IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

vs.

STEPHEN K. BANNON,

Defendant.

CR Action
No. 1:21-670

Washington, DC
June 15, 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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P R O C E E D I N G S

DEPUTY CLERK: Please be seated and come to order.

Good morning, Your Honor. This is criminal case year 2021-670, *United States of America vs. Stephen K. Bannon*.

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

MS. VAUGHN: Good morning, Your Honor. Amanda Vaughn, Molly Gaston, and J.P. Cooney for the United States.

THE COURT: Good morning, Counsel.

MR. SCHOEN: Good morning, Your Honor.

I'm David Schoen, Matthew Corcoran, Bob Costello, Mr. Bannon, Riane White; that's for the defense.

THE COURT: Good morning, Counsel.

MR. SCHOEN: Thank you.

THE COURT: We are here on five motions, I believe. We are here on, obviously, Mr. Bannon's Motion to Dismiss, which is ECF No. 58 and then a series of other motions, ECF Nos. 52, 54, 55 and 56.

Here is how I would like to proceed. I would like to hear first from Mr. Bannon's counsel on all of the topics; that is to say, on the arguments Mr. Bannon has advanced to dismiss the indictment and to exclude evidence obtained from Mr. Costello, and then also to respond to what the government has argued in its motions. A number of the

questions are obviously interrelated, so I don't think that is a problem to do.

I will then hear from the government on all of the issues. I will allow Mr. Bannon's counsel to have a brief opportunity to respond, and then the government, as warranted, can have a very short surrebuttal.

Everyone should know that obviously this is not the first time I've taken up a motion in this case. I'm very familiar with the papers, so the parties need not repeat everything that's in them. I'd like to focus on the most salient arguments.

As you can expect, I have a series of questions for each side, but I also don't have a strict time limit. I don't want this to be an overly long hearing, because I do have a pretty good idea of the issues, but I don't want to unduly limit anybody's opportunity to make arguments they would like.

So, Mr. Schoen, is that going to be you first, at least?

MR. SCHOEN: I'm the emcee, Your Honor.

THE COURT: You're the emcee. Okay.

MR. SCHOEN: We're going to split it up if you don't mind, Your Honor, so I'm going to deal with the constitutional issues, entrapment by, you know, the -- sorry.

THE COURT: Yes, you may remove your mask for sure at the podium, please.

MR. SCHOEN: Yes, Your Honor.

I am going to deal with two issues, the what we'll call public authority entrapment by estoppel issues, and the constitutional challenge as applied issues, and then Mr. Corcoran is going to deal with everything else, their motions and the rest of ours, the rules-based arguments and all the rest of it.

THE COURT: Very well.

MR. SCHOEN: I think it's better if he goes first.

THE COURT: Happy to hear from Mr. Corcoran first.

MR. SCHOEN: Thank you, Your Honor.

MR. CORCORAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. SCHOEN: I think the key point with regard to our Motion to Dismiss and the rules-based arguments is that the rules matter, and the Supreme Court has said, um, that in a criminal context, the rules of the House of Representatives should be strictly construed.

That's really what we're asking for. We talk about the composition of the Committee. We talk about the lack of a ranking minority member, and then -- so I want to essentially address those two things first.

Our raising the composition of the Committee is

not asking the Court to substitute your judgment for who should sit on that Committee. Instead, it's to require -- in order for there to be a criminal prosecution that follows the issuance of a subpoena, require the House to abide by its own rules. And in terms of the composition of the Committee, the word "shall" was used. "The Committee shall have 13 members," and it doesn't. It has nine.

From time to time, other Committees don't have the allotted members where there's a death or somebody resigns and so on and so forth, but that's not what happened here. Thirteen members were required, and there are only nine members.

An analogy, I guess -- and you might say, Well, what's the prejudice to Mr. Bannon from not having the additional four members? And the key there is that he doesn't have to show prejudice. It's sort of like the Supreme Court cases in the same criminal context, where a quorum was not present or, you know, where a perjury conviction follows the lack of a quorum.

The Court doesn't ask, Well, what if there had been the additional members that made up a quorum? How are you prejudiced? Maybe those members wouldn't have been in your favor anyway. It's the actual violation of the rule.

THE COURT: Do you concede that the word "shall" can sometimes mean "may"?

MR. CORCORAN: No.

THE COURT: No? But didn't the Supreme Court say, in cases like *Gutierrez de Martinez*, this is a quote, "Though 'shall' generally means 'must', legal writers sometimes use 'shall' to mean 'should, 'will' or even 'may'." The Supreme Court said that.

MR. CORCORAN: I understand that, but in context, "shall appoint 13 members" is not the same kind of wiggle room where "shall" is used as described by the Supreme Court. It's -- you know, there's not a lot of room for leeway.

When the House voted on the resolution, there was an understanding that there were going to be -- that there was going to be some minority representation that would be substantial to protect the rights of the minority.

THE COURT: If the House, after House Resolution 503 and after the Committee was composed said, Expressly, we believe the Committee, as composed by nine members, is consistent with House Resolution 503 -- imagine that hypothetical -- wouldn't I have to defer to that House view of its own rules, assuming they said it expressly?

MR. CORCORAN: I think if the House -- for instance, if there was a vote on it and the House voted -- a majority of the House voted that nine members satisfied the authorizing resolution, yes.

THE COURT: But don't the contempt resolutions and referrals, as to Mr. Bannon, Mr. Navarro, Mr. Meadows, Mr. Scavino, at least implicitly conclude that the rules were complied with?

MR. CORCORAN: Not at all.

THE COURT: Why is that?

MR. CORCORAN: Because members, when each of those contemporary resolutions were debated, specifically said that the Select Committee was not properly authorized.

THE COURT: But those arguments were -- did not prevail, so that issue was discussed at the full House level. It was not not discussed. And the House, nevertheless, voted to make or voted to take those actions notwithstanding those arguments.

So why don't we view -- why shouldn't I view that as the full House having rejected, at that time, the argument that the Committee was invalidly constituted?

MR. CORCORAN: Because it wasn't squarely presented to the House for a vote.

I understand your question. I do. But unless the specific question is put to the House, which it may be in the next Congress, you know, something like that may be considered.

But to say that a contempt resolution means that the House of Representatives is on record as saying that the

Select Committee with nine members is duly authorized under the rules of the House, would not be proper.

THE COURT: Is this a jury question? Isn't an element of the offense here that the Subpoena had to have been validly issued?

And we know, from Justice Scalia's opinion in *Gaudin*, that pertinency, which used to be a judge question, is actually a question for the jury. And at least the background, very strong background, principle is that elements of the offense go to the jury.

Is the question of whether the Subpoena was validly issued here a jury question?

MR. CORCORAN: I don't think. Let me answer it this way: I don't think the Court is precluded from finding that the Committee, the Select Committee, lacked proper authority or that the Subpoena was not validly issued.

THE COURT: Wouldn't that be taking an issue away from the jury?

MR. CORCORAN: Not at all if it's raised in the defendant's favor.

Now, it's a different question if you decide not grant our motion on that basis, then we wouldn't be able to still present evidence on that to the jury. So it's a slightly different issue. So our position on the Committee goes beyond, obviously, the 9 members or the 13 members.

THE COURT: Understood. That's the easiest one to talk about.

MR. CORCORAN: Right.

THE COURT: But your argument is, at least in general, equally applicable with respect to ranking minority member, for example. I mean, there are slightly different versions of the same general argument.

MR. CORCORAN: I think so. It's a little bit stronger or more specific to a criminal defendant, the ranking minority member issue, because ranking minority member appears at many places in the rules. And in each case it's meant to protect the rights of the minority as well as the rights of the witness.

When there's questioning of a witness, for instance, the ranking minority member has the ability to participate in that questioning or to designate counsel to participate. So these are things that were negotiated over decades -- you know, decades, really, in order to protect the rights of the minority and the rights of witnesses. And so it's a really -- it's a very, very important thing.

I know that the government has said at different times that, in their view, it's -- ranking minority members is only senior members of the minority, but that's not true.

And this Court, again, is well positioned to not make rules for Congress but interpret the rules that they've

made and hold them to those rules.

THE COURT: What's the standard that I should be applying in this case in reviewing whether and to what extent Congress or the January 6th Committee was constituted consistent with the rules? Is it *de novo* or do I have to defer, in some respect, to either the Committee, the Speaker or the House as a whole?

MR. CORCORAN: Well, on questions of construction of the language of a statute, it's *de novo*.

THE COURT: I'm talking about construction of House Res 503.

MR. CORCORAN: Yeah, absolutely and I'd say it's *de novo*.

THE COURT: But wouldn't that run afoul of the rulemaking clause in the constitution?

MR. CORCORAN: No. We're not --

THE COURT: But isn't that my usurping the power of Congress to, or the House, to decide what its own rules mean?

MR. CORCORAN: Not at all.

We're not asking you to impose any rule on Congress. What we are asking you to do is, before Mr. Bannon is -- faces the removal of his liberty, based on actions by Congress, that you accord to him due process, which requires notice, for instance, notice that, if he's

going to be held in contempt by the Congress, that they are going to have to follow their rules, issue a valid subpoena, have consultation with the ranking minority member, et cetera, et cetera.

And so you don't owe any deference to the House's construction of their rules when you're deciding how they play out. It's been handed over to the criminal justice system. And you're in a position, *de novo*, to see what those rules mean.

THE COURT: So the -- so that means that the deference an Article III Judge, like me, would give to the House's interpretation of its own rules is different in the criminal than in the civil context?

MR. CORCORAN: Absolutely.

THE COURT: Why? What's your authority for that proposition?

MR. CORCORAN: Well, my authority is that -- I believe we cite in our brief *Yellin*, which says that the Committee must be "meticulous in obeying its own rules." That's *Yellin*, 374 U.S. at 124.

We also cite *Christoffel*, which it says, "the question is" -- delete the next part -- "what rules the House has established and whether they have followed them." And that's 338 U.S. at 86 to 89. Those are criminal cases and --

THE COURT: But did the Court say that, in deciding those questions, that no deference is due?

MR. CORCORAN: No, not at all.

Just as any time you're interpreting or construing language, they didn't get into deference, basically. But -- I mean, I think that a key case on deference in -- or what standard would apply would be the *Rostenkowski* case. In that case, a member of Congress was facing criminal charges, and the issue was, did he properly use his House clerk's allowance for official duties or for personal things?

And the Court of Appeals of D.C. Circuit basically looked at the House rules and recognized that, in some context, the nature of a Congressman's life might make it hard, it might make it somewhat ambiguous to read a rule and apply it in a criminal case.

However, when it's unambiguous, then the Court said, We're going to do what we've always done since *Marbury versus Madison* --

THE COURT: What was the rule at issue in *Rostenkowski*?

MR. CORCORAN: What was the rule? It had to do with official duties. Were the funds drawn on official duties?

THE COURT: Right. So in a way, that was the substantive question that was presented to the Court. Here,

we are presented with essentially a procedural question about whether the House complied with its own rules procedurally. Why isn't that at least arguably different?

In other words, if the House has some substantive rule, you shall not use money for this purpose, and then they say that someone did and there's -- maybe there's even a criminal sanction being sought for the person having done that, then you have to look hard at whether substantively the rule is ambiguous or not.

But here we're talking about a procedural question. The procedural question isn't imported, really, I don't think, into the -- not directly at least in the same way -- to the elements of the charge here.

Why isn't some deference due by me to the House saying, Our rules mean, in our view, X, and we complied with them here or procedural rules.

MR. CORCORAN: Well, I don't just see it just as a procedural issue. I see it as an element of the offense.

As you started our questioning, it's in the Indictment itself that it's got to be Stephen K. Bannon, having been summoned as a witness by the authority of the U.S. House of Representatives; and that's going to have to be an element of offense.

THE COURT: For purposes of Motion to Dismiss the Indictment, aren't I supposed to look at only the four

corners of the Indictment? Doesn't the Indictment, at least by its terms, state that the Subpoena was validly issued?

MR. CORCORAN: Well, that could never be -- in that case, the government would simply put a paragraph in every indictment saying, This indictment is valid. And you wouldn't be able to look any further.

THE COURT: No, I think they have to do more than that. I've held in another case that the government has an obligation to have some meat on the bone of the facts.

MR. CORCORAN: Yea.

THE COURT: But did the government have to allege here, for example, that there were 13 members of the Committee in your view?

MR. CORCORAN: I don't think so. But when we challenge it, you can certainly look at that. You can certainly look at the authority of the Committee and whether it was properly filed, and the same with the ranking minority member.

On the ranking minority member issue, I just want to emphasize that, you know, it's a term of art. But two of the words are pretty straightforward. Member means a member of the Committee. Minority means somebody in the minority. So what does ranking mean? Well, it's not seniority.

In the Army, if you -- rank is conferred. Rank is granted. Rank is earned. And so, in the same way under

both the democratic rules and the republican rules in the House, there is a process for granting the rank of the ranking minority member on the Committee. And that process is either, for the democratic, if they're a minority, it's a secret ballot. If it's in the republicans --

THE COURT: Is the implication of this argument that everything the January 6th Committee has done is invalid?

MR. CORCORAN: No. I'm speaking directly to one subpoena that was --

THE COURT: But every subpoena that this Committee issued would be challengeable and unlawful on this argument. Correct?

MR. CORCORAN: Yes.

THE COURT: And if someone wished not to appear because of this argument, they would have a legitimate argument not to do so. Correct?

MR. CORCORAN: Absolutely.

THE COURT: There is no distinction between the Subpoena here and any other subpoena the Committee has issued, as far as you know? The implication of the holding would be that every single subpoena, request for information, deposition that the Select Committee has taken was unlawful, unauthorized. Correct?

MR. CORCORAN: I'd have to see all of the

subpoenas, but I think --

THE COURT: But if the Committee has never had 13 members --

MR. CORCORAN: Correct.

THE COURT: -- in your view, it is -- the Committee has never been validly constituted.

MR. CORCORAN: That's correct.

THE COURT: Then unless the House had taken the express step that we discussed earlier, then every single subpoena, unless there's something unique about a particular subpoena, would be unlawful in your view?

MR. CORCORAN: In my view, any person who received a subpoena by the Select Committee, as it's currently constituted, could move to quash that subpoena as invalid.

THE COURT: The government argues that Mr. Bannon waived at least some of these objections by not presenting them to the Committee. So can you walk me through your argument against that position?

MR. CORCORAN: Well, yeah. Well, again, a defendant can't waive an element of the offense. It's always going to be -- the burden is always going to be on the government to prove beyond a reasonable doubt every element of the offense. And as I've said, authority of the House -- that this subpoena was issued on the authority of the U.S. House of Representatives is an element of the

offense. You can't waive that.

They've raised -- I think the only area where they've raised an objection and said, You should have raised it at the time, was (3)(b), Section (3)(b), and the receipt of the rules on deposition authority. And there, again, the language of that rule is not open to interpretation. It says, A witness doesn't have to testify unless they receive those materials. And it's not in dispute that he didn't receive those materials here.

THE COURT: You're talking about the materials before testifying? I think the House, through its amicus brief and the government, say, Well, we could have complied with that rule by handing the materials to Mr. Bannon before his testimony if he had showed up; and that would be consistent with the rule.

MR. CORCORAN: Absolutely.

There are other rules of the House, for instance, that deal with hearings. And those rules -- and I think it's Rule 10 of the Rules of the House -- in that case it's a different rule. It says, A witness must be provided with the Rules of the Committee, comma, upon request.

In other words, Congress knows how to make a rule that has an out.

THE COURT: No, I get that. I think I'm asking you a different question, which is that your argument was

that Mr. Bannon was required to have been provided with certain information before he testified at the deposition or the requested deposition. And the government's response is, We didn't violate that rule. If he had shown up, we would have provided it to him; that was the plan or at least we can prove that was the plan at trial.

So there's not even going to be a legitimate argument that that rule was violated.

MR. CORCORAN: I don't think that's correct. I mean, I think we have looked at --

THE COURT: Why?

MR. CORCORAN: Because, I don't think that's what the rule requires. I don't think that handing a potential deponent complicated Rules of Procedure on his or her way in to testify in front of a Congressional Committee is what's contemplated by that rule.

I want to say one thing, because you did reference the amicus brief. And when I read the two briefs, one by the majority and one by the minority, I was reminded of Lincoln's famous adage, "A house divided against itself cannot stand."

And the reason I thought of that is because, when the minority filed their brief, they said that adopting the position, if this Court --

THE COURT: Well, let me just be clear --

MR. CORCORAN: Yeah?

THE COURT: In your view, is that amicus brief from the minority or is it just from two members of the minority?

MR. CORCORAN: It's from the minority whip and the minority leader, so two members.

THE COURT: Well, I don't know whether the minority party can act as an entity.

MR. CORCORAN: Absolutely.

THE COURT: I don't think it matters but for nomenclature purposes it is styled as a brief from two people.

MR. CORCORAN: Absolutely. And they're not just anyone --

THE COURT: Yes. Understood.

