

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1:12-cv-1510 (JDB)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	

**PLAINTIFF’S MOTION TO LIFT STAY
AND REQUEST FOR HEARING**

Plaintiff Judicial Watch, Inc., by counsel, respectfully requests that the Court lift the indefinite stay of the proceedings and order Defendant U.S. Department of Justice to promptly produce a *Vaughn* index. In addition, pursuant to LCvR 7(f), Judicial Watch requests an oral hearing on its motion. As grounds therefor, Judicial Watch states as follows:

MEMORANDUM OF LAW

On June 20, 2012, in response to a subpoena issued by the Committee on Oversight and Government Reform of the U.S. House of Representatives (“the House Committee”), Deputy Attorney General James Cole informed the House Committee that President Barack Obama had asserted executive privilege over a specific set of records. Memorandum Opinion, dated September 30, 2013, *Committee on Oversight Reform v. Eric H. Holder, Jr.*, No. 1:12-cv-1332-ABJ (D.D.C.) (“*House Committee* litigation”) at 8. The U.S. Department of Justice (“the Department”) refused to provide a privilege log or otherwise describe the withheld documents. *Id.* Nor has the Department subsequently produced any of the records. The House Committee filed suit on August 13, 2012. *Id.*

Pursuant to the Freedom of Information Act (“FOIA”), on June 22, 2012, Judicial Watch submitted a request to the Office of Information Policy, a component of the Department, seeking access to the same records that “were withheld from the House Committee pursuant to the President’s assertion of executive privilege and that are now at issue in the earlier-filed *House Committee* litigation.” Defendant’s Motion to Stay, Docket Entry Number 15, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510 –JDB (D.D.C.) (“*Judicial Watch* litigation”) at 2.

The Department denied Judicial Watch’s FOIA request, and, on September 13, 2012, Judicial Watch filed suit. *See* Complaint, Docket Entry No. 1, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.). The Department subsequently filed its Answer on October 18, 2012. *See* Answer, Docket Entry No. 10, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.). There was no dispute that Judicial Watch exhausted its administrative remedies. Nor was there any dispute that records responsive to Judicial Watch’s FOIA request exist. Therefore, the only issue before the Court is whether the Department is properly withholding records responsive to Judicial Watch’s FOIA request, which can be resolved by filing dispositive motions on the merits.

On November 11, 2013, the Department sought to stay the proceedings because, in part, “[the] principles of comity and respect for orderly judicial process counsel strongly against addressing the privilege claims in this FOIA suit while Judge Jackson actively considers the *House Committee* litigation.” Defendant’s Motion to Stay at 2. Specifically, the Department argued, “Most significant, of course, would be any decision regarding the merits of the executive

privilege assertion. If Judge Jackson were to reach the merits of the assertion, such a ruling would, at the very least, be relevant here. Likewise, however, any ruling by this Court on the merits of the assertion would be relevant to the *House Committee* litigation.” *Id.* at 12. On February 15, 2013, over Judicial Watch’s objection, this Court granted the Department’s motion to stay. *See* Order, Docket Entry No. 20, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.) (“Stay Order”). In its order, the Court stated, “What’s more, Judicial Watch has offered no reason that delay would present hardship. To be sure, it has a right to request the information. But a stay does not deny that right, it simply delays – *temporarily* – adjudication of the right.” Order, ECF No. 20 (February 15, 2013), at 3 (*emphasis added*). In addition, the Court explained, “But the Department does not seek, and the Court will not award, an indefinite stay pending ultimate resolution of the *House Committee* litigation.” *Id.* at 4. The Court therefore concluded that “a brief stay is appropriate.” *Id.*

Subsequent to the granting of the motion to stay on February 15, 2013, the Court has repeatedly and routinely affirmed the stay on six occasions: June 3, 2013, September 3, 2013, November 8, 2013, January 13, 2014, March 27, 2014, and May 9, 2014. *See* June 3, 2013 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.); September 3, 2013 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.); November 8, 2013 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.); January 13, 2014 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.); March 27, 2014 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB

(D.D.C.); and May 9, 2014 Minute Order, *Judicial Watch, Inc. v. U.S. Department of Justice*, No. 1:12-cv-01510-JDB (D.D.C.). The next joint status report is due on July 31, 2014. May 9, 2014 Minute Order.

Although the Department and the Court may have anticipated that the stay of proceedings would be temporary and brief, it has become anything but that. In three weeks, it will have been two years since Judicial Watch sent its FOIA request, more than 21 months since Judicial Watch filed its lawsuit, and 16 months since the Court stayed the proceedings. There is no dispute that Judicial Watch has a statutory right to request and receive all non-exempt records responsive to its FOIA request. Stay Order at 3 (“To be sure, [Judicial Watch] has a right to request the information.”); *see also Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (Under FOIA, any person “has a right to request any records held by a federal agency.”). Nor is there a dispute that Judicial Watch has a statutory right to litigate the withholding of any records. *Taylor*, 553 U.S. at 885 (“If an agency refuses to furnish the requested records, the requester may file suit in federal court.”). Simply put, Judicial Watch has waited long enough to have its day in court.

In its order granting the stay of proceedings, the Court stated, “In the present circumstances, however, a brief stay is appropriate to allow ongoing settlement discussions, and if a full settlement is not reached, to let the House Committee court to rule on the motion to dismiss at issue in the April 24, 2013 hearing.” Stay Order at 4. To date, the parties in the *House Committee* litigation have not reached a settlement. Nor are they close to reaching a settlement. In their latest Joint Status Report, the parties could not even agree as to whether Judge Jackson should refer the matter to Judge Barbara Rothstein for further mediation. Joint

Status Report, Docket Entry No. 78, *Committee on Oversight Reform v. Eric H. Holder, Jr.*, No. 1:12-cv-1332-ABJ (D.D.C.) (“It is defendant’s position that the parties should return to mediation before Judge Rothstein to discuss whether settlement is now possible. Plaintiff’s position is that further mediation will not be helpful, and that settlement discussions directly between the parties are more likely to be productive.”). In addition, the Court in the *House Committee* litigation did not grant the Department’s motion to dismiss. The parties have subsequently completed briefing on cross-motions for summary judgment, and the Court in the *House Committee* litigation held a hearing on May 15, 2014.

The indefinite stay of proceedings should be lifted for three reasons. First, the reasons for which the motion to stay was granted have passed. The *House Committee* litigation was not dismissed due to lack of jurisdiction and the parties in the *House Committee* litigation have not reached a settlement nor are they any closer to reaching a settlement. Second, any eventual decision on the merits in the *House Committee* litigation would have little, if any, effect on Judicial Watch’s case. Because Judicial Watch is not a party in the *House Committee* litigation, Judicial Watch would not be estopped from litigating its claim. *See Taylor*, 553 U.S. at 893-895. Waiting for any eventual decision, therefore, would not bring this matter any closer to resolution. Also, based on Judge Jackson’s comments from the bench during the May 15, 2014 hearing, the Court may not issue a final judgment for quite some time. *See Transcript of May 15, 2014 Motions Hearing, Committee on Oversight Reform v. Eric H. Holder, Jr.*, No. 1:12-cv-1332-ABJ (D.D.C.), at pp. 40-41.¹

¹ The transcript is attached as Exhibit 1.

Third, and most important, the issues in the two cases, although related, are different. *Playboy Enterprises, Inc. v. Department of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982) (“[T]he issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.”). In the instant matter, the issue before the Court is whether the Department is properly withholding records responsive to Judicial Watch’s FOIA request. In the *House Committee* litigation, the issue before the Court is whether the Department is properly withholding records responsive to a Congressional subpoena. *See e.g.*, May 15, 2014 Transcript at pp. 8-9 (Judge Jackson stated that she has “to address [] the unique situation of when the requester is the legislature. In particular, a legislative committee engaged in oversight. . .”); *id.* at p. 29 (Judge Jackson asked, “Putting aside the question of whether the deliberative process privilege can be invoked before Congress . . .”); *id.* at p. 80. (The Department’s attorney stated that the claimed privilege “is a special type of privilege that really doesn’t come to pass except when we’re trying to resist a request from Congress.”).

The basic fact that claims of privilege are different in the FOIA context from the Congressional subpoena context is undisputed. During the May 15, 2014 hearing, the following Exchange occurred:

THE COURT:

I mean, there may be more and greater constitutional dimension to the deliberative process privilege, if you’ve got a coequal branch on the other side. But that doesn’t mean it’s different documents are privileged. That just might mean you balance it differently, doesn’t it?

MS. HARTNETT²:

That's right, Your Honor. It may be something -- these are materials that in the ordinary course if they were sought in some FOIA or whatever, it may very well be that it wouldn't be important enough for the -- as a matter of deliberation or revealing something about a deliberation for these documents to attempt to be protected.

But in the context of the Congress trying to seek information from us in the context of an investigation about how we're actually responding to the investigation, that is not made up for this case. That is something that there is not a judicial case for because it has never been put to a Court before. You're the first Court that I'm aware of that has had the question.

May 15, 2014 Transcript at pp. 78-79.

Following this exchange, the attorney for the House Committee stated:

Understand that the privilege that they are articulating here today, the committee will do better under FOIA. We will do better issuing FOIA requests to the Department of Justice to get this information than we will pursuant to Article I.

Id. at pp. 86-87. In other words, the Department informed Judge Jackson that the Department could not withhold under FOIA all of the records it is currently withholding in the *House Committee* litigation.

Significantly, there are recent examples where a FOIA requester -- Judicial Watch in particular -- has received records previously withheld in response to a Congressional subpoena. Both Judicial Watch and the House Committee sent requests for records related to the September 11, 2012 terrorist attack in Benghazi, Libya. Judicial Watch requested records pursuant to FOIA; the House Committee requested records under a Congressional subpoena. The records released contained different information. *See Catherine Herridge, Discrepancies between*

² Ms. Hartnett represented the Defendant during the hearing. Mr. Womack, lead counsel in the instant matter, was at the counsel table during the hearing.

Benghazi emails released to Congress, watchdog group, Fox News (May 5, 2014), available at <http://www.foxnews.com/politics/2014/05/05/discrepancies-between-benghazi-emails-released-to-congress-watchdog-group/>. Judicial Watch received more information than the House Committee. In other words, the government agency – the U.S. Department of State, in that case – determined that certain privileges asserted by the Executive Branch in response to the Congressional subpoena were not applicable to the request by Judicial Watch under FOIA. Similarly, in response to a FOIA request by Judicial Watch, the Internal Revenue Service provided a more complete version of a record than was provided to a congressional committee. See May 14, 2014 Judicial Watch Press Release, available at <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-new-documents-show-irs-hq-control-tea-party-targeting/>. Whereas the Congressional subpoena process is a political process, FOIA is a legal process, established by statute and case law. It is therefore no surprise that responses by the Executive Branch to FOIA requests are more complete than those provided to Congressional subpoenas.

In sum, Judicial Watch has patiently waited for its day in Court. The *House Committee* litigation is progressing slowly. The parties in that litigation have not reached a settlement, nor does it appear as though they will ever reach a settlement. There is no clear indication of how and when that case will be resolved. However, it is clear that the instant matter should move forward. The Department should be required to produce a *Vaughn* index of all records responsive to Judicial Watch's FOIA request that it continues to withhold. The Department should also produce all records that it may be properly withholding in response to the Congressional subpoena but are not being properly withheld under FOIA. The parties should

then meet and confer, determine whether the issues before the Court may be narrowed, and jointly propose a briefing schedule for dispositive motions.

Pursuant to Rule 7(m) of the Local Rules of Civil Procedure, the undersigned counsel for Judicial Watch conferred with counsel for the Department. The Department's counsel informed the undersigned counsel for Judicial Watch that his client opposes this motion.

WHEREFORE, Judicial Watch respectfully requests that the Court lift the indefinite stay of proceedings.

