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December 31, 2021

Rep. Bennie G. Thompson, Chairman
January 6th Select Committee
1540A Longworth House Office Building
Washington DC 20515

Re: Subpoena to Bernard B. Kerik

Dear Rep. Thompson:

I represent Bernard B. Kerik and am writing in response to the subpoena dated November 5, 2021 to submit our initial disclosures.

In the initial press release that you issued regarding the subpoena to Mr. Kerik, you stated that “In the days before the January 6th attack, the former President’s closest allies and advisors drove a campaign of misinformation about the election and planned ways to stop the count of Electoral College votes,” and that Mr. Kerik was “involved in efforts to promote false claims of election fraud or overturn the results of the 2020 election” and worked to “promote baseless litigation and ‘Stop the Steal’ efforts.” These statements are as concerning¹ as they are false.

While I appreciate the partisan interests in constantly repeating phrases such as the “Big Lie” or “false claims of election fraud,” the reality is that the claims of election fraud were never fully investigated. Without a proper investigation, it is impossible for anyone to state with certainty either that President Biden stole the election through widespread fraud, or that President Trump promoted false claims of election fraud. Moreover, even if a proper investigation does demonstrate widespread fraud, it is not a certainty that the outcome would have been different, or that the perpetrators were even associated with the Biden camp. Given the utter turmoil that this country had already been put through as a result of the Russian election interference claims, nations like China would have a great interest in causing further division in our country through election

¹ As we have previously corresponded about, you issued the subpoena to Mr. Kerik on admittedly false pretenses and falsely cited to sources which did not support your falsified pretext. Though you have refused to publicly admit that these were materially false statements, you have admitted as much in private correspondence to me and have had to modify the press release on your website. The sweeping pronouncements quoted above are concerning as they demonstrate bias and pre-judgment. While I have previously represented individuals where it is clear that the investigators had prejudged their desired outcome and then conducted an investigation to find evidence to support this false prejudgment while ignoring anything contradictory, rarely do these investigators actually issue press releases admitting their prejudgment and bias.

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interference to create an impression that results of the subsequent election were being swayed in the opposite direction. While possibilities of Russian interference in the 2016 election were exhaustively investigated, it appears that partisanship has spared the 2020 election any semblance of equity in scrutiny.

The fatal flaw in all of your rhetoric about your investigation is that you are operating under the following presumptions, without first conducting an investigation:

1. That there was no widespread fraud in the 2020 election;
2. That the Trump campaign knew that there was no widespread fraud;
3. That the Trump campaign chose to knowingly push false claims of election fraud in an effort to subvert the constitutional process and overturn the will of the people.

The information that Mr. Kerik can provide, presuming we can resolve the privilege issues, will undermine confidence in the first presumption and will eviscerate the second and third presumptions.

Mr. Kerik was hired by former-President Donald Trump's legal team, to act as an investigator tasked to look into claims of election fraud. In this role, Mr. Kerik received, reviewed, and processed claims of fraud from around the country. Some were clearly baseless and needed little follow up, while others warranted further investigation. Given time constraints, limited resources, and the lack of subpoena power, it was impossible for Mr. Kerik and his team to determine conclusively whether there was widespread fraud or whether that widespread fraud would have altered the outcome of the election. However, what he did find certainly established at least probable cause that DOJ should have followed up on, and state authorities should have investigated, if Americans are to have any confidence in the integrity of the election results.

This country is suffering from deeply divisive partisanship that will only worsen if both sides continue to operate from alternative sets of facts and refuse to allow an impartial investigation to determine the truth. While promoting knowingly false claims can be dangerous, asking legitimate questions and demanding an investigation is not. It is expected, just as you and your colleagues demanded an investigation into Russian interference four years ago. However, frustration with a government that refuses to acknowledge and investigate fraud and acts dismissively and condescendingly towards the people's concerns in order to exclude them from the process can be very dangerous.

