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Legal Sidebar

United States v. Bannon: Criminal Contempt of Congress and Bad Faith

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On May 10, 2024, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) decided *United States v. Bannon*, an appeal of Stephen Bannon's conviction under the criminal contempt of Congress statute, 2 U.S.C. § 192. Section 192 criminalizes "willfully mak[ing] default" on a congressional subpoena for those who do not appear, or refusing to answer "any question pertinent to the question under inquiry" for those who do appear.

At the heart of *United States v. Bannon* is whether "willfully," as used in the statute, requires that the defendant acted in bad faith in defaulting on a subpoena or if it requires only that the defendant "deliberately and intentionally" refused to comply. Bannon urged the court to adopt the former understanding, as he sought to invoke what is commonly known as the advice-of-counsel defense by asserting that his attorney advised him that he did not have to respond to the subpoena and therefore lacked the state of mind necessary to be convicted for a violation of § 192.

This Legal Sidebar briefly discusses the D.C. Circuit's decision and sets out several considerations for Congress. A different Legal Sidebar provides specific information related to the Bannon indictment and prosecution, and another Legal Sidebar discusses contempt of Congress in more detail.

Background

On June 30, 2021, the House of Representatives adopted House Resolution 503, which established the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee). The resolution empowered the Select Committee to investigate and report on the "facts, circumstances, and causes" of the events of January 6, and to subpoena witnesses for testimony or documents. Pursuant to this authority, the Select Committee issued a subpoena to Bannon, who served as an advisor to President Donald Trump for approximately seven months in 2017. Bannon was, on January 6, 2021, a private citizen.

The subpoena sought documents and testimony from Bannon pertaining to seventeen categories of information dating from 2020 and 2021. Three of these categories involved communications between Bannon and President Trump. The remaining categories related to Bannon's communications with other executive branch officials, staff of the Trump campaign, or private citizens. Bannon did not comply by the

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required deadlines, instead stating in various letters through his attorney that President Trump intended to invoke executive privilege and that, until "[the Select Committee] reach[es] an agreement with President Trump [regarding executive privilege], Mr. Bannon will not be producing documents or testifying." It was his reliance on this advice of counsel that Bannon argued "fundamentally negates [his] guilt."

As the D.C. Circuit acknowledged, however, President Trump's attorney—in his communications with Bannon's attorney—did not assert that former President Trump intended to invoke executive privilege but rather characterized the subpoena to Bannon as seeking materials "including but not limited to" information that may be "potentially protected from disclosure by executive and other privileges." Former President Trump's attorney later reiterated to Bannon's attorney that former President Trump had not asserted executive privilege and that he did not believe that Bannon had immunity from testimony.

Following warnings to Bannon regarding his non-compliance, the Select Committee unanimously voted to recommend that the House find Bannon in contempt. On November 12, 2021, a grand jury indicted Bannon on two counts of violating 2 U.S.C. § 192: one for refusing to appear for a deposition and the other for refusing to produce the requested documents and communications.

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At trial, a jury convicted Bannon on both counts on July 22, 2022. He was sentenced to four months' incarceration on each count, to run concurrently, and received a $6,500 fine. The sentence was stayed by the district court pending Bannon's appeal.

On appeal, Bannon raised four challenges to his convictions. The crux of his position rested on the above-mentioned issue regarding whether "willfully" requires bad faith, arguing the district court erroneously defined the *mens rea*, or mental state, required to be convicted under § 192. Another Legal Sidebar discusses mens rea in greater detail. Bannon also claimed that his conduct was affirmatively authorized by government officials, that the subpoena was invalid to begin with, and that the district court erroneously quashed certain subpoenas Bannon sought that would have purportedly helped develop evidence for his defense.

The Court's Inquiry: Does "Willful" Mean "in Bad Faith"?

Section 192 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee stablished by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor . . . .

