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BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD J. TRUMP, in his capacity .	
as the 45th President of the .	
United States, .	Case Number 21-cv-0279
Plaintiff, .	
vs. .	
BENNIE G. THOMPSON, in his .	
official capacity as Chairman of .	
the United States House Select .	
Committee to Investigate the .	
January 6th Attack on the .	November 4, 2021
United States Capitol, et al., .	11:05 a.m.
Defendants. .	

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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-- continued --

1 APPEARANCES (CONTINUED):

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20 United States District Court
21 for the District of Columbia
22 333 Constitution Avenue Northwest
23 Room 4704-B
24 Washington, D.C. 20001
25 202-354-328426
27 Proceedings recorded by stenotype shorthand.
28 Transcript produced by computer-aided transcription.
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P R O C E E D I N G S

(Call to order of the court.)

COURTROOM DEPUTY: Your Honor, we have Civil Action 21-2769, Donald Trump versus Bennie Thompson, et al.

I will ask that counsel please identify yourselves, starting with the plaintiff counsel.

MR. CLARK: Justin Clark and Jesse Binnall for the plaintiff.

THE COURT: Good morning.

And for the defendants?

MS. SHAPIRO: Elizabeth Shapiro from the Department of Justice on behalf of the NARA defendants.

THE COURT: Good morning.

MR. LETTER: Good morning, Your Honor. This is Douglas Letter. I'm general counsel at the House of Representatives here representing the Select Committee.

With me, I've got Todd Tatelman, Eric Columbus, and Stacie Fahsel from the General Counsel's Office and Mary McCord and Annie Owens from the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center.

THE COURT: Mr. Letter, I'm having trouble hearing you, and I believe my court reporter is also having trouble. If anybody definitely needs to hear you, it is the court reporter, because she is preparing the transcript. If you could either speak up or get closer to your microphone, that would be great.

1 MR. LETTER: Is this loud enough, Your Honor?

2 THE COURT: I can hear you. Madam Court Reporter?
3 She's nodding. So I think we're okay.

4 I haven't put time limits on you. You are experienced
5 counsel, and I assume you will make your arguments succinctly.
6 I didn't want to limit you in case I had questioning that took
7 us beyond our allotted time.

8 First, Mr. Letter, are both defendants going to argue, and
9 if so, how are you dividing up your time?

10 MR. LETTER: Yes, Your Honor, we are both going to
11 argue. We didn't do any specific division of time. If you have
12 a preference on who goes first, please let us know. Otherwise,
13 Ms. Shapiro with the Justice Department will speak first for the
14 defendants, and I will go second. But we will change that order
15 if you prefer.

16 THE COURT: That's absolutely fine. So Ms. Shapiro
17 will be arguing first; is that right?

18 MR. LETTER: Yes, ma'am.

19 THE COURT: Mr. Binnall, am I pronouncing your name
20 right?

21 MR. BINNALL: It's Binnall, Your Honor, yes.

22 THE COURT: Mr. Binnall, sorry. I assume you will
23 want -- since you're the movant here, you want to have an
24 opportunity for rebuttal; is that correct?

25 MR. BINNALL: Your Honor, yes, and Mr. Clark, who is

1 with me here, will be handling our argument, and we would like
2 to preserve as much time as the Court would allow us for
3 rebuttal.

4 THE COURT: All right. Well, I trust you will limit
5 rebuttal to any new points presented or unaddressed in the
6 defendants' response and confine your rebuttal to that.

7 At this point I'm not going to set strict time limits, but
8 I have blocked off more than two hours for this, and I'm hoping
9 to stay well within that.

10 All right. Obviously, I've read all the parties'
11 briefings, and given that we are not in court, we're on a video
12 conference, I assume there's no objection from either side to
13 proceeding by video conference in this case?

14 MR. BINNALL: No objection, Your Honor.

15 MR. LETTER: No objection.

16 THE COURT: All right. Why don't I -- I'm going to
17 allow you, Mr. Clark, to begin. I may -- Mr. Letter?

18 MR. LETTER: Yes, Your Honor. I've got a
19 technological issue. I'm in a conference room where for energy
20 saving purposes the lights go out every now and again. We have
21 been unable to fix that. So if the lights go out, they will go
22 right back on as soon as Ms. Owens --

23 THE COURT: I won't take that as an indication of the
24 strength of your argument, Mr. Letter. I'm sure we all
25 appreciate any energy-saving measures that the government is

1 undertaking.

2 COURTROOM DEPUTY: Judge, Mr. McClanahan has joined
3 us, and he wants to request to leave early.

4 Mr. McClanahan?

5 MR. MCCLANAHAN: Good morning, Your Honor. I have to
6 teach a class at GW this afternoon. So if this hearing runs
7 past 12:30, I would like to leave and join by phone so I can
8 drive down to my class.

9 THE COURT: All right. You have filed an amicus brief
10 in this case. I haven't permitted you to argue. So you can
11 leave whenever you need to leave, if you could do so in the
12 least disruptive manner. Thank you.

13 MR. MCCLANAHAN: Yes, Your Honor. I was just making
14 sure.

15 THE COURT: Okay. That's fine.

16 All right. Because we are on video, only one person can
17 speak at one time due to the nature of the medium under which we
18 are operating. I will try to -- if I have a question, I will
19 try to pose it at the time you're addressing the area in which I
20 have a question.

21 So why don't you go ahead and begin, Mr. Clark.

22 MR. CLARK: Thank you, Your Honor, and I appreciate
23 that. As I mentioned, my name is Justin Clark for the
24 plaintiff, and with me is Jesse Binnall.

25 The arguments in this matter have been well briefed and

1 joined by everybody. We are here to discuss and review with the
2 Court today and make our argument. But it's important to note
3 that this is not only a monumental case in the area of executive
4 privilege with respect to a former and incumbent president and
5 that relationship, but it's also a case of first impression for
6 this court and one that has a fact pattern that leads to kind of
7 the end of the slippery slope in any area when you're reviewing
8 a statute. So it's not only just an important argument and a
9 monumental argument, but it also is one that is going to have
10 consequences down the line for generations potentially.

11 THE COURT: Thank you for reminding me of that.

12 MR. CLARK: I know I didn't need to remind you, Your
13 Honor, but I thought it was important to note.

14 So we're, obviously, here on a motion for preliminary
15 injunction, and the four factors there guide our argument, and I
16 want to use them to guide the discussion today.

17 THE COURT: Hold on. My court reporter is having a
18 very difficult time hearing. Just a moment. We are going to
19 pause.

20 (Pause.)

21 THE COURT: So the court reporter is actually going to
22 go to her office and connect via Zoom. So we will take a brief
23 recess.

24 (Recess taken from 11:11 a.m. to 11:18 a.m.)

25 THE COURT: All right. Sorry for the interruption,

1 but my court reporter informs me that the situation is
2 100 percent improved. So as long as I can hear you now and you
3 speak up, we should be okay. And I will tell you, I am so
4 looking forward to the end of Zoom hearings.

5 Mr. Clark?

6 MR. CLARK: Thank you, Your Honor.

7 So the four prongs of -- to the PI today: Likelihood of
8 success on the merits, irreparable harm, balance of harms,
9 favored interim relief and public interest argument.

10 So we will start with likelihood of success on the merits,
11 where I think the meat of this argument is, and I think everyone
12 can agree to that. And plaintiff is likely to succeed on his
13 arguments in large part due to *Mazars*.

14 The Court in *Mazars* really narrowed and recognized the
15 rights of an executive, even a former executive, to have a
16 narrowly tailored and narrowly drawn set of requests.

17 THE COURT: Mr. Clark, let me stop you. I note in
18 your briefs, you do rely a great deal on *Mazars*. But *Mazars* is
19 an unusual -- had an unusual procedural history in that when
20 *Mazars* first went to the Supreme Court, the plaintiff was a
21 sitting president. The Supreme Court emphasized that the case
22 presented a separation of powers issue and remanded it to the
23 District Court to refer four factors to consider.

24 When the District Court took the case again on remand, the
25 plaintiff was no longer the sitting president, and the District

1 Court found -- applied, what do you call them, *Mazars lite* test.

2 Would you agree that the fact that the plaintiff here is no
3 longer a sitting president does -- somewhat diminishes the
4 applicability of the privilege issues you're arguing?

5 MR. CLARK: It's a good question, Your Honor. But no,
6 I don't think it weakens it. In *Mazars*, we were -- Congress was
7 seeking nonexecutive privileged information. Here, they're
8 seeking information that is from the president's time in office
9 and necessarily could be privileged information.

10 Therefore, the --

11 THE COURT: But that privilege has been waived by the
12 current president. I mean, the distinction in *Mazars* and this
13 case is that in *Mazars* -- well, at least the first go around,
14 Congress is seeking private information from a sitting
15 president. And in this case Congress is seeking arguably public
16 information, quintessentially information of a governmental
17 nature from a former president, so that the situation is rather
18 transposed.