MR. CORCORAN: -- in the sense that they're members of this bipartisan legal advisory group, which has five members. And so they are the two minority members on that group, which gets to decide whether a brief can be filed in litigation on behalf of the House.

When that group, BLAG, met to decide whether to file an amicus brief in this case, two of the members, the minority members, said -- and it's in a footnote in their motion to relieve to file -- that the filing of that brief would harm the institution of Congress.

They then decided, We're going to file our own brief. And in that brief, they stated that adopting the position of the majority brief could damage the institution of Congress.

And I say that -- and that's what led me to this, "House divided against itself cannot stand" -- for the Court to rely on an amicus brief under circumstances where two members of the bipartisan legal advisory group have said it's going to harm -- that adopting the position in the amicus brief would harm the institution of Congress is not something that is advisable.

THE COURT: I mean, the House is litigating as a party in a bunch of cases in this district right now. The House or the Committee. I assume it's not doing so with 100 percent bipartisan support as a party even.

MR. CORCORAN: This is a criminal case. It's totally different. This is not a curling match on ice where the members of the majority get to sweep to try to make the rock go into the circle.

They let go of -- they should have let go of this when the vote was done on contempt and let this Court do its job. And that's why we're chal -- that's why we found it highly unusual that these amicus briefs were filed, and we find it incredibly helpful that the brief filed by the minority whip and the minority leader states, "The House

general counsel's brief misstates the law and misrepresents the complete position of the House." That's Doc. 75-2, *et seq.* And I'm just saying that, under those circumstances, it would be, in our view, a grave error to rely on what's in that brief.

THE COURT: I don't think you should worry about me relying heavily on what's in either of those briefs. They are amicus briefs. They are arguments presented by nonparties.

MR. CORCORAN: Yeah, sometimes we have to say no to friends.

Okay, let me turn to the other part of the -- I think what we'll do, I'm going to direct my comments right now to the Motion to Dismiss as it relates to the Costello records.

THE COURT: Yes.

MR. CORCORAN: And then Mr. Schoen can speak to the OLC issues and ambiguity.

THE COURT: Yes.

MR. CORCORAN: And then I'll come back and talk about the Motions to Exclude at the end. So Motion to Dismiss first. Okay.

THE COURT: So what of the issues in the Motions in Limine do you intend to address?

MR. CORCORAN: Any that the Court has questions

about. I mean, I think our overall -- if the Court doesn't --

THE COURT: So it seems to me that the Motions in Limine cover three topics generally.

MR. CORCORAN: Yes.

THE COURT: One is a hot topic that Mr. Schoen is very likely going to discuss.

MR. CORCORAN: Right.

THE COURT: The next one is about Mr. Bannon's prior experience with subpoenas.

MR. CORCORAN: Right.

THE COURT: Are you going to address that?

MR. CORCORAN: I can address that.

THE COURT: I think I'd like you to address that after you address the Costello question.

MR. CORCORAN: Okay.

THE COURT: And then we've already been discussing waiver. I don't know that there's much to add on that question.

So here's what I'd like to do, if it's okay with you, is to have you address the Costello question. You address the Motion in Limine relating to Mr. Bannon's experience with subpoenas, and then we can go to Mr. Schoen to do all of the other legal issues and as it relates to the indictment question and the Motions in Limine. Okay?

MR. CORCORAN: Okay. Yes, Your Honor.

With regard to the government's using the outrageous investigative technique of going after Mr. Costello's phone and email records, we would ask this Court to dismiss the Indictment on that basis. And the reason is that, if they're allowed to do it here, they'll do it in every case.

THE COURT: What's the prejudice?

MR. CORCORAN: Well, the prejudice --

THE COURT: The actual prejudice in this case?

MR. CORCORAN: The actual prejudice is that a wedge was driven between Mr. Bannon and his lawyer.

I grew up on a farm, Your Honor, in Illinois. There was an electric fence on the farm. As a little boy, I was asked to test it and touch it to make sure that it was on, and I would do that occasionally.

Once you've done that, you remember how it feels. And the animals, for instance, the horses and the cows, once they touch the electric fence, they know how it feels. It's not that they keep running into it and that stops them each time. Once they've touched it once, they don't have to do it again, otherwise we would have been repairing the fences all of the time.

The reason I mention that is, once Mr. Bannon learned that the government was going to the extraordinary

and outrageous step of going after Mr. Costello's phone records for a month before the Subpoena was even issued by the Select Committee. Once Mr. Bannon learned that the government had gone to the extraordinary steps of trying to get his email information, every conversation and communication that followed was like somebody having touched an electric fence. There is a chilling effect that affected his representation.

THE COURT: What's the closest case you have where conduct of this type resulted in dismissal of an indictment as opposed to exclusion of the evidence at trial, post-trial sanctions, some other step?

MR. CORCORAN: I think *Marshank*, which we cite in the brief.

THE COURT: And what happened there, exactly? How is that analogous to this case?

MR. CORCORAN: Well, it was analogous because the government in that case essentially turned an attorney into a witness against the defendant, which is precisely what they tried to do here. And they've said that in the prior hearings, and they've said it in their briefs. They viewed Mr. Costello not as an attorney but as an intermediary with the Committee, as a witness to the crime.

And the reason why this is so outrageous for those of us who spent decades doing white collar work, both

prosecution and defense, is that it's not the ordinary course of business.

In a misdemeanor case, if the government is allowed to, at the very start of the case, without any hint or allegation or suspicion that the attorney was involved in any wrongdoing at all, or was given -- you know, for them to try to turn him into a witness at that point is outrageous and shouldn't be allowed.

And if it is allowed, as we've said in our brief, years from now, whenever something like that happens, the *Bannon* case is going to stand for "No harm. No foul." Because that's what the government is saying, that unless there is blood from what we did, we shouldn't be punished. And the answer is, They should be punished. It's outrageous.

THE COURT: I mean, the government -- I'll hear from them again, I suppose, on this question. The government's view is they did nothing wrong and, in any event, even if they did -- though -- I think their argument is -- the relevant argument is something short of dismissal of the Indictment.

The government is taking the position, certainly as before, and I think has again, that they -- to prove an element of their claims, they needed to show that Mr. Bannon knew about the existence of the Subpoena. This goes to

that. Obviously, you've heard these arguments before.

And that, to some extent, I'm paraphrasing their argument for them, they did not seek -- they didn't get to the point where they sought content of communications. And so this isn't as bad at least as *Marshank*.

MR. CORCORAN: It's not an argument that I can understand how they would make with a straight face because, from the very outset, from the very first communication between the Select Committee and Robert Costello, he acknowledged that he accepted service of the Subpoena on behalf of Mr. Bannon.

In other words, for them to go and seek records that predate that by a month is simply unbelievable. I understand that they can come into court today and say, Well, Your Honor, it's routine and we're trying to prove an element of the offense. But that was not an issue in the case; that's a post-hoc rationalization, I have to say.

THE COURT: Thank you.

Let's discuss briefly, before we go to Mr. Schoen on the Motion in Limine, about Mr. Bannon's prior experience with subpoenas.

MR. CORCORAN: Yeah, the government's motion is trying to suggest that that is -- that we're trying to show that his actions in this case were in conformity with prior actions, and that's not it at all.

What we're trying to do is show what actually happened here. I mean, that's part of our mission, and we should be allowed to do it in terms of presenting a defense. And what actually happened here, because a key element of the offense is going to be intent, what was in Mr. Bannon's mind when he received the Subpoena?

What was in his mind when he communicated back and forth with the Committee through Mr. Costello? The government's going to have to prove beyond a reasonable doubt that he willfully made default. In other words, that he got the Subpoena and, whatever intent element is required, that he willfully made default. That will be something that the jury will have to decide.

So that's saying, What was in his mind? What was in Mr. Bannon's mind? And his prior experience is that he had previously been subpoenaed to testify before committees, the House Intelligence Committee, the Senate Intelligence Committee, and the Mueller investigation.

After receiving the subpoenas, he went through a process with counsel to deal with privilege issues. Accommodations were reached and he testified.

Those prior experiences informed his thinking when he received this subpoena. And the jury has got to be able to hear that. It's not a matter of us saying, Well, he testified before entities three times before. So you should

think it's more likely on the fourth time he was going to testify at all. It's not conformity.

THE COURT: In your view, it goes to his mens rea, whatever that is here.

MR. CORCORAN: Absolutely. Which is key. It's key. It is going to be a key issue in trial.

THE COURT: The government argues that the mens rea here, the standard is pretty low, deliberate and intentional. Although I'm not sure that that's what the jury will be instructed. It seems to be that maybe more detail than that is required.

But assuming the government is right about that, and obviously the government is relying on cases that have at least said that, how does deliberate and intentional fit with Mr. Bannon's experience before?

MR. CORCORAN: Well, whatever -- that's why I sort of used the term, Whatever the intent that is proved at trial. What's in his mind is critical. And we're talking about receiving a subpoena, having accommodations reached and testifying. So even if it's the level of knowing, deliberate, that's going to be a key issue, and we should be able to present it.

I mean, the trial is not -- to exclude it, I think you'd have to find that it was somehow confusing to a jury to hear that when it -- the instructions could handle that.

I mean, we're not afraid of an instruction that says, Just because he did it three times before, it doesn't mean he's going to do it the fourth time. The key is what was in his mind, and we have to be able to show that to the jury.

Again, in simple terms, a big part of our position and our evidence to the jury is going to be, What really happened here?

THE COURT: Uh-huh. Thank you, Counsel.

SPEAKER6: Thank you.

THE COURT: Mr. Schoen?

MR. SCHOEN: May I proceed, Your Honor?

THE COURT: Please.

MR. SCHOEN: Your Honor, first of all, I'm a little disheartened that we're talking about how the jury might be instructed, because I'm here to tell Your Honor why this case ought to be dismissed. It's not me telling Your Honor why it ought to be dismissed. It's the Department of Justice telling Your Honor why the case must be dismissed.

First of all, let me back up a step. Our briefs, in my view, on the entrapment by -- what we'll call public authority and entrapment by estoppel defenses and on the constitutional as applied on due process grounds are like two ships passing in the night. Not even close. I don't think we really joined issue on them.

On the due process issue, we certainly don't,

because I don't really even think what I am about to talk to you about is even addressed in their brief. On the entrapment by estoppel, as we wrote in the brief, seems to be an evolving understanding of the law by the government.

In the early papers, including an unrelated paper, the Court was told that, for this defense to apply, there has to be direct advice given by an official to the defendant. Well, that's just not right. That ignores the *PICCO* case, P-I-C-C-O, and the *Levin* case and, in my view, *Barker* in this circuit.

But -- and I have to say, Judge, you know, again, it's, in a sense, neither here nor there, but I read over and over again in their briefs that we simply don't understand entrapment by estoppel.

With all due respect, the landmark case they cite, this *Abcassis* case, is my case. I thought up the defense. I made the defense. I won the case. Most issues in this world I don't know much about, but I know something about entrapment by estoppel.

THE COURT: So let me ask you this: I think I understand the parties' respective positions, but has the Department, the Department of Justice, ever said officially it would not prosecute someone who was a nongovernment employee at the time of the potentially privileged communication for refusing altogether to appear for a

deposition or for refusing to produce altogether any documents?

MR. SCHOEN: Well, Judge, two things about that --

THE COURT: Or what's the single best OLC opinion you have or government opinion that says, We will not prosecute someone --

MR. SCHOEN: We have to put them together.

Can I just back up a step though, Judge? I want to tell you why we don't even have to get to the public authority offense and entrapment by estoppel. I want to tell you why this case has to be dismissed based on due process, fair notice grounds.

And there's zero question in my mind that this argument applies. It doesn't -- it's not affected by whether the defendant is a former member, an outside member and so on. This private citizen distinction is not availing, even in the entrapment by estoppel realm.

But for the due process argument, it's not even relevant. The due process argument is triggered when executive privilege is invoked. Period. That's what OLC has made abundantly clear since at least 1956.

If I could just take the Court through it for -- it will take me just a few minutes.

THE COURT: Okay. I mean --

MR. SCHOEN: All right.

THE COURT: I hope it's going to be tight and, I guess -- sure. Go ahead.

MR. SCHOEN: Okay, Judge. Here's where we go. And this is the most straightforward argument for why this case has to be dismissed.

Background. Long-standing, fundamental tenet in criminal law -- and I know the Court knows this, but I think it's still relevant to give the background -- is the requirement of fair notice to the public of what conduct is going to violate the criminal law and risk subjecting that person to criminal liability and punishment.

A person has to be given fair notice of the conduct that's prohibited or the law doesn't comport with the Fifth Amendment. The Fifth Amendment is due process guarantee. That's *United States versus Williams*; that's *Kolender versus Lawson* and, more recently. That's *United States versus Davis*, and here we have even a little different twist on that issue, but I'll get into that.

The question is, as the Court knows, if a person of ordinary intelligence is left to guess at whether he'll be subjected to prosecution or not, then the law violates due process. It's void for vagueness. It also violates the separation of powers doctrine. That's *Connally versus General Construction*; that's sort of the landmark case.

Now, the doctrine is not something new. It goes

way back. Roman law recognized it. The maxim nullum crimen sine lege -- I'll spell it afterwards -- with no crime there's no law. There's no crime without law.

Madison spoke about it in Federalist 62. We would have a calamitous situation if people didn't understand what the law prohibited. Montesquieu addressed it, so on. We don't need any more history lesson probably about it.

But by way of introduction, here, what the Supreme Court has said, in *Raley versus Ohio*, is that, when we consider whether fair notice is provided as to whether a person is subjected to a criminal -- the coverage of the criminal statute, statements by the government through its agents and officials concerning criminal sanctions, which are contradictory or so vague and undefined as to afford no fair warning as to what might transgress a given statute, renders the statute unconstitutionally vague, much in the same way contradictory statements within a criminal statute render the statute unconstitutional. Now that's *Raley*, at Page 438.

In *Raley*, they recognized that a step even further in rendering a criminal prosecution unlawful and a violation of due process is when government statements, vis-a-vis the criminal statute, go beyond simply being vague or contradictory, and they are actively misleading, indicating the conduct, which is later prosecuted, was legal. That's

Raley again at 438.

Such conduct is even -- is more akin to the conduct by the government in cases like *Sorrells*, standard entrapment cases, *Johnson*. So that brings us to Mr. Bannon's case.

This very principle and the suggestion that the longstanding OLC opinions that have been reiterated over and over again that, when executive privilege is invoked, the criminal contempt of Congress statute charged here, 192, cannot lawfully be charged. It renders such -- when the executive privilege is invoked, it renders such prosecution unlawful. The criminal statute doesn't apply and can't be applied for two reasons.

THE COURT: So let me ask you this question: Assume that's all true.

MR. SCHOEN: Yes.

THE COURT: Isn't it a disputed question whether former President Trump invoked executive privilege here?

MR. SCHOEN: Not a seriously disputed question, Your Honor.

THE COURT: Well, the letters are, at best, ambiguous on this question, are they not?

MR. SCHOEN: No, they're not, Your Honor. Executive privilege is invoked. There is a later letter that says, I'm not telling you -- Justin Clark writes, "I'm

not telling you you have immunity. You may not have immunity." Separate question. Separate question. Related question in this context that I can get into, but it's a separate question. He doesn't need to have immunity.

Executive privilege is invoked. Executive privilege is presumptively valid as a matter of law. They wanted to challenge the invocation of executive privilege. As they have said, the Department of Justice has said over and over again, Go to a civil enforcement proceeding. Challenge it there. Don't use the criminal statute.

Judge, I just want to --

THE COURT: Is it clear that President Trump -- former President Trump invoked executive privilege?

MR. SCHOEN: Yes, Your Honor.

THE COURT: That's clear --

MR. SCHOEN: That's clear, Your Honor.

THE COURT: -- from the letters?

MR. SCHOEN: Yes, Your Honor.

THE COURT: Assuming it's a jury question, how would that be established at trial? I know you don't want to go to trial, but how would it be established that President Trump invoked the privilege rather than the lawyer who communicated that?

MR. SCHOEN: Well, Justin Clark could testify, number one. Number two --

THE COURT: What does the letter say about President Trump's invocation of privilege?

MR. SCHOEN: I can pull the letter, if Your Honor wants.

THE COURT: I'd like to know what it says.

MR. SCHOEN: May I?

THE COURT: Yes.

(Brief pause)

MR. SCHOEN: Your Honor, Mr. Costello reminds me there was also a phone call with Justin Clark in which Justin Clark made clear that the President invoked --

THE COURT: Well, I can't rely on an out-of-court phone call that isn't in the record to conclude that executive privilege was invoked by the former president, not sitting here, can I?

MR. SCHOEN: Well, for these purposes, Your Honor, there's certainly no requirement that we've seen that requires President Trump to appear before the Committee or to personally address the Committee.

THE COURT: I'm not saying that. I want to know what the best statement in the record, that is at least before me in this context, is that the President had invoked executive privilege. I'm not saying it didn't happen. I just want to know what the best statement is.

