EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEPHEN K. BANNON,

Defendant.

CR Action
No. 1:21-670

Washington, D.C.
March 16, 2022

11:05 a.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

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

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

THE COURT: And let me just note my view, at least currently, on non-jury matters, that is to say arguments, status conferences and the like, is that whoever is at the podium, please take your mask off. It's easier for me to hear, easier for opposing counsel to hear, the court reporter and the like. And then just put your mask back on when you sit down.

MS. VAUGHN: Yes, Your Honor.

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

THE COURT: Good morning.

MR. SCHOEN: Good morning, Your Honor. David Schoen, Evan Corcoran and Robert Costello for Mr. Bannon, Your Honor.

THE COURT: Good morning, Counsel.

MR. SCHOEN: Good morning. Thank you.

THE COURT: So I've reviewed all of the papers that have been submitted, including the supplemental materials filed over the last day or two.

Obviously, we have cross motions, in a sense. I don't want to have argument on the motions individually. I want to take them in a somewhat more efficient manner, which is I want to hear from the government on all questions first, and then the defendant all questions. I'll allow the government then, essentially, a short rebuttal; and then the defendant a short surrebuttal.

With that, Ms. Vaughn, will you be taking the lead?

MS. VAUGHN: Yes, Your Honor.

THE COURT: I think I'd like to start with your Motion in Limine, but then I'd like to proceed through Mr. Bannon's motions as well.

MS. VAUGHN: Yes, Your Honor.

So starting with the government's Motion to Exclude all Evidence in Argument Relating to Advice of Counsel. So contempt of Congress for willful default is about whether or not you showed up; that is whether to produce records or to testify.

The summonsed witness doesn't get to decide if Congress can make them show up. If the witness were able to decide that, it would mean Congress had no subpoena power at all. And these are the principles that are reflected in the meaning of willfulness, under the contempt of Congress statute, as the Supreme Court and the D.C. Circuit defined

that term more than half a century ago.

So if a defendant makes a deliberate and intentional decision not to appear, he has the requisite intent for contempt; that is, Does the defendant know he's been summonsed and does he intentionally, knowing that, not show up? That's all that is required.

THE COURT: Don't you agree that seems inconsistent with more recent case law about what "willfully" means from the Supreme Court?

MS. VAUGHN: Well, Your Honor, I think the more recent case law in *Bryan* and *Ratzlaf* and *Cheek*, didn't deign to rewrite the meaning of willfulness as it might appear in other criminal laws. Those cases were limited to the specific laws that arose in those specific cases. And in *Cheek* and *Ratzlaf*, obviously, that's the highest standard, which I don't think anyone is arguing for here.

Even the intermediate standard, in *Bryan* it dealt with the statute that you needed to be licensed to sell firearms. That too is more of a regulatory scheme. And the Court even expressed its view in that case that that statute was intended to divide innocent conduct from criminal conduct. So that's really where the dividing line is. And that's what "willful," as defined by the Supreme Court, in the 1950 *Bryan* and the D.C. Circuit in *Licavoli*, that's where "willful" draws the line under the contempt of

Congress statute.

THE COURT: What seems anomalous to me, is that that means, I think, that the mens rea requirement for making default and refusing to answer any questions is the same, even though the term "willfully" applies only to making default.

MS. VAUGHN: So I think what the D.C. Circuit found in *Licavoli*, which I think still applies, is without willful before default, you are in a sense creating a strict liability statute. Because someone could be on their way to Congress, break down in their car. They know they are not showing up. They know they've committed the acts constituting default. And without that word "willful" there, they would be subject to criminal prosecution under the statute.

So "willful" separates that kind of accident, where the person still knows they are making default, but it wasn't intentional or deliberate. From an intentional and deliberate choice to show up. And what the Supreme Court made clear is that that intentional choice not to comply, that is inherently a criminal choice. There is no innocent way that someone decides they are just not going to comply with the statute.

THE COURT: Right. But that sounds a lot like intentional rather than willful. And those two terms

typically mean different things.

MS. VAUGHN: Well, intentional and deliberate is the definition of "willful" that's been determined for this statute under the controlling precedent from the Supreme Court and the D.C. Circuit.

And to your question --

THE COURT: Does the government think that if *Licavoli* had not been decided the way it is, that that is still correct interpretation of the statute?

MS. VAUGHN: The government does think that is still the correct. And *Licavoli* was relying on the Supreme Court's decision earlier in *Bryan* and *Fleischman*. Because, again, I think what the Supreme Court talks about in *Cheek Ratzlaf* and 1998 *Bryan*, is that these intent standards are intended to divide criminal conduct from citizens who innocently, sort of, get caught up in these regulatory schemes. And that's where willful and contempt of Congress draws, between someone who accidentally does not comply with their obligations, and someone who makes an intentional and deliberate choice not to do so.

THE COURT: So as a practical matter, assuming I grant your motion, this motion, what proof does the government need to make on mens rea? What's showing?

MS. VAUGHN: The government would need to demonstrate that the defendant knew he had been summonsed;

so that means, knew that Congress was requiring him to show up and produce records on October 7th; and that Congress was requiring him to show up and testify on October 14th. And that he knew that that was the obligation; and that despite knowing that, he decided not to comply.

He has to have -- the government has to prove that he was given a clear choice from Congress. Either show up or you are in contempt. That would be all that the government is required to show there.

THE COURT: And that would be -- the willful there, really, to the extent that it does any work here goes to the latter, because if a defendant knew he had or she had a summons, and mistakenly missed the date, or had his or her car break down, then that defendant would not act willfully in the government's view.

MS. VAUGHN: That's right, Your Honor.

And it's no different from in the contempt of court context. A witness gets a summons to appear before a grand jury or to appear for testimony in trial. And if they deliberately decide, I will not appear, they are subject to prosecution for contempt. It's the same principle in the contempt of Congress.

THE COURT: Okay.

So let's move on to -- unless you have anything to say on that, anything more to say on that subject, on that

motion.

MS. VAUGHN: Not unless the Court has questions.

THE COURT: So let's move on to defendant's motions. I think I'd like to start first with the motion relating to Mr. Costello's records or the records that turned out to be a different Costello's records.

MS. VAUGHN: Yes, Your Honor.

THE COURT: So that suite of issues.

MS. VAUGHN: So I think they raise different issues. Now we are talking about two categories of records. The first is Mr. Costello's toll records. So these are simply phone records showing who the subscriber is, and then showing to and from phone numbers, dates and times.

And the defendant's request there, as I understand it now, is that they would like all of the underlying grand jury subpoenas, all of the government's internal deliberations and records about its decisionmaking with respect to seeking those records.

THE COURT: So let me just pause there, because it wasn't clear from the government's brief. You just said, "grand jury subpoenas." Can you state publicly how those toll records were obtained?

MS. VAUGHN: I don't think there is an issue with saying that it was part of the grand jury investigation that we obtained those records, Your Honor.

THE COURT: Okay.

MS. VAUGHN: So the defendant is seeking those grand jury subpoenas, copies of the subpoenas, which would obviously show which records the grand jury sought.

THE COURT: You just said grand -- so are we talking about grand jury subpoenas --

MS. VAUGHN: Yes, Your Honor.

THE COURT: -- for Mr. Costello's toll records?

MS. VAUGHN: Yes, Your Honor.

Also the defendant is asking for the government's, sort of, internal processes --

THE COURT: Yes. Understood.

MS. VAUGHN: -- in doing that.

So, obviously, what subpoenas were issued has no bearing on establishing or disproving the facts of the offense; that is, did the defendant receive a subpoena? Did it require him to show up? Did he intentionally and deliberately decide to ignore that demand? Because it doesn't go to any of those facts, those records are not discoverable under Rule 16 or *Brady*.

So the defendant has to identify another basis to be entitled to those records. With respect to the grand jury materials, he needs to show a particularized need. And the defendant's relying on the provision of Rule 6, that it's needed because it may support a Motion to Dismiss.

But in order to pierce secrecy of the grand jury, the defendant needs to do more than just allege there's misconduct here. He needs to identify what grounds he will be moving to dismiss. And he hasn't done that.

THE COURT: So on that, as I understand it, whether it's about toll records or email records, the government's argument is, At the time we sought those records, we needed to prove -- still need to prove -- well, it may be stipulated now or conceded now -- but at one point we knew that we needed to prove that Mr. Bannon knew about the subpoenas or the summons from Congress.

And so we sought Mr. Costello's email and phone toll records to what? To help create a -- I'm missing the next part. Because it's not at all apparent to me how even knowing with whom Mr. Costello was communicating would prove or tend to prove that Mr. Bannon knew about the subpoena from Congress.

MS. VAUGHN: Well --

THE COURT: If that was even a disputed issue at that point.

MS. VAUGHN: Your Honor, so obviously the scope of the grand jury's investigation is not limited. They can act on suspicion, rumor, whatever they need to do to investigate every lead --

THE COURT: Is there really any dispute by the

time these subpoenas or the Stored Communication Act order was issued that -- was there any dispute that Mr. Bannon didn't know about the subpoena? I mean, the world knew about it. The world knew about the contempt proceeding.

MS. VAUGHN: Your Honor, the world did know about it, but the government still has an obligation to make sure that it has evidence to prove each of the elements.

THE COURT: But what's unique here is that the government didn't just go get -- I'll put it this way -- regular old records. It sought records of the person whom the government knew was serving as counsel to Bannon. Why is that an appropriate first move as a source for information, where it seems to me those records are pretty darn attenuated from that element of knowledge that the government had to prove -- has to prove?

MS. VAUGHN: So Mr. Costello is the intermediary here. He is the only one interfacing with the Committee. So as the government is starting its investigation, it could possibly be that Mr. Costello just never fully communicated with the defendant about what the Committee was requiring of him.

So the government needed to investigate whether those communications had happened. And Mr. Costello wasn't the only person the government sought records for. We also sought records for the defendant. But, obviously, we may

not be able to find all of the defendant's phone numbers or email accounts.

So even though we don't have the content through the tolls -- which we never sought content of any communications -- the fact that a call might happen, let's say, between the defendant and his intermediary with the Committee, on the same day that the Committee counsel tells Mr. Costello, again, No, he has to show up. That is, obviously, evidence that Mr. Costello was communicating that direction to the defendant. It may not be the most direct evidence, but it is certainly relevant evidence in proving that the defendant was engaged in this process with the Committee, even though he was not directly engaging with it.

THE COURT: Did the investigation team need to get senior approval at DOJ to seek those toll and email records?

MS. VAUGHN: The Justice Manual, Your Honor, only requires approval for issuing subpoenas directly to an attorney or a law firm.

THE COURT: So under the Justice Manual, as I understand it, the government could seek the contents of an attorney's emails with a client, so long as the request is posed to an internet provider?

MS. VAUGHN: Well, obvious, we are --

THE COURT: I mean, without seeking senior approval.

MS. VAUGHN: Yes. And, obviously, we would go through a filter process because we are not just Hoovering up privileged materials; and that's the difference here too. The government's only getting toll records. There is no content. It's not a privileged communication that we are collecting. It's merely the fact that a conversation -- or maybe the conversation didn't even happen. It can be a missed phone call, that it happened at a certain date and time. It doesn't tell us anything about the confidential communications. It is only that confidential communication that is potentially protected. So the government never even sought that.

THE COURT: Now, I note in the final footnote to the supplemental brief the government lodged that you've offered to let the defense see the application for the Gmail account, so long as the defendant agrees to treat it as sensitive under the protective order or otherwise is willing to modify the protective order to see it. I didn't see a response to that question or proposal in Mr. Bannon's response to the supplemental filing. Would the government be willing to make that same offer as to the toll records subpoenas?

