



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]

[REDACTED]

[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

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

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).

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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.