[ORAL ARGUMENT TO BE HELD NOVEMBER 30]

No. 21-5254

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP, in his capacity as the 45th President of the United States,

Plaintiff-Appellant,

v.

BENNIE G. THOMPSON, in his official capacity as Chairman of the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR EXECUTIVE BRANCH DEFENDANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-Appellant is Donald J. Trump, former President of the United States.

Defendants-Appellees are Bennie G. Thompson, Chairman of the Select Committee to Investigate the January 6th Attack on the United States Capitol, United States House of Representatives; Select Committee to Investigate the January 6th Attack on the United States Capitol, United States House of Representatives; David Ferriero, in his official capacity as Archivist of the United States; and National Archives and Records Administration.

The following parties participated as amicus curiae in the district court: Government Information Watch, Government Accountability Project, National Security Counselors, Jason R. Baron, Norman Eisen, Heidi Kitrosser, Mark J. Rozell, Mitchell A. Sollenberger, Louis Fisher, and 66 former members of Congress.

B. Rulings Under Review

Appellant seeks review of (1) the Memorandum Opinion entered on November 9, 2021, by the United States District Court for the District of Columbia (Chutkan, J.), which is available at 2021 WL 5218398; and (2) the Order Denying Appellant's Motion for a Preliminary Injunction entered on November 9, 2021, by the United States District Court for the District of Columbia (Chutkan, J.).

C. Related Cases

This case has not previously been before this Court. Undersigned counsel is unaware of any related cases within the meaning of the Circuit Rule 28(a)(1)(c).

/s/ Gerard Sinzdak
Gerard Sinzdak

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GLOSSARY

AOB	Appellant's Opening Brief
Committee or Select Committee	Select Committee to Investigate the January 6th Attack on the United States Capitol, United States House of Representatives
JA	Joint Appendix
NARA	National Archives and Records Administration
PRA	Presidential Records Act

INTRODUCTION

A House Committee investigating the unprecedented attack on the Capitol that occurred on January 6, 2021, has asked the Archivist of the United States to grant it access to Presidential records bearing on that investigation. After careful consideration and in light of the extraordinary events of January 6, President Biden concluded that granting the Committee access to certain of those requested records is in the best interests of the United States and that an assertion of executive privilege therefore is not justified. Former President Trump, however, filed suit seeking to block the Committee from accessing those records. The district court denied his request for a preliminary injunction after concluding that he could satisfy none of the factors justifying such relief. That decision should be affirmed.

Much of the former President's request for an injunction turns on his claim that the records at issue are protected by executive privilege, such that providing them to the Committee would irreparably harm the Executive Branch and, by extension, the public. But President Biden—the official best positioned to make those assessments—has concluded that an assertion of executive privilege over the relevant records, which would

shield them from disclosure to the Committee, is not in the interest of the Nation. Under governing precedent and established separation-of-powers principles, President Biden's assessment must, at a minimum, be given greater weight than that of the former President. *Nixon v. GSA*, 433 U.S. 425, 449 (1977). While there may be rare circumstances in which it would be appropriate for a federal court to take the extraordinary step of overruling an incumbent President's affirmative decision not to assert executive privilege over particular records, such circumstances are plainly not present here. The exceptional events of January 6 provide ample justification for declining to assert the privilege over the records at issue.

The former President's additional, sweeping challenge to the Select Committee's authority to request the records is also without merit. Under *Nixon v. GSA*, a former President has only a limited ability to assert the presidential communications privilege on behalf of the Executive Branch with respect to records created during the former President's term of office. But even if the former President could bring a broader challenge, the Select Committee's request furthers a legitimate legislative inquiry into an attack directed at Congress itself. And given, among other things, the former President's active participation in the rally that immediately preceded the

January 6 attack, the Committee reasonably sought records from the White House to advance its investigation. The former President's insistence that the Select Committee's request is overbroad is both immaterial to this appeal (which concerns only a discrete, identified set of records) and unavailing in light of President Biden's conclusion that responding to the request will not unduly burden the Executive Branch.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's subject matter jurisdiction under 28 U.S.C. § 1331 and 44 U.S.C. § 2204(e), asserting claims under the Constitution, the Presidential Records Act, and implementing regulations. Joint Appendix (JA) 29. On November 9, 2021, the district court entered an order denying plaintiff's motion for a preliminary injunction. JA 216. Plaintiff filed a timely notice of appeal on November 9, 2021. JA 217. This court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in denying President Trump's motion for a preliminary injunction that would bar the Archivist from granting access to a specific set of Presidential records to a House

Select Committee investigating the facts and circumstances surrounding the January 6 attack on the Capitol.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Presidential Records Act (PRA) establishes a framework for preserving, retaining, and accessing Presidential records. The Act requires the President to "take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records." 44 U.S.C. § 2203(a). These records do not belong to the President; rather, the United States has "complete ownership" of them. *Id.* § 2202. Upon the completion of a President's final term in office, "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." *Id.* § 2203(g)(1). This transfer of

legal custody occurs automatically as a matter of law; neither the incumbent nor the former President has the authority to waive or forbid it.

Although the PRA generally requires the Archivist to provide public access to Presidential records within five years of acquiring custody, an outgoing President may restrict access to certain categories of records for up to 12 years after the end of the President's final term. *See* 44 U.S.C. § 2204(a), (b)(2). Even during the period of restricted access, however, Presidential records are made available in certain circumstances. *See id.* § 2205. As relevant here, all Presidential records, including those designated as restricted, shall generally be made available on request "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available." *Id.* § 2205(2)(C). Upon receipt of such a request, the Archivist must provide written notice to the incumbent President and the relevant former President in sufficient detail to allow any appropriate assertion of executive privilege. 36 C.F.R. § 1270.44(c); *see also* Exec. Order No. 13,489, § 2 (Jan. 21, 2009). If within 30 days the Archivist does not

receive notice of an assertion of executive privilege, the documents may be released. Exec. Order No. 13,489, § 2.

If a former President asserts a claim of executive privilege, the Archivist consults with the incumbent President "to determine whether the incumbent President will uphold the claim." 36 C.F.R. § 1270.44(f)(1). If the incumbent President does not uphold the claim asserted by the former President or does not make a determination regarding the former President's assertion within the allotted time period, the Archivist discloses the Presidential record unless a court order directs the Archivist to withhold it. *Id.* § 1270.44(f)(3); *see also* Exec. Order No. 13,489, §4(b). If the sitting President upholds the former President's assertion of privilege, the Archivist may not release the records absent a court order. 36 C.F.R. § 1270.44(f)(2). The PRA authorizes a former President to bring an action in federal court challenging the Archivist's decision to release the documents notwithstanding his privilege claim. *See* 44 U.S.C. § 2204(e); *see also* 36 C.F.R. § 1270.44(f)(3).[1]

[1] Section 2208 establishes a similar procedure for consultation with the former and incumbent Presidents prior to a release of Presidential records "to the public." 44 U.S.C. § 2204(a)(1). Because this provision

B. Factual Background

1. On January 6, 2021, Congress convened a Joint Session for the purpose of certifying the results of the Electoral College vote on the 2020 Presidential Election. JA 179-80. On the morning of January 6, supporters of then-President Trump attended a self-described "Save America" rally on The Ellipse, just south of the White House. JA 180. The former President spoke at length at the rally. *Id.* During his remarks, President Trump reiterated his unsupported claim that the Presidential election had been "stolen" and urged protesters to "walk down to the Capitol" to "give them the kind of pride and boldness that they need to take back our country" and to "fight like hell" because "you'll never take back our country with weakness." *Id.*

Shortly after the President's remarks, as the Joint Session of Congress began its work, a large crowd—which included individuals wearing military-style gear and carrying weapons—amassed outside the Capitol Building's perimeter. Staff Rep. of S. Comm. on Homeland Sec. & Governmental Affairs & S. Comm. on Rules & Admin., 117th Cong.,

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applies only to a public release, it is not applicable to the Select Committee's request.

Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, at 23, 28-29 (June 8, 2021) (HSGAC Report). The crowd surged towards the Capitol Building, overwhelming law enforcement officers who were attempting to maintain order. *Id.* at 24-25. Members of the crowd eventually breached the Capitol Building, smashing windows and propping open doors through which a stream of rioters entered. *Id.* The rioting forced the Joint Session to halt its proceeding and required the evacuation of members of the House and Senate, including the Vice President. *Id.* at 25-26.

These events "marked the most significant breach of the Capitol in over 200 years." HSGAC Report 21. The attack "resulted in multiple deaths, physical harm to over 140 members of law enforcement, and terror and trauma among [congressional] staff, institutional employees, press and Members." H.R. Res. 503, 117th Cong. 1 (2021). The riot also damaged or destroyed elements of the Capitol Building's infrastructure, including "precious artwork," "[s]tatutes, murals, historic benches and original shutters." *Hearing on Health and Wellness of Employees and State of Damage and Preservation as a Result of January 6, 2021 Before the Subcomm. on the Legis.*

Branch of the H. Comm. on Appropriations 1 (Feb. 24, 2021) (statement of the Hon. J. Brett Blanton).

2. In June 2021, the House voted to establish a Select Committee to "investigate and report upon the facts, circumstances, and causes" of the January 6 attack. H.R. Res. 503, § 3. To that end, H.R. Res. 503 authorizes the Select Committee to inquire into a range of matters relevant to January 6, including "dissemination and information sharing among the branches and other instrumentalities of government," *id.* § 4(a)(1)(A); "how technology, including online platforms, . . . may have factored into the motivation, organization, and execution" of the January 6 attack, *id.* § 4(a)(1)(B); and the federal government's "structure, coordination, operational plans, policies, and procedures, . . . particularly with respect to detecting, preventing, preparing for, and responding to" the January 6 attack, *id.* § 4(a)(2)(B). The Committee is tasked with producing a report, *id.* § 4(a)(3), identifying "changes in law, policy, procedures, rules, or regulations that could be taken" to "prevent future acts of violence . . . targeted at American democratic institutions"; to "improve the security posture of the United States Capitol Complex"; and "to strengthen the

security and resilience of the United States and American democratic institutions," *id.* § 4(c).

3. On August 25, 2021, the Select Committee submitted a request to the Archivist for access to Presidential records it believes are relevant to its investigation. *See* JA 33-44. The Select Committee's request sought materials relating to the events of January 6, 2021, including all White House documents, videos, photographs, and communications from January 6, 2021, relating to President Trump's remarks, the rally, the march on the Capitol and subsequent violence, the Joint Session, and the White House's response. *See* JA 34-36. The Committee also requested access to January 6, 2021 White House visitor and call logs, as well as schedule and meeting information for various White House officials on that date. *Id.* The Committee's request further sought materials from specified timeframes within 2020 and 2021 related to any planning by the White House and others regarding the January 6 electoral count; preparations for rallies leading up to the January 6 attack; information President Trump received regarding the election outcome; and President Trump's public remarks regarding the election outcome and the validity of the election system more broadly. JA 36-42. Finally, for a specified timeframe

surrounding the 2020 election, the request sought documents and communications of the President and certain of his advisors relating to the transfer of power and obligation to follow the rule of law. JA 42-44.

The Archivist has thus far identified four tranches of Presidential records responsive to the Committee's request and has notified the incumbent and former Presidents of his intent to provide access to the records. On August 30, 2021, the Archivist notified President Trump of his intent to provide the Committee with access to the first tranche of records, consisting of 136 pages, of which seven pages were withdrawn as non-responsive upon further review. JA 125, 154.

On October 8, 2021, President Biden informed the Archivist that "an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the documents" in the first tranche. JA 157. In the President's view, given the "extraordinary events" that occurred on January 6, both the public and Congress had a "compelling need" to understand the circumstances that led to the events of that day and "to ensure nothing similar ever happens again." *Id.* The President further emphasized that the conduct of the President's activities under investigation "extends far beyond typical deliberations concerning

the proper discharge of the President's constitutional responsibilities." *Id.* And he stressed that it was not appropriate to deploy the "constitutional protections of executive privilege . . . to shield, from Congress or the public, information" bearing on "a clear and apparent effort to subvert the Constitution itself." *Id.*

Later that day, the former President informed the Archivist that he was asserting executive privilege over 39 pages of the records in the first tranche. JA 154-55. The former President further notified the Archivist that he was making a "protective assertion of constitutionally based privilege" over all additional records the Archivist might identify. *Id.*

Also on October 8, President Biden notified the Archivist that he would not uphold the former President's assertion of executive privilege, repeating his earlier determination that "an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to any of the documents" in the first tranche. JA 160. President Biden also instructed the Archivist to provide the records in the first tranche that former President Trump identified as privileged to the Committee on November 12, 2021. *Id.*; *see also* JA 162.

In mid-September, the Archivist notified the incumbent and former Presidents that he had identified two additional sets of responsive records, totaling 888 pages. JA 127-128, 165-176. During the review period, the Select Committee agreed to defer its request for fifty pages of records and another three pages were withdrawn from the notification after the National Archives and Records Administration (NARA) determined they were not Presidential records. JA 174. At the conclusion of the review period, the former President asserted executive privilege over 724 of those pages, JA 165-171, and President Biden again declined to uphold the privilege assertion, citing the same reasons he had given as to the first tranche. JA 173-74. The President instructed the Archivist to grant the Committee access to those records on November 26, 2021. JA 174; *see also* JA 176.

On October 15, 2021, the Archivist notified the former President that he intended to provide the Committee with access to a fourth set of records totaling 551 pages. Although the former President and the incumbent President have made determinations regarding certain of these records, review of most of the records remains ongoing. *See* https://www.archives.gov/foia/january-6-committee (providing relevant

correspondence). The Archivist anticipates further notifications on a rolling basis as he identifies records responsive to the Select Committee's request. JA 186-87.

C. Prior Proceedings

1. On October 18, 2021, the former President filed this suit, "in his official capacity as a former President," seeking an injunction barring the Archivist and the NARA from providing access to any Presidential records that are or may be privileged. One day later, the former President filed a motion for a preliminary injunction, arguing that (1) some of the records identified by the Archivist are subject to executive privilege and may not be provided to the Select Committee; and (2) the Select Committee lacks the legal authority to request any Presidential records. He further asserted that an injunction was necessary to avoid irreparable harm to the "Republic and . . . future Presidential administrations" from granting the Committee access to the requested records. Dkt. No. 5-1, at 5-6. And he claimed that the balance of equites and public interest favored an injunction barring disclosure of "privileged" and "confidential" Executive Branch materials to "a rival branch of government." *Id.* at 6-7.

The district court denied the motion, concluding that the former President had established none of the factors that must be present for a court to order preliminary injunctive relief. Regarding the merits, the court concluded that the former President was unlikely to prevail on his claim that executive privilege barred the Archivist from providing access to the records. JA 189-96. The court recognized that executive privilege protects the Executive Branch's interests as an "institution" and not "the President personally." JA 194. Citing *Nixon v. GSA*, 433 U.S. 425, 449 (1977), the court explained that where there is a dispute between the former and incumbent Presidents regarding whether to assert the presidential communications privilege, "the incumbent's view is accorded greater weight." JA 193. The court reasoned that the "incumbent President—not a former President—is best positioned to evaluate the long-term interests of the executive branch and to balance the benefits of disclosure against any effect on the ability of future executive branch advisors to provide full and frank advice." JA 189; *see also* JA 194-95. Accordingly, the court concluded that in the circumstances of this case President Biden's decision not to assert the privilege controlled over former President Trump's assertion of

the privilege, and executive privilege thus did not bar the Archivist from providing access to the documents. JA 196.