MS. VAUGHN: I'm not sure that the government is in the same position to be able to make that offer, because the subpoenas would be controlled by Rule (6)(e). And

McKeever made clear that unless there's a basis to provide it under (6)(e) or disclose grand jury material under (6)(e), the government can't do that. And so that goes back to the defendant's obligation to show a particularized need for those subpoenas.

THE COURT: Would the government object to producing those requests, subpoenas, as I understand it, to me for ex parte review?

MS. VAUGHN: The government would be happy to provide it to the Court for ex parte review, if the Court would require that.

THE COURT: Okay.

To summarize, there is obviously the question of those records, the requests. And on the -- so you've provided me with the Stored Communication Act application, ex parte. I've reviewed it. You've offered to make that available to the defense team, so long as they are willing to agree to certain protections.

You are willing to provide me the other requests, the toll records and the like. I'm not sure you can do that to the defense, given (6)(e). But then let's just go back to, essentially, the two buckets of information. You have some of this turns up, as we all know now, email records for a Costello, who is not Mr. Bannon's counsel.

MS. VAUGHN: Uh-huh.

THE COURT: The government's view, I assume is, those are wholly irrelevant here, because they have nothing do to with any communication between Mr. Bannon and anyone.

MS. VAUGHN: That's right, Your Honor.

THE COURT: And they quite plainly are not going to be in this case.

MS. VAUGHN: That's right, Your Honor.

THE COURT: And as to the toll records of the actual Mr. Costello, the government's position is that -- especially now that the question of Mr. Bannon's knowledge and the like is essentially undisputed, the government doesn't intend to use those?

MS. VAUGHN: I hesitate to predict how trial evidence might come in. The government obviously doesn't anticipate that it would need to use it affirmatively in its case-in-chief.

Obviously, if the defendant were to start to suggest, through its cross-examination of government witnesses, or through any case that the defendant might choose to put on, it might become necessary to the extent --

THE COURT: In any event, that information is in -- the government has produced that to the defendant.

MS. VAUGHN: (Nodded)

THE COURT: And beyond that the, I will put it this way, methods through which the government went about

obtaining that information, is not in the government's view, discoverable now. But might be *Giglio* material, to the extent that anyone who testifies touched that information?

MS. VAUGHN: So to the extent we have impeachment material relating to a witness that might testify. Let's say a government agent testifies.

THE COURT: Yep.

MS. VAUGHN: We would turn that over.

The government is not aware of any impeachment material that would go to that, that it knows of or has position of at this time, but if we became aware of it, we would obviously turn it over.

THE COURT: So now let's go to the rest -- unless there is something else you would like to say on the attorney records point.

MS. VAUGHN: I -- well, I think the bottom line of the attorney records is the defendant still needs to -- to go rummaging around in the government's files, the defendant still needs to identify on what basis he would use it.

So the Supreme Court's decision in *Armstrong* dealt with a selective prosecution claim, where the defendant wanted to go searching in the government's files for evidence that its prosecution was racially motivated.

The Supreme Court there said, This is a burden on the government, number one; and it intrudes on the executive

branch's independence in its prosecutorial decisionmaking.

The D.C. Circuit has applied that same logic to other situations where the defendant wants to go rummaging around in the government's internal files. For example, in *US v. Rashed*, that's 234 F. 3d 1280, there the defendant wanted to make a due process claim about a sham prosecution. And the D.C. Circuit, because it was a constitutional attack on the indictment said, You still need to make a colorable showing of the defense you intend to raise, before we let you go diving into the government's records.

So I think that's really the starting line for all of the defendant's requests here for the government's internal records is, Have they made a colorable showing in any defense that they would raise a Motion to Dismiss, some kind of constitutional attack? And they just haven't done that with respect to the attorney bucket or to the irrelevant records.

THE COURT: Okay. Thank you.

So now let's talk about the other -- the motion that is broader, in a sense, because it's not related to the government's efforts to get Mr. Costello's toll records and email records.

MS. VAUGHN: Uh-huh.

THE COURT: So, obviously there are a number of categories. I don't want to foreclose you from walking

through them in whatever order you like. I have questions, but feel free to tackle the different components of that in whatever order you would prefer.

MS. VAUGHN: I think the best way for me to do that is to walk through, sort of, the individual problems with each of the requests.

So first is, he has a bucket of requests that are completely untethered from proving or disproving the elements of the offense at trial. Did this defendant give subpoena? Did he understand the requirement to show up? Did he intentionally decide not to?

And that is the defendant's request for the internal deliberations about what the law requires for contempt of Congress, and the government's internal deliberations and advice from the Office of Legal Counsel, about under what circumstances the executive branch may or may not seek to prosecute individuals who have committed contempt of Congress. None of that is relevant to proving or disproving these specific factual elements.

So, again, it goes back to the defendant wants to get into the internal records of the government. He needs to under *Armstrong* and as has been applied later, make a colorable showing of what defense --

THE COURT: So -- I want to understand the government's argument here. It has been long-standing

Department of Justice policy that very close current advisors of the president are absolutely immune from Congressional subpoenas.

Imagine, hypothetically, that tomorrow -- I know this is a counterfactual but Ron Klain gets a subpoena from Congress to show up. And he and the department take the position that he is absolutely immune.

Congress doesn't like that. Makes a contempt referral. And for whatever reason, the department -- again, this is counterfactual given the parties -- but the department says, We are prosecuting Mr. Klain for willfully not showing up. And Mr. Klain says, What are you talking about? The OLC opinion says, I have absolute immunity.

The government's view is that is irrelevant to the case?

MS. VAUGHN: That is irrelevant, Your Honor, because, again -- that is the government's --

THE COURT: But the government would be saying, We have binding OLC opinion that someone has absolute immunity, but we are nevertheless the same department authorized to prosecute that person.

MS. VAUGHN: Our -- the department's views on when and under what circumstances it should prosecute someone is different from --

THE COURT: But how are those consistent

positions? In other words, how can the department, assuming the OLC opinion I just talked about has not been rescinded, I don't think it has -- how can the department simultaneously say someone in that position has absolute immunity from showing up, and can be prosecuted for failing to show up?

MS. VAUGHN: Well, I guess the department --

THE COURT: Those two positions would be held at the same time by the same department.

MS. VAUGHN: I think the department certainly might have an inconsistent legal view at that point. But as far as whether the elements are met under the statute, that's a different question --

THE COURT: Isn't there an estoppel argument at that point that the defendant might want to make and/or the defendant argues that that goes to whether he has made default?

MS. VAUGHN: Well, the issue of whether or not the defendant has made default, in an estoppel argument, this idea that he was given permission somehow to make default; that again goes to what was in the defendant's mind at the time.

The defendant's request here is not about, We think you have evidence about what was in my mind at the time. We've provided everything we have about

communications between the defendant and his representative and the Committee, and the defendant's representative and the White House. We have provided all of that. The defendant's request is broader than that. He says, Government, I know that you have decided before that you wouldn't prosecute people like me -- obviously the government disagrees we ever said that.

THE COURT: I understand there is a difference of opinion about where Mr. Bannon fits within those OLC opinions. I'm testing the proposition on the assumption that there is an express OLC opinion covering the person in Mr. Bannon's shoes and -- that is why I am using Mr. Klain as an example. Chief of Staff to the President. It fits within the OLC opinions quite clearly -- and the government's position here is that OLC opinion is altogether irrelevant.

MS. VAUGHN: It is. Well, first, this goes back to the government's Motion to Exclude Advice of Counsel --

THE COURT: Partly.

MS. VAUGHN: -- because of a mistake of law. A mistake of law, a mistake that you were not committing contempt when you were --

THE COURT: Right. And your view is --

MS. VAUGHN: -- is not an offense here.

THE COURT: -- because of your position on advice

of counsel, Mr. Klain could not argue that he relied on -- I assume he could not rely on what a lawyer told him about the OLC opinions. But you are saying he could not rely on the OLC opinions themselves.

MS. VAUGHN: Because practically at trial, how would that OLC opinion come in? He's testifying about -- Well, I knew I got a subpoena. I decided not to show up -- or the government is presenting evidence that that's the case. There is no relevance that that OLC opinion has to establishing or disproving those elements.

THE COURT: Is it relevant -- assuming there is a Motion to Dismiss the Indictment here, is it relevant or can it be relevant to my consideration of that, understanding the various positions OLC, at least, has taken on these issues. Not to say that they have, necessarily, taken a crystal-clear position as to someone in Mr. Bannon's shoes. But OLC has taken positions on issues around Congressional subpoenas and executive privilege and people in certain positions in the White House, are those official OLC opinions? I'll put it that way. Are they relevant, at least to my consideration, if there is a Motion to Dismiss the Indictment?

MS. VAUGHN: Your Honor, that is -- they are internal department advice, and I don't think that they would be controlling in any way on this Court's decisions.

In fact, I think sometimes courts have disagreed with the DOJ's view.

THE COURT: I agree they are not controlling. The question is whether they are relevant.

MS. VAUGHN: I don't think that they would be. The executive branch, obviously, doesn't decide what the law is in a court of law.

And so the executive branch internally, all of the time, takes views on what the law requires and does not require. But that, at the end of the day, is not determinative, once we are before a judge. And I think courts before have, actually, rejected some of the reasoning in DOJ OLC opinions.

THE COURT: I know of one case very well.

MS. VAUGHN: So I think what the defendant is after here is not evidence of his intent, it's evidence of the way we internally, at the Department of Justice, view the law. And that wouldn't provide him any basis for relief either before trial or during trial.

THE COURT: But isn't -- isn't there something anomalous -- and I'm not sure what the right legal hook for it is -- but for DOJ, the official DOJ policy to be, We say someone has absolute immunity in this context and/or, We will not prosecute someone in this context. And then to say that those statements of official DOJ policy are irrelevant

altogether in such a prosecution?

MS. VAUGHN: I don't think it is, Your Honor, and here's why. I think the Department, as the executive, the one enforcing the law through prosecutions is making decisions all of the time about what it believes merits prosecution and what does not. And that is sometimes based on the department's interpretation of the law.

DOJ OLC opinions around contempt of Congress are really no different. They are about, Under what circumstances do we, the Department of Justice, believe that someone is subject to prosecution under the law?

The analysis might change. I guess, if we are at the point we are prosecuting Ron Klain, it definitely has changed. But at the end of the day, that still is not -- it's just the department's view on whether prosecution is appropriate.

THE COURT: Okay. I understand the government's position.

Obviously my hypothetical is pointed because it assumes a crystal-clear inconsistency, one would say, between the OLC opinion and the later prosecution. And I understand the government's position here is there is no such inconsistency, at least as to public OLC opinions.

MS. VAUGHN: That's right, Your Honor.

So that's, sort of, the first bucket of what the

defendant is seeking, the things that are internal government deliberations.

Second, he seeks materials in Congress' possession. Obviously we, as the executive branch, cannot compel Congress to provide records to us. In fact, it might be that some of the records the defendant wants are potentially protected by the Speech or Debate Clause. So even if we wanted to, we could not force Congress to turn those records over.

Just because they are, essentially, the complainant in this case, does not make them part of the prosecution team, and we don't have the ability to go searching in their files to produce those records. So his request relating to further searches for records in Congressional files, has to be denied on that basis.

THE COURT: But to circle back to a question that arose from, my perspective at least, first in the context of the attorney records, if hypothetically the government were to call a witness who is a Congressional employee, whether -- you know, a member of the Committee or a staff person or whatever, it would have an obligation to turn over impeachment evidence, if any.

MS. VAUGHN: Anything we have or are aware of, yes, it would have an obligation to turn that over.

THE COURT: Does the government have a view about

whether statements about the political nature, from Mr. Bannon's perspective of this prosecution, if somebody said, you know, we need to go after Mr. Bannon for X-reason that that would be considered *Giglio* impeachment material?

MS. VAUGHN: If a witness said that, we would certainly turn that over as potential impeachment material.

THE COURT: Okay. But we are not there yet, obviously, because under the current schedule, there's a later process for turning over impeachment information.