Dated: June 3, 2014

Respectfully submitted,

/s/ Michael Bekesha
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Counsel for Plaintiff

Exhibit 1

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND	:	CR No. 12-CV-1332
GOVERNMENT REFORM, UNITED STATES	:	
HOUSE OF REPRESENTATIVES	:	
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ERIC H. HOLDER, JR.,	:	
	:	
Defendant.	:	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

Thursday, May 15, 2014

APPEARANCES:

For the Plaintiff:	KERRY KIRCHER, ESQUIRE ISAAC B. ROSENBERG, ESQUIRE, Office of the General Counsel 219 Cannon Building Washington, DC 20515 202-225-9700
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For the Defendant:	KATHLEEN HARTNETT, ESQUIRE Dep. Assistant Attorney General U.S. DOJ Civil Division 950 Pennsylvania Avenue NW Washington DC 20530
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Room 6509

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P R O C E E D I N G S

DEPUTY CLERK: Your Honor, calling Case No. 12-CV-1332, Committee on Oversight and Government Reform, United States House of Representatives v. Eric H. Holder, Jr. Will arguing counsel please approach the lecturn, identify yourself and your colleagues for the record and the party or parties that you represent.

MR. KIRCHER: Good morning, Your Honor. Kerry Kircher on behalf of the committee. I'm joined at the counsel table by my colleagues Bill Pittard, Todd Tatelman, Mary Bette Walker, Eleni Roumel and Isaac Rosenberg. Mr. Rosenberg will argument the motion to strike, if you hear argument on that piece.

THE COURT: All right. Thank you. Good morning.

MS. HARTNETT: Good morning, Your Honor. Kathleen Hartnett from the Department of Justice for the defendant. With me at counsel table also from the Department of Justice are Eric Womack and Greg Dworkowitz.

THE COURT: Okay. Good morning. All right. As I noted at the beginning of the last hearing, we're here because the Committee on Oversight and Government Reform in the U.S. House of Representatives has been engaged in an investigation of Operation Fast and Furious since early 2010. This was a law enforcement operation launched by

1 the Bureau of Alcohol, Tobacco, and Firearms and the U.S.
2 Attorney's Office in Phoenix, Arizona, in October of 2009
3 to confront the suspected illegal flow of firearms from
4 the United States to drug cartels in Mexico.

5 The tactics involved in that operation, tactics
6 which apparently had previously been used by the ATF in
7 Phoenix in 2006, have been the subject of intense
8 criticism. In particular, during the course of the
9 operation, law enforcement officials permitted the guns to
10 walk. That is, to let straw purchasers from the cartels
11 carry the firearms across the border without being
12 apprehended under the theory that the agents would then be
13 able to track where the guns were ending up.

14 I feel the need to point out, again, that
15 neither this case nor this hearing are about the existence
16 of the operation or the propriety of those tactics. The
17 facts have been revealed. The risks and flaws in such an
18 operation, risks that were tragically realized when a law
19 enforcement officer was killed, have been the subject of
20 extensive public discussion, and the department has issued
21 clear directives prohibiting the use of the tactics in the
22 future.

23 The case is also not about whether a
24 congressional investigation into the operation is
25 appropriate. The parties are agreed that, of course, it's

1 a legitimate subject of a legislative inquiry.

2 During the early stages of the investigation,
3 though, on February 4, 2011, the Attorney General wrote a
4 letter to the committee denying that gun walking had taken
5 place. The letter is not the subject of this hearing
6 either; nor is the fact that the letter was wrong. The
7 fact that it was wrong is not in dispute. The Attorney
8 General subsequently informed Congress that the letter was
9 incorrect and the letter was officially withdrawn in
10 December of the same year.

11 But the committee remains interested in
12 investigating how or why the Department of Justice gave it
13 inaccurate assurances and why they stood uncorrected for
14 the time that they did. So its investigation was expanded
15 to include this second focus, which the committee refers
16 to as the obstruction portion of the investigation.

17 We're not here this morning to discuss whether
18 that inquiry was necessary or appropriate either. That's
19 not being challenged by the Attorney General. We're here
20 because the committee is seeking to enforce the subpoena
21 it issued on October 11, 2011, to the Attorney General of
22 the United States. I don't believe that there's any
23 disagreement that despite the characterization of the
24 level of effort or the timeliness of the effort, that
25 subpoena has been complied with in part.

1 Also, requests have been narrowed through
2 negotiation. However, among other records, the subpoena
3 sought documents generated after February 4, 2011, which
4 it believed would illuminate how it was that the
5 department came to incorrectly deny on from February 4,
6 2011, that the gun walking had taken place. There were
7 many meetings and much correspondence back and forth about
8 what needed to be produced and when. Many documents have
9 been produced that relate to the creation of the letter.

10 But on June 20, 2012, through a letter signed by
11 the Deputy Attorney General Cole, the department declined
12 to produce the post-February 4 documents in question. The
13 letter stated that the President had asserted the
14 executive privilege over the documents because their
15 disclosure would reveal the agency's deliberative
16 processes.

17 A committee filed this action to declare that
18 assertion invalid and to enforce the subpoena on August 3,
19 2012. The complaint was amended in January 2013 after the
20 new Congress reissued the subpoena.

21 The Attorney General then moved to dismiss the
22 case on the grounds that the committee had no standing to
23 bring it, the Court had no jurisdiction to hear it. He
24 also argued that the Court should exercise its discretion
25 to decline to hear it.

1 The Department of Justice warned that it would
2 threaten the constitutional balance of powers between the
3 three branches if the Court waded into the merits of a
4 political dispute and undertook to assess for itself the
5 comparative weight of the legislature's stated need for
6 the records versus the executive's interest in
7 confidentiality or to determine whether the parties had
8 engaged in sufficient negotiation and accommodation.

9 In response the committee took a very clear and
10 strong position that the case was definitely justiciable
11 because it involved a discreet narrow pure question of
12 law: Could the Attorney General lawfully withhold
13 documents on the grounds of executive privilege when the
14 documents did not involve communications with the
15 President or the performance of his core constitutional
16 functions?

17 And ultimately, as other judges of this court
18 have found before me, and in accordance with both Supreme
19 Court and circuit precedent, I agreed that deciding such a
20 legal question, the legitimacy of a claim of executive
21 privilege fell squarely within this Court's jurisdiction.
22 In *United States v. Nixon* the Supreme Court held that when
23 the chief executive resists the production of specified
24 evidence on privilege grounds, that is a traditionally
25 justiciable controversy.

1 The Court said that our system of government
2 actually requires federal courts to interpret the
3 Constitution and determine whether another branch has
4 exceeded the authority that has been committed to it.

5 "Any other conclusion would be contrary to the
6 basic concept of separation of powers and the checks and
7 balances that flow from the scheme of a tri-party
8 government."

9 We're not here today to reargue that issue. I
10 ruled, and there's my opinion, explains why this Court has
11 jurisdiction to mediate this dispute. I then directed the
12 parties to brief the merits of what I have been assured
13 was a pristine legal question, and we're now here on their
14 cross motions for summary judgment.

15 I have to say I found reading the briefs to be
16 somewhat distressing. I feel a little bit like I'm the
17 victim of a bait and switch because the committee's brief
18 was exactly what it assured me it wouldn't be. It was a
19 length vituperative account of the facts surrounding the
20 operation itself and all of the contentious back and forth
21 between the parties, who was more reasonable, who was more
22 accommodating, which wasn't supposed to be the issue,
23 which had already been laid out in full, and I urged the
24 plaintiff not to repeat. It gets to the discussion of the
25 of pristine legal issue on page 21. The government noted

1 this disconnect in its brief as well.

2 Also, the committee's brief was pitched at such
3 an accusatory level with such a pejorative term it seems
4 to have been directed more to the press than to me. I
5 just want to state at the outset that we're not at a press
6 conference this morning. I made it through the avalanche
7 of outrage, and I can assure the committee that I've
8 received loud and clear the message that was meant to
9 convey, but I'm hoping that the presentation this morning
10 will be more tightly focused on the legal question before
11 us.

12 I also discovered to my dismay that the briefs
13 were largely based on such things as OLC opinions, law
14 review articles and pure argument rather than binding
15 pertinent authority. That's not at all the fault of the
16 lawyering, though, because it appears, as far as I can
17 tell, that there is very little case law to help me make
18 this decision. This was a fact, though, that neither side
19 seemed quite ready to admit and it probably means that we
20 didn't need all the excess pages.

21 What I have to address is the unique situation
22 of when the requester is the legislature. In particular,
23 a legislative committee engaged in oversight, and the
24 privilege involved is that subset of the executive
25 privilege that involves executive branch deliberations and

1 not conversations with the President himself.

2 I can tell you that after reviewing all of the
3 materials, I have concerns that both the defendants'
4 showing of harm and the plaintiff's showing of need are
5 weak. The explanation of the need for confidentiality
6 asserted by the government is very generalized, and it's
7 weaker in this case than in much of the authority
8 provided. But the committee's need may also be being
9 understated, particularly given how far we've wandered
10 from the core subject of the committee's inquiry. The
11 briefs are really more like ships passing in the night
12 than two parties wrestling with the single legal question.

13 The Attorney General relies heavily on cases and
14 SG opinions that relate specifically to communications
15 with the President himself. Or it cites other documents
16 in which a former executive official asserted the
17 privilege as authority for the existence of the privilege.

18 Meanwhile, the committee acts as if this is an
19 ordinary evidentiary privilege being asserted by any old
20 witness as opposed to by the President of the United
21 States. So both the situation that one side briefed and
22 the situation that the other side briefed are
23 distinguishable from the situation we actually have.

24 The Attorney General says I should uphold his
25 assertion of the privilege without looking behind the

1 assertion to the records themselves, and the committee
2 says I should accept their claim of entitlement without a
3 closer examination of the need for the records and the
4 basis for rejecting the privilege. I'm not confident that
5 either side is right about that. I think the cases
6 clearly indicate that under these circumstances I have to
7 go beyond "because I told you so." Even in cases
8 involving presidential communications, which are clearly
9 privileged, Courts have reviewed the documents and engaged
10 in an individualized determination.

11 Since the parties have filed cross motions, I'm
12 going to hear from one side and then the other without
13 giving the moving side the last word or we'll be here all
14 day. After we've talked about the motion to strike, I'm
15 going to hear from each side briefly -- after we talked
16 about the motion for summary judgment, I'm going to hear
17 from each side briefly on the motion to strike.

18 And I'd like to hear from counsel for the
19 committee first.

20 MR. KIRCHER: Thank you, Your Honor.

21 Let me assure you at the outset that the briefs
22 we submitted to this Court were not intended to be press
23 releases. They were intended to be serious legal
24 documents to address the legal issues that are presented
25 in this case. And if you perceive them otherwise, I

1 apologize on behalf of the committee.

2 As the Court is aware, on June 20, 2011, the
3 Deputy Attorney General in a letter to the committee
4 stated that, quote/unquote, the President has asserted
5 executive privilege over the relevant post-February 4,
6 2011, documents.

7 As you yourself just noted, Your Honor, in the
8 same letter, the Deputy Attorney General acknowledged "The
9 committee's legitimate interest in the department's
10 management of its response to congressional inquiries into
11 Fast and Furious." And that acknowledgment echoed a
12 June 2007 Attorney General opinion which is cited in both
13 parties' briefs which states that "The department has
14 recognized that Congress has interest in investigating the
15 extent to which the department officials may have provided
16 inaccurate or incomplete information to Congress."

17 So on the one hand what we have here is we have
18 the department acknowledging the legitimacy -- the
19 Article I legitimacy of what the committee was doing here,
20 which is trying to find out about the committee's -- I'm
21 sorry, the department's response to the committee's
22 underlying Fast and Furious investigation.

23 On the other hand, we have the Attorney General
24 doing everything he can to prevent the committee from
25 doing exactly that; from initially in December through the

1 assertion of the privilege refusing to produce documents
2 dated or created after February 4 to the assertion of the
3 privilege on January 20 itself.

4 THE COURT: In the letter, I believe, the --

5 MR. KIRCHER: The privilege letter.

6 THE COURT: -- the privilege letter -- actually
7 I think it's in the letter to the President asking about
8 the privilege, the day before, there's a statement that
9 even some post-February 4 documents have been produced if
10 they relate to the facts coming to light that the
11 February 4 letter was false. Is that correct?

