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Washington, DC 20515

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One Hundred Seventeenth Congress

Select Committee to Investigate the January 6th Attack on the United States Capitol

November 23, 2021

Mr. Stanley E. Woodward, Jr.

Mr. Stan M. Brand

Dear Messrs. Woodward and Brand,

The Select Committee to Investigate the January 6th Attack on the U.S. Capitol (“Select Committee”) is in receipt of your November 15, 2021, letter regarding document production and your November 18, 2021, letter regarding the requested testimony of your client, Daniel J. Scavino, Jr. In both letters, you and Mr. Scavino have refused to provide any documents or any testimony in response to the Select Committee’s October 6, 2021, subpoena. Mr. Scavino’s steadfast refusal to cooperate – despite a professed willingness to the contrary – is untenable and grounded in specious and misguided legal arguments.

Select Committee Jurisdiction

Your letter of November 18, 2021, incorrectly asserts that the Select Committee is attempting to assert “broad or otherwise limitless jurisdiction to investigate.”¹ The Select Committee’s charter, House Resolution 503, 117th Congress, states that the Select Committee is to “investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex ... and relating to the interference with the peaceful transfer of power.”² As I stated in my October 6, 2021, letter to Mr. Scavino transmitting the subpoena, the Select Committee’s investigation and public reports have revealed evidence indicating that your client has knowledge concerning activities that led to and informed the events of January 6, 2021, and relevant to President Trump’s activities and communications in the period leading up to and on January 6.³ These subjects are squarely within the Select Committee’s jurisdiction. Your client is apparently taking the position that he may refuse to comply with the Select Committee subpoena simply because he has a different view of what information should be important to Congress. There is no legal authority – and none is provided by your letter – supporting that position.

¹ Letter from S. Brand and S. Woodward to Chairman Thompson (Nov. 18, 2021) at p. 3.

² Section 3(1), H. Res. 8 (117th Cong.), as adopted on June 30, 2021.

³ Letter from Chairman Thompson to D. Scavino (Oct. 6, 2021) at p. 1.

Seeking information for congressional investigations is “an essential and appropriate auxiliary to the legislative function.”⁴ The explicit legislative purpose of the Select Committee is found in its charter: to make “recommendations for ... changes in law, policy, [or] procedures ... that could be taken[] to prevent future acts of violence, domestic terrorism, and domestic violent extremism, including acts targeted at American democratic institutions” ... and to “strengthen the security and resilience of” American democratic institutions.⁵ The validity of the Select Committee’s legislative purpose was recently affirmed in debate on the House floor.⁶ And as the Federal District Court recently explained in *Trump v. Thompson*, which reaffirmed the Select Committee’s legislative purpose, courts “must be highly deferential to the legislative branch.”⁷ Far from the issues you cite in your letter involving the House Committee on Un-American Activities investigating the private conduct of private individuals found in *Watkins v. United States* (354 U.S. 178 (1957)), your client was a government official conducting public business potentially relating to a riot on the U.S. Capitol that disrupted a constitutional process, which is indisputably a proper subject for possible legislation.

Deposition Rules

Your letter of November 18, 2021, challenges the Select Committee’s ability to “validly conduct a deposition” “absent a duly appointed Ranking Member.”⁸ This claim reflects a flawed understanding of the Rules of the U.S. House of Representatives. The Select Committee was properly constituted under section 2(a) of House Resolution 503, 117th Congress. As required by that resolution, Members of the Select Committee were selected by the Speaker, after “consultation with the minority leader.”⁹ A bipartisan selection of Members was appointed pursuant to House Resolution 503 and the order of the House of January 4, 2021, on July 1, 2021, and July 26, 2021.¹⁰ Neither House Resolution 503, the Regulations for the Use of Deposition Authority promulgated by the Chairman of the Committee on Rules pursuant to section 3(b) of House Resolution 8, nor the Rules of the House of Representatives require the Select Committee to include the minority leader’s preferred Members on the Select Committee.

