McGuireWoods LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
Phone: 202.857.1700
Fax: 202.857.1737
www.mcguirewoods.com

George J. Terwilliger III
Direct: 202.857.2473

McGUIREWOODS

gterwilliger@mcguirewoods.com
Fax: 202.828.2965

December 13, 2021

VIA EMAIL

Honorable Bennie G. Thompson, Chairman
Honorable Liz Cheney, Vice Chair
All Members of the Select Committee to Investigate the
January 6th Attack on the United States Capitol
U.S. House of Representatives
1540A Longworth House Office Building
Washington, DC 20515

Re: Subpoenas Served on Honorable Mark R. Meadows

Dear Mr. Chairman and Members of the Select Committee:

Mr. Thompson has indicated publicly that he intends to ask today for a committee vote to send to the House of Representatives a recommendation that it refer our client, the Hon. Mark R. Meadows, to the Department of Justice for prosecution under 2 U.S.C. § 192, the crime of contempt of Congress. Such a referral would be contrary to law. The Select Committee and the House should make no such referral. I respectfully ask your indulgence to explain why such a referral would be contrary to law, manifestly unjust, unwise, and unfair. It would ill-serve the country to rush to judgment on the matter.

The contemplated referral would be contrary to law because a good-faith invocation of executive privilege and testimonial immunity by a former senior executive official is not a violation of 2 U.S.C. § 192. A referral to the Department of Justice based on such an invocation would ignore the statute's legislative history and historical application, contravene well-

established separation of powers principles, and improperly impute a criminal intent to a good-faith actor.

Prior use of the inherent contempt power, the legislative history of the criminal contempt statute, and subsequent usage of the criminal contempt statute all demonstrate that § 192 was not intended to apply to good-faith assertions of executive privilege. Despite regular disagreements between the executive and legislature on issues of privilege and the withholding of documents, § 192 was not used against an executive branch official until 1982, 125 years after its passage. In fact, during an 1886 floor debate in the Senate regarding a demand for executive documents, one Senator seeking the documents acknowledged that, should the President order them withheld, "there is no remedy." 17 Cong. Rec. 2800 (1886) (remarks of Sen. Logan).

This opinion, widely held until more recent disputes, properly comprehends the legislative history of § 192. The criminal contempt of Congress statute was originally passed as a supplement to Congress's inherent contempt powers, specifically to allow imprisonment of a contemptuous witness when the legislative session ended. *See United States v. Bryan*, 339 U.S. 323, 327 (1950). The inherent contempt power—predecessor of the criminal contempt power—was never used against a member of the executive branch who asserted executive privilege. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,* 8 Op. O.L.C. 101, 131 (1984).

Nor did the legislators who added the criminal contempt power by passing § 192 contemplate that it would ever be used against executive officials. When the sponsor of the bill was asked whether the criminal contempt power could be used to compel disclosure of diplomatic secrets (one of the principal issues of executive privilege at the time), he brushed off the question by saying "I can hardly conceive such a case" and argued that the questioners should stop attacking the bill "by putting instances of the extremist cases." 42 Cong. Globe 431 (remarks of Rep. Orr).

A referral of a senior presidential aide would also be unwise because it would do great damage to the institution of the Presidency, as restraint in the application of the statute over time attests. Despite sporadic attempts to use § 192 against Executive Branch officials since 1982,[1] the

[1] Most notably White House Counsel Harriet Miers and Chief of Staff Joshua Bolten in 2007, *see Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 61 (D.D.C. 2008); Attorney General Eric Holder in 2012,

statute has never been used to prosecute one of the President's most senior aides who declined to appear and give testimony under compulsion by Congress. That is because the Department of Justice has recognized that it is vital, for principled and practical reasons, that the President's immediate advisors be immune from compelled testimony.

In principle, the separation of powers unquestionably requires that the President himself remain immune from compelled questioning before the legislature. But maintaining immunity for the President alone would fail to properly preserve the independence of the Presidency. "Absent immunity for a President's closest advisers, congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. *5 (July 15, 2014).

A criminal referral of a senior-most presidential advisor who declines to testify before Congress would contravene these long-held and well-established separation of powers principles. Since at least 1940, there has been unanimous bipartisan consensus among presidential administrations that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee." *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999). It is clear that Congress could not compel the President himself, on penalty of law, to appear and testify regarding his official duties, and "[t]he same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers." *Immunity of the Former Counsel to the President From Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192 (2007).

In practice, immunity from testimony, as opposed to a privilege that must be asserted during testimony, is important to avoid potential human error or political gamesmanship.

---

see Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013); and IRS Official Lois Lerner in 2013, *see* H. Res. 574, 113th Cong. (2014).

> [T]he ability to assert executive privilege during live testimony in response to hostile questioning would not remove the threat to the confidentiality of presidential communications. An immediate presidential adviser could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure.

Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena, 38 Op. O.L.C. *4. A criminal referral of a senior executive official who invokes this immunity would contravene this safeguard of the separation of powers.[2]

These protections do not exist for the personal benefit of any executive advisor, but to protect the institution of the Presidency. Executive privilege is demanded by the separation of powers "to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge." *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). The immunity of senior presidential advisors from compelled testimony serves the same purpose, because "[t]he prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President's immediate staff could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others." *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena,* 38 Op. O.L.C. *4. The immunity from compulsion must also extend to former aides for if mere passage of office from one administration to the next extinguished the privilege, it would be no privilege at all. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) ("the privilege is not for the benefit of the President

[2] As you know, Mr. Chairman, we have, for the reasons articulated above, on several occasion offered the use of written interrogatories so as to address claims of Executive Privilege in an orderly and sensible manner. You have refused those opportunities each time. I would note that in 1795 in the first case of Congressional contempt , the matter was pursued by the Speaker propounding written interrogatories to the alleged contemnors. *See,* Congress's Contempt Power and the Enforcement of Congressional Subpoenas: A Sketch., Congressional Research Service; https://sgp.fas.org/crs/misc/RL34114.pdf at p.4. Our last offer to participate in interrogatories remains open.

as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."); *Immunity of the Former Counsel to the President From Compelled Congressional Testimony*, 31 Op. O.L.C. at 192–93 ("The fact that Ms. Miers is a former Counsel to the President does not alter the analysis."). That is especially the case where, as here, the senior advisor is from the immediately prior administration and the Committee's inquiry would delve deeply into the councils of that administration.

In addition to these constitutional infirmities, a referral for criminal prosecution under § 192 would be an unfair exercise of bad faith because one essential element of that offense is not present and provable in this case. As to any alleged criminal violation generally and as to this violation specifically, as a matter of law there must be a showing of criminal intent to do wrong. A referral of criminal contempt of Congress for an individual who on a good-faith basis asserts a privilege not to appear and to provide privileged information would improperly impute *mens rea* to a good-faith actor.

The criminal contempt statute does not impose criminal penalties on anyone who defaults on a congressional subpoena, but only those who "willfully make[] default." 2 U.S.C. § 192. "As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Bryan v. United States*, 524 U.S. 184, 191 (1998). For example, "a good faith claim of privilege against self-incrimination, although erroneous, is a defense to the element of willfulness which is necessary for a conviction for willful failure to file [an income tax return] under 26 U.S.C.A. § 7203." *United States v. Pilcher*, 672 F.2d 875, 877 (11th Cir. 1982); *accord Garner v. United States*, 424 U.S. 648, 663 n.18 (1976); *United States v. Snipes*, 611 F.3d 855, 867 (11th Cir. 2010); *United States v. Farber*, 630 F.2d 569, 572 (8th Cir. 1980).

Thus, a senior executive official who refuses to provide privileged information or who refuses to testify based on a good-faith belief that their legal position is one that is required and supported by lawful authority does not "willfully" default on a congressional subpoena. Because their claim of privilege is in good faith, they lack the necessary ill-intent to satisfy the statutory language. This is unlike a case where an individual intentionally defies a lawful subpoena on the advice of counsel. *See e.g., Licavoli v. United States*, 294 F.2d 207 (D.C. Cir. 1961); *Fields v. United States*, 164 F.2d 97, 100 (D.C. Cir. 1947). An executive official who raises a good-faith

claim of privilege is not defying a lawful duty, but rather is complying with one. Executive officials are not free to unilaterally waive executive privilege and are therefore not free to comply with subpoenas seeking privileged information absent an unequivocal waiver from the owner of the privilege or direction from a court order. Their choice to comply with their constitutional and legal obligations does not constitute willful default under § 192.

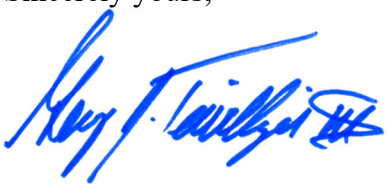
A referral and conviction in such a case would simply be unjust. An executive branch official who makes a colorable claim of privilege is simply taking the course they believe the law requires them to take. The executive privilege and testimonial immunity do not belong to individual executive officials and they are not free to waive it. It would be unjust to refer such an official for prosecution before a court even has a chance to pass upon the merits of their claims. Doing so could easily result in referring an official who correctly asserted privilege and properly upheld their duty to the federal government. Instead, Congress should at least wait until the courts determine that privilege is inapplicable or invalid before referring the official for criminal contempt.[3]

We recognize and do not dispute that the violence and interference with the processes of our democratic institutions as occurred on January 6, 2021, were deplorable and unjustifiable events. But the real strength of our democratic institutions comes from the principles that undergird them, and no singular event can justify overrunning centuries-old safeguards of the republic. Mr. Meadows's choice to decline a deposition is an attempt to comply with his legal obligations as a former advisor to the president. History and the law teach that this attempt is not a crime.

The Committee and the House should refrain from referring Mr. Meadows to the Department of Justice for prosecution under Section 192.

[3] As the Committee knows, Mr. Meadows has initiated a proceeding to obtain an answer to this very question. *See Meadows v. Pelosi,* No. 1:21-cv-03217 (D.D.C.).

Sincerely yours,



George J. Terwilliger III
Counsel for Mr. Meadows

cc: Douglas N. Letter, Counsel to the House of Representatives
Honorable Timothy J. Heaphy, Chief Investigative Counsel