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November 26, 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 in response to your November 23, 2021 correspondence. We regret that in your apparent haste to acknowledge the Select Committee's failure to properly serve Mr. Scavino with your October 6, 2021, subpoena, that you appear to have inadvertently transposed dates in your correspondence. For example, although you request that we "confirm receipt" of your correspondence "no later than 12:00pm Monday, November 29," you ask that we "identify the specific topics Mr. Scavino agrees are outside the scope of his asserted privileges . . . no later than Friday, November 26, 2021." It is unclear why it would be necessary for us to provide you with any information today, Friday, when we are not asked to confirm receipt of your correspondence until Monday.[1]

While no doubt an inadvertent oversight, this discrepancy does cast doubt on the Select Committee's careful consideration of the numerous legal and procedural issues raised by our prior correspondence. Where, as here, the threat of criminal contempt is invoked, the Supreme Court has made clear that Mr. Scavino is entitled to the "the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." *Watkins v. United States*, 354 U.S. 178, 216 (1957) (Frankfurter, J., concurring).

With respect to Mr. Scavino's deposition, you demand that we "identify the specific topics Mr. Scavino agrees are outside the scope of his asserted privileges, and if you believe a privilege applies, articulate which privilege and how it is implicated for each item no later than Friday, November 26, 2021." As articulated in our correspondence of November 18, 2021, the Select Committee has now identified thirty-three (33) "matters of inquiry" for which it purportedly seeks

[1] Today, the Friday after Thanksgiving, is recognized as a paid holiday for over 43 percent (43%) of employees who receive any paid holidays. *See* U.S. Bureau of Labor Statistics, Employee Benefits Survey, Holiday Profile – Day After Thanksgiving, https://www.bls.gov/ncs/ebs/day-after-thanksgiving-2018.htm (last visited Nov. 26, 2021).

testimony from Mr. Scavino. Indeed, your correspondence of November 23, 2021, acknowledges that despite our request to "hone in on a subset of topics that can be prioritized," no effort to do so has been made on your part. Rather, you submit that Mr. Scavino bears the responsibility of "identify[ing] the specific topics Mr. Scavino agrees are outside the scope of his asserted privileges." Tellingly, you cite no authority – law, regulation, rule, historical precedent, or otherwise – for the proposition that the subject of a deposition subpoena bears the obligation of identifying topics of information about which that deponent may be questioned. You do not, we submit, because you cannot. Never in the history of our Nation's legal system has the compelled subject of testimonial inquiry been required to volunteer the testimony believed to be of relevance to that witnesses' inquisitor. 0In fact, the precepts of Due Process require otherwise: As the Supreme Court held in *Watkins*: "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." 354 U.S. at 208-09. Your approach – to have Mr. Scavino volunteer the topics of testimony for his own deposition – would vitiate the clear due process protections delineated by the *Watkins* Court.

To that end, you seem to divorce the requirement that the Select Committee identify the "pertinency of [each] question[] propounded to the witness," *id.* at 208, from a determination of what privilege may apply. Without the requisite showing of pertinency, however, Mr. Scavino cannot be in a position to determine whether an applicable privilege requires invocation. In our correspondence of November 18, 2021, for example, we highlighted several "matters of inquiry" for which a claim of pertinency seemed untenable. Rather than address our concerns, you mischaracterize our position. Mr. Scavino does not, "tak[e] the position that he may refuse to comply with the Select Committee subpoena simply because he has a different view of what information should be important to Congress." To the contrary, he asserts his right to request that the Select Committee clearly articulate the pertinence of the "matters of inquiry" it seeks to "develop" with him. *See Watkins*, 354 U.S. at 208. Only once this prerequisite has been established can Mr. Scavino – whom as you concede "was a government official conducting public business" at all times relevant to your "matters of inquiry" – assess whether to make an assertion of executive privilege over any information he may possess. *See Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 213 n.34 (D.D.C. 2019) (acknowledging the "legal duty on the part of the aide to invoke the privilege on the President's behalf").

The assertion in your correspondence of November 23, 2021, that Mr. Scavino "is in no position to assert privilege on behalf of the executive branch" is similarly without merit. We are, of course, aware of President Trump's litigation with the National Archives concerning a former President's assertion of privilege in the face of an incumbent President's waiver of the same. *See Trump v. Thompson*, No. 21-5254 (D.C. Cir.). Indeed, the fact that this litigation remains pending should be proof enough that the issue remains unsettled. We reiterate that it would be irresponsible for Mr. Scavino to prematurely resolve President Trump's privilege claim by voluntarily waiving privilege and providing testimony or producing documents implicating the heart of the legal questions at issue. Rather, such inter-branch disputes are to exclusively be resolved by the courts and we patiently await the outcome of that judicial process. *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)).