The district court further concluded that President Trump was not likely to succeed in establishing that the Select Committee acted beyond its legal authority in requesting the records. JA 199-202. The court found that the Committee's request served a valid legislative purpose, as the request concerned "multiple subjects" on which legislation could be had, including legislation designed to safeguard the security and integrity of our electoral process. JA 204-05. The court also rejected the former President's claim that the Select Committee's request was overly broad. JA 206-08. Among other things, the court emphasized that President Biden's conclusion that the records should be provided to the Committee alleviated any concerns about the breadth of the request. JA 207-08. And, although the court expressed doubt that the heightened standard of scrutiny the Supreme Court applied to a congressional request for the sitting President's personal records in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), applied to the different circumstances presented here, the court concluded that the Select Committee's request nonetheless satisfied that standard. JA 208-12.

Turning to the remaining injunction factors, the district court rejected the former President's claim that he would be irreparably harmed absent a preliminary injunction. The court emphasized that the former President—who has sued solely in his official capacity as the 45th President—had identified "no cognizable injury to privacy, property, or otherwise" that he would personally suffer if the records were produced. JA 212-13. And it found the former President's allegation that the Executive Branch would suffer irreparable injury "unavailing" given the sitting President's implicit determination that providing access to the records would not cause the Executive such harm. *Id.* The court additionally determined that the balance of equities and the public interest weighed against an injunction given the "unsurpassed public importance" of the Committee's investigation into the events of January 6 and the public's interest in the resolution of that investigation without undue delay. JA 214-15.

2. On November 11, 2021, this Court granted the former President's request for an administrative injunction barring disclosure of the records over which the former President has asserted executive privilege while this Court considers the merits of his appeal on an expedited basis.

SUMMARY OF ARGUMENT

The district court properly denied President Trump's request for a preliminary injunction barring the Archivist from providing the Select Committee with access to identified Presidential records.

I.A. The former President is not likely to succeed on his claim that his assertion of executive privilege bars the Archivist from providing the Committee with access to the relevant records. After careful consideration, President Biden concluded that asserting executive privilege over the records at issue is not in the best interests of the United States. That conclusion was based upon the extraordinary events of January 6, 2021, Congress's and the public's uniquely compelling need to understand the causes of those events, and the Executive Branch's interest in a full and transparent accounting of its officials' knowledge of, preparation for, and response to those events. The President's well-supported decision is consistent with past Presidential practice and outweighs the former President's privilege claim here.

The Supreme Court's decision in *Nixon v. GSA* and established separation-of-powers principles mandate that the incumbent President's views about whether to assert the presidential communications privilege

be afforded greater weight than those of the former President. Executive privilege protects the interests of the Executive Branch, not the personal interests of an individual President. The Constitution, moreover, assigns ultimate responsibility for assessing and implementing the Executive's interests to the incumbent President, who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch." *Nixon v. GSA*, 433 U.S. 425, 449 (1977). As the only President with an ongoing relationship with Congress, the incumbent is also uniquely positioned to weigh the benefits and costs to the Executive Branch of withholding or disclosing materials to its coordinate branch.

Allowing a former President to override an incumbent's determination that disclosure of certain Executive Branch information is in the interest of the United States would impermissibly intrude upon the President's implementation of a quintessentially executive function. In no other area can a former President continue to dictate the exercise of governmental authority. A court decision accepting a former President's assertion of executive privilege, thereby reversing an incumbent President's conclusion that an assertion of the privilege is not justified, would be permissible, if at all, only in exceptional circumstances, and no

such circumstances exist here. The events of January 6 provided ample justification for concluding that the assertion of executive privilege over the documents at issue here would run counter to the United States' interests.

I.B. The former President is also unlikely to prevail on his claim that the Select Committee lacks authority to request the records the Archivist has identified. As an initial matter, the former President lacks a basis to bring a broader challenge to the Committee's authority. In any event, the Select Committee's request for information relating to an attack on the U.S. Capitol that was aimed at disrupting Congress's execution of its statutory and constitutional duties plainly furthers legitimate legislative functions. The information the Committee seeks could inform valid legislation on a number of topics, including election security, the security of Congress itself, Executive Branch operations, and domestic terrorism. The Committee also had sufficient grounds for concluding that its request for Presidential records would yield needed information not available elsewhere. Established facts, including the former President's participation in the rally that immediately preceded the attack, justify the Committee's inquiry into actions at the White House before, during, and after the January 6 riot.

The district court likewise did not err in declining to set aside the Committee's request as overbroad. A relatively small number of responsive records have been slated for production thus far, none of which the former President challenges as irrelevant to the Committee's inquiry. And even if the Committee's request were overbroad in certain respects, the appropriate remedy would be to excise the problematic aspects of the Committee's request, not to declare it invalid altogether. In any event, President Biden's conclusion that responding to the Committee's request will not unduly burden the Executive Branch alleviates any concerns about the breadth of the request.

President Trump invokes the heightened standard of scrutiny the Supreme Court applied to a congressional request in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). But the separation-of-powers concerns that motivated the Supreme Court to adopt a more searching standard of review in *Mazars* are greatly reduced here, where the incumbent President has concluded that a congressional request will not impair the functioning of the Executive Branch, and the request does not involve the personal records of the incumbent President. But even if the *Mazars* standard applies, the Committee's request satisfies that standard.

II. The former President also fails to establish the remaining injunction factors. The sole harm the former President alleges will result from providing access to the records is injury to the Executive Branch's long-term interest in the confidentiality of presidential communications. President Biden, however, has concluded that the interests of the Executive Branch favor providing the Committee with access to the materials. That conclusion is entitled to deference and defeats the former President's contrary assertion in this case.

The balance of equities and the public interest likewise weigh against preliminary relief. The public has a strong interest in a complete and expeditious investigation into the causes of the January 6 attack and in the informed consideration of potential legislation aimed at preventing similar attacks from occurring in the future. An injunction delaying access to information relevant to the Committee's investigation is at odds with those substantial interests.

STANDARD OF REVIEW

This Court reviews "a district court's denial of a preliminary injunction for an abuse of discretion, but in doing so [the Court] review[s] the district court's legal conclusions *de novo* and any findings of fact for

clear error." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) (per curiam).

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Courts will grant such relief only if the moving party establishes "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The former President has failed to make the necessary showing here.

I. The Former President Is Unlikely To Prevail On The Merits.

Former President Trump challenges the Archivist's decision to release the relevant Presidential records to the Committee on two grounds. He asserts that (1) the documents are protected by executive privilege, and (2) the Select Committee lacks the legal authority to request the records. Appellant's Opening Brief (AOB) 16. Neither assertion has merit.

A. The Incumbent President's Affirmative Decision Not To Assert Executive Privilege Is Entitled To Deference.

After considering the matter, President Biden concluded that asserting executive privilege to shield the records at issue from the Select Committee was not "in the best interests of the United States." JA 157. The incumbent President's well-reasoned conclusion, rooted in Congress's and the public's "compelling need" for a "full accounting" of the events of January 6 is consistent with past Presidential practice and controls over the former President's privilege claim in the circumstances of this case. The district court thus correctly concluded that the former President is not likely to prevail in establishing that the relevant records must be withheld on privilege grounds.

1. Typically, only an incumbent President may assert executive privilege to prevent the disclosure to Congress of materials in the possession of the Executive Branch. In *Nixon v. GSA*, however, the Supreme Court concluded that a *former* President could assert the "privilege of confidentiality of Presidential communications," 433 U.S. 425, 447 (1977), which is commonly referred to as the "presidential communications privilege," *In re Sealed Case*, 121 F.3d 729, 742-757 (D.C.

Cir. 1997). The Court did not address the circumstances presently before this Court, where the incumbent President has affirmatively concluded that an assertion of privilege over the documents at issue is not in the best interests of the Nation and is not justified. JA 157, 160. But the Court's analysis signals the proper outcome here. Separation-of-powers principles and other considerations mandate that an incumbent President's decision not to assert executive privilege must be controlling in most circumstances.

