No. 22-BG-891

DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of:

Jeffrey B. Clark, Esq.
Respondent,

A Member of the Bar of the
District of Columbia Court of Appeals
(Bar No. 455315)
Board Docket No. 22-BD-039

DISCIPLINARY COUNSEL'S RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC

Pursuant to the Court's Order of January 10, 2024, Disciplinary Counsel responds to Respondent Jeffrey B. Clark's Petition for Rehearing or Rehearing en banc. Clark seeks rehearing not from an opinion of the Court but from an order of a panel enforcing a subpoena *duces tecum* for documents. Perhaps the Court has before granted en banc review of such an ancillary order, but Disciplinary Counsel is unaware of such a case. At any rate, Clark's privilege issues are either frivolous or unsubstantiated. There is no reason to reconsider them, much less rehear them en banc.

A. Factual Background

In December 2020, Clark was the Assistant Attorney General for the Environmental and Natural Resources Division of the Department of Justice and was acting

head of the Civil Division. He played no role in the Department's investigation of allegations of election fraud or irregularities. Those investigations were conducted by the Criminal Division and the Civil Rights Division and were supervised nationally by Richard Donoghue, the Principal Associate Deputy Attorney General, who reported directly to Acting Attorney General Jeffey Rosen. Donoghue was the most knowledgeable person in the Department concerning the status of these investigations. He knew, and informed Rosen, that there was no evidence of election fraud or irregularity that could have potentially affected the outcome of the 2020 Presidential election.

Out of the blue, in late December, Clark presented Rosen and Donoghue with a letter addressed to various Georgia state officials, which stated that the Department "had identified significant concerns that may have impacted the outcome of the election" in Georgia. The letter recommended that the Governor call the legislature into special session and proposed that in addition to a slate of electors supporting Biden, who had won Georgia, the legislature submit a separate set of electors supporting Trump, and that both sets of electors should cast ballots to be transmitted to Washington and to be opened by the Vice President on January 6. This proposal, had it been adopted, would have thrown the outcome of a decided election into doubt.

Rosen and Donoghue knew the Department had not identified significant concerns about the election in Georgia, and they informed Clark that this statement was

false and that they would not sign a letter that might interfere with tabulating the electoral vote. They arranged for Clark to obtain a briefing from the Director of National Intelligence and provided him with contact information, including the cell phone number, of the U.S. Attorney for the Northen District of Georgia who was in charge of the election fraud investigations in that state. Clark did not contact the U.S. Attorney, and he learned from the intelligence briefing that there was no evidence of foreign election interference. Nevertheless, Clark insisted that Rosen and Donoghue send the letter with its false statements and informed them that the President had offered him the position of Acting Attorney General, which he was considering accepting if they would not send the letter. Rosen and Donoghue still refused to do so.

On January 3, 2021, Clark told Rosen that he intended to accept the President's offer to appoint him to replace Rosen as Acting Attorney General and that, once he had taken over, he would send the letter. Rosen insisted on a meeting with the President, which occurred that evening. In addition to the President and Clark, Rosen, Donoghue, another Department lawyer, and three members of the White House Counsel's office attended the meeting. All six of these lawyers argued against sending the letter because it contained false statements. Only Clark favored sending it and said that he would do so if he were appointed Acting Attorney General. Donoghue informed the President that if he appointed Clark, then all the Assistant

Attorneys General would resign. The White House Counsel also threatened to resign. The President decided not to appoint Clark, and the letter was never sent. These facts are the basis of Disciplinary Counsel's contention that Clark attempted to engage in dishonest conduct and interfere with the administration of justice. The hearing on the merits is now scheduled to begin on March 26, 2024.

B. Clark's Spurious Fifth Amendment, Act-of-Production Claim

In the letter at the center of this case, Clark asserted that the Department of Justice had identified significant concerns about irregularities that may have affected the outcome of the presidential election in Georgia. Clark's efforts to have senior officials at DOJ send the letter concluded on January 3, 2021. Accordingly, Disciplinary Counsel's subpoena requires Clark to produce documents "of which [he was] aware before January 4, 2021, that contain evidence of irregularities in the 2020 presidential election and that may have affected the outcome in Georgia or any other state." The subpoena thus asks for evidence that would support the letter's claims. The documents would be exculpatory with respect to the disciplinary charges, not inculpatory. Following the Court's December 6, 2023 order enforcing the subpoena, Clark made a partial production totaling nearly 4,000 pages of responsive documents. In a letter accompanying the production, Clark indicated that some documents were withheld under Fifth Amendment and other privileges, but he has refused to provide a privilege log identifying the documents.

