BRAND | WOODWARD
Attorneys at Law

Stan M. Brand
[redacted]

Stanley E. Woodward Jr.
[redacted]

November 18, 2021

VIA ELECTRONIC MAIL

The Honorable Bennie G. Thompson
Chairman
Select Committee to Investigate the January 6th Attack on the United States Capitol
U.S. House of Representatives
Washington, District of Columbia 20515

Re: Daniel J. Scavino, Jr.

Dear Chairman Thompson:

On behalf of our client, Daniel J. Scavino, Jr., we write regarding your October 6, 2021, subpoena for Mr. Scavino to testify at a deposition; your November 9, 2021, correspondence identifying additional "matters of inquiry" for Mr. Scavino's deposition, as well as the email correspondence from your Staff of November 9, 2021, advising that the Select Committee will extend the time for which Mr. Scavino is to appear at a deposition to November 19, 2021. Further, your staff asked that we advise the Select Committee by today, November 18, 2021, *at noon*, whether Mr. Scavino intends to appear for a deposition on November 19.

For the reasons set forth in this correspondence, we submit that Mr. Scavino cannot meaningfully appear for a deposition on Friday, November 19, 2021. As we have previously advised your Staff, the breadth of the "matters of inquiry" identified in your October 6 subpoena as well as your November 9 correspondence make it difficult for us to sufficiently prepare Mr. Scavino to present competent testimony or to ensure that he has adequate representation at such a deposition. Of note, although we invited your Staff to engage with us so as to "hone in on a subset of topics that can be prioritized," we received no response to this invitation.

Instead, the "matters of inquiry" identified within you November 9 correspondence greatly increased the effort necessary to ensure Mr. Scavino's preparedness. Although your October 6 subpoena identified fifteen (15) "items" that are "touching matters of inquiry committed" to the Select Committee, your November 9 correspondence identified an additional eighteen (18) "topics" the Select Committee advised that it "intend[ed] to develop with Mr. Scavino during [his] deposition."

Of note, the "topics" identified by your November 9 correspondence *expand* upon the breadth of the matters of inquiry identified in your October 6 subpoena. Your October 6 subpoena advises that: "The Select Committee has reason to believe that [Mr. Scavino] ha[s] information relevant to understanding important activities that led to and informed the events at the Capitol on

January 6, 2021, and relevant to former President Trump's activities and communications in the period leading up to and on January 6." The "topics" identified in your subpoena then generally reference the events of January 6.

Your November 9 correspondence, however, advises that the Select Committee intends to "develop" with Mr. Scavino "[t]he possibility of invoking . . . the 25th Amendment based on election-related issues or the events in the days leading up to, and including January 6." This one "topic" alone exceeds the breadth of the "matters of inquiry" identified in your October 6 subpoena and requires careful consideration of a plethora if issues implicated by the proposed exploration of this subject. What's more, your November 9 correspondence goes on to advise that you intend to "develop" with Mr. Scavino his "activities in generating social media content and monitoring social media for President Trump" as well as Mr. Scavino's knowledge of "far-right memes, coded language, and whether or how some domestic violent extremist groups such as the Proud Boys interpreted messages from President Trump and other officials." Here again, the scope of the Select Committee's "matters of inquiry" is unbounded and we cannot efficiently address with Mr. Scavino or the Select Committee an appropriate path toward resolving the inter-branch conflict implicated by this "topic." Similarly, your November 9 correspondence identifies as a "matter of inquiry" "[t]heories or strategies regarding Congress and the Vice President's (as President of the Senate) roles and responsibilities when counting the Electoral College vote," a subject not previously identified within your October 6 subpoena.

In summary, your October 9 subpoena makes no reference to the 25th Amendment, Mr. Scavino's social media "activities" as well as knowledge of "far-right memes [or] coded language," or "theories or strategies" regarding the role of the Vice President in the Electoral College vote, to name just a few examples. Rather, these are "topics" that grossly expand upon the breadth of the "matters of inquiry" identified in your subpoena and exacerbate the difficulty of preparing Mr. Scavino for a deposition on such short notice. Finally, as if this task were not already sufficiently challenging, your November 9 correspondence advises that "the Select Committee reserves the right to question Mr. Scavino about other topics" as well.

