UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL NO. 21-cr-670**
v.	:	
	:	
STEPHEN K. BANNON,	:	
	:	
Defendant.	:	

UNITED STATES' MOTION IN LIMINE TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO GOOD-FAITH RELIANCE ON LAW OR ADVICE OF COUNSEL

The Defendant, Stephen K. Bannon, is charged with contempt of Congress for willfully defying a subpoena that required him to produce records to and appear for a deposition before the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol ("the Committee"). Despite the subpoena's demands, the Defendant did not produce a single record and did not appear for testimony on the date designated; he did not even submit objections to compliance or properly assert a privilege in the manner required by the subpoena. Since being indicted, the Defendant has indicated that his disregard of the subpoena was purportedly justified by legal privileges and his attorney's advice regarding them, as well as other claims relating to the legal validity of the subpoena. The Defendant's excuses for non-compliance are without merit, and his erroneous reliance on privileges and purported advice of counsel is no defense to contempt. The deliberate failure to comply with a congressional subpoena—regardless of motivation—constitutes the crime of contempt. Any evidence or argument relating to the Defendant's or his counsel's views of the law, or the Defendant's reliance on it, should therefore be excluded at trial.

I. The Defendant's Claims Relating to Privilege and Advice of Counsel

The Defendant is charged with two counts of contempt of Congress, in violation of 2 U.S.C. § 192, for refusing to comply in any way with a subpoena issued by the Committee. The subpoena, issued to the Defendant on September 23, 2021, commanded the Defendant to appear and to produce documents on October 7, 2021, and to appear for a deposition on October 14, 2021. The Defendant did neither. Instead, the Defendant submitted an excerpt of a letter he received from counsel to former President Donald J. Trump. In the letter, the former President's counsel informed the Defendant that he believed the subpoena called for privileged information and instructed the Defendant to assert privileges "where appropriate" and "to the fullest extent of the law." Ex. 1 at US-000418. Through correspondence to the Committee, the Defendant's counsel claimed that these instructions effectively empowered the Defendant to ignore the subpoena unless a court ordered him to do otherwise. *Id*. at US-000419. Despite the Committee's subsequent rejection of the Defendant's legal position, repeated direction that he comply or properly submit any privilege claims for resolution by the required procedures, and warning that his failure to do so would likely constitute willful non-compliance in violation of Section 192, *id*. at US-000420-22, US-000448-50, the Defendant still refused, *id*. at US-000423-24.

Since being charged in this matter, the Defendant has indicated that he intends to use the same claims, or his reliance on them, as defenses in this matter. During a press conference the Defendant and his counsel held after the Defendant's initial appearance, his counsel asserted that the contempt charges were without merit because former President Trump's purported invocation of executive privilege required that the Defendant not comply with the subpoena.[1] At the

[1] *See "Misdemeanor from Hell": Watch Bannon Speak Out After He's Released*, CNN, Nov. 15, 2021, *available at* https://www.youtube.com/watch?v=-diE7kCCidE (last accessed Feb. 4, 2022). The Defendant's counsel stated, "It's not a matter of equal justice under the law, Mr.

December 7, 2021, status hearing, the Defendant's counsel again claimed, "This is a case with the invocation of privilege. . . . Mr. Bannon relied entirely on the advice of counsel" and advice of counsel "negates an element of the offense." Status Hrg., Dec. 7, 2021, Tr. at 25:4-7, 25:11-12. At the same hearing, counsel also indicated that the Defendant would contest the pending charges by challenging the legal validity of the subpoena based on claims relating to the Committee's investigative authority. *Id*. at 26:9-22.

II. Good-Faith Reliance on the Law or Advice of Counsel is Not a Defense to Contempt

The Defendant's claims of executive and other privileges and the Committee's authority, or any other claim relating to legal defenses to the subpoena, are without merit, which the Government will establish if and when the Defendant files his motions to dismiss on those grounds. At trial, however, the Defendant's erroneous beliefs and his purported reliance on his counsel's erroneous advice otherwise is no defense to the crime charged. Accordingly, evidence or argument supporting such a defense should be excluded at trial.

