

[REDACTED]

From: Harry MacDougald [REDACTED]
Sent: Friday, November 5, 2021 3:25 PM
To: [REDACTED]
Cc: [REDACTED]; [REDACTED]
Subject: Re: Clark Deposition at 4:00

[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]

[REDACTED]

On November 5, 2021 at 12:42:23 PM, [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]