No. 23A843

IN THE SUPREME COURT OF THE UNITED STATES

PETER K. NAVARRO, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION TO THE APPLICATION
TO STAY THE CRIMINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
OR FOR RELEASE PENDING APPELLATE PROCEEDINGS

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The Solicitor General respectfully files this response in opposition to the application for a stay of the January 25, 2024, final judgment in a criminal case entered by the United States District Court for the District of Columbia, or for release on bail, pending appellate proceedings.

The application in this case concerns applicant's criminal convictions for contempt of Congress under 2 U.S.C. 192, which criminalizes the willful refusal to comply with a congressional subpoena. Applicant is a former trade advisor to former President Donald J. Trump. In 2022, a congressional committee issued a subpoena for him to testify and produce certain documents in his custody. Applicant has asserted that some of the requested testimony and some of the requested documents are protected from disclosure by the executive privilege for presidential

communications. Yet he responded to the subpoena with total noncompliance: He did not produce any documents and did not appear at all for the scheduled deposition, even though much of the requested information indisputably was not covered by executive privilege. In addition, the district court found that even as to information potentially protected by a qualified executive privilege, the privilege would be overcome by the committee's demonstrated need for the requested information. Indeed, following an evidentiary hearing at which applicant testified, the court found that the former President did not assert (or authorize applicant to assert) executive privilege in the first place. The jury found applicant guilty on two counts of contempt of Congress, in violation of 2 U.S.C. 192. Following entry of final judgment, applicant moved for his release pending appeal. Both lower courts denied that relief. See D. Ct. Op. 1-12; C.A. Op. 1-2.[1]

Applicant now asks this Court to stay the district court's judgment -- in effect to grant release on bail -- pending appellate proceedings. The standard for that extraordinary relief is demanding: Among other things, applicant must identify "a substantial question of law or fact likely to result in" a

[1] The application does not include a consecutively paginated appendix, but the Court's electronic docket reflects the uploading of the court of appeals' March 14, 2024, order and the district court's February 8, 2024, opinion and order as two separate files. This response cites those documents as "C.A. Op." and "D. Ct. Op.," respectively.

"reversal" of his convictions or a "new trial." 18 U.S.C. 3143(b)(1)(B); see Morison v. United States, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). He cannot make that demanding showing.

Applicant does not contest the district court's finding that, as a factual matter, former President Trump did not actually assert executive privilege. See C.A. Op. 1 (explaining that any such argument is "forfeited"); D. Ct. Op. 2 n.2 (observing that applicant "d[id] not contend that he w[ould] raise a 'substantial question of fact' [on appeal] with respect to any of the [district] court's factual determinations") (ellipsis omitted). Instead, he contends that "an 'affirmative' invocation of executive privilege" by the President or a delegee is not "required." Appl. 8 (citation omitted); see Appl. 9-25. That contention is meritless: Executive privilege belongs to the Executive Branch, not to an individual present or former employee, and if the head of that Branch declines to assert the privilege, a subordinate cannot do so.

But beyond that fundamental defect, applicant would not be entitled to relief in this case for two additional, independent reasons. First, even a successful invocation of executive privilege would not excuse applicant's total noncompliance with the subpoena. A substantial portion of the Committee's requests was for personal communications that could not possibly implicate executive privilege, and applicant's willful noncompliance with

the subpoena's request for documents and testimony about such non-privileged matters is sufficient on its own to sustain the convictions. See C.A. Op. 2. Applicant has forfeited any contrary argument. Ibid. Second, the district court determined that even had executive privilege properly been invoked, the qualified immunity afforded by that privilege has been overcome in the factual circumstances here. See C.A. Op. 1-2; cf. Trump v. Thompson, 142 S. Ct. 680, 680 (2022). Applicant has forfeited any challenge to that determination as well.

Each of applicant's forfeitures alone makes it impossible for applicant to demonstrate that he is "likely" to secure a reversal or new trial. 18 U.S.C. 3143(b)(1)(B). For those and other reasons set forth below, the application should be denied.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, applicant was convicted on two counts of contempt of Congress, in violation of 2 U.S.C. 192. Judgment 1. He was sentenced to four months of imprisonment and fined $9500. Judgment 2-3. The district court denied applicant's motion for release pending appeal. D. Ct. Op. 1-12. The court of appeals denied a motion for release pending appeal. C.A. Op. 1-2.

A. Background

On January 6, 2021, Congress convened a joint session to certify the results of the Electoral College vote in the 2020

Presidential Election. See Staff of Senate Comm. on Homeland Sec. & Gov't Affairs et al., Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6, at 2 (2021). "Rioters, attempting to disrupt the Joint Session of Congress, broke into the Capitol building, vandalized and stole property, and ransacked offices." Ibid. As a result of the riot, at least "seven individuals, including three law enforcement officers, ultimately lost their lives." Ibid.

