House Calendar No. 53

117TH CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REPORT 117–200

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 1, 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-

Continued

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, with a quorum being present, to consider this Report and ordered it and the Resolution contained herein to be favorably reported to the House, without amendment, by a recorded vote of 9 ayes to 0 noes.

SELECT COMMITTEE VOTES

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

1. A motion by Ms. CHENEY to report the Select Committee Report for a 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 favorably to the House was agreed to by a recorded vote of 9 ayes to 0 noes (Rollcall No. 2).

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[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.

Select Committee Rollcall No. 2

Motion by Ms. Cheney to Favorably Report
Agreed to: 9 ayes to 0 noes

Members	Vote
Ms. Cheney, Vice Chair	Aye
Ms. Lofgren	Aye
Mr. Schiff	Aye
Mr. Aguilar	Aye
Mrs. Murphy (FL)	Aye
Mr. Raskin	Aye
Mrs. Luria	Aye
Mr. Kinzinger	Aye
Mr. Thompson (MS), Chairman	Aye

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 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.

Exhibit 1 — Subpoena to Jeffrey B. Clark

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Jeffrey B. Clark
c/o Robert Driscoll, Esq., McGlinchey, Stafford, PLLC

You are hereby commanded to be and appear before the

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

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: [redacted]

Date: October 29, 2021 Time: 10:00 a.m.

☑ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: United States Capitol Building, Washington, DC 20515

Date: October 29, 2021 Time 10:00 a.m.

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the United States Marshals Service

_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of October, 2021.

Bennie G. Thompson
Chairman or Authorized Member

Attest:

Clerk

PROOF OF SERVICE

Subpoena for Jeffrey B. Clark
c/o Robert Driscoll, Esq., McGlinchey, Stafford, PLLC

Address [redacted]

Washington, DC 20004

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

U.S. House of Representatives
117th Congress

Served by (print name) _____

Title _____

Manner of service _____

Date _____

Signature of Server _____

Address _____

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

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

October 13, 2021

VIA US and ELECTRONIC MAIL

Jeffrey Bossert Clark, Esq.
c/o Robert Driscoll, Esq.
McGlinchey Stafford PLLC
[redacted]

Dear Mr. Clark:

Pursuant to the authorities set forth in House Resolution 503 and the rules of the House of Representatives, the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") hereby transmits a subpoena that compels you to produce documents by October 29 and appear for a deposition on October 29.

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 and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures rules, or regulations.

The Select Committee's investigation has revealed credible evidence that you attempted to involve the Department of Justice in efforts to interrupt the peaceful transfer of power. As detailed in a report issued by the Senate Judiciary Committee, you proposed that the Department send a letter to state legislators in Georgia and other states suggesting that they delay certification of their election results and hold a press conference announcing that the Department was investigating allegations of voter fraud.[1] These proposals were rejected by Department leadership as both lacking a factual basis and inconsistent with the Department's institutional role.[2] The report further indicates that you engaged in unauthorized investigation of allegations of voter fraud and failed to abide by the Department's policy on contacts with the White House.[3] As a result of your efforts to prompt this Departmental action, the President considered installing you as Acting Attorney General. While he did not ultimately make that personnel change, your

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1 "Subverting Justice: How the Former President and his Allies Pressured DOJ to Overturn the 2020 Election," Majority Staff Report of the Senate Judiciary Committee, Issued October 7, 2021 at p. 19.

2 *Id.* at 22-23.

3 *Id.*

efforts risked involving the Department of Justice in actions that lacked evidentiary foundation and threatened to subvert the rule of law. Accordingly, the Select Committee seeks both documents and your deposition testimony regarding these and other matters that are within the scope of the Select Committee's inquiry.

A copy of the rules governing Select Committee depositions, and document production definitions and instructions are attached. Please contact staff for the Select Committee at 202-225-7800 if you have questions or wish to discuss this matter.

Sincerely,

Bennie G. Thompson
Chairman

SCHEDULE

In accordance with the attached Definitions and Instructions, you, Jeffrey B. Clark, are hereby required to produce, all documents and communications in your possession, custody, or control including any such documents or communications stored or located on personal devices (e.g., personal computers, cellular phones, tablets, etc.), in personal accounts and/or on personal applications (e.g., email accounts, contact lists, calendar entries, etc.)— referring or relating to the following items. If no date range is specified below, the applicable dates are for the time period April 1, 2020-present.

1. Communications referring or relating in any way to plans, efforts, or discussions regarding the Department of Justice's involvement in investigating allegations of election fraud in the 2020 Presidential election.

2. All documents and communications relating in any way to a draft letter (including previous drafts of the letter) from the Department of Justice to state officials regarding the convening of a special legislative session, delay in certification of election results, or any other matters concerning the fall 2020 election.

3. From November 3, 2020, through January 20, 2021, communications relating in any way to a possible press conference or other public statement by the Department of Justice regarding investigations of allegations of election fraud.

4. All documents and communications relating in any way to the possibility of the Department of Justice filing documents in the United States Supreme Court regarding allegations of election fraud and/or the certification of the results of the election.

5. All documents and communications relating in any way to a November 9, 2020, memorandum from Attorney General William Barr concerning investigation of voter fraud allegations.

6. From November 3, 2020, through January 20, 2021, all documents provided to you for reviewing, assessing, or reporting on the security of election systems in the United States.

7. From November 3, 2020, through January 20, 2021, all documents and communications provided to you relating in any way to purported election irregularities, election-related fraud, or other election-related malfeasance.

8. All documents and communications relating in any way to specific allegations of voter fraud in Georgia, Pennsylvania, Michigan, Arizona, or any other states.

9. All documents and communications relating in any way to alleged interference with the tabulation of votes by machines manufactured by Dominion Voting Systems.

10. All documents and communications relating in any way to alleged interference in the fall 2020 election by foreign governments, organizations, or individuals.

11. Any documents and communications relating in any way to foreign influence in the United States 2020 Presidential election through social media narratives and disinformation.

12. All communications with former President Trump, former Chief Staff to the President Mark Meadows, or other individual who worked in the White House complex during the Trump Administration, including any employee or detailee, relating in any way to allegations of fraud in the fall 2020 election.

13. All communications with Representative Scott Perry or other Members of Congress relating in any way to allegations of fraud in the fall 2020 election, or to delaying or preventing the certification of the election of Joe Biden as President.

14. All communications with attorneys representing President Trump or the Trump re-election campaign relating in any way to litigation involving the fall 2020 election.

15. All communication with the Trump re-election campaign relating in any way to the fall 2020 election.

16. All communications with Professor John Eastman relating in any way to the fall 2020 election.

17. All documents and communications relating in any way to state legislatures' selection, or potential selection, of alternate sets of electors to cast electoral votes in the fall 2020 election.

18. All documents and communications relating in any way to Congress's or the Vice President's role and authority when counting electoral votes.

DOCUMENT PRODUCTION DEFINITIONS AND INSTRUCTIONS

1. In complying with this request, produce all responsive documents, regardless of classification level, that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.

2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Committee').

3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, the request shall be read also to include that alternative identification.

4. The Committee's preference is to receive documents in a protected electronic form (i.e., password protected CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions. With specific reference to classified material, you will coordinate with the Committee's Security Officer to arrange for the appropriate transfer of such information to the Committee. This includes, but is not necessarily limited to: a) identifying the classification level of the responsive document(s); and b) coordinating for the appropriate transfer of any classified responsive document(s).

5. Electronic document productions should be prepared according to the following standards:

   a. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   b. All electronic documents produced to the Committee should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:

      BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph(s) or request(s) in the Committee's letter to which the documents respond.

9. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.

10. The pendency of or potential for litigation shall not be a basis to withhold any information.

11. In accordance with 5 U.S.C.§ 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.

12. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.

13. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production, as well as a date certain as to when full production will be satisfied.

14. In the event that a document is withheld on any basis, provide a log containing the following information concerning any such document: (a) the reason it is being withheld, including, if applicable, the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the withholding.

15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control. Additionally, identify where the responsive document can now be found including name, location, and contact information of the entity or entities now in possession of the responsive document(s).

16. If a date or other descriptive detail set forth in this request referring to a document

is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

17. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
(2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of classification level, how recorded, or how stored/displayed (e.g. on a social media platform) and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, computer or mobile device screenshots/screen captures, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, through a social media or online platform, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.

4. The term "including" shall be construed broadly to mean "including, but not limited to."

5. The term "Company" means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.

6. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; (b) the individual's business or personal address and phone number; and (c) any and all known aliases.

7. The term "related to" or "referring or relating to," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.

8. The term "employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, assignee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.

9. The term "individual" means all natural persons and all persons or entities acting on their behalf.

health, safety, and well-being of others present in the Chamber and surrounding areas. Members and staff will not be permitted to enter the Hall of the House without wearing a mask. Masks will be available at the entry points for any Member who forgets to bring one. The Chair views the failure to wear a mask as a serious breach of decorum. The Sergeant-at-Arms is directed to enforce this policy. Based upon the health and safety guidance from the attending physician and the Sergeant-at-Arms, the Chair would further advise that all Members should leave the Chamber promptly after casting their votes. Furthermore, Members should avoid congregating in the rooms leading to the Chamber, including the Speaker's lobby. The Chair will continue the practice of providing small groups of Members with a minimum of 5 minutes within which to cast their votes. Members are encouraged to vote with their previously assigned group. After voting, Members must clear the Chamber to allow the next group a safe and sufficient opportunity to vote. It is essential for the health and safety of Members, staff, and the U.S. Capitol Police to consistently practice social distancing and to ensure that a safe capacity be maintained in the Chamber at all times. To that end, the Chair appreciates the cooperation of Members and staff in preserving order and decorum in the Chamber and in displaying respect and safety for one another by wearing a mask and practicing social distancing. All announced policies, including those addressing decorum in debate and the conduct of votes by electronic device, shall be carried out in harmony with this policy during the pendency of a covered period.

117TH CONGRESS REGULATIONS FOR USE OF DEPOSITION AUTHORITY

COMMITTEE ON RULES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 4, 2021.

Hon. NANCY PELOSI,
Speaker, House of Representatives,
Washington, DC.

MADAM SPEAKER: Pursuant to section 3(b) of House Resolution 8, 117th Congress, I hereby submit the following regulations regarding the conduct of depositions by committee and select committee counsel for printing in the Congressional Record.

Sincerely,

JAMES P. MCGOVERN,
Chairman, Committee on Rules.

REGULATIONS FOR THE USE OF DEPOSITION AUTHORITY

1. Notices for the taking of depositions shall specify the date, time, and place of examination. Depositions shall be taken under oath administered by a member or a person otherwise authorized to administer oaths. Depositions may continue from day to day.

2. Consultation with the ranking minority member shall include three days' notice before any deposition is taken. All members of the committee shall also receive three days written notice that a deposition will be taken, except in exigent circumstances. For purposes of these procedures, a day shall not include Saturdays, Sundays, or legal holidays except when the House is in session on such a day.

3. Witnesses may be accompanied at a deposition by personal, nongovernmental counsel to advise them of their rights. Only members, committee staff designated by the chair or ranking minority member, an official reporter, the witness, and the witness's counsel are permitted to attend. Observers or counsel for other persons, including counsel for government agencies, may not attend.

4. The chair of the committee noticing the deposition may designate that deposition as part of a joint investigation between committees, and in that case, provide notice to the members of the committees. If such a designation is made, the chair and ranking minority member of the additional committee(s) may designate committee staff to attend pursuant to regulation 3. Members and designated staff of the committees may attend and ask questions as set forth below.

5. A deposition shall be conducted by any member or committee counsel designated by the chair or ranking minority member of the Committee that noticed the deposition. When depositions are conducted by committee counsel, there shall be no more than two committee counsel permitted to question a witness per round. One of the committee counsel shall be designated by the chair and the other by the ranking minority member per round.

6. Deposition questions shall be propounded in rounds. The length of each round shall not exceed 60 minutes per side, and shall provide equal time to the majority and the minority. In each round, the member(s) or committee counsel designated by the chair shall ask questions first, and the member(s) or committee counsel designated by the ranking minority member shall ask questions second.

7. Objections must be stated concisely and in a non-argumentative and non-suggestive manner. A witness's counsel may not instruct a witness to refuse to answer a question, except to preserve a privilege. In the event of professional, ethical, or other misconduct by the witness's counsel during the deposition, the Committee may take any appropriate disciplinary action. The witness may refuse to answer a question only to preserve a privilege. When the witness has refused to answer a question to preserve a privilege, members or staff may (1) proceed with the deposition, or (11) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer. If a member of the committee chooses to appeal the ruling of the chair, such appeal must be made within three days, in writing, and shall be preserved for committee consideration. The Committee's ruling on appeal shall be filed with the clerk of the Committee and shall be provided to the members and witness no less than three days before the reconvened deposition. A deponent who refuses to answer a question after being directed to answer by the chair may be subject to sanction, except that no sanctions may be imposed if the ruling of the chair is reversed by the committee on appeal.

8. The Committee chair shall ensure that the testimony is either transcribed or electronically recorded or both. If a witness's testimony is transcribed, the witness or the witness's counsel shall be afforded an opportunity to review a copy. No later than five days after the witness has been notified of the opportunity to review the transcript, the witness may submit suggested changes to the chair. Committee staff may make any typographical and technical changes. Substantive changes, modifications, clarifications, or amendments to the deposition transcript submitted by the witness must be accompanied by a letter signed by the witness requesting the changes and a statement of the witness's reasons for each proposed change. Any substantive changes, modifications, clarifications, or amendments shall be included as an appendix to the transcript conditioned upon the witness signing the transcript.

9. The individual administering the oath, if other than a member, shall certify on the transcript that the witness was duly sworn. The transcriber shall certify that the transcript is a true record of the testimony, and the transcript shall be filed, together with any electronic recording, with the clerk of the committee in Washington, DC. Depositions shall be considered to have been taken in Washington, DC, as well as the location actually taken once filed there with the clerk of the committee for the committee's use. The chair and the ranking minority member shall be provided with a copy of the transcripts of the deposition at the same time.

10. The chair and ranking minority member shall consult regarding the release of deposition testimony, transcripts, or recordings, and portions thereof. If either objects in writing to a proposed release of a deposition testimony, transcript, or recording, or a portion thereof, the matter shall be promptly referred to the committee for resolution.

11. A witness shall not be required to testify unless the witness has been provided with a copy of section 3(b) of H. Res. 8, 117th Congress, and these regulations.

REMOTE COMMITTEE PROCEEDINGS REGULATIONS PURSUANT TO HOUSE RESOLUTION 8, 117TH CONGRESS

COMMITTEE ON RULES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 4, 2021.

Hon. NANCY PELOSI,
Speaker, House of Representatives,
Washington, DC.

MADAM SPEAKER: Pursuant to section 3(s) of House Resolution 8, 117th Congress, I hereby submit the following regulations regarding remote committee proceedings for printing in the CONGRESSIONAL RECORD.

Sincerely,

JAMES P. MCGOVERN,
Chairman,
Committee on Rules.

REMOTE COMMITTEE PROCEEDINGS REGULATIONS PURSUANT TO HOUSE RESOLUTION 8

A. PRESENCE AND VOTING

1. Members participating remotely in a committee proceeding must be visible on the software platform's video function to be considered in attendance and to participate unless connectivity issues or other technical problems render the member unable to fully participate on camera (except as provided in regulations A.2 and A.3).

2. The exception in regulation A.1 for connectivity issues or other technical problems does not apply if a point of order has been made that a quorum is not present. Members participating remotely must be visible on the software platform's video function in order to be counted for the purpose of establishing a quorum.

3. The exception in regulation A.1 for connectivity issues or other technical problems does not apply during a vote. Members participating remotely must be visible on the software platform's video function in order to vote.

4. Members participating remotely off-camera due to connectivity issues or other technical problems pursuant to regulation A.1 must inform committee majority and minority staff either directly or through staff.

5. The chair shall make a good faith effort to provide every member experiencing connectivity issues an opportunity to participate fully in the proceedings, subject to regulations A.2 and A.3.

Exhibit 2 — Transcript of November 5, 2021 Deposition of Jeffrey B. Clark

SELECT COMMITTEE TO INVESTIGATE THE
JANUARY 6TH ATTACK ON THE U.S. CAPITOL,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

DEPOSITION OF: JEFFREY CLARK

Friday, November 5, 2021

Washington, D.C.

The interview in the above matter was held in room [redacted], commencing at 10:00 a.m.

Present: Representatives Thompson, Lofgren, Schiff, Aguilar, Murphy, Raskin, Luria, Cheney, and Kinzinger.

Appearances:

For the SELECT COMMITTEE TO INVESTIGATE

THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL:

[redacted]

For THE WITNESS:

HARRY MACDOUGALD

Caldwell, Carlson, Elliott & DeLoach, LLP

[redacted]

[redacted]

[redacted]

[redacted]. Good morning. This is a deposition of Jeffrey B. Clark, conducted by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol, pursuant to House Resolution 503.

Mr. Clark, if you could please state your full name and spell your last name for the record.

The Witness. Sure. Jeffrey B. Clark. Clark is C-l-a-r-k.

[redacted]. This will be a staff-led deposition. Members of the select committee, I believe, are already in attendance and may also choose to ask questions.

My name is [redacted], and I'm the chief investigative counsel to the select committee. I think we have Vice Chair Cheney, Ms. Lofgren, two members of the select committee, who are attending via Webex.

We are conducting a deposition in person.

So, under the House deposition rules, neither committee members nor staff may discuss the substance of the testimony that you provide today, unless the committee approves release. This is essentially an executive session of the select committee.

You and your attorney will have an opportunity to review the transcript. The court reporter is taking a verbatim account of the testimony. And you'll have a chance, Mr. Clark, to read that and review it before it is finalized to ensure that it is correct.

Before we begin, I would like to describe just a few ground rules. We'll follow the House deposition rules that we have provided to your counsel, Mr. MacDougald, previously. Under the House deposition rules, counsel for other persons or government agencies may not attend, but you are permitted to have your attorney present, and I see that you do have your attorney with you.

Mr. MacDougald, if you could just introduce yourself and spell your name for the court reporter?

Mr. MacDougald. Yes, sir. My name is Harry MacDougald. I represent Mr. Clark in this proceeding. My last name is spelled M-a-c, capital D-o-u-g-a-l-d.

[redacted]. So, as noted, there is an official reporter transcribing the record of the deposition. Please wait until each question is completed before you begin your response. We will try to wait until your response is complete before we ask our next question. The stenographer cannot record nonverbal responses, such as shaking your head. So it's important that you answer each question with an audible verbal response.

We ask that you provide complete answers based on your best recollection. If a question is not clear, please ask for clarification. If you do not know the answer, then just simply say so. You may only refuse to answer a question to preserve a privilege recognized by the select committee. If you refuse to answer a question based on privilege, staff may either proceed with the deposition or seek a ruling from the chairman based on the objection. If the chairman overrules such an objection, you are required to answer the question.

I also have to remind you that it is unlawful to deliberately provide false information to Congress. Since your deposition is under oath, we ask that you please stand and raise your right hand to be sworn by the court reporter.

[Witness sworn.]

BY [redacted]:

Q So, Mr. Clark, I want to give you a chance to open -- to provide any opening comments you have. But I just want to make sure you know who everyone is on our side of the table.

So I'll introduce myself. I am the chief investigative counsel. With me is [redacted]

[redacted] and [redacted], who are senior investigative counsel; [redacted], who is an investigative counsel; [redacted] and [redacted], who are also counsel to the committee; and I see [redacted], who is the deputy staff director and chief counsel to the select committee; and [redacted], who is our parliamentarian. [redacted], who is a researcher, is here as well.

On the video, again, I think [redacted], our staff director, has joined. And I also introduced before Ms. Lofgren and Ms. Cheney.

So, with that, if there is anything --

Mr. MacDougald. Yes. I would like to advise counsel and the committee that I delivered a letter to [redacted], which was addressed to Representative Thompson, on behalf of Mr. Clark that asserts executive privilege with respect to testimony and documents that have been subpoenaed from Mr. Clark.

The grounds of our assertion are set forth in the letter. It is 12 pages. And, based on those objections, we do not intend to answer any questions or produce any documents today, but we have appeared in compliance with the subpoena in order to assert those objections, as opposed to just refusing to show up.

[redacted]. All right. So I appreciate that the letter has been delivered. We did receive it, as you --

Mr. MacDougald. And I actually have some copies for other counsel, a few. Maybe not for everybody, but I would be happy to pass those around, keeping one for myself.

[redacted]. Thank you, Mr. MacDougald.

So let me make sure I understand. The letter, which I haven't had a chance to read yet, sets forth the position that Mr. Clark will not answer any question, regardless of its subject matter.

Mr. MacDougald. Correct.

[redacted]. Due to executive privilege.

Mr. MacDougald. Correct.

[redacted]. Will also not produce any documents.

The Witness. Correct.

Mr. MacDougald. And I interrupt just to say also on the basis that it would be prudent to await the conclusion with finality of the judicial review proceedings that are going on in the DDC.

[redacted]. Again, I haven't had a chance to read the letter. But I will say for the record that our intention today was to ask questions well beyond direct communications with the former President, questions about your involvement with Members of Congress, questions about your work within the Department of Justice, your interaction within the Department well beyond direct communications with the President.

Again, still your position that, beyond direct communications, all of the entire subject matter is subject to executive privilege?

Mr. MacDougald. Yes. That is our position, [redacted]. And the reason for that is that the privileges that are under the overall umbrella of executive privilege are numerous, including Presidential communications. In addition, as a Department of Justice official, there is a law enforcement privilege, law enforcement investigation privilege. There are -- there is a deliberative process privilege. There are any number, not to mention the attorney-client privilege. So all of these things are applicable in this context. I understand that's disputed by the committee.

[redacted]. Uh-huh.

Mr. MacDougald. And I don't want to get into an argument with you all about that today. That's being argued in court. And there will ultimately be a decision about

that. We don't know where that line is going to be drawn.

Mr. Clark finds himself in a position of having worked for a President who has asserted executive privilege, giving him a letter asserting executive privilege. And, therefore, as his lawyer, I can't allow him to be exposed to the risk of guessing where that line is going to be drawn. And so, for now, we are standing on executive privilege. We will not be answering any questions or producing any documents.

[redacted]. You are in receipt, Mr. Clark, of -- are you not, of a letter dated July 21st, I believe, of earlier this year, from the Department of Justice, indicating that, in view of the current White House, the current Department of Justice, it would not be appropriate to assert executive privilege?

Mr. MacDougald. We understand that's the position of the Department of Justice on this matter --

The Witness. But I --

Mr. MacDougald. And the White House. I mean, he did receive a letter. Okay?

The Witness. I want to reserve all rights as to that letter, including rights to -- to make any and all arguments about it, but I am in receipt of the letter, yes.

[redacted]. Okay. Can we take 5 minutes?

Mr. MacDougald. Sure.

[redacted]. I just want to consult with the parliamentarian about sort of what, if anything, we need to do on the record to preserve the ongoing conversation.

Mr. MacDougald. Sure.

[redacted]. I appreciate it. Thank you.

Mr. MacDougald. Thank you, sir.

[redacted]. So we'll take a brief recess.

[Recess.]

BY [redacted]:

Q Thank you for your indulgence. I had a chance to quickly look at the letter. And I do want to ask a few questions just to clarify more specifically the basis of the privilege assertion and ensure that we have on the record some of the things that happened before today.

So, Mr. Clark, you were subpoenaed back on October 13th to appear before the select committee, and we agreed to defer that to today when you obtained new counsel, Mr. MacDougald. Is that right?

A That's correct.

Q And were you given, and I asked you about this before, a letter back -- dated July 26th of 2021, that -- and I'm going to quote from it. It was from the Department of Justice, indicating that committees had sought your testimony about any efforts by President Trump or any DOJ officials to advance unsubstantiated allegations of voter fraud, challenge the 2020 election results, stop Congress' count of the electoral college vote, or overturn President Biden's certified victory.

And, in response to congressional inquiries on those subject matters, the Department of Justice indicated -- and I'm going to quote again -- given these extraordinary circumstances, including President Biden's determination that executive privilege -- determination on executive privilege, which was that it wouldn't be appropriate, and having reviewed the scope of the committee's request and reviews, the Department authorizes you to provide unrestricted testimony to the committees irrespective of potential privilege, as long as the testimony is confined to the scope of the interviews as set forth by the committees. And you received that letter back in July. Is that right?

A I've answered that question already. I will refer to counsel.

Q And are you aware that other representatives of the Department of Justice, frankly your superiors at the time that you were employed there, received a similar letter and have provided testimony to congressional committees?

A Yes.

Q And, yet, your position today is in stark contrast to theirs.

Mr. MacDougald. Yes, we address that in the letter.

[redacted]. Okay.

BY [redacted]:

Q Now, in the letter, which, again, I appreciate you giving us this morning, but we have not had a chance to review before.

Mr. MacDougald. And I would like, on the record, to apologize to you, [redacted], and to the committee and staff for being so late in delivering this item to you when you were inquiring about our position. So, two things: One, I want to thank you for the one-week extension. Very much appreciate it. But, secondly, to apologize for the inconvenience. Having just gotten into the matter, we have been working on this right up until yesterday afternoon and preparing what we were going to say, and we just weren't ready to tell you.

[redacted]. Mr. MacDougald, I understand. These are important issues, and we want to make sure you and your client are fully prepared.

Mr. MacDougald. It is a very important matter.

[redacted]. We are trying our best to get to the facts and want to make sure we are treating all witnesses with fairness and professional consideration.

But, going back to the letter, attached to the letter is a letter that you received from Doug Collins, who represented the former President, that essentially says, upon receipt of that DOJ authorization, that the former President will not seek judicial

intervention to prevent your testimony or the testimony of the other Department of Justice officials who have already received letters from the Department similar to July 26th, 2021, letter.

So you attach a letter explicitly from the former President saying that he would not seek judicial intervention to prevent you from going forward with this deposition or other inquiries from Congress.

Mr. MacDougald. [redacted], we address the letter and what it means in detail in our letter. And we do not agree with the characterization that you just made of that letter. We view that letter as directly asserting executive privilege. And the nonobjection statement that you read from is expressly conditioned on certain things not happening. Those things have happened.

Furthermore, the President has in fact filed suit asserting executive privilege against the committee, and specifically, he referenced his invocation of executive privilege with respect to former DOJ personnel, such as Mr. Clark. So, under the circumstances, I represent a client who asked -- the President for whom he worked has unequivocally asserted executive privilege.

I understand that you all don't agree with that, and you think the current President has the authority to waive it. We don't agree with that. That's being decided in court now.

[redacted]. Has there been any further communication, direct communication, from the former President's representatives to Mr. Clark about executive privilege?