MS. VAUGHN: Yes, Your Honor.

And our practice is, as soon as we get it, we will turn it over as soon as practicable. We won't sit on things until the last minute.

And, actually, that's another bucket of information. Obviously his request for impeachment information is essentially moot, because we provided everything that we are aware of currently, and we haven't even identified our trial witnesses yet.

The other two categories really go to what we already discussed with respect to the attorney records and the irrelevant email records. It's either grand jury material or it's material going to the government's internal deliberations that don't go to any kind of defense pretrial or during trial.

So unless the Court has other questions, I think

we've addressed all of the buckets.

THE COURT: Yes, I agree. I would like to hear from defense counsel now.

MS. VAUGHN: Thank you.

MR. SCHOEN: Judge, my first role is sort of emcee. I just want to explain how we will proceed, if we might.

THE COURT: Yes.

MR. SCHOEN: I intend to address the Costello motions and Mr. Corcoran, possibly, in addition from me, is going to address the other two motions.

So given the order the Court started in before, if the Court would rather hear from Mr. Corcoran on advice of counsel first, we can do that.

THE COURT: Why don't we do that. These are all interrelated, to an extent, but since I started there, and then in some ways ended with something it sounds like Mr. Corcoran is going to address as well, why don't we begin with him and then we will come to you.

MR. SCHOEN: Yes, Your Honor.

THE COURT: Very well. Mr. Corcoran.

MR. SCHOEN: Your Honor, Mr. Costello may also address the Court on the Costello motion issue.

THE COURT: Fair enough.

MR. SCHOEN: By the way, the legal hook that we

intend to use is entrapment by estoppel, just a little plug.

MR. CORCORAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. CORCORAN: Your Honor, your questions on advice of counsel tend to track the way that I think about it in terms of the elements of the offense; that's sort of how I always start with every case. And here it's not so much a defense, but it goes to this issue of "willfully makes default."

I think one interesting thing is that you raise a hypothetical, which is not so far from happening, and that is, this particular statute has been used. And Congress has voted to hold in contempt a lot of top public officials.

On June 28th of 2012, Attorney General Eric Holder was held in contempt by Congress, and a referral was made under the statute to the U.S. Attorney's Office. About seven years after that, Attorney General William Barr, was held by the House of Representatives in contempt of Congress. And a referral was made to the U.S. Attorney's Office. Long before that, EPA Administrator, Ann Gorsuch, in 1982, was held in contempt by the House, by a House vote, and a referral was made to the U.S. Attorney's Office.

And the odd thing is, given the elements of the offense, as described by the government, if any of those three top government officials were prosecuted and appeared

in court, they would be limited to saying, I received the subpoena, which each of them obviously did; and I made a decision not to comply with the subpoena, which each of them obviously did.

All three of those top government officials would be guilty of the crime. And they would not, under the government's theory, be able to say -- in the case, for instance of the Attorney Generals, Look, we got the best lawyers in the world here at the Department of Justice. They've given me advice I don't need to appear. The jury should hear that is the way I acted the way I did. They wouldn't be able to do that.

So I think there's a real element of unfairness in the position that the government has taken.

THE COURT: But do you agree that if *Licavoli* is binding, that it forecloses at least a component of that argument? In other words, *Licavoli* says, Advice of counsel is not a defense.

MR. CORCORAN: Right. I don't.

First of all, I think it's clear, and you asked the direct question, Is *Licavoli* correct? And I am not here to say that the D.C. Circuit is incorrect. I think it is clear that the case would be decided differently today.

THE COURT: But that is not a reason that I can ignore it.

MR. CORCORAN: Oh, I understand that. And I'm not suggesting that, other than to say, you know, sometimes we have to go with what's right.

I think what's clear in *Locavoli* is that it's totally distinguishable from the case here; and that is, *Licavoli* did not involve an assertion of a constitutionally-based privilege. Totally distinguishable.

I will read this sentence from *Licavoli* that caught my eye. It says, "Advise of counsel cannot immunize a deliberate, intentional failure to appear, pursuant to a lawful subpoena, lawfully served." That's the distinction.

Here, as you identified, OLC opinions give absolute immunity to a top presidential adviser, when the president they serve asserts executive privilege. Therefore, *Locavoli* is distinguishable. It's not a case of lawful opinion, lawfully served.

What we are talking about is a subpoena that was void because of the situation that Mr. Bannon was put in, and asked to protect the privilege.

THE COURT: You can argue that the subpoena was void and was unlawful for other reasons. In fact, you've suggested that you might, violation of the rules, the failure to have somebody, a minority, you know, ranking member or whatever.

But if the subpoena was lawfully served, doesn't

-- and that's -- that's probably a legal question. If the subpoena was lawfully served, are you saying that the fact that Mr. Bannon says that he would have been testifying about privileged information made the subpoena unlawful?

MR. CORCORAN: I think that in -- yes. In terms of distinguishing *Locavoli* --

THE COURT: In the cases that the -- so my recollection is in OLC opinions about absolute immunity, they don't say that by seeking the testimony of the senior adviser to the president or whatever, that the subpoena is unlawful or was lawfully served. They say, You have an immunity from responding to it.

Is your view that a subpoena as to which someone has immunity is an unlawful subpoena?

MR. CORCORAN: I'm not sure -- I'm using that language because that is the language in *Locavoli*. What I would say is, Receipt of a subpoena from someone in -- it's not unlawful to ignore based on OLC opinions. If you are in Mr. Bannon's shoes, it's not unlawful to ignore a subpoena, even if it is validly served.

We have got other reasons -- and, again, for purposes of deciding what the elements of the offense are, we don't necessarily -- we aren't necessarily in a position of having to prove each of the items that we would -- that the subpoena is about.

I'll give you another example. There are OLC opinions, to go to the question of whether a subpoena is valid, if it is served on an executive branch person. But counsel -- the president's counsel in this case -- can't attend the hearing in order to assert privilege. In our view, because of OLC opinions, that subpoena is void. The person in receipt of that subpoena doesn't need to appear.

I am listing these things only to say *Locavoli*, which did not deal with somebody asserting executive privilege, asserting even a Fifth Amendment privilege, which wasn't an issue here. But a constitutionally-based privilege totally distinguishes the case.

THE COURT: Let's assume that -- assume that I think that *Locavoli* is on all fours with this case or at least that it's holding covers. It's not distinguishable.

What is your best argument for why I need not follow it?

MR. CORCORAN: I don't think this court is a potted plant, such that you have to ignore the law as it's been developed and been articulated. Not just by the D.C. Circuit, but by the Supreme Court, on the keyword at issue in the statute, which is "willfully."

The Supreme Court, in *Bryan*, was crystal clear that "willfully" in a criminal context means, knowing you are doing something wrong. Knowing that you are doing

something unlawful.

THE COURT: That's not the statute, that *Bryan*, the 1998 *Bryan*. And I don't think there is any Supreme Court decision post *Locavoli* that says, Willfully in the context of this statute means something different.

MR. COSTELLO: That's very true. These cases come up, thankfully, once a decade. So the Supreme --

THE COURT: Don't you think the D.C. Circuit would find itself bound by *Locavoli*, whatever it stands for, whether it is distinguishable or not, but at least as to its terms, unless and until it takes that question en banc?

MR. CORCORAN: I don't think so. I think that -- and we cited --

THE COURT: So what's the legal -- what's the rule of law principle that allows me to ignore a D.C. Circuit opinion that has not been overruled by the D.C. Circuit or the Supreme Court in the years since it's been decided?

MR. CORCORAN: Well, I think the legal -- well, I think, first of all, it's a distinguishable case. But you're assuming, and you are asking me if it's on fours, and it's 60 years old, and the Supreme Court has spoken to the very word that's contained in the statute, are you bound with a 60-year-old D.C. Circuit opinion? My answer is, You are not.

THE COURT: Why?

MR. CORCORAN: Because you are allowed to --

THE COURT: I'm allowed to ignore D.C. Circuit opinions that have not been overruled.

MR. CORCORAN: No. No. But you are allowed to follow the guidance of the Supreme Court in a context of a criminal statute where the rule of lenity applies, where if there are multiple readings, the -- you know, the winner is the defendant, et cetera, et cetera.

I see my co-counsel approaching --

THE COURT: I really don't want to be doing a back-and-forth. I will let you speak when we get there, but I would rather hear from Mr. Corcoran.

So your answer is, I can ignore a binding D.C. Circuit precedent, so long as I don't think it's right and it's old.

MR. CORCORAN: My answer is, Where the Supreme Court has spoken, specifically in the criminal context to the meaning of the word "willfully" --

THE COURT: I don't think anybody disagrees that willfully does mean different things in different contexts.

MR. CORCORAN: Absolutely. And here, when it's paired with default, that only adds to our position, which is it is something more than intentional. It's something more than knowing.

THE COURT: I think that the D.C. Circuit may very

well have gotten this wrong; that makes sense to me, what you just said. The problem is, I'm not writing on a clean slate here.

MR. CORCORAN: Well, I think the slate that you are writing on is one that has already been prepared by the Supreme Court in *Bryan* and by the D.C. Circuit in the cases that we cite that go into great detail about the use of the word "willingly" in criminal statutes. So I don't think we are asking the Court to do anything --

THE COURT: Did you argue in your brief that *Locavoli* was distinguishable from this case because it did not involve the context of executive privilege and former executive branch employees?

MR. CORCORAN: I think we did. I can't point to the page right now, but that's clearly -- you know, that's clearly a distinction.

And if you look at these cases, and many of them come from the 50s and the 60s, House -- Committee on Un-American Activities. One of the things that I found, where there is an assertion of a constitutionally-based privilege, those cases the defendant wins.

And in some of the cases where it is just an expression where even if a lawyer says, Well, that's not within the purview of the Committee. So we are not going to answer that question, the defendant loses.

None of the cases deal with this specific question where there's a constitutionally-based privilege that's asserted from the outset by counsel to Committee counsel. And a request is made, Let's let a judge decide this. It's just a different situation, Your Honor.

THE COURT: I have that one.

So let's do the rest of the non-Costello email discovery issues. And I'm happy to have you walk me through them in whatever order you would like to take them.

MR. CORCORAN: Okay.

Well, the first -- anything that applies to the grand jury -- again, I take a very practical view of this. There's no doubt that the cases talk about secrecy of the grand jury, the specific federal rule, Rule (6)(e) pertains to it. But there's a suggestion in the writing and the oral argument of the government that somehow the grand jury is an impenetrable fortress. And it's not.

In this case, the government in their briefs have said, We gave you all of the testimony already. And we gave you all of the exhibits already. And they are covered by the protective order. And that's protecting -- whatever secrecy interest remains is protected by the protective order.

What they are now saying is, We are not going to give you the actual subpoena, a piece of paper to a phone

company; that is pretty vanilla, frankly. We are not going to give you the order, which the Court has already reviewed --

THE COURT: That's not true. They offered to give you the order.

MR. CORCORAN: Well, we will accept that offer under the protective order.

THE COURT: Okay. So that's moot.

MR. CORCORAN: That's moot.

But key -- they said is, We don't want to give you the instructions or the argument of counsel. Essentially saying, grand jury members, you heard the evidence. Here are the instructions. Read the instructions. This is what you should find. Please return an indictment. We will type it up for you and hand it to you. Please return it.

That information -- first of all, the instructions themselves in most cases would just be Red Book. This statute is not a Red Book statute because it only comes along every ten years.

The notion that Red Book jury instructions are somehow secret, does not make sense to me. I can say that. Particularly when there is a protective order in place, we believe that they should be given to us. And we cite a case from the Northern District of California.

THE COURT: So why? What's your hook for why you

think that you should get them? Beyond just, There's a protective order and we --

MR. CORCORAN: Right. We set forth our -- you know, when you used the words "particularized need." What are our hooks? What are our needs? And we've identified several of them. One is -- and it's not speculative. We believe that the government provided an -- the instructions on the elements of the offense, that it is wrong; that's the incorrect law.