MR. SCHOEN: I'm reading now from Document 35-6.

This is Justin Clark's letter. He writes in reference to the Subpoena. The Subpoena asks Bannon to produce documents, what President Trump thinks about that.

Then President Trump vigorously objects to the overbreadth and scope of these requests and believe they are a threat to the institution of the presidency and the independence of the --

THE COURT: I see it. Thank you.

MR. SCHOEN: Oh.

THE COURT: Yes. Thank you. Yes.

MR. SCHOEN: Thank you, Your Honor.

THE COURT: Right. It's the next paragraph, To the fullest extent permitted by law, President Trump instructs Mr. Bannon to...

Yes, thank you for that.

MR. SCHOEN: Thank you, Your Honor.

And by the way, I have to say that it's the Department of Justice, as we'll see in a second from their Office of Legal Counsel opinions, that saw -- sees a problem with beyond just the general principle. You cannot use this criminal statute. It sees a problem when given its long-standing OLC opinions. That's expressly addressed in an OLC opinion.

But, Judge, let me skip ahead then. Here's the thesis of this presentation. This case has to be dismissed

for the prosecution and violation of due process and separation of powers as applied to Mr. Bannon for the reasons I'm going to outline. They're outlined in the Motion to Dismiss and in the Reply.

The OLC opinions, consistently for decades, reflect the prosecuting authority's position, the Department of Justice official binding position, as a matter of law that, that when executive privilege has been invoked in connection with a congressional subpoena, the privilege is presumptively valid. And the criminal statute cannot be applied for several reasons.

I'm going to give the Court a few examples of why the case has to be dismissed based on this argument, the fair notice argument. Starting in 1956, the Department of Justice addressed this. Ted Olson reiterated it in 1984. And his opinion, like the others, are authoritative and have been consistently reiterated since.

Think, for example, in the context of fair notice, Judge, as to take the name Bannon out of it. Joe Q. Public, David Schoen, whoever, is faced with a subpoena from Congress, and the former President -- we know, under *Nixon versus GSA*, a former President can invoke privilege.

There's a question now from *Trump versus Thompson* whether the current President can supersede it. Justice Kavanaugh addressed it in the cert denial and so on. Let's

put that aside for a second. For these purposes, the former President can invoke executive privilege and, in any event, Mr. Bannon understood him to invoke executive privilege.

So executive privilege is invoked. Mr. Bannon's hands are tied. And the OLC opinions talk about a person situated like Mr. Bannon as a pawn, and they're offended by the idea that that pawn could then face criminal prosecution for assisting the President or for adhering at least to the President or former President's invocation of privilege.

And so that person -- put aside, now, I'm not talking about reliance or any of those things. I'm talking about fair notice. This person now needs to know whether this person is subject to prosecution, criminal prosecution, if he adheres to executive privilege and doesn't comply with the Subpoena.

So he looks then to the OLC opinion. These are published opinions. And the prosecuting authority in this case has said, No, once executive privilege is invoked, it cannot be applied.

So let me give the Court a couple examples, just chapter and verse. The Court has these documents in the record and there are many more --

THE COURT: No, this is helpful. I would like to talk about them.

MR. SCHOEN: Yes, Your Honor. And there are many

more in the record and outside the record, a couple of which I'll mention in a second.

So I want to go -- 58-14. This is the OLC opinion from Steven Engle, May 20th, 2019. I'm reading now: "The Department of Justice has long recognized, 'that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an executive branch official who asserts the President's claim of executive privilege.'" And he cites a string of OLC opinions.

THE COURT: Okay. But that's not Mr. Bannon. You acknowledge Mr. Bannon is not an executive branch official.

MR. SCHOEN: First of all, he is a former executive branch official.

THE COURT: But that --

MR. SCHOEN: I'm going to get to that, Judge. The OLC opinions address current, former. They address the idea that --

THE COURT: I recognize that they address them, but we need to be really careful about what they say in the context that we're talking about.

MR. SCHOEN: Yes, Your Honor.

THE COURT: It says you cannot prosecute someone who is a current government employee where privilege is asserted or there's a claim of immunity.

MR. SCHOEN: Right. That's what it says here,

Your Honor, "an executive branch official".

THE COURT: Okay.

MR. SCHOEN: The criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege. As Assistant Attorney General Olson explained, The constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the constitution.

To do so would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process, thereby burdening and immeasurably impairing the President's ability to fulfill his constitutional duties.

And, of course, Walter Dellinger -- the other side of the aisle you might say -- says the same thing. He says, in 1995, "The application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress."

Now, continuing on with Mr. Engel, same OLC opinion, "This office has further confirmed that the same 'principles...similarly shield a current or former senior advisor to the President from prosecution for lawfully invoking his or her immunity from compelled congressional

testimony.'"

Now that's the question of immunity we talked about. A little bit different from executive privilege. They use the terms interchangeably. But as the Court will see, and the Court may certainly be aware, the Department of Justice took the position, even after *Miers*, M-I-E-R-S, an OLC opinion, that a person so-situated as has immunity. Immunity. But we're focused here mainly on executive privilege. That's the triggering event. And again in --

THE COURT: And that opinion, the 2008 opinion, is also talking about someone who was communicating with the President when a government employee. Correct?

MR. SCHOEN: The communication occurred when the person was a government employee.

THE COURT: Yeah.

MR. SCHOEN: Let me just go to the logical conclusion of this. It clearly can't be limited to someone who's a current official or a former official, as the OLC says, by the way, in one of the opinions expressly, the one on the information about U.S. attorneys. But I'll get to it.

They can't just be talking about -- take, for example, President Biden thinks for some reason the economy is not doing so great. So he calls in the CEO of a company that's doing really great, and he wants to talk about, where

am I going wrong, Joe? Susie? What do I need to do? Give me some secrets. He wants to keep that confidential.

Congress says, what did Joe or Susie tell you, Mr. President? He says, Joe or she says, President invoked executive privilege. It clearly can't just be limited to current and former officials. That's why Congress has said -- that's why the OLC has said --

THE COURT: Well, has OLC ever said that a person in that circumstance would not be prosecuted for failing to show up altogether?

MR. SCHOEN: Well, they say in other opinions that, once executive privilege is invoked, that such a person has no obligation to appear.

THE COURT: Well, they are talking about executive privilege asserted in a context where the person talking to the President is a current government employee when the communication occurred. It seems to me there is no OLC opinion -- I think you would concede this. There is no OLC opinion saying expressly, The government will not prosecute a nongovernment, someone for failing to appear before Congress on executive privilege grounds if the relevant communication occurred when the person was a nongovernment employee.

MR. SCHOEN: I don't agree with that at all, Your Honor.

THE COURT: What was the opinion that says that? I know you have threads.

MR. SCHOEN: Congressional oversight opinion and the U.S. Attorney's opinion deal with a situation in which the person is not a government employee at the time the conversation occurred.

THE COURT: And does it say, We will not prosecute or does it -- some of these, of course, say that executive privilege can exist as between the President and a nongovernment employee. I don't think anybody disputes that. The question is, has the government said, The contempt doesn't reach that question in that context?

MR. SCHOEN: Absolutely. Judge --

THE COURT: Can you point me to that --

MR. SCHOEN: One second.

THE COURT: -- that document?

MR. SCHOEN: I just want to be clear.

What the OLC opinions all say is that once -- executive privilege is the triggering concept. We assume --

THE COURT: Okay.

MR. SCHOEN: Your Honor, respectfully.

THE COURT: I understand your argument. You're not -- you're fighting my question.

MR. SCHOEN: I'm not fighting your question, Your Honor. I'm intending to --

THE COURT: I'm asking you whether any opinion addresses the context of executive privilege in the context of a nongovernment employee and whether a person in that context will be prosecuted or not?

MR. SCHOEN: I'll have to pull the U.S. Attorney opinion that I'm referring to and the congressional oversight opinion. One second, Your Honor.

I got a lot more to read that I'd like to read to you, if the Court -- because it's going to tie all of these issues together, I think. Experts from these opinions.

THE COURT: Sure.

MR. SCHOEN: But let me answer this --

THE COURT: Well, I mean, I get --

MR. SCHOEN: If we accept that the privilege is presumptively valid, we don't refer them for criminal prosecution. If they want to challenge that, if they want to say --

THE COURT: But to get an indictment dismissed, you agree you have an incredibly high bar that really has to show that any reasonable person in Mr. Bannon's shoes would have -- would have not been on fair notice that he might be prosecuted or that the government is estopped from taking a contrary position for something it said before.

So we have to be really clear about what the government has or hasn't said. It seems to be pretty

foundational to all of these arguments.

MR. SCHOEN: Your Honor, any reasonable person would read these OLC opinions and say a person situated like Mr. Bannon, a former top official advisor to the President, who is then called back in by the President afterwards and has a discussion with him, which the President then deems to be privileged, that person would have every reason to believe, from the OLC opinions, that the criminal contempt statute cannot apply because it would infringe on separation of powers issues.

It's asking Congress to determine, then, whether the President can invoke his privilege in that circumstance. And the Court --

THE COURT: How should I be thinking about the Subpoena topics that don't, on their face, seem to call for anything that would approach privilege?

MR. SCHOEN: Anything that would approach?

THE COURT: Privilege, executive privilege communications. I get the privilege would cover certain topics that Mr. Bannon may have been communicating with the President about, but the Subpoena asks for a broader set of information.

MR. SCHOEN: As Your Honor is aware from the other OLC opinion that we cite, that's relevant to this issue as opposed to the other on appearance, and that is the OLC says

in two opinions, but one is the exclusion of agency counsel opinion, that if the Subpoena is issued and doesn't -- and the rules or the Committee expressly doesn't permit the agency representative to be present, the Subpoena is null and void and unconstitutional. And there is no obligation to appear.

THE COURT: But isn't that really to police what is or isn't privileged? And it seems to me that this is a subpoena where you've got some categories that are potentially privileged and some categories that aren't at all. And how should I think about these arguments?

I get your argument that agency counsel or government counsel needs or someone needs to be there to police privilege lines. But what if there's entire categories that are inarguably never going to be privileged?

MR. SCHOEN: Two answers. They chose to issue one subpoena. The second answer is, the OLC, the Department of Justice chose to use the language that the Subpoena is invalid and unconstitutional and can be ignored completely. That's the OLC Justice Department's language, not mine.

Now --

THE COURT: Yes, I've distracted you. My apologies.

MR. SCHOEN: It's not a distraction if it's important to the Court. I'm referring, of course, Your

Honor to the Paul Clement -- this is -- the Paul Clement letter is the one that refers most directly to a person outside.

Oh, I did want to say this: This notion, by the way, that outside people, private citizens, are included in the circle of coverage here, that is, the Court knows what I mean. The circle of coverage here.

THE COURT: Yes.

MR. SCHOEN: Is not a new one, but it's not just the OLC opinions, by the way. There is a CRS report that goes to some length -- there's a series of CRS reports called Presidential Advisors' Testimony before Congressional Committees and Overview. They go back at least to 2002.

But in 2014, they ran an update. They ran a compilation of opinions from between the years of 2002 and 2014. I don't mean to say opinions. I mean to say facts and relevant circumstances.

And in that, they specifically refer to this concept of the importance of a President organizing outside advisors and the importance of confidentiality and privilege in that context.

Now, according to the report, the practice started with President Jackson and then continued throughout. So this idea of a President not being limited to relying on his cabinet or formerly employed employees for privileged

conversation is discussed in that CRS report.

THE COURT: I don't think there's any serious -- I'm certainly not in any doubt that executive privilege could cover people who were not government employees at the time of the communication.

MR. SCHOEN: And if that's the case, Your Honor, then Mr. Bannon, whether you consider him a former employee or the Court takes him out of that realm because the conversation didn't occur then, or he is a private citizen or used to be a senior advisor and is called in, then he has every reason to believe he should not be, cannot be, prosecuted under the statute because executive privilege -- because of all of the rationale behind the other decisions. If I were to go on and read the experts, the rationale is --

THE COURT: I'm still going back to my question, which is --

MR. SCHOEN: Is there an opinion --

THE COURT: Yeah.

MR. SCHOEN: -- that expressly says the outside guy, a private citizen --

THE COURT: If President Biden calls the CEO of Exxon and has a privileged communication or communication and then Congress subpoenas the CEO of Exxon, and President Biden says, Your testimony is covered by executive privilege, and the CEO of Exxon says to the House, I'm not

showing up, executive privilege has been asserted, and then is prosecuted not for showing up and taking privileged calls as they go, but just for not coming, he would rely on what OLC opinion? There is no OLC opinion --

MR. SCHOEN: First of all, it doesn't have to rely on -- that's a separate question, in my view.

THE COURT: I mean to rely on for his argument.

MR. SCHOEN: The reading of all of the OLC opinions, since 1956, leads absolutely, logically, to that conclusion. There would be no distinction drawn based on the fact that -- as we know, we don't have to have an opinion that has Mr. Bannon's name on it of course.

THE COURT: I agree.

MR. SCHOEN: That's right. And we use all of these opinions that have been reiterated. That's why they all refer back to Ted Olson. They all say, you know, former officials and all of that, but give the reasons then, the separation of powers issues.

If you dare to challenge the invocation of the President's privilege, do it in a civil proceeding, not in a criminal case in which you subject the person who was told executive privilege has been invoked, you subject a person, like Mr. Bannon, that's subordinate, to the risks of a criminal trial.

That's what these opinions say. They say it

expressly. And that certainly applies no less to any person on the outside. And they talk about it in private citizen language. They talk about encouraging people to meet with the President.

That U.S. Attorney's OLC opinion talks about the potential chilling effect if you weren't to consider consultations with outside counsel -- outside person privilege. And I know Your Honor said I accept the principle, at least for purposes of this argument, that they could be privileged.

THE COURT: Yes.

MR. SCHOEN: If the Court accepts the principle they could be privileged, then the OLC opinions absolutely apply because they turn on privilege. They turn on that separation of powers issue that's relevant when privilege is invoked and privilege is deemed to be valid. And all they say is, Don't use the criminal process. The criminal statute doesn't apply.

We have two other things: Accommodation, constitutionally mandated according to the OLC opinions and implied at least in the cases; and the other is the civil enforcement proceeding. And they explain in the OLC opinions why they, the Department of Justice, the folks prosecuting this case, say these things. And they say why there would be a problem in prosecuting someone criminally

under this statute based on *Raley*.

And whether, if a person is not complying because executive privilege has been invoked, then can that person have the mens rea to violate a criminal statute, even if that mens rea doesn't include willfulness? That is an OLC opinion. In an OLC opinion.

THE COURT: Would that be a jury question then?

MR. SCHOEN: Pardon, Your Honor?

THE COURT: Would that be a jury question?

MR. SCHOEN: Would it be a jury question --

THE COURT: Yes.

So imagine hypothetically -- I know you disagree with this, but imagine I concluded that dismissal of the Indictment wasn't warranted, but the government still has to prove that Mr. Bannon acted with the relevant mens rea.

Would, in your view, these issues come in to establish that one couldn't have the relevant mens rea if executive privilege had been invoked?

MR. SCHOEN: Could be. Could be.

But, again, we have to look at this specific context. This is the prosecuting authority saying it. We don't subject a person to jeopardy under those circumstances.

Judge, can I just -- can I just run through the excerpts I want to read, see if something hits the Court?

THE COURT: Yes. Please.

MR. SCHOEN: All right. Let's take a look now at Chuck Cooper's -- Chuck Cooper's opinion, referred to generally, you know, as the Cooper Memo.

THE COURT: Yes.

MR. SCHOEN: And, again, these all arise in specific circumstances. The government would construe these OLC opinions ultra narrowly. Well, again, there's nobody -- they don't say this, but effectively nobody with Bannon's name on it. That's just not how it works. The *McGahn* case refers to OLC opinions reflecting the Justice Department decision. They have nothing to do with the *McGahn* case.

I will say this as a general proposition, Judge, by the way, the government's motion on barring the evidence of the OLC opinions and other writings is a nonstarter. I mean, the Court is the fastest gun in the west. Whatever the Court says we're going to do, we're going to do. But it should be a nonstarter that those opinions go out.

This case is either going to be dismissed, or the -- jury's going to hear about the OLC opinions that Mr. Bannon relied on; that's my view of the case. Anything else is in a frivolous argument.

All right.

THE COURT: You were just talking about Chuck Cooper's opinion.

MR. SCHOEN: Yes.

THE COURT: Can you point me to the ECF number?

MR. SCHOEN: Yes, Your Honor. Chuck Cooper's opinion is 58-15.

Now, it repeats some of the language that the Court, you know, noted earlier, in other words, executive branch official. But I want to -- this is all -- you know, it builds.

"We also concluded" -- he said, Chuck Cooper wrote, "We also concluded more broadly, however, that the contempt of Congress statute simply was not intended to apply and could not constitutionally be applied to an executive branch official who asserts the President's claim of executive privilege.