On June 30, 2021, the House of Representatives established the Select Committee to Investigate the January 6th Attack on the United States Capitol to, among other things, "investigate and report upon the facts, circumstances, and causes" of the January 6 attack. H. Res. 503, 117th Cong., 1st Sess. § 3(1) (2021) (Resolution 503). To that end, Resolution 503 authorized the Committee to inquire into a range of matters relevant to the events of January 6, including the "influencing factors that contributed to the domestic terrorist attack." Id. § 4(a)(1)(B). Resolution 503 authorized the Committee, acting through its Chair, to compel testimony and the production of documents by subpoena. See id. § 5(c).

On February 9, 2022, the Committee served applicant with a subpoena for documents and testimony relating to its inquiry. See D. Ct. Doc. 79-1, at 15-28 (Mar. 14, 2023) (copy of subpoena). Applicant worked in the Executive Branch from January 2017 to

January 2021 "as an advisor on various trade and manufacturing policies." Indictment 2. A cover letter accompanying the subpoena explained the Committee's understanding that applicant helped "to develop and implement a plan to delay Congress's certification of, and ultimately change the outcome of, the November 2020 presidential election." D. Ct. Doc. 79-1, at 17. The letter observed that applicant had written about those efforts in a book he had published and that he had posted to his personal website "a three-part report, dubbed the 'Navarro Report', repeating many claims of purported fraud in the election." Id. at 17-18. "Accordingly," the letter concluded, the Committee "seeks documents and a deposition regarding these and other matters that are within the scope of the Select Committee's inquiry." Id. at 18.

The subpoena required applicant to appear and produce documents to the Committee by February 23, 2022, and to appear for a deposition on March 2. D. Ct. Doc. 79-1, at 15. The instructions accompanying the subpoena stated that if applicant could not fully comply with the subpoena by the deadline, he should comply "to the extent possible by that date" and provide an explanation and date certain for full compliance. Id. at 22. They also instructed applicant that if he withheld any documents, including on privilege grounds, he should provide a log of such materials. Ibid. And the subpoena included a copy of the House Rules governing

depositions, which set forth the applicable procedures when a witness "refuse[s] to answer a question" in order to "preserve a privilege." Id. at 25.

Applicant did not appear or produce any documents by the February 23, 2022, deadline. Indictment 4. Nor did he provide an explanation, a log of withheld materials, or a date certain for compliance, or otherwise communicate with the Committee at all. Indictment 4-5. In response to an email from the Committee reminding applicant of his compliance obligations, applicant stated that his "hands are tied" because of "Executive Privilege." Indictment 5.

"The canonical form of executive privilege" -- the "presidential communications privilege" -- "allows a President to protect from disclosure 'documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.'" Trump v. Thompson, 20 F.4th 10, 25 (D.C. Cir. 2021) (citation omitted), cert. denied, 142 S. Ct. 1350 (2022) (Thompson I).[2] Executive privilege is qualified, not absolute, see United States v. Nixon, 418 U.S. 683, 707-708 (1974), and therefore "may be overcome by 'a strong showing of need by another institution of government,'" Thompson I, 20 F.4th at 26 (citation omitted); see Trump v.

[2] The presidential communications privilege is the only strand of executive privilege that is at issue in this case.

Thompson, 142 S. Ct. 680, 681 (2022) (Kavanaugh, J., respecting denial of application) (Thompson II).

Responding by email, the Committee rejected applicant's reliance on executive privilege to excuse his total noncompliance with the subpoena, observing that "there are topics, including those discussed in the subpoena's cover letter, that the Select Committee believes it can discuss with you without raising any executive privilege concerns at all." Indictment 5 (brackets omitted). "In any event," the Committee continued, "you must appear to assert any executive privilege objections on a question-by-question basis during the deposition." Ibid. Applicant did not appear for the deposition. Indictment 6.

B. Proceedings Below

1. A federal grand jury in the District of Columbia returned an indictment charging applicant on two counts of contempt of Congress, in violation of 2 U.S.C. 192, based on applicant's willful refusal to comply with the subpoena's request for documents (Count One) and testimony (Count Two). Indictment 6-7. Applicant moved to dismiss the indictment, including (as relevant here) on the theory that "when a former president invokes Executive Privilege as to a senior presidential advisor, that advisor cannot thereafter be prosecuted for contempt of congress." D. Ct. Doc. 34, at 17 (Aug. 17, 2022).