Deposition Testimony

You have repeatedly indicated a desire to engage and identify areas where Mr. Scavino is able to testify, but to date, you have not identified any such areas or made any proposals regarding which items your client considers beyond the scope of privilege. As recounted in our November

⁴ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *see also Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (“The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”).

⁵ Sections 4(a)(3) and 4(c), H. Res. 8 (117th Cong.), as adopted on June 30, 2021.

⁶ *See* remarks of Rep. Jim Banks, “Madam Speaker, no one has said that the select committee doesn’t have a legislative purpose,” 167 Cong. Rec. 185 (Oct. 21, 2021) at p. H5760.

⁷ *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021), at p. 26.

⁸ Letter from S. Brand and S. Woodward to Chairman Thompson (Nov. 18, 2021) at p. 5-6.

⁹ Speaker Pelosi detailed such consultation and her selection decisions in a July 21, 2021, press release available at <https://www.speaker.gov/newsroom/72121-2>.

¹⁰ 167 Cong. Rec. 115 (July 1, 2021) at H3597 and 167 Cong. Rec. 130 (July 26, 2021) at H3885. The January 4, 2021, order of the House provides that the Speaker is authorized to accept resignations and to make appointments authorized by law or by the House. *See* 167 Cong. Rec. 2 (Jan. 4, 2021) at p. H37.

9, 2021, letter, we do not believe Mr. Scavino's assertions of privilege are valid with respect to the items of interest to the Select Committee. Indeed, after identifying several topics in that letter, we stated the following:

We believe that these topics either do not implicate any cognizable claim of executive privilege or raise issues for which the Select Committee's need for the information is sufficiently compelling that it overcomes any such claim. To that end, **please provide your input on the topics that the Select Committee has reiterated by way of this letter no later than Thursday, November 11.** If there are areas listed above that you agree implicate no executive or other privilege, please identify those areas. Conversely, please articulate which privilege you believe applies to each area and how it is implicated. Our hope is that this process will sharpen our differences on privilege issues and allow us to develop unobjectionable areas promptly.¹¹

Despite that request and invitation to negotiate areas of inquiry on which the parties could agree, you and your client have provided no such detailed input. If you are indeed interested in "hon[ing] in on a subset of topics that can be prioritized,"¹² please identify the specific topics Mr. Scavino agrees are outside the scope of his asserted privileges, and if you believe a privilege applies, articulate which privilege and how it is implicated for each item no later than **Friday, November 26, 2021.**

To allow time to serve the subpoena on counsel and to permit these further negotiations, the Select Committee will provide a final continuation of the deposition to **Wednesday, December 1, 2021, at 10:00am.** The Select Committee expects Mr. Scavino's appearance at that time. Although you have stated a preference to proceed by written interrogatories, there is simply no substitute for live, in-person testimony and the Select Committee respectfully declines your suggestion to proceed otherwise. We continue to believe that the items identified in the October 6, 2021, subpoena and our November 9, 2021, correspondence do not implicate any privilege that should prevent his testimony. If you disagree about that for particular questions, you will have the opportunity to state privilege objections to specific questions on the record.

Document Request

In your November 15, 2021, correspondence, you reiterated your client's refusal to turn over any responsive document in his possession, asserting privilege, but also represented that your client has still not completed a search to identify all responsive documents. You further refused the Select Committee's request for a privilege log, asserting that "the production of a privilege log, as demanded by the Select Committee, would undermine the private, or otherwise confidential nature of advice given by or to the President and his advisors."¹³

¹¹ Letter from Chairman Thompson to D. Scavino (Nov. 9, 2021) at p. 4.

¹² Letter from S. Brand and S. Woodward to Chairman Thompson (Nov. 18, 2021) at p. 1.

¹³ Letter from S. Brand and S. Woodward to Chairman Thompson (Nov. 15, 2021) at p. 2.

