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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