Mr. Kerik is a strong believer in our constitutional system of government and would never have participated in any effort to knowingly promote false claims. He believed then, as he does now, that there were significant election improprieties and inconsistencies as well as evidence of possible fraud in the election that must be properly investigated. It is for this reason, that Mr. Kerik very much wants to cooperate with your committee and any investigators who are truly willing to move ahead swiftly and get to the truth.

Whether you like it or not, a large segment of the population believes there was fraud in the 2020 election. Some recent polls show that public distrust in the integrity of our elections is increasing.² Lecturing them, dismissing them, or simply repeating that this is the “Big Lie” without conducting an actual investigation will only continue to fuel this distrust and will likely have consequences in 2024 and beyond. That is why it is so crucial to conduct a true and credible investigation, as Mr. Kerik attempted to do a year ago, and which the entire country would benefit from now.

To be clear, while it has been reported that some may have pushed a plan for then-Vice President Pence to certify alternate slates and declare Donald Trump the winner on January 6, this is not Mr. Kerik’s understanding. His goal was to provide sufficient evidence through his investigation or prompt a DOJ investigation specifically to ensure that the election results accurately reflected the will of the people. His hope for January 6 was for sufficient evidence to be presented which would result in a delay of the election certification to ensure accuracy, not a subversion of the process.

Objections

Because Mr. Kerik’s work was done at the behest of attorneys in anticipation of litigation, a large percentage of the documents Mr. Kerik has that would be responsive to your subpoena is shielded from disclosure by the work-product doctrine. As the Supreme Court has made clear:

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. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 238-39 (1975).

As I have noted multiple times in the past, Mr. Kerik is not the privilege holder, President Trump is. Absent a privilege waiver or judicial order, Mr. Kerik is prohibited from disclosing these materials. We are therefore providing a privilege log on all documents withheld.

Although the law is clear that these documents are exempt from disclosure, we have worked to try to obtain a privilege waiver, so that Mr. Kerik can fully cooperate and disclose all materials in his possession. We successfully obtained a conditional waiver, but it was conditioned on Mr. Kerik testifying at a public hearing, a condition that your Committee has thus far refused to accept. I will continue to work with your investigative

² https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_US_111521/

counsel and counsel for President Trump to see if we can reach an agreement that will allow all remaining documents to be disclosed.

Production

Notwithstanding the forgoing, we are producing the following records to you, which are responsive to the Schedule to the Subpoena, all of which can be downloaded at <https://www.dropbox.com/t/eJ5LzyXlXqePP7Fl>

1. All documents and communications referring or relating in any way to plans, efforts, or discussions regarding challenging, decertifying, overturning, or contesting the results of the 2020 Presidential election.

Response: See Index 1/Folder 1

2. All documents and communications relating in any way to purported election irregularities, election-related fraud, or other election-related malfeasance.

Response: See Index 2/Folder 2

3. All documents for reviewing, assessing, communicating, or reporting on the security of election systems in the United States.

Response: See Index 3/Folder 3

4. All documents and communications relating in any way to alleged interference with the tabulation of votes by machines manufactured by Dominion Voting Systems.

Response: See Index 4/Folder 4

5. All documents and communications relating in any way to alleged interference in the fall 2020 election by foreign governments, organizations, or individuals.

Response: No Responsive Documents

6. Any documents and communications relating in any way to foreign influence in the United States 2020 Presidential election through social media narratives and disinformation.

Response: No Responsive Documents

7. All documents and communications about strategies or plans for communications, messaging, fundraising, and social media relating to allegations of fraud, irregularities, or other malfeasance, including sample or suggested messages, emails, social media posts, voice mails, or telephone conversations.

Response: See Index 7/Folder 7

8. All recordings of you or that you made related to the fall 2020 election or your, or others', work with the Trump re-election campaign.

Response: No Responsive Documents maintained by the client, though public documents and documents held by others exist.

