

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

CR Action
No. 1:21-670

vs.

STEPHEN K. BANNON,
Defendant.

IN RE: NON-PARTY SUBPOENAS

NANCY PELOSI, et al,
Petitioner,

MC Action
No. 1:22-60

vs.

STEPHEN K. BANNON,
Respondent.

July 11, 2022
10:04 a.m.

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

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

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

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

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

14 **THE COURT:** Ms. Vaughn, good morning.

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

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

20 **THE COURT:** Good morning, Counsel.

21 **MR. SCHOEN:** Good morning, Your Honor.

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

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

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

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

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

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

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

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

1 **THE COURT:** Okay. Ms. Gaston.

2 **MS. GASTON:** Good morning, Your Honor.

3 **THE COURT:** Good morning.

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

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

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

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

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

25 Imagine hypothetically, Mr. Bannon, in his letters

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

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

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

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

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

24 **THE COURT:** Expressly or implicitly?

25 **MS. GASTON:** Expressly.

1 **THE COURT:** In the filings here or somewhere else?

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

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

17 Do I have all of that right?

18 **MS. GASTON:** Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 **MS. GASTON:** Yes.

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

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

19 **MS. GASTON:** All right.

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

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

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

1 waived them, raised these objections as defenses at trial.

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

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

13 **THE COURT:** Right.

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

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

19 **MS. GASTON:** Exactly.

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

1 privilege against conviction based here on executive
2 privilege.

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

8 And similarly --

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

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

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

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

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

23 **MS. GASTON:** You do, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

24 **MS. GASTON:** Yes.

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

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

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

7 **THE COURT:** Fair enough.

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

13 **THE COURT:** His mens rea was such --

14 **MS. GASTON:** His mens rea was such --

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

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

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

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

24 **THE COURT:** Could it go to default?

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

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

6 **MS. GASTON:** They --

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

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

11 **THE COURT:** Willful is mens rea.

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

13 **THE COURT:** We talked about that before a lot.

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

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

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

1 illness, travel trouble, misunderstanding, et cetera."

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

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

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

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

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

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

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

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

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

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

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

18 **MS. GASTON:** Yes.

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

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

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

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

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

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

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

13 **MS. GASTON:** We'll hold that.

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

16 **MS. GASTON:** I am.

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

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

1 be testifying in front of the Committee.

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

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

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

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

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

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

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

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

4 **THE COURT:** Branches.

5 **MS. GASTON:** Branches.

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

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

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

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

25 **MS. GASTON:** Yes, Your Honor.

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

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

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

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

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

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

1 change his course.

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

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

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

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

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

1 control for prejudice.

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

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

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

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

25 **THE COURT:** Okay.

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

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

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

10 **MS. GASTON:** Yes.

11 **THE COURT:** All right.

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

15 **MS. GASTON:** No, I'm sorry.

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

18 **MS. GASTON:** Yes.

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

23 **MS. GASTON:** Absolutely.

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

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

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

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

20 I will tick through very quickly.

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

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

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

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

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

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

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

25 Punishment, I think, does not bear anymore

1 discussion.

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

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

10 **THE COURT:** Thank you.

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

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

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

19 Thank you.

20 **MS. VAUGHN:** Good morning, Your Honor.

21 **THE COURT:** Good morning.

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

24 **THE COURT:** Sure.

25 **MS. VAUGHN:** The government defers to the Court on

1 the Indictment issue.

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

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

12 **THE COURT:** Right, it goes to pertinency.

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

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

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

1 **THE COURT:** Okay.

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

5 **THE COURT:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 The defendant testifies: I read these five,
11 40-page OLC opinions, and based on the "principles," which
12 is what they said --

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

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

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

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

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

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

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

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

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

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

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

6 **THE COURT:** Yeah.

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

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

14 **THE COURT:** Yes.

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

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

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

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

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

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

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

20 **MS. VAUGHN:** Is material.

21 **THE COURT:** Is material, yes.

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

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

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

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

18 **MS. VAUGHN:** Yes.