12 MR. KIRCHER: I'm not aware that that's correct,
13 Your Honor. It may be that there are a handful, two or
14 three or four documents, post February 4 that we received,
15 that the committee received during that time period prior
16 to the assertion of the privilege. If they were, they
17 were de minimis in number.

18 THE COURT: All right. Well, let me get to the
19 core of what I think the issue is. Your entire brief
20 seems to be premised upon the argument that what is well
21 known in the law as the, quote/unquote, executive
22 privilege. It's coextensive with that aspect of the
23 privilege, according to presidential communications. And
24 the deliberative materials fall completely outside of its
25 scope.

1 And I don't really see that in the case law you
2 provided. Are you relying on any particular case for what
3 appears to be your fundamental contention, which is that
4 the executive privilege means communications to the
5 President only and not the executive branch?

6 MR. KIRCHER: That's not our position, Your
7 Honor. Our position is that executive privilege is an
8 umbrella notion. It encompasses a number of different
9 privileges that are asserted by the executive branch.
10 From state secrets and military secrets to Presidential
11 communications to deliberative process, to I think there's
12 a recognition in some quarters of a common-law law
13 enforcement provision. All of those are types of
14 executive privilege.

15 And what we have asserted in this brief is when
16 the Attorney General -- or when the Deputy Attorney
17 General asserted the privilege, executive privilege in
18 June 2012, that letter is larded with references to
19 deliberative process.

20 Under the law that is set forth in the *Espy*
21 case, the D.C. Circuit very carefully distinguished
22 between the deliberative process aspect of executive
23 privilege and the presidential communications aspect of
24 privilege. So when we went into this lawsuit, our working
25 assumption, not unreasonable assumption, was it's one or

1 the other or both of those.

2 THE COURT: Right.

3 MR. KIRCHER: And that's why you got a counter
4 complaint from us.

5 THE COURT: But is it your position that just
6 because we're talking about confidential deliberative
7 material here that there are no constitutional or
8 separation of powers implications? I realize that we
9 might go down a different track for how the interests are
10 weighed and what the agency has to prove, but don't the
11 cases suggest -- they don't really get to the point that
12 you got to, which is saying, you know, we don't even
13 really need to think about the Constitution or separation
14 of powers here. It's just a privilege being asserted by a
15 witness and we, Congress, don't recognize privileges.

16 MR. KIRCHER: I'm not saying that we don't
17 recognize it, Your Honor. The D.C. Circuit circuit has
18 not recognized deliberative process as a constitutional
19 privilege. So if we are --

20 THE COURT: Well, it says they are
21 constitutional implications in a lot of footnotes, and it
22 doesn't reach the question that quotes some Law Review
23 articles say there is, some Law Review articles say there
24 aren't. But if you have the President of the United
25 States telling a congressional committee I am asserting

1 privilege over these documents, are you really saying that
2 that just has no separation of powers or constitutional
3 implications at all?

4 MR. KIRCHER: I'm saying, Your Honor, that first
5 of all, you have to decide whether there is a privilege
6 that applies here. And there are two possibilities.

7 THE COURT: That -- that -- I'm just talking
8 about -- let's -- we're going to get to whether these
9 documents are deliberative and whether the assertion has
10 been properly asserted.

11 But my question is neither *Espy* nor any of the
12 other cases I read seem to indicate that only the
13 communications privilege raises constitutional concerns.
14 And even if they are more deluded in one situation than
15 the other, is there any specific case law that you're
16 pointing me to that says that there's nothing
17 constitutional about the deliberative process aspect of
18 the executive privilege?

19 MR. KIRCHER: I do, in fact, think that is what
20 *Espy* stands for, Your Honor. With all due respect, I
21 think that's what *Espy* stands for.

22 THE COURT: Can you direct me to a particular
23 page in *Espy* that you think says that?

24 MR. KIRCHER: The entire beginning section that
25 discusses the background of the executive privilege goes

1 through a constitutional piece of that, which is the
2 presidential communications piece, and distinguishes that
3 very clearly from the common-law piece, which is the
4 deliberative process piece.

5 THE COURT: Well, there's a sentence in *Espy*
6 where the Court says, "Although the deliberative process
7 privilege is most commonly encountered in FOIA litigation,
8 it originated as a common-law privilege." But isn't that
9 point of that sentence to distinguish the fact that before
10 it ever got embodied in FOIA, it was a creature of case
11 law and not to rule out constitutional implications?

12 MR. KIRCHER: I don't read it that way, Your
13 Honor. The entire discussion is to separate out the
14 presidential communications piece in that case from the
15 deliberative process. The whole point of that case was
16 whether the documents sought fell within the scope of the
17 former or the latter. And the discussion, I think, leads
18 inevitably to the conclusion that the D.C. Circuit
19 concluded that the deliberative process is a common-law
20 privilege. That is a privilege certainly that can be
21 asserted by the executive branch in many instances, but
22 it's not constitutionally based like the presidential
23 communications, which is routed in considerations that are
24 peculiar to the office of the President.

25 THE COURT: Well, I don't think they ruled it

1 out completely. I think they clearly indicated that the
2 constitutional implications are strong. I think you're
3 somewhat overstating the implications of the distinction
4 they drew in *Espy*.

5 But if one of your arguments is that this is a
6 common-law privilege, Congress doesn't recognize
7 common-law privileges, we don't have to, you made the
8 decision to enforce the subpoena in a court of law where
9 the privilege is unquestionably recognized. So why am I
10 bound by your internal house rules instead of legal
11 precedent, whether it's rooted in common law or somewhere
12 else?

13 MR. KIRCHER: You're not bound by internal house
14 rules, Your Honor. What we have said was they asserted a
15 privilege against us, and we came to the Court to find out
16 whether that privilege could, in fact, be asserted against
17 a congressional subpoena.

18 They have -- they have walked out on that
19 argument. They no longer assert that the common-law
20 deliberative process privilege is -- they have abandoned
21 that argument. They say they might resurrect it at some
22 later point in this litigation, but they have not defended
23 on that ground. What -- the ground on which they have
24 defended is we want you, the Court -- and they acknowledge
25 that there is no case law that accepts the justification

1 for a constitutionally based congressional response in
2 related media's inquiries privilege. There is no case law
3 that supports that constitutionally rooted privilege of
4 that nature. They admit that.

5 But so what we --

6 THE COURT: I don't think anybody has got a case
7 on point. We're all dealing with another world in between
8 the cases that you provided and the cases -- it's not FOIA
9 either. We're somewhere else.

10 MR. KIRCHER: I -- I respectfully disagree, Your
11 Honor. I think where we are is they want you to invent
12 something new. The Supreme Court and the D.C. Circuit
13 says we're not getting into the business of inventing new
14 privileges without either a compelling empirical showing
15 or some clear and convincing showing. They can hardly
16 make an empirical showing of a need for a new
17 congressional response in related media inquiries
18 privilege when -- when Congress has ventured into this
19 area three or four times at most over the last 30 years.
20 And if we actually start going through their rationales --

21 THE COURT: Well, I think you are -- I think
22 they are trying to put this squarely within the
23 deliberative process privilege as it was defined in *Espy*.
24 I don't think they are asking me to create a new
25 privilege.

1 And I realize that your argument is the
2 documents aren't privileged at all and this isn't a
3 privilege that Congress needs to recognize. But if I
4 disagree with you about that and I say the privilege
5 exists, would you agree then that what I'd have to do is
6 then balance that privilege, which may not have a strong
7 constitutional underpinning to it against your need for
8 the records, that I have to go there?

9 MR. KIRCHER: Yes, I believe you do. It's a
10 qualified privilege. Deliberative process itself is
11 qualified. This new thing that they are asking you to
12 invent, at least in our conception of the world, is also a
13 qualified privilege. They've admitted that. Qualified
14 means it could be overcome. So I don't see how you avoid
15 the question of our need, assessing our need for the
16 documents.

17 THE COURT: Well, if I assess your need for the
18 documents, they've told me a lot about your need for the
19 documents, and am I wading right into the speech or debate
20 clause if I ask you to be more specific about your need
21 for the documents?

22 MR. KIRCHER: I don't think so. I'm here to
23 answer your questions, Your Honor.

24 THE COURT: All right. Well, one of the things
25 that *Espy* said is that the deliberative process privilege,

1 as you say, is qualified. It can be overcome, but it
2 doesn't give me any kind of clear standard to apply as the
3 select committee case does in the communications
4 situation. It says the determination is supposed to be
5 made flexibly, ad hoc. "Each time the privilege is
6 asserted, the District Court must undertake a fresh
7 balancing," and then it lists a number of factors that I'm
8 supposed to consider.

9 Now, the last time around when we talked about
10 the AT&T case, one of the factors that I looked at in
11 determining whether this case was justiciable or not was
12 whether or not there were clear standards to apply. And
13 now they are telling me, okay, be flexible, ad hoc,
14 basically make up your own test, Judge.

15 So does the fact that the standards are so
16 elastic mean that we were wrong in the first place about
17 whether the case is justiciable or not?

18 MR. KIRCHER: I certainly don't think so. I, of
19 course, cannot answer for what the Court said about this
20 flexibility. I do think the balancing has to be conducted
21 anew each time, just by virtue of the nature that there
22 are new cases. But I think the standards are fairly
23 clear.

24 I mean, you have -- in the presidential
25 communications area, the standard is demonstrably specific

1 need; right? *Nixon* says that. *Espy* says that. *Judicial*
2 *Watch* says that. That -- that appears to be the standard,
3 at least for the presidential communications privilege.
4 At least in some sort of hierarchical sense is going to be
5 up here.

6 THE COURT: Right. It has to be critical to the
7 committee's function.

8 MR. KIRCHER: Well, *Senate Select* uses that
9 critical language. And if you view that as one in the
10 same, then I agree. If you view -- I think the -- I think
11 the department argues that demonstrably critical is some
12 sort of a higher standard than demonstrated specific need.

13 We don't. But if you viewed it as a higher
14 standard, then our argument is that *Senate Select* doesn't
15 apply here because, No. 1, it's in the presidential
16 communications context. It was pre-*Nixon*. You know, *Espy*
17 went the other way.

18 So it seems to me sort of the starting point
19 here is the presidential communications standard, which is
20 a demonstrably specific language. We obviously think we
21 can satisfy that, and we've told you at some length why we
22 think we can satisfy that.

23 THE COURT: Well, I am not -- I don't understand
24 why is it critical to the committee's function for you to
25 oversee not only executive decision-making but how the

1 executive responds to congressional inquiries about
2 executive decision-making. And even more so, how it talks
3 to the media. How does that go to your core ability to
4 function as a legislative committee what they are saying
5 to the press?

6 MR. KIRCHER: What they are saying to the press?

7 THE COURT: They are talking about -- one of the
8 things they are saying is privileged, and I know you're
9 saying it isn't. But let's say I think it is. Is how
10 we're going to respond to media inquiries, and there are
11 presumably communications back and forth, but what about
12 this? Let's try this. I like this scenario. I don't
13 like this scenario. This is what I think could happen if
14 we do this. This is what I think we could happen if we do
15 that. And ultimately whatever they say to the press is
16 public. And you have that. And you can say it was a
17 truth. It was a half truth. It was a lie. You have all
18 that.

19 MR. KIRCHER: Uh-huh.

20 THE COURT: How is the internal discussion about
21 what they are going to do critical to the committee's
22 ability to perform its constitutional function?

23 MR. KIRCHER: Well, again, just to be clear, we
24 do not accept that the Senate Select --

25 THE COURT: I know that.

1 MR. KIRCHER: Okay.

2 THE COURT: But you said you can meet it. So I
3 want to know how.

4 MR. KIRCHER: All right. What we have here,
5 Your Honor, here is in a specific -- we're talking about
6 the specific context of this case. All right? We've
7 got -- let me back up.

