House Calendar No.

117TH CONGRESS *1st Session* } HOUSE OF REPRESENTATIVES { REPORT 117–

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND JEFFREY BOSSERT CLARK IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH A SUBPOENA DULY ISSUED BY THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL

DECEMBER __, 2021.—Referred to the House Calendar and ordered to be printed

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Mr. THOMPSON of Mississippi, from the Select Committee to Investigate the January 6th Attack on the United States Capitol, submitted the following

R E P O R T

The Select Committee to Investigate the January 6th Attack on the United States Capitol, having considered this Report, reports favorably thereon and recommends that the Report be approved.

The form of the Resolution that the Select Committee to Investigate the January 6th Attack on the United States Capitol would recommend to the House of Representatives for citing Jeffrey Bossert Clark for contempt of Congress pursuant to this Report is as follows:

Resolved, That Jeffrey Bossert Clark shall be found to be in contempt of Congress for failure to comply with a congressional subpoena.

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, detailing the refusal of Jeffrey Bossert Clark to produce documents or answer questions during a deposition before the Select Committee to Investigate the January 6th Attack on the United States Capitol as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Mr. Clark be proceeded against in the manner and form provided by law.

Resolved, That the Speaker of the House shall otherwise take all appropriate action to enforce the subpoena.

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PURPOSE AND SUMMARY

On January 6, 2021, a violent mob breached the security perimeter of the United States Capitol, assaulted and injured scores of police officers, engaged in hand-to-hand violence with those officers over an extended period, and invaded and occupied the Capitol building, all in an effort to halt the lawful counting of electoral votes and reverse the results of the 2020 presidential election. In the words of many of those who participated in the violence, the attack was a direct response to false statements by then-President Trump—beginning on election night 2020 and continuing through January 6, 2021—that the 2020 election had been stolen by corrupted voting machines, widespread fraud, and otherwise.

In response, the House adopted House Resolution 503 on June 30, 2021, establishing the Select Committee to Investigate the January 6th Attack on the United States Capitol (hereinafter referred to as the "Select Committee").

The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify how the events of January 6th were planned, what actions and statements motivated and contributed to the attack on the Capitol, how the violent riot that day was coordinated with a political and public relations strategy to reverse the election outcome, and why the Capitol security was insufficient to address what occurred. The Select Committee will evaluate all facets of these issues, create a public record of what occurred, and recommend to the House, and its relevant committees, corrective laws, policies, procedures, rules, or regulations.

According to documents and testimony gathered by the Select Committee, in the weeks leading up to the January 6th attack on the U.S. Capitol, Jeffrey Bossert Clark participated in efforts to delegitimize the results of the 2020 presidential election and delay or interrupt the peaceful transfer of power. As detailed in a report issued by the U.S. Senate Judiciary Committee (hereinafter "Senate Report") and press accounts, after numerous courts throughout the United States had resoundingly rejected alleged voter fraud challenges to the election results by the Trump campaign, and after all states had certified their respective election results, Mr. Clark proposed that the Department of Justice (DOJ) send a letter to officials of the State of Georgia and other States suggesting that they call special legislative sessions to investigate allegations of voter fraud and consider appointing new slates of electors.[1] In violation

[1] U.S. Senate, Committee on the Judiciary, "Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election," (Oct. 7, 2021) ("Senate Report"), at p. 4. *See also* Jonathan Karl, *Betrayal: The Final Act of the Trump Show*, (New York: Dutton, 2021), pp. 250–254.

of DOJ policy and after a direct admonition from the Acting Attorney General of the United States, Mr. Clark also met with White House officials, including then-President Trump, to discuss efforts to delegitimize, disrupt, or overturn the election results.[2] To further these efforts, President Trump considered installing Mr. Clark as the Acting Attorney General, a plan that was abandoned only after much of the DOJ leadership team and the White House Counsel threatened to resign if Mr. Clark was appointed.[3]

The Select Committee believes that Mr. Clark had conversations with others in the Federal Government, including Members of Congress, regarding efforts to delegitimize, disrupt, or overturn the election results in the weeks leading up to January 6th. The Select Committee expects that such testimony will be directly relevant to its report and recommendations for legislative and other action.

On October 13, 2021, the Select Committee issued a subpoena for documents and testimony and transmitted it along with a cover letter and schedule to counsel for Mr. Clark, who accepted service on Mr. Clark's behalf on October 13, 2021.[4] The subpoena required that Mr. Clark produce responsive documents and appear for a deposition on October 29, 2021.[5]

The contempt of Congress statute, 2 U.S.C. § 192, makes clear that a witness summoned before Congress must appear or be "deemed guilty of a misdemeanor" punishable by a fine of up to $100,000 and imprisonment for up to 1 year.[6] Further, the Supreme Court in *United States v. Bryan* (1950) emphasized that the subpoena power is a "public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned."[7] The Supreme Court recently reinforced this clear obligation by stating that "[w]hen Congress seeks information needed for intelligent legislative action, it unquestionably remains the duty of *all* citizens to cooperate."[8]

On November 5, 2021, Mr. Clark appeared at the negotiated time designated for his deposition but refused to produce any documents or answer pertinent questions of the Select Committee. Counsel for Mr. Clark expressed in no uncertain terms that, "We will not be answering any questions or producing any documents."[9] Counsel and Mr. Clark then relied on a 12-page letter—addressed to the Chairman and hand-delivered to Select Committee staff counsel at the beginning of the deposition—to object to nearly every question the Select Committee Members and staff put to Mr. Clark.[10] Despite the Select Committee's attempts to determine the scope or nature of his objections on a question-by-question basis, Mr. Clark and his counsel refused to clarify their positions. When pressed to

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[2] Senate Report, at pp. 22–23, 28, 43–44.
[3] *Id.*, at pp. 37–38.
[4] *See* Appendix, Ex. 1 (Subpoena to Jeffrey B. Clark, Oct. 13, 2021).
[5] By mutual agreement, the date for testimony and production of documents was continued to November 5, 2021.
[6] The prison term for this offense makes it a Class A misdemeanor. 18 U.S.C. § 3559(a)(6). By that classification, the penalty for contempt of Congress specified in 2 U.S.C. § 192 increased from $1,000 to $100,000. 18 U.S.C. § 3571(b)(5).
[7] *United States v. Bryan*, 339 U.S. 323, 331 (1950).
[8] *Trump v. Mazars USA LLP*, 140 S.Ct. 2019, 2036 (2020) (emphasis in original; internal quotation marks removed).
[9] *See* Appendix, Ex. 2 (Transcript of November 5, 2021 Deposition of Jeffrey B. Clark), at p. 8.
[10] Mr. Clark did answer one substantive question at the deposition: regarding his use of a particular gmail account. Appendix, Ex. 2, at pp. 31–32.

proceed through the Select Committee's questions, including topics to which there could be no colorable claim of privilege, Mr. Clark abruptly left the deposition. Despite notice to Mr. Clark that the deposition would resume later that day for the Chair to rule on Mr. Clark's objections and give him instructions on responding, Mr. Clark did not return to the deposition at the notified time. When the deposition reconvened, the Chairman ruled on the objections and directed the witness to answer, as prescribed in House rules, both on the record of the deposition and in subsequent communications to Mr. Clark's counsel. Mr. Clark's subsequent correspondence with the Select Committee failed to provide valid legal justification for his refusal to provide documents and testimony to the Select Committee.

