

THE DAO’S RESPONSE TO THE SELECT COMMITTEE’S REQUEST TO SHOW CAUSE WHY THE DAO SHOULD NOT BE HELD IN CONTEMPT OF THE HOUSE

The Philadelphia District Attorney’s Office (“DAO”) submits this response to the Select Committee on Restoring Law and Order’s (“Select Committee”) “Request to Show Cause Why the DAO Should Not Be Held In Contempt of the House” (“Request to Show Cause”) for allegedly “refusing to comply with the August 8, 2022 Subpoena Duces Tecum” (“Subpoena”).

INTRODUCTION

The Request to Show Cause is part of a broader effort by the Select Committee to investigate, attack, and seek the impeachment of District Attorney Larry Krasner, the twice-elected district attorney of Philadelphia, even though it is undisputed that he has not committed an impeachable offense. The House resolution that created the Select Committee, House Resolution 216 (“HR 216”), was introduced by House members whose stated goal is the impeachment of District Attorney Krasner because they disagree with his policies and cannot defeat him at the polls. HR 216 expressly authorizes the Select Committee to make “determinations” regarding the “performance” of “the district attorney” “in the City of Philadelphia” (that is, Krasner) and to make “recommendations” for his “removal from office or other appropriate discipline, including impeachment.” No other district attorney but Krasner and no other city but Philadelphia are targeted by HR 216.

The Subpoena at the center of the Request to Show Cause seeks 11 categories of documents from the DAO, including the “complete case file” of a currently pending murder case involving a former police officer who shot and killed a Black man, the secret grand jury materials related to that case, and various policies of the DAO, including policies related to the prosecution of police officers. Since receiving the Subpoena, the DAO has tried in good faith,

both in writing and in oral communications with Rep. Lawrence’s counsel, to persuade the Select Committee to withdraw the Subpoena because:

- (1) The Subpoena seeks documents that are protected by grand jury secrecy laws and long-standing legal privileges, the disclosure of which would run afoul of the law and would undermine public safety;
- (2) The Subpoena and the Select Committee’s investigation violate the separation of powers doctrine by attempting to infringe on the power and function of the DAO;
- (3) The Subpoena and the Select Committee’s investigation do not serve a valid legislative purpose because they do not seek information for the purpose of aiding members of legislative bodies in enacting proper legislation (the goal is, instead, simply to attack District Attorney Krasner);
- (4) The House lacks the authority to impeach District Attorney Krasner, because, under the Pennsylvania Constitution, (a) the District Attorney of Philadelphia is not a “civil officer”; and (b) District Attorney Krasner has not been accused of any impeachable offense; and
- (5) This impeachment effort, if allowed and ultimately successful in removing District Attorney Krasner from office, would violate the Constitutional rights of the Philadelphia citizens who elected him.

Because the Select Committee refused to withdraw its (invalid) Subpoena, the DAO followed the guidance of the Pennsylvania Supreme Court by seeking relief in court. On September 2, 2022, the DAO filed a 40-page Petition for Review in the Commonwealth Court, wherein the DAO asked the court to quash the Select Committee’s Subpoena and enjoin the Select Committee’s investigation for the five reasons stated above. The Petition for Review is now pending in the Commonwealth Court: *The Philadelphia District Attorney’s Office, et al. v. The Select Committee on Restoring Law and Order, et al.*, Docket No. 450 MD 2022.

On the very same day that the DAO filed its Petition for Review, Rep. Lawrence, on behalf of the Select Committee, issued its Request to Show Cause. It is unclear whether the Select Committee issued its Request to Show Cause in direct response to the DAO’s filing of the Petition for Review. What is clear is that the Select Committee has subsequently refused to

withdraw or stay the Request to Show Cause until the case is resolved in court, even though that is the proper procedure here (and the one followed in similar disputes). To the contrary, Rep. Lawrence has expressly conditioned the Select Committee’s staying of the Request to Show Cause on the DAO’s withdrawal of its Petition for Review and its full production of documents in response to the Select Committee’s (invalid) Subpoena. That request demonstrates the Select Committee’s willingness to deny the DAO’s due process rights; the Select Committee cannot require the DAO to avoid contempt proceedings only by giving up its right under Pennsylvania law to challenge the validity of an (improper) Subpoena. Thankfully, the law in the Commonwealth does not permit such behavior by a legislative body.

1. THE DAO SHOULD NOT BE HELD IN CONTEMPT OF THE HOUSE BECAUSE THE DAO HAS NOT “WILLFULLY NEGLECT[ED] OR REFUSE[D] TO COMPLY” WITH THE SUBPOENA.