"We noted that the legislative history, nor the subsequent implementation of Sections 192 and 194, suggest that Congress intended the statute to apply to executive officials who carry out a presidential assertion of executive privilege.

"Moreover" -- and this applies, again, whether current official, not official or otherwise -- "Moreover, as a matter of constitutional law, we concluded that the threat of criminal prosecution would unduly chill the President's ability to protect presumptively privileged executive branch deliberations."

Those deliberations occur whether with an outside person or with an inside person. They're presidential deliberations, and that's what we cannot infringe on.

I would next go to Ted Olson's opinion, which is at 58-10 in the record, Your Honor. Ted Olson, as the Court is aware, goes into this in great detail. This is the most comprehensive of the OLC opinions on it, and it's cited over and over again and has never been withdrawn.

So he has a section he calls "Previous Department of Justice Interpretations of the Contempt of Congress Statute."

"The Department of Justice has previously taken the position that the criminal contempt of Congress statute does not apply to executive officials who assert claims of executive privilege at the direction of the President."

He then goes on to talk about the 1956 Bill Rogers --

THE COURT: Can you just tell me what page you're on?

MR. SCHOEN: Yeah. I'm on my own notes. There's a heading that says "Previous Department of Justice Interpretations". I can grab my --

THE COURT: No, I can find it.

You can keep going. I'll find it as you go.

MR. SCHOEN: All right.

Anyway, he says, "Not aware of any subsequent department position that reverses or weakens his conclusion," so on.

We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert presidential claims of executive privilege is sound, and we concur with it.

Conclusion is based on the legislative history that demonstrates it was not intended to apply to presidential assertions of executive privilege. That's not limited, in his formulation there at least, to current executive branch employees or even former executive branch employees.

And, he says, number two, "If the statute were construed to apply to presidential assertions of executive privilege, it would so inhibit the President's ability to make such claims as to violate the separation of powers."

Again, that's not based on whether that privileged conversation, deemed presumptively privileged, presumptively valid, is with Joe, Susie or a current employee.

He then goes on, several pages later, on a related issue. He says -- he writes: "Congress itself has previously recognized the impropriety of resolving executive privilege disputes in the context of criminal contempt proceedings."

And he talks about Senator Ervin introducing a bill and indicating, in his comments at least, "it may be inappropriate, unseemly or nonefficacious where executive officers are involved."

Then he writes: "The United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that criminal contempt proceedings are an inappropriate means for resolving document disputes, especially when they involve another governmental entity."

He talks about the duality. He quotes from district judge, and he says, "Especially where the context is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituencies' rights."

Now, Judge, I am saying here, because the OLC, the Department of Justice, says that this idea of accommodation is constitutionally mandated; that's in DOJ opinions.

But I'm not just asking the Court to dismiss this case because there wasn't a sufficient accommodation. I could hear how that could be a jury question whether it constitutes a default to offer -- to testify, as Mr. Bannon did, if you work out the privilege issue with the President and so on.

But it's important for the Court to be aware, at least, that this is what the Department of Justice, the

prosecuting authority, has written, that we have to exhaust that process and -- the accommodation process -- and that it's constitutionally mandated.

The opinion goes on to talk about why executive privilege for the President is different. It's different from any other privilege. It implicates separation of powers principles. And we simply don't have -- we cannot have Congress determining whether the President's invocation of privilege is valid or not valid.

And, of course, the Court in *McGahn* said just about the same thing. There the Court was considering whether even a court would be appropriate. And the Court said, Yes, at the end of the day, I think a court is appropriate because -- because Justice Department is not going to prosecute him criminally. We have the OLC opinions that say that, and we want to possibly get at this stuff so we'll consider a civil enforcement proceeding.

All right. Here's what the Court says now about this similar situation: In addition to the encroachment -- one second.

On the separation of powers question, the Court says -- the DOJ says: "If executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's

ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege would also preclude -- would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege."

Now, again, I hear the Court's out on that one is the word "officials". But, again, we have to read all of these opinions in pari materia.

THE COURT: It seems to me that the issue is, to boil it down, you have a set of what are, in effect, holdings by OLC. I know they're not holdings. They're addressing particular contexts. And they are saying, We interpret -- for example, the Olson opinion says, We interpret the contempt of Congress statute to not authorize prosecutions of current executive branch officials who are in the context in which executive privilege is being -- asserted.

And there's a bunch of reasons for that and some, or maybe all of those reasons, might apply to Mr. Bannon, at least potentially. But OLC has never said, And, therefore, the criminal contempt statute could not apply to the context of Mr. Bannon.

You agree with that. Right?

MR. SCHOEN: But, Judge, again, we're talking

about fair notice. If Mr. Bannon were to read that and also read the Paul Clement letter, in which he makes clear why there should be no distinction, because often a President has to call on outside people for counsel and those conversations --

THE COURT: The Clement letter doesn't really have anything to do with the contempt statute on the question. Right? It's about whether executive privilege can apply to outside employees, nonemployees. I understand that's an important part --

MR. SCHOEN: Whether the person has to appear to respond to the Subpoena, the outside person. Whether Congress ought to even be able to have that person come in and ask that person questions; and that's Mr. Bannon.

At worst case scenario, I say it's more than that. I say he's a former senior advisor who the President then calls in. He may not have had a formal employment contract at the time. But it's, in my view, silly to suggest that -- and I don't mean to characterize anything the Court has said as silly --

THE COURT: No, I understand.

MR. SCHOEN: It's silly to suggest that a person then who's called in for -- who was a senior advisor and is now called in, we certainly can't draw any conclusion he was called in to talk about the local bingo game.

So if the President says, He was called in for a privileged discussion, I'm invoking privilege, Congress is stuck with that, at least in terms of the application of the criminal statute.

And Mr. Bannon is entitled to believe, I cannot be subject to criminal prosecution. You don't like the privilege invocation, take me to court, take me to civil court and let's talk about it. Federal court has jurisdiction. In fact, as we know, Mr. Bannon's lawyer wrote to them and said, Work out the privilege issue, I'll testify. I'll produce the documents.

By the way, Your Honor, to be clear on the record, towards this accommodation process, the Court said, Well, what about some things you could turn over without, in any way, waiving the argument that he had no obligation to appear, both because of the fair notice question and the specific OLC opinion that says the Subpoena was invalid and unconstitutional.

Mr. Costello drafted a letter to Congress that he was prepared to give to them, and it said in there -- let me tell you, there are certain categories here he has nothing on at all. That was part of the accommodation process.

Anyway, I'll wrap it up, Judge. I hear the issues. I just want the Court to hear these excerpts that I am focusing on because, again, they have to be read -- it's

the principle that applies. And it's the principle on fair notice --

THE COURT: So I understand -- I don't think you have to go through all of them. I have the foundations on which your argument and the OLC opinions rest. The issue that I think -- the issue for you is, if OLC has never said, if the government has never said, we would not prosecute someone who is in Mr. Bannon's shoes, can he get this indictment dismissed?

The component parts of your argument are there, but you don't have a conclusion from the government ever saying, the statute would not be applied in this context. We would never prosecute someone in this context.

I think you have to admit that OLC has never said, they never expressly said, in the context of a nongovernment employee communicating with a President -- who parenthetically, is now a former President, but not clear to me that that is actually particularly material here.

Just assume, right, in the context of a former government or even a nongovernment employee communicating with the President, that we construe the contempt statute not to apply to this context.

MR. SCHOEN: My answer --

THE COURT: You don't have that.

MR. SCHOEN: My answer to that would be it would

be absurd for any person of ordinary intelligence to read these opinions to talk about the importance of having privileged conversation with outside people and also read the opinions that say, because of the invocation of privilege, the criminal statute doesn't apply to then say, Well, what we didn't mean that it doesn't apply to privileged conversations with people no longer in the executive branch. It's the institution of the Presidency's privilege that's being invoked; that's a key here.

And by the way, I did want to say, in this 2008 opinion, whether the Department of Justice may prosecute White House officials for contempt of Congress, February 29, 2008, 58-11, they did say this. And again, it may not satisfy the Court, but it says, "The Department of Justice may not bring before a grand jury criminal contempt of Congress citations or take any other prosecutorial action with respect to current or former White House officials who declined to provide documents or testimony or who declined" --

THE COURT: I know this opinion very well.

MR. SCHOEN: I know, Your Honor. But it's --

THE COURT: This is about communications by people who were, at the time of the relevant communication --

MR. SCHOEN: That's right.

THE COURT: -- a close advisor to the President in

employment in the executive branch.

MR. SCHOEN: That's right, Your Honor.

THE COURT: There's nothing in this that says -- I understand -- there is reasoning that one might conclude that the statements apply to someone who was not an employee at the time of the relevant communications, but the holding, in the sense that we're talking about holding, is it's applicable to someone who was a government employee at the time of the relevant communications.

MR. SCHOEN: Yep.

Respectfully, Your Honor, I think that the construction suggested is a far too narrow construction for the use of OLC opinions. Not what they're entitled to. The Court knows better than I do -- I don't mean to put words in the Court's mouth. The Court understands OLC opinions and their rules better than I do. Let me say that.

THE COURT: Okay. They're not binding on me.

MR. SCHOEN: Of course not.

THE COURT: They are statements of the Department's view. So then the question is, What does the statement of the Department's view about a congressional statute mean for a criminal defendant? Can you --

MR. SCHOEN: I --

THE COURT: So you have to have a defense or an element of the crime as to which a government statement

becomes relevant. And that's why, of course, you have arguments about entrapment by estoppel and notice and public authority.

But because they're not binding, they don't just mean that we apply them. They have to have some effect. So the question is, imagine, hypothetically -- well, I think it's true. OLC said a number of things in justifying its conclusions that have some relevance here, no doubt.

But their conclusion -- they have never concluded, to my knowledge, that the contempt statute doesn't apply in a context like this or that the government would never prosecute someone in the context like this. You can infer that, but they've never said it.

MR. SCHOEN: Respectfully, Judge, that inference is fair and the logical one to make. And there are statements --

THE COURT: Is it the only one?

MR. SCHOEN: Yeah, I think it is, Your Honor, absolutely, because of the reasons that the principle applies. The principle applies so that we don't undercut the President's invocation of privilege, the President's determination of privilege; that doesn't turn on who he's talking to.

He could talk to someone who has never been employed in the government or otherwise. It's just as

privileged. And it's just as presumptively valid in invocation of privilege.

And the underlying principle behind all of these opinions is that it -- the contempt statute, criminal contempt statute cannot be applied because privilege was invoked. That's the triggering factor.

And by the way, in my view at least, these statements are more than just the government's view. This is -- what's unique about this case in a sense is, this is the prosecuting authority in this case --

THE COURT: I understand all of that. I get it.

MR. SCHOEN: Okay. I don't know that I need to say anything further --

THE COURT: I think I'd like to hear from the government --

MR. SCHOEN: -- about the entrapment by estoppel and all of that.

THE COURT: No, I'd like to hear from the government on this point.

MR. SCHOEN: Thank you, Your Honor.

THE COURT: Thank you.

MR. SCHOEN: Tired of hearing my voice.

MR. COSTELLO: Your Honor, before you hear from the government --

THE COURT: Mr. Costello?

MR. COSTELLO: Thank you, Your Honor.

Just a couple of very brief points that came up in your questioning of Mr. Schoen. First of all, you talked about a phone call that I had with counsel for President Trump, and you said it's not in the record. It is, in fact, in the record in Docket 30, the motion -- this is our response.

My affirmation, Paragraph 10, "On October 5, 2021, I received a phone call, from an attorney representing former President Trump, advising me that the former President was invoking executive privilege with respect to the Select Committee's subpoena directed to Mr. Bannon. I immediately communicated that information to Mr. Bannon." So it is in the record.

Number two, with respect to your questions about no ranking member, one thing that dropped out and that is, in this case, we have an unusual situation because the Chairman of the Select Committee has admitted in videotape in a public document that Ms. Cheney is not the ranking member of this Committee. So that admission stands.

Number two, we have an admission by Doug Letter, the general counsel at the House of Representatives, that Ms. Cheney is not the ranking member. And that statement was made to the FBI, memorialized in a 302 in the presence of all three prosecutors that are here today. So they were

aware of that.

Number three, we talked about Section (3)(b). I was the recipient of the Subpoena package because Mr. Bannon authorized me to accept service on his behalf. In that subpoena package there was no Section (3)(b), which was part of House Resolution 8, if I remember correctly.

If you look at -- and I'm sure you have -- the regulations on the use of deposition authority at Paragraph 11, it says, "That a witness shall not be required to testify, unless the witness has been provided with a copy of Section (3)(b) of House Resolution 8, 117th Congress and these regulations."

The government's defense here, which you reference, is that, Oh, we would have given him that when he showed up for the deposition that he didn't have to show up for.

THE COURT: How can I consider any of this on a Motion to Dismiss?

MR. COSTELLO: I'm sorry. I didn't hear that.

THE COURT: How can I consider any of this on a Motion to Dismiss an indictment?

MR. COSTELLO: These are admissions in the record, Your Honor. There's an admission in the record that Section (3)(b) wasn't issued. The documents, the rules and regulations of the House are in the record. They say that

the witness doesn't have to show up. That's how you can consider any of this motion.

THE COURT: How does this mean that the Indictment on its face is insufficient?

MR. COSTELLO: If he doesn't have to testify, how can he be indicted for refusing to testify? House regulations say he doesn't have to testify. He wasn't given (3)(b). I wasn't given (3)(b) on his behalf.

THE COURT: That seems like an affirmative defense. Why it that a ground for dismissing the Indictment?

MR. COSTELLO: I'm going to repeat what I said. It is in the record, and it's certainly something that you can consider. They have no excuse for this other than to say, Well, if he came to testify, we would have given him the notice that he didn't have to come to testify because he didn't have (3)(b). I mean, that's just frivolous.

Thank you. That's all I wanted to add.

THE COURT: Thank you, Mr. Costello.

MS. VAUGHN: Good morning, Your Honor.

THE COURT: Ms. Vaughn.

MS. VAUGHN: I can pick up with the estoppel issue, if that's where the Court would like to begin.

THE COURT: Estoppel, due process, public authority --

MS. VAUGHN: Altogether.

THE COURT: It is the case, do you agree, that the OLC opinions have relied on a number of principles that apply here?

MS. VAUGHN: I think that that jumps ahead of what the defendant has to show to make this an issue at trial or to even raise it as a defense to the Indictment at the Motion to Dismiss stage.

Because Mr. Schoen seemed to suggest that there is a separate due process defense from entrapment by estoppel, but it really is an entrapment by estoppel case. And entrapment by estoppel is the defense that embodies the due process concern.

THE COURT: I think the argument has shifted some. I think the argument is now, everyone agrees that to be prosecuted under a relevant criminal statute, you have to have fair notice that your conduct is covered by it.

Mr. Bannon, the argument goes, could not have had such fair notice because OLC said his conduct doesn't fit within the statute. That's a due process problem. It's actually not -- it may not be only entrapment by estoppel. It's a the statute plus the OLC opinions did not put me on fair notice that my conduct fit within the criminal prohibition here.

MS. VAUGHN: That is the entrapment defense. It's

the statute -- I don't think -- I haven't heard the defendant to be arguing that the statute is vague on its face. The argument he seems to be making is that OLC, by their statements, has told me my conduct is lawful and therefore you can't prosecute me for that.

THE COURT: So, in your view, these arguments basically all do collapse to a version of, "Pick the bucket you want, but OLC has told me that the statute, which does cover my conduct, nevertheless is inapplicable."

MS. VAUGHN: And that's what happened in *Raley*. The commission in front of which the defendants there were testifying erroneously told them that they had a privilege excusing them from answering certain questions. And the *Raley* Court said, That's a problem.

Because even though, under the statute, they were subject to prosecution for not answering, the government affirmatively mislead them into believing that they were acting lawfully when they refused to answer.

So over the course of the entrapment jurisprudence, elements have been established where defendant has to show not only as an initial matter to even present it to the jury, but then in front of the jury once you get there. And if you look at those elements, the defendant has not even satisfied the threshold question of identifying what statements in particular he is relying on.

Based on his Motion to Dismiss, the government thought that it was four opinion-- or three opinions from the OLC and a letter from the U.S. Attorney. He said in the reply that that was incorrect, and he still hasn't identified what those statements were. And that's fatal, right there. We don't even need to proceed beyond that.

THE COURT: Do you agree that if Mr. Bannon were -- and I'm not suggesting he's not. I've heard counsel's argument -- but if Mr. Bannon were squarely within the four corners of an OLC holding, quote/unquote -- in other words, if, for example, Mr. Bannon had been, at the time of the relevant communications, the counsel to the President, and there was an invocation of privilege, and he is nevertheless being prosecuted now, that he would have a defense of some sort?

MS. VAUGHN: We agree with that, Your Honor.

THE COURT: What is the legal bucket for that defense?

MS. VAUGHN: So -- well, it's two -- he's charged with two different offenses, I guess. One is not producing documents, and one is not appearing.