At a hearing on his motion to dismiss, applicant agreed with the proposition that "[i]t is entirely ineffective for a former senior advisor to invoke privilege without an instruction to do it" from the President. 11/4/22 Tr. 20. Applicant suggested, however, that as result of a "conversation" he had with former President Trump, applicant "understood he was supposed to invoke executive privilege." Id. at 21, 23. The district court initially denied the motion to dismiss, 651 F. Supp. 3d 212, but on reconsideration ordered an evidentiary hearing to determine whether the former President had in fact asserted (or authorized applicant to assert) executive privilege, see D. Ct. Doc. 96, at 1-6 (July 28, 2023). At the hearing, applicant testified that he had a three-minute call with former President Trump on February 20, 2022, during which applicant thought "it was very clear that the privilege was invoked, very clear." 8/28/23 Tr. 64. At the same time, applicant refused to provide details of what former President Trump said on that call, and applicant made clear that he was not representing "that there was an explicit statement from former President Trump to [applicant] with respect to a specific subpoena that there was an invocation of privilege." Id. at 10.

The district court found, "based upon all of the evidence, including [applicant's] testimony, that he ha[d] not carried his burden of establishing a formal claim of privilege from President Trump after his personal consideration of the Select Committee

subpoena, or that President Trump had authorized [applicant] to make a determination about whether to invoke executive privilege with respect to the subpoena." 8/30/23 Tr. 23-24. The court found "[t]he lack of detail" in applicant's testimony to be "telling," because "if it was truly clear" that "'the privilege was invoked,'" then applicant "should have not had any trouble conveying to the Court what President Trump actually told him." Id. at 25.

In the alternative, the district court found that even if executive privilege had been asserted with respect to the Committee's subpoena, "such a privilege would have been pierced by Congress's and President Biden's express interest in the documents and testimony that were sought by the Select Committee." 8/30/23 Tr. 36; see id. at 31-36. The court made clear that it would reach the same conclusion "under any test." Id. at 36; cf. Thompson II, 142 S. Ct. at 681 (Kavanaugh, J., respecting denial of application) (describing different tests).

The district court further explained that even a successful invocation of executive privilege would not excuse applicant's complete failure to appear for a deposition -- where he could discuss non-privileged matters and assert privilege as to specific questions -- or his complete failure to produce documents not subject to any privilege (as well as a log of withheld documents). See 8/30/23 Tr. 27-28; cf. D. Ct. Op. 9 & n.4.

The government moved in limine to preclude applicant from advancing a trial defense based on executive privilege. See D. Ct. Doc. 58, at 3 (Sept. 28, 2022). Section 192 requires proof that the defendant "willfully ma[de] default" with respect to a congressional summons. 2 U.S.C. 192. Relying in part on Licavoli v. United States, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961), the government argued that it was required to prove "a deliberate and intentional failure to appear or produce records," but that "[a] defendant's mistaken belief that the law excused his [non]compliance -- here, for [applicant], based on executive privilege -- is not a valid defense to contempt of Congress." D. Ct. Doc. 58, at 3-4. The district court granted the government's motion in limine. 651 F. Supp. 3d at 238.

The case proceeded to trial, and the jury found applicant guilty on both counts. Judgment 1. The district court sentenced him to four months of imprisonment on each count, to be served concurrently. Judgment 2.

2. The district court denied applicant's motion for release pending appeal. D. Ct. Op. 1-12. The court explained that release pending appeal requires, among other things, that the appeal "'raise[] a substantial question of law or fact likely to result in' '(i) reversal or (ii) an order for a new trial.'" Id. at 2 (brackets omitted) (quoting 18 U.S.C. 3143(b)(1)(B)). The court found that none of applicant's contentions raised such a question.

The district court found that applicant was unlikely to secure reversal or a new trial based on his claim of executive privilege. D. Ct. Op. 5-11. The court explained that applicant had failed to show that former President Trump actually asserted (or authorized applicant to determine whether to assert) executive privilege with respect to the Committee's subpoena. Id. at 5. The court rejected applicant's argument that a President need not actually assert executive privilege, observing that a long line of precedents presupposes a presidential assertion before a court will review the assertion's validity and scope. Id. at 6-7. The court rejected applicant's reliance on the statement in United States v. Nixon, supra, that "executive privilege is presumptive," D. Ct. Op. 6 (citation omitted), explaining that the statement means only "that courts will assume the privilege applies when invoked," id. at 7. The court acknowledged that "an official authorized to speak for the president" could assert the privilege, ibid. (citation omitted), but explained that applicant had not established that he was so authorized, cf. ibid. (observing that applicant "ha[d] conceded that his invocation alone had no legal significance unless it was actually done at the behest of President Trump or his designee").