To establish that the Defendant's disregard of the subpoena constituted criminal contempt, the Government must prove that his default was willful. 18 U.S.C. § 192. A willful default is a deliberate and intentional failure to appear or produce records as required. *Licavoli v. United States*, 294 F.2d 207, 208 (D.C. Cir. 1961) ("[H]e who deliberately and intentionally fails to respond to a subpoena 'willfully makes default.'") (citing *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Fleischman*, 339 U.S. 349 (1950)); *see also Bryan*, 339 U.S. at 330

Garland, to charge a matter like this criminally. The holder of the privilege in this case, executive privilege, invoked the privilege. When the privilege has been invoked by the purported holder of the privilege, he has no choice but to withhold the documents. You can't put the genie back in the bottle. Mr. Bannon acted as his lawyer counseled him to do, by not appearing and by not turning over documents in this case. He didn't refuse to comply. He made quite clear that, if a court ordered him to comply, he would do that, but he had an obligation to honor the privilege that was invoked." *Id*.

("[W]hen the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it made out a prima facie case of wilful default."). The Government does not have to prove the Defendant had an "evil motive"; "[a] deliberate intention not to appear is sufficient." *Licavoli*, 294 F.2d at 208. Accordingly, while the Defendant's failure to appear due to "illness, travel trouble, misunderstanding, etc.," might be a valid defense, his deliberate decision not to appear or produce records is not. *See id*.

A deliberate and intentional decision not to comply with a congressional subpoena based on the subpoenaed party's erroneous belief that the law excused compliance constitutes a willful default. *Yellin v. United States*, 374 U.S. 109, 123 (1963) (addressing defendant's refusal to answer congressional committee's questions and noting, "[o]f course, should Yellin have refused to answer in the mistaken but good-faith belief that his rights had been violated, his mistake of law would be no defense.") (citing *Watkins v. United States*, 354 U.S. 178, 208 (1957); *Sinclair v. United States*, 279 U.S. 263, 299 (1929), *overruled on other grounds*, *United States v. Gaudin*, 515 U.S. 506 (1995)); *see also Watkins*, 354 U.S. at 208 (discussing a witness's refusal to answer a committee's questions on the belief that the questions are not pertinent to its inquiry and noting that "[a]n erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry"). And a defendant's good-faith reliance on counsel's advice that the law excuses compliance does not "immunize a deliberate, intentional failure to appear pursuant to a lawful subpoena lawfully served." *Licavoli*, 294 F.2d at 209; *see also Bryan*, 339 U.S. at 325, 330 (finding defendant's intentional refusal to produce records in response to a congressional subpoena

was a willful default even where the defendant claimed to the congressional committee at the time of refusal that she was following the advice of her counsel); *Sinclair*, 279 U.S. at 299 ("There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. . . . His mistaken view of the law is no defense."). As described above, that the defendant "meant to stay away was made abundantly clear. That he did so upon the advice of a lawyer is no defense." *Licavoli*, 294 F.2d at 209.[2]

That good-faith reliance on the law or advice of counsel is no defense reflects the nature of the contempt offense and the purposes of the contempt statute to "vindicat[e] the authority of Congress to compel the disclosure of facts which are needed in the fulfillment of the legislative function." *Bryan*, 339 U.S. at 327; *see also Watkins*, 354 U.S. at 187-88 ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation."). The Supreme Court has long affirmed that, once a congressional committee has directed a witness to comply with a congressional subpoena, it is the witness who risks contempt by continuing not to do so. As the Court described in *Quinn v. United States*, when objections are raised:

[2] The Defendant has suggested that *Licavoli* is not controlling because, according to counsel, "that case is based on an earlier case, *Sinclair*, that's no longer good law. *See* Status Hrg., Dec. 7, 2021, Tr. at 24:22-25:1. In *Sinclair*, the Supreme Court addressed several issues relating to Section 192. Among them, the Court held that a refusal to answer a committee's questions constituted contempt even if the defendant believed in good faith, and relied on his counsel's advice, that the law allowed him to refuse to answer the questions. 279 U.S. at 299. The Supreme Court has never overruled this holding. The Supreme Court has overruled only *Sinclair*'s holding on the entirely different issue of whether pertinency of a question posed by a congressional committee must be decided by the court or the jury. *See Gaudin*, 515 U.S. at 520-22.