19 So how do you square that difference?

20 MR. CLARK: Well, I square that difference because of
21 the heightened nature of the information that's being requested.
22 This is information that has a constitutionally based privilege,
23 based in *Nixon* and *GSA*, that goes beyond -- that *Mazars* relies
24 pretty heavily on.

25 I think that the level and the import of the documents

1 requested here are greater than the private information that was
2 requested in the original *Mazars* case.

3 But I would also say that Judge Mehta specifically, you
4 know, invoked the right of a former president to have some level
5 of protection in *Mazars lite*. So I don't think the fact that
6 the president has left office makes us go to *Mazars lite*. I
7 think that because of the nature of the information being
8 requested by the Congress, *Mazars* still applies here. But even
9 if Your Honor -- if the Court doesn't think it does, *Mazars lite*
10 certainly still would apply.

11 THE COURT: Do you think the factors *in Mazars lite* or
12 *Mazars* are -- how do I square that with the fact that Congress
13 here has not requested private information, that *Mazars* involved
14 banking records and lease documents involved in the lease to the
15 plaintiff of -- lease of a building before he became president?

16 These documents are sought to further Congress's oversight
17 into the events of January 6, and they only seek documents
18 concerning governmental activity and the former president's
19 contact with officials and his actions and statements on
20 January 6 or relating to that event, not private banking
21 information, the result -- the release of which didn't really
22 implicate any governmental activity.

23 MR. CLARK: Well, Your Honor, I'd actually disagree
24 with you on your point that it only relates to information
25 related to January 6. It seeks records from all the way back to

1 April 2020 regarding private polling data and communications
2 with campaign aides. It's not just related to information
3 surrounding January 6.

4 That's one of the points under *Mazars* that we have a very
5 great concern about, is that it's an overly broad request. I
6 would also --

7 THE COURT: Let me ask you, with regard to your
8 privilege argument, one of the things -- some of the documents
9 described by the Director of the Archives, for example, visitor
10 logs, how are visitor logs -- especially since the current
11 president has waived any claim to privilege over those
12 documents, how would visitor logs, which reveal who came to the
13 White House on specific dates, how would those be privileged?
14 How would you assert a claim of privilege over that information?

15 MR. CLARK: The theory behind executive privilege is
16 that presidents can obtain fair, honest advice from individuals
17 without the risk of that advice getting out and tainting things
18 later. Even the act of meeting with an individual could be
19 privileged if that meeting could divulge some kind of
20 information. So I think it could be privileged.

21 I would say, though, I think *Mazars* most importantly
22 is a threshold question before you even get to the privilege
23 argument. And I hate to conflate those, because I think in
24 *Mazars* you really have to go to the legislative purpose on this.
25 I would note from the outset in H.R. 503 that Section 4(d)

1 specifically says, quote, no markup of legislation permitted.
2 The Select Committee may not hold a markup of legislation.

3 That indicates to me that there's not going to be any
4 legislation and no legislation is even intended from this
5 committee.

6 THE COURT: Are you saying, Mr. Clark, that there
7 needs to be specific legislation underway before this material
8 can be subpoenaed? I mean, doesn't Congress -- can't Congress
9 issue a subpoena for information on which it intends to
10 legislate? Are you saying that this Court should require
11 Congress to have legislation underway or to delineate specific
12 legislation for which they need the information?

13 MR. CLARK: No. What I'm saying is, there needs to be
14 at least a legislative purpose behind a request.

15 Here, the legislation that is enumerated in the reply brief
16 and in the amicus briefs, none of the information requested is
17 necessary in order to legislate on any of those items that are
18 brought up.

19 I'm not saying --

20 THE COURT: Are you really saying that the president's
21 notes, talking points, telephone conversations on January 6, for
22 example, have no relation to the matter on which Congress is
23 considering legislation?

24 The January 6 riot happened in the Capitol. That is
25 literally Congress's house. They are charged with oversight to

1 determine, for example, just off the top of my head, whether
2 there need to be -- whether there needs to be legislation
3 altering or strengthening or in some way improving security
4 around the Capitol or appropriation for law enforcement or
5 creating -- creation of an executive agency with targeted goals.

6 In 2002, Congress passed the Homeland Security Act that
7 created the Department of Homeland Security following the 9/11
8 bombings.

9 I mean, are you saying that Congress has to specifically
10 say what legislation they're considering before I consider this?

11 MR. CLARK: Your Honor, I'm saying there has to be a
12 purpose to it, there has to be a valid legislative purpose. You
13 mentioned altering security around the Capitol or appropriation
14 to law enforcement. I'm not sure, and I don't think anyone can
15 articulate how a memo from a campaign aide in April of 2020
16 would lead to any legislation around either of those issues.

17 THE COURT: Well, it's not really your job or my job
18 to determine that, is it, Mr. Clark? I mean, courts -- I'm
19 citing from *McGrain*, 273 U.S. at 178. Courts are bound to
20 presume that the action of the legislative body was with a
21 legitimate object, so long as that object can be construed.

22 Is it really my role to require Congress to specify the
23 legislation that they are intending?

24 And furthermore, isn't it appropriate that Congress may not
25 know how much legislation or what kind of legislation is

1 required until they have completed their fact-finding process?

2 MR. CLARK: I would say that under *Mazars* there needs
3 to at least be some connection between the request for
4 information and even potential or theoretical legislation that
5 could come out. And the breadth of these requests doesn't lend
6 itself to any legislative purpose.

7 THE COURT: I agree with you, Mr. Clark. Some of
8 these requests are alarmingly broad, but some of them are very
9 specific and are specifically, you know, geared or targeting
10 events of January 6.

11 Are you saying that those requests, requests centered on
12 the day of the riots, are overly broad?

13 MR. CLARK: Well, what I'm saying is that the Archives
14 currently has those overly broad requests, and the documents are
15 coming in piecemeal in varying forms, you know, not in any
16 necessarily order in terms of responsiveness, in terms of the
17 order of the request.

18 What I'm saying is, Congress needs to go back and narrow
19 their requests so that as these documents come out we're getting
20 a real breadth of documents that are consistent with *Mazars*,
21 that are consistent with those things.

22 That's what I'm saying here, Your Honor.

23 THE COURT: I will let you resume. I'm sorry.

24 MR. CLARK: No, this is great. I mean, this is --
25 these are good questions, and they're important questions.

1 So the second point in *Mazars*, I think, is the one that we
2 were just touching on, which is that the request can't be any
3 broader than reasonably necessary to support Congress's
4 legislative objectives.

5 You mentioned a few legislative objectives. There are
6 others that were mentioned in the amicus and others in the
7 reply. Here, the requests are unbelievably broad, as I said,
8 and they don't match up to any necessary legislative privilege.

9 Now, it's not our job to glean what Congress really needs
10 or wants. It's not the Archivist's job to glean what they need
11 or want or the Court's job. It's up to Congress to go back and
12 draft requests that are reasonable, that are not overly broad,
13 and that bear some resemblance to a legislative purpose that can
14 even exist.

15 And here, we don't have that. I think that's a really
16 important factor to remember. It's not anyone's job to utensil
17 these things. It's not anyone's job to glean what Congress
18 needs to get to legislative intent. There just has to be some
19 nexus between legislation and a request.

20 I would also note that a lot of these documents that exist
21 are available elsewhere, you know. So many of these are from
22 people who are, you know, going to -- have been subpoenaed by
23 the January 6th committee, and those documents will be available
24 there. Many of these --

25 THE COURT: Wait a second, Mr. Clark.

1 First of all, I challenge your statement that these
2 documents are available elsewhere. I'm not sure where else the
3 White House visitor logs or notes of your client or records of
4 phone calls of your client or talking points prepared for your
5 client could be obtained.

6 And the other point is that your client has instructed
7 others who have received subpoenas not to comply. So I'm not
8 sure how the committee could obtain these documents from other
9 sources, and I'm not sure they're required to do so.

10 MR. CLARK: Well, if they're available and a
11 not-privileged document, then that information can be obtained
12 in a manner that is not seeking records that are privileged
13 under executive privilege. In *Mazars*, they had them. I don't
14 believe -- I think that's the only path that they do have.

15 I would also say your focus on actual privileged documents
16 at the White House in terms of where those documents exist,
17 that's an analysis that the Court has to have and the Court
18 probably needs to have with respect to every question and every
19 document that comes out, to make sure that there's a
20 constitutionally based reason to either assert privilege or not.

21 THE COURT: So what you're advocating is the Court do
22 a document-by-document in-camera review of every document that
23 the committee seeks to get from -- the Archives believes is
24 responsive to the requests?