The Supreme Court has interpreted the latter clause of § 192 (making it unlawful to refuse, after having appeared, "to answer any question pertinent to the question under inquiry") to require that the defendant's actions be deliberate and intentional—but not to require bad faith. While the Supreme Court does not appear to have ever ruled on the meaning of "willfully" in the first clause (criminalizing the actions of one who "willfully makes default"), the D.C. Circuit has done so, concluding in *Licavoli v. United States* that "willfully," as used in § 192, requires only that the failure to comply with a congressional subpoena be "deliberate" and "intentional"—in other words, without regard for the reason behind one's failure to comply.

On appeal, Bannon conceded that he did not comply with the subpoena, instead arguing that his decision to do so was not made in bad faith and was therefore not "willful" under the statute. He maintained that

because he relied on his attorney's advice that he was immunized due to President Trump's assertion of executive privilege, he did not know that his refusal to comply would violate the law. Rather than dispute *Licavoli*'s holding, Bannon asked the D.C. Circuit to depart from it. The court declined, noting Bannon's failure to identify a case demonstrating that *Licavoli* was "inconsistent with an earlier, on-point decision" or that it had "been overturned—or its rationale 'eviscerated'—by a subsequent decision of the Supreme Court or [the D.C. Circuit] sitting *en banc*." The court further reiterated that *Licavoli* had "specifically held that an advice of counsel defense . . . is unavailable under this statute."

The D.C. Circuit acknowledged that although "willfully" appears in the clause of the statute under which Bannon was convicted, it does not appear in the latter clause that the Supreme Court interpreted. Still, it concluded the logic underpinning the holding that bad faith is not required for a conviction under the latter clause to be equally applicable to the first. Reiterating its holding in *Licavoli*, the D.C. Circuit rejected the suggestion that the presence of "willfully" in one clause but not the other "counseled any different approach to the mental state required when a subpoena recipient refuses to appear altogether instead of appearing but refusing to answer pertinent questions." *Licavoli*, the court explained, reasoned that use of the word "willfully" in the second clause would be unnecessary, as a refusal to answer by a witness who has already "appeared, being present and conscious of what is going on, understanding the question, and being advised of its pertinency to the inquiry—is obviously in and of itself a willful act." One who defaults on a subpoena altogether, however, could do so either willfully or inadvertently—for example, if the subpoena was never received by the target recipient. The *Bannon* court further noted that, "as a practical matter, requiring evidence of bad faith would undermine the statute's function." The court explained that such a requirement would make "enforcing congressional subpoenas . . . exceedingly difficult," because "any subpoenaed witness could decline to respond and claim they had a good-faith belief that they need not comply."

The court likewise was not persuaded by precedent Bannon advanced that concluded bad faith is an element of other criminal statutes that use the word "willfully." As the court explained, none of the cases Bannon cited involved a conviction for contempt of Congress. The court reasoned that "statutory context is critical" to interpreting "willfully" in § 192, so the meaning of the word in other, unrelated statutes was not sufficient to reverse its precedent regarding the meaning of the word in § 192.

Bannon's Other Arguments

Although the court devoted much of its opinion to dispensing with Bannon's argument about the meaning of "willful" in § 192, it also rejected his various other arguments, including that he received proper authorization from government officials not to comply with the subpoena, that the Select Committee's subpoena was invalid, and that the lower court improperly quashed subpoenas for information Bannon could purportedly use in establishing his defense.

Bannon asserted what the court called three affirmative defenses "based on the assertion that the government authorized his default." These defenses—entrapment by estoppel, public authority, and apparent authority—all relied on a common theme that Bannon's refusal to comply with the subpoena "was justified because he relied on directives from [former] President Trump and a collection of opinions from the Department of Justice's Office of Legal Counsel ('OLC')." The court rejected these arguments, noting that such defenses require a showing by the defendant that the government affirmatively authorized his conduct. The court concluded that the OLC opinions Bannon cited were not applicable, as they did not address subpoenaed communications between private citizens. The court also held that Bannon had not established that President Trump authorized his refusal to respond, observing instead that the claim was contradicted by correspondence between former President Trump's lawyer and Bannon's counsel.