The district court also explained that even if applicant were correct about the assertion of executive privilege, it would not likely result in reversal or a new trial. D. Ct. Op. 8-11. As to

the deposition, the court observed that a former advisor to a former President would at most be entitled to qualified (not absolute) testimonial immunity, even as to official acts, and even applicant did not claim that any immunity would reach testimony about non-official acts. See id. at 9. The court thus explained that, at a minimum, applicant was required to appear and provide testimony about non-privileged matters (and assert privilege on a question-by-question basis). Id. at 8-9.

As to the production of documents, the district court rejected applicant's argument that the government was required to obtain a "judicial order overcoming the privilege" before commencing the prosecution. D. Ct. Op. 10 (brackets and citation omitted). The court explained that applicant had "forfeited" that "'pre-prosecution judicial order' theory," and that in any event it was unsupported by precedent. Ibid.

The district court also rejected applicant's argument that reversal or a new trial is likely on the ground that his "good-faith belief that President Trump had invoked executive privilege" precluded a finding of willfulness. D. Ct. Op. 3; see id. at 2-5. The court explained that precedent from this Court and the D.C. Circuit, including Sinclair v. United States, 279 U.S. 263 (1929), and Licavoli, supra, squarely precluded that argument, D. Ct. Op. 3-4; that Licavoli remained good law, id. at 4; and

that applicant had not identified any contrary authority, id. at 4-5.[3]

The district court directed that, absent appellate relief, applicant "shall report to the designated Bureau of Prisons ('BOP') facility on the date ordered by the BOP." D. Ct. Op. 12. BOP has instructed applicant to report to FCI Miami by 2 p.m. on March 19, 2024. See Appl. 5.

3. The court of appeals denied applicant's motion for release pending appeal. C.A. Op. 1-2. The court (1) held that applicant forfeited any argument that former President Trump actually asserted executive privilege; (2) rejected applicant's reliance on the statement that privilege is "presumptive" without regard to whether the President actually asserted privilege; (3) held that applicant "forfeited any challenge to the district court's alternative conclusion" that executive privilege was "overcome by the imperative need for the evidence"; (4) rejected applicant's request to abandon the precedential holding in Licavoli that willfulness in Section 192 requires proof only of a deliberate and intentional failure to comply with a congressional subpoena; (5) held that executive privilege would not excuse applicant's "complete noncompliance with the subpoena"; and

[3] The district court also rejected applicant's argument that his prosecution was motivated by political bias. D. Ct. Op. 11-12. Applicant does not renew that argument in this Court.

(6) rejected applicant's "argument that 'the jury may conclude a defendant's state of mind gives rise to a constitutional contravention of the separation of powers doctrine.'" Ibid. (citation omitted).

ARGUMENT

Applicant seeks to stay the final judgment in a criminal case entered by the district court -- in effect, to secure release on bail -- pending appellate proceedings. Applicant cannot make the demanding showing required to obtain that extraordinary relief. "The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. 3143(b)." Morison v. United States, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). The same standard applies to requests for release pending appeal. See, e.g., C.A. Op. 1; United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985). Accordingly, as applicant recognizes (Appl. 7-8), his application for release pending appellate proceedings should be evaluated using the standard prescribed in Section 3143(b), rather than under the stay factors that the Court applies when Congress has not established the governing criteria, cf. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam).

Section 3143(b), enacted in the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. I, 98 Stat. 1976, imposes stringent restrictions on the availability of bail pending appellate review.

See Stephen M. Shapiro et al., Supreme Court Practice §§ 17.15-17.17, at 17-47 to 17-54 (11th ed. 2019); see also, e.g., Bilanzich, 771 F.2d at 298. As an initial matter, a convicted defendant who has been sentenced to imprisonment must be detained pending appeal and certiorari unless he establishes by clear and convincing evidence that he is not likely to flee or to pose a danger if released and further demonstrates that his appeal is not for the purpose of delay. 18 U.S.C. 3143(b)(1). Those prerequisites are not at issue here.

In addition, and as critical here, a defendant must identify "a substantial question of law or fact likely to result in" a reversal of his convictions or a new trial. 18 U.S.C. 3143(b)(1)(B). That showing must be made with respect to all counts of conviction resulting in imprisonment, given the nature of the relief sought (release pending appeal). See United States v. Perholtz, 836 F.2d 554, 557 (D.C. Cir. 1988) (per curiam). Moreover, because applicant seeks relief from this Court, demonstrating a "likel[ihood]" of reversal or a new trial (ibid.) necessarily requires showing a likelihood both that this Court would grant certiorari and that it would reverse any judgment of the court of appeals affirming applicant's convictions. Cf. Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief). Congress thus "plac[ed] on the defendant the burden of showing * * * that he

or she is likely to prevail * * * on the petition to the Supreme Court for a writ of certiorari." Supreme Court Practice § 17.15, at 17-49.[4]

