**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH TWO ACCOUNTS STORED AT PREMISES CONTROLLED BY GOOGLE LLC, ONE ACCOUNT STORED AT PREMISES CONTROLLED BY MICROSOFT CORPORATION, AND ONE ACCOUNT STORED AT PREMISES CONTROLLED BY CHAPMAN UNIVERSITY, PURSUANT TO 18 U.S.C. § 2703 FOR INVESTIGATION OF VIOLATIONS OF [redacted] AND RELATED STATUTES | Case No. 22-GJ-28<br>Chief Judge Beryl A. Howell<br>**UNDER SEAL** |

**ORDER**

Pending before the Court is the government filter team's request, filed after conferral with the government's investigative team in response to the Court's prior Minute Order (dated November 16, 2022) ("November 2022 Minute Order"), for the partial unsealing of two decisions: a Memorandum & Order, issued on June 27, 2022 ("June 2022 Memorandum & Order"), ECF No. 4, and a Memorandum Opinion, issued on September 27, 2022 ("September 2022 Memorandum Opinion"), ECF No. 17. *See* Gov't Filter Team's Status Report (dated December 14, 2022), ECF No. 29. This request is granted.

The June 2022 Memorandum & Order resolved a sealed motion by the government's filter team to release material derived from search warrant returns for various email accounts to the government's investigative team, pursuant to a filter protocol issued by this Court after an iterative process that involved three separate hearings to ensure that the protocol affords robust protections to any privileged or possibly privileged materials derived from the subject accounts.

The September 2022 Memorandum Opinion and related September 2022 Order resolved a sealed motion by the government's filter team to release material derived from a separate

search warrant return for an email account to the government's investigative team, pursuant to the same filter protocol. At the government's request, a redacted version of the September 2022 Memorandum Opinion was provided to counsel for the account subscriber. *See* Minute Order (September 28, 2022); September 2022 Memorandum Opinion (Redacted For Subscriber), ECF No. 19.

Upon consideration of the government filter team's request, based on its conferral with the government's investigative team, as well as information relayed in the Status Report and the government filter team's submission, on December 15, 2022, of proposed redacted versions of the June 2022 Memorandum & Order and September 2022 Memorandum Opinion, ECF Nos. 30 and 31, it is hereby:

**ORDERED** that the government filter team's proposed redactions to the June 2022 Memorandum & Order and September 2022 Memorandum Opinion are accepted, as reflected in the Redacted June 2022 Memorandum & Order and Redacted September 2022 Memorandum Opinion attached to this Order; and it is further

**ORDERED** that this Order, along with the Redacted June 2022 Memorandum & Order and Redacted September 2022 Memorandum Opinion attached to this Order as Attachment A and B, respectively, be unsealed and posted by the Clerk of the Court for public access on the appropriate part of the Court's website; and it is further

**ORDERED** that the government filter team shall file, by the earlier of December 15, 2023, or within thirty days of when any public disclosure obviates the need for further sealing, a status report advising the Court whether the June 2022 Memorandum & Order, ECF No. 4, September 2022 Memorandum Opinion, ECF No. 17, and September 2022 Order, ECF No. 16, may be further unsealed, in whole or in part, and, if so, proposing any

redactions to be made prior to any unsealing.

**SO ORDERED.**

Date: December 15, 2022

BERYL A. HOWELL
Chief Judge

# EXHIBIT A

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH TWO ACCOUNTS STORED AT PREMISES CONTROLLED BY GOOGLE LLC, ONE ACCOUNT STORED AT PREMISES CONTROLLED BY MICROSOFT CORPORATION, AND ONE ACCOUNT STORED AT PREMISES CONTROLLED BY CHAPMAN UNIVERSITY, PURSUANT TO 18 U.S.C. § 2703 FOR INVESTIGATION OF VIOLATIONS OF [redacted] AND RELATED STATUTES | Case No. 22-GJ-28<br>Chief Judge Beryl A. Howell<br>[redacted] |

**MEMORANDUM AND ORDER**

On May 26, 2022, as part of an ongoing grand jury investigation into possible violations of [redacted] in connection with [redacted], this Court approved the use of a filter protocol to govern the identification, segregation, and disclosure of any attorney-client privilege or work product protected or potentially protected materials seized among the search warrant returns for email accounts controlled by [redacted] Jeffrey Clark, Ken Klukowski, and John Eastman (collectively, the "Subject Accounts"). *See* Mem. & Order Regarding Filter Protocol ("Filter Protocol Mem. & Order"), [redacted] ECF No. 10. On June 17, 2022, upon its receipt and processing of search warrant returns, "the filter team began reviewing approximately 130,000 documents for attorney-client and work product privilege." Mot. for Release of Email ("Filter Team Mot."), at 1, ECF No. 2. Pursuant to section (e)(vi)(1) of the filter protocol, on Friday, June 24, 2022, the filter team submitted an *ex parte* motion to release to the investigation team, as not protected under either the attorney-client privilege or work-product doctrine, 37 documents (consisting of emails

and associated attachments) involving the scott@patriotsforperry.com email address found within the Subject Account returns. *Id.* at 1.[1] Following *in camera* review of each of the 37 documents, which the filter team appended to its motion, the Court finds that the documents are not privileged under the attorney-client privilege or work-product doctrine and thus may be disclosed to the investigation team.[2] Accordingly, as further explained below, the filter team's motion for release of emails and associated attachments to the investigation team is **GRANTED**.