Mr. Clark's refusal to comply with the Select Committee's subpoena represents willful default under the law and warrants referral to the United States Attorney for the District of Columbia for prosecution under the contempt of Congress statute as prescribed by law. The denial of the information sought by the subpoena impairs Congress's central powers under the United States Constitution.

BACKGROUND ON THE SELECT COMMITTEE'S INVESTIGATION

House Resolution 503 sets out the specific purposes of the Select Committee, including:

- 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."
- To investigate and report upon the facts, circumstances, and causes "relating to the interference with the peaceful transfer of power."
- To investigate and report upon the facts, circumstances, and causes relating to "the influencing factors that fomented such an attack on American representative democracy while engaged in a constitutional process."

The Supreme Court has long recognized Congress's oversight role. "The power of the Congress to conduct investigations is inherent in the legislative process."[11] Indeed, Congress's ability to enforce its investigatory power "is an essential and appropriate auxiliary to the legislative function."[12] "Absent such a power, a legislative body could not 'wisely or effectively' evaluate those conditions 'which the legislation is intended to affect or change.' "[13]

The oversight powers of House and Senate committees are also codified in legislation. For example, the Legislative Reorganization Act of 1946 directed committees to "exercise continuous watchfulness" over the executive branch's implementation of programs within their jurisdictions,[14] and the Legislative Reorganization Act of 1970 authorized committees to "review and study, on a continuing basis, the application, administration, and execution" of laws.[15]

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[11] *Watkins v. United States*, 354 U.S. 178, 187 (1957). See also *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2031 (2020).
[12] *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).
[13] *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 305 (D.D.C. 1976), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (quoting *McGrain*, 273 U.S. at 175).
[14] Pub. L. 79–601, 79th Cong. § 136, (1946).
[15] Pub. L. 91–510, 91st Cong. § 118, (1970).

The Select Committee was properly constituted under section 2(a) of House Resolution 503, 117th Congress. As required by that resolution, Members of the Select Committee were selected by the Speaker, after "consultation with the minority leader."[16] A bipartisan selection of Members was appointed pursuant to House Resolution 503 and the order of the House of January 4, 2021, on July 1, 2021, and July 26, 2021.[17]

Pursuant to House rule XI and House Resolution 503, the Select Committee is authorized "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of books, records, correspondence, memoranda, papers, and documents as it considers necessary."[18] Further, section 5(c)(4) of House Resolution 503 provides that the Chairman of the Select Committee may "authorize and issue subpoenas pursuant to clause 2(m) of rule XI in the investigation and study" conducted pursuant to the enumerated purposes and functions of the Select Committee. The Select Committee's authorizing resolution further states that the Chairman "may order the taking of depositions, including pursuant to subpoena, by a Member or counsel of the Select Committee, in the same manner as a standing committee pursuant to section 3(b)(1) of House Resolution 8, One Hundred Seventeenth Congress."[19] The October 13, 2021, subpoena to Mr. Clark was duly issued pursuant to section 5(c)(4) of House Resolution 503 and clause 2(m) of rule XI of the Rules of the House of Representatives.[20]

A. The Select Committee seeks information from Mr. Clark central to its investigation into the attack on the U.S. Capitol and the interference in the peaceful transfer of power.

The Select Committee seeks information from Mr. Clark central to its investigative responsibilities delegated to it by the House of Representatives. This includes the obligation to investigate and report on the facts, circumstances, and causes of the attack on January 6, 2021, and on the facts, circumstances and causes "relating to the interference with the peaceful transfer of power."[21]

The events of January 6, 2021, involved both a physical assault on the Capitol building and law enforcement personnel protecting it and an attack on the constitutional process central to the peaceful transfer of power following a presidential election. The counting of electoral college votes by Congress is a component of that transfer of power that occurs every January 6th following a presidential election. This event is part of a complex process, mediated through the free and fair elections held in jurisdictions throughout the country, and through the statutory and constitutional processes set up to confirm and validate the results. In the case of the 2020 pres-

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[16] Speaker Pelosi detailed such consultation and her selection decisions in a July 21, 2021, press release available at https://www.speaker.gov/newsroom/72121-2.

[17] 167 Cong. Rec. 115 (July 1, 2021), at p. H3597 and 167 Cong. Rec. 130 (July 26, 2021), at p. H3885. The January 4, 2021, order of the House provides that the Speaker is authorized to accept resignations and to make appointments authorized by law or by the House. See 167 Cong. Rec. 2 (Jan. 4, 2021), at p. H37.

[18] House rule XI, cl. 2(m)(1)(B), 117th Cong. (2021); H. Res. 503, 117th Cong. § 5(c)(4) (2021).

[19] H. Res. 503, 117th Cong. § 5(c)(6) (2021).

[20] Section 5(c)(4) of H. Res. 503 invokes clause 2(m)(3)(A)(i) of rule XI, which states in pertinent part: "The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chair of the committee under such rules and under such limitations as the committee may prescribe."

[21] H. Res. 503, 117th Cong. (2021).

idential election, the January 6th electoral college vote count occurred following a series of efforts in the preceding weeks by former-President Trump and his supporters to challenge the legitimacy of the election, and disrupt, delay, and overturn the election results.

According to eyewitness accounts as well as the statements of participants in the attack on January 6, 2021, the purpose of the assault was to stop the process of validating what then-President Trump, his supporters, and his allies had characterized as a "stolen" or "fraudulent" election. The claims regarding the 2020 election results were advanced and amplified in the weeks leading up to the January 6th assault through efforts by the former President and his associates to spread false information about, and cast doubts on, the elections in Arizona, Pennsylvania, Michigan, and Georgia, among other States, and to press Federal, State, and local officials to use their authorities to undermine the democratic tradition of a peaceful transfer of power.[22]

Evidence obtained by the Select Committee and public accounts indicate that, in that time frame, Mr. Clark, while serving at the Department of Justice, participated in initiatives to use DOJ authorities to support false narratives about the 2020 election results in contravention of policy, tradition, and the facts.[23]

While Mr. Clark refused to be interviewed by the Senate Judiciary Committee, the Senate Report nonetheless revealed portions of this story. According to the Senate Report, after being introduced by a Member of Congress, Mr. Clark met with then-President Trump on December 24, 2020, without the knowledge or authorization of DOJ leadership,[24] and then pushed the Acting Attorney General Jeffrey Rosen and Deputy Attorney General Richard Donoghue "to assist Trump's election subversion scheme."[25] According to the Senate Report, Mr. Clark urged DOJ to announce publicly that it was "investigating election fraud" and to "tell key swing state legislatures they should appoint alternate slates of electors following certification of the popular vote."[26]

On December 28, 2020, after more than 60 courts had ruled against the Trump campaign and its allies with respect to claims of election fraud and the electoral college had already met and voted, Mr. Clark circulated to Mr. Rosen and Mr. Donoghue a draft letter to the Georgia Governor, General Assembly Speaker, and Senate President Pro Tempore that he recommended copying for other States.[27] This proposed letter informed these State officials that DOJ had "taken notice" of election "irregularities" and rec-