We acknowledge the important subject matter of the Select Committee's work and have expressed to your Staff a presumed mutual desire to ensure that witnesses appearing before the Select Committee are adequately prepared to provide competent testimony. The importance of that task is heightened by the inter-branch conflict presented by the Select Committee's solicitation of information subject to Executive Branch privilege – a privilege recognized by our first president when he refused to provide information to the House, explaining that "the boundaries fixed by the Constitution between the different departments should be preserved." Pres. George Washington, Message to the House Regarding Documents Relative to the Jay Treaty (Mar. 30, 1796). This centuries-old privilege serves the purpose, as recently delineated by the Supreme Court, to "safeguard[] the public interest in candid, confidential deliberations within the Executive Branch," and covers "information subject to the greatest protection consistent with the fair administration of justice." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2024 (2020) (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)) (internal quotations omitted). *See also In re Sealed Case (Espy)*, 121 F.3d 729, 751 (D.C. Cir. 1997) (holding that "the President's access to honest and informed advice and his ability to explore possible policy options privately are critical elements in presidential

decisionmaking" and recognizing an executive privilege applicable to "communications made by presidential advisers in the course of preparing advice of the President").

Moreover, because President Trump has directed Mr. Scavino to "invoke any immunities and privileges [Mr. Scavino] may have from compelled testimony . . . to the fullest extent permitted by law," Mr. Scavino has a "a legal duty on the part of the aide to invoke the privilege on the President's behalf . . . ." *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 n.34 (D.D.C. 2019). We submit that it would be irresponsible for Mr. Scavino to prematurely resolve President Trump's privilege claim by voluntarily waiving privilege and providing testimony implicating the heart of the legal questions at issue. Rather, such inter-branch disputes are to exclusively be resolved by the courts. *See United States v. Nixon*, 418 U.S. 683, 696 (1974) ("We therefore reaffirm that it is the province and duty of [the Supreme Court] 'to say what the law is' with respect to the claim of [executive privilege].'" (*quoting Marbury v. Madison*, 5 U.S. 1 (Cranch) 137, 177 (1803)). We thus continue to monitor the litigation initiated by President Trump and now before the D.C. Circuit *see Trump v. Thompson*, No. 21-5254 (D.C. Cir.), and welcome the opportunity to further discuss the application of the executive privilege to Mr. Scavino's testimony upon receipt of a final order on the merits of this claim. We also acknowledge that the House may, and has, sought judicial resolution of a contested claim of executive privilege, *see Committee on the Judiciary of the House of Reps. v. McGahn*, 965 F.3d 755, 762 (D.C. Cir. 2020) (*en banc*), and that so doing here would not be inappropriate given the potential for current litigation to address only the application of privilege to records.

In addition to the significant issue of the application of executive privilege to Mr. Scavino's potential testimony, we also wish to express concerns about the pertinency of the Committee's stated "matters of inquiry." While we reiterate our acknowledgement of the important subject matter of the Select Committee's work, we also respect the provenance of the U.S. Congress and its role in our co-equal branches of government. We specifically raise this issue prior to resolving the valid application of executive privilege to any potential testimony so as to provide the Select Committee with an opportunity to address our concerns.

Specifically, our review of House Resolution 503 provides no indication that the Select Committee was bestowed with broad or otherwise limitless jurisdiction to investigate. We submit that it does not, because it can not. Our federal courts have plainly held that the jurisdiction of Congressional committees is necessarily limited. *See, e.g., United States v. Kamin*, 136 F. Supp. 791 802 n.4 (D. Mass 1956) (rejecting an interpretation of legislative committee jurisdiction that "would be enormous"). Congress's broad "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Accordingly, Congress and its duly authorized committees may issue a subpoena where the information sought "is related to, and in furtherance of, a legitimate task of Congress," *Watkins v. United States*, 354 U.S. 178, 187 (1957), and the subpoena serves a "valid legislative purpose." *Quinn v. United States*, 349 U.S. 155, 161 (1955).