Mr. MacDougald. I have had no communication with any attorney for Mr. Trump about any of this.

[redacted]. Your letter indicates -- and I'm looking at pages 2 and 3 -- that the former President did directly direct other witnesses who have been subpoenaed by the

subcommittee -- Mark Meadows, Dan Scavino, Kash Patel, and Steve Bannon -- asserting -- instructing them not to testify. Did you get any similar communication from the former President similarly directing that you not provide testimony?

Mr. MacDougald. We contend the August 2nd letter from Mr. Collins on its face and in light of subsequent developments constitutes such a direction.

[redacted]. And your letter also cites the pending litigation. So, to be clear about your position, the pending litigation that the President has filed, Trump v. Thompson, in the D.C. district court governs, in your view, your ability to testify to the select committee without regard to executive privilege.

Mr. MacDougald. That's not accurate.

[redacted]. Okay. Well, help me understand.

Mr. MacDougald. So the President has asserted executive privilege. He's instructed Mr. Clark to assert executive privilege.

[redacted]. And your view is -- I'm sorry to interrupt you.

Mr. MacDougald. Yes.

[redacted]. But that is in the August the 2nd letter?

Mr. MacDougald. And in light of subsequent developments and in light of footnote 2 in their brief, in their original brief in support of the application for preliminary injunction. So all those things together clearly instruct Mr. Clark to abide by President Trump's invocation of executive privilege. And, as his attorney, I cannot expose him to the risk of going against that.

[redacted]. Let me pause and see if anybody else -- go ahead, [redacted].

Mr. Schiff, do you have any questions?

Mr. Schiff. I do. I just want to make sure that I understand correctly. You have not received any communication from the President instructing Mr. Clark to assert

executive privilege. Is that correct?

Mr. MacDougald. That is not correct. I've just explained that.

Mr. Schiff. No, you haven't. So have you received a letter --

Mr. MacDougald. You may not agree with the explanation, but it is an explanation. We have a letter from August 2nd asserting --

Mr. Schiff. Well --

Mr. MacDougald. -- the privilege. We have subsequent developments that invalidate the conditions to testimony --

Mr. Schiff. Mr. --

Mr. MacDougald. -- we have the President's lawsuit.

Mr. Schiff. Do you have a letter from the President instructing Mr. Clark to assert executive privilege?

Mr. MacDougald. Yes.

Mr. Schiff. Do you have one or do you not?

Mr. MacDougald. Yes. It is attached to my letter.

Mr. Schiff. Is that a letter to Mr. Clark?

Mr. MacDougald. Yes. It is.

Mr. Schiff. From the President's counsel instructing him to assert executive privilege.

Mr. MacDougald. That's correct.

Mr. Schiff. Can I see that letter?

This is the letter that concludes: Nonetheless, to avoid further distraction and without in any way otherwise waiving executive privilege associated with matters the committee are purporting to investigate, President Trump will not agree -- will agree not to seek judicial intervention to prevent your testimony or the testimony of five other

former Department officials (Richard Donoghue, Patrick Hovakimian, Byung "BJay" Pak, Bobby Christine, and Jeffrey Clark) who have already received letters from the Department similar to the July 26th letter you received. As long as the committees do not seek privileged information from any other Trump administration officials or advisers. If the committee do seek such information, however, we will take all necessary appropriate steps on President Trump's behalf to defend the Office of the Presidency.

This is the letter you're referring to?

Mr. MacDougald. Yes, Mr. Schiff. I apologize for the --

Mr. Schiff. And you are aware that President Trump has not sought judicial intervention to prevent Mr. Clark's testimony?

Mr. MacDougald. Not specifically as to Mr. Clark, but the current lawsuit against the committee specifically refers to the invocation of executive privilege as to persons like Mr. Clark in footnote 2 of the opening brief in support of their application for preliminary injunction, which has been delivered, of course, to committee counsel.

Mr. Schiff. I just want to make sure that I have the chronology correct. The President's counsel wrote to Mr. Clark saying that they would not seek judicial intervention to prevent his testimony, and they have not done so. Correct?

Mr. MacDougald. That is not a fair or accurate summary of the letter. The letter attaches conditions to that, and those conditions have not been met.

Mr. Schiff. Well, if, presumably, Counsel, if the conditions have not been met, President Trump was more than capable of seeking judicial intervention to stop Mr. Clark's testimony. Correct?

Mr. MacDougald. Yes, Congressman Schiff.

Mr. Schiff. And he has not done so. Has he?

Mr. MacDougald. Representative, we disagree with that. And we're not here to

have an oral argument about these --

Mr. Schiff. Counsel, I am just establishing the facts.

Mr. MacDougald. Well, the facts are plain in the documents.

Mr. Schiff. And you are aware, Mr. Clark, that those in a higher position in the Justice Department, who arguably would have a stronger claim of privilege if there was one to be made, have testified before Congress as to the same matters that you are being asked to testify?

The Witness. Mr. MacDougald has answered that question, respectfully, Representative Schiff.

Mr. Schiff. You are aware of that, Mr. MacDougald?

Mr. MacDougald. Oh, yes. It's addressed in the letter. It's addressed in the letter.

And what I would say to you all is I don't want to get into any kind of a bickering or arguing about the contours of executive privilege and whether an argument we have made is correct in person verbally. These are very important matters. We have worked hard on this letter to assert the objections. And we invite you all to respond to us, but we think that dialogue is best conducted in writing because it is so important. And it's important to be clear and precise in what we say.

And our position, we've stated it. We're not answering questions today. We're not producing documents today. We are leaving the door open for further dialogue about the points being raised in the letter. And I think that's the process that we ought to pursue.

Now, you know, the Trump v. Thompson case will ultimately be decided one way or the other, and then we'll know where we stand on executive privilege. Both sides will know.

Mr. Schiff. Before I yield back to committee counsel, I just want to state, for the

record, people in a superior position to Mr. Clark's who were at the Justice Department and were his superiors at the time of the events of interest to the committee have testified. The current Justice Department and the current President of the United States have not asserted privilege, in fact have instructed Mr. Clark they will not assert privilege.

He has refused to testify. He has refused to testify, not on the basis of any action that President Trump has taken to seek judicial intervention in this proceeding. We have not received any communication that I'm aware of from the former President asserting privilege.

And Mr. Clark, in my opinion, is asserting -- arrogating to himself a decision that his superiors disagree with, that the President has not asserted to this committee, and in defiance of the lawful process of this committee.

And I yield back to counsel.

Mr. MacDougald. And, respectfully, for the record, disagree with Congressman Schiff's assertion, but let's leave it there.

[redacted]. Let me just ask, to follow up on Congressman Schiff's question, has there been any effort to confirm your interpretation of the August 2nd letter with the former President's counsel?

Mr. MacDougald. I have indicated previously I have not communicated with them, but I can read.

[redacted]. So the interpretation that you're providing today that the August 2nd letter is, in fact, a direction not to testify, just based on --

Mr. MacDougald. We go through that in detail in this letter.

[redacted]. Okay.

Mr. MacDougald. So there are a number of circumstances that combine the direct statements in the letter.

Beyond that, there -- the statement that you all -- the committee is relying on expressly states that it is not waiving anything, and there are conditions attached. Those conditions are not being met, and there is a pending executive privilege lawsuit that specifically refers to people in Mr. Clark's position.

[redacted]. And, again, Mr. MacDougald, I appreciate that that is your position. I think it's important for us, as we consider options, contempt referrals or litigation, to make a record just to make sure --

Mr. MacDougald. I understand that.

[redacted]. -- that we're clear as to what the basis of the assertion is, on what facts or communications it relies. So I don't mean to sound belligerent. I'm just trying to ensure that we understand --

Mr. MacDougald. I understand and respect that. You have a job. I have a job.

[redacted]. To that end, we do need to go through, not every question that I would have asked, but I do need to flag particular areas that we seek to develop. I understand your position would be, as I go through those, that you will not answer that question due to assertion of executive privilege, but that, Mr. MacDougald, establishes the factual basis of what we're seeking as we consider further proceedings.

Mr. MacDougald. We're not willing to do that.

[redacted]. Well, again, this is a deposition of the select committee. I have to go through and ask some questions that will understandably prompt privilege. But, to ensure that the court ultimately or the Justice Department has a record of the subject matters and can evaluate the privilege claim, it's important for us to put those subject matters in the form of questions directly to Mr. Clark.

Mr. MacDougald. Let me confer with Mr. Clark.

Do you mind if we step out?

[redacted]. Yes. Of course. We'll go off the record.

[Recess.]

[redacted]. Mr. MacDougald, again, our intention would be just to complete a record to ensure that the court or the Department has a clear record of the subject matters. And we want to go through those questions, understanding that they will trigger an assertion of privilege, but we think it is important to put them to the scope of our intended areas of inquiry on the record.

Mr. MacDougald. Our position is that we have asserted the objection, and there's a pending court proceeding that will determine the contours of executive privilege with respect to the committee's investigation. And it is premature to engage in that exercise and that it is just unproductive to engage these questions. And we invite the committee, as we did in the letter, to have some dialogue with us. But, pending resolution of that case, we do not think that going through that process that you described is productive or worthwhile. It is just not what we are doing.

As we say in the letter, if the committee in the meantime would like to significantly narrow the scope of the inquiry that it wishes to pursue with Mr. Clark, we are willing to discuss that and do that. I mean, if it is more narrowly focused on the events of January 6th, that's something that we can work with you on. But, right now, executive privilege not -- Mr. Clark has ethical responsibilities to respect the assertion of privilege until this is determined judicially.

[redacted]. You, right now, have no idea exactly what it is I intend to ask Mr. Clark because I haven't had a chance yet. We haven't had any negotiations. We haven't had any sort of proffer or exchange of information. So it's important, in the view of the select committee, to establish for Mr. Clark, for the Department of Justice, for potential court to evaluate the claim, to put on the record what the scope of our area of

inquiry is of Mr. Clark. And, again, I understand that he's not going to provide -- is unlikely to provide any answers to those questions, and that is his right at this time to assert that privilege.

But, to the extent we are going to challenge the privilege, Mr. MacDougald, we need a record that would form the basis of that challenge.

Mr. MacDougald. One second.

[Discussion off the record.]

Mr. MacDougald. The concern that I have, [redacted], is that, at some point, this devolves into badgering the witness. And I would be surprised if the committee undertook litigation against Mr. Clark concerning the scope of the executive privilege while the Trump v. Thompson case is ongoing. That would be highly duplicative, wasteful of resources. And most of those privilege questions can be answered by that case.

And so, with respect to topics, you know, the assertion of privilege, it's -- you know, my client is in a bind. He's under subpoena. And, yet, the President that he worked for has asserted executive privilege. Okay? He cannot testify under those circumstances, period.

And so we've got a court proceeding underway that's going to resolve the scope of that. And the prudent thing is to let that play out. And, like I said, in the meantime, if the committee would like to significantly narrow the scope of the inquiry, we're certainly willing to entertain that. And, of course, we are willing to have a dialogue about the privilege assertions in the document, and if the committee chose to identify with greater specificity in that dialogue what it was seeking, and we could respond and move forward.

[redacted]. Mr. MacDougald, we haven't had a chance to have this conversation because there has been no discussion, no negotiations.

Mr. MacDougald. One at a time.

[redacted]. I understand. There is, though, the Miers case clearly rejects a blanket assertion of privilege, even when asserted by a sitting President with respect to White House counsel. The privilege must be asserted question by question, area by area.

And I understand your point about badgering. I don't intend to badger you or Mr. Clark with those questions.

With that said, it's important to get on the record the areas of inquiry so that a court could potentially adjudicate the application of a privilege.

Mr. MacDougald. I think that if the committee is interested in pursuing the inquiry, balancing Mr. Clark's interests in complying with his duties as a lawyer in light of President Trump's invocation of the privilege, the fair thing do to Mr. Clark is to let the Trump v. Thompson case play out rather than badgering.

Now, if there is some alternative method of preserving the record, I'm happy to discuss that. But I think sitting here for 5 hours while counsel and committee members propound questions that we're not going to answer is not a good use of anybody's time. And, as far as -- and, again, on the timing of this and us not having had a dialogue, before I got involved, Mr. Clark asked for a three-week extension. That was not agreed to. That's okay. You get to decide, which made the one week you gave me especially appreciated when I -- when we spoke.

But it is a significant matter. There are weighty and difficult legal issues involved. And, you know, I'm not going to let Mr. Clark traduce either attorney-client or executive privilege or any other privileges in response to these questions. I don't know where that line is going to end up. So I have to protect him. So we are just not going to answer the questions.

[redacted]. I understand. We're talking past each other. I'm not trying to talk you out of your position at this point. I'm simply trying to establish a record that can be

considered by the select committee first and ultimately potentially by the Attorney General of the United States if there's a criminal contempt referral or a Federal judge if there is some sort of effort civilly to enforce the subpoena. We don't have that complete record at this point. I'm not saying that any of that's going to happen, but we need to create a record to consider next steps. So it's not meant to be badgering. I understand.

[11:00 a.m.]

Mr. MacDougald. Okay. And my suggestion and request to the committee is to make that record after the decision is made in Trump v. Thompson, and you'll know where we stand.

[redacted]. But we are not necessarily going to wait for Trump v. Thompson to be resolved before we seek enforcement action, and that's why we need to make the record today.

And, again, I understand that these questions will prompt, according to what you've said thus far, some kind of executive privilege assertion. I want to make sure we understand the basis of that assertion and that you understand and that ultimately a court understands what are the areas that we seek to develop with Mr. Clark.

Again, not meant to be badgering. It's just essentially clarifying our positions and creating a record for others to review thereafter.

So let me just --

Mr. MacDougald. We are not going to participate in that, [redacted], and we are concluded, and we are leaving.

[redacted]. So, to be clear, you're refusing to answer any of these questions or even go through and assert privilege question by question --

Mr. MacDougald. Correct.

[redacted]. -- based on the representations in the letter and --

Mr. MacDougald. Correct.

[redacted]. -- a blanket assertion?

Mr. MacDougald. Correct.

[redacted]. Go ahead, Mr. Clark.

The Witness. The blanket assertion point is inaccurate. The points are made in the letter. Mr. MacDougald has made the points, and we're going over the same thing again and again, and it's not productive. And so you'll see that the letter makes the arguments about what would be prudent and efficient from this, you know, point forward, and that's what we're going to stand on.

[redacted]. Uh-huh.

Mr. MacDougald. And we're -- you know, we will engage in that dialogue with you, as invited in the letter, but the process that you contemplated today will not go forward.

[redacted]. Let me stop again and see if anyone else has any questions.

Mr. Schiff. I do have one question. Well, a couple of questions.

So, counsel, on behalf of your client, are you refusing to answer any questions today regarding the subject matter of our committee?

Mr. MacDougald. Our position is stated in the letter, Congressman.

Mr. Schiff. And, just for clarity, are you refusing to answer any questions about the subject matter of January 6th to our committee?

Mr. MacDougald. Well, actually, our letter invites the committee to narrow its scope to the events of January 6th.

Mr. Schiff. But, counsel, you're refusing today --

Mr. MacDougald. But the committee has not done that.

Mr. Schiff. Well, counsel for the committee was endeavoring to go through the questions and find out what your client would answer and what they would not.

Do I understand your position today is that you are giving a blanket refusal to answer any questions about the events of January 6th to this committee?

The Witness. Representative Schiff, you're mischaracterizing our position. That

question has been asked and answered about six times now.

Mr. Schiff. Well, then --

The Witness. If I had a transcript, I could count them.

Mr. Schiff. Then do you object to our asking you questions today about January 6th?

The Witness. We've already answered that question. We think --

Mr. Schiff. So then you're refusing to answer questions today. Just want to establish a very clean record. You're refusing to answer any questions today about January 6th?

The Witness. We think that you need to have a dialogue with Mr. MacDougald about that before that proceeds.

Mr. Schiff. So --

Mr. MacDougald. You can take that up if the scope is narrowed. But, as we sit, the scope is not narrowed.

Mr. Schiff. Well, counsel, this would be an opportunity for you to narrow the scope and answer questions --

Mr. MacDougald. It's not for me to narrow the scope.

Mr. Schiff. Answer questions that you believe are within the scope and refuse, and then we can decide what repercussion from that refusal. But, today, you are refusing to answer any questions whether they're within your perceived idea of the scope of the committee or not. Is that correct?

Mr. MacDougald. We have asserted our position that we're not answering questions today. We've invited the committee to engage in a dialogue with us about narrowing the scope. That invitation remains open.

Mr. Schiff. Well --

Mr. MacDougald. But, as of this moment, the scope has not been narrowed, and the -- our position remains as previously stated.

Mr. Schiff. Well, let me ask one illustrative question, then.

Mr. Clark, in your letter to the committee, you state you gave an interview to the press about January 6th, and your comments were not included in the article, and you expressed some dissatisfaction that your comments about January 6 were not included in the Bloomberg article.

What were your comments to the press about January 6th?

Mr. MacDougald. I think that's stated in the letter.

Mr. Schiff. No, it isn't.

What were your comments to the press about January 6th?

The Witness. It is stated in the letter, so that stands as the answer.

Mr. Schiff. Well, would you please tell us what those comments were?

The Witness. It's what the letter says, Representative.

Mr. Schiff. The letter doesn't tell us what you told the reporter, so I'm asking you: What did you tell the reporter --

The Witness. That's --

Mr. Schiff. -- about January 6th.

The Witness. That's not accurate, Representative Schiff. If you read the letter, it represents what was stated to the reporter.

Mr. Schiff. Well, read to me from the letter what it is you told the reporter about January 6th, then, if it's included --

The Witness. Respectfully, Representative Schiff, I think that request, you know, to have me read something that's in a letter that you have is badgering. It crosses the line into that.

Mr. Schiff. Well, Mr. Clark, it's not in the letter.

And is it your position, counsel, that somehow Mr. Clark can assert executive privilege over statements he gave to the press on behalf of the former President?

Mr. MacDougald. We made reference to that in the letter, Congressman, in the context of inviting the committee to narrow the scope. We're happy to have that discussion, but it needs to occur in writing so that we know where we stand.

Mr. Schiff. My question is --

Mr. MacDougald. This is an important matter for Mr. Clark, and I'm advising him -- I'm trying to protect him, and I'm -- we're going to do that based on a scope that is set forth in writing that we can analyze and decide whether we're going to object to it or not.

Mr. Schiff. My --

Mr. MacDougald. We don't have that, and I'm not going to let him answer those questions.

Mr. Schiff. Counsel, you would agree, would you not, that statements your client made to the press are not covered by any conceivable privilege? Can we agree on that?

Mr. MacDougald. Hypothetically.

Mr. Schiff. Are you objecting, nonetheless, to his answering questions about what he told the press about January 6th that were not included in an article?

Mr. MacDougald. I am objecting to the way the committee is proceeding with respect to Mr. Clark. You have a very broad-scope subpoena that has not been narrowed, and we have invited the committee to narrow the scope and expressed a willingness to testify more narrowly about January 6th.

We're not going to do that on the fly. We'll have a dialogue with the committee as counsel, and we will proceed in an orderly manner to resolve that scope issue. But we're not going to do it on the fly in this deposition.

Mr. Schiff. Before I yield back to counsel, I'd like the record to reflect the witness today refuses to answer any questions about January 6th, including questions as to comments he made to the press that could not be even conceivably, I think as counsel has acknowledged, within the realm of privilege.

And, with that, I yield back to committee counsel.

[redacted]. Mr. MacDougald, with all due respect, Mr. Clark has been subpoenaed to appear before this committee. It is a legal obligation, on a date certain, to answer questions. That does not include a legal obligation by the committee to negotiate, or to set forth in advance particular subject matters. It's a legal obligation to show up and answer questions, or to assert a privilege in response to specific questions.

My understanding is that, despite that legal obligation and an offer to go through the questions and assert a privilege point by point, he's refusing to answer any such questions. I just want to make clear that that is his position.

The Witness. The letter explains our position, and the letter is not based exclusively on executive privilege. You need to read the letter, respectfully, [redacted], very carefully.

[redacted]. Well, Mr. Clark, I just got the letter when you walked in the door --

The Witness. And that's why we're proposing that we depart for today.

[redacted]. But you have a legal obligation to be here today to answer questions.

The Witness. I think, if you read the letter, you will see that even that is in dispute.

[redacted]. I think your position is, again, a blanket assertion and refusal to answer --

The Witness. You continue to try to characterize my position as if it were that, but

that's a mischaracterization, and we do not accept that.

[redacted]. Before we go off the record, let me see if anyone else -- Mr. Raskin, Mr. Kinzinger, Ms. Cheney -- have any questions.

Mr. Raskin. I just wonder if Mr. Clark's counsel has any authority for the proposition that he can categorically refuse to answer any questions as opposed to invoke the privilege he says he has with respect to the specific questions.

Mr. MacDougald. Our legal authority is set forth in the letter, Congressman.

Mr. Raskin. Well, the letter seems to be the magic solution for everything, but could you name the Supreme Court decision that you're refusing to?

Mr. MacDougald. Congressman Raskin, as I previously stated, we're not going to engage in legal debate or argument over this. We've set forth a written objection. The committee can respond to it in writing, and we'll deal with that at that time. But we're not going to do Q&A on legal points in this deposition.

Mr. Raskin. Okay. Well, then, I will just state for the record that the subpoenaed witness has refused to answer any questions of fact. He's refused to engage in any questions and interpreting any questions of law and continually refers to the letter that they gave us today. So I would just say I think that this witness is categorically refusing to engage in any of the obligations that he's required to engage in.

And I'll yield back.

[redacted]. Yeah. Mr. Kinzinger, go ahead.

Mr. Kinzinger. Just -- yeah. Just a real quick -- and, since the letter is the focus, can you tell me when this letter, if you would, was completed? Did you finish it 5 minutes prior to coming in at 10 o'clock, being as you had a legal obligation to show up today, and is that why we just got this at this moment -- your legal obligation was completed just a couple minutes ago -- or had you had this in hand a few days prior when maybe you could

have shared it and we would have been, you know, better armed to discuss since this is the only thing you're willing to discuss?

Mr. MacDougald. Thank you, Congressman.

You may not have been tuned in earlier when I explained to [redacted] my apology for giving this to him just this morning.

I was just engaged last week. We've been working continuously on this letter up through yesterday afternoon, late, and I've been conferring with Mr. Clark. So I've been continuously involved in the preparation of this letter since sometime last week.

I can't remember what day I first got started, but it was just late. We didn't have time. We were working on it up through yesterday.

And I apologize to the committee and to counsel and committee staff for any inconvenience that the late delivery of this position may have caused. But I'm doing the best I can. It's just me. It's just me trying to help Mr. Clark, and I've done everything that I could to get this ready in the time that I had available, and that went up almost to the last minute.

[redacted]. Other members? Ms. Cheney, anything from you?

Ms. Cheney. Thank you very much, [redacted], yes. I'd like to ask the witness when he first met Congressman Scott Perry?

Mr. MacDougald. I will assert the privilege objection to that question, respectfully, Congressman Cheney.

Ms. Cheney. And what's the basis for the privilege assertion about your meeting a Member of Congress?

Mr. MacDougald. The privilege objection is set forth in the letter, Congressman. It's a detailed legal question, and the parameters of the privileges that attend aides and advisers to the President extends in many directions. We understand that's disputed by

the committee, and it's a particular application. But pending the resolution of the Trump v. Thompson case, we're not willing to answer any questions of that nature until we know exactly where the line is.

Ms. Cheney. And I'd like to also know when, Mr. Clark, you became engaged in the debates about the Georgia election procedure?

Mr. MacDougald. Same objection.

Ms. Cheney. I'm sorry. Could you please state that for the record?

Mr. MacDougald. Same objection, Congressman -- Representative. I called you a Congressman a minute ago. I apologize.

Ms. Cheney. So what objection is that? You're claiming executive privilege with respect to your knowledge about Georgia election procedures?

Mr. MacDougald. You're talking about me or Mr. Clark?

Ms. Cheney. I'm talking about Mr. Clark, your client.

Mr. MacDougald. We assert privileges in the letter that cover that, Representative.

Ms. Cheney. Did you have any interaction with any other Members of Congress?

Mr. MacDougald. Same objection, respectfully.

Ms. Cheney. And in terms of your assertions about Dominion voting machines and smart thermostats, could you explain where you got that information?

Mr. MacDougald. Same objection, respectfully.

Ms. Cheney. So I just want to be clear that I want the record to show that Mr. Clark is refusing to answer any questions, including those questions that have nothing to do with any of his interaction with the President, questions that couldn't conceivably be covered by any assertion of executive privilege.

And, with that, I'll yield back, [redacted].

[redacted]. Thank you. Anyone else? Mr. Aguilar, Ms. Luria, Ms. Lofgren?

Ms. Lofgren. I'm fine.

[redacted]. No? Okay.

Just a couple of things. The subpoena also today was to produce documents as well as deposition testimony. Are there any documents -- and this may be covered in the letter, but, again, haven't had a chance to read it -- that you have that are responsive to produce to the select committee?

Mr. MacDougald. We are asserting the objection as to all the document requests, and noting in the letter that there is very substantial overlap between the letters -- the documents requested from the Archives --

[redacted]. Okay.

Mr. MacDougald. -- and the documents requested from Mr. Clark.

[redacted]. Uh-huh.

Mr. MacDougald. And, consequently, we do not have any responsive documents for you today.

[redacted]. Okay. So very substantial overlap suggests that there are some documents that Mr. Clark possesses that are not included in the Archives.

Mr. MacDougald. Well, that's not right. Whether he has custody or control of the document is one thing.

[redacted]. Uh-huh.

Mr. MacDougald. Whether it's covered in the request at the Archives is another.

[redacted]. We specifically -- and I think this was the product of an email that I sent you -- have been interested in his use of a personal email, CivUSDOJ@gmail.com.

Was there any use of that email for subject matters related to the select committee's inquiry, and have those documents been identified as responsive?

[Witness conferred with counsel.]

The Witness. I'll answer.

Mr. MacDougald. He'll answer the question.

The Witness. So my strong recollection, right -- and we're talking about events that are closing on a year ago -- is that that's not an email address that I established. That's an email address that the tech contractors who had offices inside DOJ for the Civil Division established, and that that was used for purposes of, you know -- so, if I would do an argument -- and I did several arguments, including in those months -- I wouldn't tend to do it from my desk. I would tend to do it either from a side desk that I had, or from the conference room.

And so I would have the tech person set up a loaner laptop, and then I would email him the Zoom link or whatever, you know, the instrumentality was. And then I think -- so that -- I think he would open that account on the loaner laptop, and then, you know, connect to the court link for the argument. So I think that's what that account is for.

I did make an effort to see if, you know -- I have senses of kind of like what passwords might be, could I log into that, and I couldn't. And I suspect, again, based on my best recollection as I sit here, that the reason why I couldn't log in is I didn't create the account, so I don't know what the password is.