"Executive privilege is an extraordinary assertion of power 'not to be lightly invoked.'" *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 389 (2004) (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953)). The presidential communications privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449; *see also id.* at 447-448 (a former President may assert the privilege in the "name" of the Executive Branch). The privilege furthers the Executive's substantial interests in safeguarding the confidentiality of the Executive Branch's communications and in maintaining the autonomy of the Branch against incursion from coordinate branches. *See United States v. Nixon*, 418 U.S. 683, 705-06 (1974). But in any given circumstance, the President has the prerogative to weigh those benefits against the attendant costs of

withholding the relevant records. Withholding materials may, for example, impair the public's confidence in the Executive Branch, particularly where the public might assume that the requested materials shed light on government misconduct. Conversely, disclosure can help "restore public confidence in our political processes" while furthering the public's "substantial interest[]" in "reconstruct[ing] and com[ing] to terms with their history." *Nixon v. GSA*, 433 U.S. at 452-53.

Where Congress is the party requesting information, assertion of the privilege inevitably places the Executive Branch on a "collision course" with a co-equal branch of the government. *Cheney*, 542 U.S. at 389; *see Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974). Congress has a number of tools it can deploy if it is dissatisfied with the Executive Branch's response to a request for information. It can withhold funds from the Executive Branch, decline to enact legislation, and override vetoes. "Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation." *Nixon v. Sirica*, 487 F.2d 700, 778 (D.C.

Cir. 1977) (Wilkey, J., dissenting); *see also Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 955 n.19 (1983) ("The Constitution provides Congress with abundant means to oversee and control" Executive Branch agencies.).

As both this Court and the Supreme Court have emphasized, the incumbent President is "in the best position to assess the present and future needs of the Executive Branch," and thus to evaluate whether an assertion of executive privilege will further or diminish the Executive Branch's interests in any given circumstance. *Nixon v. GSA*, 433 U.S. at 449; *see also Dellums v. Powell,* 561 F.2d 242, 247 (D.C. Cir. 1977). "[I]t is the new President"—not his predecessor—"who has the information and attendant duty of executing the laws in the light of current facts and circumstances." *Dellums*, 561 F.2d at 247. There are also "obvious political checks against an incumbent's abuse of the privilege," *Nixon v. GSA*, 433 U.S. at 448, which helps ensure that the "constitutional confrontation[s]" engendered by an assertion of the privilege occur only when necessary, *Cheney*, 542 U.S. at 389-90. And "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties," *Nixon v. GSA*, 433

U.S. at 448, that shield is designed to protect the incumbent in his performance of his constitutional duties, not a former President.

A former President has no responsibility for the current execution of the law. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496–97 (2010) ("Article II makes a single President responsible for the actions of the Executive Branch."). Absent unusual circumstances, allowing a former President to override decisions by the incumbent President regarding disclosure of Executive Branch information would be an extraordinary intrusion. In no other respect can a former President play *any* role in the current execution of the duties of the office. A former President, for example, has no ability to block decisions by his successor to de-classify information that the former President classified, to unwind a state secrets assertion he made, to exit an international agreement he entered into, or to take any other action that might be contrary to an action he took. It is well established that one Congress cannot bind future Congresses. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute"). Similarly, Presidents generally cannot bind their successors. *See, e.g.*, *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172

(10th Cir. 2004) ("The executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors."); *Amino Bros. Co. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967) (noting that "[t]he Government cannot make a binding contract that it will not exercise a sovereign power"). Allowing a *former* President to block disclosure of Executive Branch information that the incumbent President has determined is in the national interest to share with Congress would be even more clearly contrary to well-established principles governing the exercise of sovereign authority.

It is the incumbent President, moreover, who must decide whether and how to accommodate Congressional requests for information as part of "the give-and-take of the political process between the legislative and the executive." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020). The accommodation process between Congress and the Executive Branch is a central component of our constitutional scheme, *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977), and is the means through which disputes over Congressional requests for Presidential information have been resolved throughout our Nation's history, *Mazars*, 140 S. Ct. at 2029. As the individual who has an ongoing relationship with Congress as

head of a co-equal branch, the incumbent President is uniquely positioned to determine whether disclosure of Executive Branch information to the Legislature is in the national interest or whether the Executive Branch's interests require that the materials be withheld.

Additional separation-of-powers considerations also mandate that a court give an incumbent President's decision not to assert Executive privilege substantial deference. "[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Cheney*, 542 U.S. at 382 (quoting *Clinton v. Jones*, 520 U.S. 681, 701 (1997)). Where a former President attempts to enlist the Judiciary in an effort to override the decision of an incumbent President not to assert executive privilege, a court is thrust into the "awkward position," *Cheney*, 542 U.S. at 389, of assessing the "wisdom and soundness," *Laird v. Tatum*, 408 U.S. 1, 15 (1972), of the incumbent's decision, including a review of the incumbent's estimation of the Executive Branch's near-term and long-term interests. The separation-of-powers concerns such an inquiry raises, in light of the incumbent President's "constitutional responsibilities and status," warrant "judicial deference and restraint." *Cheney*, 542 U.S. at 385; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir.

2016) (explaining that "judicial authority is . . . at its most limited when reviewing the Executive's exercise" of "a core executive constitutional function").

Consistent with these principles, the Supreme Court and this Court have recognized that, where an incumbent President does not support a former President's assertion of privilege, the former President's view is entitled to "much less weight." *Dellums*, 561 F.2d at 247; *see also Nixon v. GSA*, 433 U.S. at 450. Indeed, separation-of-powers principles dictate that a court may take the extraordinary step of overruling an incumbent's decision not to assert executive privilege in favor of a former President's assertion of the privilege only in exceptional circumstances. *See supra* pp. 24-31; *cf. Fokker Servs.*, 818 F.3d at 742 (given "the Executive's constitutionally rooted primacy over criminal charging decisions," a court may second guess the Executive's decision to drop such charges only in "narrow" circumstances).

This case does not require this Court to explore the narrow set of circumstances in which a court might justifiably conclude that a sitting President impermissibly declined to assert executive privilege. Nor does it require this Court to conclude that the incumbent President has

"unfettered" control over the privilege, as former President Trump fears, AOB 39.

The extraordinary events of January 6, 2021, amply support President Biden's decision not to assert executive privilege over the relevant records. After careful consideration, President Biden concluded that Congress's and the public's compelling need to understand the full scope of the circumstances that led to the unprecedented attack that occurred on January 6, 2021, and to guard against such attacks in the future, outweighed the Executive's institutional interests in maintaining the confidentiality of the relevant records. As the President explained, it is not in the Nation's interest to "shield" information bearing on an investigation into "a clear and apparent effort to subvert the Constitution," an effort possibly "provoked and fanned by" Executive Branch officials. JA 157. Rather, the President concluded that the United States' interests are best served by providing a "full accounting" of the circumstances that precipitated the January 6 attack, by aiding Congress's efforts to investigate and fully understand the causes of the events of January 6, and by helping to ensure that such an attack will not recur. *Id.* The President also emphasized that "the conduct under investigation extends far beyond

typical deliberations concerning the proper discharge of the President's constitutional responsibilities," thus reducing the Executive's interest in maintaining the confidentiality of records bearing on that conduct. *Id.* And the President reasonably determined that there was "a sufficient factual predicate for the Select Committee's investigation" into the White House's connection with and response to the events of January 6 and thus a reasonable basis for the Committee's request. *Id.*; *see also infra* pp. 48-50; JA 211.

The incumbent President's careful assessment of the Executive Branch's interests in providing Congress with access to the records at issue, therefore, can hardly be characterized as having been undertaken on a "whim[]" or merely to "meet a political objective," AOB 17. The events of January 6 were exceptional in our Nation's history. The assault on the Capitol not only resulted in deaths, injuries, widespread violence, and damage to the Capitol, but also disrupted the official function of counting the electoral votes that is central to the peaceful transition of power at the heart of our democracy. It followed a months-long effort by the former President to advance his unsupported claim that the 2020 election was "rigged, stolen, and fraudulent," JA 178, and was immediately preceded by

a speech in which he urged the Vice President to "reject[] certain states' electors and declin[e] to certify the election for President Joseph R. Biden" and told his supporters to "walk down to the Capitol" and "fight like hell," JA 180. President Biden's well-reasoned conclusion that the interests of the Executive Branch and the Nation more broadly would be disserved by asserting executive privilege over Presidential records bearing on those events controls here. The former President's effort to dismiss that decision as driven by politics ignores the magnitude of the events of January 6 and the overriding need for a national reckoning to ensure that nothing similar ever happens again.