8 The larger framework is, and I've tried to
9 explain in our brief, is Congress 99 percent of the time
10 is not interested in how they respond to Congress's
11 inquiries. Congress wants to know about operations and
12 programs: Are they working? Are they being managed
13 right? Are they being mismanaged? Is the money being
14 spent well? Do we need to spend more money? That's what
15 Congress is principally interested in. But if --

16 THE COURT: Don't we have at least three
17 investigations going on right now where the house's focus
18 is on how the executive responded to Congress's inquiries?
19 I mean, if that --

20 MR. KIRCHER: Specifically? I don't believe so.

21 THE COURT: Well, it seems like the Benghazi one
22 talks about that. The IRS one talks about that. It seems
23 like if we say that that's something that's going to
24 outweigh a privilege claim, where does that end?

25 MR. KIRCHER: Well, the Benghazi committee was

1 just created a couple of days ago, so I don't think we can
2 comment on that. I don't think that's where the IRS
3 investigation has focused. There is certainly an issue
4 with respect to one particular witness has made the news.
5 But I don't think it's fair to say that the committee's
6 underlying focus is on how the IRS responded to its
7 inquiries on what was going on in those parts of the
8 Internal Revenue Service.

9 This one is quite different because as you
10 yourself pointed out, Your Honor, we got, we got -- we got
11 false information on February 1. We got more false
12 information on May 5. On July 4 the acting director of
13 the ATF told us that internally the department is trying
14 to push the -- push the underlying investigation away from
15 political appointees; right? Then we get virtually no
16 information prior to the issuance of the Holder subpoena.
17 Then we get virtually no information after the issuance of
18 the Holder subpoena. On top that we later have the
19 inspector general telling us that it found, you know,
20 inaccuracies and had serious questions about the way the
21 May 2 letter in particular was drafted.

22 It takes ten months before the original false
23 statement is -- is withdrawn. Now, in that particular
24 context the point I'm trying to make here, Your Honor, is
25 if we can't investigate -- if the committees in Congress

1 can't go after that kind of stuff and find out about
2 deception or -- certainly allegations of deception, false
3 information, foot dragging, obstruction, if it can't look
4 into that, if it can't find out how the executive branch
5 delivers information that's relevant to the underlying
6 investigation, then it can never effectively do the
7 underlying part of the piece. We can't do the operations
8 component of Fast and Furious if we can't also do the
9 obstruction component when it's necessary to do that.

10 We have no way to check whether we're getting
11 full and complete information on the programs and the
12 operations part of what we need to do, which is the most
13 critical part of what we need to do. Nobody wants to be
14 doing what the committee is having to do here. But the
15 committee can't turn away in the face of information
16 that -- that's of the nature of what we've put in our
17 papers for you. It just can't responsibly do that.

18 THE COURT: So one of the things that concerns
19 me is that by balancing the kinds of things you're asking
20 me to balance, it seems to me, first of all, you're
21 specifically opening up the substance and the legitimacy
22 and the goals and the techniques of the investigation --
23 of your investigation to my scrutiny, and you're
24 complaining about the timeliness and the quality of their
25 subpoena responses, the reasonableness of their

1 negotiation positions. And aren't you drawing me straight
2 into the intrabranh dispute that everybody told me I
3 wasn't going to have to get into?

4 MR. KIRCHER: Well, your Honor, in all fairness
5 I don't think we ever told you that you might not have to
6 get into a balancing -- I think what we told you was we
7 don't think the privilege they asserted should be
8 recognized at all. And if you agree with us, then you
9 certainly don't have to get into that.

10 I don't think we ever said if you disagree with
11 that, you don't have to go on to the balancing piece.
12 That is a -- that is a -- it's certainly not in our
13 complaint. I've gone back to look at the transcript. I
14 don't think we ever made that kind of a representation to
15 the Court, that if you disagreed with us that the
16 privilege itself should not be recognized, that you
17 wouldn't also -- that we're just going to go home and say
18 Well, thanks, we don't need the documentation.

19 THE COURT: Right.

20 MR. KIRCHER: We still need the documents.

21 THE COURT: But even your arguments about why
22 the privilege should or shouldn't be recognized turn much
23 more on because we're investigating misconduct, because
24 they dragged their feet, because they were -- that's they
25 were -- that the privilege doesn't. So the legal

1 question, before we ever even get to the balancing, you've
2 imported all that stuff into your -- your first argument
3 for why I should reject the privilege is because you are
4 looking into misconduct. And part of the misconduct that
5 you're pointing to is the fact that they are withholding
6 the documents that you're asking for. So --

7 MR. KIRCHER: Yeah. And I don't think there's a
8 huge amount of dispute on that. I don't think there's a
9 huge amount of dispute on what was going on at the
10 department here. They have not really --

11 THE COURT: It's hard to read these briefs
12 without feeling there's a huge amount of dispute about
13 just about everything.

14 MR. KIRCHER: Well, I don't think there's been
15 any dispute about the February 4 letter. I don't think
16 there's a dispute about the February 2 letter. I don't
17 think there's a dispute about the Ken Melson --

18 THE COURT: There's a dispute -- well,
19 Mr. Melson's transcript that you gave me was full of his
20 opinion, in my view, my characterization, my thought, my
21 views. So I don't know how much weight to give that.

22 MR. KIRCHER: He was acting director of the
23 Bureau of Alcohol, Tobacco and Firearms.

24 THE COURT: Right. And he is giving you --

25 MR. KIRCHER: He was a high ranking official.

1 THE COURT: -- about what they are doing over at
2 DOJ. Putting that aside, I don't put as much weight on
3 that as you do.

4 MR. KIRCHER: Okay.

5 THE COURT: Plus you said there was no question
6 about the February 4 letter, but you call it a lie
7 throughout your -- a lie, a lie, a lie, a lie. They lied.
8 They compounded the lie. When I think the fact that
9 whether it was intentional falsehood is the question.

10 So by assuming the answer to the question, then
11 saying to me we're talking about misconduct, there's
12 something circular to your argument.

13 MR. KIRCHER: I don't -- I don't think we've
14 reached -- I don't think there's been any conclusion as to
15 whether the inaccurate information or the lie was
16 intentional or not. It was false.

17 THE COURT: That's what a lie is.

18 MR. KIRCHER: Well, actually I checked the
19 dictionary definition, Your Honor, and a lie could be
20 unintentional.

21 THE COURT: Come on.

22 MR. KIRCHER: Anyway, I don't want to quibble
23 with you about that. But certainly, yes, intention is an
24 issue.

25 Something went wrong here. The wheels fell off

1 the bus on the department's response to the committee's
2 underlying investigation to one degree or another here.
3 And it seems to me -- and the Attorney General has
4 acknowledged, as you said at the beginning in your opening
5 statement, has acknowledged the legitimacy of the
6 committee's investigation into that response process.

7 THE COURT: All right. Well, let me ask you
8 what I think is actually a perfectly legal question.

9 MR. KIRCHER: Okay.

10 THE COURT: Putting aside the question of
11 whether the deliberative process privilege can be invoked
12 before Congress, in your view are there any differences
13 between the elements and the definition of the privilege
14 under FOIA and the deliberative process privilege that
15 arose as a matter of common law under the auspices of the
16 executive privilege? Are we talking about the same
17 animal? I think we are, because everybody is citing FOIA
18 cases to me, but I just want to make sure. It has to be
19 predecisional and it has to be distributive.

20 MR. KIRCHER: Yes. I think the exemption 5 to
21 FOIA in many cases, it was intended to import the
22 deliberative process. So, yes, I think it's the same
23 deliberative process privilege, whether it arises in the
24 ordinary context outside of FOIA or it's asserted as a --
25 as a privilege in response to a FOIA request. One of the

1 differences may be that I'm not sure that balancing
2 necessarily takes place in the FOIA context.

3 THE COURT: Right. I'm just asking about the
4 definition of the privilege, not what happens after you
5 find out that it's privileged.

6 Well, you lay out the limits of the privilege,
7 but what's your authority for the proposition that the
8 decision that's being deliberated about has to be a
9 formal -- a policy decision, sort of an operations, "this
10 is what we're going to do today" decision as opposed to
11 any decision about how to proceed in some manner that the
12 agency has to make a decision about? Why is respond --
13 how should we respond to Congress, how should we respond
14 to the media, not a decision that they are allowed to
15 shield their deliberations about?

16 In general, putting aside the question of
17 whether the misconduct in that then outweighs it. What
18 you're saying is not even privilege in the first place.

19 MR. KIRCHER: Right. If you're going to accept
20 that there is a privilege here, then yes, I think we're in
21 the decision -- you know, it's predecisional and
22 deliberative realm. I mean, all the case law in the
23 deliberative process area has those two basic elements to
24 it. Now, it may well be that, again, if you're going to
25 accept the fact that -- the argument that there's a

1 privilege here, that some of these things that they did
2 may be predecisional and deliberative. I'm not -- I'm not
3 disputing that possibility. Of course --

4 THE COURT: So you're not saying, then, that the
5 decision the documents have to precede can only be a
6 formal policy decision? Are you -- I'm not sure what your
7 answer to my question just was, but . . .

8 MR. KIRCHER: Well, it's hard for me to talk
9 about specific documents or categories of documents, Your
10 Honor, given we know nothing to this date, two and a half
11 years after the subpoena was issued, we still have nothing
12 about what they have withheld.

13 THE COURT: I have questions for them.

14 MR. KIRCHER: Okay. I'm sure you do.

15 THE COURT: All right. So we're going to get to
16 that.

17 But my question to you is, is it your position
18 that if they are literally deciding internally about what
19 should we say to Congress, who should testify, what should
20 he say, what should we say to the press, what's the press
21 release going to say, who are we going to put on TV to
22 talk about this, are those decisions to which
23 deliberation -- about which deliberations could be
24 privileged?

25 MR. KIRCHER: Well, certainly -- I'm sorry.

1 Certainly I don't think that every single decision merits
2 protection under the deliberative process protection. I
3 don't think that's where the case is going. I think they
4 have to be policy-oriented kinds of decisions. I think
5 that's what the case law says. So, yeah, we're going to
6 shaft the committee today, yeah, I don't think that really
7 qualifies as a policy decision, if that's -- if that's
8 what you're asking me.

9 THE COURT: Well, I'm asking you where -- where
10 does this concept that it has to be a policy decision come
11 from as opposed to a decision about which people
12 deliberate internally?

13 MR. KIRCHER: Well, I think it's set forth -- I
14 cannot give you a case right off the top of my head, Your
15 Honor. We did cite a number of cases in our opening brief
16 when we thought we were dealing with the common-law
17 privilege. We gave a number of cases in our briefs which
18 talk about the predecisional and deliberative pieces of
19 that, and I would rely on the cases that we cited in that
20 part of our brief.

21 THE COURT: All right. I guess what concerns me
22 is just in the climate we're in where the parties are
23 polarized, and this may continue for some time, that --
24 how to respond to the other side's inquiries and to me,
25 inquiries -- something that there's going to be a lot of

1 internal discussion about. And the administration -- the
2 administration is saying we want people to be candid. We
3 want people to be honest. We want people to be frank. We
4 want them to spit out all the various scenarios. And if
5 everything -- if all you're talking about is how to
6 respond to Congress. If that's just not covered by the
7 deliberative process at all, could that chill people's
8 candor in saying, look, I think you should say this, I
9 think you should say that, if they think all of it's going
10 to end up on Capitol Hill?

11 I mean, is there some legitimacy to their
12 argument that some of this might actually be covered?

13 MR. KIRCHER: Maybe a smidgen, Your Honor, but
14 not much beyond that.

15 THE COURT: Smidgen.

16 MR. KIRCHER: Yeah, a smidgen. And the reason
17 is this: As I told you before, Congress is not
18 principally interested in doing what it's having to do
19 here. It's principally interested in getting the stuff it
20 needs to get about operations and programs. So the
21 scenario that they are painting presupposes an underlying
22 investigation. If we get the stuff, if the committees and
23 the Congress get the stuff that they want and that they
24 need, they have absolutely no reason to go back and ask
25 about how you did this. There is no --

1 THE COURT: Well, whether you get what you need
2 can be a subjective --

3 MR. KIRCHER: Granted. But I've also talked at
4 length in an earlier opinion about the structural
5 limitations on Congress's ability to do -- it cannot do
6 everything. It's got a two-year election cycle. It's
7 responsible to the voters. It's got limited resources.
8 It's got limited staff.

