16 isn't required, but to the extent that the Court believes 17 that one is, we don't have any objection to doing that. 18 We agree that no instruction is MR. CORCORAN: 19 needed at this time, and it will be covered in the Court's 20 final jury instruction. 21 **THE COURT:** I may or may not agree with that. All 22 I want to discuss another issue with the parties on right. 23 the husher. 24 (Sidebar discussion.) 25







(Sidebar discussion concluded.)

DEPUTY CLERK: We are now back on the public record.

6 **THE COURT:** I'd like to take a brief recess. I 7 want to consider the Motion for Judgment of Acquittal, the 8 parties' views around prejudice. I'll just spend five 9 minutes and then I'll come back and discuss that.

10 And then I also want to think about when an 11 appropriate time to hear from you, Mr. Schoen, is on the 12 motion relating to the granted Motion to Quash congressional 13 scheme. Okay? So we're in recess for five minutes.

DEPUTY CLERK: All rise.

(Recess at 11:15 a.m. until 11:23 a.m.)

DEPUTY CLERK: We are now back on the record. THE COURT: Thank you, Ms. Lesley.

With respect to the Motion for Judgment of Acquittal, as was made pretty clear here, I was concerned about its having been mentioned in front of the jury and what the jury might hypothesize if they are called back in here to continue the case and whether they might think that that reflected -- they would infer that that reflected a judgment by me about the motion.

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So my plan or at least my thinking coming in here

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1	was that I was going to do two things, one of which I am
2	still going to do.
3	I am going to reserve judgment, reserve decision
4	on the Motion for Judgment of Acquittal, as I am permitted
5	to do under Rule 29(b), because I thought that reserving
6	judgment was the way to most reduce the potential prejudice
7	to the jury.
8	And then I was going to what I had been
9	thinking I would do is I was going to then instruct the jury
10	that they had heard of this motion and that, in order to
11	ensure that they didn't think that I was deciding the merits
12	or the strength or anything of the case one way or the
13	other, that I was going to reserve decision. I was going to
14	tell the jury that.
15	But both parties are the parties are in
16	agreement that raising the question with the jury would
17	effectively put it in their heads more than it otherwise is
18	and would run the risk of more prejudice or some prejudice,
19	more prejudice, than making either no mention of it or any
20	instruction whatsoever about legal issues or giving them
21	some very benign instruction about my role as judge deciding
22	legal issues and that they shouldn't take anything I say or
23	do or otherwise to interfere with their duties.
24	So in light of the parties' shared view that I

shouldn't say anything about the Motion for Judgment of

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Acquittal, I'm not going to do so. I am going to give the jury a very, very basic instruction about my role versus theirs.

And so I'm reserving decision on the Motion for Judgment of Acquittal. Obviously, I have to decide it later as a result based on the arguments as they are presented to me today, and I am not going to say anything about the motion to the jury that I'm going to give them whenever they come back, a very basic instruction about my role.

10 As to Mr. Schoen, your argument about the -- in 11 your renewed motion regarding the implications of my 12 granting the Motion to Quash, if you could come forward. I 13 have sort of a procedural question for you, which is, Is 14 this really a Motion to Dismiss the indictment or is it 15 something different now? Is it like a Sixth Amendment 16 argument, Motion for Judgment of Acquittal? And is it 17 appropriate to take up now or later? Would you prefer to 18 take it up later?

19 MR. SCHOEN: I really was sold on the Court's 20 approach originally. I mean, that is, that, listen, you 21 know -- yes, it's a Motion to Dismiss. That Motion to 22 Dismiss was filed when it was filed.

THE COURT: Yes.

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24MR. SCHOEN: And those are the arguments.25I think we've made a motion, Rule 29 motion. I

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think that, given the Court's real interest -- listen, two things I've learned since I got into this case and have been reinforced to me, the Court's a whole lot smarter than I am, reinforced at every appearance, and secondly, the Court likes to cut to the chase.

6 So the Court indicated the other day that its real 7 interest in this motion is, Listen, we've briefed the issues 8 on whether dismissal is appropriate. If dismissal is not 9 appropriate, is exclusion another remedy. The Court has all 10 that. I don't think we need to discuss that too much. So 11 the Court said, I need to know what it is you wanted from 12 Thompson.

13

THE COURT: Yes.

MR. CORCORAN: So I think that makes sense, and that's why I thought the Court's idea about doing it during our case makes sense.

I think we'll have to think logistically, if that's the case, about -- I don't know if the Court intends next to bring in the jury or not, but I think --

20 **THE COURT:** So let me ask you this question, if 21 you're prepared to answer it. If we have -- imagine we 22 don't have argument right now on the proffer that you would 23 be prepared to make --

MR. SCHOEN: Right.

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THE COURT: -- what's your plan?

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1	MR. SCHOEN: May I have just one second? I just
2	want to say logistically
3	THE COURT: Yes.
4	(Discussion between counsel off the record.)
5	(Brief pause.)
6	MR. SCHOEN: I'll put it this way, Your Honor, I
7	think for the defense case we do not need the jury. In
8	other words, I want to just we'll make a proffer to the
9	Court so the Court is ensured has an assurance that
10	everyone has been fully informed of their rights and so on.
11	I know the Court would do that anyway, but in any event, we
12	would just make a proffer that we cannot make in the
13	presence of the jury.
14	So I need to make a proffer on the Thompson
15	issue
16	THE COURT: Yeah.
17	MR. SCHOEN: And then
18	THE COURT: So I guess I was asking a bigger
19	MR. SCHOEN: Actually I know what the Court was
20	asking.
21	THE COURT: Why don't we go ahead and do that?
22	Why don't you make the proffer you're prepared to make on
23	Thompson.
24	MR. SCHOEN: Okay.
25	THE COURT: I'll hear from the government and its

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1 response to that. I'll have to think through whether and to what extent that proffer and the government's response leads 2 me to conclude that relief is warranted. 3 4 Then my real -- the question I was really getting 5 to is, Is the defense going to be putting on a case, 6 assuming that we're bringing the jury back here? 7 MR. SCHOEN: I understood that, Your Honor. The 8 answer is, No. 9 THE COURT: Okay. 10 MR. SCHOEN: But way of proffer I do have to make 11 those -- so that would be the defense case. 12 THE COURT: Understood. 13 MR. SCHOEN: I just lost my --MS. VAUGHN: Your Honor, may I? 14 15 THE COURT: Ms. Vaughn, yes. MS. VAUGHN: I just wanted to make a proposal, 16 17 just thinking about the most efficient way to use the jury's time here. 18 THE COURT: Yes. 19 20 MS. VAUGHN: It sounds like the parties have 21 already figured out what proposals they have for the final 22 jury instructions. 23 THE COURT: Yes. 24 MS. VAUGHN: To present them to the Court. 25 So our proposal would be to send the jury to an

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early lunch. We can confer for 20 minutes on the jury instructions, provide our results to the Court, and then we could have a charge conference when the jury comes back for lunch, go right into instructions and closings.

5 MR. SCHOEN: If I may, that may be the best 6 course, but another suggestion would be that we go forward 7 with this and then rest. And then we would be prepared to, 8 you know, after lunch then --

9 **THE COURT:** But you are not -- as I understand it, 10 at least, you are not intending to put on any evidence to 11 the jury?

MR. SCHOEN: Correct, Your Honor.

12

13 THE COURT: Okay. So the jury has now heard all 14 of the evidence it will hear. There are then two or three 15 things that occur -- could occur before the jury gets this 16 case, if it does.

17 One is that there's a discussion around and a 18 finalization of jury instructions. That has to happen 19 before any closings.

The second is the proffer/argument around -- I'll put it this way -- the congressional subpoena-related motion that would, in Mr. Bannon's view, obviously take this case from the jury.

And then I have reserved on the judgment for motion -- the Motion for Judgment of Acquittal because I was

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concerned about prejudice to the jury and the like. My plan 1 2 had been to reserve judgment until after the jury deliberates, assuming we get there. 3 4 I guess, in theory, if we're at the end of the 5 defense case in the evidentiary sense, you might -- I take it you do not have -- as a result, you do not have a 6 7 separate motion for judgment after the defense case. It's different from this proffer. Fair enough? 8 9 MR. SCHOEN: Certainly. We are not putting on a 10 defense case. 11 THE COURT: Yes. 12 MR. SCHOEN: What I need to make, Your Honor, is 13 simply the Thompson proffer, discuss that issue. 14 THE COURT: Yes. 15 MR. SCHOEN: And then the explanation that --16 Mr. Bannon won't be testifying and I would explain 17 Mr. Bannon's decision, informed decision and so on. 18 THE COURT: Yes. Yes. Let's do that. 19 Let's go ahead -- I am trying to be respectful, in 20 part, of the jury's time, but I also want to do this in an 21 efficient manner. I also want to make sure that I have 22 adequate time to consider your argument for the judgment 23 relating to the Thompson, et cetera, testimony. I would 24 like to do the following. 25 I would like to take a recess. I would like the

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parties to confer around jury instructions and then to just submit those to us. Whatever you're -- whatever you discuss to us so that we can, at least, be looking at them and addressing them while we also then come back after the recess and hear the proffer, both around the Thompson information and Mr. Bannon's decision not to testify, the government's arguments to the contrary.

Depending on how the arguments go, I will decide whether I can resolve the question there or if I have to reserve again. And then we can just go forward. And we will see then, whether we're in a position to instruct the jury, based on the instructions as agreed or as I have sifted through them. And if we are at that point, then we can instruct the jury and do closings.

But I don't think we're there yet, because I want the parties to meet and confer around the instructions. I want to hear you, Mr. Schoen, on the Motion to Quash implications and from the government, of course, have some time to think about that.

20 So we're going to go into a recess until 1:00. 21 Okay.

24

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22 MR. SCHOEN: How does the Court handle the charge 23 conference logistically, again? In here, open Court?

