

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO THE COMMITTEE REPORT ON THE RESO-
LUTION RECOMMENDING THAT THE HOUSE OF
REPRESENTATIVES FIND STEPHEN K.
BANNON IN CONTEMPT OF CONGRESS FOR
REFUSAL TO COMPLY WITH A SUBPOENA
DULY ISSUED BY THE SELECT COMMITTEE TO
INVESTIGATE THE JANUARY 6TH ATTACK ON
THE UNITED STATES CAPITOL
OFFERED BY MR. THOMPSON OF MISSISSIPPI**

Beginning on page 1, strike “The Select Committee to Investigate the January 6th Attack on the United States Capitol, having considered” and all that follows through the end of the report, and insert the following:

The Select Committee to Investigate the January 6th Attack on the United States Capitol, having considered this Report, reports favorably thereon and recommends that the Report be approved.

The form of the Resolution that the Select Committee to Investigate the January 6th Attack on the United States Capitol would recommend to the House of Representatives for citing Stephen K. Bannon for contempt of Congress pursuant to this Report is as follows:

Resolved, That Stephen K. Bannon shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, detailing the refusal of Stephen K. Bannon to produce documents or appear for a deposition before the Select Committee to Investigate the January 6th Attack on the United States Capitol as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Bannon be proceeded against in the manner and form provided by law.

Resolved, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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PURPOSE AND SUMMARY

On January 6, 2021, a violent mob breached the security perimeter of the United States Capitol, assaulted and injured scores of police officers, engaged in hand-to-hand violence with those officers over an extended period, and invaded and occupied the Capitol building, all in an effort to halt the lawful counting of electoral votes and reverse the results of the 2020 election. In the words of many of those who participated in the violence, the attack was a direct response to false statements by then-President Donald J. Trump—beginning on election night 2020 and continuing through January 6, 2021—that the 2020 election had been stolen by corrupted voting machines, widespread fraud, and otherwise.

In response, the House adopted House Resolution 503 on June 30, 2021, establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol (hereinafter referred to as the “Select Committee”).

The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify how the events of January 6th were planned, what actions and statements motivated and contributed to the attack on the Capitol, how the violent riot that day was coordinated with a political and public relations strategy to reverse the election outcome, and why Capitol security was insufficient to address what occurred. The Select Committee will evaluate all facets of these issues, create a public record of what occurred, and recommend to the House, and its relevant committees, corrective laws, policies, procedures, rules, or regulations.

According to many published reports, and his own public statements, Stephen K. Bannon had specific knowledge about the events planned for January 6th before they occurred. He said on his January 5th podcasts, for example:

It's not going to happen like you think it's going to happen. OK, it's going to be quite extraordinarily different. All I can say is, strap in. [. . .] You made this happen and tomorrow it's game day. So strap in. Let's get ready.¹

All hell is going to break loose tomorrow. [. . .] So many people said, 'Man, if I was in a revolution, I would be in Washington.' Well, this is your time in history.²

Mr. Bannon appears to have had multiple roles relevant to this investigation, including his role in constructing and participating in the “stop the steal” public relations effort that motivated the attack, his efforts to plan political and other activity in advance of January 6th, and his participation in the events of that day from a “war room” organized at the Willard InterContinental Washington D.C. Hotel (the “Willard Hotel”). Although he was a private citizen not employed by the White House at the time, he reportedly spoke with Mr. Trump directly regarding the plans for January 6th on at least one occasion. In short, Mr. Bannon appears to have played a multi-faceted role in the events of January 6th, and the American people are entitled to hear his first-hand testimony regarding his actions. The Select Committee expects that such testimony will be directly relevant to its report and recommendations for legislative and other action.

On September 23, 2021, Chairman BENNIE G. THOMPSON signed a subpoena for documents and testimony and transmitted it along with a cover letter and schedule to counsel for Mr. Bannon, who accepted service on Mr. Bannon's behalf on September 24, 2021.³ The subpoena required that Mr. Bannon produce responsive documents not later than October 7, 2021, and that Mr. Bannon appear for a deposition on October 14, 2021. Subsequent communications between counsel for Mr. Bannon and Chairman THOMPSON, however, failed to reach any accommodation for Mr. Bannon's appearance for testimony or production of documents. Indeed, counsel for Mr. Bannon on October 7, 2021, flatly stated that Mr. Bannon would not produce any documents or appear at the scheduled deposition, as ordered by the lawful subpoena. Although Mr. Bannon's counsel referenced vague claims of executive privilege purportedly relayed by the former President, no such claims have been presented by the former President to the Select Committee.⁴ And although the Select Committee is confident that such claims could not bar any of its requests, there is no conceivable executive privilege claim that could bar *all* of the Select Committee's requests or justify Mr. Bannon's flat refusal to appear for the required deposition. The Chairman's October 8, 2021, response addressed the legal arguments raised by Mr. Bannon's counsel and made clear that the Select Committee expected—as the law demands—that Mr. Bannon appear before the Select Committee at his deposition and raise any privilege or other concerns regarding specific questions on the record of that proceeding.⁵

The contempt of Congress statute, 2 U.S.C. § 192, makes clear that a witness summoned before Congress must appear or be “deemed guilty of a misdemeanor” punishable by a fine of up to

¹Steve Bannon, “War Room: Pandemic, ‘EP 634 – Tuesday Special (with Maggie VandenBerghe, Ben Berquam, and Peter Navarro),” (Jan. 5, 2021), available at <https://rumble.com/vch0pu-ep-634-tuesday-special-w-maggie-vandenberghen-ben-berquam-and-peter-navarro.html>.

²Aaron Blake, “Who could have predicted the Capitol riot? Plenty of people – including Trump allies,” *Washington Post*, (Jan. 28, 2021), available at <https://www.washingtonpost.com/politics/2021/01/28/who-could-have-predicted-capitol-siege-plenty-people/>.