If he had been counsel to the President during the time period for which he was subpoenaed for testimony, under OLC opinions, he would have -- the DOJ views him as having a potential immunity claim --

THE COURT: Okay. Let's imagine it's not immunity, but let's imagine that he -- was not someone so close to the President who would have been immune. I just want to make this simple.

He's someone communicating with the President as a current executive branch employee at the time, privileged communications, assertion of privilege, notwithstanding the OLC opinions, there's a prosecution for two offenses, failing to show up and failing to produce documents.

So he fits within the four corners of an OLC holding, so to speak. He's prosecuted, nevertheless. What is his defense?

MS. VAUGHN: His defense could potentially -- again, depending on the circumstances and how it matches up with the opinions --

THE COURT: I'm assuming there's, like, a -- perfect alignment between OLC's statement that this is not a crime or it will not be prosecuted, and the situation we're presented with. You could make an altogether different hypothetical.

Again, I sort of posed this last time, imagine that a head of an agency is subpoenaed tomorrow, and President Biden says, Don't show up. Our communications are privileged. And that person is, nevertheless, prosecuted and says, I have a defense.

All I want to know is when, in the government's view, assuming there's perfect alignment, what is that defense called?

MS. VAUGHN: That defense is called entrapment by estoppel. It is --

THE COURT: So even though there isn't a specific statement -- to that person by a government official, as you've argued, nevertheless, that defense would apply?

MS. VAUGHN: If it's within the four corners of an OLC opinion --

THE COURT: And so really this question comes down to whether Mr. Bannon -- fits within the government's or his view whether he fits within the OLC opinions or not?

MS. VAUGHN: Yes. And I think that the case law on entrapment by estoppel is clear that it has to be a fit. The defendant can't start extrapolating and guessing at how the government might extend its reasoning.

Because the whole purpose of this defense is to prevent the government from essentially tricking someone into committing an offense by saying, No. Please. Go ahead. That's fine. You can do that. You won't be prosecuted. And then turning around and prosecuting them.

THE COURT: But Mr. Bannon says that's what happened here. You have OLC opinions that say executive privilege matters. We don't prosecute for executive

privilege. And there's a bunch of statements that are not limited, in the sentences at least, that they're written to people who were then government employees.

There are OLC opinions that talk about executive privilege applies to even nongovernment employees. There's a whole host of statements in these documents that are not limited by their terms to the context of current government employees when the communication occurred.

MS. VAUGHN: He says that, but that's not actually what the opinions stand for. And here, the defendant again -- I'm still not clear on which statements he's relying on because he hasn't clearly identified which statements he claims to have relied on at the time he decided to engage in this conduct, as he's required to show under the defense.

But he's not relying on just a regulation that's a couple of lines and is clear in its scope. He's relying on 30-, 40-page opinions. He can't start cherrypicking sentences out of those and relying on them. The entire opinion represents sort of "the holding" of the office of Legal Counsel.

And so that takes it to the other issue is, it's not even clear whether he read these directly, whether he was told about them by his attorney. And if he was told about them by his attorney, what he was told about them?

Because if he's told by his attorney something that is inconsistent with the government's statement or goes beyond the four corners of the government's statement, it's no longer a government statement.

Another element of the offense is that it has to be a statement by someone authorized in the government to interpret or enforce the law. His attorney doesn't fit that category, and at that point, it becomes an advice of counsel defense.

THE COURT: What's your answer to Mr. Schoen's argument that maybe on entrapment by estoppel there has to be reliance or knowledge or whatever, but for, more broadly speaking, due process arguments, this is about notice, and notice is notice.

MS. VAUGHN: Notice is notice. And the statute is clear. The word "default" is clear. The word being summoned by a Committee is clear. The statute is clear.

And so the statements of the OLC do not start to invalidate that statute's application in areas on which OLC has never commented.

So here, in the government's view, the Court doesn't even have to reach the question of what the OLC opinions actually say because the defendant hasn't met the threshold questions of which ones he relied on and what he was told about them, if he didn't read them himself.

THE COURT: But let's imagine I conclude that I do have to reach that question. In other words, I have to conclude whether there's a fit between the OLC statements and Mr. Bannon's case. What's the government's argument on that?

MS. VAUGHN: So I think the defendant is conflating two different issues in the OLC opinions. One is, When does executive privilege apply? And the separate question is, Can you be prosecuted for defying a congressional subpoena under the contempt statute? And you have to address those with respect to the documents and separately with respect to appearing for testimony.

So if you look at the opinions addressing executive privilege assertions over particular documents, they all are focused on particular assertions over particular documents carried out by current executive branch officials.

So, for example, in the 1984 opinion, the EPA administrator being subpoenaed -- and assert -- going through a review process within the executive branch, concluding that there are 60-some documents over which they should assert privilege, producing the remaining documents, and then the OLC says, You can't be prosecuted for not producing the remaining 62.

There's no OLC opinion that says that Mr. Bannon

didn't have to turn over his communications with the Proud Boys or the Oath Keepers or didn't have to turn over records he had in relation to a meeting he had with members of Congress at the Willard Hotel on January 5th. There's no -- OLC opinion that says a private party doesn't have to turn over private records. So that's -- the documents.

The testimony, OLC opinions are clear that immunity from showing up applies to only the highest-ranking White House officials, the closest advisors to the President. There is no OLC opinion that says a private party has immunity from showing up.

On top of all of that, there is no OLC opinion addressing a circumstance where you have a conflicting assertion decision among -- between a former President and a current President. That's another distinguishing factor.

And, again, while there are OLC opinions that certainly recognize the communications with outside parties can be protected, those OLC opinions don't conclude that those outside parties have absolute immunity from complying in any way with a congressional subpoena. Even if the Court were to reach the merits of, "Does a statement apply here?", there isn't one.

And again, that's the first element of the offense. If there's no statement from the government telling you your conduct is sanctioned, you're not entitled

to this due process entrapment by estoppel defense.

And the standard for this defense that the defendant is advocating for by arguing otherwise is one without any limiting principle. Under his approach, any defendant could essentially find any government statement, find a couple sentences within there that seem to apply to his case, and then argue he has a free pass to commit crimes.

That's not what the entrapment by estoppel defense was intended to protect against. It was intended to protect against affirmative misleading by the government, in relation to a specific course of conduct.

I think the best example of that is the *West Indies Transport* case out of the Third Circuit. There, they were dumping scrap metal in the ocean. They pointed to a placard that said, You can dump nonplastic trash, and by the way, there are other regulations.

Nonplastic trash, I mean, on its face, might apply to scrap metal, but they were on notice that that wasn't the full statement of the government. Each of these opinions also makes that clear.

The foundational opinion, in 1984, says this is limited to the specific circumstances of this case. The 2021 opinion on congressional oversight says not even all the White House officials have immunity from showing up to

testify. It's a fact-specific determination.

So because -- the defendant has failed to even make a threshold showing of any of the elements of the defense, he is certainly not entitled to dismissal, and he's not entitled to present it to the jury.

THE COURT: So I understand your argument about the defense and the like, but why isn't Mr. Bannon's knowledge of these OLC opinions potentially relevant on mens rea?

And I don't have proposed jury instructions. Obviously I know what the government has argued the general standard is, but I don't know what the jury is -- I don't yet know what the jury is going to be told specifically the mens rea is here.

And why -- I get your argument about dismissal. But as to the Motion in Limine, why isn't it at least potentially relevant to say, Hey, look, I was not intending to willfully default because I thought, based on these OLC opinions, that the way to proceed was to proceed the way I did?

MS. VAUGHN: That's a good-faith reliance defense. That's barred by *Licavoli* and *Bryan*. The defendant in that case would be saying --

THE COURT: No, why isn't it, You have to prove, government, that I acted with a particular state of mind; I

didn't act with that particular state of mind because I acted for this reason?

MS. VAUGHN: The government has to prove that the defendant knew he was required to show up on a certain day or knew he was required to produce documents, and consciously chose not to do that, as opposed to it being by accident or something else.

The reason he decided to deliberately not comply is irrelevant, and there's a jury instruction that was approved by the circuit in *Fields* exactly to this effect.

THE COURT: Do you know what it says exactly?

MS. VAUGHN: I don't have the wording exactly in front of me, but it is something to the effect of, The reason for his deliberate, intentional noncompliance doesn't matter as long as it's not accidental. You know, this goes back to our argument last time about the metro breaking down or something.

THE COURT: I certainly understand *Licavoli* to have said no advice of counsel. I've held that.

It seemed to me, approaching this argument, that whether these OLC opinions or some other questions might be relevant at trial, if there is a trial here, on the question of mens rea, depends on more granular information about the jury instructions than I presently have.

Because if the jury instruction, even within the

framework of, you know, intentional, deliberate or knowing deliberate or whatever, actually sounds a little bit more like something where the knowledge of these OLC opinions would be relevant, then maybe they come in.

MS. VAUGHN: I -- we can get the *Fields* instruction for the Court but essentially what the defense would be saying is, I deliberately chose not to show up, but I thought that executive privilege excused the requirement that I had to show up.

So, basically, we would be arguing that there was a justification for his decision, a legal justification. That's no different from an advice of counsel defense. My lawyer told me I didn't have to go under the law. It's a good-faith reliance defense, not just by *Licavoli*, which dealt with it specifically in the context of advice of counsel, but by *Bryan* and *Fields* and *Dennis*, all in this circuit -- or, sorry, *Bryan* is a Supreme Court case, but *Fields* and *Dennis* in this circuit.

THE COURT: Can we turn to the House res and the rules? Are you going to cover that as well? Are you doing the whole argument?

MS. VAUGHN: Yes, I am going to cover everything for the Court.

THE COURT: The government concedes, I assume, that there were never 13 members of this Committee. And the

government concedes that, I assume, that at least the most natural reading of the House res is that there were supposed to be 13. Do you agree with that?

MS. VAUGHN: I think -- so we certainly concede there were never 13 members. As far as what was required for the Committee to act, I think is a different question.

So given the ambiguity in the word "shall", without an affirmative position from the House, it might just be ambiguous and therefore nonjusticiable under lasting custody. But we have a position from the House. Not only in their ratification of the Committee's operations through their contempt referrals, but in their filings in various court cases where the House -- I understand the minority has a different view, but they don't speak for the House -- where the House has spoken.

So under *Barker* and *Rostenkowski*, the Court has to defer to those interpretations. But the Court doesn't even need to reach any of that, because, here, these are all procedural objections that the defendant has waived. He didn't raise them for the Committee. And there were --

THE COURT: Well, some of them -- some of them could not have been cured, could they have?

MS. VAUGHN: So --

THE COURT: And don't you -- let me ask a -- different question. The government bears the burden of

proving that the Subpoena here was validly issued. Do you agree with that, that that's an element of the offense?

MS. VAUGHN: So I think the element is a little bit different.

THE COURT: Okay. What is the element?

MS. VAUGHN: The element is whether the inquiry under which the Subpoena has been issued is authorized.

And if you look at how the Second Circuit and the Third Circuit and *Barenblatt*, which is the Second Circuit in *Seeger*, the Third Circuit in *Orman*, the Supreme Court in *Barenblatt*, they interpret that element of whether the Subpoena has been issued under the authority of the Committee as one concerning whether or not the inquiry has been authorized.

And when you think about the Select Committee, the Select Committee doesn't cease to exist when it has fewer than 13 members. The House resolution contemplates vacancies. Every Committee contemplates vacancies. The Committee doesn't cease to exist, so the question has been --

THE COURT: Can I just pause on the element question?

What does a jury have to determine on that element? Is that a jury question, first of all?

MS. VAUGHN: Yes. The government --

THE COURT: And what does the jury have to decide on this element?

MS. VAUGHN: The jury has to decide what was the scope of the authorized inquiry? And typically Courts look to the House resolution authorizing it and then did the Subpoena fall within the scope of that inquiry?

THE COURT: So imagine, hypothetically, that the House Resolution 503 was crystal clear and a hundred percent unambiguous that there needed to be 13 members to be able to issue subpoenas, and there were never 13 members. And assume Mr. Bannon raised that argument at the time, so we don't have any of those issues either. Is that irrelevant for purposes of this case in that hypothetical?

MS. VAUGHN: If the defendant had preserved it, it would be a sort of pseudo-affirmative defense. And I think *Yellin*, the Supreme Court's opinion in *Yellin*, makes this clear.

So to the extent that there are procedural protections for the witness in the rules, that's things like quorum requirements, um --

THE COURT: Is having 13 members a procedural protection for a subpoena recipient or isn't it something broader about whether the Committee even has the power to do anything?

MS. VAUGHN: It's a procedural protection. So --

although it doesn't -- there is not a procedural protection here like that. But, for example, in D.C. circuit cases, *Liveright* and *Shelton*, those cases were both concerned with whether or not the entire Committee had been consulted before a subpoena had been issued.

The Court said the rules require that. They didn't do that consultation. Therefore, it is a defense to the charges. And *Liveright* makes clear that it's not an element of the defense, but it is a defense that the defendant can raise. And I think that's where *Yellin* comes in.

So *Yellin* says, House Committees set out these procedural rules. They protect witnesses' rights. And to the extent the witness wants to vindicate those rights, that can be a defense if the House doesn't comply. So in a circumstance like *Yellin* or *Liveright*, where the witness can't know one way or another whether it's been complied with, they get to raise it as a defense regardless. In a case like *Bryan*, where the defendant can know at the time and doesn't preserve it, they waive it and they can't raise it.

So here the defendant's dispute with the number of members is really one about, Well, they didn't have enough members to issue the Subpoena. But House Res 503 doesn't require 13 members to be sitting to issue subpoenas. It

says that the Chair unilaterally can issue subpoenas.

So here it's a procedural rule, and it's not even a procedural rule that provides any rights or protections to the defendant, regardless of the number of members on the Committee. The House resolution gives the Chair the authority, the sole authority, to issue subpoenas here.

Even if we got past the waiver, it wouldn't even fall under the category of procedural objections that *Yellin* recognizes that can be vindicated by raising it as a defense at trial.

And the same goes for the objection to the ranking minority member. The ranking minority member has no role in issuing the Subpoena. So, again, there is no procedural protection with respect to that title that the defendant would have been entitled to just on the issuance of the Subpoena.

So, one, he's waived all of these objections. But, two, even if he hadn't, they're not the kinds of objections that the Supreme Court has recognized as those a defendant can raise in defense to contempt charges.

THE COURT: Counsel, the court reporter would like to take a break. Is now an okay time to take 10 minutes --

MS. VAUGHN: Absolutely, Your Honor.

THE COURT: -- and then come back? Okay. We are in recess for just 10 minutes.

DEPUTY CLERK: All rise. Court is now in recess.

(Break at 11:57 a.m. and resumed at 12:05 p.m.)

DEPUTY CLERK: We are now back on the record.

THE COURT: Ms. Vaughn.

MS. VAUGHN: Your Honor, I have the jury instruction that was approved in *Fields* on the meaning of "willful" and it's as follows: The word "willful" does not mean that the failure or refusal to comply with the order of the Committee must necessarily be for an evil or bad purpose.

The reason or purpose of failure to comply or refusal to comply is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident.

THE COURT: Okay. Thank you.

MS. VAUGHN: So we left off with objections, just to summarize the Government's view, all of these issues that the defendant raises that he has waived. And even if he had not, things like the Committee not having 13 members and the ranking minority member title, are not things that go to rights that he could have vindicated -- before the Committee with respect to the Subpoena's issuance, such that they would even be defenses in the first place.

So unless the Court has any further questions on that issue, I can move to the other.

THE COURT: Please do. Yes.

MS. VAUGHN: Okay.

THE COURT: Let me ask one question on the House's view of whether the Committee was properly constituted, notwithstanding the fact that it had 13 members or all of these issues.

I understand your point about ratifying the view and the contempt resolutions and the like. Is your view that the amicus brief that was filed with me is a place where I could find the House's considered judgment on this question?

MS. VAUGHN: We think that the Court could look to public filings in court cases by the House. Since those amicus briefs are made on behalf of the House and not any individual member or on behalf of a particular committee, we think under the -- under the rulemaking clause, they represent statements of the House about the making of their rules.

THE COURT: And even if I didn't, I take it your position is that I could look to party briefs filed by the Committee -- although that probably wouldn't work. It would have to be party briefs filed by the House and cases here. Are there any?

MS. VAUGHN: I think that's right. Party briefs in other cases, I'm not --

THE COURT: You mentioned before other cases pending on this.

MS. VAUGHN: Yeah. Sorry. My understanding is at least some of those cases are cases in which the January 6th Committee has taken a position on -- this question, but that's not the House position. Correct?

MS. VAUGHN: Well, I think, in some of those cases, the Speaker was a party. And since the Speaker has the authority -- to appoint the Committee, her position would likely also be informative.

THE COURT: Okay.

MS. VAUGHN: I think under *Yellin*, they look to the practice of the committee as well in determining what the rule requires. And here there's nothing inconsistent in the record about how the Committee or the House has interpreted or ratified these actions.