The Request to Show Cause is premised on the false allegation that the DAO “willfully neglect[ed] or refuse[d] to comply” with the Subpoena. Nothing could be further from the truth. Upon receiving the Subpoena, the DAO carefully assessed the Subpoena, determined that it is legally deficient on a number of levels, and challenged the validity of the Subpoena through proper legal channels – first by sending detailed letters to Rep. Lawrence’s counsel explaining why the Subpoena is improper and should be withdrawn, then by filing a Petition for Review in the Commonwealth Court seeking to quash the Subpoena, and finally by speaking directly and in good faith with Rep. Lawrence’s counsel in an effort to resolve our differences. Specifically:

- On August 9, 2022, the DAO, through its outside counsel, contacted Rep. Lawrence’s counsel directly and agreed immediately to accept service of the Subpoena;
- On August 22, 2022, the DAO, through its outside counsel, sent a detailed letter to Rep. Lawrence’s counsel requesting that the Subpoena be withdrawn on the grounds that the Subpoena interferes with Grand Jury secrecy laws, invades legal privileges, violates separation of powers, does not serve a valid legislative purpose, and threatens to violate the constitutional rights of the citizens of Philadelphia;

- On August 31, 2022, the DAO, through its outside counsel, responded to Rep. Lawrence’s counsel’s letter, dated August 24, 2022, declining to withdraw the Subpoena, by asking for legal authority in support of the Subpoena’s request for grand jury materials and the prosecution case file of a currently pending murder case (none has been provided);
- On September 2, 2022, the DAO, through its outside counsel, filed its Petition for Review in the Commonwealth Court, seeking to quash the Subpoena based on laws and legal principles established by the Pennsylvania Constitution, the Pennsylvania Code, the Pennsylvania Supreme Court, and the United States Supreme Court; and
- On September 9, 2022, the DAO, through its outside counsel, initiated a conference call with Rep. Lawrence’s counsel that lasted nearly an hour, during which we (1) informed Rep. Lawrence’s counsel that the DAO’s publicly-available website includes 18 policies of the DAO, many of which relate the very topics in the Subpoena; (2) emphasized that disclosure of (privileged) prosecution case files of a pending murder case would threaten the integrity of that case and would undermine public safety; and (3) asked Rep. Lawrence’s counsel to stay any request to show cause out of respect for the judicial process, so that these legitimate challenges to the Subpoena can be resolved in court.

This is not contemptuous behavior; it is what the rule of law provides. This is not just our view, but also the view of the Pennsylvania Supreme Court, which has held that the proper way to challenge a legislative (or any other) subpoena is by seeking relief through legal channels, in court. As the Supreme Court made clear in *Com. ex rel. Carcaci v. Brandamore* – a case cited by Rep. Lawrence’s counsel in support of the Select Committee’s investigation – contempt proceedings may *not* be brought against a person or entity that challenges a House subpoena by seeking relief in court. 327 A.2d 1, 5 n.4 (Pa. 1974) (“Had [the plaintiff] wished the challenge the constitutionality of the committee’s investigation without risking a contempt citation before the bar of the House, judicial recourse would have been available to him. Injunctive relief from the activities of the committee could have been sought in a court of equity.”).

Thus, the DAO cannot be held in contempt because the DAO has followed the law in this Commonwealth by challenging (not neglecting or refusing) the Subpoena through proper legal channels.

2. THE DAO IS BEING FALSELY ACCUSED OF ARGUING THAT THE LEGISLATURE CANNOT ISSUE A SUBPOENA OR INVESTIGATE THE DAO; THAT IS NOT THE DAO'S POSITION.

In refusing to withdraw its (invalid) Subpoena or to stay its Request to Show Cause until the dispute is resolved by the Commonwealth Court, Rep. Lawrence's counsel has tried to dismiss the DAO's legal arguments out of hand by mischaracterizing the DAO's position. Specifically, Rep. Lawrence's counsel accuses the DAO of taking the position that the House cannot investigate an executive officer or issue a subpoena to an executive agency. That is not, and has never been, the DAO's position.

Rather, as the DAO's Petition for Review demonstrates, the Select Committee's Subpoena is improper because it seeks obviously privileged materials as part of a politically-motivated investigation that focuses only on the City of Philadelphia and expressly targets Philadelphia District Attorney Krasner even though he has not committed any impeachable act. That is the DAO's position, not some sweeping argument that district attorney's offices are immune from inquiry because they are executive law enforcement agencies.

The Select Committee's mischaracterization underscores two points. First, it highlights the need to resolve this dispute in court. This dispute involves two independent and co-equal branches of government (that is, the legislative and executive branches). As the Supreme Court has made clear, it is for the judicial branch to resolve such a dispute, not the House. The Select Committee's haste to punish the DAO for seeking relief in court should trouble all of us.