[redacted]. Did you use a gmail account, a personal email account, to conduct any official business during your time at the Department?

The Witness. I think that, on that, we're going to stand on the letter.

[redacted]. How about personal cell phone? Were there communications, text messages that you might possess responsive to the subpoena on a personal device?

The Witness. Same as the last --

Mr. MacDougald. Same objection.

[redacted]. So, to be clear, no documents have been produced, and the letter indicates that, to the extent that documents in your possession are responsive, they're being withheld on the same assertion of executive privilege?

Mr. MacDougald. Correct. And the other privileges identified in the letter. There are other privileges identified in the letter, but the executive privilege is the front and center.

[redacted]. Okay. What are they? I'm sorry. Again --

Mr. MacDougald. Well, there is a -- we enumerate, and I believe these are all subsidiary to the executive --

[redacted]. That's my question. Are they all within the executive --

The Witness. No.

Mr. MacDougald. Well, no. That's a subtle legal point.

The Witness. Yeah. I would say no. I think that you should look at the enumeration, and we stand on that.

Mr. MacDougald. And then we reserve any other objections or rights that he may have under the Constitution or otherwise.

[redacted]. All right. So --

Mr. Schiff. If I could just --

[redacted]. Yes.

Mr. Schiff. -- follow up on that question.

What privilege are you asserting would apply to enable you to refuse to answer a question about whether you used personal electronic devices in the course of your government business?

Mr. MacDougald. We're asserting privileges set forth in the letter, Congressman.

Mr. Schiff. And what privilege in particular, because you refer to a number of

privileges? So, for this specific question -- that is, whether Mr. Clark used personal devices to communicate government business -- which specific privilege enables Mr. Clark to refuse to answer that question?

Mr. MacDougald. 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. So, you know, I -- again, with respect, Congressman, we do not want to engage in a debate or a law school set of hypotheticals about this.

Mr. Schiff. Well, counsel, you said my question wasn't very specific. Let me try to make it very, very specific.

Mr. Clark, did you use personal electronic devices to conduct government business while you were at the Department of Justice? Yes or no?

The Witness. This has been asked and answered, Representative.

Mr. Schiff. I don't have an answer, so would you please answer the question for me?

Mr. MacDougald. We would object based on privileges set forth in the letter, Congressman.

Mr. Schiff. And, counsel, which specific privilege entitles this witness to refuse to answer a question about whether he used personal devices -- I'm not asking about the content, not asking about communications with the President, but merely the simple fact of whether he used personal electronic devices to conduct government business. What specific privilege are you asserting that gives him the right to refuse to answer that question?

Mr. MacDougald. We rest on the privileges asserted in the letter, Congressman. We object.

Mr. Schiff. Let the record reflect that counsel has cited no particular privilege to refuse to answer that question.

[redacted]. So, Mr. MacDougald, I'm just looking at the letter, again, not having a chance yet to read it carefully. And, on page 2, it says, the general category of executive privilege, the specific categories of presidential communications, law enforcement, and deliberative process privileges, as well as attorney-client privilege, and the work product doctrine, all harmonize on this point. Is that the universe of privileges that that sentence that I just read from your letter that Mr. Clark is asserting today?

Mr. MacDougald. Well, the -- you should read the entire letter

[redacted]. I appreciate that, but I'm -- again, not having had a chance to do that, I just want to make sure it's clear on the record.

Mr. MacDougald. Well, we think the letter is clear, and the letter is on the record.

[redacted]. At the time of these events, Mr. Clark was an employee of the Department of Justice, right, and his client was the people of the United States, not President Trump or anyone else. So help me understand how any attorney-client privilege could possibly be implicated when a Department of Justice official, a member of the executive branch, in the course of his professional responsibilities, is engaged in talking to his superiors or anyone else within the executive branch?

Mr. MacDougald. [redacted], I will say maybe for the fifth or sixth time, we're not going to engage in legal argument on these points in the deposition. If you want to engage in legal argument in letters or court filings, we're happy to do that, but we're not going to do it in this deposition,

[redacted]. Yeah.

Mr. MacDougald. And so I think we have, you know, reached an impasse and, consequently, we --

The Witness. I --

Mr. Raskin. I have two follow-up --

The Witness. I would say that we've not reached an impasse, and there have been repeated attempts to characterize the position as absolutist. It's not. We're inviting a dialogue in the letter. But, for today, I think that we're done.

Mr. MacDougald. We're done.

The Witness. Yeah.

Mr. MacDougald. We're done for the day.

[redacted]. Mr. Raskin, go ahead.

Mr. Raskin. Well, I just want to follow up on your question about the attorney-client privilege.

Who is the attorney, and who is the client that are covered by the attorney-client privilege being invoked in the letter?

Mr. MacDougald. It's asked and answered. The privilege is set forth in the letter.

Mr. Raskin. Well, forgive me, because I'm not in the room right now. The letter arrived late, thank you for your apology about that, but one way to make that apology meaningful might be to restate the point of your own letter. Who is the attorney, and who is the client in the attorney-client privilege being asserted in your letter?

Mr. MacDougald. We're happy to engage in that dialogue in correspondence with committee counsel, but we're not going to do it in the deposition, Congressman.

Mr. Raskin. Wow. Okay.

I yield back to you, [redacted]. Thanks.

[redacted] Okay. Well, I can tell you, Mr. MacDougald, that we're not going to conclude the deposition. I think what we'd like to do is take a recess, look again at your letter temporarily and reconvene, maybe in an hour or so. I understand the position, but,

again, we have been given a letter with very substantial legal arguments that we just need a minute -- more than a minute --

Mr. MacDougald. I think you need more than a minute. I mean --

[redacted] Yeah.

Mr. MacDougald. -- to be fair to the witness, it will -- you need to let us go, and then you all study it and figure out what you want to say about it, and then we'll respond.

[redacted] Yeah. We --

[redacted] Respectfully, that's not the way it works. The witness was subpoenaed to be here today. Whether it's an inconvenience for him to wait an hour or so while the committee and the staff discuss this, he doesn't have any right to avoid being inconvenienced by a brief delay like that.

The Witness. So I think the response on that is I see no indication, from the fact that the same questions are being asked over and over again, that anything is going to change as a result of that. So, you know, we -- we're going to depart at this point. We have the dialogue. We want it to be open. You can come back to us.

And we recognize that the letter will require your study, but, you know, you've also placed me in a position where you did not give the full extension that was requested in light of personal circumstances and in light of, you know, the situation that's -- I have to deal with in terms of managing life generally, and so, I think, at this point, we would like to conclude things, and that's our position.

Again, that's not a closed door. It's an open door to dialogue.

[redacted] Mr. Clark, with all due respect, the door has been open since July when the Department of Justice wrote you a letter. I first personally reached out to your counsel in August. The indication was that perhaps you would come in for a voluntary interview. And, when that ultimately was not something to which you agreed, the

committee issued you a subpoena with a legal obligation.

You changed counsel, and we gave your new counsel a brief indulgence because he had just been retained. And, as a matter of professional courtesy to Mr. MacDougald, we gave you an extra week.

But, with all due respect, we have been willing to talk with you, work with you, wanted to do this voluntarily since this summer. So this is not a last-minute attempt to force you without ample notice of our interest to answer questions on the record. Our efforts in good faith to engage with you extend 4 months.

The Witness. So, as the letter indicates, I had been reviewing various things, studying legal doctrines, conferring with counsel, so we have similarly proceeded in good faith, and we continue to want to proceed in good faith.

But, for today, you know, sitting here to have the same questions be asked and for attempts to, you know, respectfully, to be made to mischaracterize our position, that's not something that it seems to be prudent to continue to do.

[redacted] The Rules of the House provide that the chair will rule on objections or assertions of privilege. The chair has not yet had an opportunity to rule. Part of the reason for a brief recess and discussion with the chairman is to get -- again, this is all part of completing our record such that the committee can consider other options.

So we can stand in recess subject to the call of the chair. We're not concluding the deposition. But the Rules of the House provide a recess subject to the call of the chair as we consult with him and seek his potential ruling on your executive privilege assertion.

The Witness. That involves procedures that you will decide how to invoke, and, you know -- but, in terms of our presence, though, we're going to depart. We've made our position clear, and we've made our willingness to engage in a dialogue from this point forward clear, and I think that's where we stand.

[redacted] Before I go -- yeah, go ahead, Mr. Raskin.

Mr. Raskin. [redacted], what I would just say is that what I'm taking from the representation is that Mr. Clark's lawyer has declared us at an impasse, and Mr. Clark has declared that they're going to leave despite the fact that they're being told to stay under the rules of the committee.

[redacted]. That is precisely my interpretation.

The Witness. Much like -- much like our dispute about the notion of absolutism, the notion that we're at an impasse is also a mischaracterization. I've repeatedly said and the letter says that the dialogue remains open.

Mr. Schiff. And, counsel, I just want to add to the record that we were presented with this letter right --

[redacted]. At 10 o'clock.

Mr. Schiff. -- at 10 o'clock this morning. Counsel apologized for the late delivery of this letter, yet counsel has insisted that a one-hour recess to consider the letter further and consult with the chairman of the committee is beyond their willingness to accommodate, and it is their intention to walk out of the deposition notwithstanding the deposition continues.

I yield back to counsel.

[redacted]. Again, my view is precisely the same as Mr. Raskin's and Mr. Schiff's. Disappointing, but we will consider you to have left the deposition that is subject to recall by the chair.

Mr. MacDougald. Okay.

[Mr. Clark and Mr. MacDougald left the deposition at 11:29 a.m.]

[redacted]. Okay. We're still on the record, Ms. Lofgren. I just want to make sure that there are things that are entered for the record, right.

Exhibit 1 is the letter to Mr. Clark that was sent by the Department of Justice on July 26th, 2021, which I'd ask that we mark and be part of the record as exhibit 1.

I believe exhibit 2 will be the letter that Mr. MacDougald delivered to the select committee today.

I don't think we need the subpoena to be an exhibit. That's already part of the committee's record.

[redacted]. We're okay because he showed up.

[redacted]. He did. So those two exhibits and the DOJ letter and his letter to us will be formally part of the record of the deposition.

[Clark Exhibit No. 1
Was marked for identification.]

[Clark Exhibit No. 2
Was marked for identification.]

[redacted]. And, before we go off the record, is there any other representations here, Mr. Schiff?

Mr. Schiff. I would just like to include in the record a copy of the Bloomberg article that counsel for Mr. Clark references in which, per counsel's letter, Mr. Clark was disappointed it didn't include his discussion of January 6th, the interview that was published.

He summarizes that conversation with the reporter, but was unwilling today to discuss even what he told the reporter during that interview, and failed to identify any privilege that would cover, even conceivably, an interview that Mr. Clark gave with the press about January 6.

And I would like that to be included in the record.

[Clark Exhibit No. 3

Was marked for identification.]

[redacted]. I appreciate that.

What I would propose to do quickly is to go through the exercise that he refused to indulge and just put on the record the areas that I intended to develop with him, just, again, so that, for consideration by a court or by DOJ, at least the subject matters that we intended to develop are reflected in an official proceeding.

[redacted]. And I just want to make sure that the record reflected when the witness left. It did.

[redacted]. Okay. So -- and this won't take 5 hours, as Mr. Clark suggested, but I intended to develop with him a series of questions about documents, what he maintains, his use of personal devices or emails, to get a little bit more information about categories of responsive information that he maintains, whether or not he was withholding any of them on a privilege basis. He has not produced any documents or a privilege log to the committee.

I then intended to develop very simple things about his background, his professional background, his educational background, his current employment.

I would have proceeded then to questions about the institutional role of the Department of Justice in matters of election integrity. There was a November 9th memo from Attorney General Barr to the Department that authorized U.S. Attorneys' offices to investigate credible allegations of voter fraud. I wanted to ask him about the Civil Division or the Environment of Natural Resources Division having any role in voter fraud investigations.

I wanted to ask him about communications he had with President Trump, from his initial introduction to President Trump, which we think occurred sometime in December of 2020, the role of Congressman Perry or Mark Meadows in facilitating that introduction,

what they discussed, whether it was about the election or otherwise; who else might have participated in the communication with President Trump, and the specific representations of that discussion.

We wanted to talk to him about the White House contacts policy and the fact that his communications with the President violated that White House policy, and the fact that he didn't notify Attorney General Rosen or Deputy Attorney General Donaghue of those communications.

We wanted to talk about the reaction by the Department of Justice leadership to their discovery of that meeting, any representations he made to them.

We then wanted to talk specifically about efforts that he took, proposed that the Department take with respect to election fraud. We wanted to ask him, for instance, about an ODNI briefing that he sought about alleged interference with Dominion voting machines by the Chinese Government, and a draft letter to Georgia officials that he put forth that asked the Department, or was the Department asking Georgia legislative officials to convene a special session and consider the appointment of an alternate slate of electors. We intended to go through specific representations in that draft letter and ask for their basis.

I also wanted to ask him about metadata in that draft letter that indicates some involvement with the White House Communications Agency and the drafting or preparation of that letter.

I also wanted to ask him about the response to that proposal from Mr. Rosen and Mr. Clark, which was very strongly negative, Mr. Donaghue's indication that it was factually inaccurate because the Department was not investigating serious allegations of fraud, and institutionally, it would be inappropriate for the Department to suggest to a State that it convene its legislature in a special session, get his reaction to Mr. Donaghue's

criticism of those two proposals.

I wanted to ask him about a December 28th meeting -- subsequent meeting with Rosen and Donaghue about additional conversations with the White House about the Georgia draft letter or other possible steps to take -- that the Department would take to intervene in the counting of the votes.

I wanted to ask him specifically about whether he had any involvement in the appointment of a special counsel, the possibility of holding a press conference to announce the Department's involvement, or the Department's joining a Supreme Court case as a potential plaintiff despite other professionals in the Department indicating that the Department had no standing.

We ultimately wanted to ask him about efforts by the President to install him as Acting Attorney General, the basis for that possibility, his discussions with the President about actions he might take if he were appointed as Acting Attorney General. There was a -- wanted to ask him ultimately about a meeting in the Oval Office with the President and others at which his possible appointment as Acting Attorney General was discussed and when the President ultimately decided not to make a change and appoint Mr. Clark as the Acting Attorney General.

Finally, we wanted to ask him a series of questions about things beyond his interactions with the President. For instance, his potential involvement in meetings in advance of January 6th with campaign officials, with lawyers who purported to represent the former President, who had come up with theories as to the Vice President's authority to reject slates of electors.

We wanted to ask him about the Willard War Room and communications with Steve Bannon, Rudy Giuliani, Bernie Kerik, John Eastman, and others. We wanted to ask him about what he did and what he was aware of on January 6th itself. We wanted to ask

him about further interactions at any time he had with the Chief of Staff Mark Meadows, including Mr. Meadows' travel to Georgia, and interaction with Georgia State officials.

We wanted to ask Mr. Clark about any campaign activities or discussions with representatives of the Trump campaign, Bill Stepien, and Jason Miller.

We wanted to get his substantive view on the Eastman memos. The Eastman memos put forward the theory that the Vice President need not certify the slates of electors that were put forth and were pending his review on January the 6th.

We wanted to ask him about any discussions he had with various State officials in Georgia, in Pennsylvania, or elsewhere.

We wanted to ask him about interaction with a man named John Lott, who worked at the Department of Justice and wrote a memo that involved some allegations of voter fraud.

And we wanted to ask him about the Gohmert v. Pence litigation, the one matter in which the Department did intervene, but simply to indicate that there was no standing by the plaintiff, Congressman Gohmert, to bring that litigation. Mr. Clark actually signed the pleading indicating that the Department -- the Department's view that Mr. Gohmert had no standing, and the case should be dismissed.

Let me stop and see if any of my colleagues have additional subject matters that they wanted to flag so that the record reflects the universe of things that we wanted to develop with Mr. Clark. [redacted], anything?

[redacted]. Nope.

[redacted]. No.

[redacted]. The only caveat I'd have to all of that was that that is what we intended to ask him as of now, but that this is an ongoing investigation. We continue to develop new facts and seek documents that we haven't yet received, and that that may

not ultimately be the final universe of subject matters for Mr. Clark. But that is what we intended to ask him about today.

[redacted]. And, of course, any other questions that would come up as a result of things that Mr. Clark told us in the deposition.

[redacted]. Yeah.

For the record -- I suppose it's clear, but to make it crystal clear, I proposed going through that list on the record with Mr. Clark so that he and his lawyer would have a sense of the subject matters and would articulate in response to each category the basis for his assertion of executive privilege. He refused to indulge, walked out of the deposition before we had a chance to ask those questions.

So I'm now simply making this for the record, but not for Mr. Clark, because he has left the deposition.

All right. Anything else that anyone has before we go off the record? [redacted], anything?

Mr. Schiff, any other statements that we want to make sure are reflected in the official record?

Mr. Schiff. Well, I know our committee wanted to ask, among other questions, whether he had destroyed or erased any cell phone or other digital device during the course of 2021. But, as he would not even answer questions as to whether he used personal devices for the conduct of government business, he did not allow us the opportunity to ask that line of questioning either.

I viewed his refusal as categorical, without even an assertion of privilege or a claimed assertion of privilege, but a constant reference to a letter, a letter that, in and of itself, was not from the former President directing him not to testify. There has been no legal action by the former President to intervene in this proceeding.

Given that his colleagues in the Justice Department in higher positions of authority have testified and his refusal even to answer questions about his statements about January 6th made to the press, those refusals at least strike this member of the committee as not in good faith, and I yield back.

[redacted]. Yeah. Any other Members? Yes? Mrs. Luria.

Mrs. Luria. I just wanted to add for the record that, you know, although he referred to the letter numerous times and refused to answer the vast majority of questions, I felt that he negated his claim to privilege by actually -- his universal claim to privilege for every question by actually answering a select question about the use of the gmail account.

So, although he claimed overall privilege, he did negate that on his own by answering a single question, and so that -- I just wanted to place that that was my impression on the record.

[redacted]. Uh-huh. All right. Any other members of the committee? Yeah. And I'll say that this record will remain open and that we are just going to -- the deposition will stand in recess subject to the call of the chair, so the record will not be closed, but does anyone else have anything now to add? No?

I think I made my points about the state of engagement with Mr. Clark. The select committee reached out to him through counsel back in August. We repeatedly sought his voluntary cooperation, and it wasn't until he indicated he would not agree to a date for a voluntary cooperation that we moved to issue him a subpoena

He changed counsel very late, only about a week ago. Mr. MacDougald was retained a week ago, but he had previous counsel with whom we were very directly engaged on multiple occasions.

All right. Then I think we can go off the record at this point with the caveat that

the deposition will stand in recess subject to the call of the chair.

[Whereupon, at 11:43 a.m., the deposition was recessed, subject to the call of the chair.]

[4:15 p.m.]

Chairman Thompson. So we will reconvene the deposition of Jeffrey Bossert Clark.

The committee will come to order.

I understand that [redacted], the Select Committee's Chief Investigative Counsel, can update the committee on additional communications with Mr. Clark's attorney.

And I now recognize [redacted].

[redacted]. Thank you, Mr. Chairman.

Upon the postponement or the recess of -- not postponement -- the recess of the deposition this morning, I immediately reached out to Harry MacDougald, who's counsel to Mr. Clark. Called him. His cell phone, voice mail was full. Sent him a text message, asking him to call me. And then sent an email, essentially letting him know we were going to reconvene at 4:00 o'clock for the purpose of you, Mr. Chairman, considering and ruling upon his objection, and received an email response from Mr. MacDougald at 3:25 p.m., indicating that he was already en route back to his office in Atlanta.

He said it will not be possible for us to return at 4:00. He could not allow Mr. Clark to appear without counsel. And then he sets forth some specific objections to the process, the rules of the House which have the chairman ruling on objections.

And I will make that email exchange part of the record as an exhibit to the deposition.

Chairman Thompson. Thank you very much.

Earlier today, Mr. Clark's attorney, Harry MacDougald, delivered to the Select Committee a letter asserting blanket privileges and objecting to Mr. Clark's further participation in the subpoenaed deposition.

Pursuant to House Deposition Authority Regulation 7, a witness may refuse to answer questions only to preserve a privilege. That same authority empowers the chair to rule on any objection.

Do we want to recognize other members? If so, we could open the floor for discussion. I know Mr. Raskin, who's in a CPC meeting, had indicated he wanted to say something or potentially.

Does any other member wish to be heard on the objection?

Ms. Lofgren. I think it's quite clear that Mr. Clark has failed to adhere to the subpoena, the Rules of the House, the precedents in law, in statute, and is completely acting in a lawless way.

Chairman Thompson. Well, I thank the gentlelady. And the chair, at this point, is prepared to rule on the objection.

As I stated in a letter I sent to Mr. Clark's attorney this afternoon, Mr. Clark does not enjoy categorical claims of privilege across every element of the Select Committee investigation as authorized by House Resolution 503.

Accordingly, I overrule the objections asserted by Mr. Clark and direct the witness to answer the questions posed by members and committee counsel, asserting relevant specific privileges on a question-by-question basis.

Since the witness has decided not to reappear pursuant to notice, my ruling will be communicated to Mr. Clark in writing. The chair will allow Mr. Clark, until Tuesday, to cooperate with my direction to answer the Select Committee's questions in light of this ruling.

Accordingly, the deposition stands in recess subject to the call of the chair. We will close that part of the deposition. And we will now, for the benefit of the Select Committee, just talk about the committee's business, strategy, and what other

items we might want to discuss.

[redacted]. Mr. Chairman, thank you.

We wanted to go off the record. We want to make sure we can go off the record now.

We will let the court reporter go and thank her very much for her patience today. So we are off the record as of now.

[Whereupon, at 4:21 p.m., the committee was recessed, subject to the call of the chair.]

Exhibit 3 — Staff Email to Counsel for Jeffrey B. Clark on November 3, 2021

From: [redacted]
To: Harry MacDougald
Cc: [redacted]
Subject: RE: Jeffrey Clark
Date: Wednesday, November 3, 2021 2:24:00 PM
Attachments: Document Production Instructions.pdf
HRes8Sec3b.pdf
deposition rules.pdf
Jeffrey Clark.10.13.pdf

Harry,

In anticipation of Mr. Clark's deposition on Friday, I wanted to provide some information about the subpoena and the rules of the House of Representatives that govern the proceeding. I'm attaching a copy of the resolution authorizing depositions and the rules that apply, the instructions for document production, and the subpoena issued to Mr. Clark on October 13. I assume you have some or all of these material, but I wanted to ensure you have this information before Friday.

Please let me know if it would be useful to schedule a call to discuss any of this or logistics for Friday. I'm available between now and then – just let me know what works for you.

Looking forward to seeing you soon,

[redacted]

[redacted]

Exhibit 4 — Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 5, 2021

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

[redacted]

[redacted]

November 5, 2021

Hon. Bennie G. Thompson, Chairman
January 6th Select Committee
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515

Dear Representative Thompson:

I have been retained to represent Jeffrey Clark in the investigative matters pending before your Committee.[1]

Despite disparaging and misleading media narratives, Mr. Clark is not a politician and has never sought notoriety or press attention beyond what was necessary to discharge his duties. Indeed, despite serving more than four years during the Bush Administration's Justice Department from 2001-2005 and more than two years during the Trump Administration's Justice Department from 2018-2021, he was never once during those six-plus years of service asked to come before a congressional committee for

[1] This letter focuses on the issues surrounding the executive privilege, though there are additional legal objections, including those of a structural constitutional nature, that we will interpose in good faith as well to Mr. Clark testifying, should doing so become necessary. We also reserve all of Mr. Clark's individual rights under the Bill of Rights, though invocation of those rights is also not necessary at this time, as executive privilege and related privileges should be a sufficient threshold ground not to testify in response to the subpoena as it is currently framed.

oversight purposes, even though he litigated and supervised highly controversial cases.[2] He had a winning record, recovered billions of dollars for the fisc, successfully defended numerous agency rulemakings of extreme complexity, and personally briefed and argued many cases—exemplary service. He was confirmed in October 2018 with bipartisan support in the Senate—just one part of his distinguished 25-year legal career.

Now, after his most recent, 26-month-plus tenure in government ending in January 2021, he wants nothing more than to return to ordinary life and law practice, without being subjected to selective anonymous leaks and press attacks. Yet he finds himself involuntarily caught up in a novel conflict that includes both significant inter-branch[3] and cross-presidential[4] features to which we must provide a response.

The main purpose of this letter is this: Because former President Trump was properly entitled, while he held office, to the confidential advice of lawyers like Mr. Clark, Mr. Clark is subject to a sacred trust—one that is particularly vital to the constitutional separation of powers. As a result, any attempts—whether by the House or by the current President—to invade that sphere of confidentiality must be resisted. Nothing less will comport with both Mr. Clark's obligations to former President Trump and with Mr. Clark's ethical obligations as an attorney. The general category of executive privilege, the specific categories of the presidential communications, law enforcement, and deliberative process privileges,[5] as well as attorney-client privilege and the work product doctrine, all harmonize on this point. Most importantly, core matters of constitutional principle hang in the balance.

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[2] For instance, Mr. Clark was integral to defending former President Trump's decision to withdraw from the Paris Climate Agreement, to resisting improper judicial interference with the Census, to crafting and then personally defending, in litigation, the first major reform in four decades of the National Environmental Policy Act's regulations, and to shepherding through the judicial process various agency actions protecting the southern border with Mexico against incursions. This work was unpopular in some political quarters but at all times was consistent with law and with his client agencies' policy decisions.

[3] A single House of Congress vs. former President Trump.

[4] President Biden vs. former President Trump, *i.e.*, the current President vs. the immediately past President.

[5] Indeed, Mr. Clark's work was integral to the United States' win in the Supreme Court's most recent deliberative process case, *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021).

Mr. Clark's position as a legal advisor to the President late in 2020 and early 2021 was particularly sensitive because he was a Senate-confirmed Justice Department leader with significant high-profile litigation and governmental experience, making it natural for a President to seek out and consult his views.[6] We trust that members of Congress of all stripes would agree that it is indisputable that American Presidents need to be able to consult, as they see fit, with their Senate-confirmed appointees. The principle goes both ways. Whomever succeeds President Biden, for instance, should not be able to expose to public scrutiny advice provided to President Biden by his advisors. Establishing precedent to the contrary would deeply chill the vigorous Executive Branch and energetic President the Founders envisioned. *See* Federalist Paper No. 70 (Hamilton) (Mar. 18, 1788) ("Energy in the executive is a leading character in the definition of good government."), *available at* https://tinyurl.com/3ep7fhz9. Without that energy and ability to be candid, presidential advisors would be reduced to bland, tasteless creatures, and the prospect of innovative advice would be stifled.