³See Appendix, Exs. 1, 2 (Subpoena from Chairman BENNIE G. THOMPSON to Stephen K. Bannon and attachments (Sept. 23, 2021)).

⁴See Appendix, Ex. 3 (Letter from Robert J. Costello to Chairman BENNIE G. THOMPSON (Oct. 7, 2021)).

⁵See Appendix, Ex. 4 (Letter from Chairman BENNIE G. THOMPSON to Robert J. Costello (Oct. 8, 2021)).

\$100,000 and imprisonment for up to 1 year.⁶ Further, the Supreme Court in *United States v. Bryan* (1950) emphasized that the subpoena power is a “public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned.”⁷ The Supreme Court recently reinforced this clear obligation by stating that “[w]hen Congress seeks information needed for intelligent legislative action, it unquestionably remains the duty of all citizens to cooperate.”⁸

Mr. Bannon did not produce documents by the subpoena’s October 7, 2021, deadline nor did he appear for a deposition scheduled for October 14, 2021, as ordered by the subpoena and in contravention of the clear instructions by the Select Committee Chairman on October 8, 2021, to appear at the deposition and raise any privilege concerns in response to specific questions on the record. Mr. Bannon’s refusal to comply with the Select Committee’s subpoena *in any way* represents willful default under the law and warrants contempt of Congress and referral to the United States Attorney for the District of Columbia for prosecution as prescribed by law. The denial of the information sought by the subpoena impairs Congress’s central powers under the United States Constitution.

BACKGROUND ON THE SELECT COMMITTEE’S INVESTIGATION

House Resolution 503 sets out the specific purposes of the Select Committee, including:

- to investigate and report upon the facts, circumstances, and causes “relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex”;
- to investigate and report upon the facts, circumstances, and causes “relating to the interference with the peaceful transfer of power”; and
- to investigate and report upon the facts, circumstances, and causes relating to “the influencing factors that fomented such an attack on American representative democracy while engaged in a constitutional process.”

The Supreme Court has long recognized Congress’s oversight role. “The power of the Congress to conduct investigations is inherent in the legislative process.”⁹ Indeed, Congress’s ability to enforce its investigatory power “is an essential and appropriate auxiliary to the legislative function.”¹⁰ “Absent such a power, a legislative body could not ‘wisely or effectively’ evaluate those conditions ‘which the legislation is intended to affect or change.’”¹¹

The oversight powers of House and Senate committees are also codified in legislation. For example, the Legislative Reorganization Act of 1946 directed committees to “exercise continuous watchfulness” over the executive branch’s implementation of programs within its jurisdictions,¹² and the Legislative Reorganization Act of 1970 authorized committees to “review and study, on a continuing basis, the application, administration, and execution” of laws.¹³

Pursuant to House rule XI and House Resolution 503, the Select Committee is authorized “to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.” Further, section 5(c)(4) of House Resolution 503 provides that the Chairman of the Select Com-

⁶The prison term for this offense makes it a Class A misdemeanor. 18 U.S.C. § 3559(a)(6). By that classification, the penalty for contempt of Congress specified in 2 U.S.C. § 192 increased from \$1,000 to \$100,000. 18 U.S.C. § 3571(b)(5).

⁷*United States v. Bryan*, 339 U.S. 323, 331 (1950).

⁸*Trump v. Mazars USA LLP*, 140 S.Ct. 2019, 2036 (2020) (emphasis in original; internal quotation marks removed). See also *Watkins v. United States*, 354 U.S. 178, 187-88 (1957) (stating of citizens that “It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees, and to testify fully with respect to matters within the province of proper investigation.”).

⁹*Mazars*, 140 S.Ct. at 2031 (2020) (citing *Watkins*, 354 U.S. at 187) (internal quotation marks removed).

¹⁰*Mazars*, 140 S.Ct. at 2031 (2020) (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)).

¹¹*Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (D.D.C. 1976), *aff’d*, 548 F.2d 977 (D.C.Cir. 1976) (quoting *McGrain*, 273 U.S. at 175).

¹²Pub. L. 79-601, 79th Cong. § 136, (1946).

¹³Pub. L. 91-510, 91st Cong. § 118, (1970).

mittee may “authorize and issue subpoenas pursuant to clause 2(m) of rule XI in the investigation and study” conducted pursuant to the enumerated purposes and functions of the Select Committee. The Select Committee’s authorizing resolution further states that the Chairman “may order the taking of depositions, including pursuant to subpoena, by a Member or counsel of the Select Committee, in the same manner as a standing committee pursuant to section 3(b)(1) of House Resolution 8, One Hundred Seventeenth Congress.”

A. The Select Committee seeks information from Mr. Bannon central to its investigative purposes

Mr. Bannon’s testimony and document production are critical to the Select Committee’s investigation. Among other topics, the Select Committee seeks facts that explain why the events of January 6th turned violent. Statements publicly made by Mr. Bannon on January 5, 2021, suggest that he had some foreknowledge about extreme events that would occur the next day. Mr. Bannon noted on January 5th that the country was facing a “constitutional crisis” and “that crisis is about to go up about five orders of magnitude tomorrow.”¹⁴ He also stated that, “All hell is going to break loose tomorrow. [. . .] It’s not going to happen like you think it’s going to happen. OK, it’s going to be quite extraordinarily different.”¹⁵ Congress, through the Select Committee, is entitled to discover facts concerning the activities leading up to the violence on January 6th. Under House Resolution 503, the Select Committee is directed to investigate those facts, which include “the influencing factors that fomented such an attack.” And after making public statements on January 5th like those quoted above, Mr. Bannon is obliged by law to comply with the reasonable requests of the Select Committee through its subpoena. If any witness so close to the events leading up to the January 6th attack could decline to provide information to the Select Committee, Congress would be severely hamstrung in its ability to exercise its constitutional powers with highly relevant information informing its choices. Information in Mr. Bannon’s possession is essential to putting other witnesses’ testimony and productions into appropriate context and to ensuring the Select Committee can fully and expeditiously complete its work.