## I. BACKGROUND

The filter protocol, approved by this Court following an iterative process that included three separate hearings, *see* Filter Protocol Mem. & Order at 1-3, affords robust protections to any privileged or possibly privileged materials derived from the Subject Accounts. As relevant to the instant request for disclosure, the protocol mandates the automatic identification and segregation as potentially privileged material of all communications to or from anyone known by the filter team to be an attorney. Filter Protocol § (c)(ii), Case No. 22-sc-1096, ECF No. 10.[3] After potentially privileged materials are identified and segregated, the filter protocol further directs that the investigation team may *not* learn about nor be granted access to any such

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[1] The filter team has prioritized and expedited review of any email exchanges involving scott@patriotsforperry.com, which is presumptively used by U.S. Congressman Scott Perry of Pennsylvania, at the request of the investigation team. Filter Team Mot. at 1.

[2] As Attachment A to its motion, the filter team includes a "Filing Log" listing the 37 documents involving scott@patriotsforperry.com found in the Subject Accounts and identifying each unique document with a Bates number. Copies of every document are available in Attachment B to the filter team's motion. References to documents for which disclosure to the investigation team is sought accordingly reflect the Bates numbering provided by the filter team, which is directed in future filings to identify any documents at issue in the motion with the associated Bates-stamp numbers.

[3] The filter protocol also requires, *inter alia*, that filter team members may not be part of the investigation team or include Assistant U.S. Attorneys from the U.S. Attorney's Office for the District of Columbia, *see* Filter Protocol § (a)(i), and that only experienced filter team attorneys will possess final and non-delegable decisionmaking authority regarding the disclosure of materials to the investigation team, *id.* §§ (a)(ii)-(iii); (d)(1) ("No materials shall be disclosed to the investigation team without the approval of a filter team attorney."). As contemplated by these provisions, the pending motion for release of emails to the investigation team was submitted and signed by an Assistant U.S. Attorney from [redacted]. *See* Filter Team Mot. at 3.

materials unless the filter team seeks review of those materials by, and approval from, the Court. *Id.* § (e)(vi)(1).

In accordance with these requirements, the filter team has "initially designated all communications to or from" the three attorneys among the Subject Account holders—John Eastman, Ken Klukowski, and Jeffrey Clark—as potentially privileged. Filter Team Mot. at 2. Consistent with the government's representation while seeking judicial approval for the filter protocol that the "filter team intends to err on the side of caution during its review," *see* Filter Protocol Mem. & Order at 5 (citations omitted), the filter team further indicates that, "[a]s pledged," it "has erred on the side of identifying documents as potentially privileged in conducting its review," Filter Team Mot. at 2. The request presently before the Court involves a small number of email exchanges and related documents concerning scott@patriotsforperry.com found within each of the Subject Accounts, *id.* at 1, and which the Court has examined *in camera*.

## II. DISCUSSION

"The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law.'" *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). As the Supreme Court explained, "[b]y assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation," and "[t]his, in turn, serves 'broader public interests in the observance of law and administration of justice.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Upjohn Co.*, 449 U.S. at 389). Thus, the privilege covers only communications "between attorney and client if that communication was made for the purpose

of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (Kavanaugh, J.); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("[Attorney-client] privilege applies only if the person to whom the communication was made is 'a member of a bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding.'" (citing *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984))).

For its part, the work-product doctrine "shields materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (citations omitted). These materials include the attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions," and "personal beliefs." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

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As detailed *seriatim* below, none of the documents sent to or received by scott@patriotsforperry.com found within each of the Subject Accounts and which the filter team now seeks to disclose entail communications "between an attorney and client . . . made for the purpose of obtaining or providing legal advice," *In re Kellogg Brown*, 756 F.3d at 757, or materials prepared in anticipation of litigation, *see Judicial Watch*, 432 F.3d at 369. The 37 documents at issue therefore do not implicate either the attorney-client or work-product privilege

and may be disclosed to the investigation team pursuant to section (e)(vi)(1) of the filter protocol.

***Eastman Subject Account.*** The filter team has identified three brief email exchanges between the Eastman Subject Account and scott@patriotsforperry.com from December 11 to December 13, 2020, that include no substantive discussion and only refer to a phone call. *See* EASTMAN-00001054 ("John, this is congressman Scott Perry from PA. Can you contact me ASAP?"); EASTMAN-00022910 (only suggesting call between Eastman and Perry had taken place); EASTMAN-00023514. These documents are thus in no form privileged and may be turned over to the investigation team.

***Klukowski Subject Account.*** The filter team has identified three email exchanges and associated attachments, totaling seven documents, that involve scott@patriotsforperry.com in the Klukowski Subject Account. In the first of these emails, sent on November 11, 2020, Klukowski wrote "It was a pleasure speaking with you, Congressman," *see* KLUKOWSKI-00005010, and attached a document titled the "Electors Clause/The Legislature Option" outlining arguments in support of the proposition that "The Constitution makes state legislatures the final authority on presidential elections," *see* KLUKOWSKI-00005011. The author or source of this attachment is not identified, and Klukowski forwarded it to Perry without any commentary suggesting that the document was prepared in anticipation of litigation. *See Judicial Watch*, 432 F.3d at 369 (explaining work-product doctrine only shields materials developed in anticipation of litigation).