For these reasons, as amplified below, and with due respect to the Committee, Mr. Clark has come with me today, to present this letter of objection. Mr. Clark will, of course, abide by a future judicial decision(s) appropriately governing all underlying disputes with finality, but for now he must decline to testify as a threshold matter because the President's confidences are not his to waive.

1. Since August 2, 2021, when a pivotal letter was sent on behalf of former President Trump to Mr. Clark (Attachment), there have been several cardinal developments:

(1) On September 23, 2021, this Committee subpoenaed senior White House officials Mark Meadows and Daniel Scavino, senior Pentagon official Kashyap Patel, and

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[6] Beginning in November 2018, Mr. Clark headed one of the Justice Department's seven litigating Divisions (the approximately 112 year-old Environment & Natural Resources Division, which has existed for most of the 151 years of the Justice Department's history). And later, in light of his excellent service in the Environment Division during the last Administration, Mr. Clark was also tapped by the Attorney General in the Fall of 2020 to run a second of those seven litigating Divisions as the Acting Assistant Attorney General for the Civil Division.

Stephen Bannon, making especially clear to Mr. Clark that executive privilege had been invoked in light of the violation of a condition set forth in the August 2, 2021, letter from former President Trump's counsel, as explained in more detail below;

(2) On or about October 7, 2021, former President Trump invoked executive privilege and instructed these four presidential advisors not to comply with the Committee's requests;[7]

(3) Additionally, on September 29, 2021, the Committee had subpoenaed 11 other individuals to appear for questioning; and, most importantly,

(4) The former President took the critical step of bringing suit against the Committee, among others, in *Trump v. Thompson*, Civ. A. No. 21-2769 (D.D.C. Oct. 18, 2021). In this case, President Trump asserts executive privilege and is objecting to the Committee's request to the Archivist of the United States to produce records of his administration.

The August 2 letter from your former colleague, Georgia Congressman Douglas A. Collins, stated to Mr. Clark that "President Trump continues to assert that the non-public information the Committees seek is and should be protected from disclosure by the executive privilege," and that this "executive privilege applicable to communications with President Trump belongs to the Office of the Presidency, not to any individual President, and President Biden has no power to unilaterally waive it." Attachment at 1.

The Collins letter also quoted the Supreme Court's recognition that "the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic." *Id.* (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977)). That decision provides that the purpose of the privilege is to "give his advisers some assurance of confidentiality," so that the "President [can] expect to receive the full and frank submission of facts and opinions upon which effective discharge of his duties depends." *Id.* Additionally, the August 2 letter noted that an earlier July 26, 2021 letter to Mr. Clark

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[7] See Jacqueline Alemany, *et al.*, *Trump Lawyer Tells Former Aides Not to Cooperate with Jan. 6 Committee*, WASH. POST (Oct. 7, 2021), *available at* https://www.washingtonpost.com/politics/2021/10/07/trump-lawyer-tells-former-aides-not-cooperate-with-jan-6-committee/.

from the current Justice Department had selectively edited a quotation out the *Nixon* decision, leaving off the key sentence that ***"the privilege survives the individual President's tenure."*** Attachment at 2 (quoting *Nixon*, 433 U.S. at 449) (emphasis added). *See also* Prof. Saikrishna Prakash, *Trump Is Right: Former Presidents Can Assert Executive Privilege*, Wash. Post. (Oct. 29, 2021), *available at* https://tinyurl.com/ykcpz94w.

I concur with that assessment by the former President and his counsel. Were any successor occupant of the office of President able to waive claims of executive privilege asserted by his or her predecessors, the principal purpose of the privilege would be defeated, to the detriment of the Executive Branch, to the separation of powers, and to the proper functioning of government as envisioned by the Constitution, relevant judicial precedent, and long traditions of inter-branch accommodation. This is particularly true when, as here, President Biden's purported waivers over recent months may have been informed by partisan political purposes. This is suggested by the haste with which Mr. Biden prejudged Mr. Bannon's invocation of the privilege on behalf of former President Trump.[8] Executive privilege has fundamental importance to and constitutional significance in the operation of government. Waivers of executive privilege should therefore be considered only with a gravity and solemnity commensurate with their deployment, and should not be influenced by workaday political grievances or by grudges lingering from past political controversies, even bitter ones.

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[8] See Katherine Fung, *Biden's Comments Could Fumble DOJ Prosecution of Steve Bannon: Here's How*, NEWSWEEK (Oct. 21, 2021) ("referring to those, like Bannon, who have refused to comply with the subpoena to testify before the January 6 committee [and] asked if they should face prosecution, Biden said, 'I do, yes.'"); Donald Judd & Rachel Janfaza, *Biden Says DOJ Should Prosecute Those Who Defy January 6 Committee Subpoenas*, CNN (Oct. 16, 2021) (same); *see also id.* (quoting Press Secretary Jen Psaki as arguing, contrary to law, that ultimate decisions would be made by the Justice Department because "[t]hey're an independent agency ...."), *available at* https://www.newsweek.com/bidens-comments-could-fumble-doj-prosecution-steve-bannon-heres-how-1641428. While President Biden later acknowledged he had been wrong to make the statement, the damage in the public mind had already been done. *See* Kaanita Iyer, *Biden Says He Was Wrong to Suggest Those Who Defy Subpoenas from January 6 Committee Should Be Prosecuted*, CNN, *available at* https://edition.cnn.com/2021/10/21/politics/january-6-joe-biden-town-hall/index.html (Oct. 22, 2021). For, as the Committee is aware, the President is the chief law enforcement officer of the United States and the Constitution does not mention the Attorney General by name. The Constitution simply contemplates that there will be a "principal Officer in each of the executive Departments." U.S. Const. art. II, sec. 2. Nor do any statutes establish the Department of Justice as an "independent agency."

2. Other former Department of Justice officials who received the Collins letter have apparently interpreted its concluding paragraph to mean that the former President had waived the privilege on a blanket basis or somehow otherwise greenlighted their testimony to Committees looking into assertedly similar issues prior to this Committee beginning its work. We disagree with that interpretation. No fair reading of the Collins letter can conclude that it waives any privileges as to an official like Mr. Clark, ***especially after*** the key contingency set out in the letter had been triggered:

> Nonetheless, to avoid further ***distraction and without in any way otherwise waiving the executive privilege*** associated with the matters the executive privilege associated with the matters the Committees are purporting to investigate, President Trump will agree not to seek judicial intervention to prevent your testimony or the testimony of the five other former Department officials ... who have already received letters from the Department similar to the July 26, 2021 letter you received, ***so long as the Committees do not seek privileged information from any other Trump administration officials or advisors.***

Attachment at 2 (emphasis added). The condition in the emphasized language has been triggered because the Committee sought privileged information from multiple other Trump administration officials or advisors before Mr. Clark was subpoenaed on October 13, 2021.

Our position is simple and is dictated by the plain text of the letter. The Collins letter does not waive privilege as to Mr. Clark. Even before the contingency triggered by your Committee seeking information from other Trump Administration officials had occurred, at best the Collins letter indicated that former President Trump would agree himself not to seek judicial intervention on the pre-contingency state of the facts. That is not remotely the same as authorizing testimony or waiving executive privilege. All portions of the Collins letter prior to the concluding paragraph clearly invoked privilege. Nor could Mr. Collins' indicating that the former President would not file suit at an earlier time act to relieve Mr. Clark of his ethical obligations.

And surely, once the Committee issued subpoenas to Messrs. Meadows, Scavino, Patel and Bannon on September 23, the assertion of executive privilege set forth in all of

the other paragraphs of that letter applied with special force to Mr. Clark. This is because Congress ***has, in fact, sought*** privileged information from Messrs. Meadows, Scavino, and Patel as they are all, no doubt, "other Trump administration officials." In short, even former President Trump's statement that he would not go to court in August 2021 was expressly conditional, and the Committee's issuance of the Meadows, Scavino, and Patel subpoenas has caused the failure of that condition. Therefore, especially after the triggering of the contingency, the letter simply cannot be read as an unconditional waiver as to Mr. Clark or the others named in the final paragraph.

Accordingly, particularly under the present circumstances, the Collins letter expressly informs Mr. Clark that President Trump is asserting and not waiving executive privilege with respect to the Committee's pursuit of information from Mr. Clark. President Trump's assertion of his privileges with respect to the Committee's subpoena to Mr. Clark is confirmed in *Trump v. Thompson, et al,* U.S.D.C. D.C. 1:21-cv-02769-TSC, by footnote 2 of his brief in support of his application for a preliminary injunction:

> The Committee also sought testimony and documents from several individuals, some of whom were serving in the Trump Administration in January and others who were not. To preserve all privileges applicable to him and the Presidency, President Trump sent a letter to a number of these individuals, instructing them to preserve any and all relevant and applicable privileges, including without limitation the presidential communications and deliberative process privileges and attorney-client privilege, all to the extent allowed by law.

Id., Doc. 5, p. 1, n.2. The Committee of course has actual notice of this contention since it is a party to that litigation.

Mr. Clark thus has no choice but to comply with President Trump's assertion of executive privilege and related privileges.

3. Since September 7, 2021, staff on the Select Committee has been in contact with Mr. Clark's former attorney, Robert Driscoll, about the possibility of Mr. Clark giving a transcribed interview to the Committee regarding communications with and advice given to former President Trump during the last few months of his Administration.

In good faith and while he was engaging in legal research and keeping apprised of related actions by the Committee and other parts of Congress, Mr. Clark had been requesting and reviewing documents from the Department of Justice pursuant to 28 C.F.R. § 16.300. And, if the federal judicial system orders Mr. Clark directly or produces final and clearly applicable precedent in (a) related case(s) indicating that Mr. Clark must testify, he would resume that process consistent with other legal strictures. But in line with our research and study, events subsequent to September 7 have convinced me that the only proper course of action for Mr. Clark now is to stand on the privilege position articulated to him on August 2 by former President Trump and affirmed in his October 19, 2021 filing in *Trump v. Thompson.*

This is for three reasons: (1) first and foremost because former President Trump, as noted, took heavy step of invoking the privilege in federal court litigation on October 18 against the Committee in its official capacity, indicating that the inter-branch accommodation process had broken down; (2) because the September 23 subpoenas to Messrs. Meadows, Scavino, and Patel unmistakably triggered the contingency in the Collins letter, seemingly removing the basis for any potential accommodation agreement with the Committee premised on it cabining the scope of its inquiry; and (3) because the former President acted to invoke the privilege as to those advisors and Mr. Bannon.

4. I am aware that other former top officials in the Department of Justice have provided testimony to Congress, despite the former President's assertion of privilege and despite the failure of the conditions in the Collins letter. As the privilege was not theirs to waive, at least without greater clarity (such as a court order with finality or a comprehensive arrangement entered into between former President Trump and Congress, where the latter agreed not to seek "privileged information from any other Trump administration officials or advisors"), it is unclear to me how their testimony could be consistent with former President Trump's assertion of executive privilege. Former President Trump holds that privilege, not them. Be that as it may, in the present circumstances, the fact that other former officials may have testified, rightly or wrongly at the time, does not change Mr. Clark's obligations in light of the recent positions taken by former President Trump in the Collins letter and in *Trump v. Thompson.* Indeed, D.C. Bar Ethics Opinion #288 has advised that, even in response to a congressional subpoena (and therefore, by parity of reasoning, in response to a voluntary request as well), a "lawyer has a professional responsibility to seek to quash or limit the subpoena on all

available, legitimate grounds to protect confidential documents and client secrets." *See also* American Bar Association's Committee on Ethics and Professional Responsibility, Formal Opinion 94-385 (1994).

It is improper to put Mr. Clark in a vise between this Committee and its claimed enforcement powers on the one hand and his constitutional and ethical obligations on the other, especially while there is a pending lawsuit to determine President Trump's privilege objections. To apply such pressure to Mr. Clark is to present him with a potential Hobson's choice in a manner not countenanced by the long history of inter-branch accommodation over Congressional requests for information from the Executive Branch. The Constitution is the ultimate source of our law and this Committee is bound to respect government-wide constitutional boundaries, including respecting the prerogatives of the coequal Executive Branch.

Additionally, the claim made by Senate counsel at the outset of the relevant testimonies of at least one of these other Department of Justice officials, namely, that the Collins letter was a "letter of nonobjection ... on behalf of former President Trump,"[9] if it were ever correct there (and it is not because nothing in the letter waives privilege or states a general principle of non-objection), is obviously incorrect as to Mr. Clark at the present time. The Collins letter quite explicitly (1) asserts that the former President has not waived claims of executive privilege; (2) asserts the privilege; and (3) at most, even from this Committee's potential perspective, fixes conditions that as to Mr. Clark are no longer met.

In light of the foregoing, I have advised my client that, at this time and based on these most up-to-date factual developments, he is duty-bound not to provide testimony to your Committee covering information protected by the former President's assertion of executive privilege. Accordingly, beyond showing up today to present this letter as a sign of his respect for a committee of the House of Representatives, albeit one not formed in observance of the ordinary process of minority participation, Mr. Clark cannot answer deposition questions at this time. No adverse inferences can or should be drawn from Mr. Clark accepting my advice. His doing so defends the Republic's interest in the

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[9] Transcript, *available at* https://www.judiciary.senate.gov/imo/media/doc/Rosen%20Transcript.pdf at 6-7 (Aug. 7, 2021).

separation of powers. As noted, Mr. Clark is not a politician but he is a strong defender of the Constitution, stemming from his political beliefs as an unapologetic conservative—beliefs protected by the First Amendment.

5. In addition to the foregoing, I must also point out that the vast majority of the document requests in the subpoena sent to Mr. Clark are duplicated in the requests for documents sent by the Committee to the National Archives presently at issue in the *Trump v. Thompson* litigation. It is entirely proper, therefore, to defer compliance with the Committee's subpoena to Mr. Clark until that litigation is resolved.

Moreover, the documents subpoenaed from Mr. Clark are instead largely in the possession of the Department of Justice or the Archives. Mr. Clark left his work papers at the Department of Justice when he resigned in anticipation of the January 20, 2021 inauguration of President Biden. Based on prior actions, beginning with those of the House Oversight Committee, we also believe that your Committee has access to Mr. Clark's government records, making the imposition on us of organizational work, such as Bates-stamping documents, unduly burdensome. If the Committee could please confirm this one way or the other, it may obviate any claim of demonstrably critical need for Mr. Clark to re-produce documents the Committee already has, should that become necessary at some future point.

6. Accordingly, I respectfully urge the Committee to recognize that the best and most regular course in light of the latest developments would be to pause the request for the testimony of Mr. Clark (likely along with the requests for the testimony of Messrs. Meadows, Scavino, and Patel, who would seem similarly situated) pending resolution of the *Trump v. Thompson* litigation. That will provide important guidance from the Article III branch of government to referee this inter-branch dispute, including, among other things, the entwined issue of whether the current President can purport to waive the former President's executive privilege over the former President's objection. As Justice Powell remarked in concurrence in *Nixon*, "[t]he difficult constitutional questions lie ahead." 433 U.S. at 503. *See also id.* at 491 (Blackmun, J., concurring) (noting that historically some presidential transitions had been "openly hostile," and hoping that the statute under consideration there "did not become a model for the disposition of the papers of each president who leaves office at a time when his successor or the Congress is not of his political persuasion."). A pause, as we here request, would also show proper

comity both to Executive Branch's interests (considered holistically and not as defined myopically to embrace only the views of the current President) and to the Judicial Branch's role in resolving cases and controversies. As *Nixon* indicates, "[t]he confidentiality necessary to this exchange [of advice and confidences between a President and an advisor] cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic." 433 U.S. at 449.

7. I am also compelled to note the disconnect between the scope and purpose of the Committee's authorizing resolution and the information sought from Mr. Clark. The Committee's scope revolves around events at the Capitol on January 6, 2021. The Committee would not appear to be seeking to question Mr. Clark about January 6, 2021 and no media reporting has connected him to those events. Mr. Clark had nothing to do with the January 6 protests or the incursion of some into the Capitol. He has informed me he worked from home that day to avoid wrestling with potential street closures to get to and from his office at Main Justice. Nor did Mr. Clark have any responsibilities to oversee security at the Capitol or have the ability to deploy any Department of Justice personnel or resources there. Indeed, Acting Attorney General Rosen testified ***almost 6 months ago*** that a January 3, 2021 Oval Office meeting involving him and Mr. Clark, *inter alia*, did not relate to January 6. *See* House Oversight and Reform Committee Holds Hearing on Jan. 6 Riot at U.S. Capitol, *available at* https://www.youtube.com/watch?v=719UGi8dNng, beginning at circa the one-hour, 15-minute mark (Rep. Connolly) (streamed May 12, 2021).[10] That should alone be sufficient for Mr. Clark to be excluded from a January 6 inquiry.

Indeed, just about a week after January 6, Mr. Clark gave an "exit interview" to a reporter for *Bloomberg Law* that condemned the individuals who forcibly went into the Capitol and engaged in violence, noting that some of them may have been moved by mob psychology (Mr. Clark specifically remembers referencing Gustave Le Bon), besmirching by mere association the far more numerous peaceful protesters exercising their First

[10] Q. Rep. Connolly: "Did you meet with the President at the White House on January 3rd?" A. Former Acting AG Rosen: "I did." Q. Rep. Connolly: "You did, but you decline to tell us what the nature of that conversation was about, is that correct?" A. Former Acting AG Rosen: "I can tell you it did not relate to the planning and preparations for the events on January 6th."

Amendment rights. As a clear example of mainstream media bias, however, the report later published about that interview omitted Mr. Clark's remarks on January 6, even though the reporter had ***repeatedly*** sought Mr. Clark's views on the topic during the course of the interview.[11]

For all of these reasons, the information and testimony sought by the Committee as applied to Mr. Clark in particular are outside the scope of the Committee's charter and are neither proper subjects of the Committee's subpoena, nor any subsequent attempt to enforce the subpoena.

Finally, I would kindly request a response to the objections set out in this letter, which may include a proposal to me by the Committee as to a more limited scope of inquiry narrowed to January 6—something that I would be happy to engage on to try to reach an agreement. And for the avoidance of all doubt, we reiterate that, during continued discussions and at all times, we reserve all other objections as may be applicable under the circumstances. *See supra* n.1.

Respectfully,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

Enc.
cc: Jeffrey Bossert Clark

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[11] *See* Ellen Gilmer, *Top Official Steps Down from DOJ's Environment, Civil Divisions*, BLOOMBERG LAW (Jan. 14, 2021), *available at* https://news.bloomberglaw.com/white-collar-and-criminal-law/top-official-steps-down-from-dojs-environment-civil-divisions?context=article-related.

From: Doug Collins [redacted]
Date: August 2, 2021 at 6:20:20 PM EDT
To: Driscoll, Robert [redacted]
Subject: Letter for Mr. Jeff Clark

Please find the attached letter for your client Mr. Jeff Clark.

Thank you for your cooperation.

Douglas A. Collins
Oliver & Weidner, LLC
[redacted]

JAMES C. WEIDNER

ERNEST H. "BUCKY" WOODS, III

DOUGLAS A. COLLINS

WILLIAM R. OLIVER
(OF COUNSEL)

NorthGeorgiaLawyers.com

August 2, 2021

Mr. Jeff Clark:

We represent former President Donald J. Trump and write concerning requests sent to you by the U.S. House of Representatives Committee on Oversight and Reform and the U.S. Senate Judiciary Committee to provide transcribed interviews on matters related to your service as Deputy Attorney General and Acting Attorney General during President Trump's administration. We also understand that, as set forth in its July 26, 2021, letter to you, the U.S. Department of Justice stated that President Biden decided to waive the executive and other privileges that protect from disclosure non-public information concerning those matters and has authorized you to provide such information.

Please be advised that the Department's purported waiver and authorization are unlawful, and that President Trump continues to assert that the non-public information the Committees seek is and should be protected from disclosure by the executive privilege. The executive privilege applicable to communications with President Trump belongs to the Office of the Presidency, not to any individual President, and President Biden has no power to unilaterally waive it. The reason is clear: if a President were empowered unilaterally to waive executive privilege applicable to communications with his or her predecessors, particularly those of the opposite party, there would effectively be no executive privilege. To the extent the privilege would continue to exist at all, it would become yet another weapon to level the kind of unjustifiable partisan political attacks the Democrat-controlled administration and Committees are seeking to level here.

As the Supreme Court held in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) – where, like here, the then-current administration did not support a former President's assertion of executive privilege – the executive privilege is crucial to Executive Branch decision-making:

> Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.

Nixon v. Administrator of General Services, 433 U.S. 425, 448-49 (1977). The Department's July 26 letter to you quoted this decision but left out the very next sentence in the opinion: "**Therefore, the privilege survives the individual President's tenure.**" Id. at 448-49 (quoting, and adopting, Brief for the Solicitor General on Behalf of Federal Appellees) (emphasis added).

Here, it is clear that even though President Biden and the Department do not know the nature or content of the non-public information the Committees seek, they have not sought or considered the views of the President who does know as to whether the confidentiality of that information at issue should continue to be protected. Such consideration is the minimum that should be required before a President waives the executive privilege protecting the communications of a predecessor. *See* Office of Legal Counsel Memorandum on Applicability of Post-Employment Restrictions in 18 U.S.C. § 207 to a Former Government Official Representing a Former President or Vice President in Connection with the Presidential Records Act, June 20, 2001, at 5 ("[A]lthough the privilege belongs to the Presidency as an institution and not to any individual President, the person who served as President at the time the documents in question were created is often particularly well situated to determine whether the documents are subject to a claim of executive privilege and, if so, to recommend that the privilege be asserted and the documents withheld from disclosure.").

Nonetheless, to avoid further distraction and without in any way otherwise waiving the executive privilege associated with the matters the Committees are purporting to investigate, President Trump will agree not to seek judicial intervention to prevent your testimony or the testimony of the five other former Department officials (Richard P. Donoghue, Patrick Hovakimian, Byung J. "BJay" Pak, Bobby L. Christine, and Jeffrey B. Clark) who have already received letters from the Department similar to the July 26, 2021 letter you received, so long as the Committees do not seek privileged information from any other Trump administration officials or advisors. If the Committees do seek such information, however, we will take all necessary and appropriate steps, on President Trump's behalf, to defend the Office of the Presidency.

Sincerely yours,
OLIVER & WEIDNER, LLC

Douglas A. Collins

Exhibit 5 — Letter from Department of Justice to Jeffrey B. Clark on July 26, 2021

U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer
Associate Deputy Attorney General

Washington, D.C. 20530

July 26, 2021

Jeffrey B. Clark
[redacted]
Via email to Counsel

Dear Mr. Clark:

The Department of Justice (Department) understands that you have been requested by the U.S. House of Representatives Committee on Oversight and Reform (House Oversight Committee), and the U.S. Senate Judiciary Committee to provide transcribed interviews to the Committees relating to your service as Assistant Attorney General for the Environment and Natural Resources Division and Acting Assistant Attorney General for the Civil Division. In these interviews, you are authorized to provide information you learned while at the Department as described more fully below.

According to information provided to you and the Department by the House Oversight Committee, its focus is on "examining President Trump's efforts to pressure the Department of Justice (DOJ) to take official action to challenge the results of the presidential election and advance unsubstantiated allegations of voter fraud."[1] The House Oversight Committee has stated that they wish to ask you questions "regarding any efforts by President Trump and others to advance unsubstantiated allegations of voter fraud, challenge the 2020 election results, interfere with Congress's count of the Electoral College vote, or overturn President Biden's certified victory."[2]

Based upon information provided to you and to the Department from the Senate Judiciary Committee, the Department understands that the scope of that Committee's inquiry is very similar to that of the House Oversight Committee. The letter to the Department dated January 23, 2021, explained that the Senate Judiciary Committee is conducting oversight into public reporting about "an alleged plot between then-President Donald Trump and [you] to use the Department of Justice to further Trump's efforts to subvert the results of the 2020 presidential election"—events that the letter described as raising "deeply troubling questions regarding the Justice Department's role" in those purported efforts.[3] In addition, the Senate Judiciary

[1] Letter from Carolyn B. Maloney, Chairwoman, House Committee on Oversight and Reform, to Jeffrey B. Clark, June 14, 2021.

[2] *Id.*

[3] Letter from Richard J. Durbin et al., Senate Judiciary Committee, to Monty Wilkinson, Acting Attorney General, Dep't of Justice, January 23, 2021, at 1, https://www.judiciary.senate.gov/press/dem/releases/senate-judiciary-committee-democrats-seek-answers-about-dojs-role-in-trumps-scheme-to-overturn-the-2020-election.

Committee has represented to the Department that the scope of its interview will cover your knowledge of attempts to involve the Department in efforts to challenge or overturn the 2020 election results. This includes your knowledge of any such attempts by Department officials or by White House officials to engage in such efforts. The Committee has further represented that the time frame for its inquiry will begin following former Attorney General William Barr's December 14, 2021, resignation announcement.

Department attorneys, including those who have left the Department, are obligated to protect non-public information they learned in the course of their work. Such information could be subject to various privileges, including law enforcement, deliberative process, attorney work product, attorney-client, and presidential communications privileges. The Department has a longstanding policy of closely protecting the confidentiality of decision-making communications among senior Department officials. Indeed, the Department generally does not disclose documents relating to such internal deliberations. For decades and across administrations, however, the Department has sought to balance the Executive Branch's confidentiality interests with Congress's legitimate need to gather information.[4]

The extraordinary events in this matter constitute exceptional circumstances warranting an accommodation to Congress in this case. Congress has articulated compelling legislative interests in the matters being investigated, and the information the Committees have requested from you bears directly on Congress's interest in understanding these extraordinary events: namely, the question whether former President Trump sought to cause the Department to use its law enforcement and litigation authorities to advance his personal political interests with respect to the results of the 2020 presidential election. After balancing the Legislative and Executive Branch interests, as required under the accommodation process, it is the Executive Branch's view that this presents an exceptional situation in which the congressional need for information outweighs the Executive Branch's interest in maintaining confidentiality.

The Executive Branch reached this view consistent with established practice. Because of the nature of the privilege, the Department has consulted with the White House Counsel's Office in considering whether to authorize you to provide information that may implicate the presidential communications privilege. The Counsel's Office conveyed to the Department that President Biden has decided that it would not be appropriate to assert executive privilege with respect to communications with former President Trump and his advisors and staff on matters related to the scope of the Committees' proposed interviews, notwithstanding the view of former President Trump's counsel that executive privilege should be asserted to prevent testimony regarding these communications. *See Nixon v. Administrator of General Servs.*, 433 U.S. 425, 449 (1977) ("[I]t must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support

[4] *See* Letter for Rep. John Linder, Chairman, Subcommittee on Rules and Organization, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs at 2 (Jan. 27, 2000) ("Linder Letter") ("In implementing the longstanding policy of the Executive Branch to comply with Congressional requests for information to the fullest extent consistent with the Constitutional and statutory obligations of the Executive Branch, the Department's goal in all cases is to satisfy legitimate legislative interests while protecting Executive Branch confidentiality interests.").

invocation of the privilege accordingly."); *see also id.* (explaining that the presidential communications privilege "is not for the benefit of the President as an individual, but for the benefit of the Republic") (internal citation omitted).