Mr. Bannon was the Chief Executive Officer of Mr. Trump’s 2016 presidential campaign and served as then-President Trump’s chief strategist, a White House position, for 8 months in 2017.¹⁶ Mr. Trump fired Mr. Bannon in August 2017,¹⁷ and Mr. Bannon did not thereafter hold a position in the executive branch.

After Mr. Bannon left government service, he remained actively involved in media and politics. In October 2019, Mr. Bannon began a radio show and podcast focused on rallying supporters of Mr. Trump in support of various causes and issues.¹⁸ According to one report, before the election even occurred in 2020, Mr. Bannon made public efforts to explain “his belief that the Democrats are plotting to steal the 2020 election.”¹⁹ One account of conversations involving Mr. Bannon (and Mr. Trump) prior to January 6th describes Mr. Bannon as encouraging Mr. Trump to “focus on January 6th” and articulating a plan to have millions of Americans consider Mr.

¹⁴Steve Bannon, “War Room: Pandemic,” EP 634 – Tuesday Special (with Maggie VandenBerghe, Ben Berquam, and Peter Navarro), (Jan. 5, 2021), available at <https://rumble.com/vch0pu-ep-634-tuesday-special-w-maggie-vandenberghen-ben-berquam-and-peter-navarro.html>.

¹⁵*Id.*

¹⁶Brian Bennett, “‘You Got to Be the Last Guy He Talks To.’ The Rise and Fall of Trump Adviser Steve Bannon,” *Time*, (Aug. 21, 2020), available at <https://time.com/5882072/rise-and-fall-of-steve-bannon/>.

¹⁷Jeff Mason and Steve Holland, “Trump fired adviser Bannon,” Reuters, (Aug. 18, 2017), available at <https://www.reuters.com/article/us-usa-trump-bannon/trump-fires-adviser-bannon-idUSKCN1AY205>.

¹⁸Daniel Lippman, “Steve Bannon launches radio show and podcast on impeachment,” *Politico*, (Oct. 24, 2019), available at <https://www.politico.com/news/2019/10/22/steve-bannon-radio-show-podcast-impeachment-055167>.

¹⁹E.g., KUSI Newsroom, “Steve Bannon explains how the Democrats are plotting to steal the 2020 election,” KUSI, (Oct. 1, 2020), available at <https://www.kusi.com/steve-bannon-explains-how-the-democrats-are-plotting-to-steal-the-2020-election>.

Biden an illegitimate President.²⁰ That same reporting suggests that Mr. Bannon was in frequent contact with the White House in late-December and early-January and spoke directly with the President several times.²¹ Mr. Bannon is reported to have urged then-President Trump to pressure then-Vice President Michael R. Pence to assist in overturning the results of the 2020 election.²²

Mr. Bannon was reportedly encouraging President Trump's supporters to take dramatic action. According to one report, immediately after the November 3rd election, Mr. Bannon began promoting false conspiracy claims that the election had been stolen and referred to the election as "a mass fraud."²³

The day before the January 6th attack on the Capitol, Mr. Bannon predicted that "All hell is going to break loose tomorrow."²⁴ He told the listeners of his radio show:

It's not going to happen like you think it's going to happen. OK, it's going to be quite extraordinarily different. All I can say is, strap in. [. . .] You made this happen and tomorrow it's game day. So strap in. Let's get ready.²⁵

He added:

So many people said, "Man, if I was in a revolution, I would be in Washington." Well, this is your time in history.²⁶

And:

It's all converging, and now we're on the point of attack tomorrow.²⁷

Public reporting also suggests that Mr. Bannon was among several prominent supporters of efforts to undermine the election results who gathered at the Willard Hotel, two blocks from the White House, on the days surrounding the January 6th attack.²⁸ The group that assembled at the Willard Hotel is reported to have included members of the Trump campaign's legal team (including Rudolph Giuliani and John Eastman), several prominent proponents of false election fraud claims that had been promoted by Mr. Trump (e.g., Russell Ramsland, Jr. and Boris Epshteyn), as well as Roger Stone, who left the hotel with Oath Keeper bodyguards, and campaign spokesman Jason Miller.²⁹ It has been reported that the participants in the meetings at the Willard Hotel discussed plans to stop or delay the January 6th counting of the election results and persuade Members of Congress to block the electoral count.³⁰

Mr. Bannon's statements the day before the January 6th attack, and his association with both the Trump inner circle and outside groups involved in the "Stop the Steal"³¹ events, make his testimony about the Willard Hotel meetings essential to fully understanding and establishing responsibility for the events of January 6th. In addition to the indications noted above regarding Mr. Bannon's role in various activities leading up to January 6th, he

²⁰ Bob Woodward and Robert Costa, *Peril*, (New York: Simon & Shuster, 2021), p. 207.

²¹ *Id.*, pp. 207, 233–234.

²² *Id.*, p. 207.

²³ Rob Kuznia, et al., "Stop the Steal's massive disinformation campaign connected to Roger Stone," CNN (Nov. 14, 2020), available at <https://www.cnn.com/2020/11/13/business/stop-the-steal-disinformation-campaign-invs/index.html>.

²⁴ Aaron Blake, "Who could have predicted the Capitol riot? Plenty of people – including Trump allies," *Washington Post*, (Jan. 28, 2021), available at <https://www.washingtonpost.com/politics/2021/01/28/who-could-have-predicted-capitol-siege-plenty-people/>.

²⁵ Steve Bannon, "War Room: Pandemic, 'EP 634 – Tuesday Special (with Maggie VandenBerghe, Ben Berquam, and Peter Navarro)," (Jan. 5, 2021), available at <https://rumble.com/vch0pu-ep-634-tuesday-special-w-maggie-vandenbergh-ben-berquam-and-peter-navarro.html>.

²⁶ Aaron Blake, "Who could have predicted the Capitol riot? Plenty of people – including Trump allies," *Washington Post*, (Jan. 28, 2021), available at <https://www.washingtonpost.com/politics/2021/01/28/who-could-have-predicted-capitol-siege-plenty-people/>.