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[22] Marshall Cohen, Jason Morris, and Christopher Hickey, "Timeline: What Georgia prosecutors are looking at as they investigate Trump's efforts to overturn the election," CNN, (Aug. 5, 2021), available at https://www.cnn.com/interactive/2021/08/politics/trump-georgia-2020-election/ ; Rebecca Ballhaus, Alex Leary, and Dustin Volz, "Amid Vaccine Rollout and Historic Hack, Trump Remains Focused on Reversing Election," *Wall Street Journal*, (Dec. 20, 2020), available at https://www.wsj.com/articles/amid-vaccine-rollout-and-historic-hack-trump-remains-focused-on-reversing-election-11608401545; Jonathan Cooper, "Arizona governor silences Trump's call, certifies election," Associated Press, (Dec. 2, 2020), available at https://apnews.com/article/election-2020-donald-trump-arizona-elections-doug-ducey-e2b8b0de5b809efcc9b1ad5d279023f4; Zeke Miller, Christina Cassidy and Colleen Long, "Trump targets vote certification in late bid to block Biden," Associated Press, (Nov. 18, 2020), available at https://apnews.com/article/donald-trump-targets-vote-certification-fa1f61cc5de6352deaa588dab908128e.

[23] Senate Report, at pp. 7–10.

[24] *Id.*, at p. 14.

[25] *Id.*, at pp. 3–4.

[26] *Id.*

[27] *Id.*, at p. 21.

ommended calling a special legislative session to "evaluate the irregularities," determine "which candidate for President won the most legal votes," and consider appointing a new slate of electors.[28] Mr. Rosen and Mr. Donoghue summarily rejected Mr. Clark's proposed letter, pointing out to Mr. Clark that the letter was inaccurate and a violation of established Department policy.[29]

Against Mr. Rosen's instructions and DOJ policy, according to the Senate Report, Mr. Clark continued having direct contact with then-President Trump, who offered to appoint Mr. Clark Acting Attorney General.[30] During a meeting on January 2, 2021, Mr. Clark told Mr. Rosen he might be persuaded to turn down the President's offer to have him replace Mr. Rosen if Mr. Rosen sent out the proposed letters.[31] After Mr. Rosen refused to send the letters, Mr. Clark informed Mr. Rosen on January 3, 2021, that Mr. Clark intended to accept the President's offer to replace Mr. Rosen as Acting Attorney General.[32] DOJ leadership (and several top White House advisors) then threatened to resign if the President appointed Mr. Clark as Acting Attorney General, and the plan to replace Mr. Rosen and proceed with Mr. Clark's efforts to interfere with the election results did not advance.[33]

The Select Committee sought documents and testimony from Mr. Clark to obtain complete understanding of the attempts to use DOJ to delegitimize and disrupt the peaceful transfer of power following the 2020 presidential election, including illuminating the impetus for Mr. Clark's involvement and with whom he was collaborating inside and outside government to advance these efforts.

B. Mr. Clark has refused to comply with the Select Committee's subpoena for testimony and documents.

On October 13, 2021, the Select Committee transmitted a subpoena to Mr. Clark ordering the production of both documents and testimony relevant to the Select Committee's investigation.[34] The accompanying letter from Chairman THOMPSON stated that the Select Committee had reason to believe that Mr. Clark had information within the scope of the Select Committee's inquiry and set forth a schedule specifying categories of related documents sought by the Select Committee.[35]

The requested documents covered topics including, but not limited to, Mr. Clark's role in connection with DOJ's investigation of allegations of fraud in the 2020 presidential election; communications with President Trump, senior White House officials, the Trump re-election campaign, Members of Congress, and state officials concerning alleged fraud in the 2020 election and the selection of presidential electors; delaying or preventing certification of the 2020 presidential election results, including discussions of the role of Congress and the Vice President in counting electoral votes; the

[28] *Id.*, at pp. 21–22.
[29] *Id.*, at pp. 22–23. In his response to Mr. Clark, Mr. Donoghue noted: "Despite dramatic claims to the contrary, we have not seen the type of fraud that calls into question the reported (and certified) results of the election." He reminded Mr. Clark that "[Attorney General] Barr made that clear to the public only last week."
[30] *Id.*, at p. 28.
[31] *Id.*, at p. 34.
[32] *Id.*, at p. 35.
[33] *Id.*, at p. 38.
[34] *See* Appendix, Ex. 1.
[35] *Id.*

security of election systems in the United States; purported election irregularities, election-related fraud, or other election-related malfeasance, including specific allegations of voter fraud in four states; and alleged foreign interference in the 2020 election, including foreign origin disinformation spread through social media.

The Select Committee's subpoena required that Mr. Clark produce the requested documents and provide testimony on October 29, 2021, at 10:00 a.m. This subpoena followed discussions between counsel for the Select Committee and Mr. Clark starting in early September. On October 27, 2021, Harry MacDougald, Esq. notified Select Committee staff that Mr. Clark's previous counsel had withdrawn and he had been retained by Mr. Clark. On that same date, Mr. MacDougald asked for a short continuance of the document production and deposition date to allow him to prepare for those events. The Select Committee accommodated Mr. Clark's interest in moving back the date of his appearance and document production and agreed to a new date of November 5, at 10:00 a.m. for both Mr. Clark's appearance and document production deadline.

On November 5, 2021, Mr. Clark appeared as directed before the Select Committee, accompanied by Mr. MacDougald. The deposition was conducted in accordance with the House Regulations for the Use of Deposition Authority promulgated by the Chairman of the Committee on Rules pursuant to section 3(b) of House Resolution 8, 117th Congress.[36] These regulations were provided to Mr. Clark and his attorney prior to his deposition.[37] At the outset of the deposition, Mr. MacDougald handed Select Committee staff a 12-page letter addressed to Chairman THOMPSON.[38] In that letter, and on the record at the deposition, Mr. MacDougald stated that Mr. Clark would not answer any of the Select Committee's questions on any subject and would not produce any documents.[39] In his letter, Mr. MacDougald asserted that because former-President Trump was, while in office, entitled to confidential legal advice, Mr. Clark was "subject to a sacred trust" and that "any attempts . . . to invade that sphere of confidentiality must be resisted," concluding that "the President's confidences are not [Mr. Clark's] to waive." Mr. MacDougald's letter further stated that "the general category of executive privilege, the specific categories of the presidential communications, law enforcement, and deliberative process privileges, as well as attorney-client privilege and the work product doctrine, all harmonize on this point."[40] Nowhere in his letter did Mr. MacDougald make any more specific assertion of executive privilege or of any other privilege.

Mr. MacDougald's letter attached an August 2 letter to Mr. Clark from Douglas A. Collins, counsel to former-President Trump.[41] The two-page letter informed Mr. Clark that former-President Trump was continuing to assert executive privilege over non-public infor-

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[36] *See* 167 Cong. Rec. 2 (Jan. 4, 2021), at p. H41.