> the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent. Or the committee may disallow the objection and thus give the witness the choice of answering or not. Given such a choice, the witness may recede from his position and answer the question. And if he does not then answer, it may fairly be said that the foundation has been laid for a finding of criminal intent to violate [Section] 192.

349 U.S. 155, 165-66 (1955); *see also United States v. House of Representatives of U.S.*, 556 F. Supp. 150, 152 (D.D.C. 1983) ("The statutory provisions concerning penalties for contempt of Congress, 2 U.S.C. § 192 and § 194, constitute 'an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation.' Under these provisions, constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution." (quoting *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972))).

These principles are no different from those that apply in contempt of court cases involving violations of 18 U.S.C. § 401(3) (defining criminal contempt to include "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command"). As with contempt of Congress, a defendant's failure to comply with a court order must be willful in order to constitute a criminal violation, *see, e.g.*, *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986) ("[W]illfulness is an essential element of criminal contempt."), and willfulness is defined as a refusal that is deliberate and intentional, *see, e.g.*, *United States v. Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007) (defining willfulness for contempt of court as "a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order" (internal quotation marks and citations omitted)); *United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997) ("A defendant commits a willful violation when he acts with deliberate or reckless disregard of the obligations created by a court order."). Further, as with contempt of Congress, a good-faith

belief that a court order is invalid, or reliance on counsel's advice not to comply, provides no defense to contempt of court. *See, e.g.*, *United States v. Myers*, 302 F. App'x 201, 205 (4th Cir. 2008) ("We agree with the district court that Myers' reliance on counsel's advice to fail to appear as ordered does not negate the willfulness element of the contempt offense."); *United States v. Remini*, 967 F.2d 754, 758 (2d Cir. 1992) (affirming exclusion of evidence of advice of counsel in trial for contempt for refusal to testify and affirming instructions to jury that advice of counsel and a good-faith refusal to comply was not a defense to contempt); *United States v. Monteleone*, 804 F.2d 1004, 1010-11 (7th Cir. 1986) (rejecting that the defendant's erroneous belief that he complied with an order to testify based on his counsel's advice provided a defense to contempt in the face of a clear order and noting that "an attorney may not exculpate his client of contempt by advising him to disobey an order of the court because the judge is 'wrong'"); *United States v. Di Mauro*, 441 F.2d 428, 437 (8th Cir. 1971) (rejecting defendants' contention that their failure to testify before a grand jury was not willful because they were relying in good faith on advice of counsel). Just as with contempt of Congress, to properly vindicate the authority of the issuing court, it is the party to whom a court order is directed who takes the risk of contempt in deciding simply not to comply. *See United States v. Ryan*, 402 U.S. 530, 533 (1971) ("[W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.").

Here, the Committee warned the Defendant that his privilege claims did not excuse him from his obligations under the subpoena to produce records and to appear for a deposition, or to

follow the required procedures for submitting his privilege claims. The Defendant, nevertheless, intentionally decided not to comply. When given the choice between compliance and contempt that the Supreme Court described in *Quinn*, the Defendant chose contempt. And the Defendant's total refusal to take even one step toward compliance, even refusing to submit a privilege log, provides ample evidence that he was not relying in good faith on legal privileges or advice of counsel. But even if his contempt were based on an erroneous but good-faith belief that he had a valid legal excuse for ignoring the subpoena's demands, whether by his own determination or his attorney's, it is no defense. All evidence and argument related to good-faith reliance on the law or an attorney's advice should therefore be excluded at trial.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: */s/ Amanda R. Vaughn*
J.P. Cooney (D.C. 494026)
Molly Gaston (VA 78506)
Amanda R. Vaughn (MD)
Assistant United States Attorneys
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-1793 (Vaughn)
amanda.vaughn@usdoj.gov