It's the same knowledge that they've provided here today. And we believe --

THE COURT: So if you lose the Motion in Limine, do you lose that argument as to the instructions?

MR. CORCORAN: I don't think so, because we would still want the materials --

THE COURT: I'm sure you'd want it, but what's the argument for it?

MR. CORCORAN: No. I'm saying we should still be entitled to them for examination.

THE COURT: But why?

MR. CORCORAN: Because there's enough there -- there's enough there for us to show a particularized need. In other words, to state with some specificity that it may -- and that's what the rule says -- may allow us to dismiss the indictment.

It doesn't say that we have to prove that the grand jury instructions will result in a dismissal of the indictment. That would be impossible, because they are secret. The word is "may." And we identify a number of different things that suggest that the instructions are wrong. And if they are wrong, the indictment should be dismissed and we'd move on that basis.

The other thing is we identify the grand jury testimony talking about an adjournment where Mr. Costello sent a letter to the Committee and said, Can we have a one-week adjournment? A case was just filed that may have bearing on this issue. We've asked all along to ask a judge decide this legal issue of privilege.

Well, in the grand jury, that was not the testimony. The suggestion was that no request had ever been made for a later date to appear. And if that was argued, if there was argument by the AUSA that said, You know what, you heard there was no request for a later date, when they had in their position a letter seeking an adjournment, that would be a basis for the dismissal of the indictment.

The final issue is there's testimony before the grand jury that suggests to the grand jury that President Trump did not validly assert or communicate an assertion of executive privilege to the Select Committee. That was done by a letter from Mr. Costello that quoted a letter from

counsel to the president.

So it would be a basis for the dismissal of the indictment if the prosecutors, in telling the grand jury, Well, this is a willful default here. And by the way, there was no valid assertion of executive privilege because the president didn't himself communicate that to the Select Committee. If that was the argument, it would be a basis to dismiss the indictment. It is not speculative. There is grand jury testimony right on point, which we cite in our motion.

So I think, overall in these grand jury materials, particularized need just aren't magic words. It just means we need to specify why we need it. In each of the cases that I've just run through, if we get the information, we believe it's a basis for dismissal of the indictment.

Certainly, it's a balancing. How does that balance -- how does what I said -- even if you don't believe it word for word in terms of what we are going to get, how does it balance with the secrecy interest?

There is a general secrecy interest for the grand jury, it's going to be totally protected because we are talking about instructions and argument by counsel to the grand jury by the protective order.

THE COURT: Okay. You also seek non-grand jury discovery.

MR. CORCORAN: Yes, Your Honor.

THE COURT: Why don't we start with executive branch OLC opinions.

MR. CORCORAN: Yes, the OLC opinions. The cases are pretty clear. There are a bunch of them cited in our brief and in the government's; that the US District Court cases from this court are really instructive on this kind of guidance.

Naegel, 468 F.Supp 2d. required the discovery of guidance materials and policy statements from numerous US trustee offices. *O'Keefe*, 2007 West Law 123, 9204 said, Decisions and policies on expedited visas at six international consulates had to be turned over.

The *Poindexter* case involving the Iran Contra issues, before Judge Greene, there were 300,000 pages of documents turned over by the government before the defense moved for additional discovery. And Judge Greene said, All documents in the executive branch on the applicability of the Boland amendment, must be searched for and disclosed to Mr. Poindexter.

In addition, all documents showing that executive branch official had knowledge of the National Security Counsel activities, had to be searched for and provided. We are asking for a much, much more narrow set of information. Take our letter. Email it to the US House of

Representatives' General Counsel. Please search for these materials. Send it to Main Justice Office of Legal Counsel. Please provide any information that's responsive to this request.

THE COURT: Would you be willing to limit that to, what I would consider to be OLC opinions, published or not? I mean, is an email from an attorney adviser to a deputy in OLC discoverable if it's not an official OLC opinion? Or why should I permit that type of thing?

MR. CORCORAN: Well, it is discoverable.

THE COURT: On what ground?

MR. CORCORAN: Under the local rules.

THE COURT: What issue does it go to?

MR. CORCORAN: Well, estoppel, essentially.

THE COURT: So an email from an attorney adviser to the Deputy Assistant Attorney General of OLC, would estop the United States government from taking some position in litigation? That can't be right.

MR. CORCORAN: Let's say the email said, You know what? It's our long-standing policy here at the Department of Justice not to prosecute former, even former, top presidential advisers when the president asserts privilege. But let's make an example of Mr. Bannon. That, we believe, the government should search for and provide emails along those lines, because they would tend to negate an element of

offense.

The local rule requires that. It's broader than *Giglio*. It's broader than *Brady*. The local rule that applies to the courts that --

THE COURT: So what element of the prosecution or what defense does such an email go to? It's even better for you. Imagine, hypothetically --

MR. CORCORAN: Yes.

THE COURT: -- there is an official, but not-published OLC opinion, that is 100 percent on all fours with this case. Right? Former executive branch employee discussing things with the current president, Congressional subpoena, assertion of privilege --

MR. CORCORAN: Yes.

THE COURT: -- and that OLC opinion is as strong with respect to immunity or non-prosecution as one can imagine. I'm not saying there is such an opinion. I am just hypothesizing it. The government says, That's irrelevant because it doesn't go to an element of the charge or a defense. So what does it go to?

MR. CORCORAN: Well, I think it does go to an element of the charge of the offense. Willfully makes default.

THE COURT: But why? If that is a non-public OLC opinion, then by definition neither Mr. Costello nor

Mr. Bannon would have known about them.

MR. CORCORAN: Well, first of all, the discovery rules do not require -- relevance is a concept for trial.

THE COURT: I'm just trying to understand how the opinion would be relevant in your view --

MR. CORCORAN: Right.

THE COURT: -- to something either the government has to prove or you would want to say in your defense.

MR. CORCORAN: Just to be very clear in my answer, that document doesn't have to be admissible in trial. Relevance is not a consideration when considering discovery. The rules make clear that even if it's inadmissible, but could lead to admissible evidence, then it has to be turned over.

So for instance, in the *Safavian* case -- that was Judge Friedman -- he required turning over -- it was a GSA case and ethics and the government in that case for a White House official. He required at 233 FRD 12, he required the turning over internal GSA guidelines and procedures regarding ethics opinions and disciplinary actions. He required -- it involved Abramoff. He said, Even emails by Abramoff and Associates, even if unknown to the defendant, must be turned over, because they may lead to admissible evidence.

So for your hypothetical, a request to OLC, give

us emails, give us drafts, give us information, may lead to admissible evidence. So it doesn't have to be relevant. And it doesn't have to be something that's in -- you know, in the mind of either Mr. Bannon or counsel. And that's, you know, that's the nature.

In *Trie*, another case we cite, the judge required both DOJ and Federal Election Commission, internal memoranda had to be searched for and turned over on the topic of whether a specific statute applied to conduct like the defendant's.

In other words, it's analogous. We are asking for, not internal deliberations, but statements within the government that talk about whether a certain statute applies to Mr. Bannon.

THE COURT: Okay. So now let's turn to the other bucket, which I guess is statements, documents, et cetera, to suggest that this is a political prosecution. And I don't mean to limit your argument.

MR. CORCORAN: Yes, I understand.

THE COURT: That's a different category, I think.

MR. CORCORAN: Well, I think, first of all, on Congressional documents. And I understand there are cases that talk about Congress being, you know, obviously the constitution talks -- has Congress in a different building so to speak, than the Court.

We are not asking the Court to compel Congress to do anything. We are asking the Court to compel a litigant, the United States Attorney's Office, which is prosecuting our client criminally, to seek records.

In other words, again, from just a practical standpoint, all they need to do is send to the general counsel of the U.S. House of Representatives our letter. Say, We are engaged in litigation. We followed the criminal contempt vote of the House, and we are proceeding with the prosecution.

Please search for and give us from the Select Committee staff, Select Committee members, the Speaker of the House, because she had a role in certifying the vote to the U.S. Attorney's Office. Please search for these materials and give them to us.

And the reason why it's -- so it's more like -- it's not just that the Select Committee is a complainant here. They initiated the prosecution. The statutory scheme gives the Select Committee and the U.S. House of Representatives the power to initiate this prosecution.

The statutes, 2 U.S.C. 192 but 2 U.S.C. 194 says that once the certification is made, the U.S. Attorney's Office "shall" present the information to a grand jury. In other words, there is no choice.

Now, I know that different cases and OLC opinion

at different times has taken a different position on it. But from our perspective, it's not just a complainant. They sit in the -- they are in the shoes of any other investigatory or partner in a prosecution. That's why we are seeking the documents from them. They've already made a lot of public statements, members of the Committee, that they are trying to make an example of Mr. Bannon. Obviously we are trying to present a defense and develop a defense, prepare a defense. And that is important information to know if the reason that he -- you know, that Attorney General Barr and U.S. Attorney General Holder were not criminally prosecuted, but Mr. Bannon is. And the reason is they want to make an example of him, we are entitled to that information from the Committee. And it's not -- it's not a burdensome request. Again, it's sending an email with our attachment and asking for them to do it.

Now, again, as I stated, we are not asking the Court to compel Congress to do anything. They could respond to the email that they get from the AUSAs and say, You know what? We are not going to give you that. We are not going to give you that information. Then we are in a different posture. And we'll have to decide as a defense team, what do we do in that posture?

We are not asking you to compel them to do anything. We are saying, If we are going to have a fair

trial and it's initiated by members of Congress, and they made statements to the effect they want to make an example of him, we need their private conversations on that as well, on that topic.

THE COURT: So you are not asking me to order the production of anything. You are asking me to order the government to ask Congress to "pretty please" give them these materials?

MR. CORCORAN: Yes. You don't have to use that exact language.

THE COURT: And I wouldn't. But if Congress refuses?

MR. CORCORAN: Then we as a defense team will have to take the next step. But we may seek, in some way, to get an evidentiary benefit from that. We may seek to foreclose certain positions that might be taken at trial by the government.

But right now we are in discovery. Discovery is all about, How do we get what we need to prepare a defense? We don't have the ability to go -- we are not talking about rummaging in their files. That's the words that the prosecutor used.

We have discrete requests that will take very little time to search and fulfill. And we believe it's necessary for a fair trial.

THE COURT: Thank you, Mr. Corcoran. I would like to hear from Mr. Schoen on the Costello emails.

MR. SCHOEN: Your Honor, first of all, I want to apologize for the protocol breach earlier.

THE COURT: No problem.

MR. SCHOEN: Fundamental rule, I suppose.

Having said that, to explain, our original plan was to divide up that issue, the advice of counsel. But I wanted to respect of course the Court's wishes announced this morning.

Can I have 20 seconds, though -- the Court asked the question what is the best argument.

THE COURT: Yes. Yes, please.

MR. SCHOEN: I want to give you what I believe. To crystalize it, the Court's question really was, If I find *Licavoli* is best law still, what is your best argument around it? Because here I am in District Court, and I am bound by that.

I think the best argument is -- Mr. Corcoran alluded to toward the end -- executive privilege takes this case out of *Licavoli*. Why? Because it raises a separation of power issues, not contemplated in *Licavoli*. And all of that is based on the advice of counsel in this case.

In other words, the advice of counsel, with respect to executive privilege is, Bannon, your hands are

tied. You don't have the will. Willfulness is removed from this equation. Once executive privilege is invoked, there is nothing volitional --

THE COURT: This argument is that *Licavoli* can still be perfectly good law and binding, but it's not applicable. So where in your brief did you make this argument?

MR. SCHOEN: I don't think that argument, in that form, is made.

THE COURT: Are you close to that form?

