IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	Criminal No. 21-670 (CJN)
v.	
STEPHEN K. BANNON,	
Defendant.	

SUPPLEMENT TO MOTION TO CONTINUE TRIAL

Om June 29, 2022, Defendant Stephen K. Bannon, through his undersigned counsel, filed a motion to continue the trial date in this case for a period of approximately ninety (90) days, or for such other period of time after October 15, 2022, as this Court deems appropriate [Doc. 88]. On July 1, 2022, the Government filed its opposition to the motion [Doc. 93]. On July 6, 2022, Mr. Bannon filed his reply in further support of the motion to continue [Doc. 95] and Government counsel filed a motion to file a surreply [Doc. 96].

The motion to continue the trial focuses mainly on the impact of the recent televised public hearings held by the Select Committee and the need for a continuance to dissipate the prejudice to Mr. Bannon's constitutional fair trial rights flowing from the Committee's production, developed by a specially hired television producer for the intended maximum public impact and influence, as set out in detail in the motion [Doc. 88]. In Mr. Bannon's reply, Mr. Bannon also cited a number of other factors that justify a continuance so that he can have a fair trial. We file this supplement to inform the Court of additional developments in the last few days that justify a continuance.

July 8, 2022, Production by the Government

On the evening of July 8, 2022, defense counsel received an email from Government counsel with additional discovery. In the context of the litigation that has preceded this new discovery, it is absolutely shocking that the Government is just now producing this material on the eve of trial.

Late Disclosure Of Phone Records The Government Has Had Since November 2021

As the Court is aware, the Government's conduct in trying to obtain Mr. Costello's and/or Mr. Bannon's telephone, email, and social media records through multiple subpoenas and at least one Stored Communications Act Order obtained by an application from Government counsel has been the source of considerable litigation [Docs. 26; 31; 34; 58 at 48-51; 73 at 26-27; Transcripts of Hearings March 16, 2022; June 15, 2022]. We had understood, however, that we had been provided with the universe of relevant documents obtained during that time frame by Government subpoena or other means and prior to July 8, 2022, the defense has been assured since then that the Government has already exceeded its discovery obligations in this case and has no more discoverable material to provide.[1]

With the Government's discovery production of July 8, 2022, Mr. Bannon has now learned that the Government's unjustifiable intrusion into the records of his professional advisors in this misdemeanor case did not stop with the array of subpoenas and the Stored Communications Act Order(s) directed to the records of his attorney, Mr. Costello. The defense has learned for the first time on July 8, 2022, that the Government also obtained, apparently

[1] *See e.g.*, "To date, we have provided you with material that exceeds our obligations under the various discovery rules and doctrines." [Doc. 86-2 – June 21, 2022 from Government counsel to defense counsel]

without any notice to the individuals involved, subpoenas for the personal telephone records of one of Mr. Bannon's key financial advisors[2] and for another person whose connection to the Defendant is yet to be revealed by the Government.[3]

All of these records were subpoenaed by this same Government team during the same time frame as the Costello records. They were provided to the Government by T-Mobile on November 16th and November 17th, 2021, and clearly were in the Government's possession all during the litigation in this case surrounding the intrusive use of subpoenas. The Government's purported excuse for seeking Mr. Costello's records was that it wanted to determine whether Mr. Costello provided a copy of the Committee's subpoena to Mr. Bannon.[4] It is hard to imagine the justification the Government will offer for seeking the personal phone records produced on July 8, 2022. But, whatever that justification, it is outrageous that after all the discussion about this inexcusably intrusive conduct, the Government is only now, some eight months after the fact and on the eve of trial, disclosing this information. Mr. Bannon respectfully requests an opportunity

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[2] Government counsel acknowledge in a letter that accompanied this late discovery that the numbers for which they subpoenaed records "do not appear to be associated with (Mr. Bannon)…" during the time period for which they obtained them by subpoena; but they "believe (the phone numbers) may have been associated with him at some point …." [July 8, 2022 cover letter from Government counsel]. That is truly troubling once again.

The records provided on July 8th for this financial advisor include 29 pages of T-Mobile personal telephone use, from September 22, 2021 through October 21, 2021. The subpoenaed records the Government obtained reflects the numbers to which all calls were made and from which all calls were received, IMSI and IMEI numbers and more.

[3] The records provided on July 8th for this person include 61 pages of similarly detailed private phone call information.