9 The notion that somehow we are going to turn
10 around every single time we do an underlying investigation
11 and then go back and subpoena the department or some other
12 aspect of the executive branch to produce their
13 information, you know, the records that relate to their
14 response is laughable. It's laughable.

15 THE COURT: One of the things you said to me is
16 they can't possibly assert this privilege on an omnibus
17 basis. Everything from February 4 forward. So let's say
18 I agree with you about that. They can't. But you then
19 said in your complaint I'm supposed to declare that they
20 can't do that and order them to produce them all. If I
21 can't declare them privileged on an omnibus basis, how can
22 I declare them to be not privileged and producible on a
23 blanket basis? Doesn't there have to be, before you can
24 get what you want, even if they are wrong, some sort of
25 individualized --

1 MR. KIRCHER: Well, in the ordinary case, the
2 answer to that would be yes. I don't think so here since
3 they haven't come forward with any justification on their
4 side of the scale other than a very, very generalized
5 confidentiality type of claim. That's it. That's all
6 they've got. That's all that they have come forward.

7 We've been at this for more than a year and a
8 half now, going on two years. And that's all that they
9 have come forward. We have laid out in considerable
10 detail why we think the stuff is important, why we are
11 asking for it, why -- the things that we could do if we
12 had, the possibility, the legislative possibilities, the
13 impeachment possibility if there was a senate-confirmed
14 individual who was directing the obstruction here. You
15 know, we have been very upfront, very clear about that,
16 and you've got that now.

17 On the other side of that, all you've got from
18 them is a very, very, very generalized We don't want to
19 turn this stuff over and it might chill us. And that's
20 it. And I think under those circumstances you don't have
21 to get into privilege logs and elaborate descriptions and
22 in-camera reviews and all that other stuff that sometimes
23 flows in this area. I don't think that you have to get
24 into that here given what you have before you in the
25 briefs as they are today.

1 THE COURT: Well, you seem to have acknowledged
2 a couple of questions ago that, yes, somewhere in the pile
3 there could be things that legitimately fall under the
4 deliberative process privilege. So before I order them,
5 contrary to the assertion of privilege made by the
6 President of the United States to give you every single
7 piece of paper, don't I have some obligation to give them
8 a chance to say Okay, well, we're withholding this for
9 this reason, we're withholding that for that reason, and
10 to hear from you because it's an ad hoc elastic flexible
11 balancing test as to why, with respect to these documents
12 as opposed to the group as a whole, which you've already
13 told me you don't even know what they are, why you're
14 entitled to them.

15 MR. KIRCHER: Yes, but they do, Your Honor, and
16 they've known since October 2011 when we issued the
17 subpoena and we are now in May of 2014, and they still
18 have yet to say -- to point to any specific documents that
19 raise the kinds of questions that you're raising. Not a
20 single document have they focused to in any specific way.
21 They've got the documents, and they've had them all of
22 this time and they have yet to say a word about those.

23 THE COURT: Right.

24 MR. KIRCHER: I think it's too late. Let me
25 just -- because I can add one more piece on the

1 presidential --

2 THE COURT: That's it? That's why I can't go
3 back to them and say you need to give me something more
4 particularized just because they've lost their chance?

5 MR. KIRCHER: That's why you should not go back
6 and let them --

7 THE COURT: All right.

8 MR. KIRCHER: -- have another chance. I'm not
9 telling you what you can and you cannot do.

10 THE COURT: Well --

11 MR. KIRCHER: That's why you should not do that.

12 THE COURT: In the *Miers* case there was some
13 issue about whether the Court could actually order the
14 government to produce a Vaughn index. And Judge Bates
15 said that even the plaintiffs had conceded there that
16 there was no law or statute that authorized the Court to
17 do that. Can I do that? Can I tell them we need an index
18 here?

19 MR. KIRCHER: Yes, of course, you can. I mean,
20 *Miers* did that. I mean, it didn't call it a privileged
21 log.

22 THE COURT: Right. I couldn't figure out the --

23 MR. KIRCHER: But it was for all intents and
24 privilege a privileged log. That's what *Miers* did.

25 Let me just back up for one question just to get

1 this off the table before it disappears. On this
2 presidential assertion point, factually they have not
3 established that the President actually asserted the
4 privilege.

5 THE COURT: But you have the letter from the
6 Department of Justice to the President saying
7 Mr. President, would you authorize us to assert executive
8 privilege? This is why we think it should be asserted.

9 And then you have a letter from Mr. Cole, which
10 I'm pretty sure says the President of the United States is
11 asserting the privilege. Am I not supposed to take that
12 at face value from the Deputy Attorney General of the
13 United States?

14 MR. KIRCHER: No, you're not, Your Honor.
15 Certainly context of cross motions for summary judgment.
16 They have the responsibility to -- that is the predicate
17 to their entire argument, that the President of the United
18 States made this assertion personally. That's a predicate
19 to their entire argument. It's not factually established.

20 The only things upon which they rely, if you
21 read their brief, the only things upon they relied to
22 establish that point is they cite to our amended
23 complaint, the introduction to our amended complaint where
24 we recite what the privilege letter says. The President's
25 assertion, we refer to that. Right? They deny that in

1 their answer. They deny -- they deny the introductory
2 paragraphs of our complaint in their answer. So that
3 hardly establishes that the President asserted as a matter
4 of fact.

5 Then they refer to Exhibit 21 to the Caster
6 declaration, which is the privilege letter. Caster
7 obviously could not testify -- Caster is a committee
8 staffer. Obviously he had no ability to say whether the
9 President asserted or not. All he was doing was saying
10 this is a true and correct copy of the letter that we
11 received on or about June 20. So it was nothing in the
12 Caster declaration that establishes that as a matter of
13 fact.

14 THE COURT: Well, in any case where there's a
15 privilege assertion, when the lawyer says my client
16 asserts this privilege, do we have to bring the client in
17 to swear --

18 MR. KIRCHER: No. I think they need to do at
19 the very least what was done in *Espy* where the White House
20 counsel filed an affidavit to say the President authorized
21 me to assert privilege. There was a --

22 THE COURT: But those were White House
23 documents. These are Department of Justice documents. So
24 why can't Mr. Cole, who is the Deputy Attorney General of
25 the United States overseeing the Department of Justice,

1 whose documents you're asking for, say the President
2 authorized me to assert this privilege?

3 MR. KIRCHER: Mr. Cole has not said that. There
4 is no affidavit establishing as a factual matter --

5 THE COURT: So he has to swear to the letter?

6 MR. KIRCHER: Yes. As a summary judgment
7 matter, yes, of course. Yes. They've got to put in
8 facts. And that is a material fact upon which their
9 entire argument rests, Your Honor. This was an issue in
10 *Espy*. It was also an issue in *Judicial Watch*, and it's an
11 issue here.

12 THE COURT: Well, let's say I conclude that
13 you're wrong about the general concept and the Attorney
14 General may, as a matter of general principle,
15 lawfully assert executive privilege over deliberative
16 documents when dealing -- when responding to a
17 congressional subpoena. So I'm not going to issue a
18 declaratory judgment that says it can't, and I'm not going
19 to order him to turn over them all since some of them may
20 be subject to that privilege.

21 But I also agree with you that he can't do it on
22 a wholesale basis without demonstrating that the
23 particular documents withheld satisfy the particular legal
24 requirements for the existence of the privilege, and that
25 I agree with you that the privilege is qualified. So I

1 can't enter a judgment for the defendant and rule that he
2 doesn't have to turn over anything because, even if they
3 are privileged, the privilege might be outweighed by your
4 need.

5 So if that's how I feel, that you're both right
6 and you're both wrong, what do I do? Do I deny your
7 motion for summary judgment and deny their motion for
8 summary judgment, and we just keep going and then I enter
9 some order requiring them to particularize? Do I enter a
10 judgment in your -- what's my ruling if that's how I think
11 this situation falls?

12 MR. KIRCHER: If that's where you're going, Your
13 Honor, I think your ruling is pretty much you enter an
14 order that says I've -- you know, I've reviewed the
15 motions and this is my finding about the existence of the
16 privilege, and therefore, there are further proceedings --
17 and you go where Judge Bates went in *Miers*, which is give
18 us a privilege log but don't call it a privilege log and
19 we'll start going document by document.

20 THE COURT: And so your motion essentially is
21 denied and their cross motion is denied?

22 MR. KIRCHER: Well, for all intents and
23 purposes.

24 THE COURT: All right. Now, I'm sure it came as
25 no surprise to you that I took you off your outline about

1 two minutes in and asked you a lot of questions, but you
2 also know that I'm going to give you the chance, if
3 there's something that you feel I haven't divined from
4 your briefs and from this morning's argument that you
5 wanted to say, you should say it.

6 MR. KIRCHER: Well, let me make clear that what
7 the committee's position is before I stand before the
8 Court today is that this is a common-law deliberative
9 process claim, and that's all it is. That's all it was
10 asserted in that June 20 privilege letter. They have
11 abandoned that and we're entitled to judgment.

12 This new thing that they have brought up is 20,
13 25 months too late. It's out of time, and you should not
14 even consider it on that basis alone, that it was not
15 timely.

16 THE COURT: Okay. Can you explain to me why you
17 keep telling me that they've abandoned their deliberative
18 process claim? I'm not sure I understand that
19 characterization.

20 MR. KIRCHER: The common-law part of that.
21 Because that's what they say. They say we're not
22 defending it. They say this is not about that; this is
23 about this other thing. But there's every reason to -- to
24 construe that in light of *Espy*, there's every reason to
25 construe that --

1 THE COURT: Well, all they are saying is it's
2 not common law in the way you're describing it. They are
3 saying it's under the umbrella of executive privilege.
4 It's not something else. It's a form of executive
5 privilege.

6 They haven't abandoned the claim that this is
7 covered by something called the deliberative process
8 privilege under the umbrella of the President of the
9 executive privilege that grew up as a matter of common law
10 with some constitutional underpinnings possibly.

11 MR. KIRCHER: Which they have not identified.

12 THE COURT: That question has been left open,
13 never been decided. And was ultimately embodied in the
14 FOIA statute which doesn't apply here. I mean, aren't we
15 all talking about the same thing, just trying to
16 characterize it differently?

17 MR. KIRCHER: Well, when I say "abandoned," I
18 mean we briefed up that -- we briefed up that issue
19 because that's what we understood they were claiming, and
20 then didn't respond to it. And they went off in a
21 different direction. That seems to me is fairly
22 characterized under abandonment under the case law of this
23 circuit, and we ought to be entitled to judgment on that.

24 And then this other thing that they've sort of
25 come up with -- I mean, remember how this thing has

1 proceeded, Your Honor, is on June 25 after the privilege
2 letter was issued, we wrote a letter. The committee wrote
3 a letter to the White House to ask for clarification of
4 the privilege assertion. That letter is in the -- is an
5 attachment to the complaint. And it explained the way we
6 understand the law, the way the committee understands the
7 law in the District of Columbia to be, that you've got the
8 presidential communication's privilege over here and
9 you've got the deliberative process common-law privilege
10 over here. There was no response to that.

11 THE COURT: All right. Well, you're the one
12 that keeps saying one is over here and one is over here.
13 All the cases say they both are part of the executive
14 privilege, and that's the only thing that I hear the two
15 of you saying that's different. And I think the law
16 clearly supports that they are both forms of executive
17 privilege.

18 We have, in this case at your request, I asked
19 them to tell us are we talking about presidential
20 communications. So you're absolutely right. That more
21 constitutionally based, more serious, higher standard
22 needed to breach it privilege, form of the executive
23 privilege. It's not involved in this case. There's no
24 dispute about that.

25 MR. KIRCHER: Right.

1 THE COURT: But nobody has stopped saying that
2 the deliberative process privilege is involved in this
3 case. We're still talking about what we've been talking
4 about since they wrote the letter, as far as I could tell.