25 MR. CLARK: No.

1 THE COURT: I mean, you're talking years, and you're
2 talking a level of involvement of this Court that's
3 unprecedented.

4 MR. CLARK: No, I'm not actually suggesting that.

5 What I'm suggesting is that where the former president has
6 asserted a privilege and where the incumbent president has not
7 asserted privilege, when there's a dispute with respect to those
8 documents, because the Constitution is implicated under *GSA* and
9 *Nixon*, it's incumbent on the Court to make a constitutional
10 determination as to who is right and whether --

11 THE COURT: I don't see that. I've read *GSA v. Nixon*
12 or *Nixon v. GSA* several times, and I don't find any support in
13 that case for your argument.

14 Can you point me to language in that case that requires me
15 to do that?

16 I mean, the -- the Former President Carter had agreed, had
17 signed off on legislation. I don't -- here, the sitting
18 president has waived privilege and agreed that the documents can
19 be turned over.

20 Isn't the person who is best able and in a position to
21 determine the executive privilege the executive?

22 MR. CLARK: I don't agree with that, not the incumbent
23 executive. I believe that, as they say in *GSA*, the former
24 president has rights -- and it's in the statute, has rights with
25 respect to asserting privilege.

1 THE COURT: *Nixon v. GSA* also said that the former
2 president's rights are less significant because he is a former
3 president, and where the current president has waived privilege,
4 the Court must necessarily consider that waiver.

5 They're not -- these are not two equal parties here. The
6 person best able to determine whether there is an executive
7 privilege would be, as I asked, the executive; right?

8 MR. CLARK: I don't agree when you have an incumbent
9 president -- or you have a former president, I'm sorry, who has
10 a reliance interest, has a constitutional right to --

11 THE COURT: All right.

12 MR. CLARK: -- exert privilege over. I would say --

13 THE COURT: Can you point me to any language in
14 *Nixon v. GSA* that says that?

15 MR. CLARK: The president -- the former president
16 has -- there's a constitutionally based privilege which the
17 former president can assert.

18 THE COURT: Is that language taken directly from
19 *Nixon v. GSA*?

20 MR. CLARK: Let me pull the quote for you, Your Honor.
21 I will grab that here.

22 Sticking to *Nixon v. GSA*, though, I think the important
23 thing for me is to remember that in both the *Nixon* cases we are
24 talking about documents that were going to be disclosed for
25 confidential review of these documents. Here, we're talking

1 about a broad document dump of executive documents of a
2 preceding administration that drives a truck right through the
3 constitutionally based privilege for a former president and
4 turns it into a partisan exercise.

5 THE COURT: Mr. Clark, I'm going to ask you to dial
6 down the rhetoric.

7 The documents -- the Archives have described the documents
8 at issue. I'd hardly describe them as a document dump. The
9 separation of powers issue you keep talking about I find hard to
10 discern here. In a rare instance, the executive branch and the
11 legislative branch are in agreement. They both agree that the
12 documents should be turned over. So I don't see where the
13 separation of powers argument that you are talking about exists.

14 MR. CLARK: Well, it exists because that -- the
15 previous administration has a right, has a --

16 THE COURT: But it's not a separation of powers. It
17 may be a dispute between a former president and a current
18 president about what is privileged, if that may be a dispute.

19 But can you tell me what the separation of powers issue is
20 here? There's only one executive.

21 MR. CLARK: There is, but that executive exists in
22 perpetuity, and it just changes hands at times.

23 Those documents --

24 THE COURT: Wouldn't the current executive be best
25 positioned to determine -- I mean, you're right. The executive

1 privilege is not limited to one particular officeholder. It
2 exists so that presidents now and in the future will have
3 unfettered, candid advice from advisors, from a wide range of
4 sources without fear of disclosure having a chilling effect.
5 That's the basis for the executive privilege.

6 But the fact that the current -- the current executive
7 asserts that privilege on behalf of the executive branch. And
8 here, he has done so. He has decided that there is no executive
9 privilege.

10 How should I weigh a previous president's assertion of a
11 privilege when the current president has said that there is
12 none?

13 MR. CLARK: I think you need to weigh it by looking at
14 each document that's in dispute. I think that's the only way to
15 do it. I think under the Constitution and, frankly, under the
16 PRA the only way to do this effectively and to have the former
17 president's, you know, rights to executive privilege be heard is
18 to have a review by the Court of each document as it comes out
19 that's in dispute.

20 THE COURT: Other than slowing down the process, what
21 would this -- and can you point to me a case that says that I'm
22 required to do that?

23 MR. CLARK: No, I can't. This is a case of first
24 impression, though. We know it's a constitutional question; we
25 know it's a constitutional question. And we know that only an

1 Article III Court is going to be able to say what the
2 Constitution says, and it has in the past.

3 THE COURT: Let me ask you, Mr. Clark, you talk about
4 the executive privilege and the fact that this -- your client,
5 the plaintiff, retains an executive privilege, even though he's
6 no longer president, and that certainly is an argument you may
7 make.

8 But this Act, the Presidential Records Act, was signed by a
9 previous president and existed during the incumbency of your
10 client's term as president. There was never an attempt to alter
11 it or change the terms of it.

12 Isn't that -- aren't you now -- isn't your client now bound
13 by that fact?

14 MR. CLARK: I mean, to the extent that the
15 Presidential Records Act, and I believe it does, protects a
16 former president's interests in documents that are privileged
17 and the right to assert that -- and in fact, it does provide for
18 a former president to be able to file suit under this -- to the
19 extent they are, that constitutional right is encapsulated in
20 the Presidential Records Act. To the extent that it grants no
21 rights to a former president, it still doesn't -- it's in
22 conflict with the Constitution. That's why those documents that
23 are in dispute need to be reviewed by an Article III judge.

24 THE COURT: See, the legislative and executive
25 branches agreed on the rules of the road when they enacted the

1 Presidential Records Act, which clearly established that an
2 incumbent president can decide whether or not to uphold the
3 former president's assertion of privilege.

4 That's what has happened here. And here, again, I know, a
5 rare instance of harmony between the branches, Congress and the
6 executive agree that these records should be turned over.

7 So I'm not sure that I have found any language -- I don't
8 see any language in the statute or any case that convinces me
9 that where a previous president disagrees with the incumbent's
10 assertion of privilege, that the Court is required to get
11 involved and do a document-by-document review.

12 I mean, wouldn't that always mean that the process of
13 turning over these records where the incumbent has no objection
14 would slow to a snail's pace?

15 MR. CLARK: I don't know, Your Honor --

16 THE COURT: And wouldn't that be an intrusion by this
17 branch into the executive and legislative branch functions? I
18 mean, the Court is very limited in its role here.

19 MR. CLARK: Well, except in interpreting the
20 Constitution, making sure that the statutes comport with the
21 constitutional rights that were recognized in *Nixon* and *GSA*.

22 I would say this: It is my understanding that this is the
23 first time there's been a court dispute between a former
24 president and an incumbent president with respect to executive
25 privilege. So I don't think this is a common circumstance.

1 So I also don't think we're talking about a huge volume of
2 documents right now, and I think as the release is ongoing of
3 documents, that it's not an unbearable burden for the Court or
4 for anyone to be able to do a review of documents, only the
5 documents that the incumbent president and the former president
6 disagree on with respect to executive privilege.

7 THE COURT: Okay.

8 MR. CLARK: Thank you, Your Honor.

9 So we've talked about *Mazars*. We've talked about *Mazars*
10 lite a little bit. Here, I think we just need to make sure --
11 and we've talked about the judicial review of documents. So I
12 don't want to harp on any of the things that we've already gone
13 over here. I just think it's really important on our end to
14 recognize -- to discuss the irreparable harm argument.

15 Here, we're talking about documents. Obviously, if there
16 is a right for the former president to be heard, former
17 president to have input, and the former president to weigh in
18 with respect to executive privilege, if those documents are
19 released, they necessarily create irreparable harm because they
20 obviously can't be taken back.

21 Again, unlike in *Nixon* and *GSA*, we're not talking about a
22 confidential review of documents. When the documents are out
23 the door and they go to Congress, they're out, and they're going
24 to be -- they're not necessarily under the control of the
25 archivist anymore.

1 THE COURT: Let me ask you about your irreparable harm
2 argument. Irreparable harm necessitates really two facts: Harm
3 and the fact that it's irreparable. I don't disagree that once
4 information is out you can't unring the bell. It's out. The
5 documents are out there.

6 But where is -- what's the harm? Again, we're not talking
7 about banking records or personal, you know, business records of
8 your client before he became president. We're not talking about
9 commercial proprietary information, leaseholder agreements all
10 relating to matters before your client became president. We're
11 talking about documents that are quintessentially about
12 government business, are we not?