THE COURT: Okay. Thank you.

MS. VAUGHN: So turning to -- I can turn to the issues related to Mr. Costello next.

THE COURT: Yes, that would be fine.

MS. VAUGHN: There are two issues raised. One is whether there's a basis for dismissal, and the other is whether there's a basis to exclude certain evidence.

And with respect to dismissal, for dismissal on the basis of outrageous government conduct, you have to

have, one, misconduct and then prejudice.

Here the government never chose Mr. Costello as a witness. The defendant did. He was his attorney in relation to the acts under investigation. He was involved in the acts under investigation.

THE COURT: Let me just cut to probably what seems to be the most important question, at least on the evidentiary point. Does the government intend to use any of the evidence that was obtained relating to Mr. Costello's accounts in the trial in this matter?

MS. VAUGHN: Obviously not accounts that did not belong to him.

THE COURT: Clearly. What about accounts that did?

MS. VAUGHN: The toll records, it's possible. Sitting here right now, we haven't finalized our exhibits. But to the extent that there are calls between --

THE COURT: I mean, isn't it undisputed that Mr. Bannon was aware of the Subpoena? That's the government's argument -- was the government's argument. We needed to look at this information to, in case we needed to prove that Mr. Bannon knew about the Subpoena. It is --

MS. VAUGHN: Or subsequent communications with the Committee. If the defendant --

THE COURT: Wait. What? That Mr. Bannon knew

about Mr. Costello's subsequent communications with the Committee?

MS. VAUGHN: For example, that the Committee had rejected his basis for not appearing.

If the defendant wants to stipulate to these things, that there's no factual question that he knew he had to produce documents by October 7th, and he knew that he had to appear on October 14th, we wouldn't need to use any of this. We could present the stipulation to the jury.

So it's possible that we would have to use tolls. In sitting here, I can't tell you how many calls there are in number or what have you. And it's also possible that we would have to use Mr. Costello's statements to the extent that they present, either in cross of our witnesses or in their own case in chief, evidence that's contradictory to what Mr. Costello told us about the defendant's knowledge.

THE COURT: Are you talking about, for example, his declarations here or his statements to law enforcement?

MS. VAUGHN: Either or both.

THE COURT: Is that -- at least that's not -- that, at least, is not information that the government obtained through subpoena or the process that we were talking about last time --

MS. VAUGHN: Right.

THE COURT: -- right?

MS. VAUGHN: That's right.

THE COURT: Okay.

MS. VAUGHN: But the foundational question for dismissal is, Was there misconduct? There wasn't. There's no privileged communications that the government obtained -- improperly.

And then the second question is, Was there prejudice? And the defendant still has not actually identified actual and substantial prejudice.

They say that, I guess, the defendant was upset with his attorney. But, again, the government, from the very beginning, raised this potential conflict in its first call with Mr. Schoen and Mr. Corcoran, before Mr. Costello ever entered an appearance.

Despite that, the defendant apparently decided to waive any potential conflict and have Mr. Costello enter an appearance. And he can't now turn around and turn that into a weapon against the government. These are all his choices. So he's completely failed to show misconduct, completely failed to show prejudice. -- There's no basis for dismissal here.

And on the exclusion issue, there's no basis for that either. He doesn't articulate any legal basis for exclusion. They were lawful grand jury subpoenas. We're not using anything in relation to the 2703(d), and there

were voluntary interviews in which Mr. Costello participated with the government.

So there's no violation of any legal principle or right, constitutional or otherwise, that the defendant is identifying in the government's conduct here.

So he seems to want to fashion, instead, an exclusionary rule for attorney/client privileged information, but he doesn't actually even identify any privileged information.

So without having identified any basis to exclude this relevant, admissible evidence, to the extent it is at trial, there's no basis to exclude it.

THE COURT: Okay.

MS. VAUGHN: I can turn now to the prior good acts motion that the government filed.

THE COURT: Yes.

MS. VAUGHN: Standing here we still don't know the circumstances or even the timing of the other subpoenas or instances of testimony to which the defendant has alluded in relation to the Mueller investigation, in relation to the House Intelligence Committee or in relation to the Senate Intelligence Committee. As the party proffering the evidence for admission, the defendant bears the burden of showing its relevance.

The only thing he offers is that it's somehow

relevant to his intent, what was in his mind. But the only way that it would be relevant is to show that he believed his decision not to show up or not to produce records was somehow excused by executive privilege; that would be the theory he would be suggesting to the jury. And that theory is barred under *Licavoli*, *Bryan*, et cetera, as we've already discussed.

His reason for not showing up is not relevant, if his -- decision was deliberate and intentional. So the only remaining purpose would be propensity evidence, and the defendant concedes that is improper. So that evidence should just be excluded outright.

THE COURT: It seems to me that this is one of the questions where, putting aside the dismissal arguments, but just whether the evidence can go to the jury depends, at least in part, on what the jury instruction around mens rea would be.

I understand you read me the *Fields* one. I haven't decided what the jury instruction will be. Did the D.C. Circuit in *Fields* actually say that that jury instruction was correct --

MS. VAUGHN: It --

THE COURT: -- or did they just affirm the conviction on other grounds?

MS. VAUGHN: *Fields* was addressing the meaning of

wilfulness and found that that definition was correct.

THE COURT: Was correct. Okay.

MS. VAUGHN: Uh-huh.

But even if -- even if the intent standard were different, to enter other acts evidence, the defendant still has to show a conformity in circumstance, in timing, in parties. And he hasn't even attempted to do that.

THE COURT: Why wouldn't he -- I mean, if the mens rea definition here -- I understand the government's argument is that it is not -- were sufficiently capacious that it included, for example, something like, you know, the government had to prove -- it's a little hard to frame in light of what your position is about *Fields*.

But if Mr. Bannon was entitled to argue or to at least rebut the government's evidence that when he acted in a way that he thought was consistent with how one is supposed to behave when there is an executive privilege assertion -- and not only did he do that here, but he had been through these procedures before. And in those procedures he acted in a very similar way, all which goes to show -- -- this in a technical legal sense -- his good faith, his reasonableness, his nonintentional default. I guess -- would say with a different statute or a different mens rea that might be relevant, but here it can't be?

MS. VAUGHN: Even if it were here, the defendant hasn't shown any similarities. I mean, he hasn't proffered anything. And under Rule 404(b) --

THE COURT: Well, wouldn't that be just a trial question?

I mean, we don't have exhibits yet. We don't have a proffer at trial. We haven't had someone say to me, Your Honor, we'd like to ask Mr. Bannon questions about when he was subpoenaed by the Mueller team. And we would establish that when he did that, he engaged in good faith with them, and it was a four-month negotiated process, and they protected privilege, and he was allowed to testify. And we want to show that that's how he would have approached this one if permitted to do so.

MS. VAUGHN: That would be admissible or inadmissible under Rule 404(b), and for something to be admissible under Rule 404(b), it has to be more than just --

THE COURT: No, he would say, And my intent here was to do the same thing, was to respond in the same appropriate protective way.

MS. VAUGHN: The problem is he hasn't shown any of that. He hasn't shown --

THE COURT: Well, that's a trial question.

MS. VAUGHN: Well, to even be able to present it at trial, he has to make a -- under Rule 404(b), he has to

initially show that it would be --

THE COURT: But wouldn't that be a proffer at trial?

MS. VAUGHN: So our Motion to Exclude the Evidence, in our view, tees it up for the Court.

THE COURT: Tees that up.

MS. VAUGHN: It is our view --

THE COURT: He was obligated, in your view, to have provided more details in response to your motion that would have acted as a proffer.

MS. VAUGHN: Yes. Under the Rules of Evidence, a party can't say, I promise, Judge, I'm going to prove what I have to prove. Just let me ask all the questions and make all the arguments.

Where the admissibility of evidence is challenged, the party proffering it has to make some showing to the Court initially that it is, in fact, admissible.

And here the defendant hasn't even told us when he was subpoenaed in those other instances. Was he even an executive branch official? Was he a private party? There's just nothing he's offered. And so without that initial offer, that evidence should be excluded.

THE COURT: Okay.

MS. VAUGHN: I think I've addressed everything, unless the Court has other questions.

THE COURT: No. Thank you. I'd like to hear from defense counsel, very briefly, and then from the government, briefly as well, as necessary. And by "very briefly" I mean, like, less than 10 minutes.

MR. CORCORAN: Your Honor, one thing I wanted to address, because you've asked it a couple of times about the face of the Indictment, is our Motion to Dismiss Count 2. The defense -- and basically because it would allow the grand jury to indict Mr. Bannon for not providing a log of withheld records. That's not a crime and so that count needs to be dismissed. I think the government, in their brief, has indicated that -- let me just grab that cite.

Their concession, at least with regard to the Committee not compelling any executive branch official to produce a privilege log, in the *Miers* case is at Document 65 at Page 36, and our basis for dismissal of Count 2, on that basis would be the Supreme Court case *Miller*, 471 U.S. at 136.

The only thing that I would -- I think you've, through the discussion with government counsel, come around to a view or to an understanding in terms of the discussion that the issue of the Subpoenas and so forth -- is something that's going to have to be addressed at trial, not excluded. There's certainly no obligation for a defendant to provide any information to the government in advance of trial that

goes beyond the applicable rules of discovery.

So we don't have to, for instance, until the Court requires us, even list our witnesses or notify the government of the witnesses. And a proffer about prior subpoenas is not something that we -- that there's any authority for our obligation to provide that.

I think the last point I wanted to make, and I'll be brief, is that I don't believe that the briefs filed in other cases in this courthouse can be considered the position of the House on the issues that are being raised in this case.

I don't know of any other -- I know we've talked about the distinction between civil and criminal cases. But here, I think, that would be crucial. And I think that briefs that are filed as argument simply can't be viewed as the official position of the House.

Thank you very much.

THE COURT: Thank you.

Mr. Schoen.

MR. SCHOEN: Yes, Your Honor. Briefly. I'm aware of the time limit. I'll talk faster. Just a couple quick points, Judge.

First of all, going back to the beginning of the Court's discussion with the government lawyer, our position hasn't shifted at all. The issue of fair notice and due

process is a conceptually distinct argument from the entrapment by estoppel. And we raise it in our motion, Pages 18 to 22 and 46; the Reply, 19 to 23 and 13. A critical difference which the Court pinpointed is, we don't have to show any reliance for the fair notice; that's a question for the public. We don't have to show we ever read the OLC opinions or otherwise.

We have to -- we look at it objectively. Could a reasonable person know that he's going to be subject to criminal prosecution -- despite the fact that there are -- these OLC opinions? The Department of Justice's position is once privilege is invoked, you don't have to appear; criminal contempt statute can't be applied. And the reason he should know he's subject to it is because at the time he wasn't working for the government.

I would say, by the way, in reference to the opinion I referred to, 58-8, the Assistant U.S. Attorney ones, the Department of Justice there talks about the same principles of privilege and why privilege -- not interfering with privilege, through a congressional subpoena is just as important for outside folks.

So, for example, on Page 6, when they say that the communications involve individuals outside the executive branch, does not undermine the President's confidentiality interests. The communications at issue occurred with the

understanding they'd be held in confidence. That's the underlying principle. It applies whether they're outside people or inside people. And we don't construe these things so narrowly.

Now, by the way -- you know, the test is, of course, as the Court's aware, once privilege is invoked, in order to get around that, Congress needs to show that the material was demonstratively critical. There's been no showing of anything like that with Mr. Bannon. But there would have been if they really wanted the information, his testimony or the documents. They would have had a civil enforcement proceeding. Very simple question. They never wanted that. They wanted to make an example out of him.

Now government counsel said, you know, -- The OLC opinions don't fit squarely, therefore he can't raise entrapment by estoppel. The question for entrapment by estoppel is whether it was reasonable for Mr. Bannon to believe that the OLC opinions applied and that their substance is what he should follow in the case.

With all due respect, it would be absurd --

THE COURT: Would that be a jury question?

MR. SCHOEN: Your Honor, if Your Honor doesn't dismiss it on the entrapment by estoppel.

Look, under *the Levin* case, the Court said, in the Sixth Circuit, We had enough here to dismiss it on a

pretrial motion. The opinions were there and so on.

But if the Court didn't go that route -- which I would advise the Court to be extremely cautious about. If the Court didn't go that route and the Court decided to go forward with a trial, perhaps ill-advisedly, then yes, that would be a jury question.

The reasonableness of Mr. Bannon's belief that he's covered -- because once executive privilege was invoked, he's covered -- that that OLC opinion that he made clear to the government he relied on; that no agency counsel and so on. And again, for that inquiry, the history of the OLC opinions would be relevant. And Mr. Costello's testimony would be directly relevant; and that's the *Tallmadge* case. But it makes sense, with or without that case.

He has an experienced criminal defense lawyer who tells him, These are the OLC opinions. They apply in your case. I believe they apply. Here's why they apply. That goes to the question of whether Mr. Bannon's belief was reasonable, so does the continued reiteration by the Department of Justice.

Okay. I'm going to wrap it up. Let's see. The government said that, Well, there's fair notice because the statute's language is clear. This is an as-applied challenge.

And what *Raley* says is, We also use government statements to determine whether there is fair notice. So it's not a question of just whether the language in the statute is clear. Everybody knows this statute has been applied in other cases.

The Court asked -- this is an important thing, I thought. Everything the Court asked is important, but this particularly is. The Court asked whether it goes to a matter of mens rea if he believed, for example, you know, that executive privilege permitted him not to comply with the Subpoena.

The government said -- I was surprised to hear it still at this point. It's in their opposition. The government said, No, that wouldn't matter. The reason he didn't show up doesn't matter. That's not what the mens rea in this case requires, right, under the statute.

In fact, I saw in their opposition, at Page 29 to 30, that's Document 65, they wrote, The government's motion and the Court's order granting it, however, address an entirely different question, that is, whether a defendant's purported good faith but erroneous reliance on privilege or his counsel's advice about it negates the intent element of the offense. As the Supreme Court and the D.C. Circuit and now this Court has held, it does not because the intent element of the statute requires only that the defendant's

failure to appear or produce records be deliberate and intentional, whatever the reason is.

We're back to executive privilege doesn't matter. Clearly it says it doesn't negate the intent. If that's the case, then I'm back to our argument in brief that we've got a real separation of powers problem with this statute. If the reason doesn't matter, if the invocation of executive privilege -- that's not *Fields*, by the way. Executive privilege is very different -- if the invocation by the President of executive privilege doesn't matter, then this statute, as applied, violates the separation of powers. And that's in our motion.

And by the way, here's what Ted Olson of the Justice Department wrote in a binding authoritative opinion. I think it's at Page 135, but I can't read my notes. In his opinion, he said, "Furthermore, a person can be prosecuted under Section 192 only for a 'willful' failure to produce documents in response to a congressional subpoena." There is some doubt --

THE COURT: It seems like a number of people who have said that about the statute were not reading *Licavoli*.

MR. SCHOEN: May I, Your Honor?

Binding authority on the Justice Department. Estoppel. Here is what he goes on to say, which is important. "There is some doubt whether obeying the

President's direct order, to assert his constitutional claim of executive privilege, would amount to a willful violation of the statute."

Executive privilege is different. All of the cases say, Privilege must be allowed as a defense to contempt of Congress statute. Period. The Supreme Court has said it.

And so the government's position is it doesn't matter. The only thing that matters is something like accident, you know, you couldn't show up because you got hit by a car, God forbid. It's just wrong. And that violates the separation of powers. All right.

(Brief pause)

The Court's aware we raised in ECF-82 -- I know the Court made reference to the amicus brief -- we raised our objection. -- The guy, Letter, has factual assertions in there without any declaration. And they contradict his earlier assertion to the FBI that there is no ranking member. Maybe, more importantly, they contradict Chairman Thompson's assertion, in a press conference, that Liz Cheney is not the ranking member. So unless -- well, anyway. It's not appropriate to have these factual assertions in there.

And then I guess all I would say is, again, for me -- I guess I'm a cynic -- the idea that the government was just trying to find out about Mr. Costello's

communications about the Subpoena, I would have thought they would have actually subpoenaed his real email account that they knew about, the one they used to communicate with him but they didn't. It's a shame. It's an intimidation tactic, Judge, I'm afraid.

Thank you, Your Honor.

THE COURT: Thank you. Thank you.

Ms. Vaughn, briefly.

MS. VAUGHN: Just two points, Your Honor.

First, the government has never said that a constitutional privilege cannot be a defense to contempt, but a constitutional privilege is a legal question for this Court to decide.

Once the Court decides that executive privilege did not bar enforcement of the Subpoena in total, the defendant cannot then argue at trial that his belief that it did excuses his default. Those are two different questions. One is, Is it a legal defense? That's a sole question for the Court, not the jury.

THE COURT: But the defense is not whether it was privileged. The defense that's been asserted is that there was a due process problem or entrapment by estoppel.

You're not saying that -- or are you saying that it's up to me to decide whether, in fact, the communications between the President and Mr. Bannon were privileged; and if

they were, then he has a defense here?