[4] *See e.g.*, March 16, 2022 Hearing Tr. at 11-13.

to fully explore the matter and this further supports his motion for a continuance. There is no excuse for this prejudicial late disclosure.

Late Disclosure Of The Close Personal Relationship
Between The Key Government Witness And The Prosecutor

Secondly, in their production on the evening of July 8, 2022, Government counsel for the first time has advised that the Government's key fact witness, Kristin Amerling – a primary witness in obtaining the indictment and a witness the Government intends to call at trial apparently to testify to all relevant events underlying the charges in this case[5] - has a longstanding relationship with one of the lead prosecutors, AUSA Gaston.

The Government disclosed on July 8, 2022 that Ms. Amerling and AUSA Gaston worked together for a period of four years on the same Congressional Committee staff and were also members of a book club. No other details have been provided. No information has been provided as to whether the grand jury was advised of this relationship. More than six months ago, the defense requested bias information. The defense is entitled to such information. Again, there is no excuse for this late disclosure of information that was known at the time of the indictment.

The relevant question here is why did the Government wait until the evening of Friday, July 8, 2022, to disclose well over a hundred pages of documents and new information that ought to require investigation, consistent with providing effective assistance of counsel? Certainly the relationship with AUSA Gaston has been known since Ms. Amerling was first interviewed as a key fact witness in this case and the Government has had the telephone records since November

[5] As the Court is aware from the prior motions in this case, Ms. Amerling was the point person for communications between Mr. Costello and the Select Committee.

of 2021 and the subject of its abusive use of subpoenas in this misdemeanor case has been the topic of a good deal of discussion before the Court.

Late Disclosure Of FBI Documents

Also on July 8, 2022, the Government produced typewritten reports from FBI agent Stephen Hart, with such notes having been generated in November of 2021 which must now be compared to notes from FBI agent D'Amico produced in the normal course of discovery to determine any inconsistencies. [US-002305]. This is purportedly being disclosed now as "Jencks" material; but it should have been produced earlier with the other notes of interview concerning Mr. Costello and no excuse is provided for the failure to produce this material with the other agent's notes earlier in the case. Additionally, this agent's pages of handwritten notes concerning the June 29, 2022, interview are provided.

Mr. Bannon is providing this information now because the Government only produced it after the Motion To Continue Trial was fully briefed.

Dated: July 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2022, a copy of the foregoing Supplement was filed through the Court's CM/ECF system and was served *via* electronic delivery on counsel of record.

/s/ M. Evan Corcoran
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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' OPPOSITION TO DEFENDANT'S SUPPLEMENT TO MOTION TO CONTINUE TRIAL

The Defendant now attempts to manufacture yet another reason to continue trial in this case by claiming he has received "late" discovery. ECF No. 103. Specifically, the Defendant complains that on July 8, 2022, the Government provided him an almost entirely verbatim copy of the content of an FBI-302 he received in January 2022, *id*. at 5; informed him that a witness the Government has decided to call in its case-in-chief worked with one of government counsel over a decade ago, *id*. at 4-5; and provided phone records that the Defendant concedes are irrelevant to this case, *id*. at 2-3. The Defendant's new pretext for avoiding facing a jury should be rejected.

The Court's scheduling order required the Government to provide all Jencks material as to each witness it expects to call in its case-in-chief and any remaining *Brady* material not already disclosed by July 8, 2022. The Defendant proposed that deadline, the Court ordered it, and the Government complied. The Defendant has failed to show why the deadline he requested does not provide him adequate time to consider and act upon the information and material the Government provided. First, he asserts that the Government provided a typewritten report by the FBI witness it plans to call in its case-in-chief of an interview with Robert Costello—clear Jencks Act material—too late because he has to compare it to what already was provided. The typewritten report about which he complains, however, attached here as Exhibit 1, is an almost verbatim copy

of the FBI-302 report the Government provided to the Defendant in January 2022, *see* ECF No. 28-4 at 1-10. The "inconsistencies" about which the Defendant complains consist of differences like referring to the former President as just "TRUMP" in one version, *see, e.g.*, Ex. 1 at US-002305 ("After learning of the lawsuit filed by the attorneys for TRUMP."), and referring to him as "former President TRUMP" in the other, *see* ECF No. 28-4 at 2 ("After learning of the lawsuit filed by the attorneys for former President TRUMP."). The Government provided the copy as Jencks material of a witness it plans to call in its case-in-chief. There was no other basis on which it was discoverable.