13 I mean, again, I come back to White House visitor logs,
14 notes of who your client called on January 6, notes of who he
15 spoke to as people were breaking windows and climbing into the
16 Capitol.

17 MR. CLARK: Some of it that's requested is
18 governmental function, but as we've said, due to the breadth of
19 the requests, much of it isn't quintessentially government
20 function.

21 THE COURT: Where's the -- tell me the harm. Tell me
22 the harm that would accrue to your client if documents related
23 to who he -- I've heard your argument with regard to the
24 executive privilege, but where is the harm that would accrue to
25 plaintiff if documents responsive to the request were produced?

1 MR. CLARK: The harm exists to the institution of the
2 presidency, and if you will let me --

3 THE COURT: But the current president has said -- the
4 current president apparently disagrees.

5 Shouldn't I factor that in?

6 MR. CLARK: I think it is a factor, and it is a factor
7 under the PRA. But what I would suggest, Your Honor, is that at
8 the time whatever advice was given or whatever call was made,
9 there was a reliance interest by those in the executive branch
10 that the president would be able to receive honest, truthful
11 advice that would be private for a period of time.

12 THE COURT: That goes to the executive privilege, and
13 I've heard you on that. What I'm asking, you also say there's
14 irreparable harm to your client, to the plaintiff, if these
15 documents are released, separate from the harms that are
16 attendant in a violation of the executive privilege.

17 What is that harm? How is your client harmed by a release
18 of White House visitor logs?

19 MR. CLARK: Well, Your Honor, I would suggest that the
20 harm exists in the statute. I mean, the ability to sue under
21 this grants a right of private action, which if there was no
22 harm to these documents being released -- you know, damages are
23 something you've got to prove in a case in order to not get
24 dismissed or get thrown out on summary judgment.

25 Here, that right exists for a reason. The only thing we're

1 talking about are documents and communications.

2 This goes back to what I was suggesting before, though,
3 which is, this is exactly why the Court needs to review
4 documents when there's a dispute, because if there is a review
5 of a document and it is determined that it is not privileged and
6 there's no harm, well, then the Court makes a determination as
7 to whether or not that constitutionally based privilege is
8 properly waived or not.

9 THE COURT: Mr. Clark, tell me, if you can, how your
10 client is harmed by a release of White House visitor logs.

11 MR. CLARK: Specifically, you have the president's
12 specific interest in a former president that's before the
13 Supreme Court --

14 THE COURT: That's an executive privilege arising out
15 of the Constitution. I'm not asking about that.

16 MR. CLARK: I understand where Your Honor is coming
17 from. In terms of the specific facts of a specific document,
18 I'd have to actually look at the specific document in question
19 to be able to determine that. I don't know off the top of my
20 head without seeing a document to be able to articulate a
21 specific harm that you're asking for.

22 I can tell you the harm to the institution. I can tell you
23 the harm to the reliance interest of a president. In terms of
24 the specifics of a specific document, I can't do that without it
25 in front of me.

1 THE COURT: Are you suggesting that --

2 MR. CLARK: I can see a situation where the call logs
3 of a former president could have a -- there could be a specific
4 harm to that individual.

5 THE COURT: All right. You can continue.

6 MR. CLARK: Thank you, Your Honor.

7 Finally, I would just -- I can wrap up here, because I
8 think it's important. When we're weighing public interests
9 here, I think it weighs in favor of upholding the rights of
10 executive privilege of a former president. I think a ruling by
11 the Court to not grant this preliminary injunction opens up the
12 door for the partisanship of document requests and blows a hole
13 in executive privilege that should concern everybody.

14 I think we want to make sure that we have presidents and
15 executives that get free and fair and honest advice. And if
16 this broad of a document request is allowed or the release of
17 documents with respect to it, then that two-step process of
18 first *Mazars* and then reviewing the privilege of each document,
19 then I don't think we have a privilege anymore, and I --

20 THE COURT: Mr. Clark, you've accused the defendants
21 of making overbroad requests, and I take your point that some of
22 these requests are overbroad. But isn't your assertion of
23 privilege here just as broad?

24 I mean, you've made a blanket assertion of privilege with
25 regard to some documents that have not even been produced yet.

1 MR. CLARK: Your Honor, I would say this: There have
2 been three or four tranches of documents that have come from the
3 National Archives. Former President Trump's team has reviewed
4 documents, has called balls and strikes on each document, has
5 asserted privilege over some, not asserted privilege over
6 others.

7 If someone is being broad, it's the current administration
8 when they've waived it with respect to everything. The
9 current -- President Trump has made a deliberative and honest
10 assessment of each document as it came in, and it's not -- has
11 made that assertion. There are documents that we agree that
12 should be released.

13 So I can't stress that enough. We've not made a broad
14 assertion of privilege. We're just asking the Court to make a
15 determination in terms of disagreements with respect to these
16 documents.

17 THE COURT: All right. Thank you.

18 MR. CLARK: Thank you, Your Honor. That's all we
19 have.

20 THE COURT: All right. Ms. Shapiro?

21 MS. SHAPIRO: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MS. SHAPIRO: I would like to start where Mr. Clark
24 started, with his observation that this is a case of first
25 impression. That is true, it is the first time in the history

1 of the Presidential Records Act that there's been a disagreement
2 between the incumbent and the former president that has come to
3 litigation.

4 But that does not mean that this is a difficult or even a
5 particularly novel circumstance, because courts in this district
6 are well practiced in assessing privilege. In fact, I think
7 this district has more pointed cases than any in the land, and
8 weighing privilege is not something new to this court.

9 THE COURT: You are sadly correct, Ms. Shapiro.

10 But let me ask you, what is the appropriate test here?

11 The plaintiffs say, Look to *Mazars* or *Mazars* lite. What
12 case do defendants believe is most helpful, and what is the
13 limiting principle on your test?

14 MS. SHAPIRO: The case that is most on point is
15 *Nixon v. GSA*. It addresses the circumstance. And it very
16 clearly assigns the greatest weight to the incumbent president.

17 Plaintiffs, still in response to Your Honor's question, do
18 not acknowledge that that is what the Supreme Court has said.
19 But *Nixon v. GSA*, 433 U.S. at 446, and *Dellums v. Powell*, which
20 is a decision of this circuit, 561 F.2d at 245, the Supreme
21 Court said it must be presumed that the incumbent president is
22 vitally concerned with and in the best position to assess the
23 present and future needs of the executive branch.

24 There is no doubt that the incumbent president gets
25 deference in terms of this balance, and the greatest weight

1 needs to be accorded to the incumbent.

2 So *Nixon v. GSA* basically spells out what courts do every
3 day when they assess privilege. They take the privilege, and
4 they weigh it against the corresponding need for the
5 information, and they determine whether the need outweighs the
6 privilege claim.

7 THE COURT: Ms. Shapiro, to what extent does the
8 former president maintain the ability to exert executive
9 privilege over government communications?

10 MS. SHAPIRO: So *Nixon v. GSA* recognized a single
11 residual right for a former president to make a claim of
12 privilege, and that by statute, then, is assessed by the
13 incumbent president, who makes a determination of whether to
14 assert or uphold the former president's claim of privilege.

15 That is the way the statute operates, and that is the sole
16 residual right that is recognized in *Nixon v. GSA*. And because
17 of that, we are quite confident that the *Mazars* test has no
18 applicability here. We don't have -- the former president does
19 not have a freestanding right to challenge the entire
20 legislative venture.

21 And *Mazars*, as Your Honor already pointed out, concerns a
22 sitting president. And even the *Mazars* lite test accords weight
23 to the incumbent president's view. So in that respect, it's
24 similar to *Nixon v. GSA*.

25 So the test is really to do the normal balancing that

1 courts do, even for executive privilege, ascribing the
2 appropriate amount of weight to the incumbent's judgment that
3 the public interest in this case clearly outweigh the
4 confidentiality concerns underlying the executive privilege.

5 And I would add that for this Court to do otherwise would
6 be very odd indeed, because essentially what the plaintiff is
7 asking you to do is for the Court to superintend a sitting
8 president's decision not to assert privilege.

9 Presidents may decide not to assert privilege every day,
10 and there's no recourse to the courts and no recourse to a
11 former president. For example, presidential communications are
12 often captured in agency records, and those agency records are
13 subject to FOIA. A sitting president may decline to assert
14 exemptions by or otherwise uphold privilege with respect to
15 those presidential communications. There is no challenge to
16 that decision.

17 It would be extremely unusual for courts to superintend the
18 daily decisions of the sitting executive as to whether or not to
19 assert privilege and the sitting president's assessment of the
20 public interest in that regard.

21 THE COURT: One of the requests that the committee has
22 made is for plaintiff's communications with White House counsel
23 and deputy White House counsel concerning legal advice relating
24 to the constitutional process of certifying election results.