MS. VAUGHN: If the defendant were raising that as a defense, saying executive privilege actually bars my compliance with this subpoena, that would be --

THE COURT: He is saying that in a way. I'm just trying to understand your argument.

MS. VAUGHN: Uh-huh.

THE COURT: Are you saying that if I concluded that the communications between Mr. Bannon and the President were, in fact, privileged, that that would be a defense here?

MS. VAUGHN: Well, it wouldn't be here, because he engaged in total noncompliance. So the question would be --

THE COURT: I don't understand the point of your argument then.

MS. VAUGHN: So Mr. Schoen said that the government is taking the position that executive privilege doesn't matter; and that's not the position we're taking.

So maybe the Fifth Amendment would provide a good, sort of, parallel. If a witness that's summoned by a committee says, I have a Fifth Amendment right not to testify and not to appear. And then they're charged with contempt. And they come before the Court and they say, Your Honor, the Fifth Amendment excused all of my compliance, the Court would decide as a matter of law whether that's right

or not.

Once the Court says, Actually, that's not right. The Fifth Amendment didn't excuse your compliance. At trial, the defendant does not get to argue, Acquit me because I believed it did. I know I was wrong at this point, but I believed it did.

THE COURT: I suppose it depends on what the mens rea of the relevant statute is.

MS. VAUGHN: And here the mens rea --

THE COURT: And if the statute used the term "willfully" but just in a different statute or I didn't have a D.C. Circuit opinion holding that "willfully" was really light, then maybe it would be relevant.

MS. VAUGHN: Right. Maybe it would be, if it were a willful statute where your reliance on the law could be a defense, but here it's not.

THE COURT: Right.

MS. VAUGHN: And so I just wanted to clarify that the government has never said that the executive privilege can't be a defense. It's just good faith reliance on it is not.

THE COURT: In this case because of this statute and because of *Licavoli* --

MR. SCHOEN: Yes, Your Honor.

THE COURT: -- right?

MS. VAUGHN: Yes.

THE COURT: I mean, it actually could be -- I know this is the same question I just asked. But if you had a different statute and a different mens rea, it might actually be -- not a defense. It would be a refutation of the government's attempt to prove the relevant mens rea, by whatever the standard is in that other statutory context.

MS. VAUGHN: For example, campaign finance statutes. The willfulness standard is knowledge that your conduct was generally unlawful.

THE COURT: Right. In a specific way even. Yes.

MS. VAUGHN: Yeah.

THE COURT: Okay.

MS. VAUGHN: And then Mr. Corcoran also said that there's no rule requiring the defendant to proffer evidence, which the government is objecting to. That's incorrect.

So Federal Rule of Evidence 104 says that the Court must decide preliminary issues of whether evidence is admissible. And Federal Rule of Evidence 103 says that the Court has to prevent inadmissible evidence from going to the jury, from being presented to the jury.

So obviously the government can just raise this objection again, but there's no rule allowing the defense to just surprise at trial with its evidence.

That's all we have.

THE COURT: Thank you.

MS. VAUGHN: Thank you, Your Honor.

THE COURT: Thank you, Ms. Vaughn.

MR. SCHOEN: Request I have less than one minute?

THE COURT: No.

MR. SCHOEN: Thirty seconds?

THE COURT: No.

MR. SCHOEN: Ten?

THE COURT: No.

MR. SCHOEN: Five?

THE COURT: No. I'm good.

MR. SCHOEN: Last offer.

THE COURT: I'm going to take a brief recess. I'm going to give you my thoughts on where I am on these issues. Okay?

DEPUTY CLERK: All rise. This Honorable Court now stands in recess.

(Break at 12:35 p.m. and resumed at 12:44 p.m.)

DEPUTY CLERK: We are now back on the record.

THE COURT: Thank you, Ms. Lesley.

Counsel, thank you for the argument this morning.

As I indicated, I took a short recess because I wanted to provide the parties with at least one decision and then some reasons on the way I'd like to proceed on some other issues.

So obviously we have five motions in front of us. Four go to evidentiary questions and one is the Defendant's Motion to Dismiss the Indictment or case; that's ECF-58. I'll take that motion up first. I'm going to deny that motion.

Before trial, a criminal defendant may move to dismiss a charge based on a "defect in the indictment." This is not an easy showing for any defendant to make. The key question is whether the allegations in the indictment, if proven, would permit a jury to find that the defendant committed the criminal offense charged. The Court is thus limited to analyzing the language in the indictment itself to see if it supports the counts charged by the grand jury.

Mr. Bannon first alleges that the Subpoena was not lawfully issued. He raises several arguments on this score, but each falls short at this stage at least.

First, Mr. Bannon argues that the composition of the Select Committee invalidates the Subpoena. As he notes, House Resolution 503, the resolution that authorized the Select Committee, provides that, "The Speaker shall appoint 13 members to the Select Committee, -- five of whom shall be appointed after consultation with the minority leader."

Mr. Bannon argues the Speaker rejected the nominees suggested by the minority leader, and the Committee has never operated with 13 members.

To begin, the Indictment states, And thus unless the grand jury concluded there was probable cause that Bannon was, "summoned as a witness by the authority of the U.S. House of Representatives to give testimony upon a matter under inquiry before a committee of the House." Thus, on its face, the -- indictment does allege, albeit implicitly, that the Select Committee was arranged under the authority of the House.

Even assuming the truth of Mr. Bannon's contention of there being less than 13 members of the Committee while, of course, those numbers are not in the indictment, the government at least does not dispute them. It is not a basis by which this Court can or will dismiss the indictment.

And that is not to say that the argument is unreasonable. Indeed, I agree with Judge Kelly, who recently dealt with similar arguments in another case that this is "not an unreasonable -- position," as Judge Kelly put it. But the Court cannot conclude, as a matter of law, that the Committee was invalidly constituted such that dismissal of the indictment is warranted.

As noted by Judge Kelly in his opinion, the use of the word "shall," although usually mandatory, can sometimes mean "should," "will" or even "may," as the Supreme Court stated in *Gutierrez de Martinez versus Lamagno*. Though

"shall" generally means "must," legal writers sometimes use or misuse "shall" to mean "should," "will" or even "may." That's a quote from the Supreme Court.

So the fact that House Resolution 503 uses the word "shall" is not conclusive to proving that 13 members are required for the Select Committee to lawfully operate.

And given this potential ambiguity, the Court agrees with Judge Kelly that it must give great weight to the interpretation of those House members charged with implementing the resolution and to the House itself.

This reading, the reading applied by the Speaker, appears to be that in the context of this resolution, and "the Committee shall" means "may or should"; that reading appears to have been ratified by the full House several times through the contempt resolution and prosecution referrals with respect to Mr. Bannon, the contempt resolution and referral from Mark Meadows, the contempt resolution and referral for Peter Navarro and the contempt resolution and referral for Dan Scavino.

As I've noted, this meaning of the word "shall" has been recognized in various opinions, including opinions of the Supreme Court, and there would be potential separation of powers issues, should this or any court reject a congressional interpretation of its own rule.

As the Court of Appeals as explained, "The

rulemaking clause of Article I clearly reserves to each House of Congress the authority to make its own rules. And judicial interpretation of an ambiguous House Rule runs the risk of the Court intruding into the sphere of influence reserved to the legislative branch under the Constitution." That's a quote from *Rostenkowski*. As such, the Court cannot conclude, as a matter of law, that the composition of the Select Committee renders the Subpoena invalid such that dismissal of the indictment is warranted.

Second, Mr. Bannon argues that the Select Committee exceeded its subpoena authority. He argues that the Select Committee violated rules that mandate consulting with the ranking minority member, as well as rules that require deponents to be issued protective rules in advance of testifying. Neither argument warrants dismissal of the indictment.

Mr. Bannon contends that "on its face, the indictment fails to allege that the Subpoena was issued to Mr. Bannon in compliance with the Subpoena authority granted to the Select Committee, which requires consultation with the ranking minority member."

True enough. That is true. And when assessing a Motion to Dismiss the Indictment, the Court is limited to the four corners of that document, as I've said, at least generally speaking.

But the indictment does state, and thus the grand jury concluded, that there was probable cause that Bannon was, "Summoned as a witness by the authority of the House -- of Representatives to give testimony upon a matter under inquiry before a Committee of the House."

Thus, again on its face, the indictment does allege, albeit implicitly, that the Subpoena was issued in compliance with the Subpoena authority granted to the Committee.

But even if the Court can consider whether the Select Committee exceeded its authority by not properly consulting with a ranking minority member, it would still be unable to accept Mr. Bannon's argument as a matter of law.

It is Mr. Bannon's position that ranking minority member is a well-defined legislative term, meaning a member designated by the minority party and responsible for protecting the rights of the minority party. Mr. Bannon argues that the Select Committee has no one in that position.

But the Committee does have a member of the minority party, Representative Liz Cheney, who serves as Vice Chair, and it appears that the House believes that the Select Committee's composition is consistent with this requirement as well, and thus that the Subpoena here was validly issued.

After all, the full House approved referring Mr. Bannon's alleged noncompliance to the Department of Justice for prosecution. And, again, it has reaffirmed this view several times in the cases of Mark Meadows, Peter Navarro and Dan Scavino.

One further note, Mr. Bannon suggests that the failure of the Committee to provide him with a copy of certain rules before he testified also mandates dismissal of the charges against him. But the rule that Mr. Bannon relies on states simply that "a witness shall not be required to testify unless the witness has been provided with" a copy of those rules.

The indictment alleges that Mr. Bannon never showed up to the deposition. Nothing in the rule cited by Mr. Bannon requires a copy of those rules to be provided along with the Subpoena itself or before showing up to the hearing. And in any event, once again, the full House appears to have ratified this conclusion. On this argument, again, I cannot conclude that as a matter of law the indictment is invalid.

Mr. Bannon also argues that the Subpoena was a misguided and unconstitutional effort to make an example of him. Specifically alleges that "the Subpoena was an unconstitutional attempt to usurp the executive branch's authority to enforce the law in an effort to impede

Mr. Bannon's First Amendment rights to association and free speech."

Mr. Bannon is correct that Congress' subpoena power is ancillary to its legislative authority. Thus, no congressional subpoena can be used to enforce laws or conduct criminal investigations; that would invade on the providence of the executive branch. But Mr. Bannon's incorrect when he faults the indictment for "failing to allege how the Subpoena issued to Mr. Bannon could validly inform legislation."

As I've already noted, when assessing a Motion to Dismiss the Indictment, I'm generally limited to the four corners of that document. And the Indictment (at Paragraphs 23 and 25) does state -- unless, again, the grand jury did conclude there was probable cause -- that Mr. Bannon had been subpoenaed to either give testimony or produce papers to "a matter under inquiry before a committee of the House."

To the extent more detail is necessary to meet the strictures of the Sixth Amendment, the Court would find it present: The legislative purposes of the Committee are detailed at length in Paragraphs, 2, 3, 4, 5 and 7 of the indictment. And as we know, the D.C. Circuit has already concluded that these are valid legislative purposes; that's the *Trump versus Thompson* case.

To the extent that Mr. Bannon alleges that there was no valid legislative purpose for his subpoena in particular, I cannot conclude that, as a matter of law, he is correct.

As the indictment quotes, the Select Committee's cover letter to the Subpoena detailed why it wished to talk to him. "The Select Committee has reason to believe that you have information relevant to understanding important activities that led to and informed the offense at the Capitol on January 6th, 2021. For example, you have been identified as being present at the Willard Hotel on January 5, 2021, during an effort to persuade members of Congress to block the certification of the election the next day and in relation to other activities on January 6th."

The Select Committee continued, "Moreover, you are quoted as saying on January 5, 1221 that 'all hell is going to break loose tomorrow.' Accordingly, the Select Committee seeks both documents and your deposition testimony regarding these and multiple other matters that are within the scope of the Select Committee's inquiry." Those statements are -- in the Indictment, Indictment Paragraph 7.

Thus, on its face, the Subpoena itself -- and then appears to have sought information on topics germane to the purposes identified by the Court of Appeals in the *Thompson* case, "Investigating the January 6th attack on the Capitol

and obtaining information to allow meaningful legislation", such as "passing laws imposing more serious criminal penalties on those who engage in violence to prevent the work of government institutions."

Finally, Mr. Bannon argues that Count 2 must be dismissed because the Select Committee lacks the power to compel the production of a privileged log or certification. Specifically, Mr. Bannon argues that no House Rule authorizes a committee to require subpoena recipient to create a privileged log of documents withheld or a written certification that a diligent search has been completed. And, Mr. Bannon argues, even if such a rule existed, it's application to a former presidential advisor asserting executive privilege would raise "serious separation of powers issues."

Fleshing this argument out, he notes that the Committee's instructions demanded specific details about the withheld materials that he believes are privileged, such as the "author, addressee and any other recipients", as well as the "recipient of the author and addressee to each other." Providing this information, he argues would reveal "significant information regarding confidential matters being contemplated by the President."

I disagree. Even if Mr. Bannon may have a basis for invoking executive privilege over certain of the

communications responsive to the Subpoena or may have had, listing the author and recipient of any information claimed to be privileged, that itself does not reveal any privileged material. That aside, the basis of this charge, Count 2, is Mr. Bannon's failure to comply with the document subpoena altogether.

The Committee alleges that he failed to supply any documents whatsoever. Thus, whether the Committee had the power to compel the privilege log does not really matter to the validity of this count. The basis of the charge is that Mr. Bannon failed to comply altogether, either by producing unprivileged documents or by providing a log of withheld documents that would not reveal privileged information. As with the other arguments, this argument does not provide, as a matter of law, a reason to dismiss Count 2.

Mr. Bannon's next category of objections -- this is really a different category -- about notice, entrapment or public authority all sound in Due Process. But in my view, none carries the day sufficient to warrant dismissal of this indictment.

At a minimum, Mr. Bannon is arguing that "OLC opinions are binding authoritative statements reflecting the official policy of the Department of Justice;" that those and other statements of DOJ policy provide that DOJ would not prosecute for contempt of Congress someone who has

declined to comply with a congressional subpoena in a situation like this one, and thus that this prosecution is barred by the doctrines of due process/fair notice or entrapment by estoppel, actual public authority and apparent public authority. But on the record before me, none of those doctrines requires or supports dismissal of the indictment.

Each of these arguments is an affirmative defense. And assuming, for the sake of argument, that the OLC opinions and other department documents on which Mr. Bannon relies, represent the kinds of government actions that could establish the foundation of one or more of these defenses. And I do know that the government appears to have conceded today that OLC opinion would count at least for the entrapment by estoppel defense, that each of these defenses really rests on two predicates: First, that the OLC opinions and other department statements on which Mr. Bannon relies are clearly applicable to the situation here; and second, that the former President unequivocally invoked executive privilege over Mr. Bannon's testimony and records. But neither can be established, in my view, at least not at this stage.

As for the first predicate, none of the documents that Mr. Bannon has pointed to concern a congressional subpoena seeking communications between a nongovernmental

employee and a President who, at the time of the Subpoena, was no longer in office and had not clearly directed the Subpoena recipient to decline to comply altogether.

As I'll discuss in a second, that latter point is a disputed question and thus, for purposes of the Motion to Dismiss the Indictment, I cannot assume such direction occurred. To be sure certain lessons might be drawn from the OLC opinions but is more than a stretch that they, as a matter of law, address this specific situation such that dismissal is warranted. Instead, none involve the exact situation presented here.

Now, let's take the second predicate. At this stage there is, as far as I can tell, factual question as to whether former President Trump unequivocally directed Mr. Bannon not to comply with the Subpoena and/or unequivocally invoked executive privilege.

The letters from President Trump's counsel, on which Mr. Bannon relies, instructed Mr. Bannon to, (a) -- and this is a quote -- "(a) where appropriate, invoke any immunities and privileges you may have from compelled testimony, the Subpoena; (b) not produce any documents concerning privileged material in response to the Subpoena; and (c), not provide any testimony concerning privileged material in response to the Subpoena."

President Trump's counsel later clarified in an

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

Nothing in these letters unambiguously instructed Mr. Bannon not to produce any documents whatsoever or not to appear at all, did not assert privilege over -- nothing in these letters asserted privilege over particular documents. And beyond that, the letters do not reflect, in my view, an unambiguous invocation of executive privilege. At a minimum, this appears to be a jury question, which I'll discuss in a second.

And, of course, there are topics covered by the Subpoena that might not have required the production of any privileged information at all or testimony about any privileged information at all. There is thus an open question at this stage of the proceedings over the extent to which and over what executive privilege was even invoked.

On account of both of these shortcomings, none of Mr. Bannon's due process entrapment by estoppel public authority arguments warrants dismissal of the indictment.

Another category of objections raised by Mr. Bannon is 2 U.S. Code, Section 192. The statute here is unconstitutional as applied to the facts of this case. I

disagree. This argument is based on the Court's previous decision granting the government's Motion in Limine regarding advice of counsel; that's ECF-29.