As the district court recognized, President Biden's decision not to assert executive privilege is also consistent with past Presidential practice. JA 195. "[H]istory is replete with examples of past Presidents declining to assert the privilege" in response to congressional requests for White House documents and communications. *Id.* For example, President Reagan authorized the testimony of close advisors and the production of documents, including excerpts from the President's own diaries, detailing his communications and decision-making process in connection with the Iran-Contra affair. *See* H.R. Rep. No. 100-433 (1987); S. Rep. No. 100-216

(1987). President Nixon similarly determined that executive privilege would "not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation" by the Senate Select Committee on Watergate—which led to testimony by several close staffers, including President Nixon's former White House Counsel. *Statements About the Watergate Investigations*, 1973 Pub. Papers 547, 554 (May 22, 1973). In 2004, President George W. Bush, along with Vice President Cheney, sat for a private Oval Office interview before the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) to discuss the events surrounding the September 11, 2001 attacks. JA 195. President Trump himself declined to assert the privilege to prevent then-former FBI Director James Comey's congressional testimony, which was expected to (and did) include Comey's recollection of conversations with the President.[2] And he likewise did not assert executive privilege to stop the public release of the Report of Special Counsel Robert Mueller, which included detailed information about presidential communications,

[2] *See* Peter Baker, *Trump Will Not Block Comey From Testifying, White House Says*, N.Y. Times (June 5, 2017), https://perma.cc/B93T-8STK.

including between President Trump and his Chief of Staff, White House Counsel, and other senior presidential advisors. President Biden's decision not to assert executive privilege over materials relating to the events of January 6 is thus consistent with prior practice.

2. President Trump's arguments against judicial deference to President Biden's decision not to assert executive privilege lack merit. President Trump cites *Nixon v. GSA*, 433 U.S. 425, for the undisputed proposition that "[e]xecutive privilege survives a President's term of office" and may be asserted by a former President. AOB 36-37. But the former President fails to acknowledge—let alone account for—the Supreme Court's further admonition that a former President's assertion of privilege is entitled to less weight when not supported by the incumbent, and its corollary instruction that the incumbent President is "in the best position to assess the present and future needs of the Executive Branch." *Nixon v. GSA*, 433 U.S. at 449. For the reasons discussed above, President Biden's careful assessment of the Executive Branch's interests and his determination not to assert the privilege are entitled to controlling weight under the unique circumstances presented, a result entirely consistent with *Nixon v. GSA*.

Moreover, in *Nixon v. GSA*, the incumbent Administration simply argued as a general matter that the disclosure of Presidential records to the Archivist pursuant to the PRA's predecessor statute would not unduly intrude upon the "executive function and the needs of the Executive Branch," 433 U.S. at 449. Here, by contrast, President Biden has gone further, concluding that the assertion of executive privilege over specific documents would run counter to "the best interests of the United States." JA 157. That affirmative conclusion is due great respect and negates whatever weight a former President's assertion of executive privilege might carry in other circumstances.

President Trump also errs when he suggests (AOB 38) that a former President is best situated to evaluate the Executive Branch's interests in maintaining the confidentiality of documents created during the former President's tenure. That assertion is at odds with precedent and our constitutional structure. As noted above, both this Court and the Supreme Court have recognized that it is the incumbent President who is "in the best position to assess the present and future needs of the Executive Branch," *Nixon v. GSA*, 433 U.S. at 449; *Dellums*, 561 F.2d at 247, and to decide whether to take the "extraordinary" step of invoking executive

privilege, *Cheney*, 542 U.S. at 389, to protect Executive Branch materials from disclosure.

Moreover, even assuming there are circumstances in which a former President might be better positioned than an incumbent to evaluate the importance to the Executive Branch of withholding particular documents, President Trump has failed to offer any particularized basis for objecting to the release of the specific records identified by the Archivist to date, or that their disclosure would cause harm to Executive Branch interests that President Biden has overlooked. Instead, his arguments rest entirely on the proposition that granting the Committee access to assertedly privileged materials will as a general matter harm the interests of the Executive Branch. That blanket assertion fails in light of President Biden's specific, contrary determination that production of these particular records threatens no such institutional harm.

The former President is also incorrect when he argues (AOB 38-39) that the district court must review each of the purportedly privileged documents individually to resolve the privilege dispute between the two Presidents. Such a review is unnecessary to conclude that President Biden's decision not to assert privilege is controlling. The content of

particular documents has no bearing on the structural and institutional reasons to give greater weight to an incumbent's views. And the former President has provided no basis to determine that the kind of extraordinary circumstances that would be needed to displace the incumbent's view are present here.

Indeed, the former President has not provided a basis to question President Biden's judgment with respect to a single document. The former President has reviewed the records that the Archivist intends to provide to the Committee. Despite that review, he has advanced no particularized argument as to any specific document set to be produced, let alone identified any consideration whose significance to the Executive Branch President Biden failed to comprehend. He has also failed to identify any documents in the first three tranches that are not "reasonably relevant" to the Committee's investigation. *McPhaul v. United States*, 364 U.S. 372, 381 (1960). Nor has the former President suggested that NARA's descriptions of the documents, *see* JA 129-31, are inaccurate or incomplete, much less that they fail to provide a sufficient basis for a court's necessarily deferential review of President Biden's decision not to assert the privilege. Accordingly, neither the district court nor this Court has any need to

review specific documents *in camera* to resolve the privilege dispute at issue here.

The former President asserts that a decision affirming the district court's ruling will "lead to the erosion and eventual destruction both of the separation of powers . . . and executive privilege." AOB 46-47. He claims, in particular, that Congress will possess a limitless "power of inquisition" that will enable the Legislature to "review any and every document from any executive or judicial office or officer at any time." AOB 42, 47. But the former President's predictions lack foundation. Contrary to his contention (AOB 41), Congress's investigative authority is not unbounded. Although it is "broad," Congress's power to obtain information is subject to a number of well-recognized limits. *Mazars*, 140 S. Ct. at 2031; *see infra* pp. 46-47. Congress has long operated pursuant to those limitations and has not emerged as a "supreme and unchecked," AOB 41, super-Branch capable of "gather[ing] up almost any [government] document in existence," AOB 44. Rather, the political branches have resolved congressional requests for Executive Branch information through "negotiation and compromise," *Mazars*, 140 S. Ct. at 2031; *see also* JA 124 ¶ 12, not through congressional fiat. The accommodation process

continues, including in response to this request. *See* JA 128 ¶ 25 (noting that, as part of the accommodation process, the Committee agreed to defer its request for certain records).

Moreover, both the Executive and Judicial Branches have the "necessary constitutional means, and personal motives" to resist congressional attempts to undermine their operations through burdensome investigations. The Federalist No. 51, at 349 (J. Madison). Of most relevance, the Executive and Judiciary can safeguard essential documents and communications through an assertion of executive or judicial privilege. *See United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (discussing the "Judicial Privilege"). The former President avers (AOB 43) that future Presidents will routinely decline to assert executive privilege to protect Presidential records when the President and a House of Congress are politically aligned. History belies that assertion. The Presidency and at least one House of Congress have been controlled by the same political party many times since the PRA's inception, yet Congress has not found itself with "unfettered access," AOB 43, to sensitive

Presidential records or other Executive Branch materials.[3] That is not surprising given that every incumbent President has a substantial interest in obtaining "full, frank, and confidential advice from his advisers," AOB 46, and thus a strong incentive to protect presidential communications (including those of a previous Administration) from disclosure to Congress in order to avoid chilling the advice that might be offered to the incumbent and to future Presidents.