DAVIDOFF HUTCHER & CITRON LLP
ATTORNEYS AT LAW
605 THIRD AVENUE
NEW YORK, NEW YORK 10158

TEL: (212) 557-7200
FAX: (212) 286-1884
WWW.DHCLEGAL.COM

FIRM OFFICES

WHITE PLAINS
ATTORNEYS AT LAW
120 BLOOMINGDALE ROAD
WHITE PLAINS, NY 10605
(914) 381-7400

WEST PALM BEACH
ATTORNEYS AT LAW
1107 NORTH OLIVE AVENUE
WEST PALM BEACH, FL 33401
(561) 567-8488

FIRM OFFICES

ALBANY
ATTORNEYS AT LAW
150 STATE STREET
ALBANY, NY 12207
(518) 465-8230

WASHINGTON, D.C.
ATTORNEYS AT LAW
2011 MASSACHUSETTS AVENUE N.E.
WASHINGTON, D.C. 20002
(202) 347-1117

October 7, 2021

Kristin Amerling, Esq.
Chief Counsel/Deputy Staff Director
House Select Committee to Investigate
The January 6th Attack on the United States Capitol
1540A Longworth HOB
Washington, DC 20515

Re: The Subpoena for Stephen K. Bannon dated September 23, 2021

Dear Ms. Amerling:

I write today on behalf of Stephen K. Bannon with respect to the above referenced subpoena, which I accepted on behalf of Mr. Bannon. On the afternoon of October 6, 2021, I received a letter from Justin Clark, as counsel for then President of the United States Donald J. Trump. That letter references the subpoena that your Committee served upon Mr. Bannon, and notes that the subpoena:

> "seeks records and testimony purportedly related to the events of January 6th, 2021, including but not limited to information which is potentially protected from disclosure by executive and other privileges, including among others the presidential communications, deliberative process, and attorney-client privileges. President Trump is prepared to defend these fundamental privileges in court.
>
> Therefore, to the fullest extent permitted by law, President Trump instructs Mr. Bannon to: (a) where appropriate, invoke any immunities and privileges he may have from compelled testimony in response to the Subpoena; (b) not produce any documents concerning privileged material in response to the Subpoena; and (c) not provide any testimony concerning privileged material in response to the Subpoena."

It is therefore clear to us that since the executive privileges belong to President Trump, and he has, through his counsel, announced his intention to assert

those executive privileges enumerated above, we must accept his direction and honor his invocation of executive privilege. As such, until these issues are resolved, we are unable to respond to your request for documents and testimony.

We will comply with the directions of the courts, when and if they rule on these claims of both executive and attorney client privileges. Since these privileges belong to President Trump and not to Mr. Bannon, until these issues are resolved, Mr. Bannon is legally unable to comply with your subpoena requests for documents and testimony.

Very truly yours,

/s/ Robert J. Costello

RJC/nc
None

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U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

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

October 8, 2021

Mr. Robert J. Costello
Davidoff Hutcher & Citron LLP
605 Third Avenue, 34th Floor
New York, NY 10158

Dear Mr. Costello,

I write in response to your October 7, 2021 letter which states that your client, Stephen Bannon, is "legally unable to comply" with the September 23, 2021 subpoena (the "Subpoena") issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol (the "Select Committee"). Your letter relies on an apparent instruction from former President Donald Trump that appears limited to requesting that Mr. Bannon not disclose privileged information. Despite this limited instruction, your letter takes the inappropriate position that Mr. Bannon will not comply with any request for information or testimony sought by the Select Committee. Moreover, Mr. Trump's stated "intention to assert those executive privileges" that may or may not belong to him, does not provide a legal basis for Mr. Bannon's refusal to comply with the Subpoena.

You accepted service of the Subpoena for documents and testimony on Mr. Bannon's behalf on September 24, 2021. The Subpoena required that, by October 7, 2021 at 10:00 a.m., Mr. Bannon produce certain documents and other records referring or relating to the matters described in the Subpoena's schedule. All the requested documents relate directly to the inquiry being conducted by the Select Committee, serve a legitimate legislative purpose, and are within the scope of the authority expressly delegated to the Select Committee pursuant to House Resolution 503. In the letter accompanying the Subpoena, the Select Committee set forth the basis for its determination that the documents and records sought by the Subpoena and Mr. Bannon's deposition testimony are of critical importance to the issues being investigated by the Select Committee.