[37] *See* Appendix, Ex. 1; and Appendix, Ex. 3 (Staff Email to Counsel for Jeffrey B. Clark, Nov. 3, 2021).

[38] *See* Appendix, Ex. 4 (Letter from Counsel for Jeffrey B. Clark to Chairman Thompson, Nov. 5, 2021).

[39] 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" (Appendix, Ex. 2, at pp. 23, 36), Mr. MacDougald's message was clear: "[Mr. MacDougald.] We're not answering questions today. We're not producing documents today." (*Id.*, at p. 15).

[40] *See* Appendix, Ex. 4, at p. 2.

[41] *See* Appendix, Ex. 4 (the Collins letter is enclosed).

mation related to Mr. Clark's service at DOJ. Former-President Trump's assertion came despite the fact that both President Biden and DOJ had decided not to assert any privileges preventing Mr. Clark and other former DOJ officials from disclosing that information to committees of Congress.[42] Mr. Collins's August 2 letter concluded, "[n]onetheless, to avoid further distraction and without in any way otherwise waiving the executive privilege associated with the matters [under investigation], President Trump will agree not to seek judicial intervention to prevent [Mr. Clark's] testimony . . ., so long as the Committees do not seek privileged information from any other Trump administration officials or advisors." The letter concludes that, if the committees seek privileged information from other Trump administration officials, "we will take all necessary and appropriate steps . . . to defend the Office of the Presidency."[43]

In his November 5 letter, Mr. MacDougald argued that the Select Committee's September 23 subpoenas of four former Trump administration officials had made it "especially clear to Mr. Clark that executive privilege had been invoked," because the four subpoenas were in "violation of a condition" in Mr. Collins's August 2 letter. Mr. MacDougald argued that Mr. Collins's letter should be read as former-President Trump's assertion of executive privilege with respect to the information the Select Committee was seeking from Mr. Clark. Thus, Mr. Clark was left with "no choice" but to treat all such information as subject to executive privilege "and related privileges."[44]

At Mr. Clark's deposition, Members of the Select Committee and staff attempted to obtain information from Mr. Clark and Mr. MacDougald concerning the boundaries of the privileges they sought to assert, posing a series of questions including whether Mr. Clark used his personal phone or email for official business,[45] when he first met a specific Member of Congress,[46] when he became engaged in the debate regarding Georgia election procedure,[47] and what statements he made to the media regarding January 6th (statements to which Mr. Clark's counsel referred in his November 5 letter to the Select Committee).[48] Mr. Clark refused to answer any of these questions and declined to provide a specific basis for his position, instead pointing generally to his counsel's 12-page November 5 letter.[49] Mr. MacDougald announced that Mr. Clark

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[42] Mr. Clark was advised of President Biden's and the Department of Justice position in a letter from Associate Deputy Attorney General Bradley Weinsheimer, dated July 26, 2021. (*See* Appendix, Ex. 5 (Letter from Department of Justice to Jeffrey B. Clark, July 26, 2021)).

[43] Contrary to the interpretation of the August 2 letter offered by Mr. MacDougald, this last sentence suggests that Mr. Trump's representatives will take some action if this condition is met and the "Office of the Presidency" needs defending.

[44] Mr. MacDougald made various other observations relating to Mr. Trump's lawsuit to prevent the National Archives from releasing certain Trump presidential records to the Select Committee, asserting that Mr. Trump's claims of privilege in that litigation bolster Mr. Clark's contention that Mr. Trump intends to have Mr. Clark assert executive privilege in response to the subpoena. *See* Appendix, Ex. 4.

[45] Appendix, Ex. 2, at p. 32.

[46] *Id.*, at p. 29.

[47] *Id.*, at p. 30.

[48] *Id.*, at pp. 25–26.

[49] *Id.*, at pp. 29–31. For example, when asked specifically "whether Mr. Clark used personal devices to communicate government business," Mr. Clark's attorney responded: "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, privi-

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would not produce any documents in response to the subpoena,[50] and he and Mr. Clark walked out of the deposition at approximately 11:30 a.m. Before Mr. Clark and Mr. MacDougald departed, Select Committee staff counsel informed them clearly that the deposition would remain in recess, subject to the call of the Chair, while the Select Committee evaluated Mr. MacDougald's November 5 letter.[51]

At 12:42 p.m. on November 5, Select Committee staff counsel sent Mr. MacDougald an email to inform him that the Select Committee would reconvene Mr. Clark's deposition at 4:00 p.m. that day.[52] Staff counsel informed Mr. MacDougald that the purpose of the reconvened deposition would be to obtain a ruling from the Chairman, as required by House deposition authority regulation 7 (which staff counsel quoted), on Mr. Clark's assertion of privilege and refusal to answer questions. Mr. Clark and Mr. MacDougald were asked to return to the site of the deposition at 4:00 p.m. or indicate their refusal to do so. Staff counsel noted, finally, that the Select Committee was preparing a response to the letter that Mr. MacDougald had delivered that morning, and that he would provide that letter at or before the reconvened deposition.

Mr. MacDougald responded by email at 3:24 p.m. that he was on a flight to Atlanta and that it would not be possible for him to return to the reconvened deposition with Mr. Clark at 4:00 that afternoon.[53] His email response also included an informal list of purported legal objections to the Select Committee's demand that Mr. Clark reappear at his deposition and to the Chairman's anticipated ruling on Mr. Clark's stated objections. When the Select Committee reconvened Mr. Clark's deposition at 4:15 p.m. on November 5, Chairman THOMPSON noted for the record that Mr. Clark was 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, the Chairman overruled Mr. Clark's objections and directed him to answer the questions posed by Members and Select Committee counsel.

At 4:30 p.m. on November 5, Select Committee staff transmitted a letter from Chairman THOMPSON to Mr. MacDougald responding to the arguments made in the 12-page letter from Mr. MacDougald.[54] The Chairman stated in his response letter that there was no proper invocation of executive privilege with respect to Mr. Clark's testimony and document production in either Mr. Clark's November 5 letter, the August 2 letter from Mr. Trump's counsel, or in the information provided on the record at that morning's session of Mr. Clark's deposition. The Chairman noted that in the August 2 letter, Mr. Trump's counsel had, in fact, specifically stated that Mr. Trump would not seek judicial intervention to prevent Mr. Clark's testimony and that Mr. MacDougald had, at the deposition that morning, stated that he had received no further in-

leges that are in the letter, and plus the reservation that we've made [regarding Constitutional rights]." *Id.*, at pp. 33–34.

[50] *Id.*, at p. 31.

[51] *Id.*, at p. 38.

[52] *See* Appendix, Ex. 6 (Staff Email to Counsel for Jeffrey B. Clark, Nov. 5, 2021).

[53] *See* Appendix, Ex. 7 (Email from Counsel for Jeffrey B. Clark to Select Committee Staff, Nov. 5, 2021).

[54] *See* Appendix, Ex. 8 (Letter from Chairman Thompson to Counsel for Jeffrey B. Clark, Nov. 5, 2021).

structions from Mr. Trump relating to Mr. Clark's testimony. The Chairman also noted that the Select Committee had received no direct communication from former-President Trump asserting privilege over information that the Select Committee sought pursuant to its subpoena to Mr. Clark.