25 How does attorney privilege factor in in how I must weigh

1 this request?

2 MS. SHAPIRO: I guess I would say two things. One,
3 the attorney-client privilege in the governmental context would
4 be encompassed within executive privilege. But two, the
5 documents that we have before you in the tranches that are ripe
6 for decision I don't believe involve those -- that particular
7 issue. And so we're talking about sort of a speculative
8 wholesale attack on the scope of the request.

9 And with respect to, you know, the scope of the request,
10 we've explained in our papers why it's related to the
11 investigation of the Select Committee, but I'm sure Mr. Letter
12 will have more to say about that in terms of defending the
13 legislative piece of this.

14 THE COURT: All right.

15 MS. SHAPIRO: The other points I wanted to make with
16 respect to why this is actually not a particularly difficult
17 case is that presidential communications privilege is a
18 qualified privilege. Plaintiffs concede that in their papers.
19 That's not in dispute. It can be overcome.

20 And it's not only qualified, but the Presidential Records
21 Act means that all of these records will be public. They are
22 not, as plaintiff asserts in his brief, in his reply brief,
23 going to be confidential forever. They're restricted for 12
24 years from the general public. But the PRA specifically
25 contemplates that all branches of government will have access to

1 these documents, even during the restricted period, the
2 judiciary, the current executive branch for its needs, and
3 Congress for its needs. That's contemplated in the statute.

4 So these are not documents where privilege and
5 confidentiality will survive forever. Far from it.

6 I also want to stress, Your Honor, that the former
7 president has no personal interest in these documents. There is
8 no personal injury from their disclosure. The only interest
9 that the former president claims is the interest in executive
10 branch confidentiality, which is a weighty constitutional
11 interest. We agree with that.

12 But it is the very same interest that the incumbent
13 president is charged with protecting and which the incumbent has
14 determined should give way in the circumstance due to the
15 countervailing needs of Congress for its investigation into the
16 events of January 6.

17 I also want to note that this is not unusual, it's not
18 unusual for a sitting president -- or I should say, it has
19 happened, certainly, that a sitting president will decline to
20 assert privilege over presidential communications, even of the
21 most sensitive nature. We set out in our brief prior examples
22 of where presidents have allowed their aides and documents
23 dealing with presidential communications to be provided to
24 Congress without an assertion of privilege, and that includes
25 this former president, who also allowed his presidential

1 communications with a number of people to be divulged to
2 Congress.

3 And I would add to the examples in our papers that former
4 President Trump did not sue to prevent, for example, the Acting
5 Attorney General Jeffrey Rosen from testifying about
6 presidential communications to this very same Select Committee.
7 So that apparently was not a monumental case that needed to be
8 litigated, but this one is.

9 Taking all of the elements that I've mentioned, the fact
10 that the privilege can be overcome, that it's not absolute, the
11 fact that the incumbent is entitled to great weight, the fact
12 that courts do this all the time, the fact that past presidents
13 have allowed it to happen and that this very same former
14 president has permitted it to happen, all of those factors come
15 into the balance.

16 And it should be quite clear that the events of January 6
17 create a congressional need that outweighs the confidentiality
18 in this instance and that President Biden's determination that
19 the public interest requires the production of records in this
20 case is not only entitled to deference, but it's eminently
21 rational.

22 THE COURT: Ms. Shapiro, are you going to -- I can ask
23 you, but if you prefer, I can ask Mr. Letter. What of
24 Mr. Clark's point that the documents at issue should be reviewed
25 by the Court to prevent a violation of privilege, because once

1 the documents are released, they can't be, you know, unreleased?
2 What of plaintiff's request for a Court review?

3 MS. SHAPIRO: So I want to make clear, if Your Honor
4 wants to review documents, we're happy to supply documents.
5 However, it is completely not necessary in this case. Privilege
6 is determined all the time in cases via privilege logs and via
7 descriptions of records. And we've tried to provide that in the
8 NARA declaration so that you have a sense of the documents that
9 are at issue.

10 It is certainly not necessary for you to look at White
11 House visitor logs or call logs and determine and make an
12 individualized document-by-document decision. That is --
13 there's no requirement anywhere in the case law, and courts all
14 the time -- courts would do nothing other than review documents
15 if all privilege disputes ended up in a document-by-document
16 review by the judge. I'm sure no member of this court wants to
17 be engaged in that endeavor.

18 It also would, obviously, delay production of records to
19 the committee. And as the Supreme Court has warned in *Eastland*
20 and elsewhere, that when there is an effort to halt the
21 activities of a branch of government, that the Court should act
22 as expeditiously as possible.

23 Your Honor mentioned White House visitor logs. Those
24 visitor logs, there have been multiple presidents who have
25 voluntarily disclosed White House visitor logs as a matter of

1 policy, such that the notion that there is going to be an
2 extreme impingement of confidentiality interest in the
3 disclosure of White House visitor logs, I think, is
4 counter-indicated by the fact that White House visitor logs have
5 been released by numerous presidents.

6 With respect to the irreparable harm allegation, I think
7 Your Honor essentially understands our arguments perfectly. The
8 president has no personal interest in these documents. They are
9 records of the United States per the Presidential Records Act in
10 Section 2202, and he is not personally injured by their
11 disclosure. The only injury he claims is the injury to the
12 executive branch interest. And the current sitting executive
13 has determined that the public interest lies in the production
14 of those records to Congress to further its investigation. So
15 there is no irreparable injury to the plaintiff here.

16 Also, the current schedule under the Presidential Records
17 Act is November 12th for the production of the first tranche of
18 documents. The remaining two tranches that are ripe for review,
19 I believe, go out the week after that.

20 And so we think, Your Honor, that there's ample time for
21 the Court to issue a decision without halting the PRA process,
22 which is, you know, underway and will continue to progress.

23 THE COURT: You and I have a very different view of
24 what ample time is, Ms. Shapiro, but I appreciate that.

25 MS. SHAPIRO: Yes. I apologize for that, Your Honor.

1 I think responding to the preliminary injunction motion has
2 jaded my sense of time.

3 THE COURT: I have another one; I have a hearing on
4 another preliminary injunction motion tomorrow. I appreciate
5 that everything is relative.

6 MS. SHAPIRO: It is.

7 The last thing to address is the balance of equities, and
8 here again, the equities lie heavily in favor of the public
9 interest and the interest in learning what led to the events of
10 January 6 and ensuring that they never happen again.

11 The public interest lies there. It lies in the current
12 president's assessment that that interest outweighs any interest
13 in asserting executive privilege and the underlying
14 confidentiality concerns, and that should easily dispose of this
15 case.

16 I'm happy to answer any further questions, Your Honor.
17 Otherwise, with respect to the sort of, you know, legislative
18 aspect of the -- our briefing, I would leave that to the House
19 and Mr. Letter.

20 THE COURT: Thank you, Ms. Shapiro. I do have some
21 questions, but I think they're better posed to Mr. Letter.

22 Mr. Letter?

23 MR. LETTER: I'm sorry, Your Honor. The mouse froze.
24 Isn't modern life wonderful?

25 Your Honor, first of all, I just want wanted to start off

1 by saying we agree with all of the points that my colleague,
2 Ms. Shapiro, made. So we adopt the arguments that she has made.

3 I did want to emphasize up front where Ms. Shapiro ended,
4 which is the Select Committee to Investigate the January 6th
5 Attack on the U.S. Capitol is expeditiously engaged in
6 investigation of what happened on January 6, what led up to it,
7 why did it happen, what can and should be done. It's one of the
8 most important congressional investigations that -- in the
9 history of our nation that has ever occurred.

10 THE COURT: Mr. Letter, is the Select Committee,
11 therefore, restricted -- and I don't mean to cut short your
12 emphasis on how serious an event the mass riots on January 6
13 were, because I have no disagreement with your characterization.

14 But is the Select Committee restricted to only seeking
15 information regarding the facts, circumstances, and causes of
16 the January 6 attack?

17 MR. LETTER: No, not at all, Your Honor. And this
18 goes to one of the points that my friend made at the beginning.
19 He said that the -- Mr. Clark, that the Select Committee doesn't
20 do markups. But the Select Committee is specifically authorized
21 and the expectation is that they will be making
22 recommendations -- that's right there in Resolution 503 -- for
23 legislation. No, it's not just about January 6 and focused on
24 that specific day.

25 THE COURT: Let me ask you, Mr. Letter, some of the

1 requests seem fairly narrowly tailored, but some of them do
2 strike me as very broad. It's sort of a sliding scale.

3 For example, with regard to January 6 or the days
4 immediately preceding it or even following it, there are
5 requests regarding the president's communications and contacts
6 with a number of individuals. Those appear related to a
7 specific event.

