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November 15, 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 are in receipt of your November 9, 2021, correspondence as well as the email correspondence from your Staff of the same day advising that the Select Committee will extend the deadline within which Mr. Scavino is to provide documents responsive to its October 6, 2021, subpoena until today, November 15, 2021.

Specifically, your November 9, 2021, correspondence advised that: "If Mr. Scavino has responsive documents that he believes are covered by an applicable privilege, please provide a privilege log that specifically identifies each document and each privilege that he believes applies so that the Select Committee can evaluate whether any additional actions are appropriate." You further advised that the Select Committee "subpoenaed all communications including those conducted on Mr. Scavino's personal social media or other accounts and with outside parties whose inclusion in a communication with Mr. Scavino would mean that no executive privilege claim can be applicable to such communications."

As we advised in our correspondence of November 5, 2021, the Select Committee's subpoena necessarily seeks communications between and among President Trump and his close advisors – information protected by the executive privilege. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2024 (2020) ([E]xecutive privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch. . . .) This privilege exists to ensure "the President's access to honest and informed advice and his ability to explore possible policy options *privately* are critical elements in presidential decisionmaking." *In re Sealed Case (Espy)*, 121 F.3d 729, 751 (D.C. Cir. 1997) (emphasis added). Indeed, the communication need not be directed at or by the President, and by extension need not be known to the President, so long as authored or solicited by "presidential advisors in the

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course of preparing advice for the President.” *Id.* at 752. For this reason, we submit 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 and we are aware of no authority to the contrary. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 107 (“[I]n the absence of an applicable statute or controlling case law, the Court does not have a ready ground by which to *force* the Executive to make such a production strictly in response to a congressional subpoena.”).

So as to foster further discussion and the continued collaboration with you and your Staff, and to provide “some way to evaluate assertions going forward,” *id.*, Mr. Scavino identifies the following categories of records over which an assertion of executive privilege is being made:

- Communications between Mr. Scavino and “those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate,” *see In re Sealed Case (Espy)*, 121 F.3d at 752;
- Communications between Mr. Scavino and non-Government third-parties related to Mr. Scavino’s service as a close advisor to President Trump “in the course of preparing advice for the President,” *id.* at 751-752; *see also id.* at 752 (“Given the need to provide sufficient elbow room for advisers to obtain information *from all knowledgeable sources*, the privilege must apply both to communications which these advisors *solicited and received from others* as well as those they authored themselves.” (emphasis added)); and
- Communications between Mr. Scavino and Members of Congress related to Mr. Scavino’s service as a close advisor to President Trump “in the course of preparing advice for the President,” *id.* at 751-752.

As articulated in our correspondence of November 5, 2021, because President Trump has identified sensitive information that he deems subject to executive privilege, “his doing so gives rise to 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).

To that end, we also note that 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. As we advised in our November 5, 2021, correspondence, while we 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 for

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preservation, we will promptly advise the Select Committee should we become aware of any communications not in the possession of the Archivist. As of the date of this correspondence, however, we remain unaware of any records identified by the Archivist as responsive to the Select Committee's subpoena that are sent by or to Mr. Scavino. And we are not otherwise aware of any communications that Mr. Scavino sent or received in his personal capacity that are responsive to the Select Committee's request.

Once again, we expressly reserve Mr. Scavino's right to assert any other applicable privilege or other objection to the Select 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 is "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.").

Please do not hesitate to contact us with any questions or concerns.

Sincerely,



Stan M. Brand



Stanley E. Woodward Jr.