9. All communications with or about former President Trump or White House staff relating in any way to purported fraud in, or challenges to, the fall 2020 election.

Response: No Responsive Documents.

10. All documents and communications relating in any way to the possibility of the Department of Justice filing documents in state or federal courts regarding allegations of election fraud and/or the certification of the results of the election.

Response: No Responsive Documents.

11. All documents and communications relating in any way to state legislature's selection, or potential selection, of alternate sets of electors to cast electoral votes in the fall 2020 election.

Response: No Responsive Documents.

12. All documents and communications relating in any way to Congress's or the Vice President's role in the certification of the votes of the electoral college.

Response: No Responsive Documents.

13. All documents and communications with or about Professor John Eastman or Mark Martin relating in any way to the fall 2020 election.

Response: No Responsive Documents.

14. *All documents and communications relating in any way to any state legislature's selection, or potential selection, of alternate sets of electors to cast electoral votes in the fall 2020 election.*

Response: No Responsive Documents.

15. *All documents and communications relating to protests, marches, public assemblies, rallies, and speeches in Washington D.C., on November 14, 2020, December 12, 2020, January 5, 2020, and January 6, 2020 (collectively, "Washington Rallies").*

Response: See Index 18/Folder 18 for video recordings at/around the Capitol on January 6, 2021

16. *Documents or other materials referring or relating to financing or fundraising associated with efforts to investigate and/or challenge the results of the November 2020 election, as well as financing or fundraising associated with the Washington Rallies and any individual or organization's travel to or accommodation in Washington, D.C., to attend or participate in the Washington Rallies.*

Response: No Responsive Documents.

17. *All recordings, transcripts, notes (including electronic and hand-written notes), summaries, memoranda of conversation, readouts, or other documents memorializing communications between you and President Trump and/or the Members of Congress on January 5 or January 6, 2021, relating or referring in any way to the fall 2020 election or the attack on the Capitol.*

Response: No Responsive Documents.

18. *All documents and communications relating to the January 6, 2021 attack on the U.S. Capitol.*

Response: See Index 18/Folder 18

19. *All documents and communications related to your January 2021 meetings with individuals associated with President Trump and his re-election campaign, including, but not limited to, meetings held at the Willard Hotel.*

Response: See document titled "Willard Folio"

Conclusion

We will continue to work towards a privilege waiver so that we can disclose the remainder of the documents. We will also supplement these disclosures should we find additional materials.

As to the deposition, I have been in communication with Dan George, who proposed a voluntary interview, as opposed to a deposition, which Mr. Kerik accepts. As I have previously outlined, I do not believe that your committee possesses the requisite makeup to be able to comply with the required deposition procedures but I am happy to agree to a voluntary interview to avoid having to litigate the issue.

The only issue, which does not prevent the interview, but does impact our ability to perfect the privilege waiver, is that Mr. George informed me that the conditions of the voluntary interview would be that:

it will be recorded by a court reporter who will then prepare a transcript and neither Mr. Kerik nor his representatives are permitted to make separate recordings. As you may have seen, the Select Committee has not released any interview transcripts at this point except for those included in contempt reports, and it cannot agree to an immediate release for Mr. Kerik.

As I explained to Mr. George, these conditions seem designed to prevent the contents of the deposition from being released to the public and are counter to the interests of the full and public disclosure which is at the core of President Trump's conditional offer of a privilege waiver. Should this Committee either agree to immediately release the recording and transcript or permit me to make our own recording that we could release, then I can take that back to President Trump's attorneys to try to get the full waiver, which will result in a far more productive voluntary interview.

If the true interests of this Committee are a full and accurate accounting, I do not see any reason why you would not be agreeable to these proposed terms. I certainly hope that you will consider this and get back to me quickly, so that we can get you the remainder of the documents and proceed with the voluntary interview on January 13, 2022.

Sincerely,



Timothy C. Parlatore