With respect to Bannon's argument that the Select Committee's subpoena was invalid, the D.C. Circuit affirmed the lower court's ruling denying Bannon's motion to dismiss the indictment on this basis. The court first noted that it had already decided in recent, prior cases that the Select Committee was lawfully established and investigating pursuant to a "valid legislative purpose" and that long-standing precedent militated against examining the Select Committee's motives. The court also concluded that Bannon had forfeited various procedural objections because he did not raise them to the Select Committee.

Finally, the court addressed Bannon's argument that the trial court erroneously quashed subpoenas that Bannon had served on various Members of Congress and congressional staff. The court agreed with the trial court's determination that the subpoenas were improper because "none of the information sought in the trial subpoenas was relevant to the elements of the contempt offense, nor to any affirmative defense Bannon was entitled to present at trial." In light of this determination, the court did not address whether the subpoenas would have violated the Constitution's Speech and Debate Clause.

Following the D.C. Circuit's decision, the Government filed a motion to lift the stay of Bannon's sentence that the district court had issued pending appeal, which Bannon opposed. After a hearing on June 6, 2024, the district court lifted the stay, ordering Bannon to report to the Bureau of Prisons by July 1, 2024, to begin his four-month sentence. Bannon thereafter asked the D.C. Circuit to reinstate the stay on his sentence pending the court's ruling on his petition for a rehearing en banc by that court. The court, in a per curiam order, rejected this motion on June 20, 2024, with one judge of the three-judge panel dissenting. Bannon filed an emergency application to the U.S. Supreme Court on June 21, 2024, seeking to stay his sentence. The Court denied that application on June 28, 2024.

Considerations for Congress

The House Bipartisan Legal Advisory Group voted on June 25 to withdraw certain arguments that the House previously made in court regarding the organization of the Select Committee, enabling the House to file an amicus brief in the D.C. Circuit after Bannon files his petition for a rehearing en banc. The chairman of the Committee on House Administration has also indicated plans to file an amicus brief with the Supreme Court in support of Bannon.

In addition to filing amicus briefs, Congress could consider amending the contempt statute to clarify whether "willfully mak[ing] default" on a congressional subpoena requires evidence of bad faith. It may also consider options to clarify the applicability of executive privilege assertions in the course of its investigations.

Congress has previously considered legislation that would create a uniform interpretation of "willfully" across all federal criminal statutes absent an expressly identified state of mind. Should Congress opt instead to clarify the mens rea in § 192 only, it could explicitly specify whether that statute requires bad faith. Some statutes do so with language such as "willfully *and purposefully*," and the Supreme Court has suggested its approval for including the word "purpose" in criminal statutes to "correspond[] loosely with the common-law concept of specific intent," meaning the word indicates a conscious object or desire. Congress may also add language that provides for a specific requisite state of mind. For example, 18 U.S.C. § 841 prohibits the possession or distribution of certain chemicals where one has "reasonable cause to believe" that the chemical will be used in the manufacture of a controlled substance. The federal courts are divided on this approach, however, with some concluding that "reasonableness" ought to be evaluated through a subjective lens of the particular defendant, while other circuits evaluate the standard through the lens of what a "reasonable person" would know.

If Congress chooses to adopt the D.C. Circuit's interpretation of "willfully" as it is used in § 192, it could clarify how that section applies in certain situations. For example, it could amend § 192 to clarify whether defendants could assert the advice-of-counsel defense offered by Bannon. Congress could also address

whether or to what extent executive privilege could be asserted in such cases, such as by requiring the executive to affirmatively assert the privilege to the investigating body in writing.

In addition, if the D.C. Circuit's decision in *Bannon* stands and Congress does not amend § 192, other federal courts may look to the D.C. Circuit's decision as instructive and interpret Congress's inaction as acquiescence to the D.C. Circuit's holding that bad faith is not required to willfully violate § 192.

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