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

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

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

3 **MS. VAUGHN:** Exactly.

4 **THE COURT:** -- if that were true.

5 **MS. VAUGHN:** Exactly.

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

14 **MS. VAUGHN:** Right.

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

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

25 **MS. VAUGHN:** Right.

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

3 **MS. VAUGHN:** Not unless the Court has any
4 questions.

5 **THE COURT:** No. Thank you.

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

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

11 **THE COURT:** Very well.

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

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

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

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

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

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

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

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

20 **THE COURT:** That's fine.

21 **MR. LETTER:** Thank you, Your Honor.

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

23 **MS. KALLEN:** Good morning, Your Honor.

24 **THE COURT:** Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 **MS. KALLEN:** No, Your Honor.

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

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

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

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

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

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

1 not questions of fact.

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

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

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

14 **MS. KALLEN:** No, Your Honor.

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

19 **MS. KALLEN:** No, Your Honor.

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

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

1 not raised, therefore it's waived.

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

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

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

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

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

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

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

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

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

25 **THE COURT:** Does Speech or Debate Clause immunity

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

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

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

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

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

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

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

1 putting on evidence that is relevant to his case.

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

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

13 **THE COURT:** Yes.

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

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

18 **THE COURT:** The old *Bryan*?

19 **MS. KALLEN:** Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 criminal trial or the entire criminal prosecution should be
2 dismissed.

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

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

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

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

19 **THE COURT:** Thank you, Counsel.

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

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

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

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

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

8 **THE COURT:** Yes.

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

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

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

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

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

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

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

15 **THE COURT:** Initiated a lawsuit.

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

19 **THE COURT:** It does.

20 Thank you, Mr. Letter.

21 **MR. LETTER:** Thank you, Your Honor.

22 **THE COURT:** I look forward to seeing that brief.

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

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

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

4 **DEPUTY CLERK:** We are now back on the record.

5 **THE COURT:** Mr. Corcoran.

6 **MR. CORCORAN:** Good morning, Your Honor.

7 **THE COURT:** Good morning.

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

13 **THE COURT:** Sounds fine.

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

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

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

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

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

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

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

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

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

1 **THE COURT:** Sure.

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

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

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

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

18 **THE COURT:** So is your argument that --

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

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

1 evidence is relevant?

2 **MR. CORCORAN:** No, you definitely --

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

6 **MR. CORCORAN:** Right.

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

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

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

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

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

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

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

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

10 **MR. CORCORAN:** Well, communicative --

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

16 **MR. CORCORAN:** Yeah.

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

25 And we're dealing with an element of the offense

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

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

10 With regard to Speaker Pelosi --

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

12 **MR. CORCORAN:** I understand that.

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

17 **MR. CORCORAN:** No.

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

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

23 **THE COURT:** That's what I mean.

24 **MR. CORCORAN:** -- to them.

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

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

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

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

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

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

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

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

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

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

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

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

17 I think --

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

23 **MR. CORCORAN:** Yes. Yeah. Yeah.

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

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

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

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

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

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

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

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

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

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

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

25 **THE COURT:** Yes.

1 **MR. CORCORAN:** Okay.

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

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

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

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

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

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

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

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

15 **THE COURT:** Yes.

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

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

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

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

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

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

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

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

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

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

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

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

17 **THE COURT:** Very well. Thank you.

18 Mr. Schoen.

19 **MR. SCHOEN:** Yes, Your Honor.

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

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

1 either order.

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

3 Ready, Judge?

4 **THE COURT:** I'm ready. Are you?

5 **MR. SCHOEN:** Yes, Your Honor.

6 **THE COURT:** Okay.

7 **MR. SCHOEN:** All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 **MR. SCHOEN:** Yes, Your Honor.

19 **THE COURT:** Where does that appear in your papers?

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

22 **THE COURT:** What's the argument?

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

25 **THE COURT:** Does it go to something other than

1 entrapment by estoppel and mens rea?