5 MR. KIRCHER: Well, I disagree obviously.

6 THE COURT: All right. All right. Okay. So
7 that's what you mean by abandoned.

8 What else do you want to tell me that you didn't
9 get to tell me?

10 MR. KIRCHER: Well, let me check my notes real
11 quick.

12 THE COURT: Please do. Take your time.

13 MR. KIRCHER: If I could just briefly go through
14 the rationales that they have advanced to justify this
15 connection to the Constitution here. I talked about the
16 presidential assertion piece of it, which obviously the
17 President himself doesn't get to turn something into a
18 constitutional privilege just by asserting it.

19 Then they say that their response to a
20 congressional subpoena is itself inherently
21 constitutional, which obviously it is not. The fact that
22 Congress has Article I authority to seek the kind of
23 information that's sought here doesn't convert their
24 response to it into something that is constitutionally
25 based.

1 The adversary relationship notion, that somehow
2 because there was, you know, there was some political
3 friction in this and some sparks flying in this case, as
4 there sometimes are but frequently are not, that somehow
5 that makes this a constitutionally based privilege.

6 I've talked about their generic confidentiality
7 concerns and how those are misplaced. They talk about the
8 distorting of the negotiations process. My concern with
9 that rationale is once -- if they have this privilege,
10 they will assert it and we will be back -- we'll actually
11 have the opposite impact, which is the recognition of the
12 privilege will distort the negotiations process. If they
13 have the privilege, it will get asserted, and we will not
14 get things and we will have to come back here. That is --
15 that is, in fact, what will be the consequence of the
16 recognition here.

17 And their last justification has to do with
18 general separation of powers concerns, about the Court
19 putting its finger on one side of the scale or the other.
20 The reality is the Court -- whatever the Court does here
21 it's going to put -- it's going to, you know -- it's going
22 to unbalance things a little bit. In light of the
23 fundamental and critical nature of Congress's Article I
24 responsibility to do oversight and how critical that is to
25 the very foundation of our government, if you're going to

1 put your finger on one side of the scale, you ought to put
2 it on our side of the scale and find that this privilege
3 doesn't exist.

4 Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 Let me hear from the Department of Justice.

7 MS. HARTNETT: Good morning, Your Honor. We
8 agree the proper question before the Court today is the
9 scope of the constitutionally based executive privilege;
10 and as Your Honor has identified, the documents here that
11 are at issue are ones that were developed in the course of
12 the department's deliberative process regarding its
13 response to congressional oversight, specifically the
14 operation of Fast and Furious and related media inquiries.
15 I just did want to make clear that not all the
16 documents -- and we've tried to do that both in our brief
17 and our declaration that describes the documents by
18 category -- that not every document is itself
19 deliberative, but they all are collectively part of the
20 department's deliberative process in response to
21 Congress --

22 THE COURT: How can you possibly assert
23 privilege over documents that you just told me aren't
24 deliberative, if that is one of the two elements of the
25 privilege?

1 MS. HARTNETT: That's a good question, Your
2 Honor, and I would like to explain that. The way that the
3 department has understood this aspect of the
4 constitutionally based executive privilege was -- is that
5 it covers the -- essentially the department's work file on
6 a matter when it's responding to Congress. It's somewhat
7 akin to the Attorney General work product privilege where
8 we basically have the work file. It's not physically one
9 file for the entire department, but each person that is
10 working on the oversight investigation of course has
11 deliberative materials of the type that you're describing.
12 Should we --

13 THE COURT: What is the case law that creates a
14 constitutionally based work file privilege that covers
15 every single piece of paper in the work file --

16 MS. HARTNETT: There is --

17 THE COURT: -- whether it's deliberative or not?

18 MS. HARTNETT: Your Honor, there is no case law
19 supporting the -- directly recognizing this work product
20 privilege in the context of a congressional investigation
21 of the executive branch because there are so few cases
22 about the Congress and the executive branch having a
23 dispute over documents. The cases that exist largely
24 concern presidential communications, and as Your Honor
25 pointed out, there is a more robust case law generally

1 about the deliberative process from which this privilege
2 comes.

3 THE COURT: Well, neither the presidential
4 communications privilege or the deliberative process
5 privilege has an entire work file -- is there any case
6 anywhere that talks about that, even the presidential
7 communications cases, the *Espy*, they said all right, now,
8 yes, you have to turn them over, but you have to turn them
9 over is to the court. You have to give us an
10 individualized explanation.

11 I don't know what you're talking about.

12 MS. HARTNETT: Your Honor, this is something
13 that's come up more often recently where Congress has been
14 seeking not only the underlying material about the vision
15 but actually the work file or the materials about how we
16 respond to Congress. And this is something that, Your
17 Honor, correctly identified as not just happening in this
18 case but is actually becoming more routinely requested.

19 So I would just make the point that this is just
20 not an issue that was really teed up for the courts in the
21 past. It was not the subject of extensive inquiry. There
22 were two past executive privileges assertions that were
23 based on a similar theory of Congress response work
24 product, and that was the administrations of both parties,
25 1996. There was an assertion over some congressional

1 response work product under -- and then following that
2 there was an assertion in 2007 that was the subject of
3 part of the Myers case with the U.S. Attorney Generas
4 matter.

5 And the theory there was that even in addition
6 to the deliberative process and more well established in
7 the case law type of privilege that it was necessary to
8 protect the work file because that's the sphere of
9 confidentiality that lets each side meet each other as
10 equals in the oversight process.

11 THE COURT: But there's no Attorney Genera work
12 product legal common law concept that I'm aware of, no
13 deliberative process under FOIA that I'm aware of that
14 says that if it made it into the file, but it itself
15 contains no deliberation, that it's covered. Where could
16 that theory possibly come from?

17 That's like saying everything in Attorney
18 Genera's files is covered by the attorney-client privilege
19 or Attorney Genera work product, even if it has no
20 communications in it and no thoughts or impressions in it.
21 No Court would accept that.

22 MS. HARTNETT: Your Honor, I don't think we're
23 going that broad. I think the point is that it's material
24 protected -- Attorney Genera work product would be
25 material prepared at the direction of Attorney Genera in

1 anticipation of litigation. And so to the extent that
2 that can include factual material or mental impressions
3 that are not themselves deliberative in the sense of
4 leading to a decision but that are within the scope of
5 preparing a case for trial or an anticipated case for
6 trial, and that's the analogy that the executive branch
7 has drawn in its public explanation of asserting this
8 privilege twice before, and in this case. And we believe
9 that's an important, separate but related component to the
10 deliberative process, particularly here where you have the
11 two branches. It's not a general work file privilege for
12 any matter that the department might be working on.

13 It's the work file when we are actually meeting
14 the Congress in the context of Congress seeking
15 information from us and trying to preserve a sphere of
16 allowing that investigation, regardless of whether it's
17 about a particular deliberation leading to a particular
18 decision, but the broader -- the broader scope of our
19 confidential deliberations allowing us to meet the other
20 branch as an equal.

21 And what -- even some of the information under
22 that privilege, again, would be, example, meeting times or
23 how -- who is part of the team working on responding to
24 guess, all that type of detail. Were that to be regularly
25 available to Congress in an investigation or essentially

1 an investigation into the investigation, that would chill
2 the ability of the executive branch to, you know, with
3 openness and candor discuss amongst itself how to respond
4 and it would always be this specter of having your work
5 file on the matter that's being investigated actually
6 itself be subject to congressional oversight.

7 In the past, that's been able to be resolved
8 either because the material was not sought or we would be
9 able to accommodate and negotiate with the branch and
10 focus the inquiry where it should be, on the underlying
11 oversight matter. And so we submit that as supported by
12 these past assertions of privilege, the same theory that
13 applies to both deliberative process does make sense to
14 recognize the work product privilege in this limited
15 context of us engaging with Congress in oversight.

16 THE COURT: All right. Well, I understood your
17 brief to be saying we're asserting the deliberative
18 process privilege, and under *Espy*, not just the FOIA
19 casings, the deliberative process form of the executive
20 privilege has elements. One element is that the document
21 be predecisional, and the second is that it be
22 deliberative.

23 Are you saying that's not the test? You can --
24 there's more that gets swept under this privilege than
25 things that meet those two fundamental elements of the

1 privilege that is being asserted based on that case that
2 you cited to me? We're not using that test anymore?

3 MS. HARTNETT: That test, that is the
4 appropriate test for a deliberative process.

5 THE COURT: Okay. So are you telling me that
6 everything that you've withheld from February 4 forward is
7 both predecisional and deliberative? You've already told
8 me some of it isn't.

9 MS. HARTNETT: That's correct, Your Honor.

10 THE COURT: Okay. So why don't you have to turn
11 it over? How could a date be the defining determining
12 factor as to whether things are predecisional and
13 deliberative? What does the date have to do with whether
14 they are deliberative or not?

15 MS. HARTNETT: Your Honor, I think it's the
16 same. Just going back to at least the Nixon case, the
17 Supreme Court case where it was about presidential
18 communications in that case, but the Court explained the
19 theory of what -- why there is an executive privilege.
20 And that referred to the notion of, you know, that
21 actually recognized the element of deliberative process,
22 that those who expect kind of public disclosure of all of
23 their deliberations will be less candid.

24 The same -- I would submit, and this is the
25 rationale that's been provided in the two privilege

1 assertions before this case that were based on this work
2 product rationale. In addition to the deliberative
3 process documents that would be obviously part of the work
4 file is that it would be chilling and disruptive to the
5 executive branch's ability to independently respond to
6 congressional oversight if it had to turn over every
7 document in its work file on the matter.

8 Now, it's a good question of why they would even
9 need those documents.

10 THE COURT: Does that mean they shouldn't have
11 to turn over any document? My question is, are you
12 telling me that there's some test that applies other than
13 the two elements of predecisional and deliberative? Do
14 the -- are you saying that you can withhold documents even
15 if they don't meet that test?

16 MS. HARTNETT: Yes, Your Honor. We believe we
17 can, under the theory of executive privilege articulated
18 here and in those past examples. Again, I would agree
19 that it's unclear why they would even want that type of
20 material, but that is within the scope of what they were
21 seeking from us at the time of the executive privilege
22 assertion which unfortunately, you know, necessitated a
23 privilege assertion to protect that work file. It's very
24 possible that they don't want forwards of e-mails that
25 have to talk about news reports or other documents that

1 may be part of the person's work file who is working on
2 the oversight matter. But again, when the -- when it came
3 time to -- you know, moving toward contempt, there was a
4 question of whether this material was properly protected
5 under the executive privilege precedent that the executive
6 branch turns to when it determines whether to make an
7 assertion of privilege.

8 And here, building on those past assertions,
9 which themselves built on case law such as Nixon,
10 recognizing the need for that sphere of confidentiality,
11 that's why the assertion was made here.

12 THE COURT: But the need for confidentiality,
13 even recognizing Nixon, and all of the communications
14 cases that followed, No. 1, was qualified. So ultimately
15 the Court gets to balance. And No. 2, was individualized.
16 If *Espy* required an individualized document-by-document
17 procedure to be followed when dealing with what I think
18 you would agree to me are even more confidential and even
19 more constitutionally fraught materials, which is the
20 communications, how could a lesser process be required
21 now? How can you just say my file, sorry, no?

22 MS. HARTNETT: Well, Your Honor, ideally that
23 wouldn't be what we would say. We would have a continued
24 dialogue with the -- with the legislative branch.

25 THE COURT: But that's what you're asking me to

1 do.

2 MS. HARTNETT: Well, right. Because we're here
3 now. So we're at the process where we have been unable to
4 accommodate that away and make clear that they don't
5 actually need whatever would be covered in the edges of
6 the work file or whatever. Because they actually -- we
7 were at that point of them seeking to hold the Attorney
8 General in contempt and us having to decide whether that
9 material is properly subject to a claim of privilege.

10 Ordinarily we would not want to be at this
11 point, but be able to find an accommodated resolution.
12 But --

13 THE COURT: Well, both of you are pointing me to
14 what happened in the interim. And I don't think the time
15 period that went by is compelling to me because everybody
16 has told me that process is a process you, Judge, really
17 need to stay out of. And I agree that. So I'm not going
18 to sit here or we'll never finish this litigation and
19 assess whether every single negotiating position was
20 appropriate. You don't even agree as to what the
21 negotiating positions are.