In his effort to create panic, the Defendant also mischaracterizes the information the Government provided relating to Kristin Amerling. As the Government informed the Defendant on July 8, she and Ms. Gaston worked together over a decade ago and were in a book club that Ms. Gaston has not attended in almost two years. At no point did the Government represent that Ms. Amerling and Ms. Gaston have a close personal relationship, because they do not. Because the Government has now decided to call Ms. Amerling in its case-in-chief, the Government provided this background even though its value as potential grounds for cross-examination is marginal at best. In any event, it was provided in accordance with the scheduling order and in plenty of time for the Defendant to attempt to make use of it at trial.

Finally, the Defendant asserts that he needs more time to prepare for trial because the Government has provided him with phone records apparently relating to two individuals who have nothing to do with this case. As the Government informed the Defendant when it provided the records, it was not clear to the Government that the records were related to the Defendant, but because the Government had information that the phone numbers were associated with the Defendant at some point, it was providing them out of an abundance of caution. In fact, when the

Government provided the records to the Defendant, it designated them "Sensitive" under the Protective Order out of concern that they were not the Defendant's phone numbers and otherwise would be improperly disseminated to the media like prior information relating to unrelated parties has been in this case after it was provided to the Defendant. *See* ECF No. 36-1 at 5-6. Here, the phone numbers at issue were listed as being used by the Defendant in law enforcement databases, leading the Government to obtain records for the numbers for the relevant time period. Once the Government received the records, the information in the records appeared to indicate that the numbers were no longer used by the Defendant.[1] Accordingly, the Government did not believe they were relevant to the case. The Defendant has now confirmed that they are not. They are thus not Rule 16 material, they are not *Brady* or *Giglio* material, and they are not Jencks Act material. Concededly irrelevant records cannot possibly provide a basis for delaying trial.

The Defendant's latest basis for a continuance should be rejected, and his continued efforts to avoid trial in this matter should be denied.

Respectfully submitted,

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[1] The subscriber data alone did not necessarily indicate the numbers were not used by the Defendant because evidence obtained in the investigation indicates he uses numbers subscribed under other individuals' names.

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v.	:	
	:	
STEPHEN K. BANNON,	:	
	:	
Defendant.	:	

UNITED STATES' MOTION IN LIMINE TO EXCLUDE EVIDENCE OR ARGUMENT RELATING TO THE DEFENDANT'S ELEVENTH-HOUR ASSERTION THAT HE IS WILLING TO TESTIFY BEFORE THE SELECT COMMITTEE

According to public news reports, at midnight on July 10, 2022, the Defendant claimed to the Select Committee that he would now be willing to testify before it.[1] The Defendant's last-minute efforts to testify, almost nine months after his default—he has still made no effort to produce records—are irrelevant to whether he willfully refused to comply in October 2021 with the Select Committee's subpoena. Any evidence or argument relating to his eleventh-hour efforts should, therefore, be excluded at trial.

The Defendant has been charged with criminal contempt for willfully failing to produce records and appearing for testimony in compliance with a subpoena the Select Committee served on him on September 23, 2021. The criminal contempt statute is not intended to procure compliance; it is intended to punish past noncompliance. *See United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970) (finding that Congress "may 'coerce' by means of civil contempt, 'punish' by means of criminal contempt, and perhaps even both" (citing *Jurney v. MacCracken*, 294 U.S. 125, 151-52 (1935); *In re Chapman*, 166 U.S. 661, 672 (1897))). The charged defaults were

[1] *See, e.g.*, "Bannon, Facing Jail and Fines, Agrees to Testify to Jan. 6 Panel," N.Y. Times, July 10, 2022, *available at* https://www.nytimes.com/2022/07/10/us/politics/bannon-jan-6-trump.html (last accessed July 10, 2022).

complete at the deadlines for compliance set by the Select Committee, which were in October 2021. *See, e.g.*, *United States v. Bryan*, 339 U.S. 323, 330 (1950) ("A default does not mature until the return date of the subpoena."); *United States v. McPhaul*, 272 F.2d 627, 630 (6th Cir. 1959) ("If appellant had any legitimate excuse for not complying with the subpoena, he should have made it known to the Subcommittee on the return day."); *cf. United States v. Donziger*, -- F.4th --, 2022 WL 2232222, at *11 (2d Cir. June 22, 2022) (in the criminal contempt of court context finding that "the district court did not abuse its discretion by punishing [the defendant] for his past disobedience of court orders, even if it had since been cured. Criminal contempt punishes retrospectively for a completed act of disobedience, such that the contemnor cannot avoid or abbreviate the confinement through later compliance. . . . It is therefore beside the point that [the defendant] eventually complied with most of the court orders underlying his criminal contempt conviction" (internal quotation marks and citation omitted)). The Defendant's purported desire to testify now does not erase his past contempt. Evidence of it is thus irrelevant to the charged offenses and should be excluded under Federal Rules of Evidence 401 & 402.