The "valid legislative purpose" requirement stems directly from the Constitution. *Kilbourn*, 103 U.S. at 168, 182-89 (1880). "The powers of Congress . . . are dependent solely on the Constitution," and "no express power in that instrument" allows Congress to investigate individuals or to issue boundless records requests. *Id.* The Constitution instead permits Congress to enact certain kinds of legislation, *see, e.g.,* U.S. Const. art. I, § 8, and Congress's power to investigate "is

justified as an adjunct to the legislative process, it is subject to several limitations." *Mazars*, 140 S. Ct. at 2031. These limitations include that Congress may not issue a subpoena for the purposes of "law enforcement" because "those powers are assigned under our Constitution to the Executive and the Judiciary," *Quinn*, 349 U.S. at 161, or to "try" someone "of any crime or wrongdoing, *McGrain*, 273 U.S. at 179; nor does Congress have any "general power to inquire into private affairs and compel disclosure," *McGrain*, 273 U.S. at 173-74, or the "power to expose for the sake of exposure," *Watkins*, 354 U.S. at 200. Also importantly, Congressional investigations "conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187, *Mazars*, 140 S. Ct. at 2032.

We are especially troubled by the representation of the legislative purpose of the Select Committee as made by Mr. Douglas Letter on behalf of the U.S. House of Representatives. *See* H'ng T., *Trump v. Thompson*, No. 21-cv-002769 (Nov. 4, 2021). With respect to the Select Committee's legislative purpose, Mr. Letter stated:

> [W]e need to figure out what was the atmosphere that brought . . . about [the events of January 6, including] the many attempts that were made before the election to try to build the nature of mistrust about the election itself, which goes to undermine our democracy, so that if President Trump did lose he would be able to say that his is unfair and to generate lots of anger and rage that led to January 6.

H'ng T. at 40. Contrary to Mr. Letter's assertion, courts have made clear that educating the public is not a valid congressional function. Specifically, the Supreme Court has held that when Congress claims that it is "the duty of Members to tell the public about their activities . . . the transmittal of such information by individual Members in order to inform the public and other Members is not part of the legislative or the deliberations that make up the legislative process." *Hutchinson v. Proxmire*, 443 U.S. 111, 113 (1979). Similarly, congressional investigators have no authority to "collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present." *Watkins*, 354 U.S. at 187.

Mr. Letter goes on to hypothesize as to legislative ends that could be achieved by the Select Committee:

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

H'ng T. at 43. The wide range of *potential* legislative ends cited by Mr. Letter, however, undermine the Select Committee's purported narrowly tailored stated purpose. This one issue is sufficient to defeat any claim of legitimate pertinence. Where, as here, the Select Committee has threatened referrals of criminal contempt, *see* Thompson & Cheney Statement on Bannon Indictment (Nov. 12, 2021) ("Steve Bannon's indictment should send a clear message to anyone who thinks they can ignore the Select Committee or try to stonewall our investigation: no one is above the law. We will not hesitate to use the tools at our disposal to get the information we need."), the Supreme Court

has admonished that the legislative committees are Constitutionally obligated to demonstrate the pertinence of the questions posed to its witnesses with the "explicitness and clarity that the Due Process clause [of the Constitution] requires." *Watkins*, 354 U.S. at 209. As the Court held: "The more vague the committee's charter, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress." *Id.* at 201.

Mr. Scavino is thus faced with the precise issue confronted by the Supreme Court in *Watkins*: "It is impossible . . . to ascertain whether any legislative purpose justifies the disclosure sought and, if so, the importance of that information to the Congress in furtherance of its legislative function." *Id.* at 206. In light of the public commentary by Mr. Letter and the Select Committee Members, the legislative purpose of the Select Committee is anything but explicit. Therefore, to facilitate Mr. Scavino's preparation for the provision of competent testimony, we respectfully request the Select Committee furnish an explanation as to how any desired "matter of inquiry" falls within the jurisdiction vested by Congress. Absent further explanation, we submit that the Select Committee has sacrificed its ability to enforce its subpoena. As the Supreme Court observed in *Watkins*: "The reason no court can make this critical judgment [concerning jurisdiction] is that the House of Representatives has never made it." *Id.*

