



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]

[REDACTED]

[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."

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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.