Your letter indicates that the sole basis for defiance of the Subpoena is Mr. Trump's "direction" to your client and his decision to "honor [Mr. Trump's] invocation of executive privilege." That position has no basis in law, and your letter does not cite any statute, case law, or other legal precedent for support.

First, virtually all the documents and testimony sought by the Subpoena concern Mr. Bannon's actions as a private citizen and involve a broad range of subjects that are not covered by executive privilege. You have provided no basis for Mr. Bannon's refusal to comply with

those portions of the Subpoena not covered by any privilege. Furthermore, blanket assertions of the deliberative process and attorney-client privileges, such as those apparently requested by Mr. Trump, have been rejected by courts as "unsustainable" even when—unlike the situation with Mr. Bannon—the subpoena recipient is an Executive Branch agency. *See Comm. on Oversight and Gov't Reform v. Holder*, 2014 WL 12662665, at *2 (D.D.C. 2014) (rejecting DOJ's assertion of deliberative process privilege on all documents after a particular date and noting that the "Attorney General has not cited any authority that would justify this sort of blanket approach").

Second, the Select Committee has not received any assertion, formal or otherwise, of any privilege from the Mr. Trump. Even assuming that, as a former President, Mr. Trump is permitted to formally invoke executive privilege, he has not done so. At most, Mr. Trump has "announced his intention to assert those executive privileges." The Select Committee is not aware of any legal authority, and your letter cites none, holding that the mere intention to assert a privilege absolves a subpoena recipient of his duty to comply.

Third, your letter indicates that Mr. Trump has requested that your client "to the fullest extent permitted by law … not provide any testimony concerning privileged material in response to the Subpoena." Even if your client had been a senior aide to the President during the time period covered by the contemplated testimony, which he was most assuredly not, he is not permitted by law to the type of immunity you suggest that Mr. Trump has requested he assert. To the contrary, every court that has considered the absolute immunity Mr. Trump alludes to has rejected it. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008) (rejecting former White House counsel's assertion of absolute immunity from compelled congressional process). *Miers* made clear that even the most senior Presidential advisors may not resist a congressional subpoena "based solely on their proximity to the President." *Id.* at 101 (citing *Harlow*, 457 U.S. at 810).[1] If there is no absolute immunity for senior Presidential advisors, then there certainly can be no such immunity for private citizens, such as Mr. Bannon, who occasionally communicate with the President on non-official, non-governmental, or campaign-related matters.

Regardless of any purported privilege assertion by Mr. Trump, Mr. Bannon has an ongoing obligation to produce documents to the Select Committee. Accordingly, please produce all responsive documents and records identified in the Subpoena. Should Mr. Bannon seek to withhold specific responsive documents, consistent with the Subpoena instructions, he must provide the Select Committee with a privilege log that "identifies and describes the material in a manner 'sufficient to enable resolution of any privilege claims.'" *See Comm. on Oversight*, 2014 WL 12662665 at *2 (quoting *Miers,* 558 F. Supp. 2d at 107). Such a privilege log should, at a minimum, provide the author(s) and recipient(s), indicate the general subject matter of each document being withheld, and the specific basis for withholding it.

[1] It is also worth noting that the court in *Miers* rejected the former White House Counsel's claim of absolute immunity from congressional testimony even though the sitting President had formally invoked executive privilege. *Id.* at 62.

Finally, the Select Committee expects Mr. Bannon's appearance at the time and place designated in the Subpoena for a deposition and respond fully to questions by the Select Committee. If there are specific questions at that deposition that you believe raise privilege issues, Mr. Bannon should state them at that time for the deposition record for the Select Committee's consideration and possible judicial review.

Please be advised that the Select Committee will view Mr. Bannon's failure to respond to the Subpoena as willful non-compliance with the Subpoena. His 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. Bannon in his personal capacity.

