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One Hundred Seventeenth Congress

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

November 9, 2021

Mr. Harry MacDougald
Caldwell, Carlson, Elliott & DeLoach, LLP
[redacted]

Dear Mr. MacDougald,

I write in response to your letter dated November 5, 2021 (the "November 5 letter"), and to advise you of my ruling on the objections raised by your client, Jeffrey B. Clark, during his deposition. Mr. Clark has not offered a legitimate basis for refusing to comply with the Select Committee's subpoena. As discussed in detail below, Mr. Clark's failure to provide documents and testimony to the Select Committee puts him at risk of both criminal and civil contempt of Congress proceedings.

I. Background

Mr. Clark was obligated to appear before the Select Committee to Investigate the January 6th Attack on the United States Capitol pursuant to the subpoena issued on October 13, 2021.[1] This subpoena followed discussions between counsel for the Select Committee and Mr. Clark starting in early-September. At no time during these discussions did Mr. Clark assert that certain privileges would prevent him from providing any documents or testimony in response to the subpoena. Indeed, the discussions followed receipt by Mr. Clark of a letter from the U.S. Department of Justice expressly notifying him of the executive branch's "authoriz[ation] to provide information [Mr. Clark] learned while at the Department" related to events that are central to the Select Committee.[2] *See* Letter from B. Weinsheimer, July 26, 2021 (the "DOJ letter"), a copy of which is attached.

[1] The subpoena initially required Mr. Clark to provide documents and testimony on October 29, 2021. After the withdrawal of Mr. Clark's former counsel and your appearance on his behalf, Committee staff agreed to continue both the appearance and production date to November 5, 2021, at 10:00 a.m.

[2] Mr. Clark received this authorization at the same time as did two of his superiors at the Department of Justice during the time relevant to this Committee's inquiry. Both of Mr. Clark's superiors, former Acting Attorney General Jeffrey Rosen and former Acting Deputy Attorney General Richard Donoghue, have provided testimony before the Senate Judiciary Committee as well as this Committee. Notwithstanding the authorization of the executive branch, as communicated by the Department to Mr. Clark, and the example of his former superiors, Mr. Clark refused to agree to a voluntary interview requested by the Senate Judiciary Committee. *Subverting Justice: How the Former*

On November 5, 2021, both you and Mr. Clark appeared as directed before the Select Committee but only to hand-deliver a letter, which you maintained explained the bases for his refusal to comply with the subpoena. In that letter, and on the record at the deposition, you stated that Mr. Clark would not answer any of the Select Committee's questions on any subject and would not produce any documents.[3] These refusals were based on broad and undifferentiated assertions of various privileges, including claims of executive privilege purportedly asserted by former President Trump. In fact, instead of specifically identifying the privilege applicable to a question or requested document, as the law requires, your November 5 letter asserts: "The general category of executive privilege, the specific categories of the presidential communications, law enforcement, and deliberative process privileges, as well as the attorney-client privilege and the work product doctrine…." Then, despite attempts during the deposition by Committee Members and staff counsel to obtain information from you and your client as to the boundaries of the privilege(s) asserted, Mr. Clark refused to answer questions, cited the 12-page November 5 letter that you delivered only as the deposition began, and walked out of the deposition.

Before your client's abrupt departure, Select Committee staff counsel made clear that the deposition would remain in recess, subject to the call of the Chair, while the Select Committee evaluated your November 5 letter. Following consideration of your letter, I reconvened the deposition later in the afternoon on November 5. Despite receiving clear notice of such reconvening, your client failed to attend the deposition when it was resumed. Specifically, after leaving the deposition at approximately 11:30 a.m., you were informed at 12:42 p.m. by email from staff counsel that the Select Committee would reconvene the deposition at 4:00 p.m. to seek a ruling by the Chair on your client's privilege assertions and refusal to answer questions. Neither you nor Mr. Clark appeared at the appointed time for the reconvened deposition, nor did you respond to staff counsel's email until 3:24 p.m., at which time you stated that you were on an airplane traveling back to Atlanta. *See* email from H. MacDougald, attached.