The second email exchange, which took place on December 23, 2020, consists of the hyperlink to a publicly-filed certiorari petition without any substantive discussion or commentary. *See* KLUKOWSKI-00006397; KLUKOWSKI-00006399. The third email exchange, from December 24, 2020, also lacks any substantive commentary or discussion, *see*

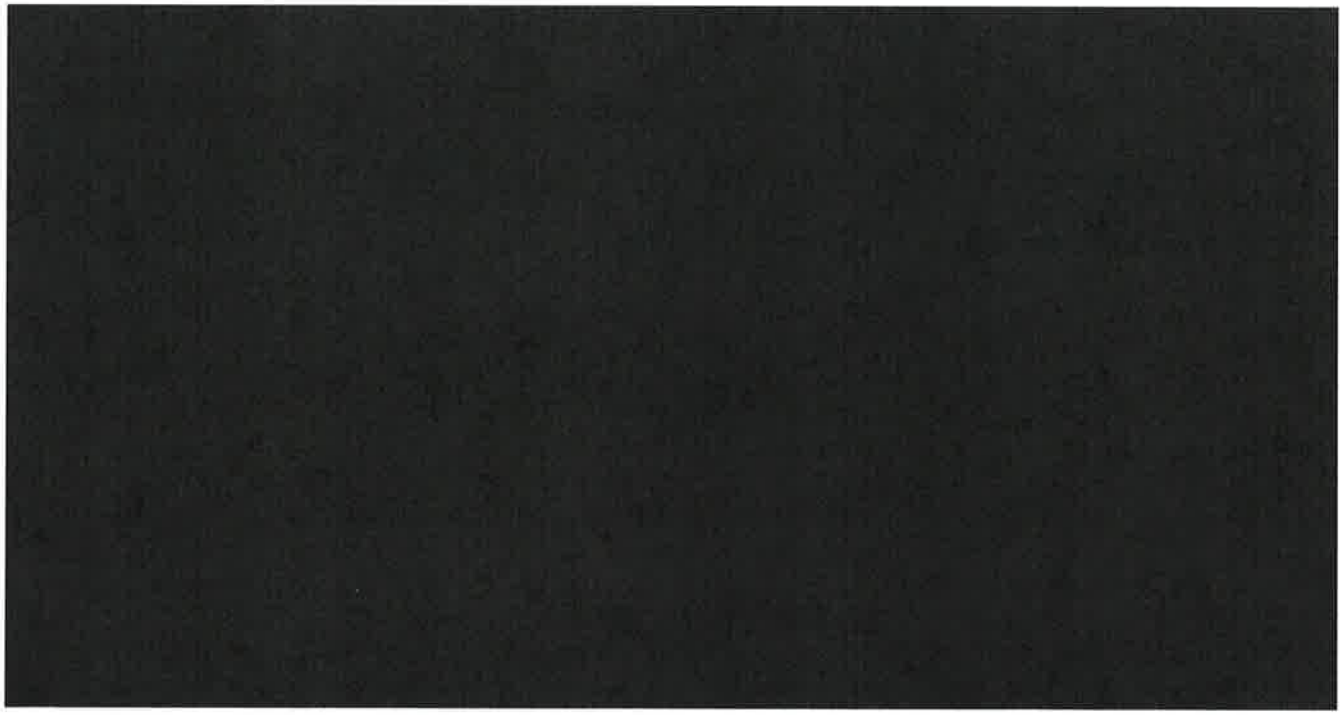
KLUKOWSKI-00006408; KLUKOWSKI-00006410, and includes the attachment of a document titled "State Legislatures Can Self-Convene to Appoint Presidential Electors," *see* KLUKOWSKI-00006409. Like the document attached to the November 11, 2020 email, the author or source of this second attachment is not identified, and Klukowski forwarded it to Congressman Perry without any commentary suggesting that it was prepared in anticipation of litigation.

In any event, as the filter team points out, at the time these exchanges took place, Klukowski was still employed in the federal government and therefore Congressman Perry could not have been his client. *See* Filter Team Mot. at 3; *see also In re Lindsey*, 158 F.3d at 1267 ("The attorney-client privilege protects confidential communications made between *clients* and *their attorneys* when the communications are for the purpose of securing legal advice or services." (emphasis added)).

***Clark Subject Account.*** The filter team has identified in the Clark Subject Account nineteen documents, consisting of several email exchanges and associated attachments, that involve scott@patriotsforperry.com and none of which implicate attorney-client communications, *see In re Kellogg Brown*, 756 F.3d at 757, or materials produced in anticipation of litigation, *see Judicial Watch*, 432 F.3d at 369. Three of these exchanges, which took place between June 2020 and October 2020 while Clark was employed at the Department of Justice, consist only of news articles that a third party sent to Clark, Congressman Perry, and other recipients. *See* CLARK-00012165 (June 18, 2020 Email); CLARK-00009671 (August 11, 2020 Email); CLARK-00014417 (October 29, 2020 Email); Filter Team Mot. at 3 ("Nothing in these emails suggests that the participants have an attorney-client relationship or that the topic relates to litigation.").

Another set of three email exchanges includes communications between Clark, Congressman Perry, and others that took place after the 2021 Presidential Inauguration, when Clark was no longer employed at the Department of Justice. As thusly summarized by the filter team, "[t]hese involve a forwarded excerpt from a Václav Havel essay," *see* CLARK-00018726, CLARK-00091174, CLARK-00079546, CLARK-00091105; "comments on a Roger Stone interview," *see* CLARK-00078500; "a forwarded Wall Street Journal article on President Biden's climate plan," *see* CLARK-00013632; and "Pennsylvania's voting system," *see* CLARK-00088875.