As we noted in our prior correspondence, categorical claims of executive privilege are improper, and Mr. Scavino must identify an invocation of any claim of executive privilege by Mr. Trump narrowly and specifically. *See, e.g., In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997); *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-1332, 2014 WL 12662665, at *2 (D.D.C. Aug. 20, 2014) (rejecting a “blanket” executive-privilege claim over subpoenaed documents). Your continued refusal to provide a privilege log, coupled with your extensive and blanket assertions of privilege, are fundamentally at odds with your stated desire to “foster further discussion and the continued collaboration” with the Select Committee. The Committee intends to fully explore the extent and nature of the withheld documents—as well as the scope and sufficiency of the document search—at Mr. Scavino’s scheduled deposition. If Mr. Scavino is to cure his non-compliance with the requirement to produce documents, **he must produce them by 12:00pm on Monday, November 29, 2021.**

Finally, as we previously communicated, the incumbent President, not former President Trump, is responsible for guarding executive privilege. *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021), at p. 13, 20; *see also Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977); *Nixon v. GSA*, 433 U.S. 425, 449 (1977). The incumbent President has expressly declined to assert executive privilege on a number of subjects on which the Select Committee has sought testimony or documents, and the district court has ruled that former President Trump’s “assertion of privilege is outweighed by President Biden’s decision not to uphold the privilege.” *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021), at p. 21; *see also* Doc. 21 (brief for the NARA defendants), Doc. 21-1 (Declaration of B. John Laster). Therefore, while we have made attempts to accommodate Mr. Scavino’s concerns about privilege, he is no position to assert privilege on behalf of the executive branch.

Service of Subpoena

Finally, in your most recent letter sent on the eve of the scheduled deposition, you raised for the first time with the Select Committee an objection to the manner in which Mr. Scavino was served. Pursuant to House rule XI and House Resolution 503, the Select Committee is authorized “to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary.”¹⁴ Further, section 5(c)(4) of House Resolution 503 provides that the Chairman of the Select Committee may “authorize and issue subpoenas pursuant to clause 2(m) of rule XI in the investigation and study” conducted pursuant to the enumerated purposes and functions of the Select Committee.¹⁵

The October 6, 2021, subpoena to Mr. Scavino was duly issued pursuant to section 5(c)(4) of House Resolution 503 and clause 2(m) of rule XI of the Rules of the House of Representatives.¹⁶ The subpoena was served to Susan Wiles at Mar-a-Lago, Mr. Scavino’s current place of employment. Ms. Wiles represented herself as Chief of Staff to former President Trump, with

¹⁴ House Rule XI, cl. 2(m)(1)(B), 117th Cong. (2021); H. Res. 503, 117th Cong § 5(c)(4) (2021).

¹⁵ H. Res. 503, 117th Cong § 5(c)(6) (2021).

¹⁶ Section 5(c)(4) of H. Res. 503 invokes clause 2(m)(3)(A)(i) of rule XI, which states in pertinent part: “The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe.”

whom Mr. Scavino is still employed. She further represented that she was authorized to accept the subpoena on Mr. Scavino's behalf. Additionally, we have had no indication that you or your client are not in receipt of the subpoena and schedule. To the contrary, you have quoted extensively from the schedule, which is clearly within your possession. Nonetheless, the Select Committee is prepared to serve the subpoena on you as his counsel of record. Per your email of November 23, 2021, confirming that Mr. Scavino authorized you to accept service of the subpoena on his behalf, the Select Committee will provide you with a new subpoena by email this week reflecting the dates set forth in this letter.

Please confirm receipt of this letter, and **no later than 12:00pm on Monday, November 29**, confirm Mr. Scavino's intent to appear for his deposition on December 1. The Select Committee will view Mr. Scavino's failure to appear for the deposition and respond to the subpoena as willful non-compliance. His continued failure to produce documents pursuant to the subpoena also constitutes willful non-compliance. Mr. Scavino has a short time in which to cure his non-compliance. The continued, willful non-compliance with the subpoena would force the Select Committee to consider invoking the contempt of Congress procedures in 2 U.S.C. §§192, 194—which could result in a referral from the House to the Department of Justice for criminal charges—as well as the possibility of having a civil action to enforce the subpoena brought against Mr. Scavino in his personal capacity.

Sincerely,



Bennie G. Thompson
Chairman