As I made clear at the time, that decision was inescapable in light of the D.C. Circuit's binding decision in *Licavoli*, which we discussed again today. I noted in my prior decision that I have serious questions as to whether *Licavoli* correctly interpreted the mens rea requirement of "willfully", but it nevertheless remains binding authority. Mr. Bannon has certainly preserved his arguments as to why that case should be overruled.

In light of my prior decision, however, Mr. Bannon argues that this prosecution here is unconstitutional as applied to him because it violates the separation of powers doctrine, is unconstitutionally overbroad by criminalizing lawful conduct such as noncompliance, based on the invocation of executive privilege and reliance on OLC opinions is void for vagueness, and unconstitutionally prohibits Mr. Bannon from telling the entire story of his case. I'll address each argument in turn.

First, in what is essentially an attempt to relitigate *Licavoli*, again, Mr. Bannon argues that the Court's interpretation of Section 192 renders Section 193 "nothing more than surplusage." That section, Section 193, provides that a witness cannot ignore a subpoena "upon the

ground that is testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." To the extent that Mr. Bannon seeks to preserve this argument, he has. But nothing about it allows me to ignore binding D.C. Circuit precedent.

Second, Mr. Bannon argues that Section 192, as applied to him, violates the "constitutional separation of powers doctrine." Specifically, Mr. Bannon argues that this Court's prior decision about the Motion in Limine "makes the indication of executive privilege by the former President of the United States and its associated directive to Mr. Bannon not to comply with the Subpoena based on executive privilege legally irrelevant." This, he claims, "gives Congress a veto over a President's invocation of privilege."

In my view though, this is, again, nothing more than an attempt to relitigate *Licavoli*, which I cannot do or reconsider it. I have no power to reconsider that decision. The argument also assumes what is, at this --, hardly an undisputed fact that former President Trump directed Mr. Bannon to act in response to the Subpoena in the way he did.

Despite putting it under the heading of "Section 192 as applied by its separation of powers doctrine", Mr. Bannon does also argue that, I believe, "Section 194 is unconstitutional as applied." And this is at ECF-58, at 44.

But, again, it appears that where we are talking about Section 194, 192, this argument is based on Mr. Bannon's belief that the statute abrogates prosecutorial discretion.

I don't believe that that is the case here. There is nothing that I've seen that would suggest that the statute here abrogates prosecutorial discretion whatsoever.

Mr. Bannon also argues the statute as applied is unconstitutionally overbroad and void for -- vagueness. I don't see it that way. As Justice Gorsuch has explained, vague laws invite arbitrary power. There is nothing vague about Section 192.

And, indeed, Mr. Bannon's do not sound in vagueness, not really. A vagueness challenge targets the language of the statute. Mr. Bannon's argument is that, in light of the OLC opinions, the statute does not give constitutionally sufficient notice of what conduct works for a person so situated to criminal liability.

I've already addressed most of this argument already. But that the DOJ will decline to prosecute certain executive branch employees in certain situations does not make the language of Section 192 any less clear. The statute applies broadly and does so here.

As Mr. Bannon also argues that, "the statute is also void for vagueness because the key phrase 'willfully makes default' gives insufficient notice as to what

constitutes a default in light of the long line of authority it raises to a constitutional level, the imperative that Congress and the executive branches must work toward an accommodation in situations like the one presented here." But none of this, in my view, goes to show why the word "default" is unconstitutionally vague.

As for overbreadth, Mr. Bannon argues that the holding in *Licavoli* means that Section 192, "includes within its ambit fully legal and constitutionally protected conduct -- noncompliance based on the invocation of Executive Privilege and reliance on the OLC opinions." But that is not what the prior Court's ruling addressed. Rather, I merely held Mr. Bannon, based on *Licavoli*, cannot testify as to advice of counsel or erroneous belief that his conduct was excused under the law.

The final argument raised by Mr. Bannon is that, "prosecutorial overreaching requires dismissal of the indictment." Specifically, Mr. Bannon argues that the government's targeting of his counsel, Mr. Costello, for certain information requires dismissal of the charges against him. I do not see this argument as a valid basis for dismissing the charges against Mr. Bannon, and I will not use my sanctions authority to do so.

I do continue to have serious issues with how the government treated the situation of Mr. Bannon's counsel and

also how the government does not appear to have any issue with its conduct. But, in my view, those issues are better left to be addressed at a later date after trial.

In particular, I do not conclude that Mr. Bannon has made the showing necessary that he was prejudiced by this conduct, such that dismissal is warranted. Relatedly, Mr. Bannon also argues that the government mislead the grand jury, also requiring dismissal. But Mr. Bannon has made no attempt to prove that these alleged errors prejudiced him in any way and, as Courts in this district have found, that is a fatal flaw. For all of these reasons, then, I will deny Mr. Bannon's Motion to Dismiss the Indictment.

But, as everyone knows, there are also four other Motions in Limine pending before me. I will be taking each of these motions under advisement. I don't think I need to repeat the motions that we have in front of us from the government. Everyone understands that these are ECFs 52, 53 and 54.

The problem is, as I discussed with government counsel, I have not yet decided exactly what the jury instructions will look like for this offense. Obviously, I have already held, as required by *Licavoli*, that Mr. Bannon cannot rely on or introduce evidence relating to advice he received from his counsel. But I have not yet decided, because we are not at the point yet where the parties have

proposed or litigated what the specific jury instructions will be for either the mens rea, willfully or actus reus/no default elements of the charged offenses.

I have also not yet decided what, if any, jury instructions might be permissible on the various affirmative defenses that Mr. Bannon has identified. In my view, while I think there are serious -- there are many reasons to think that the entrapment by estoppel defense would not result in the introduction of this evidence and, in particular, I'm talking about the Department of Justice's opinions and writings, it is at least possible that some of this evidence can go to whether Mr. Bannon acted willfully or whether Mr. Bannon made default, and again perhaps even an affirmative defense.

Until I hear from the parties about the specific jury instructions on these topics and decide what those instructions will say, it seems to me premature to resolve whether any of this evidence might be relevant.

I know -- I understand that while the scheduling order did require any Motions to Exclude Evidence to be briefed on the schedule we have in front of us, other Motions in Limine generally will not be fully briefed until July 8th, it is my intention to handle those Motions in Limine, together with the ones that are pending now, together with the parties' Proposed Jury Instructions, which

are due on July 11th.

I am not stating that the jury instructions will permit the evidence that we've been talking about today, but what I am stating is that I am not prepared to hold that evidence is altogether excluded because it may be that, notwithstanding *Licavoli*, that there is a jury instruction that would put either evidence relating to the OLC opinions and writings or Mr. Bannon's prior experience with subpoenas at issue and relevant for the trial here. So I am taking those motions under advisement to be resolved in connection with the jury instructions.

And as for Mr. Bannon's motion, ECF No. 56, which seeks to exclude evidence relating to Mr. Costello, I find it highly unlikely that the toll record information will be relevant here; and presenting that evidence would, I think, cause significant concerns for me.

I know the government hasn't had to say whether it intends to do so, but I would very much signal my disinclination to have that evidence come in here. But at the time that Mr. Costello was engaged with the Committee, he was acting on Mr. Bannon's behalf, and his communications with the Committee may be relevant.

He did not know at the time that the government had taken these steps, and he knowingly and intentionally engaged with the Committee. So I am not -- I'm not deciding

this question either, but it seems to me that that evidence is different and, assuming the government or, frankly, Mr. Bannon makes a showing that that evidence should come in, it probably will come in. And I'm reserving that question as well for resolution closer to trial in light of the jury instructions and any other Motions in Limine that will be filed as we get there.

So the bottom line is the Motion to Dismiss the Indictment is denied. The Motions in Limine are all taken under advisement for consideration in the way I've indicated.

I do think it is very relevant to me, in thinking about all of these evidentiary questions, to know exactly what or to attempt to know exactly what the jury will be instructed about the various elements of this offense. The schedule puts that question, the Proposed Jury Instructions, somewhat late relative to all of this other briefing.

So what I would like to hear from the parties is their view about whether we should modify the schedule in light of where I am. I realize both parties may think I should have decided all of these issues now. But in light of the fact that I would like not to and to think about these issues in light of the jury instructions, what do the parties think about modifying the schedule to essentially move up either to parallel the next Motions in Limine stage

or at least to make, earlier, the Proposed Jury Instructions and litigation over them?

Ms. Vaughn, do you have a view on that?

MS. VAUGHN: Your Honor, the government would be happy to move up the deadline for filing the parties' Proposed Jury Instructions. Perhaps we could leave the voir dire and things like that for the original deadline --

THE COURT: Yes.

MS. VAUGHN: -- and then --

THE COURT: Yes. It seems to me -- we may have a bunch of fights over voir dire, but that's really --

MS. VAUGHN: Yes.

THE COURT: -- that's going to be about questions that go to the jury and the like. It's not an evidentiary question. To try to put more framework about what is or is not in the case, it seems to me that I need to decide on the elements in particular of the -- what are the elements specifically and what are the jury instructions from each parties' view on those elements?

And I would like to decide those issues in tandem with the evidentiary questions because, again, hypothetically, if I think the jury instruction on mens rea is more capacious than the government thinks, then some of this evidence may be irrelevant. I know you have a different view.

MS. VAUGHN: The government would be happy to resolve the jury instructions first and then file Motions in Limine shortly thereafter.

THE COURT: And when do you think you could --

What I typically like to have happen is for the jury instructions, because some of them will likely be undisputed altogether, I would like the parties to have at least a period of meeting and conferring around the jury instructions -- is typically how I contemplate -- and then to essentially file their competing views.

By when do you think the parties could engage in -- so let's just sort of take jury instructions out of the current standing order and say, Parties shall exchange their instructions, shall meet and confer, shall lodge their respective views and arguments about disputed ones.

How long do you think you need for that?

MS. VAUGHN: I think we could probably do that in about a week and a half, get the proposal to the Court.

THE COURT: And that would -- so that would be -- that would mean you would have to get to opposing counsel your proposal. They'd have to respond. You'd have to have a meet and confer and then you'd be prepared to file something in roughly a week and a half?

MS. VAUGHN: That's right. Monday the 27th, I think, might be a good date.

THE COURT: Okay. Let me hear from Mr. Corcoran -- or I didn't mean to assume it was Mr. Corcoran.

MS. VAUGHN: Could I ask one question --

THE COURT: Yes.

MS. VAUGHN: -- to clarify the Court's order? When you were talking about Mr. Costello and the admissibility of communications between him, I think the Court said between him and the Committee. Did the Court mean between him and the government?

THE COURT: I apologize. I didn't mean to make it just the Committee.

MS. VAUGHN: Okay.

THE COURT: And to be very technical about it, I am taking that motion entirely under advisement. I was basically giving you my general thoughts, which are the toll records. Everything that was received in response to those government actions, seem to me -- I am going to be very disinclined to allow that to come in. But the other stuff, his statements to the government, generally, I think of those in a different category.

MS. VAUGHN: Thank you, Your Honor.

THE COURT: That's really all I meant to say.

Mr. Schoen, I'm sorry. I didn't mean to assume it was Mr. Corcoran.

MR. SCHOEN: Age before beauty, Judge.

Judge, I think maybe something like June 30th, -- for the jury instructions. I want to be clear, though, I'm not sure that I understand the premise. Our jury instructions on entrapment by estoppel and all that aren't based on the mens rea. It's a due process defense.

THE COURT: I understand that.

So in my view, you proposed -- -- have defenses, entrapment by estoppel, but it also seems to me that there is an argument that either the OLC opinions and/or Mr. Bannon's prior experience with subpoenas go to mens rea here. A Motion in Limine excludes that evidence altogether from the case on any theory.

And when I think about these questions, I want to understand not only the defenses that you've talked about, but also what the parties believe the mens rea instructions will be.

MR. SCHOEN: Okay.

And in formulating the instructions, is the Court's order, the original order, barring Mr. Costello from testifying as to reliance, reasonableness of reliance, the reasonableness question on entrapment by estoppel?

THE COURT: It's a very complicated question.

So, first of all, I think -- I have not resolved that question. You need to -- as I said, I am pretty

disinclined to think that there is a legitimate entrapment by estoppel defense here. I don't have to resolve that, because all I've done is deny the Motion to Dismiss the Indictment on that ground.

But I think what the parties need to do is, they need to provide me with their jury instructions on, for example, what that defense would be. And I will then, once I've resolved what, if any, the jury instructions on those questions will be, I will also decide whether and to what extent the evidence is going to be permitted at trial.

MR. SCHOEN: All right.

Then I think, Your Honor, we would like to at least make a proffer as to what our evidence would be. If the Court is going to deny entrapment by estoppel defense, I want a very clear record on what our defense would have been on that, what the belief was, why the belief was reasonable, and so on. I suppose we need to make a proffer then, if the Court's inclined.

Are you considering not allowing entrapment by estoppel defense in this case?

THE COURT: Well, I mean the parties have briefed that defense substantially.

MR. SCHOEN: Yeah.

THE COURT: The only thing I had before me on the Motion to Dismiss the Indictment is whether the motion could

be granted. A dismissal of the Indictment was warranted as a matter of law.

I am holding, for my consideration in light of the jury instructions, whether some or all evidence relating to OLC opinions is in or out. I don't have the jury instructions on the entrapment by estoppel defense. I don't have it on mens rea. I want to consider all of those questions here together.

I could have granted the government's motion today if I had thought it was warranted. I am just taking that question under advisement.

MR. SCHOEN: I understand.

THE COURT: Fair enough?

So, pure scheduling: June 30th, you believe -- not working with the government -- but that the parties could exchange materials and be in a position to file by June 30th their respective views on the appropriate jury instructions in this case?

MR. SCHOEN: I'm only saying that because the Court has indicated it feels it needs to move on a faster track. We also have many other obligations to other courts and all that. So I'm trying to just accommodate what the Court has indicated what, you know, its needs are.

I want to be clear, so the Court doesn't feel that somehow, you know, we've done something not contemplated.

There is a chance that we are going to file a motion to move the trial date because of -- for example, every day we're seeing on the television press conferences held by Ms. Schiff and Raskin and this one and the other one, about the importance of criminal charges here, and all sorts of things exposing what happened, and things that exactly the *Mazars* case said are not proper legislative purposes.

We need to make a record on all of those things, and the news is coming out day by day. So I don't want to leave here and then we decide we have to make a motion to continue the trial date and the Court says, wait a minute, you didn't ask for that --

THE COURT: No, I appreciate that. I imagine the government will oppose it, and I will take it up.

MR. SCHOEN: Yes, Your Honor.

THE COURT: This is -- I should say, I appreciate your saying it so that I know that it's potentially coming. I don't think I need to hear from the government on what its views will be. It will see the motion.

I do think it would be appropriate for you to let -- just give the government a heads up about when the motion is coming and perhaps work out a briefing schedule if you can.

MR. SCHOEN: Of course, Your Honor.

THE COURT: Thank you.

So, Ms. Vaughn, do you have anything to say or are you okay?

MS. VAUGHN: Well, we were just thinking more about how the Motions in Limine schedule would fit with all of this.

THE COURT: Yeah.

MS. VAUGHN: Just to fit it all in, we think waiting until the 30th might make it difficult to get all of the briefing done. So we could also file our Proposed Jury Instructions and our Motions in Limine together on the 27th, file Oppositions by July 5th, Replies, I guess, by the 11th and then our final pretrial hearing on the 13th.

I don't know if that's compressing it too -- I mean, we could -- I understand we're all busy, but we can make that work.

THE COURT: Absolutely.

The only thing I really care about, for my purposes -- I don't mean to say I don't care about these. What I want to do -- really, the only thing I really feel the need to do, is to have the portion of what would have been filed on July 7th, the jury instructions --

MS. VAUGHN: Uh-huh.

THE COURT: -- essentially shift that earlier so that it doesn't come at the tailend, when that's the part of this that I really feel like I need to have.

MS. VAUGHN: Okay.

THE COURT: But I don't have a magic date in mind. I just want -- it seems to me that July 11th is just on the late side, given all the other filings that will have had happened, and the fact that I would like to have those when I take up all these evidentiary issues.

MS. VAUGHN: Okay.

THE COURT: So, with that, it seems to me that June 30th is acceptable, because that gets me those materials eight days, approximately, before these other Motions in Limine are fully briefed. Obviously, the ones that have already been briefed, I can consider them altogether.

MS. VAUGHN: Okay.

THE COURT: So let's do this then: The pretrial order -- I suppose we could modify this, but the portion of Paragraph 7 that requires the submission of the Proposed Jury Instructions to be done on July 11th, we'll just change that to June 30th; that's the only modification. Okay?

MS. VAUGHN: Thanks, Your Honor.

THE COURT: Okay. Thank you, Counsel.

DEPUTY CLERK: All rise.

(Proceedings concluded at 1:25 p.m.)

C E R T I F I C A T E

I, **Lorraine T. Herman, Official Court Reporter,** certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

June 16, 2022
Date

/s/
Lorraine T. Herman