²⁷ *Id.*

²⁸ Woodward and Costa, pp. 233–234; Andre J. Ellington, "Steve Bannon Confirms His Involvement in January 6 Insurrection on 'War Room' Podcast," *Newsweek*, (Sept. 22, 2021), available at <https://www.newsweek.com/steve-bannon-confirms-his-involvement-january-6-insurrection-war-room-podcast-1631667>.

²⁹ Woodward and Costa, pp. 233–234; Michael Wolff, "Donald Trump's January 6; The view from inside the Oval Office," *New York*, (June 28, 2021), available at <https://nymag.com/intelligencer/article/michael-wolff-landslide-final-days-trump-presidency-excerpt.html>; Seth Abramson (@SethAbramson), Twitter (June 12, 2021, 10:51 a.m.), <https://twitter.com/SethAbramson/status/1403726643722547200/photo/3>.

³⁰ Woodward and Costa, p. 233.

³¹ There were a number of events organized to take place on January 5th and January 6th at which supporters of President Trump gathered, and made and heard speeches, in support of the position that Congress should not affirm that Joe Biden had won the 270 or more electoral college votes necessary to be elected President.

also reportedly spoke directly to Mr. Trump on one or more occasions regarding what could or should happen on January 6th.³²

B. Mr. Bannon's refusal to comply with the Select Committee's subpoena for testimony and documents

On September 23, 2021, Chairman THOMPSON signed and transmitted a subpoena, cover letter, and schedule to Mr. Bannon ordering the production of both documents and testimony relevant to the Select Committee's investigation into "important activities that led to and informed the events at the Capitol on January 6, 2021."³³ Chairman THOMPSON's letter identified public reports describing Mr. Bannon's activities and past statements, documenting some of the public information that gave the Select Committee reason to believe Mr. Bannon possesses information about matters within the scope of the Select Committee's inquiry.

The specific documents requested are found in the schedule in the Appendix, Exhibit 1, (pp. 4–5). The schedule included with the subpoena addressed topics including but not limited to Mr. Bannon's role in planning and promoting the January 6, 2021, rally and march in support of Mr. Trump; Mr. Trump's participation in the rally and march; Mr. Bannon's podcast and its use for promoting the rally and march; and Mr. Bannon's strategic communications with a host of individuals known to be involved with the former President's 2020 election campaign and subsequent efforts to undermine or cast doubt on the results of that election.

The subpoena required Mr. Bannon to produce the requested documents to the Select Committee on October 7, 2021, at 10 a.m. and required Mr. Bannon's presence for the taking of testimony on October 14, 2021, at 10 a.m.³⁴ Mr. Bannon had designated Robert J. Costello as his attorney for the purposes of the Select Committee's inquiry, and Mr. Costello accepted service of the subpoena on behalf of Mr. Bannon on September 24, 2021.³⁵

On October 7, 2021, at 10 a.m., at the designated location identified in the subpoena, Mr. Bannon failed to appear and produce documents. Instead, over 7 hours later, Mr. Costello sent a letter to Chairman THOMPSON via email at 5:04 p.m. reinforcing Mr. Bannon's refusal to comply.

Mr. Costello's letter cited an October 6, 2021, letter from former President Trump's counsel Justin Clark to Mr. Costello that purportedly instructed Mr. Bannon to "invoke any immunities and privileges he may have from compelled testimony," "not produce any documents concerning privileged material," and "not provide any testimony concerning privileged material[.]"³⁶ Mr. Costello's letter then asserted that Mr. Bannon was "legally unable to comply," with the subpoena for "documents or testimony," claiming to rely on the instructions of Mr. Trump to not disclose privileged information.³⁷ The two-page letter contained only conclusory statements, no legal analysis, and approximately half of it purported to quote from the letter of October 6, 2021, from the counsel to Mr. Trump.

On October 8, 2021, Chairman THOMPSON responded to Mr. Costello's October 7, 2021, letter.³⁸ He said that Mr. Trump had not communicated an invocation of privilege either formally or informally to the Select Committee. He further stated that, regardless, the information the Select Committee seeks from Mr. Bannon concerns his actions as a private citizen and involves a range of subjects not even conceivably reached by any executive privilege assertion. Chairman THOMPSON also noted that—even assuming Mr. Bannon were correct that a privilege applied to his documents and testimony and Mr. Trump had formally invoked a privilege through

³² See, e.g., Woodward and Costa, p. 207.

³³ See Appendix, Exs. 1, 2.

³⁴ See Appendix, Ex. 1.

³⁵ See Appendix, Ex. 2 (Emails between Select Committee staff and Robert J. Costello (Sept. 23–24, 2021)).

³⁶ See Appendix, Ex. 3 (Letter from Robert J. Costello to Select Committee staff (Oct. 7, 2021)).

³⁷ *Id.*

³⁸ See Appendix, Ex. 4 (Letter from Chairman BENNIE G. THOMPSON to Robert J. Costello (Oct. 8, 2021)).

the long-standing practice of consultation with the current President (which is not the case)—Mr. Bannon does not enjoy anything like the type of absolute immunity his attorney suggested would insulate Mr. Bannon from an obligation to comply with the Select Committee’s subpoena. Again, there is no conceivable legal claim to support such an assertion.