In short, we vehemently disagree with your characterization of Mr. Scavino's compliance with your subpoena. To describe our efforts as "continued, willful non-compliance" or "Mr. Scavino's steadfast refusal to cooperate" strain credulity. In your correspondence of November 23, 2021, you write: "Mr. Scavino is apparently taking the position that he may refuse to comply with the Select Committee subpoena simply because he has a different view of what information should be important to Congress." We encourage your careful consideration of what representations were *actually* made in our prior correspondence. Why has the Select Committee not addressed our request for an articulation of the pertinence of each of its delineated "matters of inquiry." You also write: "Mr. Scavino's continued refusal to provide a privilege log, coupled with your extensive and blanket assertions of privilege, are fundamentally at odds with your stated desire to 'foster further discussion and the continued collaboration' with the Select Committee." Again, we encourage your careful consideration of our prior correspondence. No "blanket assertions of privilege" have been lodged. Rather, we have specifically articulated categories of privilege we believe applicable to the communications potentially relevant to the Select Committee's "matters of inquiry." Absent from your correspondence is any acknowledgement of that assertion or any attempt to negotiate with Mr. Scavino concerning his testimony. The Select Committee's posturing is perhaps best evidenced by your position that, "there is simply no substitute for live, in-person testimony" in rejecting our request that the Select Committee propound written interrogatories so that together we might carefully parse important questions of both pertinence and privilege. Would not the receipt of *any* information be a compelling substitute for the immediate desire of live, in-person testimony?

We provide this response, per your demand, within 72 hours (including the Thanksgiving Holiday) of receipt of your correspondence of November 23, 2021. We do so and explicitly reiterate our acknowledgement of the important subject matter of the Select Committee's work. We would be remiss, however, were we not to observe the Select Committee's apparent failure to address the important procedural defects we identified in the Select Committee's process (other than correcting the Select Committee's failure to properly serve Mr. Scavino).

First, your demand that we expeditiously respond to the Select Committee's correspondence over the Thanksgiving Holiday does nothing to further our stated desire of ensuring that Mr. Scavino, and his counsel, be thoroughly prepared to address the "matters of inquiry" the Select Committee intends to "develop" with him. This challenge remains exacerbated by the Select Committee advising that it "reserves the right to question Mr. Scavino about other topics" in addition to those "matters of inquiry" delineated in its subpoena and subsequent correspondence. In that you acknowledge that Mr. Scavino is entitled to the representation of counsel in his deposition, you must further acknowledge that for this representation to be meaningful, both he and his counsel must be adequately prepared. *See Yellin v. United States*, 374 U.S. 109, 123-24 (1963) (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.").

Second, you mischaracterize our concern over the Select Committee's stated approach to the taking of Mr. Scavino's deposition. Our position is not that any applicable law, resolution, rule or other authority requires "the minority leader's preferred Members" to be appointed to the Select Committee. Rather, our inquiry focused on whether House Rules contemplate the procedure for conducting a deposition *when the minority leader's recommended Members are not appointed to the Select Committee.* Here, no Member recommended by the minority leader has been appointed to the Select Committee. In turn, no Ranking Member has been designated by the minority leader (or as far as we are aware, by anyone). Therefore, because the Select Committee lacks a Ranking Member, no "committee counsel" can be "designated" by the Ranking Member for the purpose of the Select Committee's taking a deposition, as required by the Regulations for the Use of Deposition Authority promulgated by the Chairman on Rules pursuant to section 3(b) of House Resolution 8. As the Supreme Court has held: "the competence of the tribunal must be proved as an independent element of the crime [and] [i]f 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 *Chrisoffel v. United States*, 338 U.S. 84, 90 (1949)), and the "chain of authority from the House to the questioning body is an essential element of the offense." *Gojack v. United States*, 384 U.S. 702, 716 (1966).

Because of these procedural deficiencies, the Select Committee has sacrificed its ability to enforce its subpoena – 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*, 374 U.S. at 123-24.

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

Sincerely,

Stanley Brand

Stan M. Brand

Stanley E. Woodward Jr.