THE COURT: So I was assuming that we -- there is substantial agreement on at least a lot of the instructions

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1	but some disagreement on some. I was planning to just do it
2	in here and to hear from the parties on the positions once
3	articulated to us and see what they are. In an informal
4	way, I get that these will not be filings. These are the
5	way I like to have it is emailed to me to the chambers email
6	with the parties' respective positions. It need not be
7	formal areas of disagreement and we can just discuss them.
8	But my plan, though, is so to go into a recess
9	right now. To tell the jury that, at a minimum, they have
10	until 1 to go have lunch. At 1:00 to hear from you,
11	Mr. Schoen, around your proffer and your arguments, to hear
12	from the government.
13	And then, once I've heard that, to then take up
14	the jury instructions questions. But we will at least have
15	from you before 1, I hope, your views on instructions.
16	Okay?
17	And then we'll take it from there. But thank you
18	for letting us know of the plans. Okay?
19	DEPUTY CLERK: All rise.
20	(Recess at 11:36 a.m. until 1:07 p.m.)
21	DEPUTY CLERK: Good afternoon, Your Honor, we are
22	back on the record.
23	THE COURT: Good afternoon, everyone. Mr. Schoen?
24	MR. SCHOEN: Thank you, Your Honor.
25	First, my focus is going to be like this. I want

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1	to just give a two-minute/one-minute background on why I
2	thought this issue was important. And then I just want to
3	focus on the specific areas on why we wanted
4	Chairman Thompson. When I say "Chairman Thompson," i mean
5	Committee members.
6	THE COURT: Yes.
7	MR. SCHOEN: Thank you, Your Honor.
8	As the Court knows, our view is has been badly
9	stymied in being able to present a defense in the case based
10	on the Court's ruling, after careful consideration of the
11	defenses we proposed and the Court's conclusions. We
12	believe that in that kind of
13	THE COURT: Some of which, as you know, I believed
14	I was bound by D.C. Circuit precedent that I am not even
15	sure is right.
16	MR. SCHOEN: Thank you, Your Honor. Understood.
17	THE COURT: Yes.
18	MR. SCHOEN: So in that universe, the defense
19	needs to find as many areas of material for its defense as
20	possible, principally, through cross-examination, but also
21	through calling witnesses that we believe have relative
22	noncumulative evidence to provide on the fundamental issues
23	before the Court.
24	Now we also would propose to evening these

24Now, we also would propose to examine those25witnesses on issues the Court has ruled out. We understand

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that we wouldn't be able to examine them on them. But to preserve the record, those would include issues like the rules issues, composition of the Committee, and so on, that the Court has ruled out. But that would be part of our reason for wanting to have first-hand input from the Committee members themselves.

THE COURT: Yes.

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MR. SCHOEN: That won't be my focus today.
Secondly, is this overall approach that the
government has taken, and specifically through its witness,
Ms. Amerling yesterday -- whenever that was, I think it was
yesterday.

13 THE COURT: Yesterday and the day before.
14 MR. SCHOEN: Yes, sir. Thank you, Your Honor.
15 Through Ms. Amerling that Mr. Bannon's approach
16 was that he simply ignored the subpoena; that he decided he
17 was above the law; and that he simply refused to comply for
18 no appropriate reason.

Well, he certainly didn't ignore the subpoena. So we would want to examine these witnesses, the Committee members, Chairman Thompson himself, to whom Mr. Costello's letters were directed, to make the point that Mr. Costello and Mr. Bannon didn't ignore them when they wrote their letters, each of which are in evidence now.

But the idea that Mr. Bannon thought he was above

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the law is belied by the letters. Mr. Bannon from Day 1 1 said that he wanted to comply -- take it back a step. I 2 know the Court's aware of this. I'm just sort of setting 3 4 the stage in a sense. 5 Mr. Bannon is contacted by his lawyer Costello. 6 Is told that he has a subpoena -- a congressional subpoena 7 from this Committee, and then he tells him he's been advised that he been advised -- he, Costello, has been advised that 8 9 executive privilege has been invoked. This is all in 10 Costello's Declaration ECF 30-1. 11 But anyway, so he tells them that and he tells 12 them -- to again cut to the chase -- you're bound by 13 executive privilege. Your hands are tied. You may not 14 comply with the subpoena. I, Costello, have studied these 15 OLC opinions. They support us. 16 They apply to you and your hands are bound. 17 You're caught as a pawn between a fight between a form President and this Committee. There's nothing you can do 18 19 about it. You're not permitted by law to do anything about 20 it. 21 That's not -- and on top of that, Costello --22 Bannon, through Costello, contacts the Committee, 23 Chairman Thompson again, to tell him, Bannon is looking for a way to comply. He wants to comply. So here are some 24 25 options. Either work out the privilege with former

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1	President Trump or let's go before a court. It should be a
2	court that decides whether the privilege is valid.
3	THE COURT: I know all of this.
4	MR. SCHOEN: Yes, Your Honor. Let me tie it in.
5	THE COURT: Yeah.
6	MR. SCHOEN: The Committee members themselves,
7	Chairman Thompson particularly, but the Committee members,
8	are aware of that process. They made a decision not to
9	pursue that process.
10	Had they wanted the information and documents and
11	testimony from Mr. Bannon, that was the process readily open
12	to them and that, if they're right about privilege, would
13	have led to getting that information. Because what Bannon
14	said is, if a judge orders me to comply, I will comply. I'm
15	paraphrasing. So had they gone before a judge, a judge of
16	their right, would have said either privilege isn't valid or
17	it's not so broad or you still have to respond in some
18	manner and he would have complied with that.
19	They chose not to. Now we would have examined the
20	Committee members about the accommodation process, about
21	that route and about why they made a decision, if Bannon's
22	information and testimony was so important to them as
23	Ms. Amerling testified but as we would want to hear from the
24	Committee members, then why not go that route? Why did they
25	choose to go criminal and so on?

Okay. So I'll go down a list now, Your Honor, of things that we -- with the kind of, I think the kind of specificity the Court had in mind, I hope anyway. Again why did -- I'll use Chairman Thompson for shorthand for the other witnesses, but focus on him particularly because the letters are back and forth with him.

7 Why did Chairman Thompson believe Bannon's 8 testimony was important? What was it that he thought was 9 pertinent about the Committee's work specifically from the 10 Committee's perspective, not from a staffer's perspective?

For all of these, our position is a staffer is simply neither competent to testify about this nor the appropriate person nor the person who the jury should be hearing from on our issues on cross-examination.

15 **THE COURT:** Given the Committee acts as a body, 16 would that entitle you to have every single member of the 17 Committee here? Why does Chairman Thompson matter? If nine 18 members or eight members of the Committee said, No, we don't 19 want you to do this, why is a single member in a 20 multi-member body like this particularly important on 21 something like pertinence?

22 MR. SCHOEN: I do think we would be entitled to 23 have the whole Committee here, quite frankly. But 24 Chairman Thompson, for example, is a decision-maker and he's 25 the leader of the Committee. So that's why Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 41 of 127

Chairman Thompson. And I think we're not greedy. It would 1 2 suffice to us to have Chairman Thompson here without waiving the reasons I have for the other issues. 3 4 Now, if the Committee's work was so important, 5 then why not give Bannon a one-week extension when he asked 6 for it toward the end. That period is particularly 7 important for issues I'll get to in a second. Was it important, Chairman Thompson for --8 9 important enough for the Committee to wait or to take one of 10 those other steps that Bannon suggested for compliance? And 11 if not, why not? 12 Again, the Committee's work is ongoing. Thev're 13 still hearing from witnesses. They're lining people up for 14 their television hearings. What harm would there have been 15 in giving Bannon an extension? 16 What did Chairman Thompson mean in the language 17 that he used in his letter on October 15th, when he asked 18 Mr. Bannon to submit any reasons that he had for continued 19 noncompliance by October 18th? Why October 18th? What kind 20 of reasons did he have in mind? What kind of reasons might 21 have persuaded Chairman Thompson to, in his words, change 22 course? 23 What did he mean -- what did Chairman Thompson 24 mean in the language he used on October 19th, a day after --

I mean -- yeah, a day after he had been in touch with

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Costello and the contempt -- he insisted on going forward with the contempt vote?

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What did he mean when he urged Bannon to change course? I'm reading from the first paragraph. "I write, yet again, to urge your client, Stephen K. Bannon, to change course and comply with the September 23, 2021 subpoena from the Select Committee to investigate the January 6th attack on the United States Capitol. Select Committee."

9 What did he mean? And what would the impact be of 10 Mr. Bannon complying? We heard the other day that, if he 11 had complied by 11:00 instead of 10:00, that might have had 12 a consequence, a positive consequence for Bannon. So what 13 did it mean if he complied after the 18th, after the dates 14 in the indictment?

15 Remember, again -- well, I'll talk in one 16 second -- one date is on October 14th so that -- in Count 1, 17 if the government were to prove that Mr. Bannon failed to 18 comply on October 15th, he's not guilty under Count 1.

19 On Count 2 it is by October 18th. But why 20 October 18th? October 7th is the date for that one in the 21 subpoena. Why is that date changed?

THE COURT: Why. Why -- what element or issue in the case as it exists now does any of this go to?

24 MR. SCHOEN: It goes to the direct defense that 25 the Court has permitted, the belief the dates were flexible.

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1	THE COURT: But the belief has to be is about
2	Mr. Bannon's belief.
3	MR. SCHOEN: Yes, Your Honor. So Mr. Bannon's
4	belief, when he gets a letter on October 19th, after the
5	18th
6	THE COURT: But the letter comes in and the letter
7	says what it says. Mr. Bannon, I presume, is not talking to
8	Mr. Thompson nor is Mr. Costello. So how can what is in
9	Mr. Thompson's head inform the mens rea of the defendant?
10	MR. SCHOEN: Because Mr. Thompson wrote the
11	letter. The defendant gets the letter.
12	THE COURT: The letter is the letter.
13	MR. SCHOEN: The defendant gets the letter. He
14	has to
15	THE COURT: But the defendant's mens rea is the
16	defendant, in mid-October, has a set of information in front
17	of him. That information is the letters. And the letters,
18	in his view, may be ambiguous or they may present some
19	question. But what does Chairman Thompson's testimony tell
20	us about Mr. Bannon's mens rea since it, by definition, was
21	not known to Mr. Bannon what Mr. Thompson thought in his
22	head?
23	MR. SCHOEN: Well, that's part of the issue. The
24	fact that it's a question is a reason to have the
25	discussion.

