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February 8, 2022

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:

We are in receipt of your correspondence of February 4, 2022. The irony of your threat to hold Mr. Scavino in contempt for failing to respond to this correspondence within just two business days, despite having waited fifty-three (53) days to respond to our correspondence of December 13, 2021, *without actually providing the information requested therein*, is not lost on our client and exemplifies the “prosecution tactics” with which the Select Committee has been accused of adopting.¹ Put bluntly, your latest correspondence exemplifies the Select Committee’s pattern and practice of intimidation and disregard for the rule of law, its application to the important function of the House of Representatives, and the important doctrine of Separation of Powers. Nevertheless, in a continued effort to foster collaboration with the Select Committee we provide the following response to your inquiry.

Mr. Scavino’s Subpoena for Documents

Your February 4, 2022, correspondence mischaracterizes our position with respect to Mr. Scavino’s production of documents in response to the Select Committee’s November, 23, 2021, subpoena. As we advised in our November 5, 2021, correspondence, Mr. Scavino served as a close advisor to the President – Deputy Chief of Staff for Communications – regardless of whether the communications in question were sent or received on a personal device or through a personal social media or other account.² As we also advised in our November 5, 2021, correspondence, we

¹ Michael S. Schmidt and Luke Broadwater, In Scrutinizing Trump and his Allies, Jan. 6 Panel Adopts Prosecution Tactics, *The New York Times* (Feb. 5, 2022), available at <https://www.nytimes.com/2022/02/05/us/politics/january-6-committee.html?referringSource=articleShare>.

² We are unaware of any recorded communications between Mr. Scavino, campaign officials, and other third parties that are not properly considered official communications, but invite the Select Committee

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believe any official communications that were received (or sent) from a personal device or social media account would have separately been provided to the National Archives and/or otherwise preserved. We have acknowledged the remote possibility that Mr. Scavino may be in possession of an errant record of a communication sent or received from a personal device or account that has not otherwise been provided to the Archives. Thus, as we have repeatedly advised, including in our correspondence of November 15, 2021, we will promptly inform the Select Committee if we become aware of a record responsive to a lawful subpoena of the Select Committee not otherwise in the possession of the National Archives.³

The Supreme Court's decision not to consider President Trump's petition for a stay of the D.C. Circuit's mandate (and thus the D.C. District's Court's denial of a motion for a preliminary injunction restraining order) does not resolve the issue of President Trump's directive, as detailed in our correspondence of November 5, 2021, that Mr. Scavino "not produce any documents concerning [his] official duties in response to [the Select Committee's] subpoena" and to invoke all applicable privileges and immunities protecting such records from production pursuant to your subpoena.⁴ As the Circuit Court articulated in its opinion, "[t]his 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.*" *Trump v. Thompson*, No. 21-5254, 2021 U.S. App. LEXIS 36315, at *4 (D.C. Cir. Dec. 9, 2021) (emphasis added). Further, the Circuit Court expressly limited its holding, "to those documents in the Archivist's *first three tranches over which President Biden has determined that a claim of executive privilege is not justified.*" *Id.* at *7 (emphasis added). It remains to be known whether Presidents Trump and Biden will agree on the assertion of any applicable privilege with respect to communications sent to or from Mr. Scavino that are identified by the Archivist as

to provide additional detail concerning your vague and ambiguous assertion that any such "repeated contacts" would have generated records lawfully responsive to the Select Committee's subpoena.

³ Mr. Scavino takes seriously his duty to preserve "presidential records" and is aware of his obligation to takes steps to "assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained," and thanks the Select Committee for its attention to the same.

⁴ For at least the second time, your correspondence of February 4, 2022, suggests that because, "Mr. Trump has never had any correspondence with the Select Committee asserting executive privilege over Mr. Scavino's documents or testimony," Mr. Scavino's assertion of all applicable privilege and immunities is improper. However, we are aware of no authority requiring President Trump to communicate his assertion of privilege directly with the Select Committee and would note that you cite none.