Chairman THOMPSON's November 5 letter stressed that, even if former-President Trump had previously invoked privilege with respect to Mr. Clark's testimony and document production, the law does not support blanket, absolute claims of testimonial immunity even for senior presidential aides (which Mr. Clark was not) or blanket, non-specific assertions of executive privilege over the production of documents to Congress. The Chairman also pointed out that, even had Mr. Trump invoked executive privilege with respect to Mr. Clark's testimony and document production, the privilege would only have covered communications that related to official government business. He noted that Mr. Clark would have had to assert any claim of privilege narrowly, specifically identifying the scope of those claims and which areas of testimony and which responsive documents the privilege claim covered. The Chairman noted his intention to formally reject Mr. Clark's claim of privilege when the deposition resumed.

On November 8, Mr. MacDougald sent Chairman THOMPSON a brief response to his November 5 letter.[55] In it, Mr. MacDougald asserted that, because the letter had not been transmitted until 4:30 that afternoon, when Mr. MacDougald was on a flight back to Atlanta, it was "physically impossible" for Mr. Clark and him to appear at the resumed deposition as instructed—all despite the earlier notices for reconvening.

In his letter, Mr. MacDougald also noted his disagreement with the points made in the Chairman's November 5 letter, saying he would respond to it in detail later, but insisting that Mr. Clark had not, when he appeared for his deposition the morning of November 5, made a "blanket" refusal to produce documents or answer questions. Mr. MacDougald characterized Mr. Clark's position as based on unspecified "matters of timing, prudence, and fairness, not on purported executive-privilege absolutism." He claimed that until there was a final judgment in the *Trump v. Thompson* litigation[56] relating to the Select Committee's request for presidential records held in the National Archives, Mr. Clark would be "in ethical jeopardy" if he acceded to the Select Committee's demand for documents and testimony.

On November 9, Chairman THOMPSON wrote to Mr. MacDougald to inform him of his formal ruling on the objections that Mr. Clark had raised during his deposition, and to respond in greater detail to the points made in the 12-page letter dated November 5 that Mr. MacDougald delivered to Select Committee staff at Mr. Clark's deposition.[57] The Chairman's letter noted that when the Select Committee reconvened, the Chairman stated on the record that Mr. Clark was not entitled to refuse to testify based on categorical

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[55] *See* Appendix, Ex. 9 (Letter from Counsel for Jeffrey B. Clark to Chairman Thompson, Nov. 8, 2021).

[56] *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021), F.Supp.3d , 2021 U.S. Dist. LEXIS 216812*, *currently on appeal*, *Trump v. Thompson*, No. 21-5254 (D.C. Cir.), 2021 U.S. Spp. LEXIS 33578*, 2021 WL 5239098 (Nov. 11, 2021).

[57] *See* Appendix, Ex. 10 (Letter from Chairman Thompson to Counsel for Jeffrey B. Clark, Nov. 9, 2021).

claims of privilege and that, accordingly, the Chairman had overruled Mr. Clark's objections and directed him to answer the Select Committee's questions. The Chairman went on to detail three fundamental points. *First*, Mr. Clark had not established that either the former President or the current President had explicitly invoked executive privilege at all. *Second*, the law did not entitle Mr. Clark to refuse to respond to the Select Committee's questions and document requests with a "blanket" objection. *Third*, Mr. Clark's reliance on executive privilege was tenuous and the current President had determined that, with respect to the subjects of the testimony the Select Committee sought, the "congressional need for information outweighs the Executive Branch's interest in maintaining confidentiality."

The Chairman's letter also pointed out that, while several courts had addressed assertions of absolute testimonial immunity similar to Mr. Clark's, all had held that there was no such immunity even where the incumbent President had explicitly invoked executive privilege as to a close White House adviser. The Chairman's letter further noted that the issues in the litigation that Mr. Trump had instituted relating to the Select Committee's document request of the National Archives were separate and distinct from Mr. Clark's privilege issues, so that a judgment in that matter would not resolve Mr. Clark's claims of absolute immunity from testifying in response to the Select Committee's subpoena. The Chairman's letter also noted that many of the Select Committee's questions had nothing to do with any communications Mr. Clark and Mr. Trump may have had. Chairman THOMPSON concluded by noting that Mr. Clark's refusal to provide either documents or testimony and failure to articulate any particularized claims of privilege indicated his willful disregard for the authority of the Select Committee. He stressed that there was no legal basis for Mr. Clark's assertion of a broad, absolute immunity or other privilege from testifying or providing responsive documents and noted several areas of inquiry that could not possibly implicate any version of executive privilege, even had such privilege been asserted in the manner legally required. The Chairman concluded that, for those reasons, he had overruled Mr. Clark's blanket objections to the Select Committee's subpoena.

On November 12, Mr. MacDougald responded on behalf of Mr. Clark to the Chairman's letters of November 5 and 9.[58] Mr. MacDougald's 21-page response consisted of a letter and an attached 19-point memorandum, summarized in the letter. In them, Mr. MacDougald raised several objections and arguments, including that the Select Committee's subpoena was improper in that it was "to carry out an unlawful and plainly non-legislative purpose" relating to law enforcement. He also expressed what he labeled "due process" objections, including that for the Chairman to rule on Mr. Clark's objections was to act as the "judge of [his] own case." Mr. MacDougald also argued that former-President Trump had invoked executive privilege both in Mr. Collins's August 2 letter, as well as in comments reported in a Fox News segment the next day. He asserted that it was "extremely unfair" for the Select Com-

[58] *See* Appendix, Ex. 11 (Letter and Memo from Counsel for Jeffrey B. Clark to Chairman Thompson, Nov. 12, 2021).

mittee to force Mr. Clark to testify before there had been a final resolution of the executive privilege issues raised in the *Trump v. Thompson* litigation. In addition, Mr. MacDougald objected to DOJ's July 26 letter authorizing Mr. Clark to testify on matters of interest to the Select Committee relating to information acquired during his DOJ service. He also asserted that the areas about which the Select Committee sought Mr. Clark's testimony and documents under the subpoena exceeded those authorized under the Select Committee's organizing resolution, claiming that Mr. Clark had no involvement of any sort with the events that occurred on January 6th. Mr. MacDougald's November 12 response also made several other objections unrelated to questions of executive privilege, including an assertion that the Select Committee's subpoena was invalid. Mr. MacDougald's November 12 response closed with the unsupported assertion that the Select Committee was seeking to "relitigate the failed second impeachment of President Trump" through an unconstitutional process.

On November 17, 2021, Chairman THOMPSON sent a letter to Mr. MacDougald addressing the various claims raised in the November 12 letter.[59] The Chairman noted that Mr. MacDougald had failed to provide any legal authority justifying Mr. Clark's continuing refusal to provide testimony and documents compelled by the subpoena. The Chairman also addressed the various challenges Mr. MacDougald made with respect to the scope of the Select Committee's work, its authority to issue subpoenas, and the fairness of the deposition process. The Chairman set forth the governing resolutions, House rules, and caselaw that justified the actions taken and the process followed with respect to Mr. Clark.