MR. SCHOEN: Your Honor, I think it is sort of close to it.

THE COURT: Point me to where that is in your brief.

MR. SCHOEN: I think after you get to the *Licavoli* discussion, and we talk about separation of powers, it doesn't make the argument that, By the way, if you buy into *Licavoli*, here is why *Licavoli* is different.

THE COURT: No. It just says, *Licavoli* is no longer good law. It doesn't say, Even if it is good law, we win. Because it is completely irrelevant to the question at hand.

MR. SCHOEN: I think that's right, Your Honor. I think we address that when we say *Licavoli*, that standard has been replaced by *Zeese* and *Ratzlaf* and all of that. But

this is an argument.

I personally think it's the best argument; and that is -- and we do make the point about executive privilege in the brief. But the point here is, the jury deserves to know what really happened. And, in fact, if we believe what Mr. Costello has said in his declaration, what really happened is, he on behalf of Bannon, tried to find a way to accommodate the subpoena, the opposite of "lack of willfullness." He was willing to testify.

He didn't default. He didn't willfully make default. He said, Work it out with the president or take me before a judge and let the judge tell me it doesn't apply. I need to testify. He was willing to do those things. But his lawyer said, You can't -- absent those things, you cannot go forward. Your hands are tied. That's what the law is, Bannon, and you've got to follow the law.

The jury deserves to hear that. And if they don't hear it, all they hear is, well, let's see. Bannon got a subpoena. And Bannon didn't show up.

It gives Congress, in a sense, a veto power over the executive privilege. The executive branch has the right to determine for itself what's a privileged matter. The ultimate arbitor would be you or the court; and that's what the courts have said in a number of cases. The ultimate arbitor -- I'm sorry I'm talking too fast. The ultimate

arbiter on executive privilege is the Court.

And so we need advice of counsel here because Mr. Costello was the only -- they like to call intermediary or point of contact. He was the only person who ever dealt with this Committee on Mr. Bannon's behalf.

To tell the story of this case, and specifically on willfulness, we need to have Mr. Bannon -- we need to have the evidence go in on advice of counsel. That's, I think, the best answer on that.

The other thing, the OLC opinions of course, is a conceptually different argument. It may be relevent to wilfulness, but it's a due-process-based argument. That is, the government is estopped. This is the classic entrapment by estoppel. The government is estopped from taking a position inconsistent with these publicly-issued, binding on the Department of Justice, legal opinions.

When they say things like, If you get -- former member of the executive branch -- if you get a subpoena and the rules or by Fiat, Congress committee won't allow the privilege holder invoker, that subpoena is invalid -- (A sneeze.) God bless you -- that subpoena is invalid. That's a position taken in OLC opinion.

If an OLC opinion says, An executive branch member or former executive branch member cannot be prosecuted by the Department of Justice, if that person invokes executive

privilege, that's a binding, publicly-issued opinion, that Mr. Bannon and everybody else is entitled to rely on. And that the government is estopped from prosecuting or from violating, put it that way. And that's a due-process-based argument.

All right. Back to my agenda, Your Honor.

Just a couple things. I know, first of all, the Court clearly has read all of the papers, knows all of the arguments and is very familiar with all of the facts, which is extraordinarily impressive in and of itself. But I don't need to go into the facts. And the Court's questions at the beginning of this discussion with the AUSA pointed that out.

I do think we have to ask the question, which the Court asked, Why? The Court knows what happened here. They went after emails -- well, we are still not clear exactly. I gather from the discussion today, there is only one Stored Communication Act application in order. I'm not clear why there is only one, when they went after several email accounts. And 2703(d) clearly contemplates using the Stored Communications Act to get other email accounts. So I don't know what happened there on their end.

And I'm not sure, by the way -- it's a little bit of a side issue I don't think we need to deal with today. I'm not sure -- and some commendators have suggested what I am going to say -- that after *Carpenter*, just getting a

Stored Communications Act order is enough, even for records, non-content records. But that's a question for another day and another Court, I suppose.

But today we look at what they got, these email records, none of which were Mr. Costello. So it's not in the posture of a Motion to Suppress. And the telephone records that are of Mr. Costello.

And, of course, you know, we hear the government dismiss all of this as, Well, we didn't get any contents. We don't know what he said in the conversation, which undercuts the very basis they have for trying to get these. But these are still very important. And this is why the Department of Justice's policy says, A subpoena to an attorney related to the representation of clients. It doesn't require just when it relates to contents.

The position, by the way, since I want to try to cut to what the questions and answers were earlier -- the positions, by the way, that the position only applies if you serve the subpoena on the attorney himself, and not to a third party -- for which no authority is cited in the government's brief -- is absurd on its face.

The principles behind the policy are reflected in the policy. There is a special relationship between attorney and client. You risk imposing and interfering with that relationship by going after an attorney's records of

any kind by subpoena. And that doesn't depend on whether you handed it to Bob Costello or you handed it to TMobile.

In fact, there is no reason in this case not to give notice to Mr. Costello. His phone records were not going away. There is no reason in this case not to have abided by the DOJ policy that requires the government to seek those records voluntarily, as a matter of first course.

Now, you know, the government said, This policy isn't binding on the Court; that's absolutely right. The Court can't enforce that policy. I'm hopeful the Inspector General will see things differently from how the government presents in this case but that's also beyond the purview.

THE COURT: So let's cut to the chase.

MR. SCHOEN: Yes, sir.

THE COURT: As to emails, email records, at least as the record reflects, no email records for Mr. Bannon's lawyer, Costello -- to be distinguished from other Costellos in the world -- were collected. I assume you agree, the email records from other Costellos are completely irrelevant here.

MR. SCHOEN: The records themselves are irrelevant.

THE COURT: The records themselves.

MR. SCHOEN: Any representation made to a federal judge to get those records, under 2703(d) specific,

articulable facts that --

THE COURT: Just hold on.

MR. SCHOEN: Yes.

THE COURT: The government has offered, and Mr. Corcoran accepted the offer to produce that application to you. So you are getting that.

MR. SCHOEN: I understand.

THE COURT: So at least as to that question, you have a set of irrelevant emails that you already have, and you have an application that you are about to get. It seems to me that that's -- at least for present purposes, that's the email stuff. Now, you may want to do something with that application, but in terms of discovery, you got it.

MR. SCHOEN: Yes, Your Honor.

THE COURT: Now, as to the phone records, you have the phone records. I'm relying on the government's representations that all records that were collected have been produced. I can't do anything other than rely on that. The government has said there were subpoenas as to those records, and they will produce them to me for my in-camera review but not to you.

What more do you want?

MR. SCHOEN: I tell you what I think is relevant, to some degree, I was surprised to hear today the government say, Well, these telephone subpoenas really go to the grand

jury investigation.

I would be surprised, to put it mildly, if the grand jury actually requested subpoenas for Bob Costello's telephone records for the purposes stated here.

In my imagination, at least, I believe it is possible that the government decided that they wanted to subpoena those records. And so I think there -- if it's otherwise, if the grand jury really asked for Bob Costello's telephone records, then I think we are back to Mr. Corcoran's argument on another reason we need grand jury minutes, because what on earth were they told about what the government knew at this point?

Let me try to bring that home. The Court asked earlier to the government, Well, you know, certainly today -- by today the defense has conceded that Mr. Bannon got the subpoena and so, you know, today you wouldn't really need to get those records, would you?

Two answers to that. Bologna, is one. They knew -- the referral in this case was made on October 21st to the Justice Department. Banners about Bannon were in newspapers all over the world. Everybody knew that Bannon's position was he wasn't complying with the subpoena because executive privilege had been invoked and he couldn't.

There's never been any discussion that Mr. Bannon never received the subpoena or that Mr. Bannon showed up in

the wrong place or that this was a matter of accident and that's what really happened. And it's disingenuous to suggest otherwise. These subpoenas went out after that referral. The earliest one we know about is October 25th.

Putting aside all of the other interaction, on November 1st -- it's in the record. I think it's 34-1 at Pages 15 to 24 -- Mr. Costello put in writing to the government his whole defense in the case. The defense that Bannon would raise and why the government shouldn't prosecute this case.

No one on this planet could read that by November 1st and conclude in any way that either Mr. Bannon was or could consider taking the defense that he never received the subpoena or that there was some accident involved here.

But here we are in March, with the government telling the Court that that's the reason they went after these records. In fact, they gave two different answers. One was in document 30 -- well, one was Document 31, Page 12 they say, "Costello is a witness to Bannon's decision not to comply." That was on February 25th. Then on March 14th they say they have into prove deliberate non-compliance, it wasn't an accident. And Costello's a witness to establish that Bannon had knowledge of the subpoena and his communications are relevant to the government's investigation. And then the government tells you, at 36-1,

Page 2, Bannon finally has conceded in his post-indictment pleadings that he knew of the demands.

Again, we have in the record already Bannon -- a letter from Costello to the Committee that he accepted the subpoena for Bannon. But more than that, we have in writing on November 1st the whole scenario of the defense.

According to the papers we have so far, and of course now we will get the order. The order referred to the Stored Communications Act order referred to was dated November 11th. It's impossible that by November 11th the government could have thought that Mr. Bannon's defense was going to be, I never got the subpoena or that it was an accident.

Putting all of that to the side, what on earth were they going to tell from the records that they got? From the metadata, from who we sent it to, who we got it from, all of those things. Nothing about whether he received --

THE COURT: Isn't the government allowed to, as part of its investigation, look for cumulative evidence?

MR. SCHOEN: First of all, this wouldn't be cumulative, Your Honor, in my view. But secondly --

THE COURT: Why not?

MR. SCHOEN: Cumulative of the fact that Bannon actually received the subpoena?

THE COURT: Or at least that Bannon and Costello were talking on particular dates, which would be cumulative of whether Costello had told Bannon there was a subpoena or whatever.

MR. SCHOEN: Could be, Judge.

Getting subpoena for attorney records wouldn't be the way to do it and certainly not a matter of first course. They knew he was communicating, from his written -- (indiscernible) -- so the Court says, Okay. How about cumulative?

Well, again, if Costello is going to be a witness, you've got it in writing from him. You've got in your 302s that you took when you were interviewing him and all of that. But we have rules around, and ethical concepts, around subpoenaing attorney records.

Consider this, for example --

THE COURT: So assuming that is all true, how does it impact this case?

MR. SCHOEN: I will tell you how it impacts this case, it's obviously, you know, the $64 million question, in some sense. So why am I not wasting the Court's time with all of this? I hope I am not waisting the Court's time, because I think what happened is outrageous. But I also think if it's allowed to stand without being addressed, then it will be accepted practice in the future.

THE COURT: What do you mean by "without being addressed"?

MR. SCHOEN: Without being --

THE COURT: Do you think it goes to a substantive question in the case?

MR. SCHOEN: No. No, your Honor.

Right now, from what we know, I think that it goes to a matter within the Court's supervisory power, to send a clear message on, that this was inappropriate what happened here. The reasons given don't make any sense, and the methods used don't make any sense, to try to achieve those goals. And I think that's crystal clear. I think that message has to be sent.

The other reason, Judge, that I thought it was important to still raise this issue, once -- even though we know now, we hope, what happened. And I'm hoping that what we have is a representation that Mr. Bannon's other lawyer, Adam Katz's records were not going over. I think we have that representation in some earlier writing.

But, in any event, I think that the other reason it's important is because notwithstanding what the government says about -- since they didn't get the contents, it doesn't affect privilege issues. It interferes with the attorney/client relationship. And there is a long line of authority going back, way back, talking about the importance

and the sometimes tenuous nature of that relationship, and how attorney subpoenas, pitting an attorney against a client, or just attorney subpoenas, puts that delicate relationship at issue. And I'm thinking of cases like *Maine versus Moulton*, a whole host of case of cases, Judge. You are as familiar with them or more probably than I am. Probably more.