As Justices of this Court explained even before enactment of the Bail Reform Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" Julian v. United States, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) (quoting Graves v. Barnes, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)); accord McGee v. Alaska, 463 U.S. 1339 (1983) (Rehnquist, J., in chambers). Applicant falls well short of meeting the "extraordinary" standard for obtaining release pending appellate proceedings, Julian, 463 U.S. at 1309, because he cannot establish that the Court would be likely to grant a writ of certiorari and reverse any judgment affirming his convictions or order a new trial based on the questions he raises about the invocation of executive privilege.[5]

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[4] The factors that govern an application for a stay in other contexts require a somewhat analogous showing: An applicant must demonstrate, among other things, "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." Hollingsworth, 558 U.S. at 190.

[5] Section 3143(b) requires the applicant to identify "a substantial question of law or fact." 18 U.S.C. 3143(b)(1)(B). Most lower courts have explained that "a substantial question is 'a "close" question or one that very well could be decided the

I. APPLICANT HAS NOT RAISED ANY QUESTION LIKELY TO RESULT IN REVERSAL OR A NEW TRIAL

Applicant's numerous arguments fall into two main categories, neither of which is likely to result in reversal or a new trial. Applicant principally contends (Appl. 9-25) that his prosecution was precluded by executive privilege. But as the district court found, former President Trump never actually asserted any privilege.[6] Even if he had, any claim of privilege would have been overcome by the Committee's need for the requested documents and testimony. And at all events, even a successful claim of privilege would not excuse applicant's total failure to comply with the subpoena. Applicant has forfeited contrary arguments with respect to all of those points, each of which is an independent reason to reject his claims here.

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other way.'" Perholtz, 836 F.2d at 555 (citation omitted); see id. at 555 n.1 (collecting cases). This Court need not resolve what is required to establish substantiality because the identified question also must be "likely to result" in reversal or a new trial, 18 U.S.C. 3143(b)(1)(B), which itself is a demanding standard that applicant has not satisfied.

[6] Applicant emphasizes (e.g., Appl. 15-16, 21) that former Presidents, like President Trump, may assert executive privilege. That is correct as far as it goes, although the extent to which a former President's claim of executive privilege can prevail over an incumbent President's contrary determination is an unresolved question, cf. Thompson II, 142 S. Ct. at 680. In any event, there is no need for the Court to address that question here. Applicant's claims would fail even assuming that former Presidents have complete and unilateral authority to assert executive privilege, and the Court may proceed on that assumption for present purposes.

Applicant also contends (Appl. 26-34) that he is entitled to release pending appeal because of an alleged conflict in two decisions of the district court in the District of Columbia about whether the continued viability of Licavoli v. United States, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961), itself is a question satisfying the standard in Section 3143(b). But the D.C. Circuit has now resolved that issue against him, see C.A. Op. 2, thus eliminating the supposed conflict. In any event, applicant's deliberate and intentional refusal to make any effort to comply to any degree with the subpoena satisfied Section 192's willfulness requirement.

A. Applicant's Claims Of Executive Privilege Lack Merit

Applicant's principal contention (Appl. 9-26) is that the presidential communications component of executive privilege precluded any prosecution based on his failure to comply with the Committee's subpoena. That contention lacks merit for several independent reasons.

1. The district court found, after an evidentiary hearing at which applicant testified and had the opportunity to submit evidence, that former President Trump did not in fact assert executive privilege with respect to the Committee's subpoena. See 8/30/23 Tr. 25-26. Applicant forfeited any challenge to that factual finding below, see C.A. Op. 1; D. Ct. Op. 2 n.2, and he does not challenge that finding as clearly erroneous in this Court.

That alone should be enough to dispose of applicant's privilege claims. If privilege was never asserted, it cannot be a defense to the prosecution here.

Applicant contends, however, that "an 'affirmative' invocation of executive privilege" by the former President or an authorized delegee was not "required" to preclude applicant's prosecution. Appl. 8 (citation omitted). That contention lacks merit. Executive privilege is "held by the Executive Branch" -- not by individual employees -- "'for the benefit of the Republic.'" Thompson I, 20 F.4th at 26 (quoting Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977)); see Dellums v. Powell, 561 F.2d 242, 247 n.14 (D.C. Cir.), cert. denied, 434 U.S. 880 (1977). "[E]xecutive privilege also can be waived," and the "historical record documents numerous instances in which Presidents have waived executive privilege." Thompson I, 20 F.4th at 26. Indeed, Presidents often decline to assert privilege in response to congressional demands for information as part of "the give-and-take of the political process between the legislative and the executive." Trump v. Mazars USA, LLP, 591 U.S. 848, 859 (2020) (citation omitted).