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1	THE COURT: No, but are you saying that Mr. Bannon
2	had any information about what was in Mr. Thompson's head
3	other than what's reflected in the letters?
4	MR. SCHOEN: No, Your Honor. That's exactly why
5	we need him on the witness stand because we don't have
6	THE COURT: But how can that go to mens rea? You
7	just said it goes to Mr. Bannon's belief that the dates were
8	flexible.
9	MR. SCHOEN: If we're right and the reason he
10	moved it is because the dates are flexible and we get that
11	from Chairman Thompson on the witness stand, then
12	Mr. Bannon's the jury certainly
13	THE COURT: That doesn't go to mens rea, but maybe
14	it goes to whether the dates were in fact not fixed, not
15	mens rea.
16	MR. SCHOEN: Well, that's certainly part of the
17	equation. If the dates were in fact not fixed, that
18	certainly goes to support Mr. Bannon's belief as a
19	reasonable, fair belief. And the fact, quite frankly, that
20	the indictment and the subpoena have different dates,
21	supports the idea that the date was malleable. The 18th
22	seems to be just an arbitrary date. So if it's the 18th of
23	October, why isn't it the 23rd of December?
24	All right. So
25	THE COURT: Do you concede that what was in do

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 45 of 127 934 you concede that what was in Mr. Bannon's head at the time 1 from -- in terms of information from the Committee was only 2 3 what was reflected in the letters? 4 MR. SCHOEN: About the dates, I think that's 5 right. I mean, there were public statements made by the 6 Committee about what, we believe, reflects an agenda. 7 THE COURT: Mr. Bannon and Mr. Costello didn't 8 have any communications with Mr. Thompson at the time. 9 Correct? 10 MR. SCHOEN: Correct. I mean --11 **THE COURT:** I mean oral communications? 12 MR. SCHOEN: Correct, Your Honor. 13 THE COURT: Okay. Keep going. 14 MR. SCHOEN: I'm sorry. 15 I lost my train of thought for a second. 16 THE COURT: Sorry. Take your time. 17 MR. SCHOEN: Yeah. Yeah. 18 THE COURT: You were going through the various 19 items in which you --20 MR. SCHOEN: Yeah, the Court obviously knew that, 21 but --22 THE COURT: Would like a congressional person to 23 testify about. I didn't mean to undue --MR. SCHOEN: In any event, the progression 24 25 continued. What did Mr. Thompson mean -- it's the same

1 effect.

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THE COURT: Right.

3	MR. SCHOEN: What does Mr. Thompson mean in his
4	January 4th letter, he appreciates Mr. Bannon January
5	14th letter I keep saying January July 14th letter in
6	which he appreciates Mr. Bannon's willingness to comply. So
7	we would want to examine Chairman Thompson about that.
8	And, Judge, the idea that just the letters speak
9	for themselves reminds me certainly there are some
10	distinctions, but reminds me of the confrontation clause
11	issue that the Court noted in Crawford versus Washington,
12	for example. They had the wife's letter. She was
13	unavailable. They had a marital privilege, but the letter
14	just wasn't good enough, the Supreme Court told us.
15	So these letters have meaning behind them. And
16	even if they're just offered for notice, the question is,
17	was that notice reasonable? In other words, the Court
18	raised the issue the other day
19	THE COURT: Wait. Wait. Wait. Why is the
20	question reasonable? What's that issue? I hadn't heard
21	that before.
22	MR. SCHOEN: Because, if one of the reasons Bannon
23	thinks that the dates are flexible is, if the Committee is
24	going to yield eventually on executive privilege or one of
25	those issues, then the reasonableness of the Committee's

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position is relevant to that idea, or it's just, you know, 1 completely off the wall that Bannon could think that, and 2 again, that's a question for the jury. 3 4 All right. If Chairman Thompson thought that 5 Mr. Bannon -- again, this goes to the dates issue, how firm 6 are they, and the default question. 7 If Chairman Thompson thought that Mr. Bannon 8 already had defaulted on the subpoena, then what would make 9 him think that he has the right to demand continued 10 compliance? Why does he use the term "compliance"? Why 11 don't they, in their July 14th letter, use the word 12 "default" if they think there's been a default? 13 Now, Ms. Amerling went through the subpoena and 14 what she said, as a staffer, they suspected about -- I don't 15 mean any disrespect by saying "staffer". I'm sure it's very 16 important position. 17 THE COURT: I understand. It's a distinction between staff and member. 18 19 MR. SCHOEN: Yes, Your Honor. 20 Ms. Amerling went through the subpoena and what 21 they suspected about Bannon and intended to show through 22 The significance of Bannon not complying under the Bannon. 23 auspices of the pertinency -- if pertinency is the word or 24 pertinence is the word? But we need to discuss, whichever 25 word that is -- pertinency I'll call it for now -- with

Chairman Thompson.

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It's the Committee's perspective on pertinence 2 3 that's important. So if pertinence is independently 4 relevant through testimony on the stand here as an element 5 for the government or as a defense that it's not pertinent, 6 we need to examine a Committee member, a person who has the 7 authority on behalf of the United States Congress or that 8 Committee, to make those decisions. What's his perspective 9 as the decision-maker and go through each reason with him.

10 Now, Ms. Amerling referred constantly to 11 Mr. Bannon's misconduct throughout her testimony. But we 12 would want to establish with Chairman Thompson, as the 13 Committee representative, the authorized Committee 14 representative, the leader of the Committee, about 15 Mr. Bannon's actual willingness to comply and his position 16 that, if privilege were not valid and a judge said so or it 17 weren't so broad and a judge said so, then he would have 18 complied fully.

We want to establish with the Committee, Chairman Thompson, that Chairman Thompson knew at all times that Mr. Bannon was acting on the advice of counsel. And I understand that may be an issue the Court wouldn't permit today, but I still say this is one of the things we would want to examine him on. But that he wasn't acting on some inexplicable intransigence. Rather, he had specific reasons

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which he thought the Committee should yield on and they had notice of that.

That's, you know, the purpose of we say these letters are for. They had notice that that was Mr. Bannon's position. He offered a way out. The entire presentation we saw from Ms. Amerling was that, "He had no intention ever of complying, he never produced anything for that reason and for no good reason and it was all misconduct."

9 That's not the story of the case. If Mr. Bannon 10 is going to be handcuffed and not able use his defenses to 11 explain the story of the case, then we need, through 12 cross-examination, to be able to get out that story of the 13 case to the extent permissible within the narrowed defense 14 the Court has permitted through a member of the Committee.

We want to know -- I may be repeating this, but that wouldn't be the first time, I'm sure. We want to develop through Chairman Thompson whether the Committee considered either of the options. The Court heard the questions to Ms. Amerling the other day, but Ms. Amerling is not competent to answer that question.

Whether the Committee, the Committee members, the members of Congress, the elected members of Congress, authorized members of Congress, whether they considered, for the American people, either of the options that Mr. Bannon offered. If they really wanted to get Bannon's testimony

for this January 6th Committee, did they consider the 1 2 options that he offered? And Chairman Thompson, isn't this a normal course 3 4 to pursue? Haven't you pursued this course, you, 5 Chairman Thompson, speaking institutionally -- hasn't this 6 institution pursued the course of a civil enforcement 7 proceeding in the past? And haven't the courts said that ultimately the courts are the ultimate arbiter of these 8 9 kinds of disputes? 10 Because we heard from Ms. Amerling the other day 11 that Bannon, through Costello, was told over and over again, 12 This Committee rejects your privilege claim. Well, the 13 courts have said, it's a tension; that's a --14 separation-of-powers issue. When the President or former President invokes 15 16 privilege, it's presumptively valid. It's presumptively 17 privilege. And it's not for Chairman Thompson or any other 18 member of Congress to seek to override that unilaterally. 19 There was a question, as the Court is well aware, 20 whether that's a justiciable question in the first place. 21 The Court certainly in this district indicates that it is. 22 So why didn't Chairman Thompson take that option? 23 I talked about the presumptive validity. I'd want 24 to question him about that. 25 Why would he, Chairman Thompson -- knowing this

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historic tension and its resolution by the courts in the 1 past, why, if he wanted that information, wouldn't he pursue 2 that course? Why would he expect Mr. Bannon to be satisfied 3 4 by what we have said -- although not admissible in evidence 5 I understand, but we have said is a purely partisan 6 political agenda to get Bannon? 7 And by the public statements, the reason we think those are independently important is that those public 8

9 statements, some of which we cite in the opposition to10 Motion to Quash papers, indicates that partisan agenda.

Another issue, quite frankly, and I don't know that the Court would permit it but that we would want to examine Chairman Thompson on to preserve for the record would be the extraordinary conflicts that mar this Committee.

16 Chairman Thompson brought a lawsuit against 17 President Trump alleging that former President Trump was 18 directly responsible for the events of January 6th and that 19 he, Chairman Thompson, was personally injured. When he 20 withdrew from that lawsuit to become chairman, he said that, 21 in his withdrawal motion, he stands by the allegations or 22 words to that effect.

23 Mr. Raskin, Mr. Schiff have written books on the 24 events of January 6th. They have a reputational and perhaps 25 financial interest in ensuring that the Committee's

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conclusions are consistent with their books.

2 We want to examine those members about that. It's 3 a matter of bias, in choosing this course and in 4 determining, to put it in in our framework, in determining 5 whether the dates were fixed or were malleable. And maybe 6 they were moved in their decision-making process on that by 7 their conflicts, by their bias.

8 Ms. Amerling imbued the Committee the other day 9 with this sincere desire to investigate fully and get to all 10 the facts but from some perspectives. We say this question 11 is a lot more complicated. I don't believe that, under the 12 Court's -- under the narrow defense we have here, this would 13 be admissible evidence. But it is a reason we would want to 14 try to examine Chairman Thompson and that is, did the 15 Committee ever really want to hear from differing 16 perspectives?

We know, at least from the media, that members suggested, recommended by Mr. McCarthy, were kept off of the Committee, Jordan, Banks. And from their perspective, it was because they wanted to broaden the investigation to include other issues relevant to the events of January 6th. We'd want to examine the members here and why those decisions were made.

Chairman Thompson -- this is also directlyrelevant, I think. Chairman Thompson has made public

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1	statements to the effect that anyone who invokes
2	privilege and in this case it was a Fifth Amendment
3	privilege. Anyone who invokes privilege must have something
4	to hide. Therefore, again carrying it one step further, it
5	would be reasonable to believe that he simply flatly rejects
6	privilege claims in response to a subpoena; and that he
7	believes he unilaterally has the authority to reject them
8	and that it doesn't need to be brought to a Court; and that
9	hopefully he would be moved, swayed from that position by
10	reason over the course of time so that those dates would
11	move, in the sense that Mr. Bannon would be able to comply,
12	they would go before a judge or President Trump would have
13	removed the privilege earlier than he did now.

We say that eliminating instruction in the letters doesn't obviate the need to examine the letter writer himself; and that's why -- you know, I think that *Crawford versus Washington* is relevant there.

And also, you know, a case like -- United States versus Nobles in which defense investigator wanted to testify consistent with the defense theory but he refused to -- the defense refused to produce his report and so they kept the testimony out.

Here, I think the similarity is we need the underlying evidence of these opinions or conclusions that Ms. Amerling, who has no authority to make them or to speak

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on them, gave to us.