Sincerely,

Bennie G. Thompson
Chairman

DAVIDOFF HUTCHER & CITRON LLP
ATTORNEYS AT LAW
605 THIRD AVENUE
NEW YORK, NEW YORK 10158

TEL: (212) 557-7200
FAX: (212) 286-1884
WWW.DHCLEGAL.COM

FIRM OFFICES

WHITE PLAINS
ATTORNEYS AT LAW
120 BLOOMINGDALE ROAD
WHITE PLAINS, NY 10605
(914) 381-7400

WEST PALM BEACH
ATTORNEYS AT LAW
1107 NORTH OLIVE AVENUE
WEST PALM BEACH, FL 33401
(561) 567-8468

FIRM OFFICES

ALBANY
ATTORNEYS AT LAW
150 STATE STREET
ALBANY, NY 12207
(518) 465-8230

WASHINGTON, D.C.
ATTORNEYS AT LAW
2011 MASSACHUSETTS AVENUE N.E.
WASHINGTON, D.C. 20002
(202) 347-1117

October 13, 2021

Hon. Bennie G. Thompson
Chairman
House Select Committee to Investigate the January 6th Attack
c/o Kirstin Amerling, Esq.
1540 A Longworth HOB
Washington, DC 20515

Re: The Subpoena for Stephen K. Bannon dated September 23, 2021

Dear Congressman Thompson:

I write on behalf of Stephen K. Bannon to respond to some of the inaccurate statements made in your letter to me dated October 8, 2021, which purports to address the positions taken by Mr. Bannon with respect to the above-referenced subpoena.

As an initial matter, your use of the word "defiance" is inappropriate. Mr. Bannon's position is not in defiance of your Committee's subpoena; rather, Mr. Bannon noted that President Trump's counsel stated that they were invoking executive and other privileges and therefore directed us not to produce documents or give testimony that might reveal information President Trump's counsel seeks to legally protect. Mr. Bannon has testified on three prior occasions, before the Mueller Investigation, the House Intelligence Committee and the Senate Intelligence Committee. In each of those instances, when President Trump waived his invocation of the executive privileges, Mr. Bannon testified.

As recently as today, counsel for President Trump, Justin Clark Esq., informed us that President Trump is exercising his executive privilege; therefore, he has directed Mr. Bannon not to produce documents or testify until the issue of executive privilege is resolved. Your Committee will have the right to challenge that exercise or its scope. That is an issue between the Committee and President Trump's counsel and Mr. Bannon is not required to respond at this time. See *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, FN 34 (D.D.C. 2019) ("The President can certainly identify sensitive information that he deems subject to executive privilege, and his doing

so gives rise to a legal duty on the part of the aide to invoke the privilege on the President's behalf when, in the course of his testimony, he is asked a question that would require disclosure of that information.")

Until such time as you reach an agreement with President Trump or receive a court ruling as to the extent, scope and application of the executive privilege, in order to preserve the claim of executive and other privileges, Mr. Bannon will not be producing documents or testifying. As noted previously, Mr. Bannon will revisit his position if President Trump's position changes or if a court rules on this matter.

Mr. Bannon's communications with President Trump on the matters at issue in the Subpoena are well within the scope of both the presidential communications and deliberative process executive privileges. See *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997) (holding that the presidential communications privilege covers communications made or received by presidential advisors in the course of preparing advice for the President even if those communications are not made directly to the President); *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (finding that deliberative process privilege applies to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.")

Very truly yours,

/s/ Robert J. Costello

RJC/nc

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U.S. House of Representatives
Washington, DC 20515

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(202) 225-7800

One Hundred Seventeenth Congress

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

October 15, 2021

Mr. Robert J. Costello
Davidoff Hutcher & Citron LLP
605 Third Avenue, 34th Floor
New York, NY 10158

Dear Mr. Costello,

The Select Committee to Investigate the January 6th Attack ("Select Committee") is in receipt of your October 13, 2021 letter (the "October 13 letter"), in which you reassert that your client, Stephen Bannon, will not comply with the September 23, 2021 Subpoena to him for documents and deposition testimony (the "Subpoena"). As you know, the Subpoena demanded that Mr. Bannon produce documents by October 7, 2021 and appear on October 14, 2021 before the Select Committee to provide deposition testimony on a wide range of issues relating to the January 6, 2021 attack on the United States Capitol, as well as plans to interfere with the count of the 2020 Electoral College results. Mr. Bannon has now willfully failed to both produce a single document and to appear for his scheduled deposition. The Select Committee believes that this willful refusal to comply with the Subpoena constitutes a violation of federal law.