The evidence's lack of probative value and, instead, propensity to result in confusion and a waste of time on collateral issues in violation of Federal Rule of Evidence 403, is clear when considering the circumstances of the Defendant's sudden efforts to cooperate. First, the Defendant apparently has not told the Committee he wishes to provide documents responsive to the subpoena, so his eleventh-hour efforts do nothing to begin to cure his failure to produce records.[2] Instead, his continued failure to comply with the subpoena's document demand while claiming he now will

[2] *See* "Bannon initiates talks with January 6 panel on testifying over Capitol attack," The Guardian, July 10, 2022, available at https://www.theguardian.com/us-news/2022/jul/10/steve-bannon-discussions-january-6-committee-capitol-attack (last accessed July 10, 2022).

testify suggests his actions are little more than an attempt to change the optics of his contempt on the eve of trial, not an actual effort at compliance.

Second, the Defendant's timing suggests that the only thing that has really changed since he refused to comply with the subpoena in October 2021 is that he is finally about to face the consequences of his decision to default. On June 15, 2022, the Court denied his motion to dismiss the indictment; he is now one week from trial. On June 29, 2022, former President Donald Trump's attorney, who sent the letter on which the Defendant claimed his noncompliance was based, confirmed what his correspondence has already established: that the former President never invoked executive privilege over any particular information or materials; that the former President's counsel never asked or was asked to attend the Defendant's deposition before the Select Committee; that the Defendant's attorney misrepresented to the Committee what the former President's counsel had told the Defendant's attorney; and that the former President's counsel made clear to the Defendant's attorney that the letter provided no basis for total noncompliance.[3] Even the Defendant's claim that the reason he is now willing to testify is because the former President is "waiving" executive privilege is subject to question given all of the evidence and law that has been addressed in this case, of which he must be aware, demonstrating that executive privilege never provided a basis for total noncompliance in the first place. Indeed, when the Defendant asked for an extension of the Committee's final deadline—October 18, 2021, at 6:00 p.m.—he cited *Trump v. Thompson*, Case No. 21-cv-02769 (TSC) (D.D.C.), in which the former President challenged the National Archives' ability to turn over his presidential records to the Committee, suggesting it had some bearing on the Defendant's willingness to comply. The D.C.

[3] The Government provided an FBI report of the interview in which the attorney made these statements to the Defendant on June 30, 2022, the day after the interview was conducted.

Circuit, however, long ago, in December 2021, decided in that case that even the former President's claims of executive privilege over his actual presidential records would fail. 20 F.4th 10, 32-46 (D.C. Cir. 2021). Yet, the Defendant did not change course. The Government notes as well that news reports indicate the Defendant's attorney in this case now also works for the former President and that his law firm is being paid by the former President's Super PAC.[4]

All of the above-described circumstances suggest the Defendant's sudden wish to testify is not a genuine effort to meet his obligations but a last-ditch attempt to avoid accountability. Should evidence relating to it be introduced at trial, therefore, it will lead to extensive exploration of those circumstances so that the Government can rebut the improper nullification claim to which the evidence of his efforts to testify only can be relevant: "no harm, no foul." The resulting mini-trial on an irrelevant, improper issue is the very kind of confusion and waste of resources Federal Rule of Evidence 403 is intended to preclude. Accordingly, any evidence or argument relating to the Defendant's claimed willingness to now testify before the Select Committee should be excluded at trial.

[4] "Despite Growing Evidence, a Prosecution of Trump Would Face Challenges," N.Y. Times, June 18, 2022, available at https://www.nytimes.com/2022/06/18/us/politics/trump-jan-6-legal-defense.html (last accessed July 10, 2022); "Trump Group Pays for Jan. 6 Lawyers, Raising Concerns of Witness Pressure," N.Y. Times, June 30, 2022, available at https://www.nytimes.com/2022/06/30/us/trump-jan-6-lawyers-witness-pressure.html (last accessed July 10, 2022)

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