A final set of documents, including several duplicates, consists of emails without any substantive discussion that Clark sent to Congressman Perry in February 2021 along with two different versions of his resume. *See* CLARK-00077935; CLARK-00077936; CLARK-00077937; CLARK-00091270; CLARK-00091271; CLARK-00091272; CLARK-00002693; CLARK-00078818; CLARK-00089715.



[redacted]

## III. ORDER

Upon consideration of the filter team's *Ex Parte* Motion for Release of Email, ECF No. 2, and the entire record herein, it is hereby

**ORDERED** that the filter team's motion is **GRANTED**; and it is further

**ORDERED** that the 37 documents involving scott@patriotsforperry.com identified in the Subject Accounts shall be disclosed by the filter team to the investigation team; and it is further

**ORDERED** that the filter team shall identify any documents referenced in future motions for disclosure by their Bates-stamp number.

**SO ORDERED.**

Date: June 27, 2022

BERYL A. HOWELL
Chief Judge

[redacted]

# EXHIBIT B

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH TWO ACCOUNTS STORED AT PREMISES CONTROLLED BY GOOGLE LLC, ONE ACCOUNT STORED AT PREMISES CONTROLLED BY MICROSOFT CORPORATION, AND ONE ACCOUNT STORED AT PREMISES CONTROLLED BY CHAPMAN UNIVERSITY, PURSUANT TO 18 U.S.C. § 2703 FOR INVESTIGATION OF VIOLATIONS OF [redacted] | Case No. 22-GJ-28<br>Chief Judge Beryl A. Howell<br>[redacted] **WITH REDACTIONS** |

**MEMORANDUM OPINION**

In compliance with a court-ordered filter protocol approved on July 21, 2022, *see* Order Regarding Filter Protocol ("Filter Protocol (Clark Gmail Account)") [redacted] ECF No. 10, a filter team has been reviewing information from the Gmail account with the address jeffrey.b.clark@gmail.com ("Clark Gmail Account"), which is registered to Jeffrey Clark, who previously served as Acting Assistant Attorney General for the Civil Division of the Department of Justice. The contents of and associated information from the Clark Gmail Account were obtained pursuant to a court-ordered search warrant approved on June 24, 2022 and executed on June 27, 2022, *see* Issued Search Warrant, [redacted] ECF No. 3; Search and Seizure Warrant Return, Case No. 22-sc-1678, ECF No. 7. The purpose of the filter team's review is to identify and segregate from material disclosed to the investigative team any material in the Clark Gmail Account that is attorney-client privileged and work-product protected. *See* Filter Protocol (Clark Gmail Account) § (b)(i)-(ii). As part of that process, on September 8, 2022, the filter team filed, *ex parte* and under seal, the instant motion to release to the investigative team certain documents—namely, 331 iterative versions of what appears to be an autobiography outline auto-

saved to the Clark Google Account. Gov't Filter Team's *Ex Parte* Motion to Release Documents ("Gov't's Mot.") at 3, ECF No. 11. The same motion requested permission for limited disclosure of the motion and its attachments to Clark's counsel, which request was granted the same day, along with issuance of a scheduling order that adopted a timeline designed to avoid further delay for briefing on the motion to disclose the materials at issue to the investigative team, which briefing, including a supplemental response submitted by the filter team in response to the Court's *ex parte* query, Minute Order (Sept. 21, 2022); Gov't's Suppl. Brief Supp. Mot. to Release Documents ("Gov't's Suppl. Mem."), ECF No. 15, was completed on September 23, 2022.

Upon consideration of the government's motion, as well as Clark's Response to Government's Motion to Release Documents and Request for Scheduling Order ("Clark's Opp'n"), ECF No. 13, and the government's reply ("Gov't's Reply"), ECF No. 14, the Court finds that the 331 documents are not protected by the work-product doctrine or the attorney-client privilege and thus may be disclosed to the investigative team. Accordingly, as further explained below, the government's motion for the release of documents to the investigative team is **GRANTED**.

## I. BACKGROUND

### A. Files at Issue

The government filter team seeks to disclose to the investigative team a total of 331 files largely consisting of auto-saved drafts of the same ultimate document: the outline of an autobiography that Clark apparently contemplated writing. *See* Clark's Opp'n at 1–5 (describing the drafts as a "single document . . . electronically 'auto saved' many, many times").[1] The

[1] Clark devotes half of his seven-and-a-half-page brief to highlighting that all of the files at issue are a "single Note" auto-saved through the Notes app on Clark's phone rather than created as emails, Clark's Opp'n at 1–

documents take the form of a book outline, including a "[p]rologue," "[i]ntroduction," nine numbered sections that chronologically narrate Clark's life, and a "[c]onclusion." Gov't's Mot., Ex. 6, Document Drafted 10/14/2021 at 11:27 ("Oct. 14, 2021 Outline Draft") at 27–31, ECF No. 11. The substance, too, reveals the documents' intended purpose as a book outline. Clark calls the documents an "outline" in introductory text, and writes that the final chapter will cover "[f]uture [e]vents (ie from October 2021 to whenever text close out date would be)." *Id.* at 27, 30.