On November 29, 2021, Mr. MacDougald sent two letters to Chairman THOMPSON challenging the authority of the Select Committee to issue deposition subpoenas and raising various concerns supposedly prompted by his review of the deposition transcript.[60] Mr. MacDougald reiterated Mr. Clark's continued refusal to answer questions at a deposition, instead proposing that Mr. Clark appear at a public hearing of the Select Committee to testify as to certain matters Mr. MacDougald deemed "appropriately tailored to the Committee's mission under H. Res. 503," namely, comments Mr. Clark made to a reporter after January 6th regarding the events at the Capitol and "his role, if any, in planning, attending, responding to, or investigating January 6's events or former President Trump's speech on the Ellipse that same day."[61]

C. Mr. Clark's purported basis for non-compliance is wholly without merit.

As part of its legislative function, Congress has the power to compel witnesses to testify and produce documents.[62] An indi-

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[59] *See* Appendix, Ex. 12 (Letter from Chairman Thompson to Counsel for Jeffrey B. Clark, Nov. 17, 2021).

[60] *See* Appendix, Exs. 13 and 14 (Letters from Counsel for Jeffrey B. Clark to Chairman Thompson, Nov. 29, 2021).

[61] Mr. MacDougald had previously represented to the Select Committee that Mr. Clark "had nothing to do with the January 6 protests or the incursion of some into the Capitol." *See*, *e.g.*, Appendix, Exs. 4 and 11.

[62] *McGrain*, 273 U.S. at 174 ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The scope of the power of inquiry, in short, is as pene-

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vidual—whether a member of the public or an executive branch official—has a legal obligation to comply with a duly issued and valid congressional subpoena, unless a valid and overriding privilege or other legal justification permits non-compliance.[63] In *United States v. Bryan*, the Supreme Court stated:

> A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned.[64]

In *United States v. Nixon*, 418 U.S. 683, 703–16 (1974), the Supreme Court recognized an implied constitutional privilege protecting presidential communications. The Court held that the privilege is qualified, not absolute, and that it is limited to communications made "in performance of [a President's] responsibilities of his office and made in the process of shaping policies and making decisions."[65] The D.C. Circuit has recognized that, under certain, limited circumstances, executive privilege may be invoked to preclude congressional inquiry into specific types of presidential communications.[66]

Mr. Clark has refused to testify or produce documents in response to the subpoena. Mr. Clark's refusal to comply with the subpoena is ostensibly based on broad and undifferentiated assertions of various privileges, including claims of executive privilege purportedly asserted by former-President Trump.[67] As the Select Committee has repeatedly pointed out to Mr. Clark, his claims of executive privilege are wholly without merit, but even if some privilege applied to aspects of Mr. Clark's testimony or document production, he was required to assert any testimonial privilege on a question-by-question basis and produce a privilege log setting forth specific privilege claims for each withheld document. Mr. Clark has done neither.

1. Executive privilege has not been invoked.

Mr. Clark is not able to establish the foundational element of a claim of executive privilege: an invocation of the privilege by the Executive. In *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953), the Supreme Court held that executive privilege:

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trating and far-reaching as the potential power to enact and appropriate under the Constitution.").

[63] *Watkins*, 354 U.S. at 187–88 ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action."); *see also Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 99 (D.D.C. 2008) ("The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement.") (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

[64] *United States v. Bryan*, 339 U.S. 323, 331 (1950).

[65] *Nixon v. Administrator of General Services (GSA)*, 433 U.S. 425, 449 (1977) (internal quotes and citations omitted).

[66] *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 7293–33 (D.C. Cir. 1974).

[67] In correspondence with the Select Committee, Mr. Clark has supplemented his executive privilege claims with a variety of claims challenging the authority of the Select Committee and the subpoena, including that the Select Committee was not lawfully constituted and the subpoena seeks irrelevant information, is duplicative of other investigatory steps the Select Committee has taken, violates House rules, is "unfair," and is indicative of bias against his political views. Mr. Clark has not cited any legal authority for the proposition that any of these objections justify refusal to comply with a congressional subpoena because no such authority exists.

> [B]elongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.[68]

Here, the Select Committee has not been provided with any formal invocation of executive privilege by the incumbent President, the former President[69] or any other current employee of the executive branch. To the contrary, the executive branch has explicitly authorized Mr. Clark to provide the testimony and documents sought by the Select Committee. By letter dated July 26, 2021, the Department of Justice reminded Mr. Clark that Department attorneys are generally required to protect non-public information, including information that could be subject to various privileges "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.[70]

The Select Committee has not received any formal invocation of privilege from the former President. Mr. Trump has had no communication with the Select Committee—a fact the Select Committee has pointed out to Mr. Clark's counsel on several occasions.[71] Nor has the former President provided Mr. Clark any clear invocation of executive privilege with respect to his testimony. Instead, in justifying his refusal to comply with the Select Committee subpoena on November 5, Mr. Clark cited to an August 2 letter from Mr. Trump's counsel advising Mr. Clark that Mr. Trump would *not* seek judicial intervention to prevent his testimony before various congressional committees.[72] Notably, as acknowledged by Mr. Clark's attorney during the November 5 deposition, Mr. Clark relied on his interpretation of the August 2 letter as an executive privilege instruction from Mr. Trump without having taken any

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[68] *See also United States v. Burr*, 25 F. Cas. 187, 192 (CCD Va. 1807) (ruling that President Jefferson had to personally identify the passages he deemed confidential and could not leave this determination to the U.S. Attorney).

[69] The Supreme Court has held that a former President may assert executive privilege on his own, but his claim should be given less weight than that of an incumbent President. *Nixon v. GSA*, 433 U.S. at 449 (the "expectation of the confidentiality of executive communications has always been limited and subject to erosion over time after an administration leaves office"). The Court made note of the fact that neither President Ford nor President Carter supported former-President Nixon's assertion of privilege, which, the Court said "detracts from the weight of his contention [that the disclosure of the information at issue] impermissibly intrudes into the executive function and the needs of the Executive Branch." *Id.*; *see also Trump v. Thompson*, No. 21-cv-2769, at *13 (the incumbent President "is best positioned to evaluate the long-term interests of the executive branch and to balance the benefits of disclosure against any effect on the [. . .] ability of future executive branch advisors to provide full and frank advice").

[70] *See* Appendix, Ex. 5.

[71] *See* Appendix, Exs. 8 and 10.

[72] Mr. Clark contends that certain "conditions" attached to Mr. Trump's decision not to block testimony from Mr. Clark and other Department of Justice officials were triggered after the August 2 letter, thereby negating Mr. Trump's authorization for Mr. Clark to testify. (*See* Appendix, Exs. 4 and 11.) However, the fact remains that Mr. Clark has failed to put forward any invocation of executive privilege or revised instructions from Mr. Trump regarding the assertion of privilege with respect to Mr. Clark.[73]

[73] Appendix, Ex. 2, at pp. 11, 16.

[74] *See* Appendix, Exs. 4 and 11.

[75] *See Committee on the Judiciary v. McGahn*, 415 F.Supp.3d 148, 214 (D.D.C. 2019) ("To

steps to confirm this interpretation with Mr. Trump or his representatives.