The Fifth Amendment privilege against self-incrimination does not excuse Clark from complying with the subpoena. As the Supreme Court has held, the Fifth Amendment does not protect the contents of pre-existing, voluntarily prepared documents. *Fisher v. United States*, 425 U.S. 391, 408-409 (1976). If a person is subpoenaed to produce such documents, he must do so even if the documents would be powerful evidence against him in a criminal prosecution. *Id.* at 410. The act-of-production doctrine is an extremely limited exception to this rule. It applies only when both (1) the act of producing the subpoenaed evidence is "testimonial" and (2) the production would tend to incriminate the person who was subpoenaed. *Id.* at 410-411. For example, if the government subpoenaed the murder weapon or drafts of a ransom note from a suspect, producing those items would equate to testimony that she possessed the murder weapon or wrote the ransom note.

It is the burden of the party invoking act of production to prove that doing so would incriminate him. *See*, *e.g.*, *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 750 (D.C. Cir. 2006) ("[i]t is well established that the proponent of a privilege bears the burden of demonstrating facts sufficient to establish the privilege's applicability"). The party claiming the privilege must show that the incriminating effect of production is "substantial and 'real,' not merely trifling or imaginary hazards of incrimination." *United States v. Hubbell*, 167 F.3d 552, 581 (D.C. Cir. 1999), *aff'd* 530 U.S. 27 (2000). Here, Clark has never

articulated any theory under which producing documents that would support the claims made in his letter would incriminate him. To the extent producing documents amounts to a tacit acknowledgment that responsive documents exist or that he was aware of them, the production does not amount to a testimonial statement that creates a substantial and real hazard of incrimination; indeed, Clark has already produced nearly 4,000 pages of such documents he had previously withheld on act-of-production privilege grounds. Those documents (an index of which is available here), demonstrate that Clark's claim lacks substance. They include materials such as public reports from government agencies on best practices for conducting elections, excerpts from the Department of Justice Manual about techniques for prosecuting election fraud, and articles about the potential vulnerability of voting machines. There was no good faith argument that producing such materials was incriminating, and Clark has not explained any reason why whatever materials he continues to withhold would be incriminating.

Nor would enforcing the subpoena conflict with *In re Artis*, 883 A.2d 85 (D.C. 2008), as Clark claims (Pet. 5-7). *Artis* involved the appropriate sanction for an attorney who, like Clark, failed to respond to a subpoena in a disciplinary case. The Board recommended suspension as a sanction for his failure to respond and that, as a condition of reinstatement, Artis be required to comply with the subpoena. Disciplinary Counsel argued for the additional condition that Artis be required to respond

to written interrogatories it had issued, which asked him, for example, to "explain in detail" certain conduct. Although the Court held that Artis could not be compelled to answer the interrogatories, it had no trouble imposing the requirement that he comply with the subpoena. *Id.* at 102-103. Thus, while *Artis* supports an attorney's invocation of privilege against self incrimination in response to interrogatories, it does not support a Fifth Amendment right to defy a subpoena. To the contrary, *Artis* shows that an attorney may be compelled to comply with a subpoena despite invoking the privilege. Enforcing the subpoena against Clark does not conflict with that holding.

Nor is this subpoena a "disguised interrogatory." *See* Clark Br. 5-6. There is nothing unusual about setting temporal or relevance boundaries on a subpoena for documents. Here, the request is limited to the relevant time period—before Clark's efforts to send the letter ended—and the relevant documents—those he was aware of. Materials Clark learned about later and those which he was not aware of simply are not relevant because they could not have informed Clark's knowledge of alleged irregularities in the Georgia election. And even if producing documents would acknowledge that they are responsive, Clark has not shown such an acknowledgment would be potentially incriminating. To the contrary, Clark's knowledge of such documents would appear to be exculpatory. In *Fisher*, the Supreme Court rejected a similar argument, noting that the production would "express nothing more than the

tax payer's belief that the papers are those described in the subpoena," which, without more, "would not appear to represent a substantial threat of self-incrimination." 425 U.S. at 413.

The Court's order enforcing the subpoena against Clark does not suggest that respondents do not possess a Fifth Amendment right not to incriminate themselves. Rather, it is an acknowledgment that Clark has not met his burden to show that the act-of-production doctrine applies here.

C. Executive Privilege and Other Asserted Privileges

Clark also claims that he is withholding responsive documents on the grounds of executive privilege. He relies upon two letters written by the former President's lawyers, one dated August 2, 2021 and another dated January 4, 2024.