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Now, Ms. Amerling said -- and I think -- well, Ms. Amerling said that Mr. -- I think she was parsing words a bit or this is just how she understood it or the question wasn't sufficiently clear. But, in any event, she answered that -- again, I'm paraphrasing. I don't have the transcript in front of me.

8 Mr. Bannon never asked for an extension of time to 9 produce documents. He just asked for an extension for *Trump* 10 *versus Thompson* decision that came out. We would want to 11 talk to Chairman Thompson about that. Now he's a party to 12 that lawsuit, and it's particularly important for this 13 question, the question of the dates, whether the dates would 14 have been moved for this reason, two reasons.

15 Trump versus Thompson lawsuit dealt, in part, with 16 exactly one of the issues before this committee -- before it 17 evolved here. Does a currently-sitting President take 18 precedence on the issue of the invocation of privilege over 19 a former President?

Now, the D.C. Circuit opined to some degree on that, but Justice Kavanaugh wrote a very clear statement in the denial of circuit in which he said, that part of the D.C. Circuit opinion is out.

Of course, a former President has the right to
invoke privilege. We decided that in *Nixon versus GSA*.

1 2 When there's a tension between the two, there has to be a question of what's going to be determined.

So what happened here? On the 18th of October, 3 4 this fellow Jonathan Su, S-U, on behalf of President Biden 5 wrote a letter to Mr. Costello in which he went through a 6 couple of things. It's only two or three paragraphs long. 7 But he said, "On the 18th of October, President Biden's determination that an assertion of privilege is not 8 justified with respect to these subjects applies to your 9 10 client's deposition testimony and to any documents your 11 client may possess concerning either subject."

12 That's on the 18th of October. That's the day 13 that Mr. Costello asked for a one-week extension to study 14 Trump versus Thompson. That's one of the issues in Trump versus Thompson. Does President Biden have the authority to 15 16 tell Bannon, Costello, you don't have privilege no matter 17 what former President Trump said. That was on the 18th. He 18 asked for a one-week extension. Why didn't they move that 19 deadline given that? Because, we say, because they had a 20 televised contempt referral vote scheduled for the 19th 21 already and that was more important.

But in terms of getting the information and complying with the subpoena, maybe they would move the dates if it weren't about posturing. And maybe one day they would say it's not about posturing. We want to get your Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 56 of 127

1	information. And maybe that's what they said on July 14th,
2	when they talked about welcoming his compliance of the
3	subpoena, his willingness to comply with the subpoena.
4	The last two or three points, Judge. Sorry I've
5	taken up a lot of your time already.
6	THE COURT: No, I want to hear it, and I think
7	it's important to have the full proffer.
8	MR. SCHOEN: Thank you, Your Honor.
9	So Ms. Amerling testified. This is a pure-dates
10	issue again. Ms. Amerling testified that she didn't know
11	why the 7th was changed to the 18th. That may not have been
12	exactly what she said, but the issue around this is, the
13	subpoena requires production of documents by the 7th.
14	The indictment requires the production of or
15	finds a default if the asks the jury to find a default,
16	willful default, if the documents were not produced by the
17	18th.
18	I want to know from the Committee, the Chairman,
19	why did that date change? Was that an arbitrary date?
20	Didn't that reflect the idea that the dates in the subpoena
21	or that date at least in the subpoena, October 7th, was a
22	flexible, malleable
23	THE COURT: What does the Chairman have anything
24	to do with the indictment?
25	MR. SCHOEN: Nothing to do with the indictment.

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We would present him with the indictment. And the idea is, this indictment charges the willful default. So what's the interchange? What's the connection between the date --THE COURT: Does he have any personal knowledge of the indictment? MR. SCHOEN: I have no idea. We would ask him that. It's another reason -- good idea, Judge. It's another reason we need him on the stand. I would ask him whether he had any personal knowledge about the indictment. THE COURT: You have to make a proffer that it's likely that he would have such knowledge. Yes, I understand, he may have personal knowledge of what's going on in the Committee. MR. SCHOEN: Well, then there must be a one-way -not "must be," there might be then a one-way channel between Ms. Amerling and Chairman Thompson, because she certainly seemed to know every thought and idea that he had. She's not competent to testify to them. So Ms. Amerling worked closely with these prosecutors and so on.

20 **THE COURT:** Remind me, was Ms. Amerling asked 21 about the date of the 18th in the indictment?

22 MR. SCHOEN: I thought she was asked why did the 23 date change from the 7th to the 18th. She said the date --24 something like, the date didn't change. She was asked about 25 that.

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1	THE COURT: Okay.
2	MR. SCHOEN: I know the Court's aware of it. I
3	don't have to set up the dichotomy, but again, the subpoena
4	charges documents by the 7th, testify on the 14th.
5	Indictment charges documents by the 18th. Testify on the
6	14th.
7	And so the dates and this theory is independently
8	critically relevant to a finding of guilt or innocence
9	not guilt, because of that date. Because this indictment,
10	Mr. Corcoran alluded to it earlier, the indictment is not an
11	on or about date. Dates matter here. Indictment charges on
12	the 14th.
13	Another question is, why you know, was there
14	this flexibility that the date for compliance, at least in
15	the indictment, is by the 18th? Is that from input from the
16	Committee?
17	And if not, then what do we mean here when we say,
18	every time Chairman Thompson wrote a letter, the
19	government seems to be the government's position, when he
20	wrote a letter, he was just asking for the information still
21	even though he used the words "compliance" and referred to
22	the subpoena, he just meant, oh, you've already defaulted.
23	We just want that information in any event.
24	What did they mean then when he said, again, in
25	his letter of the 15th, "Give us any objections you have or

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other material you want to supply to us to convince us of your position, Costello, by the 18th, and that's not the date in the subpoena."

The other things where I said, Your Honor, earlier J just used shorthand because they clearly would not have been admissible here, but we would want to preserve the record to examine Chairman Thompson on the rules that the Court has ruled out.

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THE COURT: Yes.

10 MR. SCHOEN: Specifically on the 3(b) issue, which 11 seems to be possibly in play based on that portion of the 12 transcript. We would want to examine -- Ms. Amerling's 13 position was, Well, of course, we waited for him at the 14 deposition and would have given him a copy of it at the 15 deposition. However, we would have wanted to examine 16 Chairman Thompson on the Committee's practice with other 17 witnesses.

I am advised that at least the following witnesses were given a copy of Rule 3(b) with their subpoena: Kerik, Navarro, someone named Christina Bobb and Giuliani. I cannot make a representation to the Court that that's 100 percent accurate. That's how I've been advised. I thought I heard something. Sorry.

24 THE COURT: Let me ask you this question which is 25 related to the procedural question I asked earlier. Is this Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 60 of 127

akin to a Rule 29 motion in the sense that I can deliberate 1 on it, reserve my decision on it, as I have with the Motion 2 for Judgment of Acquittal, while the jury deliberates? 3 MR. SCHOEN: Thinking on the fly, Judge, in my 4 5 view there is absolutely no reason why not. We're not 6 putting on evidence. It's always better to have a more 7 contemplative decision. I don't have to tell this Court that. This Court, as I said earlier, is way up there. 8 9 And by the way, I meant it as a compliment that 10 the Court is much smarter than I am. I know that's not a 11 high threshold but I meant it as a compliment. I think the 12 Court's the smartest quy in the room. 13 THE COURT: Just trying to do my job. Just trying 14 to do my job. MR. SCHOEN: Doing it very copiously and with --15 16 respectfully, Judge, with the kind of demeanor that I think 17 we would all want to see in our judges. 18 THE COURT: Very nice of you, Mr. Schoen. Thank 19 I'd like to hear from the government now. you. 20 MR. SCHOEN: Thank you. 21 **THE COURT:** Ms. Vaughn, let's start procedurally. 22 What is the government's view about whether -- or by when 23 must I decide this question? 24 MS. VAUGHN: Your Honor, this question would be 25 answered on a Motion to Dismiss the Indictment. The Rule 29

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 61 of 127 950 standard is whether the government has presented sufficient 1 evidence at the end of its case for a reasonable juror to 2 decide. 3 THE COURT: 4 Uh-huh. 5 MS. VAUGHN: So whether they've had the ability to 6 put on a defense that they're allowed to put on is a 7 question separate from whether we've met our initial burden. It would be a ruling on the indictment to dismiss it. 8 9 I imagine that would have to happen before a 10 verdict, but I honestly would have to look into that more. 11 THE COURT: Let me ask you a different question. 12 In light of the arguments that have been made, is it the 13 government's position still that it will not call 14 Mr. Thompson or that Mr. Thompson will not appear? 15 MS. VAUGHN: To answer that, Your Honor, if I 16 could just go back to first principles. So to return to the 17 standard that governs this question, the closest thing --18 because where another branch uncontrolled by the prosecution 19 invokes an immunity to prevent a witness from being 20 available, there's really not a lot of precedent on that. 21 The closest thing is, when the government refuses to give 22 Fifth Amendment immunity to a witness to make them available 23 to the defense. The standard there is that, to be entitled to 24

dismissal, the defense has to show some kind of misconduct

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on the part of the government. And that is something beyond
just simply saying we're not going to immunize this person.
And they also have to show the question they plan to ask or
questions and what the answers that they have a
nonspeculative reason to think they will get, what those are
that are materially-exculpatory and noncumulative.

So in deciding this issue, the Court doesn't even have to reach the substance of anything that Mr. Schoen just said because the entire argument was, Let's just bring them in here and find out what they have to say. They have no nonspeculative basis to think that any member of that Committee has any materially-exculpatory noncumulative information.

14 That's for two reasons: First, nothing they asked for goes to the elements of the offense in this case. 15 Ι 16 think the through-line of everything that Mr. Schoen said 17 that they wanted is really just trying to get at personal motives of members. There is no element of the offense 18 19 here, that the Committee's request for the information, the 20 issuance of the subpoena, the refusal to give an extension, 21 there is no element of the offense that those steps have to 22 be reasonable in some way.

23 So questioning Chairman Thompson about, Well, why 24 didn't you go to the court? Why didn't you go talk to 25 former President Trump? That's irrelevant.

