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November 5, 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:

We write on behalf of our client, Daniel J. Scavino, Jr. in response to your October 6, 2021, subpoena for records to Mr. Scavino as well as pursuant to our October 20, 2021, October 27, 2021, November 3, 2021, email correspondence with your Staff.

Specifically, you advise: “The Select Committee has reason to believe that [Mr. Scavino] [has] 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.” As you are aware, in the period leading up to and on January 6, Mr. Scavino served as senior advisor and Deputy Chief of Staff for Communications to President Trump. As such, the Committee’s subpoena requests records related to the communications between and among President Trump and his close advisors – information protected by the executive privilege so as to “safeguard[] the public interest in candid, confidential deliberations within the Executive Branch,” and “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).

To that end, we are aware that on August 25, 2021, the Committee also issued a subpoena to the National Archives and Records Administration seeking records from the Executive Office of the President. On October 8, 2021, President Trump, pursuant to the Presidential Records Act, 44 U.S.C. §§ 2201-2209, and Executive Order No. 13489, advised the Archivist of his formal assertion of executive privilege with respect to the limited number of documents then identified by the Archivist as responsive to the Committee’s

November 5, 2021

Page 2

subpoena, as well as a protective assertion of executive privilege over any additional materials that may be identified as responsive by the Archivist or otherwise requested by the Committee. Then, on October 18, 2021, President Trump filed suit in the United States Federal District Court for the District of Columbia seeking, *inter alia*, a declaratory judgment recognizing the valid assertion of the executive privilege as well as an injunction enjoining the Archivist from providing such privileged records pursuant to its subpoena. Complaint, *Trump v. Thompson*, No. 1:21-cv-02769 (D.D.C. Oct. 18, 2021) (ECF No. 01). President Trump's legal challenge remains pending as of the date of this correspondence.

The Committee's subpoena for President Trump's records thus presents legitimate separation of powers concerns and exactly the type of interbranch conflict that the Supreme Court acknowledged requiring "careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the 'unique position' of the President." *Mazars*, 140 S. Ct. at 2035.

Moreover, our understanding is that any records responsive to the Committee's subpoena to Mr. Scavino are records that would have been generated or otherwise received in his official capacity as a senior advisor to and as Deputy Chief of Staff for Communications to President Trump. These records, accordingly, were provided to the National Archives and Records Administration upon Mr. Scavino's separation from the White House. The Committee's subpoena to Mr. Scavino therefore seeks the same records for which President Trump has asserted executive privilege and places Mr. Scavino in the center of this interbranch conflict. That Mr. Scavino, now a *private citizen*, is *also* in the possession, custody, or control of any duplicate records, does not otherwise resolve the interbranch conflict created by the assertion of executive privilege by a former President. *See Mazars*, 140 S.Ct. at 2035 ("[S]eparation of powers concerns are no less palpable . . . simply because the subpoenas were issued to third parties.").

Mr. Scavino's production of records responsive to the Committee's subpoena would therefore interfere with President Trump's assertion of executive privilege and would serve to inadvertently moot the legal claims validly asserted by President Trump. *See, e.g.,* Saikrishna Prakash, Trump is Right: Former Presidents Can Assert Executive Privilege, *The Washington Post* (Oct. 29, 2021) ("Had Biden quickly released the documents after receiving the request, the privilege claim would have been moot and a suit would have been pointless."). Indeed, this is consistent with the President's own directive to Mr. Scavino that he "not produce any documents concerning [his] official duties in response to the Subpoena" and to invoke all applicable privileges and immunities protecting such records from production pursuant to your subpoena. A copy of this correspondence is attached for your reference. Mr. Scavino can therefore not be compelled to produce such records until a determination of the applicability of President Trump's assertion of Executive Privilege is fully and finally litigated. *See United States v. Bryan*, 339 U.S. 323, 330 (1950) ("Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply."). *See also United States ex rel.*

November 5, 2021

Page 3

Touhy v. Ragen, 340 U.S. 462 466-467 (1951) (holding that a subordinate acting in pursuance of valid regulation prohibiting disclosure was justified in refusing to comply with a subpoena).

As we have discussed with your Staff, our review of Mr. Scavino's records is ongoing. We have agreed to continue to advise your Staff of the progress of our review and acknowledge the possibility that there may be records within Mr. Scavino's possession, custody, or control that were not generated or otherwise received in Mr. Scavino's professional capacity as senior advisor to or Deputy Chief of Staff for Communications to President Trump. To the extent such records exist, or to the extent of a final adjudication on the merits of President Trump's assertion of the executive privilege issues, we expressly reserve Mr. Scavino's right to assert any other applicable privilege or other objection to the Committee's subpoena. We note, for example, that the House Counsel has made broad assertions of pertinence as to the specific records at issue. While we are not at this time in a position to fully assess those assertions given that the scope of potentially responsive records remains undefined, we are mindful that Congress's access to information is subject to several limitations and any subpoena it issues is valid only if it "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 215 (1957) ("It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That 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.").

Should you have any questions, please do not hesitate to contact us.

Sincerely,



Stan M. Brand



Stanley E. Woodward Jr.

ELECTIONS, LLC

Attorneys at Law
Justin R. Clark

October 6, 2021

Mr. Dan Scavino
[REDACTED]

Dear Mr. Scavino:

I write in reference to a subpoena, dated September 23, 2021, by the Select Committee to Investigate the January 6th Attack on the United States Capitol (the “Select Committee”), that was issued to you (the “Subpoena”). The Subpoena requests that you produce documents by October 7, 2021, and appear for a deposition on October 15, 2021. While it is obvious that the Select Committee’s obsession with President Trump is merely a partisan attempt to distract from the disastrous Biden administration (*e.g.*, the embarrassing withdrawal from Afghanistan, the overwhelming flood of illegal immigrants crossing our southern border, and growing inflation), President Trump vigorously objects to the overbreadth and scope of these requests and believes they are a threat to the institution of the Presidency and the independence of the Executive Branch.

Through the Subpoena, the Select Committee seeks records and testimony purportedly related to the events of January 6th, 2021, including but not limited to information which is unquestionably protected from disclosure by the 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. Furthermore, President Trump believes that you are immune from compelled congressional testimony on matters related to your official responsibilities. *See Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. (May 20, 2019), available at <https://www.justice.gov/olc/opinions-main>.

Therefore, to the fullest extent permitted by law, President Trump instructs you to: (a) where appropriate, invoke any immunities and privileges you may have from compelled testimony in response to the Subpoena; (b) not produce any documents concerning your official duties in response to the Subpoena; and (c) not provide any testimony concerning your official duties in response to the Subpoena.

[REDACTED]

Thank you for your attention to this matter. Please do not hesitate to contact me, or have your counsel contact me, if you have any questions or would like to discuss.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a period.

Justin Clark
Counsel to President Trump