The Chairman underscored that Mr. Bannon remained obligated to produce documents and testimony about all non-privileged material that was responsive to the subpoena, was expected to produce a privilege log identifying any documents being withheld based on any specific privilege claims, and that the Select Committee expected Mr. Bannon to appear at the deposition on October 14th and state on the record any privilege concerns raised by specific questions. As made clear by the deposition rules provided to Mr. Bannon by the Select Committee, under House deposition regulation 3, Mr. Bannon may be accompanied at the deposition by a personal, nongovernmental counsel to advise him of his rights.³⁹

The Chairman concluded by saying that Mr. Bannon was therefore not in compliance with the Chairman’s duly issued subpoena for documents, and that the Select Committee would view refusal to produce documents and refusal to appear at the October 14th deposition as willful non-compliance with the subpoena. The Chairman warned that this willful non-compliance would put Mr. Bannon in jeopardy of a vote to refer him to the House to consider a criminal contempt referral to a U.S. Attorney pursuant to 2 U.S.C. §§ 192 and 194.⁴⁰

On October 13, 2021, at approximately 12:35 p.m., Select Committee staff emailed Mr. Costello to discuss logistics for the deposition at which Mr. Bannon was compelled to appear on October 14, 2021, at 10 a.m. Approximately an hour later, Select Committee staff and Mr. Costello spoke on the telephone, during which Mr. Costello informed the Select Committee that Mr. Bannon would not appear the next day, and that a letter to that effect was forthcoming. Mr. Costello indicated that he was in contact with Mr. Trump’s attorney, and he had informed Mr. Trump’s attorney of the Select Committee’s explanation of the deficiencies in Mr. Bannon’s and Mr. Trump’s justifications for Mr. Bannon’s defiance of the subpoena.

On that call, Mr. Costello represented to the Select Committee that he had asked Mr. Trump’s counsel to identify, with specificity, communications for which executive privilege would apply. Later that day, Mr. Costello transmitted a response to Chairman THOMPSON’s October 8, 2021, letter. In that letter, Mr. Costello reiterated his position that Mr. Bannon’s refusal to comply with the Select Committee subpoena was based on the former President’s “executive and other privileges.”⁴¹ Mr. Costello claimed that President Trump’s counsel had “exercis[ed] his executive privilege” and “directed Mr. Bannon not to produce documents or testify until the issue of executive privilege is resolved.”⁴² He further stated that Mr. Bannon would refuse to produce any documents or appear for testimony until after a court had ruled on, or former President Trump and the Select Committee reached an agreement on, the matter of executive privilege that the former President had never actually communicated to the Select Committee. In defiance of the clear instructions by the Select Committee to appear at the deposition and state any privilege concerns as they applied to specific questions, Mr. Bannon refused to appear to make any objections in person. Further, he refused to engage at all with the specifics of the document demands, including failing to provide a privilege log identifying any privilege claims regarding specific documents.

³⁹ U.S. House of Representatives, “117th Congress Regulations for Use of Deposition Authority,” 167 Cong. Rec., (Jan. 4, 2021), p. H41.

⁴⁰ See Appendix, Ex. 4 (Letter from Chairman BENNIE G. THOMPSON to Robert J. Costello (Oct. 8, 2021)).

⁴¹ See Appendix, Ex. 5 (Letter from Robert J. Costello to Chairman BENNIE G. THOMPSON (Oct. 13, 2021)).

⁴² *Id.*

On October 14, 2021, at 10 a.m., Mr. Bannon failed to appear at the designated location to provide testimony relevant to the Select Committee's inquiry in response to questions posed, as was required by the subpoena.⁴³

At 2:05 p.m. on October 15, 2021, Chairman THOMPSON sent a letter to Mr. Costello noting that Mr. Bannon had not even attempted to provide the Select Committee any explanation for refusing to comply with the Select Committee's demand for documents and testimony on a range of subjects that do not involve communications with the former President. The Chairman also reiterated that Mr. Bannon does not enjoy absolute immunity from testifying before the Select Committee. The Chairman reminded Mr. Costello that the Select Committee views Mr. Bannon's conduct as willful non-compliance with the subpoena. He notified Mr. Costello that, accordingly, the Select Committee would meet on October 19, 2021, to consider a criminal contempt referral for Mr. Bannon, and invited Mr. Costello to submit any written materials he believed the Select Committee should consider in its deliberations on this referral.

On October 18, 2021, Mr. Costello wrote Chairman Thompson requesting a "one-week adjournment of our response" to the Chairman's October 15th letter, citing the need to "assess" litigation Mr. Trump filed on October 18, 2021, concerning the Select Committee's request for documents from the National Archives.⁴⁴ The Chairman replied on October 19, 2021, that Mr. Trump's lawsuit was immaterial to the Select Committee's subpoena to Mr. Bannon, and accordingly, no grounds existed for any further delay in Mr. Bannon's compliance with the subpoena.⁴⁵

C. Mr. Bannon's purported basis for non-compliance is wholly without merit

Mr. Bannon has relied on no legal authority to support his refusal to comply in any fashion with the subpoena. Mr. Bannon's refusal to comply with the subpoena is ostensibly based on his decision to "honor [former President Trump's] invocation of executive privilege" and instruction that, "to the fullest extent permitted by law," Mr. Bannon "invoke any immunities and privileges he may have from compelled testimony," "not produce any documents concerning privileged material," and "not provide any testimony concerning privileged material."⁴⁶ Far from being "permitted by law," Mr. Bannon's conduct in response to the Select Committee's subpoena constitutes a violation of the contempt of Congress statutory provisions.

1. Executive privilege has not been invoked

Mr. Trump has had no communication with the Select Committee. In an October 7th letter to the Select Committee, Mr. Bannon's attorney referred to purported correspondence from Mr. Trump's attorney, Justin Clark, in which Mr. Clark asserted that the Select Committee subpoena seeks information that is "potentially protected from disclosure by executive and other privileges, including among others the presidential communications, deliberative process, and attorney-client privileges."⁴⁷ According to Mr. Bannon's attorney, Mr. Clark also stated that, "President Trump is prepared to defend these fundamental privileges in court."⁴⁸

⁴³ See Appendix.

⁴⁴ Letter from Robert J. Costello to Chairman THOMPSON, (Oct. 18, 2021).

⁴⁵ Letter from Chairman THOMPSON to Robert J. Costello, (Oct. 19, 2021).

⁴⁶ See Appendix, Ex. 3 (Letter from Robert J. Costello to Select Committee staff (Oct. 7, 2021)).