8 But there are requests seeking all documents concerning the
9 president's communications with 40 individuals from
10 April of 2020 to January 6. That seems to me unbelievably
11 broad. And there are requests for documents concerning polling
12 data and election issues, which I guess would tangentially
13 relate to the president's claim that the election was stolen,
14 which I don't think any -- not a single court has upheld. But
15 those requests seem really broad to me.

16 Can you justify them?

17 MR. LETTER: Yes, Your Honor, and they are broad.
18 Your characterization is correct. I have several responses.

19 First, if I may, if you look at page 20 of our brief, that
20 is where you will find Vice Chair Cheney, in remarks that were
21 then adopted also by the Chairman, describe what the committee
22 is looking into. So you see there the breadth of it.

23 The key thing is, I think in response to your question
24 right now, is part of the investigation about the influencing
25 factors that fomented the attack -- as we know, this attack

1 didn't just come out of nowhere. This wasn't just some
2 spontaneous thing that arose on the morning of January 6. One
3 of the most important things that the committee has to look
4 into -- and again, this is emphasized by Ms. Cheney and -- Vice
5 Chair Cheney and Chairman Thompson, is we need to figure out
6 what was the atmosphere that brought this about.

7 So clearly, we go back to the many attempts that were made
8 before the election to try to build the nature of mistrust about
9 the election itself, which goes to undermine our democracy, so
10 that if President Trump did lose he would be able to say that
11 this is unfair and to generate lots of anger and rage that led
12 to January 6. So that is exactly what the committee has to look
13 into and is looking into, because otherwise, we're just looking
14 at a very narrow focus.

15 If I may just note one thing that occurred to me last
16 night. As many wise people have said, those who don't study
17 history are doomed to repeat it. We want to make sure this
18 never happens again, and that means going way before January 6
19 itself.

20 So yes, we want to see who did President Trump talk to, who
21 was he consulting with, what were the various groups urging,
22 what types of claims were they thinking that he could make,
23 et cetera, what really led up to this. I think it's both what
24 the House expects this committee to do, and also, it's what the
25 American people expect.

1 THE COURT: But in April of 2020, Mr. Letter? What's
2 going on in April of 2020 that might have a connection to
3 January 6?

4 MR. LETTER: Your Honor, it's all -- we think maybe
5 this all ties in with -- you know, leading up to this, the
6 fomenting of it, the building a groundswell of feeling that this
7 election was going to be tainted.

8 THE COURT: Okay. I grant you that after the November
9 election this groundswell began, and even shortly before the
10 election, there's an argument to be made that the former
11 president was priming the pump for in case he lost.

12 But April of 2020? How could those documents be connected
13 to what happened on January 6?

14 MR. LETTER: Your Honor, because remember that there
15 was an election that was held that -- you know, later in which
16 there were major concerns, obviously, that Mr. Trump had that
17 started this whole line of well, the election is going to be
18 stolen, and it may reveal a plan to subvert the election.

19 And more important, this ties in with -- remember, there
20 was an entire impeachment about subverting the election. So the
21 connection is noted. The House impeached the president because
22 of concerns about Russian efforts to subvert the American
23 people's confidence in the election itself.

24 Now, I did want to make two other points about that, Your
25 Honor, because your questions are very serious ones.

1 Remember that Congress can investigate -- plenty of times
2 it may lead to blind alleys, plenty of times a quick evaluation
3 might lead one to say it's just not -- it turns out there's
4 nothing there. But you've got to look to see it.

5 And my colleagues have just reminded me that the April 2020
6 date is when the president himself started tweeting about the
7 election coming up. So this is something that he was raising.
8 He himself made this relevant.

9 But again, yes, we might run into, you know, blind alleys,
10 et cetera, in which case we will stop wasting time. But that's
11 a determination for Congress to make.

12 THE COURT: I understand. And Congress certainly has,
13 you know, broad authority to determine the facts before it
14 decides what legislation to create or to enact.

15 But there has to be some limit, wouldn't you agree?

16 MR. LETTER: Yes, Your Honor.

17 THE COURT: And where is the line drawn?

18 MR. LETTER: Your Honor, we could probably come up
19 with a batch of hypotheticals if the -- you know, that if the
20 committee asked about that would so clearly could have no
21 relationship whatsoever, certainly.

22 But remember, again, we're talking about a whole
23 groundswell. Many of the people who were caught in the Capitol,
24 who were doing things in the Capitol, and who were thrown out of
25 the Capitol have said that it was because the president asked

1 them to come, the president asked them to save the democracy.

2 And so we want to know, when did that process start, who
3 was involved in it, how did it come about. And as far as
4 legislation, yes, this is all tied to and is clearly appropriate
5 for Congress to look into.

6 For example, should we amend the Election Counting Act.
7 Should there be restrictions possibly on ways that federal
8 officials can try to influence state officials to change
9 election results. Should we increase the resources of various
10 committees and bodies who are gathering information. Should we
11 increase resources for, you know, something that I think has
12 been done many, many decades, rebuilding the confidence of the
13 American people in the election process and our democracy.

14 I remember any number of times, I think it started with
15 Chief Justice Burger, who would distribute pocket copies of the
16 Constitution. The whole point was an effort to -- you know,
17 sort of a civics lesson to the American people.

18 So we need to know, what are we confronting? Clearly, we
19 have major dangers with a significant percentage of the
20 population thinking that these elections were stolen, even
21 though, even though any number of judges said there's no
22 evidence of that. The committee is -- it's perfectly
23 appropriate for them to say we've got a problem in United States
24 that we need to address, we need to make people have more
25 confident in the electoral process.

1 Again, in order to do that, we need to find out, why was
2 the president tweeting that early about already undermining the
3 confidence of the American people in the election.

4 THE COURT: Mr. Letter, I'm not sure that there's an
5 answer to why the president was tweeting whatever he was
6 tweeting. And I don't disagree that some of these requests seem
7 very narrowly tailored to me.

8 But for example, one of the committee's request is all
9 documents and communications within the White House on
10 January 6, 2021, relating in any way to plaintiff, Former Vice
11 President Pence, and over two dozen government officials.

12 Now, plaintiff argues that because this request is not
13 limited to communications about the facts, circumstances, or
14 causes of the January 6 attack, that these communications could
15 be about all sorts of unrelated things, including conversations
16 with foreign leaders, attorney work product, and discussion of
17 matters of national security.

18 And that question becomes even more compelling when we're
19 talking about communications, you know, in April or May. And I
20 understand, you know, the president started tweeting about
21 issues in April. But why is that not overbroad?

22 MR. LETTER: Your Honor, we don't think it's overbroad
23 because the president was talking to lots of people. Lots of
24 people were talking to each other. And we want to know how much
25 of this was inside the White House, how much of it was with

1 members of Congress, how much of it was with outside groups such
2 as the Proud Boys, et cetera, how long was this whole problem
3 that we now face, where did it come from.

4 Now, and let me emphasize, Your Honor, one of the most
5 important things I want to say is, if there are certain requests
6 that are overbroad, there are a couple of things. One is,
7 President Trump can say specifically that particular request is
8 overbroad.

9 The one question is, is he entitled to do that, since as
10 Ms. Shapiro pointed out, these materials being sought are not
11 his. These are materials of the current administration and the
12 United States government and the Archives. These do not belong
13 to President Trump.

14 And if I could, I just want to interrupt myself for a
15 moment. At one point, Mr. Clark, I think, said something about,
16 you know, these are -- I forget what words he used, you know,
17 personal, that they don't involve official duties. If that's
18 true, they're not covered by executive privilege.

19 And remember, that's what we're here about. President
20 Trump under this statute and under the Constitution is allowed
21 to raise concerns about privileges. Well, executive privilege
22 doesn't cover the kinds of things that Mr. Clark was talking
23 about.

24 So that's --

25 THE COURT: What about attorney-client privilege?

1 MR. LETTER: Yes, he could clearly claim
2 attorney-client privilege. Now, White House counsel -- that
3 seems to be one of the privileges he could raise. So a couple
4 questions about that. One, I don't know what that has to do
5 with the chief of staff. Two, there may be all sorts of
6 waivers. Three, it's not at all clear that that even applies
7 against the Congress of the United States. The House does not
8 recognize a, you know, common law claim like attorney-client
9 privilege. That's not --

10 THE COURT: Are you posing another novel area of first
11 impression for me to wade into, Mr. Letter? I have enough on my
12 hands.

13 MR. LETTER: Yes, you're right. You do not need to go
14 into that. But remember, as I think Ms. Shapiro said,
15 attorney-client privilege is merely a subset of executive
16 privilege. It's not some different thing all by itself. And as
17 Ms. Shapiro pointed out, President Trump has had all sorts of
18 his attorneys providing evidence and testifying.