I think that's it. The last thing I want to talk about is remedy. The government says that we are trying to get at all of their internal deliberations about all of this process. I looked at the relief we asked for. I don't see that.

I am looking at Document 34, Pages 24 and 25. We asked for, you know, a copy of all of the subpoenas that were issued, directed at third parties, to get the email and telephone records, along with all of the applications for those things.

Then a list -- number two, "A list of third parties on whom a subpoena, court order or other process was served." And I say "other process" because Google at that time referred to it as an SCA order or equivalent.

THE COURT: Uh-huh.

MR. SCHOEN: Number three, "A list of all people in the Department of Justice for whom authorization to seek and obtain the email and telephone records was received."

I mean, I guess that's going to look something like this. (Showed the Court a blank page.) I don't know that we have to follow it. Sorry. (Turned around and displayed to opposing counsel.)

I asked for them to disclose to us -- or we asked them to disclose to us, "Whether the email records and telephone records that were obtained were shown to or referred to in front of the grand jury."

Now, I'm led to believe today they must have been. Because we heard earlier that this is all part of the grand jury investigation. So the grand jury asked for it, and they must have been told something about it.

I think that's all I have, Judge. I think it is an important issue to take up with the Court, even if it doesn't impact substantively on the case.

Thank you, very much, Your Honor.

THE COURT: Thank you, Counsel.

Mr. Costello?

MR. COSTELLO: Thank you, Your Honor.

I am the actual Robert Costello that they were looking for.

I am kind of the cleanup hitter here. I have a couple points that I want to make about presentations we've already made.

Your Honor was discussing the issue of willfulness

and the fact that I asked for an accommodation in not one, not two, but three or four of my correspondence with Chairman Bennie Thompson. And then at the end, I asked for an extension of time, because that very day -- I think it was October the 18th -- President Trump filed a lawsuit that presumably would have a lot to do with what we were doing.

So I said to them, We would like to look at the lawsuit. We don't know anything about it. Can you give us a week? This was the night of the 18th. They didn't reply that night. They waited until the next morning and they said, No. The reason they said no is that was the day they had a televised performance of the vote to hold Mr. Bannon in criminal contempt. And after that vote, Bennie Thompson and Ms. Cheney both said on television -- I watched it live -- that they were doing this to make an example of Mr. Bannon.

With respect to the issue of willfulness. I mean, when somebody has a lot of experience they are often referred to -- they make a comment that "this isn't my first rodeo." Well, this isn't Mr. Bannon's first rodeo when it comes to executive privilege and the Congress. In fact, it's his fifth rodeo.

Four times previously he was in a situation where executive privilege was invoked, he was asked to answer questions before the Mueller Committee, before the Senate

Intelligence Committee and twice before the House Intelligence Committee.

Why is the House Intelligence Committee important? Because the Chairman of the House Intelligence Committee during both of these occasions is Adam Schiff, who sits on the Select Committee. So he certainly was aware that Mr. Bannon, when pressed on the issue of executive privilege, asked the Committee, on four previous occasions, please talk to the president. This is not our battle. Executive privilege doesn't belong to Steve Bannon. This is not our battle. Please talk to the President's counsel and work something out or if you can't, go to the District Court and have the District Court tell us what's executive privilege, what isn't. It's not his position or mine to decide what questions are covered by executive privilege.

In this particular instance, we were facing a committee that was going to hold a private deposition pursuant to the subpoena. That private deposition, according to their rules, would not allow the president's counsel to be present, in order to invoke executive privilege, as to what questions he was willing to let Mr. Bannon answer.

There is a case -- you talked about the Office of Legal Counsel. There is a decision, binding upon the executive department, not binding upon the Court, but

binding upon the executive branch of the government, of which the U.S. Attorney's Office is part, that says, When Congress issues a subpoena to a man like Mr. Bannon, an executive privilege is involved. If they do not let the president's lawyer attend the deposition, then that subpoena is -- and this is a quote -- "unlawful, illegal" -- I don't know why they used both words but they did -- "unlawful, illegal and incapable of enforcement either civilly or criminally." That's information from the OLC opinion that certainly I communicated to Mr. Bannon.

Now, let me talk for a moment about the Costello issue and why is that important? I think it's important because, quite frankly, it shows terrible abuse of the grand jury process. It is not the ordinary course of business. I was a federal prosecutor myself. I was Deputy Chief of the criminal division in the Southern District of New York. I have a lot of experience in this area. It is, by far, not the normal experience to turn around and subpoena a defense lawyer's records.

And in this case, we first asked -- when I saw that, one night looking at the discovery and realized that the phone number I was looking at is my personal cell phone. Which, as you might imagine, during COVID season became my personal phone and my business cell phone. And when you further consider that I represent not just Mr. Bannon, but I

also represent Rudy Giuliani, who is involved in these same issues. They subpoenaed those records the very day I reached out to the U.S. Attorney's Office and said, I want to make a presentation seeking a declination -- because there was a long history of declinations in that office -- and who is the contact person I should be in touch with? That day, October 25th, they issued the subpoena for my personal cell phone records, which is also my business records. They went on to subpoena my office direct line in New York City and my home number. What information could they be looking for? Well, we asked that question. And at first they said, Costello is a witness.

Now, I can't think of any way to put a wedge between a lawyer and his client than to say that that guy that you thought, Mr. Bannon, was your lawyer, is now going to be a witness against you; that's what they were doing here.

The first time we asked that question, they said, He's going to be a witness. Recently when that question was asked they said, Oh, we have to check to make sure that Mr. Costello told Mr. Bannon about the subpoena; that this isn't all just a big mistake. First of all, you know somebody is not telling the truth when they give you two explanations for the same thing that are inconsistent with one another.

Second of all, that position is preposterous. They should be embarrassed to make that. It's an insult to the Court. It's an insult to defense counsel.

The question of whether I communicated the fact of the subpoena to Mr. Bannon is mind boggling, because it was the Select Committee that contacted me, in the first instance, and said, Do you represent Mr. Bannon? Yes, I do. Will you accept service of his subpoena? I said, Well, I will have to talk to Mr. Bannon about that, of course. I said, I will get back to you. I called Mr. Bannon, spoke to him about it, explained it. He said, Sure. Accept service of the subpoena.

I then sent an email, which is on the record, back to Select Committee saying, I am Mr. Bannon's counsel, and I am accepting service of a subpoena.

If you allow this office to do what they did to me to every other lawyer in the system, which is what is going to happen if we just poo-poo this, then no lawyer in his right mind is ever going to accept service or process.

Second of all, part of this equation is, because I was acting in good faith, and I said in my first email -- that's why I want to talk about the people in U.S. Attorney's Office about a declination. I was aware of the OLC opinions, aware of the long history of that office not prosecuting. I was aware of attorney generals, like Mike

Mukasey saying, I won't refer it to the U.S. Attorney's Office.

So I sat down with them for, I am going to guess because I wasn't keeping close track, maybe a total of five hours on two occasions. If they really wanted to find out whether -- I mean, first of all, would I do that if I hadn't given Mr. Bannon the subpoena? Of course not.

THE COURT: Do you remember what dates --

MR. COSTELLO: I'm sorry?

THE COURT: Do you remember what dates those two meetings --

MR. COSTELLO: Yeah. November 3rd and November 8th. November 3rd was the first meeting and November 8th was the second meeting.

During that period of time never once said to me, By the way, Mr. Costello, did you give Mr. Bannon the subpoena? Did you ever tell him about the subpoena? Of course it was a ludicrous question. Because I presented them, they wanted to meet right away. I said, No, I have a better idea. I am writing a legal memo on why I think your office should decline prosecution. I would like to send that to you, and then have a day or two go by so you can review it, check the OLC cites, and then we can sit down and have a meaningful discussion.

What I didn't know was they viewed that as an

opportunity to try to turn me into a witness. At that Zoom conference, I am looking at a table consisting of four people sitting at the table. Mr. Cooney, the two other Assistant US Attorneys and in the back was a young man who was a paralegal taking notes.

I was told, Oh, by the way, we have FBI agents that are going to be listening in to the conversation. I could care less who listened in to the conversation. I was making a legal presentation on a declination.

Then when we get to discovery, I see there is an FBI 302 Report of Investigation, pretending to be an interview of me. The interview of me that is conducted while I'm conducting a Zoom conference with the U.S. Attorney's Office seeking a declination.

Part of that FBI 302 said that I was advised of the identity of the agents; that's true. They introduced themselves orally. They weren't in the picture at any time. My recollection is they didn't ask any questions. But I certainly was not advised that this is going to be an FBI interview of you. I would have been out of my mind to do that.

When Mr. Bannon found out about that, he was irritated because he thought I gave an interview to the FBI because of the 302. So that's the kind of wedge I'm talking about here that they drive between a lawyer and his client,

by making that lawyer look like he's not a lawyer representing you. In fact, he's going to be a witness against you. To top it off, at the same time, they make a Motion in Limine to deprive Mr. Bannon of the defense of advice of counsel.

Well, I think you touched upon this earlier. With respect to the advice of counsel, especially when I am talking to him about OLC opinions, that information is going to come in in any event.

Even if you decide advice of counsel doesn't come in, it's coming in under an estoppel ground because it was presented to Mr. Bannon. And that's one OLC opinion that so far we haven't discussed, because that's the opinion that says, with executive privilege, that subpoena is dead on arrival. It is null and void. It's incapable of being enforced civilly or criminally.

That's why Mr. Bannon didn't show up. Mr. Bannon said, If you can make an accommodation, work out something with the president, I'll show up. And there's proof of his word. He did that four times previously.

Now, with respect to grand jury materials, we are pretty certain they never said anything to the grand jury about the fact that Mr. Bannon had been down this road four times previously, and in each occasion had ultimately testified when an accommodation was worked out.

But there is something even more important that we are almost certain they forgot to tell the grand jury. In reading the FBI 302, I discovered they were interviewing Doug Letter, the general counsel of the House of Representatives. He represents both democrats and republicans.

Mr. Letter pointed out that when I accepted service of the subpoena, the Select Committee did not provide me with Section (3)(a) -- excuse me -- Section (3)(b) of House Resolution 8, adopted January 4th, 2021.

Why is that important? What they did give me was The Congress' Regulations for the Use of Deposition Authority, which contains Paragraph 11 that says, "A witness shall not" -- excuse me. I'll quote this again. "A witness shall not be required to testify unless the witness has been provided with a copy of Section (3)(b) of House Resolution 8, 117th Congress, and these regulations."

What this says is, Because they didn't give us this, (indicated) Mr. Bannon did not have to appear for his deposition. You can bet your bottom dollar that that grand jury that indicted him for failure to appear, never heard about that. That's why we need to know what the grand jury was told. What they were instructed.

I think that's everything. Oh, I'm sorry. There is one other thing.

In talking about this abuse of grand jury process, along the way, trying to put this wedge, they now have written an awful lot of stuff. They wrote a reply to their in limine motion that for the first nine pages doesn't have anything to do with the in limine motion. What it has to do with, it's a nine-page, ad hominem attack on me, claiming that I misspoke this or said that or I failed to say this. They call it bad faith.

THE COURT: I think both parties decided that it helps their positions to throw a bunch of facts about the underlying issues in their briefs. So I wouldn't spend a lot of time criticizing --

MR. COSTELLO: I don't want to spend a lot of time, Your Honor. I want to do, unlike what the government did the other night, which is to file a surreply and ask permission. It's already on the public record. All the reporters have already read it.

I want your permission to file a surreply just to those factual issues where they are impugning my integrity. And I have -- they made 12 allegations. I can prove all 12 of them false. And one of them is a fraud on the Court, because they cite something from a previous filing, that I quote. They failed to quote it. I quote it. It's directly contrary to the position the US Attorney's Office took.

So I don't want you to sit there and deciding

things and think, Maybe this guy Costello doesn't tell the truth. I do.