⁴⁷ *Id.*

⁴⁸ *Id.*

In *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953), the Supreme Court held that executive privilege:

[B]elongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.⁴⁹

Here, the Select Committee has not been provided with any formal invocation of executive privilege by the President, the former President,⁵⁰ or any other employee of the executive branch.

In fact, in an October 18, 2021, letter to Mr. Bannon’s attorney, the White House Counsel’s Office specifically stated that “at this point we are not aware of any basis for [Mr. Bannon’s] refusal to appear for a deposition.”

The letter also informed Mr. Bannon’s counsel that:

[P]resident Biden determined that an assertion of executive privilege is not justified with respect to a set of documents shedding light on events within the White House on and about January 6, 2021, and with respect to documents and testimony concerning the former President’s efforts to use the Department of Justice to advance a false narrative that the 2020 election was tainted by widespread fraud. President Biden’s determination that an assertion of privilege is not justified with respect to these subjects applies to [Mr. Bannon’s] deposition testimony and to any documents [Mr. Bannon] may possess concerning either subject.⁵¹

With respect to the former President, the Select Committee has not received a formal invocation of executive privilege. Mr. Costello’s October 13th letter merely states that the attorney for former President Trump had informed him that “President Trump is exercising his executive privilege.” This third-hand, non-specific assertion of privilege, without any description of the documents or testimony over which privilege is claimed, is insufficient to activate a claim of executive privilege.

2. Even assuming an invocation of executive privilege (which is not justified here), assertion of privilege could not bar the Select Committee from lawfully obtaining the documents and testimony it seeks from Mr. Bannon

The Select Committee seeks information from Mr. Bannon on a wide range of subjects that it is inconceivable executive privilege would reach. Mr. Bannon was a private citizen during the relevant time period and the testimony and documents the Select Committee is demanding do not concern discussion of official government matters with the President and his immediate advisors. The law is clear that executive privilege does not extend to discussions between the President and private citizens relating to non-governmental business or among private citizens. In *United States v. Nixon*, 418 U.S. 683, 708 (1974), the Supreme Court recognized a qualified, presumptive privilege for presidential communications. The scope of the so-called “presidential communications privilege” was further defined by the Court to apply only to “communications in performance of [a President’s] responsibilities of his office and made in the process of shaping policies and making decisions.”⁵²

In *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997), the DC Circuit extended the presidential communications privilege to “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have

⁴⁹See also *United States v. Burr*, 25 F. Cas. 187, 192 (CCD Va. 1807) (ruling that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney). In *Reynolds*, the Court addressed the “state secrets privilege,” which can be viewed as a subset of executive privilege.

⁵⁰ The Supreme Court has held that a former President may assert executive privilege on his own, but his claim should be given less weight than that of an incumbent President. *Nixon v. Administrator of General Services*, 433 U.S. 425, 451 (1977) (the “expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office”). The Supreme Court in *Nixon v. GSA* made note of the fact that neither President Ford nor President Carter supported former President Nixon’s assertion of privilege, which, the Court said, “detracts from the weight of his contention [that the disclosure of the information at issue] impermissibly intrudes into the executive function and the needs of the Executive Branch.” *Id.*, p. 449.

⁵¹Letter to Robert J. Costello from Jonathan C. Su, Deputy Counsel to the President, (Oct. 18, 2021).

⁵²*Nixon v. Administrator of General Services*, 433 U.S. at 449 (internal citations and quotations omitted).

broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” The court stressed that the privilege only applies to communications intended to advise the President “on official government matters.”⁵³ In *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004), the court reaffirmed that the presidential communications privilege applies only to documents “solicited and received by the President or his immediate advisers in the Office of the President.” Relying on *In re Sealed Case* and the principle that “the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President’s decision-making process is adequately protected,”⁵⁴ the court refused to extend the privilege even to executive branch employees whose sole function was to provide advice to the President in the performance of a “quintessential and nondelegable Presidential power.”⁵⁵

Here, neither Mr. Bannon nor former President Trump has asserted that Mr. Bannon’s testimony would reveal communications involving the President or members of his immediate White House staff regarding the performance of the President’s responsibilities of his office. At no point during the time period under investigation by the Select Committee was Mr. Bannon a government employee, much less a key White House adviser in the Office of the President. Moreover, the matters under review by the Select Committee concern efforts to overturn legitimate election results and an attack on our democratic institutions. Communications regarding these subjects (or any other matter related to the presidential campaign), by definition, would not constitute advice on “official government matters” that could be shielded by executive privilege. In any event, any confidentiality interest in such communications would be far outweighed by the oversight needs for this information that are at stake in the Select Committee’s investigation.

In sum: In this instance, there is no reasonable argument that Mr. Bannon’s communications with the President regarding January 6th are the type of matters on which privilege can be asserted. Also, the Select Committee is confident that no executive privilege assertion would bar Mr. Bannon’s testimony regarding his communications directly with the President regarding January 6th—because the privilege is qualified and could be overcome by an appropriate showing of need. Again, there is no conceivable assertion that privilege could apply to other information sought that does not constitute communications with Mr. Trump during his presidency. Beyond communications between Mr. Bannon and Mr. Trump, the Select Committee seeks documents and testimony from Mr. Bannon regarding his own actions and interactions with other private citizens relating to the events of January 6th. For example, the subpoena to Mr. Bannon includes requests for documents related to many other matters, including:⁵⁶

- His presence, purpose, statements, and activities at a meeting with Members of Congress at the Willard Hotel on January 5, 2021, or the presence, purpose, statements, or activities of others in attendance related to that meeting.
- Anyone with whom he communicated by any means with respect to any aspect of the planning, objectives, conduct, or participation in the January 6, 2021, rally, including but not limited to Boris Epshteyn.
- Anyone with whom he communicated with respect to efforts, plans, or proposals to contest the 2020 presidential election results or delay, influence, or impeded the electoral count, including but not limited to communications with Boris Epshteyn, Kashyap Patel, and Ezra Cohen-Watnick.

⁵³ *Id.* (Italics added.)