[redacted].[2] The prologue describes Clark's involvement in *Bush v. Gore*, stating that he "never thought [he'd] have a bird's eye view of a second deeply contested presidential election," but that he "would be wrong." Oct. 14, 2021 Outline Draft at 27. The introduction then skips forward to January 2021, when the outline indicated Clark learned the New York Times was writing a story about how he "headed up a plot to take over as Acting AG and 'subvert democracy.'" *Id.* The numbered chapters trace Clark's life from "growing up

5. The fact that the files reflect auto-saved, iterative versions of the same document is undisputed, Gov't's Mot. at 3–4, and whether the files were composed in the Notes app or an open email—in Clark's verbiage, the files' "native habitat," Clark's Opp'n at 4—is irrelevant to whether they are deserving of protection from disclosure as privileged.

[2] The filter team "may [] segregate and not disclose to the investigation team any material that is unambiguously not responsive to the search warrant," pursuant to the Filter Protocol. Filter Protocol (Clark Gmail Account) at § (d)(i).

deplorable in Philadelphia," to his career as "a young DAAG" in the Bush administration, to his work as Assistant Attorney General for the Environment and Natural Resources Division under the Trump administration. *Id.* at 27–28. The following six chapters outline his perspective on the 2020 presidential election results ("[d]on't believe it but I've got a day job") and role in the election's aftermath, including a description of his creation of the ultimately never-sent "letter to Georgia legislature" regarding potential election fraud and Trump's reaction to it ("good letter"). *Id.* at 28–29. The outline also provides a detailed description of a January 3, 2021 meeting attended by President Trump, Acting U.S. Attorney General Jeffrey Rosen, Acting U.S. Deputy Attorney General Richard Donoghue, and Clark in the White House, in which the officials discussed Clark's draft letter and Rosen's potential removal. *Id.*

All drafts of the outline contain text in the "Subject" line, repeated as the first line in the body of the outline, stating that "[n]one of this outline reveals privileged information," *see* Gov't's Mot., Ex. 11, Index of Disputed Documents at 39–62, ECF No. 11. At some point on October 11, 2021, Clark edited this line so that it read in many drafts saved that day: "[n]one of this outline reveals privileged information, though some of it relies on information disclosed in testimony from other officials they never should have given." *Id.* The final two drafts contain the same text in both the "Subject" line and repeated in the first line of the body of the outline, but with the addition of the line: "However this is attorney work product." *Id.* at 39. The initial 329 drafts were all auto-saved over the course of October 11, 2021, with the final two drafts saved on October 14, 2021. *See id.* at 39–62.

**B. Applicable Filter Protocol**

This Court initially approved a filter protocol with respect to the review of certain email accounts of Jeffrey Clark and others, following an iterative process that included three separate hearings, on May 26, 2022. *See* Filter Protocol Mem. & Order ("Filter Protocol (Clark Outlook

Account and Others)") at 1–3, 22-sc-1096, ECF No. 10.[3] This filter protocol affords robust protections to any materials derived from the subjects' email accounts that are protected or possible protected by the attorney-client privilege or work-product doctrine. After potentially protected materials are identified and segregated, the protocol provides that the investigation team may not learn about nor be granted access to any such materials unless the filter team seeks review of those materials by and approval from the Court, either *ex parte* without informing the potential privilege holder's counsel, or after conferral with the potential privilege holder's counsel fails to reach a resolution. *Id.* at § (e)(vi).

This filter protocol was later amended with respect to Clark and others to provide for detailed procedures for disclosing certain material to any potential privilege holder after separate search warrants on Clark and others, and Clark's residence were executed, alerting these persons to the government's investigation. *See* Gov't's Mot. Regarding Filter Protocol at 1, [redacted], ECF No. 13.[4] Under the amended procedures, the government filter team may provide to the potential privilege holder material determined to be unprotected by privilege. The potential privilege holder must then raise any objections to the materials' disclosure to the investigative team within seven days, and disputed materials may not be disclosed to the investigative team unless the government filter team gains approval from the Court. *See* Order Regarding Filter Protocol ("Amended Filter Protocol (Clark Outlook Account and Others)") at § (d)(vi)(1)–(4), [redacted], ECF No. 14.

[3] [redacted]

[4] This amended filter protocol had already been adopted by this Court in the search warrant issued on July 12, 2022, to search the contents of the electronic devices seized from locations including Clark's residence. *See* Issued Search Warrant at 7–11, [redacted], ECF No. 3.

With respect to the Clark Gmail Account from which the presently disputed materials were seized, this Court adopted the same amended filter protocol already in place for the search warrants targeting Clark's devices and Outlook account. *See generally* Filter Protocol (Clark Gmail Account). In accordance with the protocol, the filter team conferred with counsel for Clark before disclosing to the investigative team potentially protected material that the filter team determined were not protected. *See* Gov't's Mot. at 3–5. In a letter dated August 17, 2022, the filter team notified Clark's counsel of the files currently in dispute, providing Clark seven days to object before the files would be released to the investigative team. *See* Gov't's Mot., Ex. 7, Ltr. from Filter Team Assistant U.S. Attorney ("Filter Team") to Clark's counsel, Charles Burnham (Aug. 17, 2022), ECF No. 11. On August 25, 2022, Clark's counsel objected to the release of the documents on the basis of attorney work product, also noting that Clark did not waive any objections to the legal sufficiency of the filter protocol. *See* Gov't's Mot., Ex. 8, Ltr. from Clark's counsel to Filter Team (Aug. 25, 2022) ("Aug. 25, 2022 Clark's Counsel Letter"), ECF No. 11.[5] The filter team provided a more detailed explanation of its position to Clark's counsel on August 29, 2022, prompting a succinct reply, without any substantive response: "We object." *See* Gov't's Mot., Ex. 9, Ltr. from Filter Team to Clark's counsel (Aug. 29, 2022), ECF No. 11; Gov't's Mot., Ex. 10, Email from Clark's counsel to Filter Team (Aug. 29, 2022), ECF