3. The former President is also incorrect in arguing (AOB 47-48) that the PRA would be unconstitutional if it granted a sitting President unfettered authority over the assertion of executive privilege. This argument attacks a strawman. The presidential communications privilege is constitutionally based. *Nixon v. GSA*, 433 U.S. at 447. The PRA and its implementing regulations do not alter the scope, function, or other characteristics of the privilege. *See* 44 U.S.C. § 2204(c)(2) ("Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former

[3] Nor has it in this matter. Thus far, President Biden has been called upon to make a privilege determination as to a limited number of tranches of records and has repeatedly affirmed his intention to consider each question of privilege on its individual merits as they arise. *See* JA 158.

President."). All the Act and the Archivist's implementing regulations do is set out a process by which a former President may assert executive privilege and the incumbent may decide whether to uphold that assertion. *See id.* § 2208(c) (for public disclosures); 36 C.F.R. § 1270.44(f)(2). And the Act further provides that judicial review is available to the former President to challenge the incumbent's decision. *See* 44 U.S.C. § 2208(c)(2)(C); *see also id.* § 2204(e). The requirement that a court give a former President's assertion of executive privilege "much less weight," *Dellums*, 561 F.2d at 247, than the incumbent's is a function of the incumbent's role in our constitutional scheme, the nature of the privilege (designed to protect the Executive Branch's interests, not those of the President personally), and other separation-of-powers considerations. *See supra* pp. 24-31. The PRA does not in any way affect that constitutional principle.

4. For the reasons explained above, this Court should defer to President Biden's affirmative decision not to assert executive privilege and, accordingly, reject the former President's privilege assertion. However, even if this Court were to conclude that the former President has asserted a valid privilege claim notwithstanding President Biden's conclusion that

assertion of the privilege is not in the United States' interests, the former President's claim would not support an injunction barring the Archivist from granting the Committee access to the records at issue. For the reasons explained above, the former President's privilege claim would be entitled to, at most, minimal weight in light of President Biden's determination. Congress's compelling need for the records, *see infra* Part I.B., would overwhelm the former President's nominally valued claim. *See Nixon v. GSA*, 433 U.S. at 446-54 (Executive privilege is a "qualified" privilege that can be overcome by a substantial countervailing public interest).

B. The Select Committee Did Not Exceed Its Authority When It Requested The Relevant Records.

1. For the reasons explained *supra* Part I.A., the district court correctly concluded that President Biden's decision that an assertion of executive privilege is not justified as to the records at issue is entitled to deference and controls here. That conclusion is sufficient to affirm the district court's order denying the former President's request for a preliminary injunction. The allegedly privileged nature of the documents was the sole reason the former President instructed the Archivist not to release them to the Committee. JA 154-55. It is also the foundation of his

alleged irreparable harm, and the basis of his claim that the public interest weighs in favor of an injunction barring the Committee from accessing the records. *See infra* Part II. If this Court defers to President Biden's decision that the assertion of executive privilege is not justified here, the former President's request for preliminary relief therefore necessarily fails.

Moreover, apart from asserting privilege, the former President has no basis to challenge the Committee's authority. Like any private citizen, the former President lacks a "personal stake," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), in whether the Archivist makes the requested disclosures to the Committee. Indeed, he has filed this suit "solely in his official capacity as a former President," JA 16 ¶ 20, rather than in his personal capacity. The Supreme Court's decision in *Nixon v. GSA* recognizes such a limited right of a former President to assert a "Presidential privilege" claim on behalf of the Presidency, 433 U.S. at 449, and in the "name" of the Executive Branch, *id.* at 447-48. But *Nixon v. GSA* does not provide former Presidents with the right to bring a broader, stand-alone challenge to a congressional committee's underlying authority to request Executive Branch documents. Thus, if the former President's privilege claim on behalf of the Executive

Branch is rejected, this Court need not consider his additional arguments challenging the Select Committee's legal authority.

2. Assuming this Court reaches the former President's challenge to the Committee's legal authority, that claim is without merit. The district court correctly found that the Select Committee's request furthers a legitimate legislative function.

The Supreme Court has held that Congress has an implicit but limited power to investigate. A congressional request for information "is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187). One of those tasks is legislation. The authority to investigate "is inherent in the legislative process." *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[T]he power to investigate is inherent in the power to make laws."). Congress's investigative authority in aid of legislation extends only to a "subject on which legislation could be had." *Mazars*, 140 S. Ct. at 2031. That "encompasses inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political

system for the purpose of enabling Congress to remedy them.'" *Id.* (quoting *Watkins*, 354 U.S. at 187).

Congress's investigative authority is further limited in various respects. Congress may not seek information for purposes of "law enforcement" or "to try someone before [a] committee for any crime or wrongdoing." *Mazars*, 140 S. Ct. at 2032. Congress likewise has no "general power to inquire into private affairs and compel disclosures," and "there is no congressional power to expose for the sake of exposure." *Id.* That said, a congressional investigation is not invalid simply because it might uncover "crime or wrongdoing." *McGrain v. Daughtery*, 273 U.S. 135, 179-80 (1927).

The Select Committee's request for the Presidential records at issue here satisfies these standards. Congress's investigatory authority is at its apex in the present circumstances—where it is investigating the "facts, circumstances, and causes relating to" an attack on a Joint Session of Congress, H.R. Res. 503 117th Cong. § 3 (2021), that endangered Members of Congress and their staff and disrupted Congress's carrying out of a statutory and constitutional duty at the heart of our system of government. The causes of the January 6 attack and the role government officials may

have played in events related to the attack, or in preparing for or responding to the attack, are "subject[s] on which legislation could be had." *Mazars*, 140 S. Ct. at 2031. Congress might, for example, enact or amend criminal laws to deter and punish violent conduct targeted at the institutions of democracy. Congress might impose structural reforms on Executive Branch agencies to prevent their abuse for antidemocratic ends. Congress could also address resource allocation and intelligence sharing by federal agencies charged with detecting and interdicting foreign and domestic threats to the security and integrity of our electoral processes. It could also enact legislation designed to enhance the security of the Capitol and sessions of Congress. These are just a few examples of potential reforms that Congress might—as a result of the Select Committee's work—conclude are necessary or appropriate to securing democratic processes, deterring violent extremism, protecting fair elections, and ensuring the peaceful transition of power.

Contrary to President Trump's assertion, there is no sound basis for concluding that the Select Committee is seeking Presidential records simply "for the sake of exposure" or for "law enforcement purposes." AOB 22. The Committee has ample reason to believe that Presidential

records responsive to its request could include information relevant to its investigation and potential legislation. Among other things, President Trump spoke at length at the rally that immediately preceded the attack, reiterating claims he had advanced for months that the Presidential election had been "stolen," and insisting that the Vice President should refuse to certify President Biden's victory. In the same speech, he urged protesters to "walk down to the Capitol" to "give them the kind of pride and boldness that they need to take back our country" and to "fight like hell" because "you'll never take back our country with weakness." JA 180. According to the Committee's investigation, in the weeks leading up to January 6, President Trump and other White House officials were also in regular communication with individuals involved in promoting the January 6 protest. H.R. Rep. No. 117-152, at 6 (2021). It has been alleged in a Senate Report that the White House and senior government officials were slow to respond to the riot, despite repeated pleas for help from law enforcement officials and others. *See* HSGAC Report 83-95.

The Select Committee thus has sufficient reason to probe, among other things: (1) what, if anything, the former President, his advisors, other government officials, and those close to him knew about the likelihood of

the protest turning violent; (2) when they knew it; (3) whether they sought to encourage or prevent it and the actions they took in response; and (4) how, if at all, their actions facilitated, exacerbated or led to the violence that overtook the protest. Far from "fishing," AOB 20, or looking to the former President and his advisors as a "case study," AOB 26, the Select Committee is investigating known events involving the former President and other White House officials and relating to a singular attack on the Capitol.