Under these circumstances, there is no actual claim by Mr. Trump of executive privilege with respect to Mr. Clark's testimony and materials.

2. Mr. Clark is not entitled to absolute immunity.

Mr. Clark has refused to provide any responsive documents or answer any questions based on his asserted reliance on Mr. Trump's purported invocation of executive privilege. However, even if Mr. Trump had invoked executive privilege, and even if certain testimony or documents would fall within that privilege, Mr. Clark would not be absolutely immune from compelled testimony before the Select Committee.

In apparent recognition of the weakness of his legal position, Mr. Clark has repeatedly disavowed that he made any "blanket" or "absolute" claim of privilege.[74] Yet, he has clearly adopted such a position: He refused to answer any substantive questions put to him on November 5; he walked out of the deposition; he failed to return when the deposition reconvened; and he rejected several opportunities to reconsider his position after being confronted with controlling legal authority that foreclosed his claims.

Every court that has considered the concept of absolute immunity from compelled congressional testimony has rejected it. These holdings have underscored that even senior White House aides who advise the President on official government business are not immune from compelled congressional process.[75] To the extent that testimony by Mr. Clark relates to information reached by a privilege, Mr. Clark had the duty to appear before the Select Committee to provide testimony and invoke privilege where appropriate on a question-by-question basis.[76]

The Select Committee directed Mr. Clark and his counsel to the relevant authority on this point several times—at the deposition, when Mr. Clark first raised the issue of executive privilege, and in several letters since.[77] In his protracted correspondence with the Select Committee, Mr. Clark has assiduously avoided this clear authority, and has cited no case that holds otherwise. His categorical refusal to answer questions and produce documents is entirely improper and unsupported by legal authority.[78]

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[72] Mr. Clark contends that certain "conditions" attached to Mr. Trump's decision not to block testimony from Mr. Clark and other Department of Justice officials were triggered after the August 2 letter, thereby negating Mr. Trump's authorization for Mr. Clark to testify. (*See* Appendix, Exs. 4 and 11.) However, the fact remains that Mr. Clark has failed to put forward any invocation of executive privilege or revised instructions from Mr. Trump regarding the assertion of privilege with respect to Mr. Clark.[73]

[73] Appendix, Ex. 2, at pp. 11, 16.

[74] *See* Appendix, Exs. 4 and 11.

[75] *See Committee on the Judiciary v. McGahn*, 415 F.Supp.3d 148, 214 (D.D.C. 2019) ("To make the point as plain as possible, it is clear to this Court for the reasons explained above that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist."); *Miers*, 558 F. Supp.2d at 101 (White House counsel may not refuse to testify based on direction from President that testimony will implicate executive privilege).

[76] 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).

3. Even if the former President had invoked executive privilege and Mr. Clark had properly asserted it, the Select Committee seeks information from Mr. Clark to which executive privilege would not conceivably apply.

The law is clear that executive privilege does not extend to discussions relating to non-governmental business or solely among private citizens.[79] In *In re Sealed Case (Espy)*, 121 F.3d 729, 752 (D.C. Cir. 1997), the D.C. Circuit explained that the presidential communications privilege covered "communications authored or solicited and received by 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." The court stressed that the privilege only applies to communications intended to advise the President "on official government matters."[80] In *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004), the D.C. Circuit reaffirmed that the presidential communications privilege applies only to documents "solicited and received by the President or his immediate advisers in the Office of the President." Relying on *Espy* and the principle that "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,"[81] the circuit court refused to extend the privilege even to executive branch employees whose sole function was to provide advice to the President in the performance of a "quintessential and nondelegable Presidential power."[82]

The Select Committee seeks information from Mr. Clark on a range of subjects that the presidential communications privilege does not reach. 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.[83] At his deposition, Mr. Clark refused to answer questions regarding whether he used his personal phone or email for official business,[84] when he first met a specific Member of Congress,[85] and what statements he made to the media regarding January 6th.[86] Mr. Clark has failed to provide a specific basis for his refusal to answer these questions—none of which involve presidential communications—instead

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[78] Even if properly raised by Mr. Clark, any claim of executive privilege would fail because the Select Committee's need to investigate the facts and circumstances surrounding the January 6th assault on the U.S. Capitol and the Nation's democratic institutions far outweighs any executive branch interest in maintaining confidentiality, particularly where the core substance of Mr. Clark's activities has already been described by others within the Department of Justice. *See* Senate Report, at pp. 19–37. As noted by DOJ, 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." Appendix, Ex. 5, at p. 2.

[79] *Nixon v. GSA*, 433 U.S. at 449.

[80] *Id.*

[81] *Id.*, at 1116.

[82] *Id.*, at 1111. See also *Miers*, 558 F. Supp.2d at 100 (privilege claimants acknowledged that executive privilege applies only to "a very small cadre of senior advisors").

[83] After Mr. Clark walked out of his deposition, Members of the Select Committee and staff described on the record several topics they had intended to cover with Mr. Clark. Appendix, Ex. 2, at pp. 41–45.

[84] Appendix, Ex. 2, at p. 32.

[85] *Id.*, at p. 29.

pointing generally to his counsel's November 5 letter.[87] That November 5 letter, however, provided no authority or argument to justify Mr. Clark's refusal to answer questions on these topics.

Even with respect to Select Committee inquiries that involve Mr. Clark's direct communications with Mr. Trump, executive privilege does not bar Select Committee access to that information. Executive privilege reaches only those communications that relate to official government business.[88] Here, it appears that much of Mr. Clark's conduct regarding subjects of concern to the Select Committee did not relate 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 DOJ and then, when revealed, continued to pursue, even after being explicitly instructed to stop.

4. Mr. Clark has not established that any testimony or documents are protected by the attorney-client privilege.

Mr. Clark has also made unspecific claims that the subpoena implicates the attorney-client privilege and the work product doctrine.[89] As an initial matter, under longstanding congressional precedent, recognition of common law privileges such as the attorney-client privilege is at the discretion of congressional committees.[90] Further, Mr. Clark has failed to articulate a coherent argument regarding the applicability of the attorney-client privilege to the specific information sought by the Select Committee. Despite repeated requests,[91] Mr. Clark has failed to identify the client who could have an interest in protecting the confidentiality of communications with Mr. Clark or the subject matter of any purportedly privileged conversations.[92] "It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected," and to carry this burden one "must present the underlying facts demonstrating the existence of the privilege."[93] Further, as with assertions of other privileges, "[a] blanket assertion of the [attorney client] privilege will not suffice."[94]

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[86] *Id.*, at pp. 25–26

[87] *Id.*, at pp. 29–31. For example, when asked specifically "whether Mr. Clark used personal devices to communicate government business," Mr. Clark's attorney responded: "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]."*Id.*, at pp. 33–34.

[88] *See 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. In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (Deputy White House Counsel's "advice [to the President] on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.").

[89] *See* Appendix, Ex. 4.

[90] *See, e.g.*, Christopher M. Davis, Todd Garvey, and Ben Wilhelm, "Congressional Oversight Manual," Congressional Research Service, (RL30240, Mar. 31, 2021), pp. 61–64.