Executive privilege is held by the Executive Branch, not by Clark. It is a qualified, not absolute, privilege, and it resides with the sitting President, who speaks authoritatively for the Executive Branch. *Trump v. Thompson*, 20 F.4th 10, 26, 33 (D.C. 2021). A former president attempting to assert executive privilege "bears the burden of showing some weighty interest" in continuing confidentiality to justify his claim. *Id.* at 38. This requires a particularized showing and the identification of a specific "need for confidentiality tied to the documents at issue, beyond their being presidential communications." *Id.*

In the two letters that Clark relies on for his claim of executive privilege, the former President does not make any showing, much less a particularized one, as to why the withheld documents require confidentiality. The first letter concerned requests by the January 6 Committee to interview Clark, Donoghue, Rosen, and other former officials for whom President Biden had waived executive privilege. The letter asserts, inaccurately, that the sitting President cannot waive the privilege; in addition, it authorized Clark to testify before the Committee. Although purporting not to do so, this authorization is a waiver of the privilege. Most importantly, for the purposes of this disciplinary matter, the 2021 letter does not identify any documents for which the former President is asserting executive privilege or make a particularized showing why such documents must remain confidential.

Although the more recent letter instructs Clark to "maintain President Trump's executive privilege and other related privileges," it likewise fails to identify any document in Clark's possession over which the former President asserts privilege or make any particularized showing as to why the document must remain confidential. In fact, Disciplinary Counsel has no knowledge whatsoever as to what type of documents Clark is withholding because he refuses to provide a privilege log.

After this Court's December 6, 2023 Order enforcing the subpoena and ordering production within ten days, Clark produced some documents on December 18. Letter from Charles Burnham to Hamilton Fox (Dec. 18, 2023) (available here). In

the cover letter, Clark's lawyer stated that he was withholding some responsive documents because he did not believe the Court had explicitly addressed all the privilege issues that he had raised. Disciplinary Counsel asked for a privilege log by December 22. Clark initially refused to provide one. Letter from Charles Burnham to Hamilton Fox (Dec. 19, 2023) (available here). In a telephone conversation, Disciplinary Counsel agreed, in light of the pending holidays, to extend the deadline until January 5, 2024. On January 4, Clark's counsel forwarded the letter from Blanche, the former President's lawyer. Disciplinary Counsel responded by asking whether Clark intended to produce a privilege log but received no response. Emails from Hamilton Fox to Harry MacDougald (Jan. 5 and 8, 2024) (available here and here). Clark's lawyers requested a "meet and confer," which was held on January 10. During that session, Disciplinary Counsel again asked for a privilege log, this time by January 12. A few hours later, the Court issued its Order that Disciplinary Counsel respond to Clark's motion for rehearing en banc. On January 11, 2024, Disciplinary Counsel again requested a privilege log "particularly for the documents for which you contend Mr. Trump has asserted executive privilege or some other form of privilege." Email from Hamilton Fox to Harry MacDougald (Jan. 11, 2024) (available here). Clark has not responded.

The refusal to identify the documents that are being withheld on grounds of executive or some other form of privilege means that Clark has not—and cannot—

meet his burden of showing that the documents are in fact privileged. The privileges do not belong to Clark. Even if the former President had a continuing ability to assert executive privilege, he has not met his burden of making a particularized showing that there is a reason to keep these documents confidential. How could such a showing be made if the documents have not even been identified? There is no reason to believe that the withheld documents have even been examined by the former President or his representatives. *See U.S. v. Navarro*, 651 F.Supp.3d 212, 224 (D.D.C. 2023) (requiring evidence that the President has invoked executive privilege over certain information after "personal consideration" with respect to the specific proceeding in which it is invoked). In short, Clark's blanket assertion of the privilege—that does not belong to him and has not been properly invoked by the official who could conceivably claim it—cannot stand.

Finally, Clark has at times alluded to other privileges—law enforcement, attorney client, deliberative process—on which he may also be relying. But his failure to identify the withheld documents or explain why they are privileged defeats these claims as well. Moreover, the Department of Justice has issued a "Touhy letter" authorizing Clark "to provide information to the Office of Disciplinary Counsel and to testify at any D.C. Bar disciplinary proceedings concerning what he may have learned or actions he took while at the Department relating to the matter you have described in your letter." Letter from Bradley Weinsheimer to Hamilton Fox (Feb.

8, 2022) (available here). The Department holds the law enforcement privilege. *See Kusuma Nio v. U.S. Dep't of Homeland Security*, 314 F.Supp.3d 238, 243 (D.D.C. 2018) (discussing requirements for invocation of law enforcement privilege). Pursuant to Rule 1.6(e)(2)(B) and Comment [37-38], the Department also holds the attorney client privilege. The Department has therefore waived these privileges, which do not belong to Clark, and he may not invoke them. (The deliberative process privilege, to the extent it exists, is simply another form of executive privilege.)

In sum, Clark's assertions of privilege are frivolous and unsubstantiated. They do not raise questions of exceptional importance or cast doubt upon the uniformity of this Court's decisions. The Court should deny his petition for rehearing and rehearing en banc, so this case can proceed to a hearing on the merits on its scheduled date of March 26, 2024.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 17, 2024, I served the foregoing through the Court's electronic filing system on the following:

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