19 But again, if he wants to say that particular request is
20 overbroad, then that is a plea that he can make, and that is
21 something that this Court could rule on if the Court finds that
22 that particular part is invalid.

23 That doesn't have anything to do with the broad nature of
24 the request, which is overwhelmingly -- there's just no
25 argument. I think overwhelmingly the request is appropriate.

1 So there isn't some sort of notion that if one tiny thing is
2 wrong, overbroad, that that means the whole request falls.
3 That's just wrong.

4 And as Your Honor knows clearly from when you consider
5 privilege claims, if you find that, you know, there are claims
6 that five different items are privileged and you reject that
7 argument as to four, that doesn't mean that the whole request is
8 no good. It just means whatever might be overbroad will be
9 tossed out.

10 But again, we don't think President Trump can make that
11 claim anyway. That's up to --

12 THE COURT: I want to ask you about that, Mr. Letter.
13 To the issue of overbreadth, is that issue one that I need to
14 consider, given that the current president has waived any claim
15 over -- any claim over release of the documents?

16 MR. LETTER: No, Your Honor. In fact, you have
17 anticipated the note that one of my colleagues just handed me
18 saying that exact thing. If it's overbroad, that's for the
19 Department of Justice and NARA, the Archivist. That's a
20 determination for those bodies to make.

21 But President Biden does not seem to believe that any of
22 these tranches thus far has a problem, because he has not raised
23 this. Again, there's no reason why that would be something that
24 President Trump could raise.

25 And I did want to point out, too, remember that the

1 declaration from Mr. Lassiter (phonetic), I think it is, has
2 pointed out that there are a batch of documents that have been
3 set aside as nonresponsive. Other documents have been set aside
4 for the moment. The committee has agreed to have those set
5 aside so that we don't get bogged down in those.

6 Instead, let's deal with as quickly as possible the ones
7 that we've identified and that the Archivist has identified and
8 that President Biden has said are not covered by executive
9 privilege.

10 So that was a long-winded answer, Your Honor, of saying no,
11 they are not issues that -- overbreadth is not an issue. If
12 ever the Archivist identifies some documents that are responsive
13 and President Trump says I just think those are overbroad, we
14 can deal with that then. I suspect that's never going to
15 happen.

16 THE COURT: Let me ask you, Mr. Letter, and this could
17 be equally posed to Ms. Shapiro, the Congress and the executive
18 branch are in agreement that the documents should be turned
19 over, and the executive branch has waived any claim to privilege
20 in the documents. The previous president has said wait a
21 minute, there is a privilege to be asserted.

22 What factors -- what balancing test is appropriate in
23 weighing basically what is a disagreement between the current
24 president and a former president as to whether the privilege
25 exists?

1 MR. LETTER: The balancing -- and I think Ms. Shapiro
2 did address this somewhat. The balancing has already been done.
3 It's been done by President Biden. The D.C. Circuit Court and
4 the Supreme Court said it's in the best position to determine
5 what is in the interest of the executive branch and the interest
6 of the president --

7 THE COURT: So is that where I end? Is that where I
8 start and begin? Once a current executive, once a current
9 president says there's no privilege, that the former president
10 doesn't get a say?

11 Would you agree that if these were personal documents, that
12 that would be different?

13 MR. LETTER: If they were personal documents, it's to
14 say they wouldn't be covered by executive privilege. So I'm not
15 sure how that would tie in.

16 But Your Honor, I think the best way to answer what you
17 said is, on the one hand, yes, this is authority of the
18 president, current president. You have only one president. The
19 former president has had an opportunity to raise these claims.
20 He raised them to President Biden. They were rejected by him.

21 Undoubtedly, we can think of hypotheticals where a court
22 would say, well, I think there still is an important residual
23 interest here and, you know, that it's bad faith or something
24 like that. We can come up with hypotheticals. Frankly, we've
25 had trouble coming up with ones that make sense. None of them

1 have any relation to the current situation. And so I don't want
2 to say there would never be any need to under the statute, I'm
3 not saying that, but certainly nothing that is raised by this
4 case, no.

5 THE COURT: All right.

6 MR. LETTER: As far as other points, I just had a
7 couple of things I wanted to mention.

8 THE COURT: Oh, let me just ask you one more question
9 while we're on the question of -- the subject of the breadth of
10 the committee's requests.

11 The limiting principle on overbreadth is -- the committee
12 has authority to request information over areas where
13 legislation could be had.

14 MR. LETTER: Yes.

15 THE COURT: What is the relevance of summer 2020
16 polling data? That's one of the areas of information that the
17 requests seek. How is that relevant, polling data?

18 MR. LETTER: Because what we would hope, what we may
19 find, is that that helps explain why President Trump started at
20 that time --

21 THE COURT: He didn't want to lose the election. I
22 mean, do you need polling data to determine that a president who
23 is up for reelection wants to win or may be worried that he's
24 not going to win?

25 MR. LETTER: It might very well be, though, that it

1 will tell us -- the polling data, combined with the other
2 material that we're looking at, would help tell us, okay, he
3 decided at that point that the key thing to do was to start
4 stirring up the far-right armed militias, certain members of
5 Congress.

6 Polling data, remember, isn't just you're likely to be
7 reelected or you're not. It's who's not going to vote for you,
8 who might vote for you. And so you might then start --

9 THE COURT: But isn't that kind of tangential? I
10 mean, you have -- you sought information, and you have
11 information that the plaintiff did start doing these things. I
12 mean, so polling data may show that he had every good reason to
13 be worried, but isn't the fact that -- is it really in
14 dispute -- don't you have plenty of information that he started
15 tweeting, that he started making these connections? And aren't
16 there other requests you've made which would corroborate that?

17 MR. LETTER: As to the other requests, we hope so, but
18 I think your question earlier helped us -- helps answer that
19 question, which is, at this point we don't know exactly who is
20 going to be cooperating with us, who is going to be providing
21 information, who instead is going to say President Trump --
22 former President Trump instructed me not to respond, so I'm not
23 going to.

24 As far as the polling data, if a report is issued, I
25 suspect there's some people out there who are going to attack

1 it. And one of the things they will do --

2 THE COURT: I think it's almost assured.

3 MR. LETTER: Isn't it? And they're going to say, oh,
4 they didn't look at this, the committee didn't look at that.

5 THE COURT: But that's the nature of politics in this
6 town, which is why I'm a judge and not a politician. I mean,
7 there's always going to be an attack from the other side.
8 You're never going to, you know, waterproof or make your report
9 completely airtight. There's almost no limit to the information
10 you could be seeking, and some of these requests do seem very,
11 very broad indeed.

12 MR. LETTER: They are broad, Your Honor, and that gets
13 into a separation of powers issue. That's for Congress to
14 decide. I think it would be a very startling thing. And I
15 think a question you asked earlier showed that you fully
16 recognize this: It would be a startling thing for you to,
17 either in an injunction or declaratory judgment or in an
18 opinion, tell Congress, I know better than you what you need,
19 you don't need that.

20 THE COURT: Well, I think the question more is, I
21 think I would be on stronger footing doing something like that
22 if the executive branch disagreed with Congress, but they seem
23 to be in agreement here.

24 MR. LETTER: Exactly, Your Honor. That's exactly
25 right. Therefore, if at some point the current administration

1 says, oh, come on, you're reaching too far into the White House,
2 I'm putting my foot down, obviously, that's something that the
3 president could do.

4 But this is not -- this apparently is not harming --
5 remember, what executive privilege is about is can the White
6 House function properly. It's not is Congress asking too many
7 questions. It's can the White House function properly, can the
8 president get the advice that he needs.

9 And not surprisingly, the current administration does not
10 think that Congress asking for polling data is going to harm the
11 operation of the presidency of the White House.

12 So we may be wasting some time. Maybe the committee is
13 wasting some time. Maybe we're wasting some of the Archivist's
14 time. I don't think we are. But even if we are, that's not in
15 this case. That's not a question here. That's something that
16 if Mr. Trump wants to raise with President Biden, he can do
17 that. But it's not a question here for this Court. It's not
18 what's being raised in this case.

19 What privilege would it be for President Trump to say, you
20 can't find out if I'm looking at polling data. I don't know
21 what privilege would cover that.

22 So again, if we're wasting the taxpayers' money, President
23 Trump can argue about that, but that's not the issue before this
24 Court today.

25 THE COURT: All right.

1 MR. LETTER: Just -- I'm sorry. Some of the
2 questions, some of the things in legislation that might come up,
3 things like, should there maybe be a hotline or ways for
4 Congress to be able so that there isn't that massive delay that
5 there was at the White House before requests were made for
6 National Guard troops to show up, should there be some standards
7 for when the D.C. National Guard is brought in.

