DISTRICT OF COLUMBIA COURT OF APPEALS

BOARD ON PROFESSIONAL RESPONSIBILITY

HEARING COMMITTEE TWELVE

In the Matter of **JEFFREY B. CLARK** **A Member of the Bar of the District of Columbia Court of Appeals** **Bar No. 455315** **Date of Admission: July 7, 1997**	**Disciplinary Docket No.** **2021-D193**

JEFFREY B. CLARK'S MOTION TO STRIKE EVIDENCE RECEIVED IN VIOLATION OF *TRUMP v. U.S.*

The relief sought here is implicit in the opening supplemental brief we filed on July 15, 2024. Hence, this filing is done out of an abundance of caution since it seeks a special form of affirmative relief: namely, Jeffrey B. Clark hereby moves to strike all evidence admitted in this case in violation of the evidentiary ruling in *Trump v. U.S.*, 144 S.Ct. 2312 (2024).

Trump held that "the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." 144 S.Ct. at 2328. President Trump's discussions with DOJ officials, including Mr. Clark, about whether to send the draft letter to Georgia officials and whether to continue with replacing the Acting Attorney General with Mr. Clark "plainly

implicate Trump's 'conclusive and preclusive' authority'" because the "Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, ***including with respect to allegations of election crime***." *Id*. at 2334 (emphasis added). Lest there be any confusion, the Court explained:

> The President may discuss potential investigations and prosecutions with his Attorney General ***and other Justice Department officials*** to carry out his constitutional duty to "take Care that the laws be faithfully executed." Art II, §3. And the Attorney General … acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to "preserve, protect, and defend the constitution."

Id. at 2335 (emphasis added). Further, "Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive' Presidential authority." *Id*. Finally, "the indictment's allegations that the requested investigations were 'sham[s]' or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials." *Id*. "Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials." *Id*.

The President is thus absolutely immune for his part of the discussions with the Department of Justice and Mr. Clark. Mr. Clark is likewise immune because all of his charged conduct was within the scope of the President's "'conclusive and preclusive' authority'" under the Take Care Clause and because absolute

prosecutorial immunity is also implicated here (as explained in the contemporaneous Reply Brief we are also filing today). The "exclusive" and "preclusive" aspects of this holding "exclude" and "preclude" the Hearing Committee, the Board of Professional Responsibility and the D.C. Court of Appeals from having any authority to admit into an adjudication evidence of Mr. Clark' conduct in this matter.

The President's immune ***official*** acts and ***functions*** are carried out through his subordinates like Mr. Clark. As a matter of clearly settled constitutional law, and as we have contended from the beginning, the D.C. Bar has no authority to intrude upon the confidential internal deliberations of the President with DOJ over whether and how to carry out the President's core Article II authorities. "Congress cannot act on, ***and courts cannot examine***, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id*. at 2328 (emphasis added).

Trump also held that "[i]f official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id*. at 31. Admitting such evidence "would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Id*. This risk materialized into actual prejudice in the hearing in this case. Ordinary "prosaic tools" such as limiting instructions would have been wholly inadequate to protect the "peculiar constitutional concerns

implicated in the prosecution of a former President." *Id*. Therefore, such evidence was categorically banned.

Here the official act of the President—his decision to ***not*** send the letter—was probed in great but entirely unconstitutional depth through the testimony of the President's advisers. ODC's case in chief consisted exclusively of such prohibited evidence from Donoghue, Rosen, and Philbin, and exhibits admitted through their testimony. They testified in detail to their private conversations with the President (alone or with Mr. Clark), with each other, and with Mr. Clark. Mr. Rosen and Mr. Donoghue authenticated and testified to their notes and emails of their conversations with the President, exposing to public view and juridical condemnation matters within the scope of the President's "'conclusive and preclusive' authority" over which the Hearing Committee, the Board of Professional Responsibility and the D.C. Court of Appeals have no authority whatsoever as a matter of the structural constitutional separation of powers. Such evidence unconstitutionally intrudes on the President's exercise of his core constitutional authorities and is inadmissible.