[5] Although Clark does not argue in his submission before this Court that the filter protocol was insufficient, his counsel has asserted to the filter team that "review [of] the seized materials should be conducted via adversarial proceedings before a court, or by a Special Master." Aug. 25, 2022 Clark's Counsel Letter at 1. Clark's counsel's call for adversarial proceedings on issues related to a grand jury investigation runs contrary to the Supreme Court's guidance to "avoid[] minitrials on peripheral matters." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300 (1991). Grand jury proceedings eschew many of the "technical procedural and evidentiary rules governing the conduct of criminal trials" in order to free the proceedings of delay and ensure their "indispensable secrecy." *Id.* at 298–99 (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974); then quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)). Certainly, claims of privilege remain applicable in grand jury proceedings, but the method by which potential privilege claims are evaluated may be adapted to the particular need for expeditious and secret review of relevant evidence of criminal wrongdoing by the grand jury. *See In re Sealed Case,* 121 F.3d 729, 756–57 (D.C. Cir. 1997). To this end, the filter protocol relaxes the requirements of secrecy for grand jury proceedings, generally required by Federal Rule of Criminal Procedure 6(e), and allows for limited adversarial proceedings in the course of a grand jury investigation, but this reflects an accommodation—not an entitlement.

No. 11. The conferral process having reached an impasse, the filter team filed the instant motion pursuant to § (d)(vi)(3) of the filter protocol.

## II. DISCUSSION

Following review of the general legal principles governing the attorney-client privilege and work-product doctrine, the applicability of these legal shields to bar disclosure of the materials from the Clark Gmail Account at issue here are addressed in turn, followed by a brief discussion of Clark's procedural request regarding the order of future briefing.

### A. Work-Product Doctrine and Attorney-Client Privilege Generally

The work-product doctrine "shields materials 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative.'" *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting FED. R. CIV. P. 26(b)(3)). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The doctrine emerged as a common law privilege in the civil litigation context, *see Hickman v. Taylor*, 329 U.S. 495 (1947), and has been extended to apply to criminal matters, *see Nobles*, 422 U.S. at 236–38, with codification in both the federal civil and criminal procedural rules, *see* FED. R. CIV. P. 26(b)(3) and FED. R. CRIM. P. 16(b)(2). "While the 'work product' may be, and often is, that of an attorney, the concept of 'work product' is not confined to information or materials gathered or assembled by a lawyer." *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977)). The "key" element of the doctrine is that documents are only protected if they were prepared in anticipation of litigation, and, importantly, "the proponent of the work-product protection [] bears the burden of demonstrating that the

prospect of litigation was an independent, legitimate, and genuine purpose for the document's creation." *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 134 (D.D.C. 2012).

The attorney-client privilege, for its part, "is the oldest of the privileges for confidential communications known to the common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). As the Supreme Court explained, "[b]y assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation," and "[t]his, in turn, serves 'broader public interests in the observance of law and administration of justice.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Upjohn Co.*, 449 U.S. at 389). Thus, the privilege covers only a communication "between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (Kavanaugh, J.); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("[Attorney-client] privilege applies only if the person to whom the communication was made is 'a member of the bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.'" (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984))).

**B. Clark's Privilege and Work-Product Claims**

Clark appears to claim both the work-product protection and attorney-client privilege, contending that the disputed documents are "privileged/protected by the work product doctrine," *see* Clark's Opp'n at 1, in an approach that can best be described as throwing spaghetti at the wall to see what sticks. None of Clark's arguments are successful, however. His arguments—based solely on conclusory factual statements in briefing without any support from sworn

declarations from him or current or former counsel to carry his burden here—cast two alternative realities: either (1) Clark represented himself in preparing for anticipated litigation, and the documents constituted his own work product, Clark's Opp'n at 5–6 & 6 n.2, or (2) he was represented by then-counsel Robert Driscoll, and the substance of the documents may have been shared with counsel. *Id.* at 6–7. Although both Clark and the filter team conflate the work-product doctrine and attorney-client privilege in their papers, the applicability of each basis for protection from disclosure is addressed *seriatim*.

**1. *Work-Product Doctrine***

Three days after completing the outline reflected in the instant files, Clark returned to the document to add to the "Subject" line and introductory text—which already disclaimed that "[n]one of this outline reveals privileged information"—the advisory that "this is attorney work product." Oct. 14, 2021 Outline Draft; *see also* Clark's Opp'n at 3 (noting that "the final two versions are marked 'work product'"). In support of this "attorney work product" assertion, Clark contends that he was able to "prepare work-product-protected notes for his own defense," and "at all times, Mr. Clark has acted as his own counsel in the various matters on the Hill and elsewhere." Clark's Opp'n at 6 n.2. Specifically, Clark argues that he could have prepared the documents "about the upcoming legal challenges being anticipated" after the House Select Committee to Investigate the January 6, 2021 Attack on the Capitol requested that Clark provide testimony about the Justice Department's investigations of alleged voter fraud related to the 2020 election results. Clark's Opp'n at 5–6; *see also* Aug. 25, 2022 Clark's Counsel Letter (asserting that Clark was "on notice" of an investigation by the Department of Justice Inspector General's Office, proceedings before the Senate Judiciary Committee, and an anticipated subpoena from the House Select Committee).