THE COURT: Thank you, Counsel.

MR. COSTELLO: Do I have permission, Your Honor?

THE COURT: Yes.

MR. CORCORAN: Thank you.

THE COURT: So here's what I would like to do: As you can imagine, Madam Court Reporter would like a break. I would like to finish the argument, and so what I'm thinking of is a brief rebuttal from the government. A very brief rebuttal from the defendant. I know the issues. I just want you to focus on the most pertinent things you've heard.

We will then take a break. And my plan is to then come back after the break and decide some, if not all of the issues that are before me, or at least have a notional way forward to the extent that I am not deciding issues.

So with that, a brief rebuttal from the government, please.

MS. VAUGHN: Your Honor, I will start with the issue of willfulness. And there were four brief points I wanted to address.

First this idea that *Licavoli* is distinguishable. It's not. *Licavoli* decided the meaning of willfulness under the statute as a matter of law. And because the meaning is deliberate and intentional, as a matter of law, a mistaken

reliance on the law, whether that is through the defendant reading the law himself or getting it from his attorney is not a defense. So *Licavoli* cannot be distinguished.

There's another reason it is not distinguishable. The defendant claims it is different here because he raised constitutional privilege of some kind.

Defendants in these contempt of Congress cases raise constitutional privileges all of the time as a defense. Fifth Amendment. First Amendment. They've raised the gamut. The defendant is not barred from filing a Motion to Dismiss to argue that the subpoena was invalid for some constitutional violation. That's a different question than whether his mistaken reliance on the law is a defense. And *Licavoli* says "as a matter of law." It's not. So *Licavoli* is not different.

Second, this idea that the Court cannot follow -- can decide not to follow controlling precedent in *Bryan* 1950 or *Fleischman* or as it was applied in *Licavoli*. The defendant's position is not that *Bryan* 1998 applies somehow differently in this case because of the specific statute.

The defendant's position appears to be that *Bryan* rewrote willfulness across the criminal law. So if the Court were to apply *Bryan*, it wouldn't be just rewriting willfulness under the Contempt of Congress Statute, it would be rewriting willfulness among many different statutes. And

courts have addressed those post *Bryan* 1998, and find they still require the lowest level of willfulness, which is deliberate and intentional.

The defendant is really asking the Court to redefine it in a number of statutes, including Contempt of Congress and the Contempt of Court Statute. And, again, the Supreme Court's made clear, it does not overturn its precedence by implication. But that is what the defendant is asking this Court to find and that's not allowed under the law.

Third, the defendant suggests that there is an element of unfairness in this, in not allowing him to raise advice of counsel as a defense. I think at bottom that argument really goes to the fact that the defendant just didn't recognize the constitutional power of Congress to compel witnesses, in the same way that someone might recognize the Court's power to compel witnesses. But it is a coordinate branch of government. This is a constitutional power it has, and the witness does not get to decide when and how Congress gets to exercise that.

I think what's most telling about the defendant's position is he says, Well, I told Congress that I would comply, if they went to court and got an order telling me to. He is essentially saying that Congress' constitutional authority to compel testimony is completely subordinate to

the power of the courts. And that's not what the constitution recognizes. It's not what the Supreme Court has recognized in cases like *Quinn* and *Watkins*, where they say, All right, witness. You decide that Congress doesn't have this power over you. You are taking the risk of contempt. That's your choice.

Finally, the defendant says the subpoena was void because of these constitutional issues. He couldn't have counsel there or whatever it might be. But that is not even a defense to willfulness under the heightened standards.

When you have a legal duty, even under the highest standard, set out by *Cheek* and *Ratzlaf*, the defendant cannot say, for example in the tax context, Well, I know I didn't report my taxes properly, but I think the tax laws are invalid as applied to me. *Cheek* makes very clear, that's not a defense. That's, essentially, a sovereign citizen who walks in and says, I am not subject to the power of this court. I don't recognize it.

That's not a defense to willfulness even under the highest standard. So even if the intermediate or highest standard applied here, the defendant wouldn't be able to raise the defense that he is proffering.

So unless the Court has anything else on willfulness, any questions for the government, that's all I have.

THE COURT: No.

MS. VAUGHN: So I will turn to the discovery issues, starting with the attorney issue. Bottom line, the defendant still has not identified what relief he would seek.

THE COURT: I think the defendant conceded he's not seeking any relief in this case in the most specific sense, but he would like something as to the conduct. A referral, an admonition, a determination by me, I suppose, about the conduct.

MS. VAUGHN: So in that way, if the defendant has abandoned his request for discovery, then I guess that is a different issue.

THE COURT: I don't think he has. I think he said, I want the information I've been seeking, to make the argument to you, as to what those steps should be.

MS. VAUGHN: And I'm not aware of any authority in the criminal discovery law that allows a defendant to get internal government deliberations in a criminal case, on the hope that they can make some kind of motion for a sanction or something else. And he still doesn't even identify what that potential sanction would be.

He still has to identify some basis that he would attack the indictment, in which case he needs to make a colorable claim of his defense or attack the merits of the

offense at trial. And he hasn't done either of those things.

And, secondly, now defense is saying, Well, everybody knew that Bannon knew about the subpoena. That is just a lot of Monday morning quarterbacking. The government's investigation is not limited to one form of evidence. And, frankly, the government is not required to rely on Mr. Costello's representations.

The government's investigation can certainly try to corroborate those claims, whatever he may have made. It can try to confirm them in some other way. The government is not limited. And there is no per se bar on subpoenaing records that do not contain privileged communications just because those records might relate to an attorney.

THE COURT: I get that. Let's talk about the arguments relating to the information that was provided to the grand jury or was not provided to the grand jury or was potentially -- the grand jury wasn't -- I guess the best way to put it is, the grand jury was not fully apprised of the whole situation. And the indictment is, therefore, potentially suspect. And, therefore, I should order the government to produce what it told the grand jury.

MS. VAUGHN: So I --

THE COURT: What's wrong with that argument?

MS. VAUGHN: I understand the defendant's argument

to be about the government -- an allegation that the government did not present exculpatory evidence to the grand jury. And the government's not required to do that. And, again, to show particularized need, it's not just, We don't think the government did this. You have to have a particularized factual basis to believe that it did not.

And the government has no obligation to show exculpatory information to the grand jury. So just the statement that maybe we didn't do it, doesn't provide any basis to get those grand jury materials.

And the defendant still has not identified on what basis they could even move to dismiss the indictment, especially because the government has no obligation to present that exculpatory material to the grand jury, to the extent it even is exculpatory.

THE COURT: Thanks.

So briefly on OLC opinions, to the extent there is anything you want to say or, Congressional information. Briefly.

MS. VAUGHN: Yeah. As I was listening I heard maybe two new bases for seeking it. One being the government is estopped in making legal arguments about how the statute applies.

So I take that to mean -- and I think Mr. Schoen said it was some kind of due process challenge. But, again,

that puts us right back in the camp of *Armstrong*. The defendant needs to make a colorable showing of the elements of whatever due process claim he would raise before he's entitled to get the government's internal files. And that's not just saying, Well, it's a due process violation. That's showing articulable, colorable claims about how that due process violation may have occurred.

The other new argument I think I heard, was a factual issue as to whether or not the defendant at trial will say that he believed he had been authorized by the government to not comply with the subpoena.

But, again, OLC internal opinions are privileged attorney advice to its client. There is nothing to suggest that that would have any relevance to what was in the defendant's mind at the time. And as I said earlier, the government has already provided everything of which it's aware and has relating to what the defendant knew from the executive branch and the Committee at the time he did not comply.

So unless the Court has additional questions.

THE COURT: Thank you.

MS. VAUGHN: Thank you.

THE COURT: Mr. Schoen, very briefly. Because I know the court reporter is running up against a couple of deadline type of things.

MR. SCHOEN: And I made her work too hard by talking too fast.

Three points, just very quickly, Judge. The government said *Licavoli* is not distinguishable because of privilege. There are all kinds of privileges out there. You know what? There are. But executive privilege is different. It's not his privilege. It wasn't Mr. Bannon's privilege. His hands were tied by someone else's privilege. Fifth Amendment, you make a decision. Often they are cautioned, If you make that position, we may hold you in contempt.

But in this case it's not his privilege. His hands were tied, and that was what the advice of counsel was. And, in effect again, you would be giving Congress a veto over the executive branch's decision about his privilege; that's number one.

Number two, first of all, it's not a new argument we've raised about the OLC opinions and entrapment by estoppel. It's in our papers. We allude to it. We will be making it much more broadly, of course, in the Motion to Dismiss. But it goes not only to state of mind, it is a due process basis. Whatever. I don't need to go into that further.

Finally, the idea that if the Court changes the standard of willfulness, it will affect courts all over the

place. Let's be real clear, not every court agrees, in the first place, that in the contempt situation, willfulness just means, Did you show up or not show up?

There is a case, *Westbrooks*, for example, out of the Fourth Circuit 2015, 780 Fed. 3d, 593. Fourth Circuit 2015, in which they say, it's an open question. Now, the opinion treats it as if advice of counsel would apply. But it says it's an open question and they say, We, the Fourth Circuit, have held in the past or at least considered that advice of counsel applies.

Finally, this is in our brief at Document 30, Page 24, the law, even in this circuit, doesn't seem to be quite as settled as the government would have it.

Why do I say that? *United States versus Taylor*, 139 F. 3d 924, at Page 934, Note 10, D.C. Circuit, 1998. The Court there said in their footnote, in the contempt situation, We note that both sides appear to assume that advice of counsel applies to a contempt -- criminal contempt charge. And we note that the District Court treated it as if advice of counsel applies to a criminal contempt charge; therefore, we, the D.C. Circuit, don't need to get into that question today.

So I would suggest that the *Taylor* footnote suggests that -- more than suggests -- that the D.C. Circuit doesn't see it today -- or in 1998, as quite as settled a

question about *Licavoli* as the government would have the Court believe. Evan is going to make one point.

Thank you, Your Honor.

MR. CORCORAN: Two very quick points.

One on the grand jury question. Counsel is talking about no need to present exculpatory evidence. We are not saying that that's the issue at all. We agree that that's -- although they said in their papers that it's their practice to present exculpatory evidence, we make a different point, which is the evidence that they did present was misleading on two issues. Whether or not there was a request for a later date, misleading testimony on that, and whether or not executive privilege was communicated to the Select Committee, misleading testimony on that.

So it's not a matter of our hope that they would have presented additional evidence to the grand jury. We get to see what the argument was based on the misleading evidence that they presented.

My final point really just goes really to this issue of intent. You asked what we had in our brief, particularly with regard to *Licavoli*. Our focus in the brief, really, was that *Licavoli*, both early on, says we are relying on the *Sinclair* case. And later on, right before holding says, We are relying on the *Sinclair* case. We say the *Goudin* case, which says that *Sinclair* is totally

eviscerated and another reason, essentially, why it's not good law. Thank you, Your Honor.

THE COURT: Thank you.

So here's what we are going to do: We are going to take a short recess. I am going to come back, as I said, and walk through where I am on all the motions. To the extent I can, I will decide some of them today orally. To the extent that I can't, but I have a view of what I would like to do by way of next steps. I will articulate them. My guess is that this recess will be all of 10 minutes, maybe 15 but that's the plan.

So we'll take a quick recess and we'll be back.

(Break.)

THE COURT: Thank you for the arguments this morning and early afternoon, Counsel. As I said, I am going to decide, to an extent, some of the issues that are in front of me.

I will start first with the United States' Motion in Limine to Exclude Evidence or Argument Relating to Good-Faith Reliance on Law or Advice of Counsel at ECF No. 29. As I think people heard me say earlier, I read all of the briefing on this matter and am familiar with all of the arguments and exhibits in the papers, as well as the cases cited therein.