As justification for Mr. Bannon's complete failure to comply with any portion of the Subpoena, you continue to rely on ex-President Trump's stated intention to invoke executive privilege with respect to Mr. Bannon, and Mr. Trump's purported request that Mr. Bannon not produce documents to or testify before the Select Committee. As was explained in the Select Committee's October 8, 2021 letter (attached), the former President has not communicated any such assertion of privilege, whether formally or informally, to the Select Committee. Moreover, we believe that any such assertion of privilege—should it be made by the former President—will not prevent the Select Committee from lawfully obtaining the information it seeks.

Further, your letter makes no attempt to justify Mr. Bannon's failure to comply with the Subpoena's demand for documents and testimony on a range of subjects that do not involve communications with the former President. As is clear from the Subpoena and accompanying letter, and as underscored in the Select Committee's October 8, 2021 response letter, the Select Committee seeks documents and testimony on numerous other matters, including Mr. Bannon's

communications with Members of Congress, presidential campaign representatives, and other private parties concerning the events of January 6, 2021, that could not conceivably be barred by a privilege claim.

Moreover, even if the Select Committee were inclined to accept the unsupported premise that executive privilege reaches communications that the Select Committee seeks to examine between President Trump and Mr. Bannon,[1] Mr. Bannon does not enjoy any form of absolute immunity from testifying or producing documents in response to a Congressional subpoena. Your citation to *Committee on Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019) actually supports the Select Committee, not your client. In *McGahn*, the district court unequivocally held that even senior White House aides are not entitled to absolute immunity from testifying in response to a Congressional subpoena. *Id.* at 214 ("To make the point as plain as possible, it is clear to this Court … that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist.").[2] Indeed, the footnote in *McGahn* that you selectively quote makes clear that a President lacks legal authority to order an aide not to appear before Congress based on a claim of executive privilege. *See Id.* at 213, n. 34 ("But the invocation of the privilege by a testifying aide is an order of magnitude different than DOJ's current claim that the President essentially owns the *entirety* of a senior-level aide's testimony such that the White House can order the individual not to appear before Congress *at all*." (Emphasis in original)).

Accordingly, the Select Committee views Mr. Bannon's failure to produce documents by the October 7, 2021 deadline as willful non-compliance with the Subpoena. Mr. Bannon has persisted in his refusal to produce any documents to the Select Committee, and he has failed to provide a privilege log identifying specific, asserted privileges. Mr. Bannon has now further compounded his non-compliance by refusing to appear on October 14, 2021 at the Select Committee deposition to which he was summoned to provide testimony. The Select Committee will therefore be meeting on Tuesday, October 19, 2021 to consider invoking the contempt of Congress procedures set forth in 2 U.S.C. §§ 192, 194.

If Mr. Bannon believes that there are any additional issues relating to his non-compliance with the Subpoena that have not been addressed, please submit them in writing to the Select

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[1] Notably, neither of the cases you cite supports the claim that communications between the former President and a private citizen may be shielded by either the presidential communications or deliberative process privilege. Indeed, the case you rely upon to support your presidential communications claim specifically held that the privilege extends only to a President's closest advisors in the White House. *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997). *See also Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 100 (D.D.C. 2008) (privilege claimants acknowledged that executive privilege applies only to "a very small cadre of senior advisors").

[2] The *McGahn* court followed *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 108 (D.D.C. 2008), which reached the same conclusion 13 years ago. *McGahn*, 415 F. Supp. 3d at 202-03 ("this Court finds that the *Miers* court rightly determined not only that the principle of absolute testimonial immunity for senior-level presidential aides has no foundation in law, but also that such a proposition conflicts with key tenets of our constitutional order").

Committee by 6:00 p.m. E.S.T. on Monday, October 18, 2021 for the Select Committee's consideration in its deliberations.

Sincerely,

Bennie G. Thompson
Chairman