

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 30, 2021

Decided December 9, 2021

No. 21-5254

DONALD J. TRUMP, IN HIS CAPACITY AS THE 45TH PRESIDENT
OF THE UNITED STATES,
APPELLANT

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS
CHAIRMAN OF THE UNITED STATES HOUSE SELECT
COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON
THE UNITED STATES CAPITOL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02769)

Jesse R. Binnall and *Justin R. Clark* argued the cause
and filed the briefs for appellant.

Douglas N. Letter, General Counsel, U.S. House of
Representatives, argued the cause for appellees Bennie
Thompson and the United States House Select Committee to
Investigate the January 6th Attack on the United States Capitol.
With him on the brief were *Todd B. Tatelman*, Principal Deputy
General Counsel, *Stacie M. Fahsel*, Associate General

Counsel, *Eric R. Columbus*, Special Litigation Counsel, and *Annie L. Owens*, *Mary B. McCord*, and *Joseph W. Mead*, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center.

Brian M. Boynton, Acting Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee National Archives and Records Administration. With him on the brief were *Michael S. Raab* and *Gerard Sinzdak*, Attorneys. *Mark R. Freeman*, *Sarah E. Harrington*, and *Elizabeth J. Shapiro*, Attorneys, entered appearances.

Elizabeth B. Wydra and *Brianne J. Gorod* were on the brief for *amici curiae* Former Department of Justice Officials in support of appellees.

Norman L. Eisen was on the brief for *amici curiae* States United Democracy Center and Former Federal, State, and Local Officials in support of appellees.

Nikhel S. Sus and *Conor M. Shaw* were on the brief for *amici curiae* Citizens for Responsibility and Ethics in Washington and Former White House Attorneys in support of appellees.

John A. Freedman, *Samuel F. Callahan*, and *Cameron Kistler* were on the brief for *amici curiae* Former Members of Congress in support of appellees.

Kelly B. McClanahan was on the brief for *amici curiae* Government Accountability Project, et al. in support of appellees.

Before: MILLETT, WILKINS, and JACKSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: On January 6, 2021, a mob professing support for then-President Trump violently attacked the United States Capitol in an effort to prevent a Joint Session of Congress from certifying the electoral college votes designating Joseph R. Biden the 46th President of the United States. The rampage left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol.¹ Then-Vice President Pence, Senators, and Representatives were all forced to halt their constitutional duties and flee the House and Senate chambers for safety.

The House of Representatives subsequently established the Select Committee to Investigate the January 6th Attack on the United States Capitol, and charged it with investigating and reporting on the “facts, circumstances, and causes relating to” the January 6th attack on the Capitol, and its “interference with the peaceful transfer of power[.]” H.R. Res. 503, 117th Cong. § 3(1) (2021). The House Resolution also tasked the January 6th Committee with, among other things, making “legislative recommendations” and proposing “changes in law, policy, procedures, rules, or regulations” both to prevent future acts of

¹ STAFF REP. OF S. COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFS. & S. COMM. ON RULES & ADMIN., 117TH CONG., EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 29 (June 8, 2021) (“*Capitol Attack Senate Report*”); *Hearing on Health and Wellness of Employees and State of Damages and Preservation as a Result of January 6, 2021 Before the Subcomm. on the Legis. Branch of the H. Comm. on Appropriations* (“House Hearing”), 117th Cong., at 1:25:40–1:26:36 (Feb. 24, 2021) (statement of J. Brett Blanton, Architect of the Capitol), <https://perma.cc/XS7N-MRG8>.

such violence and to “improve the security posture of the United States Capitol Complex[.]” *Id.* § 4(b)(1), (c)(2).

As relevant here, the January 6th Committee sent a request to the Archivist of the United States under the Presidential Records Act, 44 U.S.C. § 2205(2)(C), seeking the expeditious disclosure of presidential records pertaining to the events of January 6th, the former President’s claims of election fraud in the 2020 presidential election, and other related documents.

This preliminary injunction appeal involves only a subset of those requested documents over which former President Trump has claimed executive privilege, but for which President Biden has expressly determined that asserting a claim of executive privilege to withhold the documents from the January 6th Committee is not warranted. More specifically, applying regulations adopted by the Trump Administration, President Biden concluded that a claim of executive privilege as to the specific documents at issue here is “not in the best interests of the United States,” given the “unique and extraordinary circumstances” giving rise to the Committee’s request, and Congress’s “compelling need” to investigate “an unprecedented effort to obstruct the peaceful transfer of power” and “the most serious attack on the operations of the Federal Government since the Civil War.” Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), J.A. 107–108 (“First Remus Ltr.”); *see also* Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 8, 2021), J.A. 113 (“Second Remus Ltr.”); Letter from Dana A. Remus, Counsel to the President, to David Ferriero, Archivist of the United States (Oct. 25, 2021), J.A. 173–174 (“Third Remus Ltr.”).

The central question in this case is whether, despite the exceptional and imperative circumstances underlying the Committee's request and President Biden's decision, a federal court can, at the former President's behest, override President Biden's decision not to invoke privilege and prevent his release to Congress of documents in his possession that he deems to be needed for a critical legislative inquiry.

On the record before us, former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents. Both Branches agree that there is a unique legislative need for these documents and that they are directly relevant to the Committee's inquiry into an attack on the Legislative Branch and its constitutional role in the peaceful transfer of power.

More specifically, the former President has failed to establish a likelihood of success given (1) President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States; (2) Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations; (3) the demonstrated relevance of the documents at issue to the congressional inquiry; (4) the absence of any identified alternative source for the information; and (5) Mr. Trump's failure even to allege, let alone demonstrate, any particularized harm that would arise from disclosure, any distinct and superseding interest in confidentiality attached to these particular documents, lack of relevance, or any other reasoned justification for withholding the documents. Former President Trump likewise has failed to establish irreparable harm, and the

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