On the other hand, the filter team contends that the files do not enjoy work-product protection because they comprise "the outline of a memoir," without any indication that Clark drafted the outline for a litigation-related purpose. Gov't's Reply at 2–3.

Putting aside the questions of whether Clark was *pro se* at the time of the documents' creation, Clark has failed to meet his burden to prove that these drafts of an autobiography outline meet the prerequisite for the protection he claims of being "prepared in anticipation of litigation." *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010); *see also United States v. Williams Cos.*, 562 F.3d 387, 393 (D.C. Cir. 2009) (holding the same in the context of a criminal case).[6] The D.C. Circuit applies the "because of" test, "asking 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *Deloitte,* 610 F.3d at 137 (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)). "Where a document would have been created 'in substantially similar form' regardless of the litigation, work product protection is not available." *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015). Anticipated litigation in this context includes "adversarial administrative matters, settlement negotiations, and the *avoidance* of anticipated litigation." *Gen. Elec. Co. v. Johnson*, No. 00-cv-2855, 2006 WL 2616187, at *11 (D.D.C. Sept. 12, 2006) (emphasis in original). Whether a congressional investigation, as Clark cites here with reference to the House Select Committee hearings, can constitute such an adversary proceeding is unclear. *See, e.g., In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 39 (D.D.C. 1998), *aff'd in part, rev'd*

[6] For this reason, Clark's reliance on *Moore v. Kingsbrook Jewish Med. Ctr.*, No. 11-cv-3552, 2012 WL 1078000 (E.D.N.Y. March 30, 2012) is inapposite. In *Moore*, the *pro se* party claimed work-product protection over notes that she took during a deposition that were "clearly prepared in anticipation of litigation or trial" because these were her "'personal notes' that reflected her own mental impressions of the deposition and the litigation." *Id.* at *8. The dispositive issue is whether the documents were created in anticipation of litigation—not by whom they were written.

*in part on other grounds sub nom. In re Lindsey,* 158 F.3d 1263 (D.C. Cir. 1998) (avoiding a similar question in the context of an Office of Independent Counsel probe where the attorney's client, the White House, was not being investigated). Although materials prepared by non-attorneys can enjoy the work-product protection, "the degree to which counsel is involved in creating the document bears directly on whether the document was prepared in anticipation of litigation." *ISS Marine Servs.,* 905 F. Supp. 2d at 134.

To be sure, Clark penned the autobiography outline in an atmosphere charged with news that congressional committees' investigations into the January 6, 2021 Capitol attack and other efforts to overturn the 2020 election were increasingly focusing on his role. On October 4, 2021, the House Select Committee's Chief Investigative Counsel Tim Heaphy wrote to Clark's then-counsel that the Select Committee intended to speak with Clark "ideally in the next couple of weeks." Clark's Opp'n, Ex. 2, Email from Heaphy to Clark's then-counsel Robert Driscoll (Oct. 4, 2021) at 1, ECF No. 13-2. Three days later, on October 7, 2021, the Senate Judiciary Committee published a report on its parallel investigation into attempts to subvert the presidential election that featured Clark's role prominently, finding that "[a]fter personally meeting with Trump, Jeffrey Bossert Clark pushed Rosen and Donoghue to assist Trump's election subversion scheme." SENATE COMMITTEE ON THE JUDICIARY, SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION at 3–4 (2021), https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf. Four days later, Clark penned the book outline drafts currently in dispute. Then, on October 13, 2021, the House Select Committee issued a subpoena for Clark's testimony and records. *See* Luke Broadwater, *Jan. 6 Panel Subpoenas Jeffrey Clark, Former Justice Dept. Official*, N.Y.

TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/10/13/us/politics/jeffrey-clark-subpoena.html. The following day, Clark edited the outline to add the tag-on line that it was protected by the attorney work-product rule.

Even assuming the congressional investigations constituted anticipated litigation, Clark fails to meet his burden as to the second, "motivational element" of this inquiry, which "demands that the document at issue be prepared or obtained *because of* the prospect of litigation." *In re Veiga*, 746 F. Supp. 2d 27, 35 (D.D.C. 2010). Clark contends that, as an attorney representing himself, the outline was created to "captur[e] his own mental impressions, legal strategy, and related notes about the upcoming legal challenges," Clark's Opp'n at 5, but these work-product buzzwords cannot be reasonably applied to the outline before this Court, which is almost entirely composed of retrospective accounts of Clark's past experiences stretching from his childhood to the present. The outline's "conclusion" does not contain thoughts or legal strategies related to the congressional committee investigations, but rather a promise to "resist communism" and work on "Covid litigation and against wokeism." Oct. 14, 2021 Outline Draft at 31. Although the outline references the ongoing congressional investigations, it does so in the context of the book's overall narrative, in a chapter Clark titled "Re-Rising Action." The outline of this chapter is comprised of skeletal bullet points, such as "J6 Select Committee established," "Rosen, Donoghue, and Hovakimian rush in to testify," and "I continue to stand on privileges preventing me from testifying." *Id.* at 30. Clark's bare assertion of the work product doctrine in his outline and briefing is insufficient to carry his burden of proving that he prepared this outline *because of* the congressional investigations.