The President's primacy in that process would be gravely undermined if his determination not to assert the privilege could be overridden by a subordinate -- especially a subordinate like applicant who lacks authority to assert the privilege himself.

Applicant's suggestion (Appl. 19, 22, 34) that he was "duty-bound" to claim executive privilege notwithstanding former President Trump's failure to assert it thus gets things exactly backward.

Applicant observes that executive privilege protects the separation of powers, Appl. 11-12; that it can preclude congressional subpoenas issued not just to the President, but also to his close advisors, Appl. 12-13; and that it may in some circumstances be asserted by a former President, Appl. 15-16. Nobody contends otherwise. But in every case cited by applicant (and in every case of which the government is aware), the President or his delegee had actually asserted executive privilege before a court evaluated the validity and scope of the assertion. Indeed, it is the Executive Branch's usual practice to make a formal assertion of privilege before the relevant congressional committee or House of Congress even votes on whether to hold a witness in contempt. See, e.g., Assertion of Executive Privilege Over Deliberative Materials Regarding Inclusion of Citizenship Question on 2020 Census Questionnaire, 43 Op. O.L.C. __, slip op. at 1, 5 & n.4 (June 11, 2019) (Barr, Att'y Gen.) (requesting assertion by President Trump before committee's scheduled meeting to vote on contempt resolution; citing previous assertions by Presidents Obama, Bush, Clinton, and Reagan), www.justice.gov/olc/file/1350186/dl. Applicant cites no authority to the contrary.

Applicant's reliance (Appl. 13, 20-22) on the "presumptive" nature of executive privilege is misplaced. Cf. United States v. Nixon, 418 U.S. 683, 708 (1974) (describing "considerations justifying a presumptive privilege for Presidential communications"). As the district court explained, that language simply means "that courts will assume the privilege applies when invoked," D. Ct. Op. 7 (emphasis added); it neither relieves a President (or a person authorized by him) of the obligation to assert the privilege as a precondition to its application nor permits former subordinates like applicant to assert the privilege when the President has declined to do so.

2. Even if former President Trump had asserted executive privilege -- or even if applicant were correct that no such assertion was necessary -- applicant still could not show that his appeal would likely result in reversal or a new trial because, as the district court found, any privilege assertion would be overcome by the Committee's need for the information in this case. 8/30/23 Tr. 31-36. As applicant acknowledges (App. 13-14), executive privilege is qualified, not absolute, and may be overcome by a sufficiently strong showing of need. See United States v. Nixon, 418 U.S. at 713 ("demonstrated, specific need"); Senate Select Committee v. Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("demonstrably critical" need).

Here, the district court explained that under "the balancing test discussed in Thompson [I], Congress's and President Biden's interests" in the work of the Committee "outweigh former President Trump's interest in confidentiality." 8/30/23 Tr. 35. Indeed, the court explained that it would reach the same conclusion "under any test." Id. at 36; cf. Thompson II, 142 S. Ct. at 681 (Kavanaugh, J., respecting denial of application). Applicant does not challenge that finding as clearly erroneous in this Court; indeed, he has previously forfeited any challenge to that finding. See C.A. Op. 1-2. And if a claim of qualified executive privilege has been overcome, that privilege cannot provide a basis for precluding the prosecution here. Cf. Thompson II, 142 S. Ct. at 680.

3. Even if executive privilege had been asserted here, and even if that privilege had not been overcome by the Committee's demonstrated need for the requested information, applicant still would not be entitled to reversal or a new trial on his executive privilege claims because that invocation of privilege could not excuse his total noncompliance with the subpoena's request for testimony and records.

As for testimony, applicant no longer claims that he has absolute testimonial immunity -- that is, a right to refuse to appear for a deposition, irrespective of the areas of questioning -- even with respect to official matters. See D. Ct. Op. 9. Nor

would there be any basis to claim such an immunity. The Office of Legal Counsel has endorsed absolute testimonial immunity only for advisors to an incumbent President. E.g., Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. 5 (2014) ("Simas Opinion"). Applicant has not identified any authority endorsing absolute testimonial immunity for former advisors of former Presidents. See D. Ct. Op. 8-9.