Therefore, given these extraordinary circumstances, including President Biden's determination on executive privilege, and having reviewed the scope of the Committees' requested interviews, the Department authorizes you to provide unrestricted testimony to the Committees, irrespective of potential privilege, so long as the testimony is confined to the scope of the interviews as set forth by the Committees and as limited in the penultimate paragraph below.[5] This accommodation is unique to the facts and circumstances of this particular matter and the legislative interests that the Committees have articulated.

Consistent with appropriate governmental privileges, the Department expects that you will decline to respond to questions outside the scope of the interview as outlined above and instead will advise the Committees to contact the Department's Office of Legislative Affairs should they seek information that you are unable to provide.

Please note that it is important that you not discuss Department deliberations concerning investigations and prosecutions that were ongoing while you served in the Department. The Department has a longstanding policy not to provide congressional testimony concerning prosecutorial deliberations. If prosecutors knew that their deliberations would become "subject to Congressional challenge and scrutiny, we would face a grave danger that they would be chilled from providlng the candid and independent analysis essential to just and effective law enforcement or, just as troubling, that they might err on the side of prosecution simply to avoid public second-guessing." Linder Letter. Discussion of pending criminal cases and possible charges also could violate court rules and potentially implicate rules of professional conduct governing extra-judicial statements. We assume, moreover, that such Department deliberations are not within the scope of the requested testimony as defined by the Committees.

Accordingly, consistent with standard practice, you should decline to answer any such questions and instead advise the Committees to contact the Department's Office of Legislative Affairs if they wish to follow up on the questions. Responding in such a way would afford the Department the full opportunity to consider particular questions and possible accommodations that may fulfill the Committees' legitimate need for information while protecting Executive Branch confidentiality interests regarding investigations and prosecutions.

Sincerely,

Bradley Weinsheimer

[5] You are not authorized to reveal information the disclosure of which is prohibited by law or court order, including classified information and information subject to Federal Rule of Criminal Procedure 6(e).

Exhibit 6 — Staff Email to Counsel for Jeffrey B. Clark on November 5, 2021

From: [redacted]
To: Harry MacDougald
Cc: [redacted]; [redacted]
Subject: Clark Deposition at 4:00
Date: Friday, November 5, 2021 12:42:00 PM

Harry,

I tried calling you a short while ago. I couldn't leave a message, as your cellphone voicemail box is full. I wanted to let you know that the Select Committee is reconvening for Mr. Clark's continued deposition at 4:00 today . The purpose of the reconvened deposition is to seek a ruling from the Chairman on Mr. Clark's assertion of privilege and refusal to answer questions. The House Rules I sent you this week provide (in pertinent part) that "**[w]hen the witness has refused to answer a question to preserve a privilege, members of staff may (i) proceed with the deposition, or (ii) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer**." Please return to the O'Neill House Office Building with Mr. Clark at that time, or indicate your refusal to do so.

We are preparing a response to the letter to the Chairman you delivered this morning. We will provide that letter as soon as it is complete, before or at 4:00.

Thanks,

[redacted]

Exhibit 7 — Email from Counsel for Jeffrey B. Clark to Select Committee Staff on November 5, 2021

[redacted]

From: Harry MacDougald [redacted]
Sent: Friday, November 5, 2021 3:25 PM
To: [redacted]
Cc: [redacted]; [redacted]
Subject: Re: Clark Deposition at 4:00

[redacted]

I am in the air on the way back to Atlanta. Therefore it will not be possible for us to return at 4 pm. I cannot allow Mr. Clark to appear without counsel. This is a basic feature of due process, which equally governs Congress as it does other branches of government.

As for the Chairman overruling our objections and ordering us to appear despite the objections on pain of criminal contempt (and without prejudice to making additional arguments since it is difficult for a tall man especially to work on a plane, and therefore while reserving all rights), I note the following responses. Fortunately, I had some ability to cut and paste from my device, despite the cramped quarters and nature of work on a plane:

(1) Congress lacks the power to apply law to fact. That is an exclusively judicial power. Hence, consistent with the U.S. Constitution, the Chair cannot overrule an objection that encompasses anything more than purely procedural matters exclusively confined to congressional rules. Mr. Clark stands on the separation of powers. See Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) (Congress lacks power to invade judicial province of applying law to fact, and where it acts with respect to one particular person it raises special concerns that it is disfavoring (as here) or favoring particular individuals). In light of Plaut, only an Article III court can rule on whether my objections on behalf of Mr. Clark in light of privilege doctrines and, without restriction, all of the legal points made in my letter to the Chair dated today.

(2) There are also serious due process problems with the Committee Chair purporting to rule on objections. The old maxim in common law (and perhaps equity as well) that man cannot be the judge of his own case applies here. (Discovery would be a lot different if I got to rule on the validity of all the objections to my questions.) Despite that maxim, this is nevertheless precisely what appears to be the situation here with the Chair simply confirming desires he has made clear in advance from statements to the press and in other January 6 proceedings.

(3) Related to point (2), the Committee and its Chair cannot rely on structural committee fairness as a kind of ersatz substitute for due process -- in general or in specific. This is especially true because the Committee is formulated to be a political monolith. As you are aware, the Committee's membership is purpose-built and allowed the minority no ability to participate in its proceedings. This stacks the deck and whenever procedural decks are stacked, due process principles are being violated. See, e.g., Air Transp. Ass'n of Am. v. National Mediation Board, 663 F.3d 476 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."). We have seen no indication in the fashion in which the Committee is proceeding that it has anything other than an unalterably closed mind.

Finally, I note that our invitation to discuss a narrowed scope of inquiry pending resolution of the executive privilege issues in Trump v. Thompson remains open.

With best regards,

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

[redacted]

On November 5, 2021 at 12:42:23 PM, [redacted] wrote:

Harry,

I tried calling you a short while ago. I couldn't leave a message, as your cellphone voicemail box is full. I wanted to let you know that the Select Committee is reconvening for Mr. Clark's continued deposition at 4:00 today . The purpose of the reconvened deposition is to seek a ruling from the Chairman on Mr. Clark's assertion of privilege and refusal to answer questions. The House Rules I sent you this week provide (in pertinent part) that "**[w]hen the witness has refused to answer a question to preserve a privilege, members of staff may (i) proceed with the deposition, or (ii) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer**." Please return to the O'Neill House Office Building with Mr. Clark at that time, or indicate your refusal to do so.

We are preparing a response to the letter to the Chairman you delivered this morning. We will provide that letter as soon as it is complete, before or at 4:00.

Thanks,

[redacted]

Exhibit 8 — Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 5, 2021

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225–7800

One Hundred Seventeenth Congress

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

November 5, 2021

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

Dear Mr. MacDougald,

I write in response to your November 5, 2021, letter on behalf of your client, Jeffrey Clark. The letter was handed to Select Committee staff when you arrived for Mr. Clark's deposition at 10:00 am this morning (the "November 5 letter"). We are prepared to resume the deposition of your client at 4:00 pm this afternoon, at which time I will rule on the claims of privilege you raised in this morning's session. A more detailed response to the November 5 letter will be forthcoming.

Service of the subpoena that was accepted on Mr. Clark's behalf by Robert Driscoll, Esq. on October 13, 2021. The subpoena called for Mr. Clark to appear on October 29, 2021, to provide documents and testimony.[1] All the requested documents relate directly to the inquiry being conducted by the Select Committee, serve a legitimate legislative purpose, and are within the scope of the authority expressly delegated to the Select Committee pursuant to House Resolution 503. In the October 13, 2021, letter that accompanied the subpoena, the Select Committee set forth the basis for its determination that the documents and records sought by the subpoena and Mr. Clark's deposition testimony are of critical importance to the issues being investigated by the Select Committee.

In your November 5 letter, and on the record in this morning's session of 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 based on broad and undifferentiated assertions of various privileges, including claims of executive privilege purportedly asserted by former President Trump.[2] Your reliance on executive privilege is wholly misplaced and does not provide a basis for your client's blanket refusal to produce documents or answer any of the Select Committee's questions.

In support of your executive privilege assertion, you have directed the Select Committee to an August 2, 2021, letter from Douglas Collins, counsel for former President Trump (the

[1] At your request, Committee staff agreed to continue the appearance and production date to today.
[2] The November 5 letter also asserts, without meaningful discussion or authority, that the testimony sought by the Committee is "outside the scope of the Committee's charter."

"August 2 letter"), and your interpretation of certain events since the delivery of the August 2 letter. None of these documents or arguments justify Mr. Clark's position.

First, neither the November 5 letter, the August 2 letter, nor any information you provided on the record in this morning's session reflects an assertion of executive privilege conveyed to the Select Committee by former President Trump with respect to the testimony and document production of Mr. Clark. The August 2 letter specifically notes that Mr. Trump will not seek judicial intervention to prevent your client's testimony,[3] and you stated on the record today that you have received no further instructions from former President Trump with respect to Mr. Clark's testimony. While the November 5 letter expresses your view that subsequent actions by former President Trump – specifically, letters to other subpoenaed individuals and litigation filed seeking injunctive relief regarding a document request to the National Archives -- reflect a change in Mr. Trump's position with respect to Mr. Clark, you have not demonstrated to the Select Committee that you have made any effort to confirm that Mr. Trump agrees with your analysis, nor have you indicated receipt of any communication from Mr. Trump or his counsel reflecting some revised instructions to Mr. Clark. In fact, you indicated this morning that you had not sought concurrence with this position or otherwise engaged with representatives for former President Trump. Further, the Select Committee has received no direct communication from former President Trump or his representatives asserting 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.

Second, even assuming the former President were to have formally invoked privilege with respect to Mr. Clark, the law does not support the type of blanket testimonial immunity that he has claimed for himself. To the contrary, every court that has considered the absolute immunity Mr. Clark has claimed has rejected it. *See, e.g., Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008) (rejecting former White House counsel'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) ("This Court finds that the *Miers* court rightly determined not only 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.").[4] Similarly, courts have 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] The August 2 letter makes reference to a July 26, 2021, letter from the Department of Justice authorizing you to provide unrestricted testimony to the Select Committee within the scope of its inquiry, subject to certain limitations regarding Department deliberations concerning investigations and prosecutions. A copy of the Department's July 26 letter is attached.

[4] The *McGahn* court could not have been more clear in its holding: "To make the point as plain as possible, it is clear to this Court … that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist." *Id.* at 214.

In light of this clear authority, even if former President Trump had explicitly directed Mr. Clark to assert executive privilege, Mr. Clark could only assert that privilege with respect to documents and testimony to which it applies. As the D.C. Circuit noted in *In re Sealed Case (Espy*), 121 F.3d 729, 752 (D.C. Cir. 1997):

> [Executive] privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to 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.

See also 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").

Further, the Select Committee views as tenuous at best any claims of Mr. Clark that executive privilege bars the Select Committee from obtaining Mr. Clark's testimony and documents. Mr. Clark was not among the "small cadre of senior advisors" to former President Trump, and, therefore, cannot invoke executive privilege with respect to communications with anyone other than the President. Likewise, only those presidential communications that relate to official government business would be covered by the 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"). Even assuming executive privilege was invoked by former President Trump, Mr. Clark would be required to assert any claim of executive privilege narrowly and specifically. *See, e.g.*, *Id.* ("the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected").

At this morning's session, the Select Committee and its staff made several attempts to define the scope of Mr. Clark's blanket assertion of privilege.[5] Neither you nor Mr. Clark were not willing to engage on this issue, other than to repeatedly refer to the November 5 letter. Members and staff shared with you the legal authority (including the *Miers* case cited above) that precludes your client from categorically claiming privilege and asked you to identify the specific privileges you were claiming and the scope of those privilege claims, *i.e.,* which areas of the anticipated testimony and which responsive documents are covered by the claimed privileges. Again, you cited your November 5 letter, but would not otherwise provide this information to elucidate your position. Select Committee Members and staff asked your client a series of questions regarding

[5] Mr. Clark repeatedly took issue with the use of the term "blanket" when describing his refusal to answer substantive questions within the scope of the Select Committee's inquiry. However, his consistent refusal to respond to a broad range of questions and topics posed by the Members and staff at this morning's session, coupled with the categorical assertion in your November 5 letter that Mr. Clark "must decline to testify as a threshold matter" and your decision to walk out of the deposition certainly constitutes a "blanket assertion."

topics within the scope of the Select Committee's inquiry, but your client would answer only one of the substantive questions.[6]

The breadth of your client's assertions of privilege raises questions regarding whether there is a good faith basis for his position. 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 U.S. Department of Justice. None of these areas of inquiry even remotely implicate executive privilege, even if such a privilege had been formally invoked by former President Trump.

You have been advised that the deposition will resume at 4:00 pm this afternoon, at which time I will formally reject your claims of privilege. We expect your client to produce responsive documents forthwith and proceed with the deposition. The Select Committee will view Mr. Clark's failure to do so as willful non-compliance with the Subpoena. His continued non-compliance with the Subpoena will force the Select Committee to consider referring him to the Department of Justice for contempt of Congress, pursuant to Title 2, United States Code, Section 192, as well as the possibility of having a civil action to enforce the subpoena brought against Mr. Clark in his personal capacity.

Sincerely,

Bennie G. Thompson
Chairman

[6] That question related to a document request related to a particular email account.

Exhibit 9 — Letter from Counsel for Jeffrey B. Clark to Chairman Thompson on November 8, 2021

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

[redacted]

[redacted]

November 8, 2021

Hon. Bennie G. Thompson, Chairman
January 6th Select Committee
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515

Dear Representative Thompson:

I write to respond briefly to your November 5, 2021 letter, which in turn responded to my letter to you dated that same day.[1] Your letter was sent to us at approximately 4:30 pm EDT on November 5 by [redacted] yet it demanded we re-appear for a deposition at 4:00 pm EDT. *See* Attachment A. Obviously, that was physically impossible, and I was at that point in the air on the way back to Atlanta. An earlier email calling for a return appearance at that same hour had been sent to me, but we are hard-pressed to imagine how you could have reviewed our detailed 12-page letter, given it due consideration along with the statements made on the record, and then ruled on all of the objections made. Additionally, I note that, while on the plane, I also sent a brief email making additional legal points that your letter did not respond to. *See* Attachment B.

Turning to substance, we disagree with your November 5, 2021 letter and will respond more fully to it in a subsequent letter (see below). Suffice to say for purposes of this brief letter, which I have prepared largely to acknowledge receipt of your late-in-the-day November 5 letter out of due respect for the Committee, we do not agree that Mr. Clark, on Friday November 5 issued a "blanket refusal to produce documents or answer

[1] This letter reminds you and the Committee of the same reservations of rights stated in my November 5, 2021 letter to you. For reasons of economy of words, I will not restate those reservations here.

any of the Select Committee's questions." Rep. Thompson Letter, at 1 (Nov. 5, 2021); *see also id.* (relatedly and wrongly asserting that we asserted "absolute immunity").[2] Those are unfortunate mischaracterizations that counsel for the Committee and several Committee members in attendance repeatedly attempted last Friday, but repetition will not make those mischaracterizations correct. As just a few examples of this, we repeatedly indicated on the record that we wished to continue the dialogue and in the concluding paragraph of my letter I specifically stated that "I would be happy to engage on" ... "a more limited scope of inquiry narrowed to January 6," which is what we believe is all the Committee's limited charter extends to.

And we repeatedly clarified that our threshold objection is based on matters of timing, prudence, and fairness, not on purported executive-privilege absolutism. There is substantial overlap between what the subpoena to Mr. Clark identifies as the reasons for seeking Mr. Clark's testimony and the matters over which former President Trump has sought to maintain executive privilege in the pending *Trump v. Thompson* litigation. At the very least, until that litigation reaches a final outcome in the Judicial Branch, Mr. Clark would be in ethical jeopardy of wrongly guessing how that litigation will come out. Accordingly, it is best for all involved to await clarification of the parameters and application of executive privilege in that closely related dispute now in litigation.

We do not yet have a rough, non-final transcript of Friday's proceeding, but we recall [redacted] indicating on the record that the Committee may not "want to" wait until the *Trump v. Thompson* privilege litigation is complete. But we cannot understand why not. The House could easily draft a bill now to, for instance, (i) harden the security of the Capitol; (ii) narrow the valid time, place, and manner aspects of First Amendment protests held at or near the Capitol, as long as any new limitations comported with free expression and petition-for-redress principles; (iii) designate a lead agency to coordinate Capitol security during significant protests; (iv) better share between Article I and II officials any pre-event intelligence gathered, as well as social media and other Internet

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[2] Your letter cites to non-Supreme Court case law on the issue of absolute immunity. It should go without saying (but we state it explicitly to avoid any ambiguity) that we reserve the right to contest the validity or applicability of such case law, including by seeking review by the Nation's highest court, should that ever become necessary.

"chatter" regarding planned activities of a suspicious nature that could impact the Capitol's safety, etc.[3] Congress's ability to draft, debate, and pass such worthy and protective legislation is not somehow hopelessly frozen while this Committee engages in various depositions or interviews, particularly of Mr. Clark.

Finally, as [redacted] indicated at the outset of the Friday proceeding, please share the transcript of that proceeding with us. Next, we will await the Committee's completion of the "more detailed response to the November 5 letter" that you say "will be forthcoming" before we complete a more detailed follow-up letter. In conjunction with that effort, we will also want to have the transcript in hand, and make clarifications as appropriate, etc., either separately or by combining that with our more detailed forthcoming letter.

Thank you for your attention to this matter, Mr. Chairman.

Respectfully,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

Encs.
cc: Jeffrey Bossert Clark

[3] Indeed, we see that Congress has already passed legislation that provides for additional security at the Capitol. And, presuming Congress's legislative rationality, this would appear to discharge any exigent needs that Congress judged necessary to ensure its safety. *See, e.g.*, Mary Clare Jalonick, *Congress Passes Emergency Capitol Security Money, Afghan Aid* (July 29, 2021), *available at* https://www.military.com/daily-news/2021/07/29/congress-passes-emergency-capitol-security-money-afghan-aid.html.

Attachment “A”

Subject: Select Committee to Investigate the January 6th Attack on the U.S.

From: [redacted] - To [redacted] - Cc: [redacted], [redacted], [redacted] - Date: November 5, 2021 at 4:30 PM, Attachments: 2021-11-5.BGT Letter to Harry MacDougald.pdf 2021-07-26.DOJ Letter to Jeffrey Clark.pdf

Mr. MacDougald,
Please see the letter attached.

Thank you,
[redacted]

[redacted]

Attachment “B”

Subject: Re: Clark Deposition at 4:00

From: [redacted] - To: [redacted] - Cc: [redacted], [redacted] - Date: November 5, 2021 at 3:24 PM

[redacted]:

I am in the air on the way back to Atlanta. Therefore it will not be possible for us to return at 4 pm. I cannot allow Mr. Clark to appear without counsel. This is a basic feature of due process, which equally governs Congress as it does other branches of government.

As for the Chairman overruling our objections and ordering us to appear despite the objections on pain of criminal contempt (and without prejudice to making additional arguments since it is difficult for a tall man especially to work on a plane, and therefore while reserving all rights), I note the following responses. Fortunately, I had some ability to cut and paste from my device, despite the cramped quarters and nature of work on a plane:

(1) Congress lacks the power to apply law to fact. That is an exclusively judicial power. Hence, consistent with the U.S. Constitution, the Chair cannot overrule an objection that encompasses anything more than purely procedural matters exclusively confined to congressional rules. Mr. Clark stands on the separation of powers. See Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) (Congress lacks power to invade judicial province of applying law to fact, and where it acts with respect to one particular person it raises special concerns that it is disfavoring (as here) or favoring particular individuals). In light of Plaut, only an Article III court can rule on whether my objections on behalf of Mr. Clark in light of privilege doctrines and, without restriction, all of the legal points made in my letter to the Chair dated today.

(2) There are also serious due process problems with the Committee Chair purporting to rule on objections. The old maxim in common law (and perhaps equity as well) that man cannot be the judge of his own case applies here. (Discovery would be a lot different if I got to rule on the validity of all the objections to my questions.) Despite that maxim, this is nevertheless precisely what appears to be the situation here with the Chair simply confirming desires he has made clear in advance from statements to the press and in other January 6 proceedings.

(3) Related to point (2), the Committee and its Chair cannot rely on structural committee fairness as a kind of ersatz substitute for due process -- in general or in specific. This is especially true because the Committee is formulated to be a political monolith. As you are aware, the Committee's membership is purpose-built and allowed the minority no ability to participate in its proceedings. This stacks the deck and whenever procedural decks are stacked, due process principles are being violated. See, e.g., Air Transp. Ass'n of Am. v. National Mediation Board, 663 F.3d 476 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments."). We have seen no indication in the fashion in which the Committee is proceeding that it has anything other than an unalterably closed mind.

Finally, I note that our invitation to discuss a narrowed scope of inquiry pending resolution of the executive privilege issues in Trump v. Thompson remains open.

With best regards,

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

On November 5, 2021 at 12:42:23 PM, [redacted] ([redacted]) wrote:

Harry,

I tried calling you a short while ago. I couldn't leave a message, as your cellphone voicemail box is full. I wanted to let you know that the Select Committee is reconvening for Mr. Clark's continued deposition at 4:00 today . The purpose of the reconvened deposition is to seek a ruling from the Chairman on Mr. Clark's assertion of privilege and refusal to answer questions. The House Rules I sent you this week provide (in pertinent part) that "**[w]hen the witness has refused to answer a question to preserve a privilege, members of staff may (i) proceed with the deposition, or (ii) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer**." Please return to the O'Neill House Office Building with Mr. Clark at that time, or indicate your refusal to do so.

We are preparing a response to the letter to the Chairman you delivered this morning. We will provide that letter as soon as it is complete, before or at 4:00.

Thanks,

[redacted]

Exhibit 10 — Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 9, 2021

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225–7800

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

Exhibit 11 — Letter and Memo from Counsel for Jeffrey B. Clark to Chairman Thompson on November 12, 2021

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

[redacted]

[redacted]

November 12, 2021

Hon. Bennie G. Thompson, Chairman
January 6th Select Committee
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515

Dear Representative Thompson:

This letter and the attached memo constitute my response on behalf of Jeff Clark to your letters of November 5 and 9, 2021. This cover letter will summarize that memo.

Separation of Powers Violations. As we have stated repeatedly, the doctrine of executive privilege central to our objections is designed to preserve the separation of powers. You inadvertently but powerfully confirmed the validity of our worries about the Committee's intrusions into the separation of powers when you were quoted in *Politico* on November 9 saying "And we'll let the evidence based on what we look at ***determine guilt or innocence.***"[1] But no Congressional committee wields constitutional authority to "determine guilt or innocence." And Congress lacks the power to issue or enforce subpoenas to carry out such an ***unlawful and plainly non-legislative purpose.***

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[1] *See* Kyle Cheney & Josh Gerstein, *Trump Cannot Shield White House Records from Jan. 6 Committee, Judge Rules*, POLITICO, *available at* https://www.politico.com/news/2021/11/09/trump-executive-privilege-court-ruling-kings-520512.

Due Process Violations. We have also repeatedly pointed out serious due process objections to how the Committee is proceeding as to Mr. Clark, but none of your letters deigns to address these problems. For example:

- You claim the authority to rule on our objections to your own Committee's questions. Due process forbids anyone acting as the judge of their own case.
- You have proven the wisdom of that constitutional guardrail by exhibiting an unalterably closed mind in judging your own case. On November 5 you wrote both that (a) our objections had been overruled but that (b) the underlying reasoning would come later (and came November 9)—a real-life case of the surrealistic royal decree where the Red Queen in *Alice in Wonderland* pronounced: "sentence first-verdict afterwards."
- Your letter of November 9 was thus just a series of *post hoc* rationalizations designed to justify what you had let slip was an outgrowth of your already made-up mind back on November 5.
- On November 5 at 4:30 pm, you directed us to appear in person once again at 4 pm. We lack a time machine, and I was on an airplane when that letter was received. And compelled attendance without counsel would breach due process.
- To the extent the Committee is permitted to question Mr. Clark about election-related matters, he should be able to review all DOJ election-related investigation files, which the Committee and DOJ have strangely combined to declare off-limits.
- Similarly, Mr. Clark has been unfairly denied access to refresh his memory about classified analysis of foreign influence on the election that he reviewed while he was at DOJ, and which include his personal notes on a classified conversation with Director of National Intelligence John Ratcliffe that he had on January 2, 2021.
- We have not yet been provided with a copy of the transcript of the November 5 session, though it was promised at that time and you have quoted from it liberally in your November 9 letter.

Proper and Repeated Presidential Instructions Exist to Mr. Clark to Assert Executive Privilege. More than once, your letters dispute the sufficiency of President Trump's direction to Mr. Clark to assert executive privilege, contending, for example,

that President Trump only gave the direction once. While we are unaware of any legal authority that would support the peculiar notion that a Presidential directive must be repeated to be effective, in this case, ***the relevant instruction actually was given twice***. In addition to his August 2 letter, Mr. Collins was quoted by Fox News on August 3 as saying President Trump regarded the communications as privileged and that he "hopes the former officials will withhold any information from Congress that would fall under executive privilege."[2]

The Committee simultaneously and by its own admissions (a) seeks to question Mr. Clark about his direct communications with President Trump, but (b) contends that Mr. Clark cannot claim executive privilege because he was not part of a "small cadre" working directly with the President. The contradictory nature of these positions is plain.

Mr. Clark Cannot Be Made a Pawn of an Inter-Branch Squeeze Play. The Committee's attempt to force Mr. Clark to testify—before the applicable contours of executive privilege are decided, for instance, in *Trump v. Thompson*—is extremely unfair. You are putting him to the Hobson's choice of risking contempt for following the instructions to assert executive privilege given to him by the President for whom he worked, or violating his professional responsibilities to honor those instructions—all while leaving Mr. Clark in the posture of having to guess how the courts will draw that line. Once struck, the bell of testimony, of course, cannot be un-rung. As esteemed former Solicitor General Rex Lee wrote in a notable law review article relied on by another former Solicitor General (albeit when he, Ted Olson, was the head of the Office of Legal Counsel), "It is neither necessary nor fair to make [the Executive Brach official] the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute," especially when there is already an expedited proceeding underway, between President Trump and the Committee directly, that will provide at least some guidance on the executive privilege questions involving Mr. Clark. Rex Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 239. *See generally* 8 Op. OLC 101 (1984).