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

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

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

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

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

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

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

3 **MR. SCHOEN:** Thank you, Your Honor.

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

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

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

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

23 **THE COURT:** Okay.

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

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

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

5 **MR. SCHOEN:** No --

6 **THE COURT:** So OLC --

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

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

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

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

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

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

23 **MR. SCHOEN:** Pardon?

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

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

1 *Licavoli*.

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

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

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

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

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

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

1 process that's constitutionally mandated.

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

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

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

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

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

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

7 On October 19th -- back up a step. The Indictment
8 in this case charges the default on specific dates: October
9 14th in Count 1, and by October 18th in Count 2.

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

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

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

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

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

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

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

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

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

20 **THE COURT:** Testimony --

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

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

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

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

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

7 **MR. SCHOEN:** Right.

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

9 **MR. SCHOEN:** Yeah. Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and that executive privilege is different.

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

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

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

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

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

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

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

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

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

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

1 *Meadows* and *Scavino*, Judge.

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

6 Continuance motion, Judge.

7 **THE COURT:** Thank you, Mr. Schoen.

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

10 **THE COURT:** Oh, I thought we discussed it.

11 **MR. SCHOEN:** No, Your Honor.

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

14 **MR. SCHOEN:** That's right.

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

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

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

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

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

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

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

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

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

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

5 First of all, people come into a political --

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

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

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

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

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

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

16 And I'd say this --

17 **THE COURT:** What's the magic behind October?

18 **MR. SCHOEN:** Nothing about October, just --

19 **THE COURT:** What about August?

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

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

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

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

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

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

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

1 may be sought.

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

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

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

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

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

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

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

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

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

10 **MR. SCHOEN:** We've discussed it at some length to
11 try to give the Court -- we said originally two weeks. I
12 happen to think that's longer than it will take. It depends
13 100 percent on the Court's rulings.

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

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

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

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

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

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

22 **THE COURT:** Thank you, Mr. Schoen.

23 **MR. SCHOEN:** Thank you, Your Honor.

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

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

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

7 **THE COURT:** Sure.

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

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

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

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

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

25 **THE COURT:** Okay.

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

7 **THE COURT:** Okay.

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

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

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

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

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

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

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

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

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

1 interpreted by me, actually complied with?

2 **MS. VAUGHN:** Yes.

3 **THE COURT:** Okay.

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

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

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

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

25 And so if there were a factual question on how

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

4 **THE COURT:** I mean, put differently, let's use the
5 inverse of that. If the rule was clear, unambiguous, and
6 the House had adopted the view that there had to be
7 13 members of the Committee, and there's a factual dispute
8 about whether there were, that would be a jury question?

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

10 **THE COURT:** Okay.

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

13 **THE COURT:** Uh-huh. Yep.

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

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

21 **THE COURT:** Yes.

22 **MS. VAUGHN:** The ranking minority member issue.

23 **THE COURT:** Okay.

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

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

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

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

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

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

25 I think the issue with the other --

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

3 **MS. VAUGHN:** Right. So whether --

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

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

11 **MS. VAUGHN:** Yeah.

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

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

22 **MS. VAUGHN:** Yes.

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

1 the rule, that would be a jury question.

2 **THE COURT:** Okay.

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

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

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

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

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

25 So to the extent that the Court quashes the

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

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

14 What is the magic to July 18th?

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

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

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

1 provided no information about what those mentions are.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 issue from there.

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

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

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

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

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

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

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

10 I don't see why any defendant couldn't find some
11 20-year-old pleading and say, Well, I read this line out of
12 a pleading. I therefore have an entrapment defense. The
13 defendant just keeps ignoring that requirement and has not,
14 to this day, identified a single statement, which is why he
15 can't even begin to show that the *Meadows* and *Scavino* issues
16 are relevant.

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

19 **THE COURT:** Thank you, Counsel.

20 Mr. Corcoran, briefly.

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

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

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

9 **MR. SCHOEN:** (Inaudible)

10 **THE COURT:** Okay. Mr. Schoen?