⁵⁴ *Id.*, p. 1116.

⁵⁵ *Id.*, p. 1111. See also *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 100 (D.D.C. 2008) (privilege claimants acknowledged that executive privilege applies only to “a very small cadre of senior advisors”).

⁵⁶ See Appendix, Ex. 1.

- All public relations, advertising, or other communications efforts to persuade Americans that the election was stolen.
- The January 6, 2021, rally on The Mall and Capitol grounds in Washington, DC, in support of President Donald J. Trump and opposition to the counting of the results of the 2020 presidential election, including its permitting, planning, objectives, financing, and conduct, as well as any communications to or from any person or group involved in organizing or planning for the January 6, 2021, rally.
- The financing or fundraising to assist any individual's or organization's travel to or accommodation in Washington, DC, to attend or participate in the January 6, 2021, rally.
- The "War Room" podcast, insofar as at any time he communicated through it statements referring or relating to the January 6, 2021, rally, including all statements concerning its planning, objectives, purpose, organization, message, or sponsorship.
- The organization or group named "March for Trump" and its activities relating to the January 6, 2021, rally, including any communications Mr. Bannon had with any officer or member of "March for Trump" relating in any way to the planning, objectives, organization, message, sponsorship, and participation in the January 6, 2021, rally.

No colorable claim of executive privilege could possibly be made with respect to documents or testimony related to these and other matters sought by the subpoena, or any other topics that were not connected to official decisionmaking by the President.

3. *Mr. Bannon is not entitled to absolute immunity*

Mr. Bannon has refused to provide any responsive documents or appear for a deposition based on his asserted reliance on Mr. Trump's purported invocation of executive privilege. However, even if Mr. Trump had invoked executive privilege, and even if certain testimony or documents would fall within that privilege, Mr. Bannon would not be immune from compelled testimony before the Select Committee.

The law is clear that even senior White House aides who advise the President on official government business are not immune from compelled congressional process.⁵⁷ To the extent there has been a formal invocation of executive privilege by the Office of the President, and in the unlikely event that testimony by Mr. Bannon relates to information covered by that privilege, Mr. Bannon was nonetheless required to appear before the Select Committee to provide testimony and invoke executive privilege where appropriate. If there are responsive documents that Mr. Bannon claims include privileged information, he was required to provide the Select Committee with a privilege log that "identifies and describes the material in a manner 'sufficient to enable resolution of any privilege claims.'"⁵⁸ Mr. Bannon did neither. He should be held in contempt.

D. *Precedent supports the Select Committee's position to proceed with holding Mr. Bannon in contempt*

An individual who fails or refuses to comply with a House subpoena may be cited for contempt of Congress.⁵⁹ Pursuant to 2 U.S.C. § 192, the willful refusal to comply with a congressional subpoena is punishable by a fine of up to \$100,000 and imprisonment

⁵⁷ See also *Committee on the Judiciary v. McGahn*, 415 F.Supp.3d 148, 214 (D.D.C. 2019) (and subsequent history) ("To make the point as plain as possible, it is clear to this Court for the reasons explained above that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist."); *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 101 (D.D.C. 2008) (holding that White House counsel may not refuse to testify based on direction from the President that testimony will implicate executive privilege).

⁵⁸ See *Comm. on Oversight and Gov't Reform v. Holder*, 2014 U.S. Dist. LEXIS 200278 at *7 (D.D.C., Aug. 20, 2014) (quoting *Miers*, 558 F. Supp. 2d at 107).

⁵⁹ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505, 515 (1975).

for up to 1 year.⁶⁰ A committee may vote to seek a contempt citation against a recalcitrant witness. This action is then reported to the House. If a resolution to that end is adopted by the House, the matter is referred to a U.S. Attorney, who has a duty to refer the matter to a grand jury for an indictment.⁶¹

In his October 8th letter to Mr. Bannon's counsel, the Chairman of the Select Committee advised Mr. Bannon that his claims of executive privilege were not well-founded and did not absolve him of his obligation to produce documents and testify in deposition. The Chairman made clear that the Select Committee expected Mr. Bannon to appear for his scheduled deposition on October 14th and produce the requested documents at that time. The Chairman warned Mr. Bannon that his continued non-compliance would put him in jeopardy of a vote to refer him to the House to consider a criminal contempt referral. Mr. Bannon's failure to appear for deposition or produce responsive documents in the face of this clear advisement and warning by the Chairman constitutes a willful failure to comply with the subpoena.

SELECT COMMITTEE CONSIDERATION

[. . .]

SELECT COMMITTEE VOTES

Clause 3(b) of rule XIII requires the Select Committee to list the recorded votes during consideration of this Report:

[. . .]

SELECT COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII, the Select Committee advises that the oversight findings and recommendations of the Select Committee are incorporated in the descriptive portions of this Report.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The Select Committee finds the requirements of clause 3(c)(2) of rule XIII and section 308(a) of the Congressional Budget Act of 1974, and the requirements of clause 3(c)(3) of rule XIII and section 402 of the Congressional Budget Act of 1974, to be inapplicable to this Report. Accordingly, the Select Committee did not request or receive a cost estimate from the Congressional Budget Office and makes no findings as to the budgetary impacts of this Report or costs incurred to carry out the Report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII, the objective of this Report is to enforce the Select Committee's authority to investigate the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate problems and to recommend corrective laws, policies, procedures, rules, or regulations; and to enforce the Select Committee's subpoena authority found in section 5(c)(4) of House Resolution 503.

⁶⁰See *supra* note 6. The prison term for this offense makes it a Class A misdemeanor. 18 U.S.C. § 3559(a)(6). By that classification, the penalty for contempt of Congress specified in 2 U.S.C. § 192 increased from \$1,000 to \$100,000. 18 U.S.C. § 3571(b)(5).

⁶¹See 2 U.S.C. § 192.