As observed above, the former President does not single out any specific documents slated to be produced to the Committee on the ground that they are not "reasonably relevant" to the Committee's investigation into the causes of the January 6 attack and the White House's knowledge of and response to those events. *McPhaul*, 364 U.S. at 381. Any such challenge would fail in any event. The first tranche of documents includes, for example, White House visitor logs, call logs, and schedule information for January 6, 2021; and drafts of speeches, remarks, and correspondence concerning the events of that day. JA 129. The second tranche of documents includes proposed talking points of a former press secretary related to the 2020 election, drafts of a presidential speech for the January 6

rally, and presidential activity calendars for January 2021, and a handwritten note from the former Chief of Staff listing potential or scheduled briefings and telephone calls concerning the January 6 certification and other election-related issues. JA 130. The third tranche includes drafts of a proclamation relating to the events of January 6; and memoranda, emails, and talking points concerning the validity of the 2020 election and potential actions that could be taken. JA 130-31. Collectively, these records may aid the Committee in understanding the causes of the January 6 attack, including the months-long campaign to cast doubt on the validity of the 2020 presidential election; what role White House officials may have played in the events that precipitated the attack; and how the former President and other officials responded to the attack as it occurred.

The district court also correctly rejected the former President's claim that the Committee's request is too broad. JA 205-08. As an initial point, even if the Committee's request were overbroad in certain respects, this Court would be obligated to construe the request narrowly to avoid any constitutional concerns. *See McGrain,* 273 U.S. at 179. The appropriate action would not be to "invalidate[] the entire" request, *id.* at 180, as the former President contends, AOB 23. *See McGrain*, 273 U.S. at 180 (affirming

a Senate Committee's authority to investigate the Attorney General's actions while ignoring language in the Committee's authorizing resolution that would have arguably granted the committee authority that exceeded constitutional limits). As noted, the former President does not argue that any of the specific records slated for production are irrelevant to the Committee's investigation. There is no basis for barring access to those records (the only records at issue in this appeal) on the ground that the Committee may lack authority to seek other materials.

Indeed, the former President's concerns about the disclosure of records responsive to the Committee's purportedly less-relevant requests may never ripen. President Biden has authorized access to only the records identified by the Archivist to date and has reserved the right to refuse the Committee access to any future records the Archivist deems responsive. *See* JA 157-58. And the Select Committee has already agreed to defer its request for certain records identified by the White House, demonstrating that the process of negotiation and accommodation can be readily used to avoid confrontation. In addition, it may turn out that there are no Presidential records responsive to some of the Committee's requests. *See* JA 206 (noting that some of the materials requested by the Committee,

including polling data, may not qualify as Presidential records under the PRA).

In any event, President Biden's conclusion that the Executive Branch can work with the Committee to accommodate its request alleviates any concern about the request's potential overbreadth. In this context, the requirement that a congressional request be reasonably tailored is designed to protect "against unnecessary intrusion into the operation of the Office of the President." *Mazars*, 140 S. Ct. at 2036. Because President Biden has concluded that responding to the Committee's request will not unduly interfere with the functions of the Executive Branch, the scope of the Committee's request provides no ground for setting it aside.

The former President likewise misses the mark when he asserts (AOB 28, 32-33) that the Select Committee lacks the authority to request Presidential records. The resolution establishing the Select Committee's jurisdiction tasks the Committee with investigating "the facts, circumstances, and causes relating to" the January 6 attack and authorizes the Committee to investigate "entities of the public and private sector as determined relevant by the Select Committee." H.R. Res. 503, § 4(a)(1). The Committee is also authorized to investigate the "structure,

coordination, operational plans, policies, and procedures of the Federal Government" with respect to "detecting, preparing for, and responding to targeted violence and domestic terrorism." *Id.* § 4(a)(2). As explained *supra* pp. 48-50, under the particular circumstances presented, the Select Committee had reasonable grounds for concluding that the White House was a public entity with information that would shed light on the events of January 6 and on the federal government's plans, policies, and procedures regarding the government's preparation for and response to the attack. Moreover, the Committee has not relied on any inherent authority to issue subpoenas, cf. *Mazars*, 140 S. Ct. at 2031, but instead on the *statutory* authority to obtain records pursuant to the PRA, 44 U.S.C. 2205(2)(C), which was passed by both Houses of Congress and signed by the President, *see* Pub. L. No. 95-591, 92 Stat. 2523 (1978).

3. President Trump relies on the heightened standard of scrutiny the Supreme Court applied to the congressional request in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020). But that standard does not apply here. In *Mazars*, the Supreme Court set forth a non-exclusive four-factor test that courts must deploy when considering the validity of a congressional demand for a sitting President's personal information pursuant to its

inherent powers to issue compulsory process. 140 S. Ct. at 2035-36. The Supreme Court concluded that more careful scrutiny of a congressional request for information in such circumstances was required given the "ongoing institutional relationship" between Congress and the Executive Branch and the possibility that Congress might deploy its subpoena power to "'exert an imperious controul' over the Executive Branch" and "aggrandize itself at the President's expense." *Id.* at 2034 (quoting The Federalist No. 71, at 484 (A. Hamilton)). The Court also emphasized that heightened scrutiny was necessary to protect the "established practice" of accommodation and negotiation between the political branches, by ensuring that Congress could not easily "walk away from the bargaining table and compel compliance in court." *Id.* at 2034. The Court further justified its more exacting approach on the ground that a congressional request for a President's personal papers raises "a heightened risk" that Congress is seeking the papers for an improper motive, given the "documents' personal nature and their less evident connection to a legislative task." *Id.* at 2035.

The separation-of-powers considerations underlying the Court's decision in *Mazars* are largely absent where, as here, Congress requests

official records belonging to the Executive Branch and the incumbent President has to date determined that it is in the best interests of the United States to provide the records at issue to Congress. In such circumstances, the incumbent President—who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch," *Nixon v. GSA*, 433 U.S. at 449—has necessarily concluded that providing the Committee with access to the information will not impair the Executive Branch in the carrying out of its constitutional responsibilities. Moreover, where a sitting President has decided to accommodate a congressional request for Executive Branch records, an injunction barring disclosure would interfere with the "ongoing institutional relationship" between the Branches by disrupting the "established" negotiation-and-accommodation process that the *Mazars* standard was designed to protect. *See Mazars*, 140 S. Ct. at 2033-35. And because Congress does not seek access to the former President's personal papers, there is not a "heightened risk" that Congress is seeking the materials for an improper purpose. *Id.* at 2035. Under these circumstances, there is no need for a court to apply the *Mazars* standard.

In any event, even assuming the *Mazars* standard applies here, the district court correctly concluded that the Committee's request satisfies that

standard. JA 209-11. To determine "whether the asserted legislative purpose warrants the significant step of involving the President and his papers," the first *Mazars* factor requires courts to consider whether "other sources could reasonably provide Congress the information it needs." 140 S. Ct. 2035-36. Here, as noted, the Committee has established its need for information from the White House as part of the Committee's inquiry into the causes of the January 6 attack, the White House's potential connections to the attack, and the White House's response. *See supra* pp. 48-50. Moreover, there is no evident alternative source of information that could inform the Committee about what, if anything, the former President, his advisors, and other White House officials knew about the events of January 6 and what actions they took or declined to take in preparation for or in response to the January 6 rally and subsequent riot. *See* JA 210 (noting that the former President has failed to identify any other sources from which the Committee might learn the relevant information); *cf. Dellums*, 561 F.2d at 249 (concluding that, in a civil suit against former Attorney General John Mitchell regarding his alleged involvement in suppressing the "May Day Demonstrations," plaintiffs had demonstrated a "substantial need" for communications between President Nixon and his Attorney General

regarding the demonstrations given that the Department of Justice played a leading role in coping with the demonstrations and other evidence established that the White House and the Justice Department had communicated about the demonstrations). In these circumstances, Presidential records are the only available official source of information about actions taken by these officials purportedly during the course of performing their official duties.