* * *

Finally, we would be remiss were we not to address the Select Committee's public threat to hold in contempt those that do not meet its exacting demands. *See* Katie Benner and Luke Broadwater, Bannon Indicted on Contempt Charges Over House's Capitol Riot Inquiry, *The New York Times* (Nov. 12, 2021) (quoting Rep. Jamie Raskin: "It's great to have a Department of Justice that's back in business . . . I hope other friends of Donald Trump get the message . . . ."). Although Mr. Scavino desires to continue to foster a productive dialogue with your Staff in an effort to identify valid "matters of inquiry" that would produce competent testimony, we feel compelled to highlight significant procedural deficiencies in the Select Committee's threats to refer Mr. Scavino for contempt for asserting legitimate legal challenges to your October 6 subpoena.

First, to our knowledge, Mr. Scavino has not been properly served with the subpoena at issue. Contrary to House Rules, Mr. Scavino was neither handed a copy of the subpoena nor did he waive service of the subpoena. Rather, the subpoena was delivered to a member of President Trump's staff. Indeed, although we are aware of media claims that Mr. Scavino was somehow "evading" service, *see* Ryan Nobles, Zachary Cohen, and Annie Grayer, House Committee Investigating January 6 Can't Find Trump Aide to Serve Subpoena (Oct. 6, 2021), prior to the delivery of the subpoena to Mar-a-Lago on or about October 8, 2021, we are aware of no prior attempts to serve Mr. Scavino with the subpoena (and it bears noting that all visitors to Mar-a-Lago are identified to the U.S. Secret Service).

Second, we do not believe the Select Committee as constituted can validly conduct a deposition. House regulations for the use of deposition authority provide that any committee deposition is to be conducted "in rounds" with "equal time [provided] to the majority and the minority." These regulations further provide that, "[a] deposition shall be conducted by any member or committee counsel designated by the chair or ranking minority member of the Committee that noticed the deposition." 2 Cong. Rec. H41 (daily ed. Jan. 4, 2021) (117th Cong. Reg. for use of Deposition Authority). While we have no desire to enter the political theatre that has

engulfed the important subject matter of the Select Committee's work, we nevertheless must acknowledge the unprecedented refusal of the Speaker of the House to sit the Minority Leader's recommendation for Ranking Member of the Select Committee. We submit that the House regulations do not contemplated this unprecedented decision and absent a duly appointed Ranking Member to the Select Committee it is literally impossible for Mr. Scavino to be questioned by a "member or committee counsel designated by the . . . ranking minority member."

Because of these procedural deficiencies, the Select Committee has sacrificed its ability to enforce its subpoena. As the Supreme Court has held: "[T]he competence of the tribunal must be proved as an independent element of the crime. If the competence is not shown, the crime of perjury is not established regardless of whether the witness relied on the absence of a quorum." *United States v. Reinecke*, 524 F.2d 435, (D.C. Cir. 1975) (citing *Christoffel v. United States*, 338 U.S. 84, 90 (1949). *See Christoffel*, 338 U.S. at 90 ("A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction."). The principal that a Congressional committee must adhere to applicable Rules in pursuit of the enforcement of its subpoenas has similarly resulted in convictions for contempt of congress being overturned. *See Yellin v. United States*, 734 U.S. 109, (reversing conviction for contempt of congress where the Congressional committee failed to adhere to its own rules: "The Committee prepared the groundwork for prosecution in Yellin's case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules.").

We further submit that the Select Committee is not without recourse. The House took the relatively unprecedent step of bestowing upon the Select Committee the authority of the Chair "to compel by subpoena the furnishing of information by interrogatory." H. Res. 503 § 5(c)(5). As we have stated repeatedly, we acknowledge the important subject matter of the Select Committee's work and welcome the opportunity to identify "some way to evaluate assertions going forward." *Comm. On the Judiciary v. Miers*, 558 F. Supp. 2d 53, 107 (D.D.C. 2008). Given the complex and unprecedented nature of privilege and pertinency issues the Select Committee's inquiry implicates, the submission of written questions may enable Mr. Scavino, with the assistance of counsel, to parse this critically important vestige of the doctrine of Separation of Powers.

Please do not hesitate to contact us should you wish to discuss.

Sincerely,

Stan M. Brand

Stanley E. Woodward Jr.