When the Select Committee reconvened Mr. Clark's deposition, I noted for the record that your client is not entitled to refuse to provide testimony to the Select Committee based on categorical claims of privilege. Accordingly, consistent with applicable law and the House's deposition rules, I overruled Mr. Clark's objections and directed him to answer the questions posed by Members and Select Committee counsel.

This morning, we received an additional letter (the "November 8 letter") you sent to staff counsel acknowledging receipt of my November 5 letter and notice of my rulings on the objections you raised at your deposition on November 5.

President and His Allies Pressured DOJ to Overturn the 2020 Election, Senate Judiciary Committee (Oct. 7, 2021) ("Senate Judiciary Report").

[3] Although Mr. Clark argued with the Select Committee as to whether his refusal to answer substantive questions within the scope of the Select Committee's inquiry was properly described as "blanket" or "absolutist," your message was clear: "We're not answering questions today. We're not producing documents today."

II. Mr. Clark's Refusal to Comply with the Subpoena Is Wholly Without Merit

As reflected in my initial response to your November 5 letter, your assertions of privilege are unavailing. *First*, you have not clearly established the foundational predicate for your assertion regarding executive privilege: a clear invocation of the privilege by the president (or former president). *Second*, Mr. Clark is not entitled to assert a blanket objection to all questions and document requests. *Third*, even if executive privilege was directly and properly invoked, Mr. Clark's reliance on executive privilege is tenuous, at best. In any event, the current administration has determined that, with regard to the subjects that are the focus of the testimony sought, the "congressional need for information outweighs the Executive Branch's interest in maintaining confidentiality." *See* DOJ letter at 2.

A. Your November 5 Letter Provides No Valid Basis for Your Client's Assertion that Mr. Trump has Invoked Executive Privilege in a Manner that Precludes Compliance with the Subpoena

Your November 5 letter makes the unremarkable statement that a President should be able to confidentially confer with aides, and then spends more than six pages seeking to cobble together a claim that Mr. Trump has, in effect, instructed Mr. Clark not to testify in response to the instant subpoena. Notably absent from your November 5 letter is any indication that Mr. Trump or his counsel clearly invoked executive privilege regarding Mr. Clark's testimony. Further, the August 2, 2021 letter attached to your November 5 letter specifically notes that Mr. Trump will not seek judicial intervention to prevent your client's testimony. You have offered no communication from Mr. Trump asserting executive privilege over Mr. Clark's testimony or any documents he may possess. You also acknowledged on the record that you have not sought to confirm this position or otherwise engage with representatives for Mr. Trump.[4] Under these circumstances, there is no actual claim by Mr. Trump of executive privilege covering Mr. Clark's testimony and materials, and an inexplicable lack of even the most minimal effort on your part to discover if such an assertion of privilege is being made.

In addition, the Select Committee has received no direct communication from Mr. Trump or his representatives asserting any privilege over information sought by the Select Committee's subpoena to Mr. Clark. Accordingly, your client's refusal to testify cannot be based on his supposition regarding Mr. Trump's position.

B. Mr. Clark is Not Entitled to Make a Blanket Objection to all Questions and Document Requests

Beyond citing the general need for confidentiality between a President and his advisers and the obviously flawed effort to construe Mr. Collins's August 2 letter as a directive from Mr. Trump not to comply with the subpoena, your November 5 letter fails to articulate any sound basis for your client's failure to respond to the questions put to him at his deposition. Nowhere in your 12-page letter do you address the court decisions that clearly hold that even close advisers to a

[4] Specifically, you said, "I have had no communication with any attorney for Mr. Trump about any of this."

president (which Mr. Clark was not) may not refuse to answer questions based on broad and undifferentiated privilege assertions.[5]

As noted in my November 5 letter, several courts have addressed the type of absolute testimonial immunity posited by your letter and Mr. Clark's actions. All have held that no such immunity exists, even where the incumbent president had clearly and unequivocally invoked executive privilege (not invocation by inference and supposition as you offer) *and* the witness was within the small cadre of immediate White House advisers for whom executive privilege has been held to apply. *See, e.g., Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008) (rejecting former White House Counsel Harriet Miers's assertion of absolute immunity from compelled congressional process); *Comm. on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 203 (D.D.C. 2019) (rejecting claim of White House Counsel Don McGahn on grounds 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").