Mazars next requires a court to evaluate whether a congressional request for information is "no broader than reasonably necessary to support Congress's legislative objective." 140 S. Ct. at 2036. For the reasons explained *supra* pp. 51-53, the Select Committee's request is not unduly broad and is subject to further narrowing as the President conducts the review process mandated by the PRA.

The Committee likewise satisfies *Mazars*'s third factor, which calls on courts to "be attentive to the nature of the evidence offered by Congress to establish that a [request for information] advances a valid legislative purpose" and notes that "the more detailed and substantial the evidence of Congress's legislative purpose, the better." 140 S. Ct. at 2036. Here, that factor cuts against the former President. H.R. Res. 503 identifies the

Committee's aims, including: to "investigate and report upon the facts, circumstances, and causes" of the January 6 riot, *id.* § 3, including the federal government's actions in "detecting, preventing, preparing for, and responding" to the riot, *id.* § 4(a)(2)(B). It expressly directs the Committee to "issue a final report" containing "recommendations for corrective measures," which include "changes in law . . . that could be taken" to "prevent future acts of violence . . . targeted at American democratic institutions," improve the security posture of the United States Capitol Complex," and "strengthen the security and resilience of democratic institutions against violence, domestic terrorism, and domestic violent extremism." *Id.* § 4(a)(3) & (c). And as already discussed, the facts known to date establish a sufficient connection between the White House and the events of January 6 to explain why the Committee believes the requested Presidential records will advance Congress's legislative goals. *See* JA 211.

Finally, the Committee's request does not impose undue "burdens on the President's time and attention." *Mazars*, 140 S. Ct. at 2036. President Biden—who represents the "rival political branch that has [the] ongoing relationship" with Congress, *id.*—has determined that the Committee's request does not impermissibly burden the institution of the Presidency.

That carefully rendered assessment defeats the former President's contention that the Committee's request "burdens the presidency generally." AOB 29. There is likewise no merit to the former President's unelaborated contention (AOB 29) that "the limited time period to review potentially responsive documents" burdens the former President personally. Former President Trump has been able to review the relevant records for privileged material in the time allotted by the Archivist. *See infra* p. 62. And under NARA's regulations, the Archivist "may adjust any time period or deadline" as needed to address any concerns that might later arise, 36 C.F.R. § 1270.44(g), authority the Archivist has exercised here. *See* JA 127 ¶ 23. There is no reason to believe similar adjustments will not be made in the future should they be necessary.

4. The former President argues (AOB 33-34) that the Select Committee's request does not meet the PRA's requirements, which he asserts "mirror the constitutional requirements." For the reasons explained above, the Committee has established that the requested records contain "information that is needed for the conduct of [the Committee's] business" and that such information "is not otherwise available," 44 U.S.C.

§ 2205(2)(C). *See supra* pp. 48-50, 56-58. The former President's argument therefore fails.

II. The Remaining Factors Likewise Weigh Against A Preliminary Injunction.

The district court also correctly concluded that the former President cannot establish the remaining preliminary injunction factors. JA 212-14. As the district court noted, President Trump does not argue that the disclosure of the specific Presidential records the Archivist has identified will cause injury to any privacy, property, or other interest personal to himself. JA 212. Rather, he argues only that the release of the records will "inva[de] . . . executive privilege." AOB 48; *see also* AOB 50 (arguing that granting the Committee access to the records will cause irreparable harm because the records' "confidential and privileged nature" will be lost). That alleged harm cannot support the requested relief. Executive privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. GSA*, 433 U.S. at 449. Here, President Biden has determined that it would not be in the interest of the United States to assert executive privilege. That determination, which should be given greater weight than assertions by the former President, *see supra* Part I.A,

establishes that the Executive Branch's interest in the confidentiality of presidential communications and other deliberations will not be irreparably harmed by granting the Committee access to the materials at issue.

In his motion for a preliminary injunction, the former President alternatively argued that an injunction barring release of any future documents the Archivist may identify is needed to afford him sufficient time to review any such documents. Dkt. No. 5, at 37; *see also* JA 213-14 (rejecting this argument). The former President does not press that argument on appeal, and it is therefore waived. *See New York v. U.S. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005). In any event, the record belies the former President's assertion. As just explained, the Archivist has to date identified a number of responsive records, and the former President has been able to successfully review those documents in the time allotted by the Archivist. As noted, the Archivist may also extend the time period allotted for review and has done so here. *See* JA 122 ¶ 8; 36 C.F.R. § 1270.44(g). The former President supplies no basis to conclude that this process has been or will be inadequate.

The balance of equities and the public interest, which "merge" where relief is sought against the federal government, *Nken v. Holder*, 556 U.S. 418, 435 (2009), also weigh against the former President's request for injunctive relief. The public has an undeniably strong interest in an expeditious and full investigation of the facts, circumstances, and causes of the January 6 attack on the Capitol, including White House officials' connection to the events of that day and the actions they took in response to those events. The public also has a significant interest in the expeditious consideration of remedial measures aimed at securing the safety and soundness of our democratic processes and institutions. Timely disclosure of the identified materials to the Select Committee furthers those important interests. Any undue delay in providing those records, with the concomitant delay in the completion of the Committee's work, does not.

CONCLUSION

For the foregoing reasons, the district court's order denying the motion for a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,506 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

/s/ Gerard Sinzdak
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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Gerard Sinzdak
Gerard Sinzdak

ADDENDUM

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44 U.S.C. § 2203

§ 2203. Management and custody of Presidential records.

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if--

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on

Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that--

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) When the President considers it practicable and in the public interest, the President shall include in the President's budget transmitted to Congress, for each fiscal year in which the term of office of the President will expire, such funds as may be necessary for carrying out the authorities of this subsection.

(4) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient

administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

44 U.S.C. § 2204

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

> **(1)(A)** specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;
>
> **(2)** relating to appointments to Federal office;
>
> **(3)** specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;
>
> **(4)** trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> **(5)** confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or
>
> **(6)** personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

> **(A)(i)** the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of—

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1);[1] or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any

Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

44 U.S.C. § 2205

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available--

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

44 U.S.C. § 2208

§ 2208 Claims of constitutionally based privilege against disclosure

(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall--

(A) promptly provide notice of such determination to--

(i) the former President during whose term of office the record was created; and

(ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)--

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period

or extension, respectively, shall expire at the end of that 6-month period.

(b)(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.

(c)(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)(A) Not later than the end of the 30-day period beginning on the date on which the Archivist receives notification from a former President of the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless--

(i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or

(ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the

determination under paragraph (1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless--

(1) the incumbent President withdraws the privilege claim; or

(2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

36 C.F.R. § 1270.44

§ 1270.44 Exceptions to restricted access.

(a) Even when a President imposes restrictions on access under § 1270.40, NARA still makes Presidential records of former Presidents available in the following instances, subject to any rights, defenses, or privileges which the United States or any agency or person may invoke:

(1) To a court of competent jurisdiction in response to a properly issued subpoena or other judicial process, for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the President seeks records that contain information they need to conduct current Presidential business and the information is not otherwise available;

(3) To either House of Congress, or to a congressional committee or subcommittee, if the congressional entity seeks records that contain information it needs to conduct business within its jurisdiction and the information is not otherwise available; or

(4) To a former President or their designated representative for access to the Presidential records of that President's administration, except that the Archivist does not make any original Presidential records available to a designated representative that has been convicted of a crime that involves reviewing, retaining, removing, or destroying NARA records.

(b) The President, either House of Congress, or a congressional committee or subcommittee must request the records they seek under paragraph (a) of this section from the Archivist in writing and, where practicable, identify the records with reasonable specificity.

(c) The Archivist promptly notifies the President (or their representative) during whose term of office the record was created, and the incumbent President (or their representative) of a request for records under paragraph (a) of this section.

(d) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under this section, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days

after the date of the Archivist's notice. The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(e) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

(1) The incumbent President withdraws the privilege claim; or

(2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

(f)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

(i) The incumbent President withdraws the decision upholding the claim; or

(ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30–day period detailed in paragraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(g) The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section.