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1	THE COURT: What about on the question of whether
2	the dates were flexible?
3	MS. VAUGHN: Ms. Amerling testified that the
4	Committee first of all, just to step back. The Committee
5	is a body. There is no rule of law under which, for
6	example, if a corporation's position were at issue, the CEO
7	would have to come in and testify every time.
8	Ms. Amerling testified that she was involved in
9	all of the conversations, advising the members. She
10	testified from first-hand knowledge what the Committee's
11	position was. And then she testified that that position was
12	communicated to the defendant through the letters. There's
13	no other channel of communication on this. There's no other
14	evidence that there were any other dates out there.
15	So the question of whether the dates were fixed,
16	the evidence in the record is the evidence. It's pure
17	spe
18	First of all, it would be irrelevant if there was
19	some member of the Committee who was secretly hiding in
20	their office saying, Well, I know we sent a subpoena out
21	that says October 7th, but I think it should be October 8th.
22	That's irrelevant to the position of the body.
23	The only evidence is the letters, which
24	Ms. Amerling said was consistent with what she knows from
25	her personal knowledge to be the position of the Committee.

She is an agent of the Committee and was completely 1 competent to testify about its positions. 2 Mr. Schoen said that, when the Court asked what 3 4 that goes to in the case, he offered two things. Whether it 5 goes to the defendant's belief that the dates were flexible, 6 which I think the Court already addressed. There is no 7 evidence that the defendant had any information in his mind from the Committee other than the letters. 8 9 And he, second, said that the dates were not 10 fixed. But again, I just addressed that. The position of 11 the body is in evidence. They have no -- they've offered 12 nothing to conclude that some other member of the Committee 13 would have different or exculpatory evidence on that point. 14 The motion should just be denied. 15 THE COURT: So I know the government -- I 16 understand the government's position is it's very consistent 17 with what we have talked about before. Nothing that 18 Mr. Schoen articulated or proffered warrants dismissal of 19 the indictment or any other judgment in the defendant's 20 favor. 21 In light of that, I take it that your answer is, 22 No, the government isn't -- or Chairman Thompson is not 23 presently prepared, notwithstanding the arguments that have 24 been presented, to appear voluntarily or otherwise here. 25 MS. VAUGHN: The Committee has asserted they are a

1	different branch of government.
2	THE COURT: I understand that. I'm saying your
3	understanding is that Mr. Thompson has no present intention
4	to testify in response to the subpoena, voluntarily or
5	otherwise. So, for lack of a better word, there is no way
6	to have his testimony cure the objections that Mr. Bannon
7	has raised.
8	I recognize the government thinks they're
9	meritless. I'm just saying that that is not a possibility?
10	MS. VAUGHN: Not in the government's view.
11	THE COURT: Right. So I have to resolve the
12	motion however one styles it?
13	MS. VAUGHN: Yes.
14	And also it's just we can't even go back to the
15	Committee and ask them if we don't if there's not even a
16	relevant question to see if he has the answer to.
17	There's just Mr. Schoen talked for a long time.
18	I didn't hear a specific question that they had for
19	Chairman Thompson to which they have a reasonable basis to
20	believe he has exculpatory information on. It just seems
21	very premature to get to the question of, Would the
22	Committee consider waiving?
23	I have no idea. I wouldn't even know what to go
24	back and ask them for.
25	THE COURT: All right. I want to turn to the jury

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instructions because I have all of the parties here. I'm 1 going to take a recess after we do that, and I will come 2 back and talk about what I intend to do on the Motion to 3 4 Dismiss the Indictment or for other relief and the 5 instructions. 6 So can we go through the instructions? MS. VAUGHN: Yes, I'm just going to --7 THE COURT: Of course. And I saw the government's 8 9 email -- Mr. Schoen, did you want to respond to something 10 you heard from Ms. Vaughn about? 11 MR. SCHOEN: I just wanted to make one point, 12 Judge, so that we're not seen as conceding it. I don't 13 concede that this conduct is required in this case. There are cases that say otherwise, the Lieutenant Calley case 14 15 from the Fifth Circuit, for example, from my day and other 16 There are cases in which there was no misconduct, cases. 17 Fernandez and so on. 18 THE COURT: Thank you. Thank you. 19 Okay. So as to the instructions, walk through 20 them if that's okay. Can we -- whoever on Mr. Bannon's side 21 is going to sort of have the lead, so to speak, what I 22 thought we could do is we could just walk instruction by 23 instruction. 24 I think a lot of the initial ones are agreed upon. 25 We can do this relatively quickly.

1I will have changed the format of these to provide2to the jury. It will include a case caption. I won't3include the form number. They're just going to be called4Instruction 1, 2, 3, 4.5I will be adding an instruction that I'm not sure6that I just can't recall whether it was proposed by the7parties. It was a form instruction that will be Instruction81 that I will be providing the jury with a copy of the9instructions.10MS. VAUGHN: It is in your original proposal.11THE COURT: It is? Okay. We adopted that.12Instruction 2 will be the role of the Court which13I believe the parties are in agreement on.14Instructions 3 and 4, role of the jury and15recollection, I don't believe we have any proposals to16eliminate.17MS. VAUGHN: Oh, yes. I'm sorry, Your Honor.18The COURT: Okay. Eliminate or otherwise edit.20Instruction what was Instruction 2.104,21evidence in the case, judicial notice, stipulations,22depositions, I don't believe that that is applicable.23MS. VAUGEN: We agree.24MR. CORCORAN: We agree, Your Honor.25THE COURT: So that will be removed. The next one		Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 67 of 127 956
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	23	MS. VAUGHN: We agree.
25 THE COURT: So that will be removed. The next one	24	MR. CORCORAN: We agree, Your Honor.
	25	THE COURT: So that will be removed. The next one

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1	is statements of counsel. Everyone agrees that that is in?
2	MR. CORCORAN: Yes, Your Honor.
3	MS. VAUGHN: Yes, Your Honor.
4	THE COURT: The next one is indictment is not
5	evidence, also in?
6	MR. SCHOEN: Yes, Your Honor.
7	MS. VAUGHN: Yes, Your Honor.
8	THE COURT: The next one is burden of proof and
9	presumption of innocence, also in?
10	MR. CORCORAN: Yes.
11	THE COURT: Ms. Vaughn?
12	MS. VAUGHN: Yes, Your Honor.
13	THE COURT: Next one, reasonable doubt, also in?
14	MR. CORCORAN: Yes.
15	MS. VAUGHN: Your Honor, the Court had indicated
16	that it was going to use the U.S. District Court one in the
17	note instead of the
18	THE COURT: Yes, that is the plan. We will double
19	check that, in fact, that is the one.
20	MS. VAUGHN: Thank you.
21	THE COURT: Direct and circumstantial evidence,
22	in?
23	MR. CORCORAN: Yes.
24	MS. VAUGHN: Yes, Your Honor.
25	THE COURT: Nature of charges not to be

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 69 of 127 958 considered, in? 1 MS. VAUGHN: Yes, Your Honor. 2 3 MR. CORCORAN: Yes. THE COURT: Inadmissible and stricken evidence, 4 5 that is applicable, and I believe the likewise sentence at 6 the bottom is inapplicable however? 7 MS. VAUGHN: Yes, Your Honor. We disagree. MR. CORCORAN: Yes, Your Honor. 8 9 THE COURT: Okay. 10 Credibility of witnesses is in? 11 MS. VAUGHN: Yes, Your Honor. 12 MR. CORCORAN: (No response) 13 THE COURT: There is the question of whether the 14 bracketed language in the fourth-to-last paragraph should be 15 My instinct is to include if there isn't any harm included. 16 in including. Is there any objection to including it? 17 Mr. Corcoran? 18 MR. CORCORAN: No objection, Your Honor. MS. VAUGHN: No objection. 19 20 THE COURT: Thank you. That's credibility of 21 witnesses. 22 The next one is police officer's testimony. 23 Obviously, we had an agent testify here. So it is 24 applicable in a sense. Mr. Corcoran, what do you think? 25 MR. CORCORAN: We don't think it is appropriate,

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1	Your Honor.
2	THE COURT: Okay. Ms. Vaughn?
3	MS. VAUGHN: No objection to excluding it,
4	Your Honor.
5	THE COURT: Okay. We'll exclude police officer's
6	testimony.
7	Right of defendant not to testify is in. Everyone
8	agrees. Correct?
9	MR. CORCORAN: Agree, Your Honor.
10	MS. VAUGHN: Agree.
11	THE COURT: Defendant is witness, not applicable.
12	Correct?
13	MR. CORCORAN: Agree, Your Honor.
14	MS. VAUGHN: Yes.
15	THE COURT: Evaluation of prior inconsistent
16	statement of a witness. Ms. Vaughn?
17	MS. VAUGHN: Not applicable, Your Honor.
18	MR. CORCORAN: Agree.
19	THE COURT: Okay.
20	Evaluation of prior consistent statement of a
21	witness?
22	MS. VAUGHN: Not applicable.
23	MR. CORCORAN: We agree.
24	THE COURT: Motive is in?
25	MS. VAUGHN: Agree.

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1	MR. CORCORAN: Agree, Your Honor.	
2	THE COURT: Multiple counts, in?	
3	MR. CORCORAN: Agree.	
4	MS. VAUGHN: Agree.	
5	THE COURT: Unanimity in, yes?	
6	MS. VAUGHN: Agree.	
7	MR. CORCORAN: Yes.	
8	THE COURT: Verdict form explanation in, yes?	
9	MS. VAUGHN: Agree.	
10	MR. CORCORAN: Yes.	
11	THE COURT: Redacted exhibits inapplicable?	
12	MS. VAUGHN: Agree.	
13	MR. CORCORAN: Agree.	
14	THE COURT: Exhibits during deliberations in?	
15	MS. VAUGHN: Agree.	
16	MR. CORCORAN: Agree.	
17	THE COURT: Selection of foreperson in?	
18	MS. VAUGHN: Agree.	
19	MR. CORCORAN: Agree.	
20	THE COURT: Cautionary instruction on publicity	,
21	communication and research in?	
22	MS. VAUGHN: Agree.	
23	MR. CORCORAN: Agree.	
24	THE COURT: Note taking by jurors in?	
25	MS. VAUGHN: Agree.	

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1	MR. CORCORAN: Agree.
2	THE COURT: Communications between Court and jury
3	during jury's deliberations in?
4	MS. VAUGHN: Agree.
5	MR. CORCORAN: Agree.
6	THE COURT: Excusing alternate jurors, I'm going
7	to modify this a little bit. The first three sentences are
8	still applicable. I would intend to say it says, "We
9	selected two seats to be the alternate seats before any of
10	you entered the courtroom. We excused one juror for health
11	issues. Since the rest of you have remained healthy and
12	attentive, I can now excuse the juror in seat" and I'm
13	not going to mention the seat on the public record here.
14	MS. VAUGHN: That's fine for the government,
15	Your Honor.
16	THE COURT: Do the parties want to get on the
17	husher to discuss which seat that would be?
18	MR. CORCORAN: I just have one other suggestion
19	would be to
20	THE COURT: Yes.
21	MR. CORCORAN: For consideration to excuse the
22	two jurors who would no longer be on the jury without
23	bringing them into the courtroom.
24	THE COURT: At all?
25	MR. CORCORAN: At all.