Unlike Mr. Clark, both Ms. Miers and Mr. McGahn, as White House Counsel, served as close legal advisers to the president. In both the *Miers* and *McGahn* cases, the President issued an unambiguous instruction for the witness not to testify in response to a congressional subpoena[6] (; and, in both cases, the courts rejected this approach, instead requiring these advisors to appear and indicate specific objections to specific questions.[7] As the court stated in *McGahn*: "**To make the point as plain as possible, it is clear . . . that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist.**" *Id.* at 214 (emphasis added). Your letter failed to address either *Miers* or *McGahn* and pointed to no contrary authority supporting or justifying your client's conduct.

At the deposition, Members and staff posed a series of questions to Mr. Clark regarding issues such as whether he used his personal phone or email for official business, whether or how he first met a specific Member of Congress, and what statements he made to the media regarding January 6 (statements to which your November 5 letter specifically referred). Mr. Clark refused to answer the questions and refused to provide a specific basis for his position, instead pointing generally to your November 5 letter.[8] Your November 5 letter, however, provides no authority or argument to justify Mr. Clark's approach; nor does it articulate the specific privileges you and he are claiming apply to the questions put to him at the deposition.

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[5] Courts have similarly rejected blanket, non-specific claims of executive privilege over the production of documents to Congress. *See Comm. on Oversight & Gov't Reform v. Holder*, No. 12-cv-1332, 2014 WL 12662665, at *2 (D.D.C. Aug. 20, 2014) (rejecting a "blanket" executive-privilege claim over subpoenaed documents).

[6] *Miers*, 558 F. Supp. 2d at 62; *McGahn*, 415 F. Supp. 3d at 153.

[7] *Miers*, 558 F. Supp. 2d at 106; *McGahn*, 415 F. Supp. 3d at 203

[8] For example, when asked specifically "whether Mr. Clark used personal devices to communicate government business," you responded as follows: "Given the lack of specificity of the question, we can do no more than allude to the privileges that are asserted in the letter, which are the full panoply of executive, Federal law enforcement, and so on, privileges that are in the letter, and plus the reservation that we've made [regarding Constitutional rights]." When the same specific question was directed to your client, Mr. Clark responded "This has been asked and answered."

In your November 8 letter, you state that your "threshold objection" is not based on "purported executive-privilege absolutism" but your contention that the pendency of litigation initiated by Mr. Trump regarding production of documents by the National Archives pursuant to the Presidential Records Act prevents your client from compliance with a congressional subpoena. As a preliminary matter, this is not a valid objection to a subpoena, and the Select Committee is not aware of any legal authority (nor have you provided any) that supports this position.

Moreover, your letter overstates the relationship between the litigation involving documents held by the National Archives and the instant matter. The National Archives litigation relates to the production of records within the possession of the Archivist pursuant to the Presidential Records Act. Mr. Clark is not a party to that litigation and the issues raised are distinct from the privilege claims raised by Mr. Clark (to the extent we can discern those claims from your prior correspondence). While, in his attempt to prevent the production of documents in the possession of the Archivist, former President Trump has raised claims of executive privilege (something he has not done with respect to Mr. Clark's testimony) directly under the Presidential Records Act, that litigation will not address your client's dubious reliance on some undifferentiated claims of privilege to avoid testifying in response to a subpoena.

Indeed, as more fully set forth below, your client's obligations regarding compliance with the Select Committee's subpoena are clear: Mr. Clark must appear for his deposition and answer the questions of the Select Committee, subject only to particularized objections and privileges he might raise in response to specific questions. You have put forward no authority or argument requiring a different result.