Accordingly, even if there were valid claims of executive privilege as to some of the information requested by the subpoena, applicant was nevertheless required to appear at the deposition, answer questions seeking non-privileged information, and assert any claim of privilege on a question-by-question basis. See C.A. Op. 2; D. Ct. Doc. 79-1, at 25. And the subpoena plainly requested applicant's testimony on indisputably non-privileged topics, such as the three-volume "Navarro Report" on his website, which he "made clear * * * was being released in [his] personal capacity." 1/25/24 Tr. 87; see D. Ct. Doc. 79-1, at 19. Indeed, the fact that applicant was "more than happy to talk to the press about what [he] did, [and] write about it in [his] book," 1/25/24 Tr. 87-88, is incompatible with a claim of privilege. Applicant's willful failure to appear for his deposition thus would be sufficient to sustain the conviction on Count Two irrespective of any claim of executive privilege.

The same is true of Count One, involving the documents. It is well accepted that even the President may not assert a generalized claim of executive privilege to absolutely immunize himself from a congressional subpoena for records. See United States v. Nixon, 418 U.S. at 713; Senate Select Committee, 498 F.2d at 729-731. A fortiori, a former presidential advisor like applicant likewise was required to produce non-privileged documents while asserting any claim of privilege on a document-by-document basis. C.A. Op. 2; see D. Ct. Doc. 79-1, at 22 (requiring a log of documents withheld on privilege grounds); cf. Simas Opinion 15. Again, applicant has not contested that the subpoena sought some obviously personal, non-privileged records -- such as those related to sources he used for his own book and website. See D. Ct. Doc. 79-1, at 19-20. Applicant's willful failure to produce non-privileged documents, or to provide a log of withheld documents, thus would be sufficient to sustain his conviction on Count One irrespective of any claim of executive privilege.

4. Applicant's remaining arguments lack merit.

Applicant appears at times to renew (e.g., Appl. 14, 16, 18, 22, 25) his contention that the government was required to obtain a pre-prosecution judicial order resolving his privilege claim. But the district court found that applicant had "forfeited" that theory by refusing to engage with the Committee pre-prosecution,

D. Ct. Op. 10, and applicant does not challenge that finding as clearly erroneous. In any event, applicant cites no authority for his pre-prosecution theory, and elsewhere acknowledges that courts have held that privilege claims are properly "raised as defenses in a criminal prosecution." Appl. 17 (citation omitted). Moreover, it would turn separation of powers on its head to require judicial preclearance before Congress could pursue a line of investigation or the Executive Branch could initiate a prosecution.

Finally, applicant asserts (Appl. 22-25) -- in seeming tension with his pre-prosecution-judicial-order theory -- that only the Executive Branch can determine whether executive privilege has been asserted, not the Judicial Branch. It is unclear what he means by that; after all, the Solicitor General represents the Executive Branch and takes the position that executive privilege was not asserted here, but applicant presumably does not intend that position to be controlling. Perhaps applicant intends to suggest that whenever executive privilege could plausibly be asserted, courts should conclusively presume that it has been asserted. Cf. Appl. 24. Applicant purports to find support for that proposal in Judge Wilkey's dissenting opinion in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc) (per curiam), but that opinion did not address the issue of when the privilege has been properly invoked; instead, it

set forth the view -- a view later contradicted by this Court's decision in United States v. Nixon, supra -- that a proper assertion of executive privilege should categorically preclude disclosure as to the privileged information without a judicial "balancing of interests," Sirica, 487 F.2d at 774 (Wilkey, J., dissenting). Even then, Judge Wilkey made clear that "it is the holder of the Constitutional privilege who decides" whether to disclose documents protected by a privilege. Ibid. (capitalization and emphasis omitted). Here, applicant has acknowledged that he is not the holder of the privilege. See D. Ct. Op. 7.

B. Applicant's Arguments About D.C. Circuit Precedent Are Not Likely To Result In Reversal

Applicant's second principal argument concerns his challenge to "the continued precedential value of Licavoli," supra, in the D.C. Circuit. Appl. 26; see Appl. 26-34. Specifically, he observes that another district judge in the District of Columbia granted a motion for release pending appeal on the ground that the question whether Licavoli applies to cases involving claims of executive privilege satisfies the criteria for questions under 18 U.S.C. 3143(b). See Appl. 28-29 (citing United States v. Bannon, No. 21-cr-670 (D.D.C.)). That argument is misplaced in this Court. In rejecting applicant's request for release pending appeal under Section 3143(b), the D.C. Circuit has already conclusively resolved that issue against applicant, see C.A. Op. 2, thus

eliminating it as a ground for reversal or a new trial. And this Court generally does not concern itself with intra-circuit conflicts, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Setting those threshold matters aside, applicant's contention that Licavoli is no longer good law -- a contention that no court has accepted -- lacks merit. Licavoli explained that "he who deliberately and intentionally fails to respond to a subpoena 'willfully makes default'" within the meaning of Section 192. 294 F.2d at 208 (citation omitted). Relying on Licavoli, the government moved in limine to preclude applicant from arguing to the jury that he did not "willfully" fail to comply with the subpoena on the ground that he believed he was protected by executive privilege. See D. Ct. Doc. 58, at 3-4. The district court correctly granted that motion under Licavoli. 651 F. Supp. 3d at 238. An incorrect belief that executive privilege excuses compliance with a subpoena, even if held in good faith, would not vitiate a finding that the defendant acted "deliberately and intentionally" in defying the subpoena, Licavoli, 294 F.2d at 208.