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[2] Tyler Olson, *Trump Foreshadows Executive Privilege Fight in Election Investigations, But Won't Try to Block Testimony Yet* (Aug. 3, 2021), *available at* https://www.foxnews.com/politics/trump-executive-privilege-election-investigations-wont-block-testimony.

DOJ's July 26, 2021 Letter Is Internally Contradictory. Your letters place great (as well as misplaced) weight on DOJ's July 26 letter to Mr. Clark. Under certain conditions, this letter purported to waive executive privilege for Mr. Clark's direct communications with President Trump, while asserting law enforcement privilege to conceal, most remarkably, ***any investigations*** (or lack thereof) underway while he was there, which would necessarily include any inquiries delving into election irregularities in particular. Executive privilege exists to serve the Republic, not any one President, and cannot be so nakedly contorted to serve the current Administration's political grievances against the former President. Most ironically, the DOJ letter zealously guards and refuses to waive the Department's prerogatives to avoid public disclosures because that could chill candid discussions inside DOJ but cavalierly disregards the very same concern as it applies to the President having candid discussions with his advisors, even though the presidential communications privilege is of a constitutionally higher order than a DOJ intramural law enforcement privilege. The logical contradictions in these positions are glaring.

Mr. Clark Is an Irrelevant, or at Best Marginal, Witness In Light of the Committee's Limited Charter. The Committee's investigative jurisdiction over the events of January 6 does not extend to the information sought from Mr. Clark regarding the election or his interactions with the former President.

- Mr. Clark had zero involvement in the events of January 6th;
- Mr. Clark had no authority over any law enforcement function relevant to January 6th;
- There is no demonstrably critical need for Mr. Clark's testimony regarding either January 6th itself or internal deliberations as to the election (which is a different topic), especially given the testimony previously given by other DOJ officials;
- The Committee's theory of relevance with respect to Mr. Clark does not make any sense. His confidential and privileged deliberations regarding the election were totally unknown to anyone in the Capitol crowd or the public at large at the time of January 6. Therefore, Mr. Clark's legal advice could not possibly have contributed to the opinions of anyone amongst the January 6th protesters toward the election, and so could not have any causal connection whatsoever to the tragic disturbance of good order on that day.

- The baying after Mr. Clark based on such an incoherent theory of relevance stands in stark contrast to the Committee's studious disinterest in one Mr. Ray Epps, who is on video recorded on January 5 and 6th ***repeatedly*** inciting and whipping up protestors to "enter the Capitol" on January 6. Your colleague Representative Massie has called for answers on this issue, which would clearly be part of the mix if the Committee's membership were balanced. Hounding Mr. Clark, who had nothing to do with January 6, while leaving Mr. Epps entirely undisturbed, when the latter was obviously up to his neck in the events of that day, requires explanation and confirms that Mr. Clark is being deployed as a prop in the public-private partnership of narrative-mongering.[3]

The Committee Has Repeatedly Mischaracterized Our Legal Positions. The Committee, both in person and in writing, has repeatedly mischaracterized our position to lay an inaccurate predicate for contempt. We have not asserted an absolute or blanket refusal to answer. We have instead pleaded with the Committee that it is only prudent and fair to await the final merits resolution of litigation, including but not limited to *Trump v Thompson*, so that we will all know where things stand on executive privilege.[4]

The Committee Is Violating the Governing Congressional Rules. Defects in the Committee's organization render it incapable of complying with the Rules of the House with respect to depositions. As Rep. Banks and others stated in THE FEDERALIST on

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[3] The Committee has emphasized concern about threats to the safety of its members and to the Capitol building. We respect those concerns and agree that they should be taken very seriously and have underscored, as you know, that new legislation has already been passed to address such concerns. But you should be aware that the constancy of improper, anonymous, and, in many instances, inaccurate leaks against Mr. Clark in the media poses very real safety concerns for him as well. Over the Summer and into the Fall, Mr. Clark repeatedly received threatening messages at a place of employment, leading the employer to make several reports to the FBI. And the peaks and valleys of those threats correspond very closely in time with media hit pieces, especially when they are broadcast on television.

[4] Relatedly, you have wrongly claimed that we "abrupt[ly]" left the November 5 deposition. That is inaccurate, as we interacted with Committee for about 90 minutes and also patiently accommodated requests for the Select Committee to conduct sidebars with itself during which we were instructed to leave the room. And most importantly, we left only after our respective legal positions had been hashed and rehashed for the fifth or sixth time, constituting badgering or harassment of the witness.

November 9, 2021,[5] the nominal members of the minority party on the Committee were appointed by the Speaker, not the Minority Leader, and therefore constitute representatives of the majority, not the minority. The Minority Leader's appointments to the Committee were refused by the Speaker. As a result, there is no ranking minority member to be consulted on the issuance of subpoenas, and no minority staff to participate in examining witnesses or conducting the Committee's investigation. Consequently, the Committee's subpoena to Mr. Clark is invalid under the Rules of the House.

Conclusion. Finally, we must observe that the Committee's project here appears to be an attempt to relitigate the failed second impeachment of former President Trump but without following the prescribed constitutional process. To date, Mr. Clark has engaged with the Committee with patience and in good faith, but the evidence of bias against him and improper political agendas mounts by the day. We recognize that the Committee is formed exclusively of staunch opponents of former President Trump, but even so, at some point the war on Mr. Trump must eventually run its course.

As we have often stated and reiterate here, we are certainly willing to engage in further dialogue over a reduced scope of inquiry, or to consider written questions, or to discuss other means of accommodating the inter-branch and cross-presidential interests that are presently in tension in this matter.

Respectfully,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

cc: Jeffrey Bossert Clark

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[5] *See* Mollie Hemingway, *J6 Committee Misleading Witnesses About Republican Staff Presence*, THE FEDERALIST (Nov. 10, 2021), *available at* https://thefederalist.com/2021/11/10/j6-committee-misleading-witnesses-about-republican-staff-presence/.

MEMORANDUM RE: CLARK SUBPOENA

November 12, 2021

This Memorandum (or "Memo") responds more fully to Chairman Thompson's letters of November 5, 2021 and November 9, 2021 and accompanies my cover letter of November 12 to Chairman Bennie G. Thompson.[1] I also incorporate by reference the points made in my November 8 letter. This Memo is organized so as to respond, roughly sequentially, to your points as they were made in your November 5 letter, coupled with supplementation regarding your November 9 letter as appropriate:

1. There is a self-evident problem posed by your November 5 letter. It proposed resuming the deposition at 4:00 pm that day, but that letter was not sent until 4:30 pm—a half-hour ***in the past*** at the time your November 5 letter was sent. Given that, we also do not understand your assertion that you would rule at 4:00 pm on our objections inasmuch as your November 5 letter appears to have already rejected those claims.[2] This is clear from your November 9 letter, which refers to your November 5 letter providing "notice of my rulings on the objections you raised at your deposition on November 5," Thompson Letter at 2 (Nov. 9, 2021). This is yet another illustration of the "unalterably closed mind" problem that I explained from the airplane during my return flight to Atlanta on November 5 and my point that you ruling on objections we presented using that frame of mind is a violation of due process. *See* my email to [redacted] of Nov. 5, 2021, (citing *Air Transp. Ass'n of Am. v. National Mediation Bd.*, 663 F.3d 476 (D.C. Cir. 2011)). *See also* Point 13, *infra*. And most importantly, nowhere do your November 5 or 9 letters even reference due process or respond to our arguments in that vein.[3]

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[1] This Memo reminds you and the Committee of the same reservations of rights stated in my November 5, 2021 letter to you. To economize on words, I will not restate those reservations here. Additionally, you cannot assume that any point in your letters not responded to in specific terms are points that we accept. I reserve all of Mr. Clark's rights.

[2] Though, of course, we would urge you to reconsider, even now.

[3] We suspect part of the problem here is the Committee's extreme haste. In addition to the timing problem (calling for Mr. Clark to return to a congressional office building at 4:00 pm in a letter sent at 4:30 pm), page 6 of your November 9 letter reflects a heading that repeats itself (*i.e.,* heading II.C).

2. Your November 5 letter also indicated that a more detailed letter would be forthcoming, which was the November 9 letter. But we similarly do not see how, before that more detailed letter provided all of the legal analysis your staff thought necessary to include, you could have been fully informed in ruling on the objections as of 4:00 or even 4:30 pm last Friday, November 5, given that the November 9 letter was still four days in the future. All of this similarly underscores the due process problems with how the Committee is proceeding. Taking a step back, I cannot help but observe that the chronology of when, exactly, you overruled the objections calls to mind the Queen of Hearts' demand in *Alice in Wonderland* of "Sentence first—verdict afterwards." https://wordhistories.net/2019/07/14/sentence-first-verdict-afterwards/.

3. You assert that "[a]ll the requested documents relate directly to the inquiry being conducted by the Select Committee …." Chairman Thompson Letter, at 1 (Nov. 5, 2021). We strongly dispute that there is such a direct relationship. Mr. Clark had no involvement with the events of January 6th. And, as I noted in my November 5 letter, former Acting Attorney General Rosen has already testified to the House that the January 3, 2021 Oval Office meeting Mr. Clark participated in "did not relate to the planning and preparations for the events on January 6th." At best, Mr. Clark is a very tangential witness in light of House Resolution 503, which sets up this Committee's function. That point alone—together with the point made in my November 8, 2021 letter to you that protective legislation for the Capitol has already been passed and additional legislation of that type need not await interviewing Mr. Clark—undercuts any claimed urgent or "demonstrably critical" need for Mr. Clark's testimony.

a. Mr. Clark was not a "cause" of a "domestic terrorist attack on the Capitol. *Compare* House Resolution 503, § 3(1). Nor was he in charge of the "preparedness and response of the United States Capitol Police and other Federal, State, and local law enforcement agencies in the National Capital Region and other instrumentalities of government …." *Compare id.* Nor did Mr. Clark participate in any January 6 activities at the Capitol where some of the individuals involved may have sought to interrupt the "peaceful transfer of power." Nor could Mr. Clark's work, which was not publicly released while he served in the Trump Administration, be an "influencing factor" leading

to a decision by some individuals to go into the Capitol building on January 6. *Contra* Thompson Letter, at 8 & n.13 (Nov. 9, 2021) (citing H. Res. 503, § 3(1)).[4]

b. All Mr. Clark knows about "evidence developed by relevant Federal, State, and local governmental agencies regarding the facts and circumstances surrounding the domestic terrorist attack on the Capitol," etc. is what he has read or seen in the media or learned by watching some portions of past testimony by other officials on those topics, especially to the House Oversight Committee. *Compare id.* § 3(2).

c. The purpose enunciated in House Resolution 503 Section 3(3) is also something that does not embrace Mr. Clark.

d. We note that Section 4(a)(1)(B) of House Resolution 503 references "malign foreign influence operations." Mr. Clark has no visibility into that issue as it may relate to the events of January 6, 2021. But he did review classified information on potential foreign influence as it bore on the 2020 presidential election. Pursuant to Justice Department regulations, he requested that he be allowed to re-review such material, including his personal notes on that topic left in the Justice Department Command Center. But the Department denied his request, noting that the Committee had told the Department that this was not relevant to the Committee's inquiry.[5] If the Committee has

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[4] What appears far more relevant for getting to the bottom of why some individuals went into the Capitol Building are the activities of a Mr. Ray Epps, who was caught on video on both January 5 and 6, 2021 urging protestors and anyone nearby who would listen, it seems, to "enter the Capitol" on January 6. Yet it is Mr. Clark who has been subpoenaed to testify about non-public information based on work subject to various Executive Branch, DOJ, and general legal confidentiality protections, while Mr. Epps has not been subpoenaed. *See, e.g.*, https://youtu.be/uHn1hZyPJxk, Video Gallery, Rep. Thomas Massie, *available at* https://massie.house.gov/videos/ (page 2) (last visited Nov. 12, 2021). If the Committee were properly constituted, *see* Point 16, *infra*, the Committee minority could use the Committee's investigators to pursue this promising lead evenhandedly. As former Rep. Henry J. Hyde once memorably said, "The mortal enemy of equal justice is a double standard." Impeachment Trial of William Jefferson Clinton, remarks of Rep. Henry J. Hyde, available at https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/managers2text020899.htm.

[5] On October 14, 2021, Kira Antell of the Department of Justice's Office of Legislative Affairs emailed Mr. Clark's former counsel, stating as follows:

changed its mind and now views the issue of foreign influence in the election to be relevant, the Department's denial of Mr. Clark's request is another denial of due process. And, even if the Committee's position that the foreign influence question is irrelevant remains unchanged, it is not up to Ms. Antell and/or this Committee to decide what materials Mr. Clark needs to refresh his recollection. Mr. Clark, consulting with me as his lawyer, should be able to make that determination. Part of due process requires giving witnesses the ability to determine how to answer particular lines of questioning; due process is not consistent with trying to place entire lines of inquiry beyond question, especially where intent is a relevant legal factor. As a result, however one slices it, blocking Mr. Clark from accessing the classified material on foreign election interference that he previously reviewed is a denial of due process.

4. We reiterate that Mr. Clark did not state on November 5 that, for all time, he would "not answer any of the Select Committee's questions on any subject and would not produce any documents," as you assert in your November 5 letter. As I explained in my November 5 and November 8 letters, the issue is predominantly one of timing, prudence, and fairness in awaiting, at the very least, a final merits outcome of the *Trump v. Thompson* litigation. The mismatch between the written statements of our position and the Committee's various erroneous characterizations of our position makes it particularly important for this dialogue to occur in writing.

5. You argue that the August 2, 2021 letter from Mr. Collins to Mr. Clark does not allow executive privilege to apply to Mr. Clark absent a "***further instruction***[] from former President Trump with respect to Mr. Clark's testimony." Chairman Thompson Letter, at 2 (emphasis added). We do not understand why ***one instruction*** given in August 2 is not enough and a "further instruction" would be required. You offer no explanation

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Finally, I wanted to address your question seeking access to materials relating to a classified ODNI briefing of Mr. Clark in early January. OLA has spoken to the Select Committee and confirmed that the details of this briefing are outside the scope of their interest in speaking with Mr. Clark. Beyond confirming with Mr. Clark that the briefing occurred, they do not require additional information about that briefing. We believe this resolves this question.

for that, and there is simply no support for that view in the text of the letter. The August 2 letter speaks for itself.

And, lest there be any doubt, a later interview does actually constitute ***a second instruction*** because Mr. Collins later stated that he "hopes the former officials will withhold any information from Congress that would fall under executive privilege" and that "'I would hope they would honor that,' Collins said when asked whether Rosen and the other officials [clearly including Mr. Clark] should withhold certain deliberations from Congress. 'The former president still believes those are privileged communications that are covered under executive privilege'"[6]

If the Committee wishes to contest our plain-text reading of that letter and Mr. Collins' related statements to the media, it can consult with former President Trump's lawyers on that point, though we should be included in any such process—it should not be *ex parte*. You also assert that our position is based on suppositions about former President Trump's position. Again, that is obviously not the case. Our position is based on the text of the August 2 letter ***and*** Mr. Collins' amplification of that letter to the media. Your interpretation of the August 2 letter is inconsistent both with the letter itself and Mr. Collins' interpretation of his own letter.

6. Relatedly, you argue in the November 9 letter that Mr. Clark should testify because, *inter alia*, Messrs. Rosen and Donoghue testified based on a July 26, 2021 letter they (along with Mr. Clark) all received at roughly the same time. *See* Thompson Letter at 1 n.2 (Nov. 9). Especially after the August 3 comments were made by Mr. Collins to the media, we are at a loss to explain why others at DOJ were anxious to testify. Part of the answer may appear in a story in the *New York Times*, which states as follows:

> Mr. Rosen has spent much of the year in discussions with the Justice Department over what information he could provide to investigators, given

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[6] Tyler Olson, *Trump Foreshadows Executive Privilege Fight in Election Investigations, But Won't Try to Block Testimony Yet* (Aug. 3, 2021), *available at* https://www.foxnews.com/politics/trump-executive-privilege-election-investigations-wont-block-testimony. Of course, as the Committee knows, President Trump decided in the Fall—after the Collins letter dated August 2 and Mr. Collins' statements to the media reported on August 3, that he would indeed go to court.

> that decision-making conversations between administration officials are usually kept confidential.
>
> Douglas A. Collins, a lawyer for Mr. Trump, said last week that the former president would not seek to bar former Justice Department officials from speaking with investigators. But Mr. Collins said he might take some undisclosed legal action if congressional investigators sought "privileged information."[7]
>
> ***Mr. Rosen quickly scheduled interviews with congressional investigators to get as much of his version of events on the record before any players could ask the courts to block the proceedings***, according to two people familiar with those discussions who are not authorized to speak about continuing investigations.

Katie Benner, *Former Acting Attorney General Testifies About Trump's Efforts to Subvert Election*, New York Times (Aug. 7, 2021), *available at* https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html (emphasis added). Mr. Clark has acted, we believe, more consonant with the President's instructions as conveyed via Mr. Collins to Mr. Clark and the others. Thus, we do not view it as consistent with Mr. Clark's duties as a lawyer and former government official to make "quick[]" disclosure decisions on his own before courts rule on all relevant legal disputes.[8]

7. As explained in my November 8 letter and above, I do not agree that Mr. Clark has invoked "blanket testimonial immunity." *See also* Thompson Letter at 4 (Nov.

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[7] This is a misleading characterization of what the text of the August 2 letter says. It appears designed to convey to the *New York Times*' readers that (a) former President Trump was not asserting privilege and was greenlighting testimony; and (b) former President Trump's future condition was vague. Neither is accurate—and, as we have repeatedly explained, the letter clearly invokes privilege and its condition was plainly triggered by this Committee's post-August 2 actions.

[8] This is also as good a juncture as any to note that one feature of the real story here should be to ask why so many anonymous leaks keep occurring—leaks that violate Executive Branch confidentiality of various stripes.

9, 2021) (referencing "absolute testimonial immunity"). For the sake of economy, I would refer you to the November 8 letter's points about the issue of timing, prudence, and fairness re *Trump v. Thompson* (now on interlocutory, not final merits appeal) and our continuing invitation to negotiate a narrower scope for potential testimony. Consider as well entering negotiations with us on written questions that could be confidentially propounded to Mr. Clark for our consideration, as opposed to another live session.

We remind you that Mr. Clark's livelihood has been threatened by "cancel culture" and that he also has a pressing family matter in the Philadelphia area to attend to that he has been holding off on, so proceeding via writing would be appreciated in light of the fact that two weeks of Mr. Clark's extension request were denied with no real explanation. Mr. Clark is no longer a government employee, where interfacing with Congress in some instances would have been part of his job duties. As a private citizen, the Committee should make some reasonable accommodation to Mr. Clark's circumstances, especially when his testimony is at best tangential to January 6 and is certainly not urgent in light of the prior passage of protective legislation.

8. Relatedly, your November 9 letter asserts that privilege assertions must be on a document-by-document basis. *See* Thompson Letter at 2 & 7 (Nov. 9, 2021) (asserting this is what "the law requires." But just yesterday, a *New York Times* story came out indicating that a different legal position is colorable. That story reports as follows: "During arguments last week, [Judge Chutkan] rejected a suggestion by a lawyer for Mr. Trump that she examine each document before deciding whether executive privilege applied." Charlie Savage, *Swift Ruling Tests Trump's Tactic of Running Out the Clock*, New York Times (Nov. 10, 2021), *available at* https://www.nytimes.com/2021/11/10/us/politics/swift-ruling-tests-trump-delay-tactic.html.[9] The Committee cannot urge on us (or benefit from) an approach by the courts based on rejecting use of a document-by-document approach, while arguing here that it is incumbent on us to use only a document-by-document approach. Indeed, such an internally inconsistent position could trigger estoppel.

[9] Of course, we do not agree that President Trump's lawyers are trying to achieve strategic delay in *Trump v. Thompson*.

9. You refer to the July 26, 2021 letter sent to Mr. Clark by the Justice Department. *See* Chairman Thompson Letter at 2 n.3 (Nov. 5, 2021). We do not think that letter supports your position, for multiple reasons, but for now it should suffice to point out that that letter is curiously vehement that Mr. Clark not disclose the Department's "investigations and prosecutions ongoing while [Mr. Clark] served in the Department," because if it were known that such "deliberations would become subject to Congressional challenge and scrutiny, [the Department] would face a grave danger that [Department lawyers] would be chilled from providing the candid and independent analysis essential to just and effective law enforcement." Weinsheimer Letter at 3 (July 26, 2021).

DOJ's rationale of avoiding the chilling of candid advice is, of course, one of the core purposes of the executive privilege, which is clearly rooted in the separation of powers, a structural constitutional principle that outranks the mere policy concerns of one department of the federal government. ***Most importantly, what DOJ has done in the July 26 letter is strongly endorse on of our main arguments***.[10] The Department's version of executive privilege, however, seems carefully molded to achieve political objectives rather than doctrinal coherence: it would purportedly shield whatever can be smuggled under the skirt of "ongoing investigations and prosecutions," while totally exposing advice given directly to former President Trump, as well as internal deliberations leading up to such advice, even if they were based on such investigations. Respectfully, the internal contradiction of that position is obvious and disabling. It also makes little sense to imagine, as the July 26 DOJ letter does, that DOJ's departmental privilege is superior to the brand of executive privilege attending to direct presidential communications and—applying the same method of innuendo the Committee is using in the press—causes one to ask: what does DOJ have to hide?

Even if the Committee were able to somehow properly establish that such election matters fall into Resolution 503's charter (something we think it cannot), then by parity of reasoning and as an element of due process Mr. Clark should be able to review all of

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[10] Alternatively, because the Justice Department is part of the unitary Executive and reports to the President, the concern the Department points out here as to its own investigations is just a part of the umbrella concept of the executive privilege. Either way, the two parts of DOJ's letter are at war with one another.

the election-related investigative files of the Department, particularly since the asserted results of those inquiries were an explicit premise of the advice that others gave to President Trump, according to their testimony. In all events, however, it is clear that proceeding on the basis of such an incoherent version of executive privilege in the manner the July 26 letter proposes would be fundamentally unfair and thus deny Mr. Clark due process. It would tie one arm behind his back.

10. Note as well that your November 9 letter admits there is overlap between that litigation and Mr. Clark's testimony.[11] But your letter further contends that Mr. Clark is only entitled to assert executive privilege as to the documents and testimony to which it applies. The Committee's position thus assumes the point in question. And *Trump v. Thompson*, which may be just the first of multiple cases in this area, is not yet even concluded,[12] so neither we nor the Committee knows the precise contours of executive privilege in this matter. Given this uncertainty and Mr. Clark's competing duties as a witness on the one hand and as a lawyer ethically obligated to protect the privileges asserted by former President Trump on the other, it is grossly unfair to require him to guess now where that line will ultimately be drawn, on pain of civil or criminal contempt if he is over-inclusive in asserting the privilege, and a violation of the bar rules if he is under-inclusive. You assert that there is no authority supporting awaiting the outcome of related judicial review proceedings, *see* Chairman Thompson Letter at 5 (Nov. 9, 2021). But we are hardly the first to note the unfairness of the dilemma you are imposing on Mr. Clark:

> By wielding the cudgel of criminal contempt, however, Congress seeks to invoke the power of the third branch, not to resolve a dispute between the Executive and Legislative Branches and to obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried

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[11] Your November 9 letter merely quibbles about the extent of the overlap. *See* Thompson Letter, at 5 (Nov. 9, 2021) ("your letter overstates the relationship between the litigation involving documents held by the National Archives and the instant matter.").

[12] I also specifically alert you here that I am aware that *Trump v. Thompson* may not result in a final merits resolution of the underlying privilege dispute.

> out the President's constitutionally authorized commands, for asserting a constitutional privilege.

8 Op. OLC 101, 139 (1984). This passage, in turn, cited a law review article by former Solicitor General Rex Lee as follows:

> [W]hen the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of executive privilege by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make [the Executive Brach official] the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Id. at 139, n. 39, *citing* Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 239. This is precisely the unfair trap in which Mr. Clark finds himself.

Also relevant to the hazard of assuming the eventual outcome of the *Trump v. Thompson* litigation, the Executive Branch has long taken the position that executive privilege applies even where the President was not directly involved in the communications and documents in question. The history of that position is set forth in 8 Op. OLC 101 (1984) which involved the assertion of executive privilege by the Administrator of the EPA as instructed by the President. The Department of Justice confirmed that executive privilege applied. Based on executive privilege, documents and communications between EPA enforcement staff and DOJ's Environment and Natural Resources Division were withheld from Congress. The OLC opinion not only affirmed the propriety of the executive privilege claim, it also declined to prosecute any criminal contempt of Congress. "We believe that the Department's long-standing position that the contempt of Congress statute does not apply to executive officials who assert Presidential claims of executive privilege is sound, and we concur with it." *Id*. at 129. "[T]he separation of powers principles that underlie the doctrine of executive privilege also would preclude

application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege." *Id*. at 134. Thus, the idea that executive privilege is limited to officials like former White House Counsels Donald McGahan or Harriet Miers has no foundation in the law or history of executive privilege.

11. Your November 5 letter also asserts that Mr. Clark was not among the "small cadre of senior advisors" to former President Trump. *See* Chairman Thompson Letter at 3. Perhaps if this inquiry involved Mr. Clark's work in defending, say, the Affordable Clean Energy rule issued by EPA during the Trump Administration, Mr. Clark might not be standing on executive privilege. But Mr. Clark had conversations directly with President Trump that the subpoena indicates the Committee is interested in penetrating into. *See* Thompson Letter, at 5 (Nov. 9, 2021) (Committee admitting that "the Select Committee is interested in conversations and interactions Mr. Clark had with former President Trump").

The "small cadre" concept, even assuming its validity, has to be interpreted functionally. It cannot mean that anything a White House official, who is close on a paper org chart to the President, advises is privileged but that the advice of any official situated in an Executive Branch department, even if given directly to the President, is not privileged. Moreover, as noted, this "small cadre" concept is contrary to the Department of Justice's long-standing position that the privilege applies much more broadly to executive branch officials even in the absence of any direct involvement by or communication with the President. See 8 Op. OLC 101 (1984). The concept advanced in your letter would hamstring the President's constitutional effectiveness, especially as applied to his high-ranking officials who are Senate-confirmed. The President, in other words, should not be confined to hosting confidential conversations only with those advisors who physically work at the White House. Discharge of the President's Article II duties to take care that the laws are faithfully executed may sometimes, and at the President's sole discretion, require consulting with a wide variety of department, agency, board, etc. officials.