8 And remember, here, there's a very key aspect to this,
9 because I'm sure that Mr. Clark there is saying, oh, oh, wait a
10 minute, that would interfere with the powers of the executive.
11 Remember, here, one of the things we're looking at is was the
12 president himself fomenting this attack on Congress.

13 THE COURT: Are we once again to what did the
14 president know and when did he know it?

15 MR. LETTER: I think we are, Your Honor. I think that
16 is absolutely central to this inquiry.

17 I think that that covers the main things that I wanted to
18 cover. Obviously, I'm happy to answer any other questions.
19 Really, the way I want to end is by saying that, you know, we
20 urge the Court to act with great dispatch. We totally
21 understand how much you have on your docket. We are very aware
22 that you have numerous criminal cases on your docket arising
23 from the riot. Every time I talk to your colleagues, they
24 remind me of how many cases they have.

25 THE COURT: We have a lot.

1 MR. LETTER: You do, and we're very well aware of
2 that. We deeply appreciated the fact that you set this hearing
3 so quickly.

4 But the committee also has essential work that we need
5 done, because we can't have this happen again, and that is
6 something that, fortunately, the Archivist and the current
7 president has insisted that the Archivist move fast.

8 And so as I say, we strongly request that you act with
9 dispatch here.

10 THE COURT: Thank you, Mr. Letter.

11 Mr. Clark?

12 MS. SHAPIRO: Your Honor, may I --

13 THE COURT: Ms. Shapiro?

14 MS. SHAPIRO: I'm sorry. I just wanted to respond to
15 a few points of Mr. Letter before Mr. Clark so he has the
16 opportunity to respond to both of us.

17 THE COURT: Okay. Briefly.

18 MS. SHAPIRO: So a few things that go to Your Honor's
19 concerns and, I think, are very important. Mr. Letter alluded
20 to one of them, and that's the accommodation process.

21 The current executive has the constitutional mandate to
22 engage in accommodations with the legislative branch, and that
23 has been going on. There have been, as spelled out in
24 Mr. Lassiter's declaration, there have been requests that have
25 been deferred because the executive branch went back to Congress

1 and said whatever it said to question whether those are
2 appropriately addressed at this time.

3 So there is that accommodation process, and the
4 accommodation process is typically how overbreadth issues get
5 resolved. And those discussions, I want to underscore, are
6 going on in this very case.

7 Relatedly, it is not the case that President Biden has
8 wholesale waived privilege. One, it hasn't been -- I wouldn't
9 call it a waiver. It's a decision not to assert or uphold
10 privilege.

11 THE COURT: I agree. That's an important distinction.

12 MS. SHAPIRO: And secondly, it hasn't been wholesale,
13 because there has been a careful review of the records, and
14 there has been some pushback and some accommodation, and there
15 have been records that the executive has gone back to NARA and
16 said these aren't relevant or they're not responsive. And those
17 things get worked out in the accommodation process.

18 And the declaration spells out that for decades that
19 informal process of dealing with the representatives from the
20 former president, the representatives of the incumbent, and
21 NARA, that that process has worked informally for decades
22 without an issue. And that pertains not only to the
23 accommodation process with respect to scope and breadth, but
24 also with respect to administrative burdens that the plaintiff
25 alluded to in their briefs.

1 There's another point that I wanted to make with respect to
2 Your Honor's question about polling data. We need to remember
3 the definitions in the Presidential Records Act itself. Section
4 2201(3)(c) defines materials related exclusively to the
5 president's own election to be personal records. So those would
6 not even be appropriate for production and -- because they would
7 be deemed non-records.

8 So there are decisions all the time that NARA will be
9 making with respect to what's a presidential record and what
10 might be strictly personal or strictly campaign-related or
11 otherwise not falling within the definition of presidential
12 records. That's all a part of the PRA process, the review, the
13 accommodation, and all of that is ongoing.

14 So I wanted to stress those points, Your Honor.

15 THE COURT: Thank you for the clarification,
16 Ms. Shapiro.

17 Mr. Clark?

18 MR. CLARK: Thank you, Your Honor.

19 THE COURT: And Mr. Clark, I hate to jump right in
20 here, and I meant to ask you about this when you started your
21 argument.

22 You make a rather startling assertion in your reply brief
23 on page 2, where you say, "Notwithstanding their allegations and
24 insinuations of conspiracy, investigations by the FBI and the
25 Senate Committee on Government Affairs and Homeland Security

1 rebut their contentions of wrongdoing by Trump administration
2 officials."

3 What's your basis for that assertion?

4 MR. CLARK: That's a public article from Reuters with
5 respect to the -- quoting the FBI. The citation is right in
6 there.

7 THE COURT: So you cite an article -- and by the way,
8 the article says the FBI has found scant evidence.

9 But I mean, the fact that something -- that's the only
10 support for that statement?

11 MR. CLARK: The support's in the brief, Your Honor.

12 I think the bigger point here, though, is that, you know,
13 there's no limiting principle to these questions, and finding an
14 answer to that question may or may not be in Congress's purview.

15 And that's not what my point here is. My point is, the
16 lack of the limiting principle on what they're asking for and
17 the lack of any balancing between a former president's assertion
18 of privilege and the current administration is really
19 revolutionary and breathtaking.

20 You asked me earlier with respect to where in *GSA v. Nixon*
21 we could point to that the former president had a right to
22 assert privilege. They're very clear on pages 448 to 449, and
23 we cite it in our reply brief at page 21, that the privilege
24 survives the president's tenure.

25 THE COURT: Absolutely. I don't disagree with you,

1 and the case is pretty clear on that. But is his right to
2 assert the privilege the same as a sitting president?

3 The current president has decided -- has declined, as
4 Ms. Shapiro says, has declined to assert privilege. What
5 principle do I apply here when a former president says wait, but
6 I want to assert it?

7 They're not equal. I mean, there's not a single case that
8 says a former president has -- you know, his assertion or her
9 assertion -- all of the former presidents were his, but his
10 assertion trumps the current executive. What principle do I
11 apply?

12 MR. CLARK: I think you have to apply the principles
13 in *Nixon* and *GSA* with respect to where we are with the PRA,
14 which does give a former president rights to --

15 THE COURT: I'm not sure if that case is as helpful to
16 you as you think it is, Mr. Clark.

17 MR. CLARK: Okay. I mean, I would say that the way
18 that NARA currently reads the statute and applies it doesn't
19 balance anything. All it does is just give a final say to the
20 executive, period, full stop. And that reading is inconsistent
21 with what's in *GSA v. Nixon* and, frankly, what's in the text of
22 the statute.

23 THE COURT: Wasn't the PRA enacted after *Nixon v. GSA*,
24 *GSA v. Nixon* was decided, and wasn't there a response to that
25 case? And it's been signed off on by several administrations

1 since, and there was never an objection from your client's
2 administration about that act.

3 MR. CLARK: Well, right, because it certainly didn't
4 overturn *Nixon v. GSA* or in any way take away the value of a
5 former president's ability to object to documents with respect
6 to privilege.

7 So there isn't a need to have objected to it, because the
8 rights that exist in *Nixon* and *GSA* and are codified in the PRA,
9 quite frankly, give the former president a right to balance it.
10 This Court needs to make that balancing test for them. I mean,
11 that's what this is.

12 I would just like to address one more thing, Your Honor,
13 and it's a little bit off the beaten path of what we discussed.

14 I agree that the executive privilege rights are broader and
15 probably stronger than an attorney-client privilege, but there's
16 one really key distinction here. With a private attorney, the
17 current administration holds no rights to waiving or not waiving
18 attorney-client privilege with respect to a private attorney for
19 a former president. I just want to make sure that we all have
20 an understanding of that distinction.

21 THE COURT: And are you claiming that there are
22 documents that are subject to production that involve
23 communications with the former president and his private
24 attorney?

25 MR. CLARK: In a few of the document requests, there

1 are. They're not in the identified documents right now, but I
2 just wanted to make sure that if the requests are read broadly,
3 there are communications that could be produced that were
4 private between a private attorney and his client, and that
5 right isn't -- there's no right to the current administration to
6 waive attorney-client privilege with respect to those documents.

7 THE COURT: All right.

8 MR. CLARK: That's all, Your Honor. Thank you.

9 THE COURT: Thank you very much. Thank you to the
10 parties.

11 I know this case was put on a very short timeline because
12 of the deadline that we have of November 12th. Everyone has
13 worked really hard to complete their briefings and submit their
14 materials on a very, very short deadline, and I appreciate the
15 work that's gone in and the preparation for the argument today.

16 I will issue my opinion and ruling expeditiously. Thank
17 you very much.

18 (Proceedings adjourned at 12:44 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Please Note: This hearing occurred during the COVID-19 pandemic and is, therefore, subject to the technological limitations of court reporting remotely.

/s/ Sara A. Wick

November 4, 2021

SIGNATURE OF COURT REPORTER

DATE