Applicant incorrectly suggests (Appl. 27-32) that Licavoli is inconsistent with this Court's precedents. The D.C. Circuit adopted its interpretation of "willfully" in Licavoli because it viewed this Court's decisions in United States v. Bryan, 339 U.S. 323 (1950), and United States v. Fleischman, 339 U.S. 349 (1950),

as having "established" that interpretation. Licavoli, 294 F.2d at 208. Indeed, in Sinclair v. United States, 279 U.S. 263 (1929), this Court held that even "act[ing] in good faith on the advice of competent counsel" would not preclude a finding of willfulness under Section 192. Id. at 299; see ibid. ("No moral turpitude is involved. Intentional violation is sufficient to constitute guilt."). Applicant asserts (Appl. 28, 30) that this Court "repudiated" Sinclair in United States v. Gaudin, 515 U.S. 506 (1995), but Gaudin overruled only a separate Sixth Amendment holding in Sinclair -- not its interpretation of "willfully" in Section 192. See Gaudin, 515 U.S. at 519-521.

This Court has made clear that "willfully" is a "'word of many meanings' whose construction is often dependent on the context in which it appears." Bryan v. United States, 524 U.S. 184, 191 (1998) (citation omitted); cf. Safeco Insurance Co. v. Burr, 551 U.S. 47, 57 n.9 (2007). For example, in certain tax and regulatory statutes, the Court has concluded that "the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." Bryan, 524 U.S. at 194.

But as evidenced by Sinclair, the 1950 Bryan decision, and Fleischman, this Court has consistently understood "willfully" in the context of Section 192 to refer to a deliberate and intentional act; at a minimum, if someone "ha[s] legitimate reasons for failing to produce the records * * * , a decent respect for the House of

Representatives, by whose authority the subpoena[] issued, would have required that she state her reasons for noncompliance upon the return of the writ," Bryan, 339 U.S. at 332. Subsequent decisions of this Court adhere to that understanding. See Quinn v. United States, 349 U.S. 155, 165 (1955) ("deliberate, intentional refusal to answer"); Watkins v. United States, 354 U.S. 178, 208 (1957) ("An erroneous determination on [the witness's] part, even if made in the utmost good faith, does not exculpate him."). Licavoli, and the decisions below in this case, are consistent with that precedent. See C.A. Op. 2; D. Ct. Op. 3-5.

Applicant's reliance (Appl. 32-34) on the rule of lenity -- which he raises for the first time in this Court -- is misplaced. Lenity "applies if 'at the end of the process of construing what Congress has expressed,' there is '"a grievous ambiguity or uncertainty in the statute."'" Shaw v. United States, 580 U.S. 63, 71 (2016) (citations omitted). No such grievous ambiguity exists here; this Court has adhered to its clear and definitive interpretation of "willfully" in Section 192 since at least its 1929 decision in Sinclair, supra, and applicant does not claim that he lacked notice of that interpretation, cf. United States v. Davis, 139 S. Ct. 2319, 2333 (2019) (explaining that lenity is "founded" on a concern for providing "fair notice of the law").

II. THIS COURT WOULD NOT LIKELY GRANT REVIEW IF THE COURT OF APPEALS AFFIRMED THE CRIMINAL JUDGMENT

As noted above, because applicant seeks relief from this Court, a showing that his appeal is likely to result in reversal or a new trial necessarily requires showing that the Court likely would grant certiorari to address the questions he has raised. See pp. 16-17, supra. Applicant does not attempt to make that showing, and he could not make it if he tried. If the court of appeals were to affirm the convictions, its decision would not conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle in which to address applicant's asserted executive-privilege defense. That is not just because of the many arguments applicant has forfeited along the way, see C.A. Op. 1-2; D. Ct. Op. 2 n.2, 10, but also because of the multiple independent grounds for rejecting applicant's claims: former President Trump did not assert executive privilege; even if he had, the privilege was overcome; and even if it were not overcome, that would not excuse applicant's total noncompliance with the subpoena, which is sufficient to sustain the convictions on both counts. See Part I.A, supra.

CONCLUSION

The application should be denied.

Respectfully submitted.

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Solicitor General

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