12. On page 3 of your November 5 letter, you again attempt to mischaracterize our position as "categorical" or "blanket." You did not attend last Friday's session and so perhaps you were misinformed on this point. But my November 5 letter, our statements at the session that same day, and my November 8 letter were not categorical. Our point,

again, which seems to have been missed, is that timing is a critical consideration here as a threshold matter. There is no reason to put Mr. Clark (and me, as his lawyer, frankly) at risk of guessing wrong about how matters like the *Trump v. Thompson* litigation will come out. We have not heard any rationale from this Committee's lawyers or members who attended Friday's session as to why that is not a prudent way to proceed. Obviously, once Mr. Clark answers questions on the substance of his presidential conversations and his related actions at the Department, he cannot un-testify if the *Trump v. Thompson* case or other litigation ultimately holds that the invocation of the privilege is proper in whole or in part.

13. Respectfully, your November 5 letter appears to cast in concrete terms the due process problem by stating that the "deposition will resume at 4:00 pm this afternoon,[13] ***at which time I will formally reject your claims of privilege***." Chairman Thompson Letter at 4 (Nov. 5) (emphasis added). That inherently shows (a) an "unalterably closed mind," especially when you were not a percipient participant in Friday's session and (b) renders surplusage the November 9 letter providing fuller responses. In light of this sequence of events, it is clear that your November 9 letter lays out a series of *post hoc* rationalizations that crystallize the point that your mind was already made up as of at least 4:30 pm on Friday November 5 when your letter was transmitted to me. Finally, (c) you have not provided any response to my point from the airplane last Friday that you ruling on objections to your own questions is itself a violation of due process.

14. I also request, with respect, that you should respond to our objection based on *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), that Congress cannot apply law to fact without unconstitutionally intruding into the judicial sphere. Under the Constitution, the Executive Branch, in essence, proposes violations of law to the Judicial Branch and then the latter branch disposes of such disputes. But Congress's role in that process is neither to propose nor dispose in that process. Instead, Congress is only designed to debate and pass new legislation or not.

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[13] Again, this was a time period 30 minutes *before* I received your letter from [redacted].

Your public statements confirm a confusion about how this basic constitutional structure functions. Commenting on Judge Chutkan's November 9, 2021 ruling in *Trump v. Thompson*, you are quoted in *Politico* as saying: "If we have access to the records, they'll speak for themselves. So we look forward, as a committee, to getting it. ***And we'll let the evidence based on what we look at determine guilt or innocence***."[14] (emphasis added). Obviously, legislative committees can never have any valid legislative or constitutional purpose in determining guilt or innocence, and therefore may not conduct investigations or issue subpoenas to achieve such flagrantly unconstitutional purposes. Additionally, it is not even proper for the Legislative Branch to arrogate to itself processes of legal discovery in the hopes it can make a later hand-off to the Executive. For instance, Congress cannot circumvent the Fourth Amendment by proceeding as if that constitutional constraint applies only to the Executive Branch. The Constitution binds all three branches of government and all must take an oath to be bound by and support the Constitution. *See* U.S. Const., art. VI ("The Senators and Representatives before mentioned … shall be bound by Oath or Affirmation, to support this Constitution ….").

15. You assert that under the circumstances, Mr. Clark is "willfull[y]" not complying with the subpoena. Thompson Letter of Nov. 5 at p. 4; *see also* Thompson Letter of Nov. 9, at pp. 9-10. That is not the case. We seek to continue the dialogue about how to secure appropriately cabined testimony from Mr. Clark at the appropriate time and framed with due regard for all of necessary constitutional or other legal and ethical guardrails.

16. It should also be noted that the Committee's subpoena to Mr. Clark does not comply with the relevant Rules of the House. The minority party, through the governing congressional processes, must be represented on the Committee and participate in the issuance of subpoenas and the examination of witnesses. There are no members of the Committee who were appointed by the Minority Leader. The persons selected by the Minority Leader were refused by the Speaker and are not allowed to participate in the Committee's proceedings. Instead, the Speaker selected two nominal

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[14] Kyle Cheney & Josh Gerstein, *Trump Cannot Shield White House Records from Jan. 6 Committee, Judge Rules*, POLITICO, *available at* https://www.politico.com/news/2021/11/09/trump-executive-privilege-court-ruling-kings-520512.

members of the minority party to serve on the Committee. Their nominal party membership does not meet the requirements of the House Rules because they were selected and appointed by the Speaker and not the Minority Leader. There is no ranking minority member with whom to consult, and no properly constituted minority participation in the proceedings. This is a fatal defect in the Committee's subpoena to Mr. Clark. We also incorporate by reference the legal arguments made by Representative Banks and other attorneys and congressional staff, as reported in *The Federalist* in the article set out in the margin below.[15] In light of the points made in that article, when you respond to this letter please include a listing of the name and position of everyone affiliated with Congress who was present on November 5 in the room or by videoconference.

17. Your November 9 letter suggests that Mr. Clark should have told this Committee or others before November 5, 2021 that he intended to stand on President Trump's instruction to him through Mr. Collins to assert executive privilege. Mr. Clark had no obligation to reveal his discussions with counsel before he arrived last Friday and your suggestion particularly ignores my recent entry into the case. We also disagree that the other Committees and this Committee are interchangeable.

18. Your November 9 letter claims that Mr. Clark left "abrupt[ly] on November 5." *See* Thompson Letter at 2 (Nov. 9, 2021). You may be misinformed, as that is not accurate. We were present for about 90 minutes and we also accommodated two requests that we leave the room for a period of time so that the Committee members and staff present could confer with one another. And your related assertions about timing in getting back to the Committee after we left the building that day ignore that we were harassed by the press as we attempted to walk to have a meeting and that other urgent client matters arose for me as I scrambled to get to the airport to go back to Atlanta.

19. I wish to conclude by noting that your November 9 letter ignores my November 8 request for a copy of the transcript from November 5. Nor have we received any other word on that request since November 9. The silence is particularly troubling in

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[15] Mollie Hemingway, *J6 Committee Misleading Witnesses About Republican Staff Presence*, THE FEDERALIST (Nov. 10, 2021), *available at* https://thefederalist.com/2021/11/10/j6-committee-misleading-witnesses-about-republican-staff-presence/.

light of the fact that on page 3 (at footnote 4) and page 4 (at footnote 8), as just two examples, you appear to be quoting from the transcript. This points out another due process problem of the Committee acting to advantage itself over Mr. Clark. Providing us with the transcript would also, for instance, make clear that we did not leave precipitously. We also offered numerous times to continue the conversation.

Thank you for your continued attention to this matter, Mr. Chairman. I want you to be assured that while we disagree with the positions you took in your November 5 and 9 letters, our legal arguments are rooted in good faith. We are simply attempting to vindicate the Constitution, which requires energetic defense of the Executive Branch's prerogatives, and make sure that Mr. Clark's rights are protected.

Respectfully submitted, this 12th day of November, 2021.

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

[redacted]

cc: Jeffrey Bossert Clark

Exhibit 12 — Letter from Chairman Thompson to Counsel for Jeffrey B. Clark on November 17, 2021

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225–7800

One Hundred Seventeenth Congress

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

November 17, 2021

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

Dear Mr. MacDougald:

I write in response to your letter and attached memo dated November 12, 2021 (the "November 12 letter"). Your letter fails to include any legal authority justifying your client's continuing refusal to provide testimony and documents compelled by the Select Committee's October 13, 2021, subpoena. It also reflects a fundamental misunderstanding of the House rules governing subpoenas and depositions.

There is no valid legal basis for Mr. Clark's refusal to comply with the subpoena. Nonetheless, Mr. Clark has refused to produce any records in response to the subpoena, nor have you provided a log detailing the documents withheld and the privileges asserted. Mr. Clark also refused to answer any questions at his deposition, save for one question related to a private email account. This refusal was despite the fact that the Select Committee asked Mr. Clark a series of questions regarding clearly non-privileged topics. Then, as the record reflects, both you and Mr. Clark abruptly left the deposition and failed to return as instructed. After your departure, the Select Committee described on the record a series of topics about which it wished to ask Mr. Clark but was unable to because of your departure.

The relevant case law holds that a presidential adviser may not refuse to testify in response to a congressional subpoena based on claims of executive privilege. At Mr. Clark's deposition, staff counsel pointed you to both *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008), and *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148, 203 (D.D.C. 2019), and I cited those cases in each subsequent letter I have sent you.[1]

[1] *See* Letter to H. MacDougald, dated November 5, 2021, at 3; Letter to H. MacDougald, dated November 9, 2011, at 3–4. We have also repeatedly called your attention to *Committee on Oversight & Gov't Reform v. Holder*, No. 12-cv-1332, 2014 WL 12662665, at *2 (D.D.C. Aug. 20, 2014), which rejected a "blanket" executive-privilege claim over subpoenaed documents. You have likewise ignored this case without any explanation. And indeed, in my November 9 letter, I pointed out: "Nowhere in your 12-page [November 5] letter do you address the court decisions that clearly hold that even close advisers to a president (which Mr. Clark was not) may refuse to answer questions based on broad and undifferentiated privilege assertions."

Your November 12 letter can be summarized into four broad categories, each addressed in turn:

Allegation 1: You allege that executive privilege applies to Mr. Clark because of an August 2 letter by an attorney for former President Trump.[2] Neither Mr. Trump nor his representative has communicated any assertion of privilege to the Select Committee (either directly or through you) regarding the subpoena to Mr. Clark. The letter from Mr. Trump's counsel that you rely upon, issued more than two months prior to any subpoena, plainly states that "President Trump will agree not to seek judicial intervention to prevent [Mr. Clark's] testimony."[3] Declining to seek judicial review to prevent testimony is not an assertion of executive privilege. Regardless, as the District Court for the District of Columbia recently held, there is only one president at a time, and courts place greater weight on the views of the incumbent president, who "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."[4] In this case, neither the current president nor the former president has asserted executive privilege over your testimony or any documents you may possess.

Allegation 2: You claim that you have not made a "blanket" assertion of privilege.[5] Even assuming any executive privilege applies here—and we maintain that it does not for the multitude of reasons previously explained—Mr. Clark still has a duty to comply with the Select Committee's subpoena by asserting any privileges on a question-by-question basis. That is the clear holding of both the *Miers* and *McGahn* cases you have not addressed. With respect to documents, Mr. Clark is required to produce all non-privileged documents and provide a privilege log describing the legal grounds upon which any documents are withheld.[6]

Allegation 3: You allege that Mr. Clark's testimony is irrelevant to the Select Committee's charter.[7] The Select Committee's charter, H. Res. 503 (117th Congress), states that the 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."[8] As I stated in my October 13, 2021 cover letter transmitting the subpoena, there is credible evidence that Mr. Clark attempted to involve the Department of Justice in efforts to interrupt the peaceful transfer of power.[9] You have

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[2] Letter from D. Collins to J. Clark, dated August 2, 2021, at 2.
[3] *Id.*
[4] *Trump v. Thompson*, No. 21-cv-2769 (D.D.C. Nov. 9, 2021), at 13. *See also Nixon v. Administrator of General Services*, 433 U.S. 425 449 (1977): "[I]t must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."
[5] Letter from H. MacDougald to Chairman Thompson, dated November 12, 2021, at 5.
[6] *Holder*, 2014 WL 12662665, at *2.
[7] Letter from H. MacDougald to Chairman Thompson, dated November 12, 2021, at 4–5.
[8] Section 3(1), H. Res. 503 (117th Cong.), as adopted on June 30, 2021.
[9] Letter from Chairman Thompson to J. Clark, dated October 13, 2021, at 1. *See also* "Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election," Senate Committee on the Judiciary, (Oct. 7, 2021), available at: https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf.

provided no legal authority—because none exists—permitting Mr. Clark to refuse to comply with a congressional subpoena simply because he has a different view of what information is important to Congress.

Allegation 4: You allege that the Select Committee has violated House rules and deposition procedures. With respect to the claims regarding deposition procedures,[10] you received notice both during and after the deposition regarding the reconvening of the deposition later that afternoon;[11] and House rules specifically empower the Chair to rule on objections either in real time or at a subsequent time.[12] The authority for committees to rule on witness objections has been affirmed by Supreme Court case law.[13] Your claims regarding the Select Committee's subpoena authority are equally meritless. The Select Committee was properly constituted under section 2(a) of H. Res. 503. As required by H. Res. 503, Members of the Select Committee were selected by the Speaker, after "consultation with the minority leader."[14] Neither H. Res. 503 nor the Rules of the House of Representatives require the minority party to participate in the Select Committee's business or investigation or to have the minority leader's preferred Members participate in the Select Committee. There is also no "fatal defect" in the subpoena, which was duly issued pursuant to sec. 5(c)(4) of H. Res. 503 and clause 2(m) of rule XI of the Rules of the House of Representatives. Mr. Clark's subpoena was issued with the unanimous support of the Select Committee Members in accordance with these authorities. As to your request for a transcript of the November 5 deposition,[15] I will provide the transcript to date pursuant to House Deposition Regulation 8.[16]

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[10] Letter from H. MacDougald to Chairman Thompson, dated November 12, 2021, at 2.
[11] After leaving the deposition at 11:30 a m., you were informed at 12:42 p m. by email from staff counsel that the deposition would reconvene at 4:00 p.m. You acknowledged receipt of the notice of the reconvening in an email to the same staff counsel at 3:25 p m. on November 5, admitting you were already "in the air on the way back to Atlanta."
[12] *See* House Deposition Authority Regulation 7: "When the witness has refused to answer a question to preserve a privilege, members or staff may (i) proceed with the deposition, or (ii) either at that time or at a subsequent time, seek a ruling from the Chair either by telephone or otherwise. If the Chair overrules any such objection and thereby orders a witness to answer any question to which an objection was lodged, the witness shall be ordered to answer." "117th Congress Regulations for Use of Deposition Authority," 167 Cong. Rec. H41 (daily ed., Jan. 4, 2021).
[13] *See Quinn v. United States* 349 U.S. 155, 165 (1955) (providing that "the [C]ommittee may disallow the objection, and thus give the witness the choice of answering or not."). Your memo cites a case wholly unrelated to Congress's investigative or interrogatory authority, *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995). In that case, Congress had amended the Securities Exchange Act of 1934 to require Federal courts to reopen final judgements, including those entered prior to the enactment of the amendment. But far from the Select Committee engaging in any judicial power, the investigation pursuant to H. Res. 503 reflects Congress's Article I legislative authority. As the Supreme Court held in *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927),"the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." The legislative purpose of the Select Committee has not only been affirmed by the district court in *Trump v. Thompson*, but also expressly recognized during debate on the House Floor: *See* 167 Cong. Rec. H5760 (daily ed., Oct. 21, 2021) (remarks of Rep. Jim Banks, "Madam Speaker, no one has said that the select committee doesn't have a legislative purpose.").
[14] 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.
[15] Letter from H. MacDougald to Chairman Thompson, dated November 12, 2021, at 14–15.
[16] House Deposition Authority Regulation 8. "117th Congress Regulations for Use of Deposition Authority," 167 Cong. Rec. H41 (daily ed., Jan. 4, 2021).

As I noted in my November 9 letter, there is no legal basis for your client's assertion of privilege in this broad and categorical manner, and the Select Committee views Mr. Clark's refusal to comply with its subpoena as willful disregard for the Select Committee's authority.[17] Given Mr. Clark's continued defiance of his obligations under the Select Committee's subpoena, the Select Committee will have no choice but to advance subpoena enforcement efforts.

Sincerely,

Bennie G. Thompson
Chairman

[17] Letter from Chairman Thompson to H. MacDougald, dated November 9, 2021, at 9.

Exhibit 13 — Letter 1 from Counsel for Jeffrey B. Clark to Chairman Thompson on November 29, 2021

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

[redacted]

[redacted]

November 29, 2021

Hon. Bennie G. Thompson, Chairman
January 6th Select Committee
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515

Via Email

LIMITS ON THE COMMITTEE'S DEPOSITION POWER

Dear Representative Thompson:

This letter is sent for two reasons: *first*, to note that based on our research regarding congressional powers, we have concluded that the current composition of this Committee precludes its use of deposition authority under the Committee's authorizing Resolution and the governing House Regulations for Use of Deposition Authority; *second*, to note that I am nonetheless willing to allow Mr. Clark to testify at a public Committee hearing (but not at a closed deposition) on two topics relating specifically to the January 6 events (see below) that do not implicate any of the privileges previously asserted.

1. **The Committee's Current Composition and Genesis Precludes It from Wielding Deposition Authority Under the House's "Regulations on the Use of Deposition Authority."**

This Committee's purported use of deposition authority is *ultra vires*. That is true for numerous reasons, which we enumerate below:

A. The deposition rules contemplate that the "ranking minority member" of the Committee must be consulted before depositions can be taken. *See, e.g.*, Regulations for the Use of Deposition Authority, Cong Rec. H41, Rule 2 (Jan. 4, 2021) [hereinafter "Deposition Rules") ("Consultation with the ranking minority member shall include three days' notice before any deposition is taken"); *see also* Rules 3, 4, 5, and 9 (also requiring consultation with and participation by the "ranking minority member" or their designees).

Similarly, H. Res. 503, § 5(c)(6)—the Resolution creating the January 6 Committee—requires consultation with the ranking member in order to take a deposition:

> (6) (A) The chair of the Select Committee, **upon consultation with the ranking minority member**, 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.
>
> (B) Depositions taken under the authority prescribed in this paragraph shall be governed by the procedures submitted by the chair of the Committee on Rules for printing in the Congressional Record on January 4, 2021.

H. Res. 503, § 5(c)(6) (all forms of emphasis added).

Thus, to take a deposition, you as Committee Chair are expressly and unambiguously required by H. Res 503, § 5(c)(6) to consult with the ranking minority member and to comply with the procedures specified in the Deposition Rules discussed above.

The first problem is that this Committee not only does not have a ranking minority member, it does not even purport to have a ranking minority member. Instead, it purports only to have Representative Cheney as a Vice Chair, but even that designation is flatly contrary to the Rules of the House. *See* January 6 Select Committee, *Chairman Thompson Announces Representative Cheney as Select Committee Vice Chair* (Sept.

2, 2021), *available at* https://january6th.house.gov/news/press-releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair (Attachment A). The Deposition Rules are silent on Vice Chairs; neither they nor the Committee's enabling Resolution can be construed to treat Vice Chairs as if they are equivalent to ranking minority members.[1]

The Committee, lacking a minority ranking member, thus must take the bitter with the sweet. The sweet, in the view of the House's majority party, involves a gerrymander of the Committee's membership without the Republican Steering Committee's or Conference's participation or consent, and thus avoids the inconvenient complications and respect for minority prerogatives that would go along with true bipartisanship. Whereas the bitter is that, by proceeding in this manner, the Committee loses the ability to make use of deposition authority under H. Res. 503, § 5(c)(6) or the Deposition Rules. To do so, the Committee would have to be reconstituted.

B. Each of the two parties in Congress has rules and procedures governing how their committee chairs and ranking minority members are designated. On the Republican side, the Conference Rules of the 117th Congress are relevant. Rule 2(d)(2) is

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[1] There is also serious controversy over whether Vice Chair Cheney even still qualifies as a Republican. The Wyoming Republican party no longer recognizes her as such. *See e.g.*, Associated Press, *Wyoming Republican Party Stops Recognizing Liz Cheney as Member*, THE GUARDIAN (Nov. 16, 2021), *available at* https://www.theguardian.com/us-news/2021/nov/15/liz-cheney-wyoming-republican-party-trump. Speaking for herself, the Chair of the Republican National Committee argues that "she still considers Rep. Liz Cheney (R-Wyo.) to be a member of the party after the Wyoming GOP voted to no longer recognize the Republican congresswoman." Julia Manchester, *McDaniel Says She Still Considers Cheney a Republican Despite Wyoming GOP Vote*, The Hill (Nov. 18, 2021), *available at* https://thehill.com/homenews/house/582150-mcdaniel-says-she-still-considers-cheney-a-republican-after-wyoming-gop-vote [hereinafter "Manchester Article"]. Former Speaker of the House Thomas "Tip" O'Neill is perhaps best known for political aphorism contained in the title of his book. *See* Thomas P. O'Neill & Gary Hymel, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME (1993). And, in that vein, even Chair McDaniel acknowledged: "The thing about that everyone should be taking note [of] is that a state party is the most grassroots body that the state has. These are people who are running in their district committee and they're going to their county convention and they're getting on their state committee and they really represent where the party is in their state." Manchester Article.

a default rule that provides that references to Chairs equate to the Ranking Republican Member when the Republican party is in the House's minority, as now. *See* House GOP, Conference Rules of the 11th Congress, *available at* https://www.gop.gov/conference-rules-of-the-117th-congress/ [hereinafter "House GOP Conference Rules"]. And Rule 14 provides that the Republican Steering Committee nominates its chairs/ranking minority members and they must be voted on by the full GOP House Conference. *See* House GOP Conference Rules at Rule 14(a)(1), (b). Such chairs/ranking members need not be the Republican member with the longest service on the Committee. *See id.*

By rule and the customs, traditions, and precedents of the House, it is the role of each party, in line with its own internal processes, to designate committee chairs and ranking members and thus that role cannot be usurped by the other party. The only way for a ranking Republican minority member to be designated is for the procedure in the House GOP Conference Rules to be followed. Representative Cheney thus can only be denominated the ranking minority member (which, again, is a pivotal role given how H. Res. 503, § 5(c)(6) and the Deposition Rules work) if the Republican Steering Committee has nominated her to that role and she is then confirmed by vote of the full Republican Conference.

Representative Cheney was neither nominated for the ranking minority member role on this Committee nor voted into that role by the full Republican Conference. It appears that she does not carry the title of Ranking Minority Member in silent recognition of this very fact. Instead, she carries only the title of Vice Chair, an appellation conferred on her solely by you as Chair. *See* Attachment A, entitled "***Chairman Thompson Announces*** Representative Cheney as Select Committee Vice Chair"). And, as you are well aware, the history of this Committee leaves Representative Cheney owing her post on this Committee to Speaker Pelosi. *See* Associated Press, *Pelosi Appoints Cheney to Jan. 6 Committee*, NEW YORK TIMES (July 1, 2021), available at https://www.nytimes.com/video/us/politics/100000007846056/pelosi-cheney-january-6-committee.html. This makes her, in essence, a Democrat-appointed member of the Committee in the first instance ***and*** a Democrat-appointed leader acting in the capacity as Vice Chair of the Committee as well—***a doubly Democrat appointment***. Indeed, during our November 23, 2021 session at the Longworth House

Building to review the draft November 5, 2021 transcript, Mr. Clark also specifically asked [redacted], your Parliamentarian, to confirm that Vice Chairs can be appointed by and be members of the majority party on this Committee and [redacted] confirmed that was accurate.

But even Rep. Cheney's appointment as the "Vice Chair" of the Committee is legally defective. The definition of a "Vice Chair[s]" under the Rules of the House clearly requires they be a member of the majority party. Rule XI(2)(d) provides in relevant part as follows:

> **Temporary absence of chair**
>
> (d) A member of the ***majority party*** on each standing committee or subcommittee thereof **shall be designated by the chair of the full committee as the *vice chair* of the committee or subcommittee**, as the case may be, and shall preside during the absence of the chair from any meeting.

(all forms of emphasis added). This rule is applicable to the January 6 Select Committee because (1) Rule X(10)(b) makes Rule XI(2)(a) applicable to Select Committees; (2) Rule XI(2)(a) requires the Committee to adopt rules; (3) H. Res. 503 § 5(c) specifically states that "Rule XI of the Rules of the House of Representatives shall apply to the Select Committee except as follows"; and (4) clause 2(d) of Rule XI is not one of the listed exceptions.

Therefore, to the extent she is a member of the minority party, Representative Cheney cannot be a "Vice Chair" as that term is used and defined in the Rules of the House. Representative Cheney, it seems, is thus neither fish nor fowl.

Contrary to the Associated Press's suggestion, the law and procedures governing this Committee are not a matter of "close enough," like "horseshoes and hand grenades." *See Pelosi Appoints Cheney to Jan. 6 Committee*, NEW YORK TIMES ("Ms. Cheney's appointment appeared to be an attempt by Democrats to bring ***a degree of bipartisanship*** to the investigation.") (emphasis added). Representative Cheney cannot be considered a Republican appointee to this Committee because she was not appointed

in accord with Republican processes, and is not a "ranking minority member," and this precludes the Committee making use of deposition processes because use of those processes requires the presence on the Committee of a ranking minority member.

C. This problem is a further reflection of the overarching fact that this Committee is misstructured because it was formulated as a political monolith. *See* MacDougald Letter, at 5-6 (Nov. 12, 2021); Memo. Re: Clark Subpoena, at 13-14 (Nov. 12, 2021); MacDougald Letter, at Att. B (Nov. 8, 2021). Minority Leader McCarthy's designees for this Committee, especially Representatives Banks and Jordan, were rejected by the Speaker of the House. *See* Mike Lillis, *Pelosi Rejects Jordan, Banks for Jan. 6 Committee*, THE HILL (July 21, 2021), available at https://thehill.com/homenews/house/564122-pelosi-rejects-jordan-banks-for-jan-6-committee. We explain in our separate letter, also carrying today's date and addressed to procedural and other issues, how our November 5, 2021 letter objections were repeatedly misconstrued by the Committee and its lawyers. Related to that set of problems for the Committee, we note here that it is hard to imagine that Representatives Banks or Jordan would have allowed our November 5 objections to be mischaracterized and then ruled on as they were mis-framed, at least not without making a strong record objecting to proceeding in such an unlawful fashion.[2] Accordingly, how minority party Members of the Committee, especially the ranking minority member leader thereof, come to be designated and whether that process has been hijacked by the majority party is a matter of great significance and not a mere technicality.

D. Additionally, under the Deposition Rules, the ranking minority member can designate committee counsel to conduct a deposition. Those rules establish a balance requirement in that "[o]ne of the committee counsel shall be designated by the chair and the other by the ranking minority member per round." Deposition Rules at Rule 5. Indeed, Rule 6 specifically states as follows:

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[2] As I note in our other letter dated today, we will be responding separately to your November 17, 2021 letter, which is relevant to these points.

> Deposition questions shall be propounded in rounds. The length of each round shall not exceed 60 minutes per side, ***and shall provide equal time to the majority and the minority***. In each round, the member(s) or committee counsel designated by the chair shall ask questions first, and the member(s) or committee counsel designated by the ranking minority member shall ask questions second.

Deposition Rules at Rule 6. This scrupulously ensures balance between the majority and minority lawyers in their role of propounding deposition questions. Yet, there is no minority counsel for this Committee that has been properly designated by the ranking minority member, because the Committee lacks a ranking minority member for the reasons explained above.

