

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

HARRY W. MACDOUGALD
MANAGING PARTNER

ATTORNEYS AT LAW

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.

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

Hon. Rep. Bennie G. Thompson

November 8, 2021

Page 2

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

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.

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

Hon. Rep. Bennie G. Thompson

November 8, 2021

Page 3

"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.DDJ Letter to Jeffrey Clark.pdf

Mr. MacDougald,
Please see the letter attached.

Thank you,

[REDACTED]

[REDACTED]

[REDACTED]

[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]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]