ODC argues that *Trump v. U.S.* can essentially be ignored because under DCCA rules this body is limited to finding facts and has no power to dismiss. DCCA rules are not superior to the U.S. Constitution, and after *Trump*, this Committee has no constitutional authority even to find facts. So it has no option but to recommend dismissal.

ODC contends that neither immunity nor its accompanying evidentiary protections extend to Mr. Clark. But the protection of core Executive Branch functions that Presidential immunity in *Trump* confers, and the separation of powers it preserves, would be largely defeated if the subordinates with whom the President consults in deciding whether and how to exercise his core Article II authorities were themselves subjected to prosecution or discipline for their part in those consultations, and if the details of those deliberations were exposed to the public as they have been in this case.

It is a matter of ***constitutional*** dimension that this case will have a terrible chilling effect on future presidential advisers and thereby debilitate the presidency, an effect that scales up with the severity of any discipline imposed. The debilitation of the presidency is exactly what *Trump v. U.S.* prohibits, whether directly by prosecution of the President for official acts, or indirectly by prosecuting his subordinates for official acts with evidence that intrudes upon the exercise of the core powers of the presidency. The Supreme Court barred use of "***testimony or private records*** of the President['s] ***… advisers*** probing the official act itself." This requires striking of all of ODC's evidence in this case.

ODC contends this is all much ado about nothing because President Biden waived President Trump's executive privilege. But President Biden merely ***purported*** to do so. Whether he is permitted by the Constitution to do so is far beyond

the authority of this Hearing Committee, the Board of Professional Responsibility or the D.C. Court of Appeals to decide. *See Trump v. Thompson*, 142 S. Ct. 680 (2022) (including the separate opinion of Kavanaugh, J., respecting denial of petition). More importantly, however, in *Trump*, the old balancing of interests and waiver framework for penetrating executive privilege was displaced. *Trump's* ban on evidence that would intrude on the core authorities of the President has no balancing test whatever and, as Justice Barrett recognized, extends "beyond the limits afforded by executive privilege." *Trump v. United States*, 144 S. Ct. 2312, 2354 (2024) (Barrett, Jr. concurring in part, dissenting in part).

The ruling in *Trump v. U.S.* simply banned the evidence outright, overruling President Biden's purported waiver of executive privilege *sub silentio*. This flat ban obviates any question of waiver of executive privilege. Therefore, ODC's reliance on President Biden's purported waiver of executive privilege cannot redeem the erroneous and prejudicial admission of prohibited evidence of the President's confidential deliberations with Mr. Clark and his other senior legal advisers over whether and how to exercise his core Article II authorities.

There is no diminution of the Bar's disciplinary authority from this reasoning because Mr. Clark's charged conduct by its nature was in the first instance never cognizable as a violation of the Bar rules—again as we have insisted from the beginning.

ODC's evidence, both testimony and exhibits, is *per se* inadmissible and should be stricken from the record in this case.

Respectfully submitted this 19th day of July, 2024.

/s/ Charles Burnham
Charles Burnham
DC Bar No. 1003464
Burnham and Gorokhov, PLLC
1424 K Street, NW
Suite 500
Washington DC 20005
(202) 386-6920
charles@burnhamgorokhov.com

/s/ Harry W. MacDougald
Harry W. MacDougald
Georgia Bar No. 453076
Caldwell, Carlson, Elliott & DeLoach, LLP
6 Concourse Parkway, Suite 2400
Atlanta, Georgia 30328
(404) 843-1956
hmacdougald@ccedlaw.com

Robert A. Destro
Ohio Bar #0024315
4532 Langston Blvd, #520
Arlington, VA 22207
202-905-6064
robert.destro@protonmail.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for the opposing party with a copy of the foregoing filing by email addressed to:

Hamilton P. Fox
Jason R. Horrell
D.C. Bar
Building A, Room 117
515 5th Street NW
Washington DC 20001
foxp@dcodc.org

This this 19th day of July, 2024.

/s/ Harry W. MacDougald
Harry W. MacDougald
Georgia Bar No. 453076

Caldwell, Carlson, Elliott & DeLoach, LLP
6 Concourse Parkway, Suite 2400
Atlanta, Georgia 30328
(404) 843-1956
hmacdougald@ccedlaw.com