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

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

25 **THE COURT:** No, I understand your argument there.

1 I get it.

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

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

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

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

25 Thank you, Your Honor.

1 **THE COURT:** Thank you, Mr. Schoen.

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

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

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

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

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

24 **THE COURT:** Okay. Counsel?

25 **MR. SCHOEN:** In person, Your Honor.

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

2 Why don't we make it 1:30? I was thinking 2:00
3 only because, if we were going to do it by phone, then I
4 would be keeping people around for less time, but 1:30 means
5 50 minutes from now. So let's do that. Let's go to a
6 recess. I'll come back at 1:30 and issue an oral decision
7 on these questions. Thank you.

8 **DEPUTY CLERK:** All rise.

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

10 **DEPUTY CLERK:** We are now back on the record.

11 **THE COURT:** Thank you, Ms. Lesley.

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

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

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

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

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

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

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

1 that his conduct was unlawful."

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

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

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

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

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

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

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

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

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

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

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

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

25 Mr. Bannon cannot present evidence regarding those

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

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

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

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

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

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

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

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

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

1 part and denied in part.

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

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

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

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

25 To the extent that Mr. Bannon would attempt to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 contours of this defense. But I agree with the Eleventh
2 Circuit that: "A defendant may assert a public authority
3 affirmative defense when he has knowingly acted in violation
4 of federal criminal law but has done so in reasonable
5 reliance on the authorization of a government official."
6 That's the *Alvarado* case, 808 F.3d 474, Eleventh Circuit
7 2015.

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

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

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

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

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

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

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

1 circuit.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 obstruction of its process."

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

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

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

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

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

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

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

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

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

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

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

25 But as we discussed earlier, if there is some rule

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

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

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

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

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

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

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

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

25 So having addressed those three, sort of, general

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

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

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

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

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

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

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

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

25 That being said, I won't prohibit the government

1 from using, at least sometimes, the full title of the Select
2 Committee. I do admonish the government that unnecessary
3 invocation of the full title might lead me to reconsider
4 that decision. And, of course, the government must prove
5 that the Select Committee's subpoena sought testimony and
6 records from Mr. Bannon that were pertinent to the topics
7 that the Select Committee was investigating. That will
8 necessarily require some mentions of the events of January
9 6th generally. I'll allow such evidence, but I intend to
10 police this line tightly.

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

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

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

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

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

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

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

1 sense.

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

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

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

25 The final point in the Omnibus Motion is a little

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

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

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

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

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

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

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

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

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

1 be relevant in any event.

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

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

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

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

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

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

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

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

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

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

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

1 individuals that Mr. Bannon seeks to subpoena.

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

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

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

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

25 I am certainly cognizant of Mr. Bannon's concerns

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

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

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

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

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

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

11 Thank you, Counsel.

12 Mr. Schoen, would you like to say something?

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

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

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

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

6 **MR. SCHOEN:** I got that.

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

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

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

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

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

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

5 **MR. SCHOEN:** Yeah.

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

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

14 **THE COURT:** Are you talking about the letter?

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

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

18 **MR. SCHOEN:** Well --

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

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

1 **THE COURT:** Agreed.

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

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

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

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

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

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

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

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

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

19 **THE COURT:** Fair enough.

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

25 **THE COURT:** Well, for all the reasons I said

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

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

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

16 **MR. SCHOEN:** Even though the conversation --

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

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

22 **THE COURT:** I understand that. I understand that.

23 **MR. SCHOEN:** Okay.

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

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

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

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

15 **THE COURT:** Thank you. Anything else?

16 **MR. SCHOEN:** [SHAKES HEAD]

17 **THE COURT:** Okay.

18 **MS. VAUGHN:** Nothing from the government.

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

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

24 **THE COURT:** It may not be long, and we can take it
25 up on Thursday if necessary. Thank you, all.

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(Proceedings concluded at 2:29 p.m.)

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C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter**, certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

July 12, 2022

DATE

/s/

Lorraine T. Herman