The defendant was charged with violating 2 US Code

Section 192. As relevant here, that statute covers any individual who "willfully makes default" on certain Congressional summonses.

The defendant argues he's entitled to argue at trial that he cannot have been "willfully" in default, because he relied in good faith, on the advice of his counsel, in not complying with the Congressional subpoena. He points to many Supreme Court court cases defining "willfully," including *Bryan v. United States*, 524 U.S. 184, 1998, to support his reading of the statute.

If this were a matter of first impression, the Court might be inclined to agree with defendant and allow this evidence in. But there is binding precedent from the Court of Appeals, *Licavoli v. United States*, 294 F.2d 207, D.C. Circuit 1961, that is directly on point. It involved the conviction under the very same part of 2 U.S. Code Section 192, with defendant arguing on appeal that, "good faith reliance upon advice of counsel is a defense." That is at Page 207.

The Court of Appeals explained that, "an essential part of that premise is that an evil motive, which can be negative by bonafide advice of counsel, is an element of 'willfully' under the statute." But it expressly rejected that argument.

To quote the Court of Appeals, "Advice of counsel

cannot immunize a deliberate intentional failure to appear pursuant to lawful subpoena lawfully served." Rather, as it explained, "All that is needed...is a deliberate intention to do the act. Advice of counsel does not immunize that simple intention. It might immunize if evil motive or purpose were an element of offense. But such motive or purpose is not an element..."

The Court therefore held, "In the case at bar there can be no serious dispute about the deliberate intention of," the defendant there, "Licavoli not to appear before the Committee pursuant to its subpoena. That he meant to stay away was made abundantly clear. That he did so upon advice of lawyer is no defense. The Court instructed the jury."

The defendant offered two reasons in his brief why this Court should ignore the holding of *Licavoli*, but neither of those arguments is persuasive.

First, defendant claims *Licavoli* relied on bad law, specifically the now-disavowed Supreme Court case of *Sinclair v. United States*. It is true that subsequent Supreme Court cases have cut back in some of the holdings of *Sinclair*, but not the holding that *Licavoli* relies on.

And even if the Supreme Court had done so, the defendant has cited to no authority and the Court has located none on its own, that would allow me to ignore

otherwise binding precedent, just because some of the cases on which it relied are no longer good law.

Second, the defendant notes that in the sixth decade since *Licavoli*, the Supreme Court has provided clarity on the meaning of "willfully" in criminal statutes. Clarity that favors defendant. That might very well be true. But none of that precedent dealt with the charge under 2 U.S. Code, Section 192. *Licavoli* did. Thus, while this precedent might furnish defendant with arguments to the Court of Appeals on why *Licavoli* should be overruled, this court has no power to disregard a valid and on-point or seemingly on-point holding from a higher court.

The problem is, that a new argument was presented today. Did not appear in defendant's briefs. I wasn't prepared to think about it, let alone pass on it. This argument is not that *Licavoli* is no longer good law, but that *Licavoli* is inapplicable here, because it did not involve an executive privilege assertion, a Congressional subpoena to a former member of the executive branch communicating with the president and the like.

I have therefore not had time to consider whether, assuming *Licavoli* is good law, which as I've held it is, it nevertheless is inapplicable here because this case is distinguishable. I am not prepared to make that determination on the fly here.

I am not happy that this argument came up for the first time during argument. It's an important question and it should have been briefed. Nevertheless, I am going to give the parties an opportunity to brief it. So what I would like are supplemental briefs to be filed in the following order, which is: The defendant shall file a supplemental brief on this question no later than March 22nd to exceed no more than 10 pages, and limited to the question of whether *Licavoli* applies to this case. The government will then have an opportunity to respond to that argument and to brief whether that argument was somehow waived in its own supplemental brief to be filed March 29th.

And I will then consider the question and make a final determination as to the Motion in Limine in light of those arguments. That's that motion. So I am taking that motion under advisement.

As to the Motion to Compel regarding attorney records, which is called Defendant's Motion to Compel Disclosure of Government Efforts to Obtain Telephone and Email Records of Mr. Bannon's Attorneys, ECF No. 26.

Again, I've read all briefing on this matter, and I'm familiar with all of the parties' arguments and exhibits and cases cited therein. I've also ordered the production of and reviewed the government's ex parte submission as to the Google email order and application.

There are really two groups of information within the defendant's request and motion. The first is information that the government obtained pertaining to an unrelated Robert Costello, i.e., somebody who is not the Costello who represented Mr. Bannon today. To the extent that the defendant seeks any discovery on that question or information, his motion is denied, such records and information are clearly immaterial to his case, as was essentially conceded today.

As to records that the government obtained relating to the actual Robert Costello, I am not yet prepared to rule on the matter. In its most recent filings, the government has proffered the steps that it took in obtaining Mr. Costello's subscriber information and phone records.

As I noted, the government provided me its application for an order pursuant to 18 US Code 2703(d) -- although I think it's undisputed that relates to a different Costello -- and its surreply is offered to produce that information to the defendant, if he agrees to treat that application as sensitive under the protective order.

As I understood it, the defendant accepted that proposal. And therefore the government can produce that application, which is -- I acknowledge is not -- did not end up pertaining to the actual Costello here. But I do think

it's relevant, because it has some information in it about the reason the government articulated to at least one judge for its application. So the government shall produce that information, as it has proposed, to Mr. Bannon. And that information shall be treated as sensitive under the protective order. I've seen that application, as I mentioned.

I haven't, however, seen additional information described in the government's surreply. I will just order the government to produce to me for my ex parte, in-camera review, no later than March 18th, the subscriber information the government obtained for what it describes as the Yahoo account, the Comcast account and the Google account, as well as the requests the government used to obtain that information. That is described at ECF No. 36-1 at 3.

And, I think most importantly, the subscriber and toll records for the Westchester County phone number, as the government puts it, that the government obtained, as well as the requests that the government used to obtain that information. After the government has provided that information to the Court under seal, I will rule on the remainder of defendant's motion.

I'll turn last to defendant's Motion to Compel discovery. Again, I think it's pretty clear I've read all of the briefing on this matter. I'm familiar with all of

the parties' arguments and exhibits, as well as the cases cited therein. I will deny this motion in part and grant it in part.

The defendant seeks many categories of information. First, citing to Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and the Supreme Court cases of *Brady* and *Giglio* he seeks a broad swath of material that he lumps together as, "Information that tends to show that the indictment is invalid." The Court will deny this part of the motion.

Criminal Procedure Rule 16(a)(1)(E)(i) requires the government to provide the defendant certain items "within the government's possession, custody or control" that are "material to preparing the defense."

It covers both inculpatory and exculpatory evidence. It's generally intended to cover a wide range of material. *Brady* and *Giglio* on the other hand, require the government to disclose exculpatory and impeachment evidence. The defendant need not make a request for such materials to be disclosed.

With respect to what we have been referring to as the grand jury materials, defendant has not shown that it would be material to helping him prepare his defense or that he's entitled to it under *Brady* or *Giglio*. He attempts to argue that this information might show grounds to dismiss

the indictment based on the failure to properly charge the grand jury on applicable law. But he bases this argument, at least in substantial part, on the arguments in his brief about what "willfully" means in the Circuit. And at a minimum, those arguments that were presented in brief, I think are wrong. And I certainly haven't concluded that there is any reason to believe that *Locavoli* doesn't apply here.

Regardless, the Court doesn't have some wide-ranging supervisory authority to require the government to give all potentially exculpatory evidence to the grand jury when seeking indictment. Even if that were not an issue, defendant would still run into the problem of secrecy of grand jury materials.

It is, of course, true that some evidence of the grand jury has been released under seal to him. But that does not mean that no further grounds exist for maintaining the secrecy of the remaining documents. Quite to the contrary, releasing grand jury documents is a serious step for the Court to take, and not one that it does lightly. It requires case-by-case adjudication. Allowing release of some documents, does not mean it is appropriate to release them. As I have said, I do not believe defendant has made a showing that the materials we are talking about would be material to help him prepare his defense.

Next, defendant seeks "information that tends to show that the subpoena was not lawfully authorized" as well as, "information that tends to show bias or the invalidity of the evidence."

Specifically, he seeks to have the Court order the government to ask the Select Committee, U.S. House of Representatives and other individuals, regarding the process through which the subpoena was issued and the referral as well. He also seeks information relating to conversations and communications regarding his interactions with the Select Committee. But Rule 16 only requires the government to provide information "within the government's possession, custody or control." Those are quotes.

The government in this context refers to the prosecuting office, not the entirety of the government, including a separate branch. And as the United States notes, defendant has not tied any of the documents he seeks to the possession of the prosecuting agency.

Of course, if the government does name an individual from the House as a witness in this matter, it will be obligated to provide discovery on that individual, at least as impeachment evidence, as well as their potential biases. But we are not at that stage of this case yet. To the extent there is evidence that defendant seeks that is in the government's possession, the Court notes that he has not

shown how it would be relevant to his defense. At best, it would relate to a selective prosecution claim. But defendant has not hinted that he will raise such a claim, nor does the Court see how one would be colorable.

Accordingly, as to what defendant styles as "information that tends to show that the subpoena was not lawfully authorized," the Court will deny his motion.

Finally, defendant seeks what he styles as, "Information That Tends To Negate Willfulness." Some of what defendant seeks in that way is not going to be discoverable through an order of this Court. For reasons already discussed. He seeks, for example, information, the possession of the Select Committee and the Rules Committee of the House of Representatives. But for reasons I've also discussed, that evidence is not discoverable under Rule 16.

But I recognize there are might be some relevancy to defendant -- to this case, whether to an element of the government's claim or defendant's defense for information within the possession of the Department of Justice. Specifically I will grant defendant's motion to the extent it requests statements or writings reflecting official DOJ policy, such as an opinion of the Office of Legal Counsel or the position of an entire division or litigating group, whether those statements are public or not, if such writings relate to the department's policy on prosecuting or not

prosecuting government or former government officials raising executive privilege claims or defenses of immunity or similar issues.

I therefore will grant [sic] defendant's motion in part and grant it in part.

Those are my current holdings. Any questions?

MS. VAUGHN: Your Honor, I just want to make sure that I understood what you would like us to provide ex parte, with respect to the attorney records.

THE COURT: Yes.

MS. VAUGHN: You said the subscriber information the government actually received for the Yahoo, Google, Comcast and Westchester County accounts?

THE COURT: Yes, and how they were obtained.

MS. VAUGHN: Okay.

THE COURT: Here's -- I am just looking at Pages 3 and 4 of your supplemental brief. The government says, In an effort to confirm the use of these accounts by Mr. Costello, the government first obtained subscriber information for each of them. Referring to Yahoo, Comcast and Google. I would like to know what request the government used to get those subscriber information and then the information.

MS. VAUGHN: Got it, Your Honor.

THE COURT: And then as to the -- what we've been

calling the "toll records" the phone records, the same question. I want to see the phone records and I want to see the requests. Likely grand jury subpoenas, based on the discussion we had today. I understand you are not committing to that, but the requests that resulted in the production of those records.

MS. VAUGHN: Yes, Your Honor. Thank you.

THE COURT: Thank you.

MR. SCHOEN: One question, Your Honor. If we might add, since the Court is allowing the government on the 29th to raise a possible waiver issue, if they deem it, I would like three days to file a reply if they raise the waiver issue.

THE COURT: If the government raises a waiver issue, you may respond to that issue and that issue only by April 1st.

MR. SCHOEN: Your Honor, housekeeping issue. There is a typo in one of the briefs, just to note. I had cited -- on Document 38, Page 5 I cited Document 31 at Note 1. It should have been Document 26 at Note 1. Sorry.

THE COURT: Thank you.

MR. SCHOEN: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

(Proceedings adjourned at 1:23 p.m.)

C E R T I F I C A T E

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

March 18, 2022 /s/

DATE **Lorraine T. Herman**