Furthermore, your claim that it would be "prudent" for the Select Committee to delay the deposition lacks merit. The Select Committee has extremely important work to complete, and your client has critical information that will further its investigation. While aspects of Mr. Clark's role in efforts to press the Department of Justice to advance unsupported allegations of 2020 election fraud, by Mr. Trump and others, is now known (based mostly on documents and testimony provided by his superiors at the Department of Justice), the Select Committee is interested in conversations and interactions Mr. Clark had with former President Trump, Members of Congress, and others who participated in the promotion of baseless election fraud claims and attempted to enlist the Department of Justice in that effort. For example, with whom did Mr. Clark discuss the draft letter to state officials he forwarded to Jeffrey Rosen and Richard Donoghue on December 28, 2020 before drafting or sending that letter? What facts and legal theories informed the representations in that letter? What other strategies for delaying the certification of the results of the 2020 election did Mr. Clark discuss with others in government or the Trump campaign? Did Mr. Clark have involvement with additional efforts to pursue claims of alleged election fraud? Where did he receive information regarding those claims, and who else was involved in such efforts? These questions are among those that Mr. Clark is uniquely positioned to illuminate.

C. Even if Directed by the Former President to Assert Executive Privilege, Mr. Clark's Claim of Privilege Would be Tenuous, at Best Even if Directed by the Former President to Assert Executive Privilege, Mr. Clark's Claim of Privilege Would be Tenuous, at Best

Even assuming Mr. Trump had invoked executive privilege with respect to the Select Committee's subpoena to Mr. Clark, that privilege does not prohibit access by the Select Committee to the information sought from Mr. Clark. This is so for several reasons.

First, in *Nixon v. Administrator of General Services ("GSA")*, 433 U.S. 425, 448-49 (1977), the Supreme Court made clear that any residual presidential communications privilege is subordinate to executive privilege determinations made by the incumbent president. "[I]t is the new President [not his predecessor] who has the information and attendant duty of executing the laws in the light of current facts and circumstances," and "the primary, if not the exclusive" duty of deciding when the need of maintaining confidentiality in communications "outweighs whatever public interest or need may reside in disclosure." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977).

Here, neither Mr. Clark nor Mr. Trump currently serve in positions in the United States Government. Mr. Trump has not made any effort to contact the Select Committee regarding your client's testimony, and he has not sought any injunctive or other relief from a court to prevent his testimony. Furthermore, incumbent President Biden and the Department of Justice *have* weighed in regarding subjects about which the Select Committee seeks testimony from Mr. Clark. By letter dated July 26, 2021, the Department of Justice reminded Mr. Clark that the Department attorneys are generally required to protect non-public information, including information that could be subject to various privileges like "law enforcement, deliberative process, attorney work product, attorney-client, and presidential communications privileges." After listing those protective privileges, however, the Department explicitly authorized Mr. Clark "to provide unrestricted testimony to [Congress], irrespective of potential privilege" within the stated scope of Congress's investigations.[9] *See* DOJ letter at 3. According to the Department, the "extraordinary events in this matter . . . present [] an exceptional situation in which the congressional need for information outweighs the Executive Branch's interest in maintaining confidentiality." *Id*. at 2.

Second, many of the Select Committee's questions have nothing to do with communications between Mr. Clark and Mr. Trump. For example, the Select Committee seeks information from Mr. Clark about his interactions with private citizens, Members of Congress, or others outside the White House related to the 2020 election or efforts to overturn its results. Courts have made clear that the presidential-communications privilege does not apply to such subjects or

[9] As discussed below, your November 5 letter also suggests that Mr. Clark may be limited in his testimony by the attorney-client privilege, the attorney work product doctrine, and corresponding ethical confidentiality concerns. You raised ethical considerations again in your November 8 letter. Those suggestions are addressed below, but it is worth emphasizing here that the Department of Justice's July 26 authorization letter addresses those concerns as well. It is difficult to see how Mr. Clark would be required to keep confidential the very information that the Executive and his former agency have authorized him to share, and the D.C. Bar Ethics Opinion you cited, #288, actually allows lawyers to produce information to Congress when given the choice between production or contempt.

communications. *See In re Sealed Case (Espy)*, 121 F.3d at 752 (D.C. Cir. 1997) ("[executive] privilege should not extend to staff outside the White House in executive branch agencies"); *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d at 100 (privilege claimants acknowledged that executive privilege applies only to "a very small cadre of senior advisors").