### 2. *Attorney-Client Privilege*

Clark alternatively argues that he was represented by counsel at the time he drafted the outline, and the outline is therefore protected by the attorney-client privilege. He contends that "an outline of what a client wishes to discuss with one's counsel—and which is subsequently discussed with one's counsel" is privileged. Clark's Opp'n at 6 (quoting *Hicks v. Bush*, 452 F. Supp. 2d 88, 101 n.10 (D.D.C. 2006) (emphasis omitted)). Further, he asserts, "many attorneys have a practice of even requesting that clients provide autobiographical information for use in the representation." *Id.*

Clark fails to demonstrate that the outline is attorney-client privileged, however, because he never argues before this Court—let alone provides any sworn declaration—that the outline was *in fact* created to guide a conversation with counsel, or at the request of counsel. Nor does Clark argue that he shared the outline with counsel.[7] To the contrary, he claimed to be "puzzled as to why the Filter Team stresses that there was no evidence Mr. Clark sent the note in question to his counsel." Clark's Opp'n at 6 n.2. Such puzzlement would be resolved, however, with a closer reading of the case he quotes, which states in the preceding sentence that "[a] question recently answered in the negative by the Second Circuit is whether notes intended for an attorney are privileged if their content has not yet been communicated to the attorney. The privilege

[7] Clark's counsel asserted in a letter to the filter team that the "substance of the documents was later communicated to counsel," Aug. 25, 2022 Clark's Counsel Letter, but avoids repeating that assertion in his opposition to the government's motion. Clark's brief notably avoids making many factual assertions at all, instead arguing legal hypotheticals that may or may not apply to the facts at hand. *See, e.g.,* Clark's Opp'n at 5 (describing Clark as "entirely capable of preparing a document capturing his own mental impressions, legal strategy, and related notes about the upcoming legal challenges," without stating that Clark did in fact prepare the drafts for this purpose); *id.* at 6 (noting that "many attorneys have a practice of even requesting that clients provide autobiographical information" without arguing that Clark's counsel actually did so); *id.* (quoting a case in which notes of what a client wished to discuss—and then did discuss—with her counsel were protected by the privilege, without asserting that Clark created the drafts with the later-fulfilled intention of sharing them with counsel). That the opposition brief elided any firm factual assertion about Clark's intended purpose in writing the drafts—even while making legal arguments that depended on such facts being true—raises concern about any good faith basis Clark has for claiming protection under the attorney-client privilege or the work-product doctrine.

requires an attorney-client *communication*." *Hicks*, 452 F. Supp. 2d at 101 n.10. *See also United States v. DeFonte*, 441 F.3d 92, 95–96 (2d Cir. 2006) (holding that "central to the finding of privilege . . . is the fact that the notes were communicated by the client to the attorney"). Clark failed to show that his outline drafts were so communicated.

Clark's claim that the outline drafts are privileged fails for the second, related reason that the Clark has not demonstrated that the drafts were "made for the purpose of obtaining or providing legal advice." *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018). Clark argued that documents resembling autobiographies may hypothetically be shared with counsel for the purposes of "mitigation, establishing intent, or general understanding of a client's life situation and goals," Clark's Opp'n at 6, but does not actually argue that he shared the outline drafts with his then-counsel for any of those reasons. Nor does the nature of the outline drafts indicate that they were designed with the purpose of seeking legal advice; not only do the drafts expressly disclaim that the "outline reveals privileged information," they also fail to list any questions requiring the legal advice of counsel. Instead, the drafts outline a book—not a contemplated discussion with counsel in which Clark may have sought legal advice.

**C. Clark's Requested Briefing Schedule**

Finally, Clark contends that, because he bears the burden to support any assertions of privilege, he should be permitted to "submit a brief in support of his privilege assertions followed by a response from the government and a reply from Respondent," Clark's Opp'n at 7. Clark is correct that in typical privilege battles, the privilege proponent tends to be the movant, but his argument is a red herring because Clark was given a full opportunity to support his position in his opposition to the government's motion. Clark's ability to have the last word is irrelevant to the question of whether he sustained his burden. Further, if the filter team had

raised any arguments for the first time in its reply—which Clark does not argue, because the filter team did not—Clark could have requested leave to file a surreply—which Clark did not—to cure any unfairness that the ordering of the briefing might have created. *See Awan v. U.S. Dep't of Justice*, No. 10-cv-1100, 2011 WL 2836541, at *1 (D.D.C. July 13, 2011).

## III. CONCLUSION

The 331 drafts of an autobiography outline that Clark drafted in mid-October 2021 are neither privileged nor protected by the work-product doctrine, because Clark failed to sustain his burden of showing that the drafts were communicated with counsel in pursuit of legal advice, or that the drafts were written because of the congressional investigations related to Clark. Instead, the files were clearly designed to outline an autobiographical book, tracing Clark's life from childhood to his future hopes for the country. The filter team may disclose these 331 drafts of an autobiography outline seized from the Clark Gmail Account to the investigative team.

An order reflecting the conclusion reached in this Memorandum Opinion will be filed contemporaneously. In addition, the filter team is permitted to disclose the accompanying order to Clark's counsel and is directed to review this Memorandum Opinion promptly for any proposed redactions that may be necessary before disclosure of the same to Clark's counsel.

**SO ORDERED**.

Date: September 27, 2022

Beryl A. Howell

BERYL A. HOWELL
Chief Judge