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[redacted]

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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