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1	THE COURT: So one of them is not here.
2	MR. CORCORAN: Right.
3	THE COURT: And the other one would we'd just not
4	bring into the courtroom; that would be fine too. Well,
5	Ms. Vaughn, what do you think about that?
6	MS. VAUGHN: Your Honor, they should be brought
7	into the courtroom for the instructions because, if
8	something were to happen in deliberations and a juror needed
9	to be replaced and they had to start over, the alternate
10	would have already been instructed.
11	THE COURT: So before Mr. Corcoran's suggestion, I
12	was actually going to say that I was also going to give this
13	instruction about excusing alternate jurors after the
14	closings and before we send the jurors to deliberate. Any
15	objections to doing it that way?
16	MR. CORCORAN: No objection, Your Honor.
17	THE COURT: Okay. So I will give this instruction
18	with the modification I just mentioned. I will do it after
19	closings, essentially to say, the 12 who are going are the
20	12 and this one person is staying.
21	Okay.
22	Proof of state of mind is in?
23	MS. VAUGHN: No objection.
24	MR. CORCORAN: Agree.
25	THE COURT: Elements of the offense.

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1	Okay. The government has proposed some edits. I
2	need to hear from counsel well, I also recall that
3	Mr. Schoen, you were going to propose two additional
4	instructions. So it seems to me we have the government's
5	proposed edits to the elements of the offense and you have
6	proposed two additional instructions that are the issues to
7	discuss.
8	So how should we handle them? Ms. Vaughn, do you
9	want to start with your position on why these edits make
10	sense to the elements instruction?
11	MS. VAUGHN: Yes, Your Honor.
12	Yes, Your Honor, because I think the two proposals
13	that the defendant sent us are additional instructions, not
14	these, so we can go ahead and address this?
15	THE COURT: Yes.
15 16	THE COURT: Yes. MS. VAUGHN: So with respect to I'll start with
16	MS. VAUGHN: So with respect to I'll start with
16 17	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress.
16 17 18	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress. We thought it was necessary to add in legal advice
16 17 18 19	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress. We thought it was necessary to add in legal advice he received from his attorney or someone else just to ensure
16 17 18 19 20	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress. We thought it was necessary to add in legal advice he received from his attorney or someone else just to ensure that there's no suggestion that a mistake could count as
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16 17 18 19 20 21 22	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress. We thought it was necessary to add in legal advice he received from his attorney or someone else just to ensure that there's no suggestion that a mistake could count as advice, if he was misinformed in some way about sort of the root requirement of the subpoena that you must be by this
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16 17 18 19 20 21 22 23 24	MS. VAUGHN: So with respect to I'll start with the paragraph that is no defense to contempt of Congress. We thought it was necessary to add in legal advice he received from his attorney or someone else just to ensure that there's no suggestion that a mistake could count as advice, if he was misinformed in some way about sort of the root requirement of the subpoena that you must be by this date. Then the executive privilege changes.

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explanation of what executive privilege is and things like 1 that to make clear to the jury that it's not their decision 2 whether executive privilege actually, as a matter of law, 3 4 excused the defendant. We think it's necessary to tell them 5 that. 6 THE COURT: I have not held that. And it's 7 different from telling them it's not their issue from 8 saying, in my view, as a matter of law, executive privilege 9 cannot excuse the defendant. 10 MS. VAUGHN: I apologize, Your Honor. We've 11 always had a little bit of confusion on our table on whether 12 that issue was teed up sufficiently and resolved. 13 THE COURT: I know. 14 MS. VAUGHN: Our goal here was to just make it 15 clear to the jury that it doesn't matter --16 **THE COURT:** I was inclined to strike: "I am also 17 instructing you that, as a matter of law, executive 18 privilege did not excuse the defendant from complying with 19 the subpoena." 20 I'm just saying, potentially, "it is not a defense 21 to contempt of Congress that the defendant did not comply 22 with the subpoena because of his understanding or belief of 23 what the law required or allowed or a misunderstanding or 24 belief that he had a privilege, which is executive 25 privilege, excusing him from complying."

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1	Do you object to that?
2	MS. VAUGHN: Could we propose adding that the jury
3	is not to consider whether executive privilege did, in fact,
4	excuse? Maybe just replace the language we have on the
5	matter of law at the beginning and say that you're not to
6	wherever it's appropriate but add that?
7	THE COURT: Okay. I'll hear from Mr. Schoen or
8	Mr. Corcoran on that. Okay. What about the last paragraph?
9	MS. VAUGHN: The last paragraph, we tried to stick
10	to what the Court instructed them on this issue yesterday.
11	THE COURT: Yes.
12	MS. VAUGHN: And incorporate it into the final
13	instruction. But this is getting at that idea of later
14	compliance is not a waiver.
15	THE COURT: Okay. Thank you.
16	MS. VAUGHN: Thank you, Your Honor.
17	THE COURT: Mr. Schoen?
18	Why don't you come to the podium? I think it's
19	just easier for the court reporter if you have the
20	information.
21	MR. SCHOEN: I'll make it brief, Your Honor.
22	Our objection is that first of all, we do
23	believe that we teed up, so to speak, executive privilege as
24	a defense. I addressed that in Document 107 to try to make
25	it clear then, if it weren't clear.

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1	In any grant I think the Court gold this, but we
1	In any event, I think the Court said this, but we
2	think it would be inappropriate to use the redline version
3	that tells the jury executive privilege is not an excuse.
4	And then our objection is that it weights it too much as to
5	what their what wouldn't be a defense in this case. We
6	already unfortunately, we know that too well, but I don't
7	think that has to be hammered like this to the jury because
8	I think they're going to be confused as to what is a
9	defense.
10	And the last part, if that is intended to deal
11	with waiver, we have submitted our proposal on waiver of
12	default. I assume that is. I mean, I sent it to the
13	government. I thought the idea was the government was
14	forwarding it all to the Court.
15	THE COURT: They may have. We've just been in
15 16	THE COURT: They may have. We've just been in here. I'm not sure I've seen them
16	here. I'm not sure I've seen them
16 17	here. I'm not sure I've seen them MR. SCHOEN: I don't know that that's the case. I
16 17 18	here. I'm not sure I've seen them MR. SCHOEN: I don't know that that's the case. I didn't speak to the government. Mr. Corcoran did.
16 17 18 19	here. I'm not sure I've seen them MR. SCHOEN: I don't know that that's the case. I didn't speak to the government. Mr. Corcoran did. THE COURT: The instructions that Mr. Corcoran and
16 17 18 19 20	here. I'm not sure I've seen them MR. SCHOEN: I don't know that that's the case. I didn't speak to the government. Mr. Corcoran did. THE COURT: The instructions that Mr. Corcoran and Mr. Schoen have proposed to you.
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Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 78 of 127 967 THE COURT: I'd be happy to take a look at the 1 2 printed version. 3 MR. CORCORAN: Your Honor, just one point 4 procedurally. THE COURT: Yeah. 5 6 MR. CORCORAN: It would be great to be able to see 7 things printed out once the Court has --8 THE COURT: Yes. 9 MR. CORCORAN: -- come up with a decision on some 10 of these things. 11 THE COURT: Yes. 12 MR. CORCORAN: Most of it's not disputed. 13 The reason I raise that is just, trying to follow 14 what was offered as an amendment by the government to --15 THE COURT: Oh, yeah. We're not going to do this 16 on the fly. 17 MR. CORCORAN: Yeah. THE COURT: Yeah. 18 19 MR. CORCORAN: And really the point that I wanted 20 to make because I heard a change that's talk about executive 21 privilege and use the words "in fact" and something about 22 the jury not considering it, which I think would be 23 objectionable from our standpoint because the fact of 24 executive privilege is something that they can consider. 25 Even though they can't consider it as a legal defense --

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1	THE COURT: I understand. Yes. We'll try to
2	parse this carefully.
3	MR. SCHOEN: I'm hopeful there's nothing
4	objectionable in there, Your Honor. I just don't know. I
5	only got it, as government counsel said, shortly before we
6	showed up here at 1:00.
7	MS. VAUGHN: I'm sorry.
8	MR. SCHOEN: I am just saying I only got it from
9	the government about a quarter to 1 or something like that.
10	THE COURT: All right. Okay.
11	So there are two additional proposed jury
12	instructions. The government has them. Correct,
13	Ms. Vaughn?
14	MS. VAUGHN: Yes, Your Honor. We've considered
15	them. We object.
16	THE COURT: Do you object to them entirely or do
17	you have problems with the specific language?
18	MS. VAUGHN: We object to them entirely,
19	Your Honor.
20	THE COURT: Do you want to come to the podium and
21	tell me why?
22	MS. VAUGHN: The second one is the waiver
23	argument, which is not available under the law.
24	The first one so for a defendant to be entitled
25	to an instruction on the theory of the defense, there has to

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1	be sufficient evidence in the record to support it.
2	So there are two issues with this instruction:
3	One, is it instructs the jury on unavailable defenses under
4	the law suggesting that they are, in fact, available. And
5	it puts facts in front of the jury that are not in evidence.
6	So I'll start at the beginning. The sentence,
7	"The defendant contends that he believed that the dates for
8	compliance with the subpoena were not fixed and were
9	flexible and subject to change and that therefore, he did
10	not act willfully."
11	There's no evidence in the record about the
12	defendant's belief that the dates were not fixed and were
13	flexible. So there's nothing there's no sufficient
14	evidence to provide that instruction to the jury.
15	And then the idea that, if you find that he
16	honestly and reasonably believed, there is no evidence about
17	the defendant's past experience with subpoenas. The
18	suggestion that the jury can find he acted willfully if they
19	think he acted in an honest and reasonable belief on an
20	executive privilege, that's a mistake of law defense that's
21	not available.
22	This line about his belief that negotiations were
23	ongoing as part of an "accommodation" process; that, again,
24	appears to be a reference to this idea that the defendant
<u> </u>	

has been raising the whole time that the law requires

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1	Congress to go to a court because he made an executive
2	privilege claim. That's a mistake of law defense.
3	The rest appears to return to
4	THE COURT: Let me ask you this question. So I
5	understand the points. On the elements of the offense, once
6	we get to willfully, there's a paragraph that defines
7	willfully generally in general, what willfully is,
8	deliberate and intentional means this.
9	Then the government has proposed at least one
10	paragraph about well, a paragraph about what doesn't
11	count or what isn't required. Obviously, Mr. Schoen says
12	that's basically putting too weight on what can't count or
13	what is irrelevant.
14	If you want that language, would you object to a
15	sentence that says, you know, if one would not act
16	deliberately or intentionally if he believed that the dates
17	were flexible or something like that?
18	Basically you have a paragraph that defines
19	willful in general. Then there is a paragraph, from the
20	government's perspective, that says, this that and these
21	other things are irrelevant. And Mr. Schoen has said that's
22	sort of putting your thumb on the scale of what can't count.
23	But you could either eliminate some of those
24	things or you could put some weight back on what could
25	count.