22 The point is we're here now and your position is
23 still, if it's after February 4, it's privileged. The
24 privilege I'm relying on, while it derives, it is a form
25 of executive privilege. It's something called the

1 deliberative process privilege. It has elements. One is
2 that it's predecisional. The second is that it's
3 deliberative.

4 But you're also telling me I don't actually have
5 to demonstrate to you that any of the documents in the
6 file are actually predecisional or deliberative.

7 MS. HARTNETT: If I may, I don't -- I think we
8 agree that we should -- we should tell the Court -- make
9 clear to the Court that the documents that we're
10 withholding under the claim of executive privilege do
11 match up to the privilege that we're asserting. I think
12 the one place where we may, and I'm hopefully trying to
13 communicate it, is that we don't believe that the
14 deliberative process rationale that you articulated alone,
15 that was not solely the basis for the constitutionally
16 based privilege claim.

17 That claim derived from the separation of powers
18 and the need to protect the independent functioning of the
19 executive branch, particularly in this context here where
20 we're responding to Congress directly as they seek to
21 conduct oversight. I don't know if this will helpful and
22 I certainly don't mean to be --

23 THE COURT: Well, what -- what case embraces
24 deliberative process materials, deliberative materials
25 under that separation of power's theory that the case law

1 seems to just step away from the question. It says that
2 the whole idea of candor has a constitutional function,
3 and I think -- but they are very unclear and murky about
4 the extent to which the Constitution covers these
5 materials. But to the extent it does, what it's trying to
6 cover is candor in deliberations.

7 So don't the materials have to be deliberative
8 themselves for this privilege to apply?

9 MS. HARTNETT: No, Your Honor. And I think
10 maybe one helpful example, again, because there is limited
11 judicial precedent on the question of the Congress trying
12 to seek our documents directly in Court, and specifically
13 this type of document, there is not a case about these
14 type of documents that went to a merit's decision.

15 But, for example, we point in our brief to the
16 1954 assertion by President Eisenhower. And that was in
17 the context of him issuing a directive across the
18 executive branch not to provide materials that were
19 internal agency materials to the -- in the context of the
20 Army McCarthy hearings. There was not a case that didn't
21 go generate a case that then validated that privilege, but
22 there is a broad -- that's a broad assertion and one
23 that's in our briefs described. And I would commend that
24 to the Court's attention. Because it does show that the
25 privileged assertions in the past, ones that have been few

1 and far between, but have happened, and there was
2 specifically about the deliberative process was not a
3 neatly tied to the definition of deliberative process in
4 the common law but was a broader assertion in order to
5 preserve the executive independence in that -- in the
6 area.

7 THE COURT: Well, parties can assert things.
8 And if the other side says I'm going to respect that, that
9 doesn't mean it was legally required. It just means that
10 that's the way it worked out.

11 People are less respectful of each other's
12 positions these days when it comes to asking for
13 documents. And so now you're asking me, a third party,
14 the third branch, to get in the middle. And so don't I
15 need more than, well, the executive has done this before
16 as a legal basis to tell them you can't have it? That's
17 what you're asking me to tell them. You can't have it.

18 Don't I need more than, well, in the past the
19 executive has withheld this and they weren't upset?

20 MS. HARTNETT: Your Honor, I think we've tried
21 to cite whatever -- just to be clear, of course, we're
22 not -- we were coming here to seek your endorsement of the
23 privilege in this case. We believe that these have been
24 matters --

25 THE COURT: Okay. You moved for summary

1 judgment.

2 MS. HARTNETT: Well, only after the case was
3 brought against us. I mean, we have to try to find some
4 way to end the case. And so we believe that judgment in
5 the context of the Court having assumed jurisdiction over
6 the legal question at issue, we did move for judgment.

7 But I guess my broader point is that we are not
8 trying to seek to gain something from this lawsuit,
9 some -- you know, something that we didn't may have
10 before. We, as we've explained to the Court, believe that
11 the accommodation and negotiation process generally works.
12 And, again, since Watergate there have been only 15
13 assertions of privilege, indicating that there's not a
14 rampant problem with an overassertion of the executive
15 privilege.

16 If I may, just back to the work product notion.
17 And I appreciate the deliberative process is a core
18 important privilege and one that will protect a lot of the
19 executive's interests, it might be helpful to think from
20 the judicial perspective of having your file or a clerk's
21 work in a matter where -- again, I'm not suggesting at all
22 that that would be subject to some sort of judicial
23 oversight or disclosure, but just the idea of having to
24 produce not only the core part of the file that talks
25 about the opinions in the cases and the wrangling that

1 goes on as you work through a case, but also just the
2 edges of when you were going to talk to your clerks about
3 the case or what someone else may have said about it,
4 things that are not core to the deliberations but are part
5 of the independence that you enjoy being a judge.

6 And I think the point of what that we're trying
7 to make here is it's a similar chill that would happen if
8 we knew that in every investigation -- because, again,
9 this would be something that would be outside of privilege
10 and therefore not even subject to a showing of need that
11 they could regularly ask for and receive without any
12 showing of need, the material that we collect as we have
13 tried to respond to them as a co-equal. And so that's the
14 point we are trying to --

15 THE COURT: Was that distinguishable from a case
16 where we know that, when you responded to them, you said
17 it didn't happen? The guns did not walk. The United
18 States does not conduct itself that way. That turned out
19 to be wrong.

20 And they want to know why such a blanket
21 statement would be made that was not true. And you've
22 said, okay, well, we'll give you everything internal that
23 led to the creation of that statement. We're willing to
24 give it to you.

25 So clearly if you can do that, why would your

1 internal conversations about afterwards when you said,
2 oops, we need to fix that, how are we going to fix that,
3 what are we going to say now, why is that going to inhibit
4 candor in deliberations and impair the executive's ability
5 to respond effectively to oversight more than giving the
6 documents that happened before? And why doesn't the fact
7 that there is a trigger here, this misstatement, change
8 the situation?

9 MS. HARTNETT: Your Honor, that's -- I think
10 that the point is that the same chill in the institutional
11 interests would be at interest for all of those documents,
12 both the pre-February 4 and post, and that's why they all,
13 in our view, you know, were properly subject -- could be
14 subject to a congressional response work product. That's
15 what those documents are.

16 I think as the department explained in the
17 December 2 letter when they conveyed the over 1300 pages
18 of documents about the creation of the February 4 letter,
19 that they made an exception to their long-standing
20 practice of not providing their work product in responding
21 to Congress in order to help explain and show how that
22 misstatement in that letter came to be.

23 And so that was seen as an accommodation, and
24 one that I think shows the responsible functioning of the
25 executive branch in order to meet a demonstrated -- a need

1 that was specifically identified by the Congress to
2 understand how did that -- or by the committee about how
3 to understand why that misstatement came to be.

4 So my point is that at that level the
5 confidentiality is at some level threatened or -- the
6 candor in the deliberations are affected any time you turn
7 over some executive branch documents. But here a decision
8 was made by the department and publically explained that
9 that was -- it was important to help the committee
10 understand how that misstatement came to be.

11 But we would submit that there -- it doesn't
12 open the door. And that's kind of how the oversight
13 process works generally, is to the extent you make an
14 accommodation for one thing where there's been a specific
15 explanation why they need it and the parties have met and
16 decided to accommodate, that to the extent that that would
17 then open the door for any additional work product that we
18 generated would create a very bad incentive at that point
19 to make an accommodation.

20 And here we would submit the department did the
21 right thing by providing that material to the committee to
22 help it understand that, even though it did have some
23 confidentiality costs for the people that were identified
24 in the documents produced.

25 THE COURT: Well, all right. Well, in your

1 introduction to your initial brief, you stated that the
2 nature of the nature of the department's objection to
3 production is that deliberative communications may
4 implicate the agency's internal decision-making processes,
5 foreign policy, and national security concerns.

6 Just want to make clear, there's no claim here
7 that any particular documents being withheld implicate
8 foreign policy or national security concerns. Is that
9 right --

10 MS. HARTNETT: I'd have to look specifically
11 because there's a couple of -- one of our categories of
12 documents that were like less central to the actual
13 assertion was that it had some -- there was some
14 discussions. I'm looking at the Colburn declaration
15 involving foreign relations issues dealing with the
16 government of Mexico. Those are more of a --

17 THE COURT: But weren't those carved out? They
18 are not even part of what they are talking about --

19 MS. HARTNETT: They were -- there are some that
20 became -- due to the fact that they were connected to the
21 congressional response, a few documents, I believe, that
22 the declaration explains of that nature were there. But
23 that wasn't the basis for the privilege assertion. The
24 privilege assertion's basis was the need to protect the --
25 our response to Congress and our response to the documents

1 generated in our deliberations about how to respond to
2 Congress.

3 THE COURT: All right. Well, we've talked and
4 talked and talked, I think, about whether these documents
5 are deliberative or not and whether that matters. I think
6 it clearly matters. And that *Espy* makes me look at that
7 and makes me look at it on, not a wholesale basis, but an
8 individualized basis. I don't see how we can get around
9 that even if *Espy* says I have to do that even for
10 communications.

11 There -- wasn't one problem with the District
12 Court's decision that led to the reversion on *Espy* the
13 fact that the District Court ruled on the documents as an
14 unit and didn't make individualized decisions? Wasn't
15 that one of the things they were upset about?

16 MR. KIRCHER: Well, Your Honor --

17 THE COURT: Why they said we can't even give him
18 any difference at all because he didn't do anything? I
19 don't want an opinion like that.

20 MS. HARTNETT: No. No. Understandably, Your
21 Honor, but I think just one key point on *Espy*, just to the
22 extent that I know you've referred to the presidential
23 communications privilege as sort of being on the hot top
24 of the hierarchy in this deliberative process privilege
25 being possibly below that. From our conception of it is

1 that it is one constitutional executive privilege when we
2 assert it as against Congress, and therefore, to us they
3 are both in the same category.

4 In other words, the proper way to concede the
5 privilege is that we would get the way that the privilege
6 would attach to once the assertion was made. And so it
7 doesn't matter -- the rationale that supported the
8 constitutional claim is less important than the fact that
9 it was an assertion of privilege made by the President
10 with respect to congress. And I think that's -- we
11 just -- I wanted to make that point clear.

12 THE COURT: So in your view the showing that has
13 that outweigh it is the senate collect committee's
14 showing?

15 MS. HARTNETT: Correct. Yes.

16 THE COURT: But all the cases you rely on for
17 that proposition are communications privilege questions
18 that talk about national security and the President's
19 ability to get the best advice from his aides. How --
20 there's no case that equates those to an *Espy*. Certainly
21 seems to set out different tests for the two.

22 Was *Espy* wrong?

23 MS. HARTNETT: Not at all. I mean, no. That's
24 not our submission at all. I think *Espy* is helpful on two
25 points in this respect.

1 First, early in the opinion, it does note that
2 assertions against congress -- they were discussing kind
3 of the historical assertion of privilege in describing the
4 various elements. They said over time against Congress,
5 and this is a quote from *Espy* at 739, were most often
6 essentially assertions of the deliberative process
7 privilege. So I think *Espy* itself was recognizing that
8 there was that history of a different type of assertion.

9 And then the most important part of the *Espy*, I
10 believe, is where it does state expressly that the case
11 should not be read as in any way affecting the scope and
12 the privilege in the congressional executive context. And
13 I think at first you might think which way does it push
14 you, I guess is the question.

15 The question is there is an assertion of whether
16 the privilege should allow information not to be part of
17 the criminal justice process where you have an individual
18 person there, somebody submitted subject to a grand jury
19 investigation from having that -- and the idea of somehow
20 comprising the criminal justice process by withholding
21 information presented distinct concerns that the Court
22 discussed in *Espy*; whereas I think --

23 THE COURT: Right. So that might mean a greater
24 need for disclosure in *Espy*. On the other hand, there's
25 not a constitutional imperative on the other side of *Espy*.

1 So the committee would say no, the need is greater for us
2 because we're talking about a constitutional function
3 versus a constitutional function.