E. Relatedly, we note that the brief instances where [redacted] ostensible minority counsel, participated in the November 5 proceedings (*i.e.*, the deposition itself, and the sessions held after Mr. Clark and I departed that day) reinforce that these proceedings are not being conducted in true bipartisan fashion. [redacted] spoke when we were present only to urge us not to leave the deposition when it became unproductive in light of the fact that the Committee and staff had not yet fully digested my November 5 letter. *See* Dr. Tr. at 37:10-13.[3] Nor did he push back on a single point made or position taken by any majority party Member of the Committee or [redacted], majority investigative counsel. All of this is consistent with Representative Banks' view of [redacted] participation.[4] And it also appears [redacted] declined to state anything for the record in the first session held outside of our presence on November 5, let alone

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[3] All citations to the Draft Transcript (Dr. Tr.) are to the version Mr. Clark reviewed on November 23, 2021 at the Longworth House Office Building and that I simultaneously reviewed, connected to Mr. Clark by Webex, from an Atlanta federal building.

[4] *See Mollie Hemingway, J6 Committee Misleading Witnesses About Republican Staff Presence* (Nov. 10, 2021) (arguing that [redacted] and Representative Cheney, in the context of this Committee's operations, both work for the Democrat Party and that according to Representative Banks, at least some witnesses are being misled "about the motives and the position of the person questioning them."), *available at* https://thefederalist.com/2021/11/10/j6-committee-misleading-witnesses-about-republican-staff-presence/ (Attachment B), *incorporated by reference into* Memo. Re: Clark Subpoena, at 14 & n.15 (Nov. 12, 2021).

anything that would call in question the majority's January 6 narratives, or whether the Committee is proceeding in conformity with the House Rules and its own enabling Resolution. *See id.* at 44:24.[5]

None of these points are designed to impugn [redacted] personally, especially because he and Mr. Clark were once colleagues together in private practice and in the Bush Administration.[6] But, as the design of the Appointments Clause of the United States Constitution recognizes, loyalty flows structurally from the authority that makes any given appointment and can terminate it,[7] and here it is clear that [redacted] was appointed by you as Chair of the Committee, Representative Thompson. Accordingly, [redacted] is here serving your interests and those of your political party, not those of the minority party. *See* January 6 Select Committee, *Thompson & Cheney Announce Senior Investigative Counsel for the Select Committee* (Sept. 17, 2021), *available at* https://january6th.house.gov/news/press-releases/thompson-cheney-announce-senior-

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[5] We acknowledge there is some lack of clarity in our notes about the relevant person speaking (hampered, as we were, by not having a transcript we could take with us on November 23 and by the threshold problems encountered on November 23 as we described in our letter to you that evening). If page 44, line 24 of the deposition transcript is not [redacted] speaking, we apologize for that error stemming from our hastily written-up notes. But if that is in error, it would only underscore why we should be given the opportunity to review the transcript again before it is finalized—preferably by receiving a physical copy of the finalized transcript or, at the very least on that follow-up occasion, not being hampered by the threshold problems that created time pressure for our transcript review on November 23.

[6] The same is true as to the points made in this letter concerning Representative Cheney's participation on the Committee as currently structured—the points are legal in nature, not personal.

[7] *See, e.g.*, Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 512 (2017) ("The core concern is that the President, in whom the Constitution vests the 'executive Power' and who must 'take Care' to 'faithfully execute' the laws, will lose control of an unelected bureaucracy. To mitigate this possibility, the Appointments Clause and other constitutional provisions ensure that the President is able to hire loyalists in key positions and fire insubordinates.") (footnote omitted). Of course, the principal obligation of any Executive Branch official is to his Oath to the Constitution as a whole, which Mr. Clark takes very seriously. But it is undeniable that the President cannot function properly and ensure that the branch functions in a unitary fashion without the ability to select his own appointees, subject to Senate confirmation for high-ranking officials.

investigative-counsel-select-committee. [redacted]'s past appointments by President George W. Bush notwithstanding, he was not appointed here pursuant to a consultation with Minority Leader McCarthy, *et al.* or the designated ranking minority member on the Committee. Of course, while [redacted] served in the Executive Branch more than a decade ago, the structure of the Constitution ensured his loyalty to President Bush. But as to his service with this Committee, the manner of his appointment ensures his loyalty to you as Chair.

The Rules of the Republican Conference make this point explicit. A member's designation as the ranking Republican member of a Committee comes only through nomination by the Steering Committee and election by the Conference. Conference Rule 14(d)(1) concomitantly requires, among other things, that Republican ranking members "ensure that each measure on which the Republican Conference has taken a position is managed in accordance with such position on the floor of the House of Representatives."

F. These problems with the absence of both a minority ranking member and a counsel chosen by a properly constituted ranking minority member cannot be retroactively fixed. They render the November 5 deposition of Mr. Clark *ultra vires* and preclude its use for any follow-on purpose.

2. Proposal for Testimony on a Limited Topic to the Full Committee in a Public Hearing.

The Committee and its staff have repeatedly mischaracterized our position as claiming blanket privilege for Mr. Clark. We have not done so. Our position has instead emphasized prudence in awaiting, at the very least, full resolution of *Trump v. Thompson* so that the boundary points for testimony are clearer. Nevertheless, to serve the interests of the historic inter-branch accommodation process related to executive privilege disputes, I am willing to offer Mr. Clark's testimony in a public hearing before the full Committee (not in a closed-door deposition, including for the reasons given above about why use of the Deposition Rules here is *ultra vires*) on defined topics. *See, e.g.*, Dawn Johnsen, *Executive Privilege Since* United States v. Nixon: *Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127 (1999) (referring to "the accommodation process"

as "a central feature of executive branch policy in this area and the process actually used to negotiate with Congress to seek to accommodate the legitimate needs of both branches").[8]

As you know, we learned only on November 23 of two sessions held as part of the November 5 proceedings that occurred without either me or Mr. Clark present. At one of those sessions, Representative Schiff stated as follows: Mr. Clark "refus[ed] even to answer questions about his statements about January 6th made to the press at least strike this member as not in good faith …." Dr. Tr. 46:5-7.[9]

Respectfully, we believe it was ***always clear*** from what was actually said on November 5 (both in writing and orally) that Mr. Clark was not refusing to ever testify about his remarks to a *Bloomberg Law* reporter on January 6. But that he was only urging, as a matter of proceeding in an orderly fashion, the Committee to await the conclusion of the *Trump v. Thompson* litigation before we discussed how to agree about testimony on any topic—all while inviting a dialogue with the Committee.[10] Nevertheless, to avoid any implication (even an unfair one) that Mr. Clark is not proceeding in good faith, I can now agree to allow Mr. Clark appear in a public meeting of the full Committee to testify about the following topics that do not implicate any of the privileges asserted and are also appropriately tailored to the Committee's mission under H. Res. 503:

> (1) Mr. Clark's questioning by and responses to a *Bloomberg Law* reporter interviewing him after January 6 about events at the Capitol, and (2) his role, if any, in planning, attending, responding to, or investigating January

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[8] Professor Johnsen was the Acting Assistant Attorney General for the Office of Legal Counsel at the start of the Biden Administration.

[9] Again, this citation is drawn from our notes since we lack access to a copy of a final transcript, though we have again requested we be given one in our other later dated today.

[10] A dialogue which at all times it appears the Committee has refused to enter, insisting on Mr. Clark's testimony on a smorgasbord of more than 20 topics, including Mr. Clark's conversations with President Trump. *See* Dr. Tr. at page 41 (Mr. Heaphy listing topics without Mr. Clark or me present in the room).

6's events or former President Trump's speech on the Ellipse that same day.

Please let us know if this proposal is agreeable to the Committee, or otherwise continue the dialogue with us, consistent with the Committee's obligation to seek accommodation in good faith in cases involving invocations of executive privilege.

Sincerely,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

Encls.

cc: Jeffrey Bossert Clark (w/ enclosures)

CHAIRMAN THOMPSON ANNOUNCES REPRESENTATIVE CHENEY AS SELECT COMMITTEE VICE CHAIR

Sep 2, 2021

Bolton, MS—Chairman Bennie G. Thompson today announced that he has named Representative Liz Cheney (R-WY) to serve as the Vice Chair of the Select Committee.

Chairman Thompson said, "Representative Cheney has demonstrated again and again her commitment to getting answers about January 6th, ensuring accountability, and doing whatever it takes to protect democracy for the American people. Her leadership and insights have shaped the early work of the Select Committee and this appointment underscores the bipartisan nature of this effort."

House Resolution 503 established the Select Committee to investigate and report upon the facts, circumstances, and causes related to the January 6th attack and interference with the peaceful transfer of power.

"Every member of this committee is dedicated to conducting a non-partisan, professional, and thorough investigation of all the relevant facts regarding January 6th and the threat to our Constitution we faced that day. I have accepted the position of Vice Chair of the committee to assure that we achieve that goal. We owe it to the American people to investigate everything that led up to, and transpired on, January 6th. We will not be deterred by threats or attempted obstruction and we will not rest until our task is complete," said Vice Chair Cheney.

Chairman Thompson continued, "It's important to everyone that the Select Committee's leadership reflect the bipartisan effort we are engaged in and I'm pleased that Ms. Cheney has agreed to serve as the select committee's Vice Chair. We are fortunate to have a partner of such strength and courage, and I look forward to continuing our work together as we uncover the facts, tell the American people the full story of January 6th, and ensure that nothing like that day ever happens again."

# # #

Attachment A

releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair) (https://twitter.com/intent/tweet?&url=/news/press-releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair&text=Chairman Thompson Announces Representative Cheney as Select Committee Vice Chair) (mailto:?subject=Chairman Thompson Announces Representative Cheney as Select Committee Vice Chair&body=/news/press-releases/chairman-thompson-announces-representative-cheney-select-committee-vice-chair)

CORRUPTION

J6 Committee Misleading Witnesses About Republican Staff Presence

'If this was a real investigation, that'd land you in jail for prosecutorial misconduct,' Rep. Jim Banks said.

Wyoming Rep. Liz Cheney ran to CNN a few weeks ago to accuse conservative stalwart Rep. Jim Banks of falsely presenting himself as the Jan. 6 commission's ranking member. Banks is, in fact, congressional Republicans' choice to be their top investigator on the committee, but he has been prevented from fulfilling his duties by Speaker of the House Nancy Pelosi.

However, it's Cheney who appears to be misrepresenting herself as the ranking member — that is, the top Republican — on the committee.

January 6 Select Committee staff have been falsely telling witnesses that Republican staff will be present for interviews, according to multiple eyewitness sources and documents. In fact, not a single Republican-appointed member of Congress nor a single staff member representing the Republican conference is part of the controversial committee.

Witnesses are being told that John Wood, a longtime friend and ally of the Cheney family, will represent Republicans when witnesses testify. But neither Cheney nor her friend is representing the Republican conference. In fact, Cheney was appointed to the committee in early July by Pelosi herself.

"John Wood works for the Democrat Party, just like Liz Cheney, who was appointed by Pelosi and is not the Ranking Member of the Select Committee. She is misleading witnesses, before they testify under penalty of law, about the motives and the position of the person questioning them," said Banks, who has continued leading Republicans' investigation of the federal government's handling of the Jan. 6 riot at the Capitol. Cheney's work with CNN was designed to prevent him from being able to gain answers to the questions the select committee was ostensibly set up to answer.

Cheney was given six days to explain whether she considers herself just the Democrat-appointed vice-chair of the committee or also the Republican ranking member, as is being represented to key witnesses. She has not responded to multiple requests for comment.

The misrepresentation to witnesses is key because the absence of any ranking member — meaning, in this case, any Republican-appointed member — or minority party staff means the committee appears to be failing to adhere to ironclad rules for its work.

Pelosi "blew up" the Jan. 6 committee when she took what she herself admitted was the "unprecedented" step of refusing to seat multiple Republican-appointed members, including the highly respected Navy officer and Indiana Republican Banks, who was to be the committee's ranking member. She also banned Rep. Jim Jordan of Ohio, who currently serves as the top Republican on the Judiciary Committee.

Pelosi chose two of her key Republican allies and anti-Trump obsessives to fill two

of her slots for the committee. As such, they do not represent the Republican conference, which opposed their selection, but the Democrat conference, which supported their selection.

Cheney was promoted to vice-chair in September in thanks for her stalwart work on Pelosi's behalf. Cheney, who has been censured by Wyoming Republicans for working against Republican voters and their interests, and who lost her position as House Conference chair for hijacking multiple briefings for Republican policy initiatives to talk about her personal vendetta against Trump, is facing precipitously low poll numbers and a challenge from popular Republican Harriet Hageman.

Cheney was joined by lame-duck Adam Kinzinger of Illinois, who recently announced his retirement rather than facing certain defeat from Illinois constituents who don't share his anti-Trump obsession. Kinzinger was appointed by Pelosi in late July to make the committee appear more bipartisan after she'd vetoed Banks and Jordan. Cheney, her selection for vice-chair, was brought in for the sole purpose of helping Democrats with their tribunal.

The resolution establishing the committee, purportedly to investigate the federal government's role in detecting, preventing, preparing for, and responding to the Jan. 6 riot, says depositions taken by the select committee must follow House rules.

Those rules clearly state, "Consultation with the ranking minority member shall include three days' notice before any deposition." Also, "A deposition shall be conducted by any member or committee counsel designated by the chair or ranking minority member of the Committee that noticed the deposition. When depositions are conducted by committee counsel, there shall be no more than two committee counsel permitted to question a witness per round. One of the committee counsel shall be designated by the chair and the other by the ranking minority member per round."

Additionally, the rules say, "Deposition questions shall be propounded in rounds. The length of each round shall not exceed 60 minutes per side and shall provide equal time to the majority and the minority. In each round, the member(s) or committee counsel designated by the chair shall ask questions first, and the member(s) or committee counsel designated by the ranking minority member shall ask questions second."

The point of these rules is to structure depositions so the minority and the majority counsel have the same opportunity to question witnesses and gather information for their separate reports. That's why they rotate and why they're allotted equal time. Having questions alternate from one hostile lawyer to another hostile lawyer who is working with the first makes a mockery of the provisions. It also means that the hostile lawyers can coordinate and cherry-pick which information to leak or publish, and which to conceal from the public because it contradicts their preferred narrative.

The rules do not envision the circumstances that accompany Pelosi's uni-party select committee. The House Rules "become nonsensical in a situation like this," said one congressional aide, adding, "This isn't just a partisan investigation — it's a coverup."

For the select committee to be in accordance with the rules regarding consultation for depositions, Cheney must be considered simultaneously the ranking member for the minority party while also being the vice-chair for the majority party.

Hill lawyers say Pelosi's handling of the committee casts doubt on its adherence to the rules. Because she vetoed the ranking member from the committee, it has no ranking member. But the committee rules require consultation with the ranking member before taking certain basic actions, such as taking depositions, including those pursuant to subpoenas.

"So how can you consult with the ranking member when you don't have one?"

asked one Hill attorney.

The multiple sources consulted for this article include a document which confirmed January 6 Committee staff represented to a witness that Wood would be the Republican counsel during their interview.

"If this was a real investigation, that'd land you in jail for prosecutorial misconduct," Banks said of the false representation. "Fortunately for Liz, this is a sham investigation," he added.

Mollie Ziegler Hemingway is a senior editor at The Federalist. She is Senior Journalism Fellow at Hillsdale College. A Fox News contributor, she is a regular member of the Fox News All-Stars panel on "Special Report with Bret Baier." She is the author of "Rigged: How the Media, Big Tech, and the Democrats Seized Our Elections." Follow her on Twitter at @MZHemingway.

Exhibit 14 — Letter 2 from Counsel for Jeffrey B. Clark to Chairman Thompson on November 29, 2021

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

[redacted]

[redacted]

November 29, 2021

Hon. Bennie G. Thompson, Chairman
January 6th Select Committee
U.S. House of Representatives
Longworth House Office Building
Washington, DC 20515

Via Email

ADDITIONAL OBJECTIONS BASED ON INFORMATION FIRST LEARNED OF BY MR. CLARK AND COUNSEL ON 11/23/21

Dear Representative Thompson:

This letter is sent to flag additional legal objections arising from or catalyzed by (1) Mr. Clark's review on November 23, 2021 at the Longworth House Office Building of the draft November 5, 2021 deposition transcript and/or (2) my simultaneous review of that same draft transcript from a federal building in Atlanta, Georgia, with a Webex connection linking the two locations. Most significantly, unbeknownst to Mr. Clark and me before November 23, two transcribed sessions were held with Committee Members and staff ***after*** we had departed on November 5.

Learning the content of these sessions only upon our review of the draft transcript presents yet another serious due process problem with these proceedings as applied to Mr. Clark. Particularly alarming is that the topics on which Mr. Clark was to be questioned were not shared with us while we were present but were instead put on the record in Star Chamber fashion. *See In re Oliver*, 333 U.S. 257, 268–69 (1948) ("[D]istrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the

French monarchy's abuse of the *lettre de cachet*." (footnotes omitted)). Had we not asked to review a copy of the draft transcript, we would have been kept in the dark about specific topics that Mr. Clark supposedly refused to testify about on a blanket basis so that the myth that Mr. Clark issued a blanket refusal to testify could be perpetuated. Please see the first point below for more on this.

Any references below to the November 5 draft transcript, not yet finalized, are based on our notes. Those notes may not be perfect because of the range of problems set out in our letter to you sent the evening of November 23, which caused us to lose time and because those problems made conditions for our review sub-optimal. Nor is there any reason why we should have been denied the ability to take away copies of the draft deposition transcript so that we could review it under conditions that allowed us to consult freely while maintaining attorney-client privilege and so that we could more accurately quote from it to protect Mr. Clark's legal rights. Both of us are lawyers and we have never encountered a legal process that did not allows us access in writing, but only under observed and highly controlled circumstances, to a pre-final deposition transcript to review. We do recognize that you indicated in a letter dated November 26, 2021 to me that the Committee is still considering our request for a copy of the transcript. Please let us know about the Committee's resolution there when you can.[1] But the restrictions on our access to the transcript are another Star Chamber-like feature of the Committee's proceedings.

The new objections we raise are as follows, and they are without prejudice to a response to your November 17, 2021 letter, which we are still working on:

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[1] In a footnote, *see* Thompson Letter, at 1 n.3 (Nov. 26, 2021), you argue that action by the full House of Representatives would be required to release the audio file from November 5. But neither House Resolution 558 (112th Cong.) nor House Resolution 553 (116th Cong.) preclude release of the audio file. Instead, both Resolutions simply show the full House resolving to release audio files for trial purposes. However, you cite no authority for the proposition that a resolution by the full House is a necessary condition and thus that an audio file can be released only in that fashion. You or your advising counsel must see that those Resolutions do not prove the point for which they are cited—far from it.

First, there is ***no indication*** in the transcript of the second session held without us on November 5 present—from 4:15 pm to approximately 4:21 pm—that you had either read my November 5 letter or properly understood that it was ***not*** asserting an absolute privilege to all potential questions. Nevertheless, Mr. Heaphy represented to you that the "letter [was] asserting blanket privilege." Dr. Tr. at 48:24.[2] So, at the time you ruled, you appear to have been misinformed about the contents of our November 5 letter and transcribed statements on the morning of November 5. Accordingly, we request that you acknowledge in writing that:

(1) the concluding paragraph of my November 5 letter noted that you could respond with "a proposal to me by the Committee as to a more limited scope of inquiry narrowed to January 6—something that I would be happy to engage on to try to reach an agreement.";

(2) Mr. Clark and I repeatedly stated on November 5, as the draft transcript reflects, that we were not adopting a blanket position, *see, e.g.,* Dr. Tr. at 36:4-6 (where Mr. Clark clearly stated "I would say that we've not reached an impasse, and there have been repeated attempts to characterize the position as absolutist. It's not. We're inviting a dialogue in the letter."). You were apparently not informed of this either; and thus

(3) your ruling that "Mr. Clark does not enjoy categorical claims of privilege across every element[] of the select committee investigation authorized by House Resolution 503" should be withdrawn as a *non sequitur* because it is ruling on a counterfactual objection that we did not actually advance either in our November 5 letter or in the live session on November 5. Additionally, you are by now certainly aware (or should be aware) that my November 8, 2021 letter to you (*e.g.,* pages 1-2, 4) and my November 12, 2021 letter (*e.g.,* pages 6-7) noted that we were not asserting "absolute immunity."

In the alternative, we would request that you share this letter immediately with all Committee Members and it is to them we address this follow-on request: "Please invoke Rule 7 of the 117th Congress Regulations for Use of Deposition Authority by appealing

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[2] All citations to the Draft Transcript (abbreviated Dr. Tr.) are to the version we reviewed on November 23.

Chairman Thompson's ruling in accord with that Rule."[3] Relatedly, if such an appeal is filed by a Member, I would request the opportunity to be heard on Mr. Clark's behalf in a transcribed and in-person meeting held before a quorum of the Committee.

Given the clear disconnect between a misconstrued objection we did not make, which was what you ruled regarding on November 5, and the basis for and contours of our objection as we actually stated it, all other Members of the Committee should vote to reverse your ruling on appeal. But at the very least, one or more Members of the minority should file an appeal in an attempt to get you to rule on the objection that was actually made and not one that put words in our mouths. So whether such an appeal will be filed now that this issue has been surfaced (and again, it could not have been surfaced prior to our transcript review on November 23) will act as an important test of whether there is ***representation of the minority party in more than name only on this Committee*** or if those ostensible Members also have an unalterably closed mind characterized by prejudgment, which I have previously explained is a violation of due process. Please see my email drafted while I was in flight on November 5 back to Atlanta and in the attachment to my subsequent November 12 letter. *See* MacDougald Letter, at 2 & Att. B (Nov. 8, 2021); Memo. Re: Clark Subpoena, at 1 (Nov. 12, 2021).

Second, as is implicit in the first objection above, but which I state as a separate point here for clarity, we have now seen for the first time that the transcript clearly reflects that ***you had already ruled*** in the second session on November 5 (held without us present) that our objection (as mis-framed) had been overruled. This clinches the Queen of Hearts problem of *post hoc* rationalization that I set out in my November 12 letter and attached memo. *See* MacDougald Letter, at 2 (Nov. 12, 2021); Memo. Re: Clark Subpoena, at 2 (Nov. 12, 2021). In other words, this revelation confirms that the November 9 letter you sent to me was an attempt to paper over the defects of your November 5 late afternoon ruling

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[3] We advance this argument as an alternative one to our primary position, stated in my other letter to you today, that this Committee's composition precludes any use of the House Deposition Rules and thus that the November 5 deposition was *ultra vires*. I continue to reserve all of Mr. Clark's legal rights, especially as various problems with the Committee's actions continue to emerge.

and thus forms another reason why one or more Members should appeal your November 5 ruling.[4]

Third, in your November 26 letter, you register a sort of complaint that because Mr. Clark did not sign the transcript or certificate set before him on November 23, you may not opt not to include the corrections we identified to the transcript on November 23 in the final transcript. *See* Thompson Letter, at 1 (Nov. 26). But you ignore the due process problem we identified of a transcript that Mr. Clark is expected to sign but that (a) had errors and multiple versions floating around as a "known issue" on November 23 and yet we still encountered that issue last week; (b) yet you will not allow us to lock down a single final version of the transcript that we can keep a copy of to ensure the transcript is not further changed; (c) you present no response to my point that the integrity of the transcript has already been threatened in a legally unprecedented fashion; and (d) you are silent about our sensible suggestion that a certified pdf document could be produced and retained by all sides, assuring everyone that the transcript could not undergo further unilateral revision.

Fourth, your letter offers no response to our request that the identity of all Members and staff present for any portion of the November 5 questioning be listed to reflect the relevant portions of the transcript for which they were present. *See* MacDougald Letter, at 3 (Nov. 23, 2021) ("[T]his must be corrected in the revised transcript such that the transcript accurately indicates precisely who affiliated with the Committee was present for each of the three distinct segments of the session on November 5 reflected in the transcript, respectively, i.e., (1) the main period where Mr. Clark and I were present, (2) the period late morning where staff and some members remained on the record to mark exhibits for identification purposes and to set out their unilateral positions without our presence; and (3) the period late afternoon where Chair Thompson participated and purported to rule on our legal objections, again without us

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[4] We recognize that Rule 7 concerning depositions indicates that appeals must be noticed by Members within 3 days of the ruling but your November 5 ruling was clearly interlocutory and can be revisited. And avoiding the due process problems we have been highlighting since November 8 surely provides a strong basis for you to reconsider. Members could also call for you to reconsider your ruling as a general matter—outside the parameters of Rule 7.

present."). There is no reason for the Committee not to do so unless it or the court reporter did not track that information, in which case that point should be admitted and memorialized as part of the final transcript.

Fifth, and reserving all rights as to other topics, in the extensive list of topics [redacted] set out on the record but ***without Mr. Clark or I being present***, we have to point out that one of the topics [redacted] flagged directly contradicts a statement that the Department of Justice made to us about the Committee's position on topics, namely, DOJ's statement via Kira Antell as follows:

> Finally, I wanted to address your question seeking access to materials relating to a classified ODNI [Office of the Director of National Intelligence] briefing of Mr. Clark in early January. OLA [*i.e.*, DOJ's Office of Legislative Affairs] has spoken to the Select Committee and confirmed that the details of this briefing are outside the scope of their interest in speaking with Mr. Clark.

MacDougald Letter, at 3-4 & n.5 (Nov. 12, 2021) (quoting Ms. Antell). *Compare* Dr. Tr. at 43:13-15 (Heaphy: "[W]e wanted to ask him, for instance, about an ODNI briefing that he sought about alleged interference with Dominion voting machines by the Chinese government.").[5] Even assuming for the sake of argument that this is a permissible line of inquiry with Mr. Clark in light of the various applicable privileges, this is a serious contradiction which we will take up with DOJ by renewing our request under DOJ's

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[5] Note once more that this is the Committee's unilateral view of this issue. By contrast, Mr. Clark thinks the relevant ODNI materials, including his secure discussion with the then-Director of National Intelligence Ratcliffe, are relevant for many reasons, assuming the various privilege objections were resolved in favor of giving testimony on this topic. As I explained on November 12, it is not up to the Committee to decide what is relevant to Mr. Clark's potential response to any given line of questioning. MacDougald Letter, at 4 (Nov. 12, 2021). Mr. Clark can determine that for himself, consulting with me. The manner in which the Committee is proceeding, based on what Ms. Antell has represented, is equivalent to asserting in circular fashion that "Mr. Clark does not need access to X category of material because we do not believe he needs access to it." It is sufficient to show that Mr. Clark is entitled to review and refresh his recollection from that material that the Committee wants to ask about it.

regulations to be able to review the relevant documents. This will require confirmation that Mr. Clark's security clearances are still operable and that I, as his counsel, obtain those security clearances anew, so that Mr. Clark can be given the due process protections provided by receiving advice of counsel.

Sincerely,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

cc: Jeffrey Bossert Clark