Third, even with respect to Select Committee inquiries that involve Mr. Clark's communications with Mr. Trump, executive privilege does not bar Select Committee access to that information. Only communications that relate to official government business can be covered by the presidential communications privilege. *In re Sealed Case (Espy*), 121 F.3d at 752 ("the privilege only applies to communications . . . in the course of performing their function of advising the President on official government matters"); *cf. Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 144-45 (D.D.C. 2013) ("the [attorney-client] privilege does not extend to a 'a government attorney's advice on political, strategic, or policy issues, valuable as it may [be]'"). Here, it is questionable that Mr. Clark's conduct regarding several subjects of concern to the Select Committee related to official government business. For example, Mr. Clark's efforts regarding promoting unsupported election fraud allegations with state officials constituted an initiative that Mr. Clark apparently initially kept secret from the Department of Justice and then, when revealed, continued to pursue, even after being explicitly instructed to stop.[10]

Fourth, even with respect to any subjects of concern that arguably involve official government business, the Select Committee's need for this information to investigate the facts and circumstances surrounding the horrific January 6 assault on the U.S. Capitol and our democratic institutions far outweighs any executive branch interest in maintaining confidentiality. *Finally*, even if there were merit to your position on executive privilege—which there is not—Mr. Clark is nonetheless required to appear before the Select Committee and assert Mr. Trump's claims of privilege to specific questions asked and specific documents requested. *See, e.g., In re Sealed Case (Espy*), 121 F.3d at 752 ("the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected"); *Holder*, 2014 WL 12662665, at *2 (rejecting a "blanket" executive-privilege claim over subpoenaed documents).

D. Mr. Clark's Claim that the Attorney-Client Privilege and Work Product Doctrine Prevent his Compliance with the Select Committee's Subpoena Is Equally Unavailing

You contend, in a single statement on the second page of your November 5 letter, that Mr. Clark's compliance with the subpoena is also affected by the attorney-client privilege and the work product doctrine. Contrary to your assertion during the limited portion of the deposition in which you participated,[11] your November 5 letter does not identify the client who could have an interest in protecting the confidentiality of communications with Mr. Clark. It is Mr. Clark's burden to do so. "It is settled law that the party claiming the privilege bears the burden of proving that the

[10] *See, e.g.*, Senate Judiciary Report at 23.

[11] Specifically, you were asked by Rep. Raskin, "Who is the attorney, and who is the client that are covered by the attorney client privilege being invoked in the letter?" You responded by stating that "the privilege is set forth in the letter" and declining to discuss the matter further during the deposition.

communications are protected," and to carry this burden one "must present the underlying facts demonstrating the existence of the privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (1998).[12] The conclusory statement of your November 5 letter clearly has not carried this burden.

Further, as with assertions of other privileges, "[a] blanket assertion of the [attorney client] privilege will not suffice." *In re Lindsey*, 148 F.3d 1100, 1106 (1998). To the extent you believe a privilege applies you must assert it specifically as to communications or documents, providing the Select Committee with sufficient information on which to evaluate each contention. You have not done so.

III. The Information Sought Is Important to the Select Committee's Investigation and is Clearly within the Scope of Authority Delegated Pursuant to House Resolution 503

The documents and testimony sought by the Select Committee from Mr. Clark relate directly to the inquiry being conducted by the Select Committee, serve a legitimate legislative purpose, are within the scope of the authority expressly delegated to the Select Committee pursuant to House Resolution 503, and are not protected from disclosure by any privilege.

Your November 5 letter asserts a "disconnect between the scope and purpose of the Committee's authorizing resolution and the information sought from Mr. Clark." November 5 letter, at 11. That is incorrect. Your letter misstates both the scope and purpose of the Select Committee's work as well as the relationship to that work of the documents and information sought from Mr. Clark.