Second, it highlights the risk that decisions in the House will be made without an accurate understanding of the relevant facts and law. Here, rather than respond directly to the DAO's Petition before a neutral court, the Select Committee appears to be pursuing contempt proceedings based on made-up positions attributed to the DAO. Proceeding in this manner is not fair to the public or the DAO, and it will result in the denial of the DAO's due process rights.

In the end, if the Select Committee believes that its Subpoena is lawful and proper, it should have the courage to present its arguments in court and on the record. That the Select Committee would pursue contempt proceedings *before* it has addressed the Commonwealth Court proceeding and *before* that Court has ruled violates its obligation to comply with due process.

3. THE SUBPOENA DOES NOT APPEAR TO HAVE BEEN ISSUED IN GOOD FAITH.

The Select Committee appears to be justifying the issuance of its Subpoena to the DAO on the grounds that it is involved in a wide-ranging investigation to aid the legislature in reducing crime and improving public safety in Philadelphia, not a political attack on District Attorney Krasner. Even if that were true (and it is not), the DAO's production of documents responsive to the Subpoena would not serve those goals. To the contrary, they would undermine public safety and violate grand jury secrecy laws.

Public safety would be undermined if the DAO produced the prosecution's "complete case file" in the DAO's prosecution of former officer Ryan Pownall, which is scheduled for trial this fall. Because the Select Committee's mandate is to produce a public report, the prosecution's case would be compromised if its "complete case file" were in the public domain. Potential jurors, witnesses, and the defendant himself would have access to all kinds of confidential information. The prosecution would be at significant disadvantage if the defense

had access to its “complete case file,” including notes and memoranda on strategies, strengths and weaknesses of the case, and other mental impressions that are not subject to disclosure to the defense. In addition, the safety and integrity of witnesses could not be guaranteed if the names, addresses, and statements of witnesses were in the public domain. Finally, disclosure of the “complete case file” in the *Pownall* case would undermine not only the DAO’s prosecution of former officer Pownall, but also the DAO’s prosecution of other pending and future defendants as well. Witnesses in other cases might be afraid to come forward if they knew that their names, addresses, and statements could end up in the public domain. It is for all these reasons that the prosecution’s “complete case file” is protected from disclosure by legal privileges.

The DAO would be in violation of the law if it produced the investigating grand jury records in the Pownall case to the Select Committee. The Pennsylvania Supreme Court has “repeatedly” affirmed the importance of grand jury secrecy. *See In re 2014 Allegheny Cnty. Investigating Grand Jury*, 656 Pa. 589, 615, 223 A.3d 214, 230 (2019). The Investigating Grand Jury Act, title 42 Pennsylvania Consolidated Statute sections 4541-53, preserves and codifies the traditional rule of secrecy in grand jury proceedings. It does not authorize a district attorney or any member of a prosecution team to produce grand jury records to a House committee in response to a subpoena. *See id.* § 4549(b). “A violation of grand jury secrecy rules may be punished as a contempt of court.” tit. 234 Pa. Code § 556.10(A)(2) (2012). Rep. Lawrence’s counsel is aware of grand jury secrecy laws, and yet has not withdrawn that request.

As for the Subpoena’s request for the DAO’s policies, the DAO’s publicly-available website includes 18 policies, many on the very topics in the Subpoena. The DAO, through its outside counsel, has acknowledged that the DAO’s policies on its website are not subject to any

privilege. Rep. Lawrence's counsel is aware of the policies on-line and yet has refused to withdraw the Subpoena.

In sum, the Subpoena does not appear to have been issued in good faith. It seeks documents that are protected by well-established legal privileges and grand jury secrecy laws, the disclosure of which would undermine public safety and violate the law. And it seeks policies that are publicly available on the DAO's website.

Understand that the DAO would be delighted to join the House in addressing efforts to prevent gun violence and maintain public safety. For example, the Pennsylvania legislature could immediately reduce gun violence in Philadelphia and throughout the Commonwealth by increasing funding for a Philadelphia Forensics lab to solve gun violence crimes, requiring universal background checks on gun purchases, closing gun show loopholes, mandating the reporting of lost or stolen guns, imposing a safe storage requirement, and banning the sale of ghost guns. It could also repeal the statewide preemption law that prevents cities like Philadelphia from enacting their own gun laws that could be locally tailored to stop gun violence in cities throughout the Commonwealth.

It is both troubling and ironic that the very legislature that is preventing Philadelphia from combatting gun violence is singularly investigating its district attorney. To be sure, the DAO recognizes that Rep. Lawrence and other House members may not agree with the DAO's policy recommendations with respect to gun violence, or that they may find disagreeing with the DAO's policy recommendations to be politically useful during the election cycle. Nonetheless, the DAO fervently hopes that we can all agree on respect for the judicial process and in not using political power to punish opponents based on policy differences.

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