APPENDIX

The official transcript that memorialized Mr. Bannon's failure to appear at his deposition as ordered by subpoena, along with exhibits included in that record, is as follows:

**SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON
THE U.S. CAPITOL, U.S. HOUSE OF REPRESENTATIVES, WASH-
INGTON, DC**

DEPOSITION OF: STEPHEN K. BANNON (NO-SHOW)

THURSDAY, OCTOBER 14, 2021

WASHINGTON, DC

**The deposition in the above matter was held in * * * * commencing at 10:00
a.m.**

PRESENT: Representative SCHIFF.

APPEARANCES:

**FOR THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH
ATTACK ON THE U.S. CAPITOL:**

* * * *, * * * *

Sean Tonolli, Senior Investigative Counsel

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Mr. TONOLLI. So we are on the record. Today is October 14, 2021. The time is 10:00 a.m. We are convened in * * * * for the deposition of Stephen K. Bannon to be conducted by the House Select Committee to Investigate the January 6th Attack on the United States Capitol.

My name is Sean Tonolli. I am the designated Select Committee staff counsel for this proceeding. And I'd ask everyone else to please go around the room and introduce themselves.

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Mr. TONOLLI. For the record, it is 10:01 a.m., and Mr. Bannon is not present. The person transcribing this proceeding is the House stenographer and notary public authorized to administer oaths.

On September 23, 2021, Chairman BENNIE THOMPSON issued a subpoena to Mr. Bannon both to produce documents by October 7, 2021, and to testify at a deposition today, October 14, 2021, at 10:00 a.m.

The subpoena is in connection with the Select Committee's investigation into the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations.

This inquiry includes examination of how various individuals, to include Mr. Bannon, and entities coordinated their activities leading up to the events of January 6, 2021. Mr. Bannon has not produced any documents or appeared today to testify.

I will mark as exhibit 1 and enter into the record the Select Committee's subpoena to Mr. Bannon, included with which are the materials that accompanied the subpoena, namely, a letter from the chairman, a document scheduled with accompanying production instructions, and a copy of the deposition rules.

[Insert Bannon Exhibit No. 1]

Mr. TONOLLI, I will mark as exhibit 2 and enter into the record an email exchange between * * * and Robert Costello, Mr. Bannon's attorney.

[Insert Bannon Exhibit No. 2]

Mr. TONOLLI. On September 23, 2021, * * * * emailed Mr. Costello the subpoena to Mr. Bannon and the accompanying materials included in exhibit 1 and asked whether Mr. Costello was authorized to accept service of the subpoena on Mr. Bannon's behalf.

Mr. Costello replied to * * * * on September 24, 2021, that he was authorized to accept service of the subpoena on Mr. Bannon's behalf.

I will mark as exhibit 3 and enter into the record a letter Mr. Costello sent to * * * * on October 7, 2021.

[Insert Bannon Exhibit No. 3]

Mr. TONOLLI. In sum and substance, the letter states that Mr. Bannon is, "legally unable to comply with your subpoena requests for documents and testimony," because President Trump's attorney informed Mr. Costello by letter, dated October 6, 2021, that President Trump is invoking executive privilege, "to the fullest extent permitted by law," and instructing Mr. Bannon not to provide documents or testimony, "concerning privileged material," in response to the Select Committee's subpoena.

I will mark as exhibit 4 and enter into the record a letter that Chairman THOMPSON sent to Mr. Costello in response on October 8, 2021.

[Insert Bannon Exhibit No. 4]

Mr. TONOLLI. And I'll take a brief pause to recognize that Mr. SCHIFF has joined us.

Turning back to the letter that Chairman THOMPSON sent on October 8th, in sum and substance, the response states that Mr. Costello's, "letter relies on an apparent instruction from former President Donald Trump that appears limited to requesting that Mr. Bannon not disclose privileged information. Despite this limited instruction, your letter takes the inappropriate position that Mr. Bannon will not comply with any request for information or testimony sought by the Select Committee. Moreover, Mr. Trump's stated 'intention to assert those executive privileges' that may or may not belong to him does not provide a legal basis for Mr. Bannon's refusal to comply with the subpoena."

The letter states the Select Committee's expectation that Mr. Bannon would appear today for the deposition and respond fully to the Select Committee's questions and to state for the record any objections to particular questions for the Select Committee's consideration and possible judicial review.

The letter concludes by advising that the Select Committee will view Mr. Bannon's failure to respond to the subpoena as, "willful noncompliance," that would force the Select Committee to consider invoking the contempt of Congress procedures entitled to United States Code, sections 192 and 194, which could result in a referral from the House to the Department of Justice for criminal charges as well as the possibility of a civil action against Mr. Bannon personally to enforce the subpoena.

I will mark as a final exhibit, exhibit 5, and enter into the record a reply letter that Mr. Costello sent to Chairman THOMPSON, the evening of October 13, 2021.

[Insert Bannon Exhibit No. 5]

Mr. TONOLLI. In sum and substance, the letter reiterates that Mr. Bannon is abiding by President Trump's invocation of executive privilege and direction to Mr. Bannon not to produce documents or testify.

In support of Mr. Bannon's position, the letter cites several judicial opinions on executive privilege, including a 2019 decision of the United States District Court in Washington in the case of *Committee on the Judiciary v. McGahn*.

In particular, the letter cites the following sentence from the court's opinion: "The President can certainly identify sensitive information that he deems subject to executive privilege, and his doing so gives rise to a legal duty on the part of the aide to invoke the privilege on the President's behalf when, in the course of his testimony, he is asked a question that would require disclosure of that information."

However, Mr. Bannon is not here today to assert executive privilege on a question-by-question basis. He chose instead not to appear at all, just as he chose not to produce any documents at all or even a log of responsive documents that he is withholding based on the claim of executive privilege.

With that, I will note for the record that it is 10:06 a.m., and Mr. Bannon still has not appeared or communicated to the Select Committee that he will appear today as required by the subpoena.

Accordingly, the record is now closed as of 10:06 a.m.

[Whereupon, at 10:06 a.m., the deposition was concluded.]