One of the purposes of the Select Committee is:

> To investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the interference with the peaceful transfer of power . . . as well as the influencing factors that fomented such an attack on American representative democracy while engaged in a constitutional process.[13]

To fulfill its responsibility to investigate and report upon "the influencing factors that fomented such an attack on American representative democracy," the Select Committee must explore the facts and circumstances that led a mob to assault the Capitol and the police officers

[12] Of course, the attorney-client relationship privilege would only apply to those communications that qualify based on their substance and over which confidentiality has been maintained. The attorney-client "privilege applies only if (1) the asserted holder of the privilege is . . . a client; (2) the person to whom the communication was made . . . is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *In re Sealed Case*, 737 F.2d 94, 98-99 (1984).

[13] H. Res. 503, Section 3(1).

attempting to protect it, threaten leaders of our government, and disrupt the peaceful transfer of power. Chief among the factors that rioters have cited to justify their actions is the belief that the 2020 election was stolen.[14] Documents and testimony show that Mr. Clark was directly involved in efforts to promote this false narrative. *See* Senate Judiciary Report at 19-27.

In the October 13, 2021, letter that accompanied Mr. Clark's subpoena, the Select Committee set forth the basis for its determination that the documents and records sought are of critical importance to the issues being investigated by the Select Committee. Testimony of senior Department of Justice officials before this Committee as well as before the Senate Judiciary Committee has revealed efforts by Mr. Clark, along with others in the federal government, to have the Department intervene in the electoral processes of various states and to make public pronouncements to fuel Mr. Trump's baseless claims of election fraud. The Select Committee intends to investigate fully allegations of efforts by elected officials and others within the federal government to interfere with the electoral process, disrupt the peaceful transfer of power, and use the authorities of the Department of Justice to advance Mr. Trump's personal political objectives.

IV. The Categorical Nature of Mr. Clark's Refusal to Comply with the Subpoena Indicates a Willful Disregard for the Select Committee's Authority

Mr. Clark's appearance before the Select Committee at which he resisted providing any documents or testimony[15] and made no clear or particularized claims of privilege save for general references to a letter hand-delivered to the Select Committee as the deposition commenced indicates a willful disregard for the Select Committee's authority. When asked by staff counsel to discuss the topics on which the Select Committee planned to depose Mr. Clark – many of which could have no plausible infringement on any privilege – you and your client instead chose to walk out of the deposition.

There is no legal basis for your client's assertion of privilege in this broad and categorical manner. Your client refused to answer questions about the events of January 6, his comments to the press about the events of January 6, when he first met a certain member of Congress, whether he had ever interacted with members of Congress, his involvement in discussions regarding election procedure in Georgia, how he obtained information relevant to assertions regarding alleged election fraud, and whether he used personal devices to conduct official government business while he was employed at the Department of Justice. None of these areas of inquiry even remotely implicate executive privilege, even if such a privilege had been formally invoked by Mr. Trump.

As such, after considering and analyzing the privileges and arguments asserted in your November 5 letter, I overruled your blanket objections to the Committee's subpoena. Based on your November 8 letter, it is clear that your client does not intend to abide by my ruling. Be advised that the Select Committee intends to move forward with subpoena enforcement efforts. If, after

[14] *See, e.g.*, They rioted at the Capitol for Trump, Now many of those arrested say it's his fault, USA Today, Feb. 10, 2021; Defense for Some Capitol rioters: election misinformation, Associated Press, May 29, 2021.

[15] Mr. Clark gave a substantive answer to a single question, relating to a request for documents from a particular email account.

considering this letter, Mr. Clark agrees to appear for deposition and fully answer the questions of the Select Committee or make particularized assertions of privilege to specific questions posed to him, please advise staff counsel immediately. If we do not hear from you by Noon on Friday, November 12, 2021, we will assume that you have not changed your posture.

Sincerely,

Bennie G. Thompson
Chairman