[91] *See* Appendix, Ex. 2, at pp. 35–36; Appendix, Ex. 10.

[92] The general subject matter of the communications is particularly critical here, where it is questionable as to whether Mr. Clark was providing legal advice within the scope of an attorney-client relationship. *See Lindsey*, 148 F.3d at 1106 ("advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege").

[93] *Id.* 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;

To the extent Mr. Clark believes a privilege applies, he was required to assert it specifically as to communications or documents, providing the Select Committee with sufficient information on which to evaluate each contention. He has not done so.[95]

5. The pendency of litigation involving the former President does not justify Mr. Clark's refusal to testify or produce documents.

In his November 8 letter, Mr. Clark's counsel stated that his "threshold objection" is not based on "purported executive-privilege absolutism," but rather that the mere pendency of litigation initiated by Mr. Trump regarding production of documents by the National Archives pursuant to the Presidential Records Act absolves Mr. Clark from compliance with a congressional subpoena. This is not a valid objection to a subpoena, and the Select Committee is not aware of any legal authority that supports this position. Moreover, the issues raised in the National Archives litigation (*Trump v. Thompson*) are wholly separate and distinct from those raised by Mr. Clark, and the result in that case will not justify his refusal to testify, no matter the outcome.

The dispute in *Trump v. Thompson* is whether a former President's assertion of executive privilege alone pursuant to statutory mechanism can prevent the Archivist from complying with the Presidential Records Act and turning over documents in the Archivist's possession in response to a congressional request that is authorized by the statute. In that case, the former President has made a formal invocation of executive privilege and has taken legal action to assert that privilege. The district court has held that a former President may not block compliance with the Presidential Records Act where the incumbent President has declined to assert privilege and has authorized the release of the requested documents.[96]

Mr. Trump has appealed the district court's adverse ruling. But resolution of *Trump v. Thompson* will not resolve Mr. Clark's undifferentiated claims of privilege. However *Trump v. Thompson* is resolved, it will not change the fact that Mr. Trump did not clearly invoke executive privilege with respect to the information sought by the Select Committee's subpoena to Mr. Clark. Nor would it alter Mr. Clark's obligation to appear for his deposition and assert executive privilege with respect to specific questions and documents. Nor would any ruling pull within the privilege testimony outside the limited sphere of executive privilege defined by the Supreme Court in *U.S. v. Nixon* and its progeny. In short, even a dramatic reversal and resounding victory for Mr. Trump in the *Trump v. Thompson* case would not justify Mr. Clark's defiance of the subpoena.

Mr. Clark has cited no authority for the proposition that he may avoid a subpoena on the ground that the law—on an unrelated issue in litigation that does not involve or implicate him—might change in his favor with the passage of time. As the Supreme Court noted, a congressional subpoena is not "a game of hare and

[95] Mr. Clark has also claimed that "ethical considerations" prevent his testimony, citing D.C. Bar Ethics Opinion No. 288 (*See* Appendix, Ex. 4, at p. 8). That opinion actually allows lawyers to produce information to Congress when given the choice between production or contempt.

[96] *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021) at *20.

hounds, in which the witness must testify only if cornered at the end of the chase."[97] Mr. Clark was required to testify and produce documents. His failure to do so constitutes contempt.[98]

D. Precedent Supports the Select Committee's Position to Proceed with Holding Mr. Clark in Contempt.

An individual who fails or refuses to comply with a House subpoena may be cited for contempt of Congress.[99] Pursuant to 2 U.S.C. § 192, the willful refusal to comply with a congressional subpoena is punishable by a fine of up to $100,000 and imprisonment for up to 1 year. A committee may vote to seek a contempt citation against a recalcitrant witness. This action is then reported to the House. If a resolution to that end is adopted by the House, the matter is referred to a U.S. Attorney, who has a duty to refer the matter to a grand jury for an indictment.[100]

The Chairman of the Select Committee repeatedly advised Mr. Clark that his claims of privilege are not well-founded and did not absolve him of his obligation to produce documents and provide deposition testimony. The Chairman repeatedly warned Mr. Clark that his continued non-compliance would put him in jeopardy of a vote to refer him to the House to consider a criminal contempt referral. Mr. Clark's failure to testify or produce responsive documents in the face of this clear advisement and warning by the Chairman constitutes a willful failure to comply with the subpoena.

SELECT COMMITTEE CONSIDERATION

The Select Committee met on Wednesday, December 1, 2021. [. . .]

SELECT COMMITTEE VOTES

Clause 3(b) of rule XIII requires the Select Committee to list the recorded votes during consideration of this Report: [. . .]

SELECT COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII, the Select Committee advises that the oversight findings and recommendations of the Select Committee are incorporated in the descriptive portions of this Report.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The Select Committee finds the requirements of clause 3(c)(2) of rule XIII and section 308(a) of the Congressional Budget Act of 1974, and the requirements of clause 3(c)(3) of rule XIII and section 402 of the Congressional Budget Act of 1974, to be inapplicable to this Report. Accordingly, the Select Committee did not request or

[97] *Bryan*, 339 U.S. at 331.

[98] The Select Committee did not accept the "proposal" set forth by Mr. Clark's attorney in November 29, 2021, correspondence with the Select Committee, whereby Mr. Clark would testify only at a public hearing before the full Select Committee, and only on topics of his choosing. This was not an appropriate accommodation, particularly as Mr. Clark had already advised the Select Committee that he had no substantive information to share on the topics referenced in the proposal. *See* Appendix, Ex. 4, at p. 11 ("Mr. Clark had nothing to do with the January 6 protests or incursion of some into the Capitol."); Appendix, Ex. 11, at p. 4 ("Mr. Clark had zero involvement in the events of January 6th").

[99] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

[100] *See* 2 U.S.C. § 194.

receive a cost estimate from the Congressional Budget Office and makes no findings as to the budgetary impacts of this Report or costs incurred to carry out the Report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII, the objective of this Report is to enforce the Select Committee's authority to investigate the facts, circumstances, and causes of the January 6th attack on the U.S. Capitol and issues relating to the peaceful transfer of power, in order to identify and evaluate problems and to recommend corrective laws, policies, procedures, rules, or regulations; and to enforce the Select Committee's subpoena authority found in section 5(c)(4) of House Resolution 503.

APPENDIX

Exhibits referenced above are as follows:

1. Subpoena to Jeffrey B. Clark.
2. Transcript of November 5, 2021 Deposition of Jeffrey B. Clark.
3. Staff Email to Counsel for Jeffrey B. Clark on November 3, 2021.
4. Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 5, 2021.
5. Letter from Department of Justice to Jeffrey B. Clark on July 26, 2021.
6. Staff Email to Counsel for Jeffrey B. Clark on November 5, 2021.
7. Email from Counsel for Jeffrey B. Clark to Select Committee Staff on November 5, 2021.
8. Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 5, 2021.
9. Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 8, 2021.
10. Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 9, 2021.
11. Letter and Memo from Counsel for Jeffrey B. Clark to Chairman Thompson on November 12, 2021.
12. Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 17, 2021.
13. Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 29, 2021.
14. Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 29, 2021.