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responsive to the Select Committee's subpoena in the future,⁵ and we note the Select Committee's agreement to withdraw its request for certain records at President Biden's prompting.⁶

*Mr. Scavino's Subpoena for Deposition Testimony*⁷

Your February 4, 2022, correspondence again baldly misrepresents that, "the Select Committee has more than adequately addressed [Mr. Scavino's] questions about the jurisdiction of the Select Committee and subjects [the Select Committee] intends to address at [Mr. Scavino's] deposition." Rather, the Select Committee has merely articulated "blanket assertions" of jurisdiction – mere *ipse dixit* – including, for example, by asserting in your correspondence of December 9, 2021, that, "[t]he items identified by the Select Committee's subpoena and November 9, 2021, letter . . . are unquestionably pertinent to the Select Committee's jurisdiction." (emphasis added). Specifically, in our correspondence of November 18, 2021, we requested that the Select Committee "furnish an explanation as to how any desired 'matter of inquiry' falls within the jurisdiction vested by Congress." Despite subsequent correspondence on November 23, 2021, December 9, 2021, and now February 4, 2022, the Select Committee has yet to articulate the specific nexus as between its proffered matters of inquiry, including your admonishment that "the Select Committee reserves the right to question Mr. Scavino about other topics," and the specific legislative purpose it seeks to advance. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, at *2024 (2019) ("Most importantly, a congressional subpoena is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" (quoting *Watkins*, 354 U.S. at 187)).

⁵ We also note that the Parties to this litigation, yourself included, recently advised the District Court that, [t]he parties have again conferred with respect to Defendants' forthcoming responses to the Complaint and the future of the litigation [and] agreed that the best course was to further defer the Defendants' response for thirty days so that Plaintiff can determine his next steps." Mot. Ext., *Trump v. Thompson*, No. 21-cv-02769-TSC (D.D.C. Feb. 4, 2022) (ECF No. 52). This representation confirms that the litigation remains pending and will remain pending for another thirty (30) days.

⁶ See Correspondence from Jonathan C. Su, Deputy Counsel to the President, to [REDACTED], [REDACTED] to the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Dec. 16, 2021), available at <https://www.archives.gov/files/foia/su-letter-to-amerling.12.16.2021-attached-to-12.17.2021-remus-letter-to-ferriero.pdf> (confirming the Select Committee's agreement to withdraw or defer its requests for all or part of 511 documents deemed sensitive or unrelated to the Select Committee's investigation).

⁷ We feel compelled to note, for the benefit of history, that the Select Committee's arbitrary deposition date of December 1, 2021, was functionally ceremonial. Prior to that date, the Select Committee had yet to (and still has yet to) respond to Mr. Scavino's request for information contained within his November 18, 2021, correspondence. Then, in response to Mr. Scavino's November 26, 2021, correspondence, your staff wrote to confirm whether Mr. Scavino would attend a deposition arbitrarily set for December 1, 2021. In response, counsel advised that, "as the Select Committee has yet to address the concerns we raised, I believe our position remains fairly stated in our correspondence." Your staff responded by advising that, "[f]or your information, we will be proceeding on the record tomorrow to record [Mr. Scavino's] absence." Had your staff meaningfully engaged counsel in an effort to resolve our concerns with the proposed deposition, your staff would have learned that counsel was scheduled to appear that morning, and did appear, before U.S. District Court Judge Paula Xinis. See H'rg T., *United States v. Schulman*, No. 20-cr-00434-PX (Dec. 1, 2021) (ECF No. 97).