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1	MS. VAUGHN: I disagree with Mr. Schoen's
2	characterization.
3	THE COURT: I suspected that but what if I don't?
4	MS. VAUGHN: So the instruction on the meaning of
5	willfulness does say already that deliberate and intentional
6	does not mean by accident, mistake or inadvertence.
7	THE COURT: Yes.
8	MS. VAUGHN: The defendant is not entitled to the
9	instruction the specific instruction he wants, as long as
10	whatever it is he is entitled to is appropriately
11	represented in the instruction.
12	THE COURT: Why isn't what the government wants
13	then included within that first paragraph?
14	MS. VAUGHN: Because it doesn't make clear that a
15	mistake of law is not the kind of mistake that's being
16	discussed there. And particularly, with the evidence we
17	have in our case, I have no doubt that, if there is not that
18	language in the instruction, we are going to hear argument
19	in closing that he just made a mistake because he thought
20	executive privilege was the claim, what have you.
21	We think it's essential that those instructions be
22	included. We do not think that the jury would have a clear
23	understanding of what a mistake is under the law without it.
24	THE COURT: Okay. Thank you.
25	Mr. Schoen?

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1	MR. SCHOEN: As Your Honor has previously held,
2	mistake of fact accordingly is a defense to the law. The
3	jury wouldn't intuitively know that, so they have to be
4	advised about that.
5	THE COURT: We're not going to be gilding the lily
6	on anything here. Right?
7	MR. SCHOEN: This reflects the defense theory in
8	the case. Now, if some of the specifics were left out, I
9	would still object, but it would be a correct proposition of
10	the law and it would at least be something toward the
11	defense theory.
12	By that I mean first sentence: "The defendant,
13	Stephen K. Bannon, contends that he believed that the dates
14	for compliance with the subpoena were not fixed and were
15	flexible and subject to change and that, therefore, he did
16	not act willfully in failing to comply with the subpoenas by
17	the date set out in the indictment." That is his defense
18	theory. It's a defense theory and he's entitled to it.
19	By the way, this idea that, because he didn't
20	testify and put on evidence, he can't show his belief is
21	simply wrong. That's what cross-examination is for, to make
22	that a plausible inference to be drawn.
23	Now, "If you find that Mr. Bannon honestly and
24	reasonably believed, based on the exchange of" I now have
25	plugged in here the factors that we had discussed with the

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1	Court that could be considered.
2	THE COURT: Uh-huh.
3	MR. SCHOEN: So that's why it draws it
4	specifically to this defense theory in this case.
5	We find that Mr. Bannon honestly and reasonably
6	believed, based on the exchange of letters between his
7	lawyer I guess the Court doesn't need me to read it out
8	loud probably.
9	THE COURT: No, I don't.
10	MR. SCHOEN: Up until
11	THE COURT: No, I understand.
12	MR. SCHOEN: The word "process".
13	THE COURT: Your point is that this is consistent
14	with your theory.
15	MR. SCHOEN: Yes.
16	THE COURT: It is only identifying evidence that
17	is in or is, like, reasonably inferred from evidence that is
18	in, for example, Mr. Bannon's past experience with subpoenas
19	which one of the letters references. Executive privilege is
20	obviously in. Exchange of letters are obviously in. And
21	therefore, that this is legitimate.
22	Okay. Let's talk about the waiver of default.
23	MR. SCHOEN: Yes, Your Honor.
24	THE COURT: So what is the best case for the
25	proposition that the Committee could waive a default here?

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 85 of 127 974 MR. SCHOEN: Well, I say that the contract 1 principle cases apply to this. Do I have a criminal case 2 3 that says we apply contract principles in this situation for 4 default? I don't. But that may just reflect my research 5 skills. 6 We do know, as I said the other day, that we apply 7 contract principles in criminal law all the time, and 8 Santobello is probably the best example of that. But it 9 certainly logically applies. And again, this is our theory 10 of defense. 11 I don't have a case that says it doesn't apply. 12 THE COURT: An absence of evidence --13 MR. SCHOEN: I cite the civil case as a principle 14 of law. 15 THE COURT: Okay. I understand the parties' 16 positions. We're going to take another recess. 17 MS. VAUGHN: Your Honor, I do have another 18 objection I need to raise. THE COURT: Okay. Of course. 19 20 MS. VAUGHN: I'm sorry I didn't raise this 21 earlier, but the listing of evidence that they believe 22 supports their theory in the instruction, we think is 23 improper. It's to point the jury -- to use a court's 24 instruction to point the jury to specific evidence that goes 25 to the defendant's theory.

THE COURT: Thank you.

1

25

2 So here's what I'm going to do. I'm going to go 3 back to chambers. I'm going to reflect on the motion, the 4 renewed motion, the proffer of evidence from Mr. Schoen, the 5 government's position and these instructions and the 6 parties' respective positions.

Assuming we're going forward with instructions, my plan is to finalize them and to communicate them to the parties before we come back and I tell you where I am, for example, on that motion or the instructions.

I will get them out to the parties. You will have, what we would consider to be, the final versions and what I would intend, assuming we do this to instruct the jury on so that you have the actual documents, Word documents.

16 If you would like me to print them we could do 17 that too, Mr. Corcoran, or we could attempt to.

18 MR. CORCORAN: I think just sending them to us is19 great, Your Honor.

20 THE COURT: Okay. So we're in recess again.
21 DEPUTY CLERK: All rise.

22 MR. CORCORAN: Your Honor, just one quick 23 question. Just wondering what you think we might accomplish 24 for the rest of the day just for planning purposes.

THE COURT: So on the -- let me ask this question:

Case 1:21-cr-00670-CJN Document 177 Filed 12/28/22 Page 87 of 127 976 If we are going to get to closings, the jury instructions 1 would take me, if we do them, probably take me 15 to 20 2 They have been paired down somewhat. They're not 3 minutes. 4 even full pages. 5 If we get past the jury instructions, how long are 6 the parties' closings? Ms. Vaughn, how long would your 7 closing be? MS. VAUGHN: The government's closing is 30 8 9 minutes, and we wouldn't expect rebuttal to be more than 10 15-20 minutes depending. 11 THE COURT: Mr. Corcoran, do you have a sense of 12 how long your closing would be? 13 MR. CORCORAN: I think in the same range that was 14 just mentioned, which is why I raised it. It's just whether 15 to argue and have them not deliberate at all or --16 THE COURT: Do you have a view? 17 MR. CORCORAN: I'm fine with -- I think starting 18 in the morning in terms of hearing the instructions, hearing 19 the argument and then setting to work so that there's --20 **THE COURT:** In the morning when they're fresh, 21 they haven't been sitting around? 22 MR. CORCORAN: Absolutely. No forgetting. 23 MS. VAUGHN: We've been here all day, Your Honor. 24 We think we should just do it. We have three hours left in 25 the day. We think --

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THE COURT: Well, that assumes I can get this done
quickly. And what I'm so I don't think there's any
reason to split the instructions from the closings. I think
they should be done together. The problem is, if I take a
while to do to finalize the instructions to get them out
to the parties to think about the motion that I have to
consider, and if we are not back on the record until 2:45 or
3:00, then there's at least the risk that we take well,
maybe we
MS. VAUGHN: We have no objection if we are forced
to rebut tomorrow morning or something because we don't get
through it. But I think I mean if we go until 5:15 I
mean
THE COURT: I know. The jury got here late too.
MR. CORCORAN: Our position I like Ms. Vaughn's
position. They're ready to go whenever and we feel the same
way.
THE COURT: Yes, of course.
MR. CORCORAN: But I think the real issue here is,
in my mind, having the jury hear the instructions and the
argument of counsel that is pertinent to the instructions or
will be considered in the framework of the instructions and
then begin their work. What I certainly don't want to
happen is run late or to have only the government open, have
them thinking about that overnight

1	THE COURT: That is not going to happen.
2	Here's we are either going to do all of the
3	instructions, closings today or all of that tomorrow
4	morning. It sort of depends on how quickly I can get done
5	with the instructions. If I can do it very quickly, then I
6	think we have plenty of time and deal with the motion.
7	If it takes if, for whatever reason, I am
8	delayed and just can't get it done, then I think what I'll
9	have to do is I'll come back and say, in light of that, it's
10	better to let it pend till tomorrow.
11	I know I'm the holdup at this point, so let me go
12	do the work.
13	MS. VAUGHN: Thank you, Your Honor.
14	MR. CORCORAN: Just, from our perspective, you're
14 15	MR. CORCORAN: Just, from our perspective, you're not the holdup in the sense that we want to we'd have the
15	not the holdup in the sense that we want to we'd have the
15 16	not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them
15 16 17	not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course.
15 16 17 18	not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon.
15 16 17 18 19	not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's
15 16 17 18 19 20	not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's fully-informed position on his testimony and rest before we
15 16 17 18 19 20 21	<pre>not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's fully-informed position on his testimony and rest before we leave here?</pre>
15 16 17 18 19 20 21 22	<pre>not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's fully-informed position on his testimony and rest before we leave here? THE COURT: Yes. Yes. That's prudent. Thank</pre>
15 16 17 18 19 20 21 22 23	<pre>not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's fully-informed position on his testimony and rest before we leave here? THE COURT: Yes. Yes. That's prudent. Thank you.</pre>
15 16 17 18 19 20 21 22 23 24	<pre>not the holdup in the sense that we want to we'd have the chance to look at the instructions and consider them THE COURT: Of course. MR. CORCORAN: on behalf of Mr. Bannon. MR. SCHOEN: Judge, should I give you Mr. Bannon's fully-informed position on his testimony and rest before we leave here? THE COURT: Yes. Yes. That's prudent. Thank you. MR. SCHOEN: Judge, so that the Court is clear,</pre>

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1 gone over is it carefully. I'd like to just read two
2 paragraphs that will, I think, fully inform the Court as to
3 his reasons why he's not testifying. And I've gone over
4 this with Mr. Bannon.

5 The defendant, Mr. Bannon, understands that he has 6 the right to testify on his own behalf, and he has very much 7 wanted to do so since the day he was indicted. He has 8 wanted to testify publicly in this case under oath to tell 9 the Court, the jury and the public exactly what the true 10 facts of the case are.

However, on the advice of counsel, in this case, me and Mr. Corcoran and support of the team, he has decided not to testify because he understands that he would be barred from telling the true facts and explaining why he did what he did and why he did not do what he did not do in relation to the Committee's subpoena.

He wanted to testify under oath to explain that, at all times, he believed he was doing what the law required him to do, based on his lawyer's advice and the other factors mentioned in Mr. Costello's declaration, ECF30-1. If Mr. Bannon were to testify, his testimony would have been consistent with the narrative in Mr. Costello's declaration, ECF30-1.

24 Mr. Bannon's experienced lawyer, Mr. Costello, 25 received the subpoena from the Committee, and he told

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1	Mr. Bannon he had received it. Mr. Costello then told
2	Mr. Bannon that he, Costello, had received notice that
3	former President Trump had invoked executive privilege.
4	From that point forward, Mr. Costello, as Mr. Bannon's
5	lawyer, told him that executive privilege had been invoked
6	and he was not permitted by law to comply with the subpoena.
7	Mr. Bannon followed and relied on the advice and
8	directives of his experienced lawyer at all times and in all
9	regards with respect to the subpoena. He relied as well on
10	the OLC opinions that were relevant and that his lawyer
11	brought to his attention, and he and Mr. Costello reasonably
12	believed they applied to him.
13	Since Mr. Bannon would be barred from testifying
14	about his reliance on the advice of counsel and on facts
15	supporting his defenses of executive privilege, public
16	authority and entrapment by estoppel, as would Mr. Costello,
17	Mr. Bannon will not be testifying and he will not call
18	Mr. Costello as a witness, who he otherwise would have
19	called for the same reasons, the Court's orders barring
20	these defenses and testimony relevant to and in support of
21	those barred defenses.
22	And I say this last part with most respect to the

And I say this last part with most respect to the Court. I know the Court thought it out carefully and the Court has opined at length on its reasoning. Thank you, Your Honor.

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1	THE COURT: Thank you.
2	Let me just ask one question. Mr. Bannon, have
3	you conferred with counsel and do you knowingly and
4	intentionally waive your right to testify based on the
5	advice that Mr. Schoen has just described?
6	THE DEFENDANT: Yes, Your Honor.
7	THE COURT: Okay. Thank you very much. And thank
8	you, Mr. Schoen, for reminding me of that.
9	MR. SCHOEN: Thank you, Your Honor. Ms. Vaughn.
10	MS. VAUGHN: Your Honor, I'm sorry thinking about
11	the schedule more. It's not clear to me how long the
12	defense would like to consider the instructions afterward.
13	So now I'm concerned that it will be more time the jury is
14	sitting around, and then we'll end up telling them to leave
15	anyway.
16	THE COURT: Which I would like to.
17	MS. VAUGHN: Maybe we should just let them go and
18	come back.
19	THE COURT: Mr. Corcoran, how long do you think?
20	MR. CORCORAN: Your Honor, I was just going to say
21	we're
22	THE COURT: It seems to me. I'm sorry.
23	There really are three substantive ones. It's the
24	two that you've proposed and it's the edits from the
25	government on the elements. How long, after I've gotten

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them back to you, would you want to have time to rebut 1 2 those? MR. CORCORAN: It's hard to estimate, but we'll 3 4 try to be as fast as we can. As I said, we have no 5 objection to the, you know, dismissing the jury today as a 6 practical matter. As you know, you know, we've tried to be 7 efficient in the case on so many different levels. THE COURT: Yes. 8 9 MR. CORCORAN: And in terms of the promise to the 10 jury, there was the possibility that a defense case would 11 have put us into next week. So just, in efficiency terms, 12 we're happy to dismiss the jury today, Your Honor. 13 MS. VAUGHN: We reluctantly agree, Your Honor. 14 THE COURT: Okay. All right. 15 Then we're going to do that. We are going to 16 We will allow the jury to go home. I will go back recess. 17 and consider the instructions first and get them to the 18 parties so you can start (inaudible) them. Then I will also 19 consider the pending, renewed Motion to Dismiss and what I 20 intend to do with that. 21 When we communicate the jury instructions to the 22 parties by email just will be my final view, we will let the 23 parties know whether I intend to come back on the record 24 relatively soon on the motion or if, instead, we'll just do 25 it the morning, but I'll be respectful of everyone's time.

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1	MR. SCHOEN: One other suggestion from the
2	government.
3	THE COURT: Yes.
4	MS. VAUGHN: There is a hearing tonight, and so we
5	thought it might be prudent to bring the jury in, give them
6	the cautionary instruction on media and meeting,
7	particularly tell them to not to watch anything tonight
8	given that we don't know what might come up in them.
9	THE COURT: Mr. Corcoran, what do you think about
10	that?
11	MR. CORCORAN: Your Honor, I think the Court's
12	already instructed them, and so we don't see the need for an
13	additional instruction.
14	MS. VAUGHN: We also think the defense needs to
15	rest in front of the jury to create the record in front of
16	the jury and let them know that tomorrow we're just closing.
17	THE COURT: We could do that in the morning.
18	MS. VAUGHN: (Nodded head.)
19	THE COURT: Right?
20	MS. VAUGHN: (Nodded head.)
21	THE COURT: It seems to me that there is the
22	inefficiency of just getting the jury down here and the like
23	but it's not that.
24	I don't think we need to instruct the jury again
25	on the cautionary instruction. That's not a reason to bring

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1	them in, in my view. I think I would just like to talk to
2	them about where we are.
3	So, Ms. Lesley, can you bring them in just to let
4	them know we're dismissing them for today?
5	MR. SCHOEN: Judge, we don't have any objection
6	either way on that. I was just leaving it up to the Court.
7	THE COURT: Yes.
8	MR. SCHOEN: I was mindful it's up to the Court
9	whether I say that or not. We were mindful the other day.
10	We were asked not to bring the jury's attention to that CNN
11	special in particular. I don't know how
12	THE COURT: I don't intend to tell the jury about
13	the motion or judgment of acquittal. I don't want to
14	bring to them the attention any specific thing that they
15	shouldn't be watching, but I may give them another reminder
16	that they should keep not talking to anyone about this case
17	at all.
18	Ms. Lesley, I'd like to go into a recess while you
19	gather the jury. Okay? Then, once you have them and we're
20	ready to go, we can go back on the record. Okay?
21	So we're in recess.
22	DEPUTY CLERK: All rise. Court is in recess.
23	(Recess at 2:23 p.m. until 2:32 p.m.)
24	DEPUTY CLERK: All rise. This honorable court is
25	now in session.

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1	THE COURT: Ms. Lesley, would you please bring the
2	jury in?
3	(Jury enters the courtroom.)
4	DEPUTY CLERK: Please be seated and come to order.
5	Your Honor, we are now back on the record.
6	THE COURT: Thank you.
7	Mr. Schoen or Mr. Corcoran, I think you had one
8	small thing to do as to your case before I talk to the jury.
9	MR. CORCORAN: Your Honor, the defense rests.
10	THE COURT: Thank you, Mr. Corcoran.
11	Ladies and gentlemen of the jury, thank you for
12	your patience today. As you just heard, the defense has
13	also rested its case.
14	We've considered the most efficient way to
15	proceed, and what we're going to do is we're going to
16	release you for the day. What we're going to do is, in the
17	morning, first thing in the morning, I'm going to give you
18	final instructions, which are basically the instructions
19	that you will be using to deliberate. And you will hear
20	from the parties in their closing arguments, and then you
21	will go off and deliberate.
22	That's the first thing I wanted to tell you.
23	The second thing is, as you all know, we have 13
24	jurors now and not 14. That juror had a health issue that
25	caused her to be unable to continue to serve. It is not

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anything contagious. It's not COVID. It's not something 1 that any of you have to worry about having caught from her 2 or anything like that, so please don't worry. But as often 3 4 happens and the reason we have two alternates is in case something like this comes up. So we excused her this 5 6 morning after she communicated what had happened with the 7 doctor's appointment she had this morning. So we now have 13 jurors who will be here tomorrow morning. 8

9 The last thing I'd like to just remind you. I 10 know you've heard it from me a lot this week so forgive me 11 but it's just a reminder. Again, I'm not going to read the 12 whole instruction.

Do not talk to anyone about this case, whether in the courthouse, outside the courthouse, any other jurors. Do not read about this case. Do not read or watch TV or videos about this matter or related matters through the end of your deliberations.

Obviously, when you deliberate tomorrow, you will necessarily be talking with one another about this case but, until then, the same instructions I gave you before apply, and you are to not communicate with anyone about the case and all of those things.

23 So, again, I want to thank you very much for your 24 patience today. I think, as often happens in these cases, 25 there is a lot of discussion with the lawyers that occurs

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outside the presence of the jury. The fact that we did that 1 really has no effect on what you will ultimately be asked to 2 3 do, which is to decide the facts given my legal instructions 4 to you tomorrow. Sometimes those discussions are helpful in ways that it will improve the case as it goes to you 5 6 tomorrow. 7 So with all of that, I thank you again for being 8 here today, and you are excused for the rest of the day. 9 And we will start tomorrow morning at 9 a.m. Okay? 10 Thank you, Ms. Lesley. 11 (Jurors exited the courtroom.) 12 THE COURT: I just want to say that, now that 13 we've excused the jury, I think the plan is still the same. 14 I'm going to go back, finalize the instructions, communicate 15 them to the parties. Then you'll have them, be able to 16 consider them overnight and the like. And then I will 17 communicate at the same time what my plan is on the motion 18 that was argued earlier. Okay? 19 So we are now in recess again. Thank you. 20 DEPUTY CLERK: All rise. 21 (Recess taken at 2:36 p.m.) 22 23 24 25

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1	<u>CERTIFICATE</u>
2	
3	I, Lorraine T. Herman, Official Court Reporter,
4	certify that the foregoing is a true and correct transcript
5	of the record of proceedings in the above-entitled matter.
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1	<u>CERTIFICATE</u>
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3	I, Lorraine T. Herman, Official Court Reporter,
4	certify that the foregoing is a true and correct transcript
5	of the record of proceedings in the above-entitled matter.
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9	July 21, 2022/s/DateLorraine T. Herman
10	Date Lorraine T. Herman
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