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Your February 4, 2022, correspondence again suggests that Mr. Scavino has “declined to” “narrow the topics in dispute by requesting that [Mr. Scavino] identify the areas of inquiry for which [Mr. Scavino] ha[s] no responsive information or documents.” Notwithstanding your representation to the contrary, the Select Committee has yet to ask Mr. Scavino to identify any “matter of inquiry” for which he has no responsive information – and this mischaracterization again casts doubt on the Select Committee’s careful consideration of the numerous legal and procedural issues raised by our prior correspondence.⁸ For it is this mischaracterization that highlights what has been a consistent theme in the Select Committee’s demands – the obligation of *Mr. Scavino* to facilitate the Select Committee’s taking of his deposition. Contrary to the Select Committee’s assertion, however, Mr. Scavino has a Constitutional right to the information he has requested and he does not now, nor has he ever, asserted absolute immunity from subpoenaed testimony before the Select Committee. Rather, we ask only that the Select Committee afford Mr. Scavino the rights guaranteed to him – and every citizen irrespective of their service as senior Presidential advisors – under the law: “It is obvious that a person compelled to [testify] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent [and] [t]hat knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense.” *Watkins v. United States*, 354 U.S. 178, 208-09 (1957). Only once this information has been furnished can the application of an applicable privilege or immunity, including the executive privilege, be properly assessed.

To that end, we note that the Supreme Court’s decision not to consider President Trump’s petition for a stay of the D.C. Circuit’s mandate has no bearing on President Trump’s directive that Mr. Scavino invoke all applicable privileges and immunities, including with respect to any testimony subpoenaed by the Select Committee. Specifically, that action *only* involves the challenge of a subpoena for documents issued by the Select Committee, and not a subpoena for testimony. See Complaint, *Trump v. Thompson*, No. 21-cv-02769 (Oct. 18, 2021) (ECF No. 1). The D.C. Circuit defined the breadth of the suit as a challenge to, “a request to the Archivist of the United States under the Presidential Records Act, seeking the expeditious disclosure of *presidential records* pertaining to the events of January 6th . . .,” *Trump v. Thompson*, No. 21-5254, 2021 U.S. App. LEXIS 35315, at *3-4 (Dec. 9, 2021). Put simply, the Presidential Records Act, 44 U.S.C. § 2205(2)(C), does not apply to assertions of executive privilege as to deposition testimony.

* * *

Finally, we respectfully request that our good faith negotiations in furtherance of an amicable resolution of our challenges to the Select Committee’s subpoenas continue to be memorialized in writing. As you are no doubt aware, the Department of Justice has taken the position that the representation of an individual before the Select Committee potentially renders them a witness in any future contempt action. See Mot. Compel, *United States v. Bannon*, No. 21-cr-00670, at Ex. 2 (Feb. 4, 2022) (ECF No. 26-2) (Correspondence from Amanda R. Vaughn, Assistant United States Attorney, United State’s Attorney’s Office for the District of Columbia, to David I.

⁸ We note that your correspondence of February 4, 2022, incorrectly asserts that we cite the pending litigation brought by President Trump against the Committee and the National Archives in our correspondence of November 15, 2021. That correspondence identified, as the Select Committee requested, categories of records over which an assertion of executive privilege was being made. To date, Mr. Scavino *has received no response* to this correspondence.

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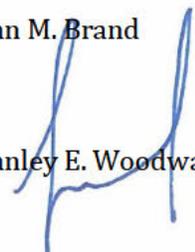
Schoen, Esq. (Jan. 7, 2022)) (“As you are aware, . . . Mr. Costello represented Mr. Bannon before the January 6th Committee . . . in relation to the subpoena it issued to Mr. Bannon and is, therefore, a witness to the conduct charged in the Indictment.”). Therefore, we again encourage your careful consideration of our prior correspondence, which clearly articulates our client’s specific concerns with the Select Committee’s subpoenas, including our correspondence dated November 5, 2021, November 15, 2021, November 18, 2021, November 23, 2021, and December 13, 2021.

We look forward to the courtesy of your response.

Sincerely,



Stan M. Brand



Stanley E. Woodward Jr.