4 So -- but let's assume there's constitutional
5 underpinnings to what you're doing, and the committee is
6 doing, and there's also constitutional underpinnings to
7 the notion that the executive is entitled to candor in its
8 deliberations. The question is then, what test do I have
9 to apply? And doesn't *Espy* suggest if what you're talking
10 about is the deliberations within an agency, as opposed to
11 within the White House, you look at the test for
12 deliberative process. And then there's a very flexible
13 ad hoc balancing District Court. You figure out what the
14 test is test to be applied.

15 MS. HARTNETT: I think that you're right. There
16 is not a lot of case law on this point. Because, again,
17 there's just so few cases that have had the executive and
18 the Congress going, you know, head-to-head in the Court on
19 this question. Senate Select is the one that has kind of
20 actually reached a decision. You have other materials at
21 issue with AT&T. That was national security information,
22 and you have a couple other cases that implicated
23 different information.

24 I guess my point is that to the extent this is a
25 constitutionally based executive privilege, not a common

1 law assertion. And the reason why the Court --

2 THE COURT: Well, don't all the cases -- I don't
3 think they go as far as the committee says to rule out any
4 constitutional basis for the deliberative process
5 privilege. But don't they say that it's weaker? Don't
6 they quote Law Review articles that say it's not the same,
7 and say, well, we're not going that far, but this has been
8 said. I mean, don't they suggest that there are tiers
9 here? T-i-e-r-s.

10 MS. HARTNETT: Yes. Both probably.

11 And I think that Nixon really is instructive
12 here, Your Honor, because that was about tapes and about
13 the presidential communications. But the principle that
14 was recognized in that case by the Supreme Court was about
15 those who expect public dissemination of their remarks may
16 well temper candor. It's the typical deliberative process
17 rationale.

18 And so I don't think not only has it not been
19 ruled out that deliberative process is a equally weighty
20 component of executive privilege of presidential
21 communications when it's being asserted against Congress
22 for all the separation of power's reasons we tried to
23 describe. I think that that case actually supports the
24 assertion here.

25 And again, Nixon itself had a footnote

1 distinguishing the Congressional context. Not --
2 remember, both in Nixon and in -- you have the actual --
3 in an Espy you have the information being subject to some
4 disclosure. And so I think the point there being in both
5 cases that the criminal process need is one where you may
6 be able to allow the disclosure that wouldn't actually
7 attach in a congressional dispute with the executive.

8 So I do think that -- again, you can't -- you
9 don't want to overread the cases, and I appreciate that,
10 but on the other hand I think we gleaned from those cases
11 that the point is that we have a stronger basis for
12 withholding when we are trying to meet our political
13 branch coequal counterpart.

14 And, again, particularly here in the context of
15 them trying to figure out how are we responding to what
16 they are trying to figure out, which becomes even one step
17 removed. I mean, that really would start to compromise
18 our ability to function independently and feel like we
19 have a separate existence and one that allows us to meet
20 them as an equal branch.

21 THE COURT: Well, if we're going to apply the
22 privilege, we've talked about the deliberative element.
23 The other element is that the documents be predecisional.

24 What is the decision that these documents
25 preceded?

1 MS. HARTNETT: I think you -- the discussion
2 earlier kind of suggested that there be some restriction
3 to a policy decision. I don't think that's supported by
4 the case law. It's certainly not the scope of the
5 privilege that we described here. As Your Honor noted,
6 there would be many decisions made throughout the entire
7 process of figuring out how to respond to congressional
8 oversight, including what witness to send up, you know,
9 how to write a letter, you know, various -- you know,
10 any -- any number of decisions come up throughout a
11 department's response to congressional oversight. And so
12 certainly those decisions and documents preceding those
13 decisions would be covered by the assertion of the
14 privilege.

15 And then more broadly, and I agree that it's a
16 more categorical sense of the work file, but it's in each
17 of the pieces, if you take them out may not themselves
18 reveal a deliberation. Although, as I also pointed out,
19 some of them that may seem innocuous would. For example,
20 how long did it take someone to open an email? That could
21 be on a read receipt. Who is on the distribution line for
22 a certain letter? Some things that may seem less
23 deliberative in nature, but that would give an overall
24 picture to the committee of how we conducted ourselves and
25 how we decided to strategize and organize ourselves in

1 response to oversight, again, not particularly tied to a
2 particular situation but in the aggregate would reveal and
3 chill our deliberative process were they have ready access
4 to that. And that's --

5 THE COURT: Are we in a different world?
6 Haven't you agreed that how you responded to their
7 oversight in this case is a legitimate subject of inquiry
8 for them?

9 MS. HARTNETT: I think what we -- we certainly
10 said was that the misstatement that was made in the
11 December 2 letter raised a legitimate concern for them
12 to -- and I don't want to -- I don't want to go beyond
13 what was said in the December 2 letter, but we -- yes,
14 that we noted that because we had had an inaccurate letter
15 that we believed that it was appropriate to provide them
16 with documents explaining that letter.

17 THE COURT: Right. And it's a significant
18 inaccuracy made by a very high official about a very
19 important matter.

20 MS. HARTNETT: Yes.

21 THE COURT: So everybody agrees that they have
22 the right to say how did that happen. And if you agree
23 that they have the right to say how did that happen,
24 how -- but then you say everything after that happened is
25 going in our work file, how can they do their job that you

1 just said was a legitimate job that they are allowed to
2 do?

3 MS. HARTNETT: Your Honor, I think we think
4 they've done their job. Again, we're here before the
5 Court, and the Court now has that under advisement. And
6 to the extent -- and this does get a little bit into the
7 need balancing that Your Honor recognized that it would be
8 an uncomfortable place for the Court to be in when
9 you're --

10 THE COURT: But inevitable.

11 MS. HARTNETT: I mean, and certainly only
12 once -- I mean, Senate Select was the only case where you
13 had a Court at the end of the day actually doing the need
14 balancing in the context of the two political branches
15 going head to head. That was the only one. And there it
16 was, not to minimize the task that was before the Court
17 there, but that was a question of whether the second copy
18 of the tapes was needed because Congress already had one.

19 And so at some level, even though, again there
20 is an institutional question about how the Court balancing
21 those needs makes a difference, but there it also did
22 not -- it would not emmesh the Court potentially in the
23 way that this would, which is that they say they need
24 more. We say that they already have enough to satisfy
25 their obstruction investigation. And to the extent that

1 they have --

2 THE COURT: Were there any post-February 4
3 materials presented? I understood, I believe from the
4 letter to the President, I believe that's where I got
5 that. It was a statement that the President was told that
6 how the facts unfolded and were discovered to have been
7 false, even though that was post-February 4, that that's
8 been produced. Is that correct?

9 MS. HARTNETT: I think with respect to the
10 post-February 4 documents that have been produced are
11 largely those that are related to the IG report. So there
12 are over 300 documents that were produced in conjunction
13 with our -- the release of the IG report in a highly
14 unredacted form. And I think to provide further public
15 explanation and to the committee about what happened, and
16 so there would be post-February 4 documents in those.

17 THE COURT: The IG report refers to exhibits
18 that aren't publically available with the IG report. Did
19 they get the exhibits to the IG report?

20 MS. HARTNETT: We produced -- I can clarify this
21 if needed, but we produced 300 pages of documents cited in
22 the IG report. So they have those.

23 THE COURT: Are those all the exhibits cited in
24 the IG report? Some of the exhibits cited? If you gave
25 them the IG report, did they get all the documents the IG

1 looked at in reaching his conclusions?

2 MS. HARTNETT: No, they did not get all the
3 documents that the IG looked at. But what's important is
4 that to the extent there's some additional need that
5 they -- first of all, there is a question of whether the
6 need balancing should even be before the Court now. And I
7 think what we would submit -- that they haven't really
8 made or tried to make the Senate Select showing, and so
9 that would be one way to kind of resolve this after a
10 finding of privilege without having to get into the need.

11 Another way would be to make a ruling on the
12 legal question that was kind of the crux of what brought
13 us here, which was whether the privilege could extend
14 beyond presidential communications, and then send the
15 parties back to mediation where we have been to some
16 extent over the past several months.

17 THE COURT: You can go to mediation any time you
18 want. You just call my chambers and say we want to go
19 back to mediation. I will order you back to mediation.
20 Please do that before I write an opinion. We've got other
21 cases that are ready to go that I would love to focus on.

22 But let me take you there. Because, I think --
23 and I haven't decided this case, but I think you can tell
24 from my questions to both sides that I'm pretty confident
25 that the law recognizes a deliberative process privilege

1 for intraagency deliberations that is a form of the
2 executive privilege that has some constitutional
3 implications and underpinnings, even if they are less
4 compelling than those attached to presidential
5 communications. So the Attorney General -- the President
6 and the Attorney General may, I believe, I'm leaning to
7 determine that he may assert executive privilege over
8 deliberative documents in response to a congressional
9 subpoena.

10 But for that privilege to withstand a test
11 that's been brought to this Court, it cannot be a blanket
12 omnibus this is in my file privilege, but the individual
13 materials have to, in fact, meet the elements of the
14 privilege. The privilege does not apply to a box. It
15 applies to the materials in the box.

16 So you're right that the privilege exists. He's
17 right that you can't say anything from February 4
18 thereafter and that's all, Judge, we don't have to do
19 anymore. It must be demonstrated that the individual
20 documents contain deliberative matter.

21 That has to be determined before balancing, but
22 if I determine that they are -- that any of them are
23 privileged, because you've made the showing that I think
24 you have to make, that doesn't mean they win. It's a
25 qualified privilege, and then there's a balancing test

1 that needs to be applied. I think it is probably the *Espy*
2 test and not the Senate Select committee test, but there's
3 a balancing in any event that has to be applied.

4 So if that's what I think, that you're right
5 that some documents are privileged, that the committee is
6 right that this assertion of privilege is inadequate to
7 shield every single post-February 4 document, that
8 something further needs to be done.

9 I'm asking you the same question I asked him.
10 What does my opinion look like? Am I saying you lose, no
11 summary judgment for you, no summary judgment for you, and
12 then I give you time to let me know if you want to mediate
13 the next step, or presumably the next step would be so
14 this case is still pending before me, they are asking for
15 the documents. If you're asserting privilege, you need to
16 give me -- you need to substantiate that on at least
17 categories of documents, if not every single page. There
18 would be some further showing you need to make to me.

19 Is that what I need to do next?

20 MS. HARTNETT: Your Honor, I guess, I may take
21 one more run at the congressional response work product
22 portion because what you just described -- because I think
23 you're describing a more limited ruling about the
24 privilege, and in light of some of the other recent
25 investigations and attempts to get this material, I do

1 think that that ruling -- it would be important to at
2 least recognize the availability of the privilege for a
3 broader set of documents. But I don't want to -- I don't
4 think that was your exact question.

5 THE COURT: Okay. But what you've told me is
6 your authority for that is that you've done it before and
7 there's no actual case law that says there's something
8 even broader under the executive privilege than the
9 deliberative process privilege.

10 MS. HARTNETT: Well --

11 THE COURT: I mean, there may be more and
12 greater constitutional dimension to the deliberative
13 process privilege, if you've got a coequal branch on the
14 other side. But that doesn't mean it's different
15 documents are privileged. That just might mean you
16 balance it differently, doesn't it?

17 MS. HARTNETT: That's right, Your Honor. It may
18 be something -- these are materials that in the ordinary
19 course if they were sought in some FOIA or whatever, it
20 may very well be that it wouldn't be important enough for
21 the -- as a matter of deliberation or revealing something
22 about a deliberation for these documents to attempt to be
23 protected.

24 But in the context of the Congress trying to
25 seek information from us in the context of an

1 investigation about how we're actually responding to the
2 investigation, that is not made up for this case. That is
3 something that there is not a judicial case for because it
4 has never been put to a Court before. You're the first
5 Court that I'm aware of that has had the question.

6 The reason why it is because it historically was
7 not sought. Historically there was a respect for that, at
8 least that sphere of confidentiality, notwithstanding the
9 request for other information. It's been asserted twice
10 before, so it's not novel. And the same principles do
11 apply. And, for example, you know, despite the attempt to
12 minimize the attempt to seek that, in other investigations
13 that has been the subject of -- including the -- I
14 believe -- my opposing counsel referenced the select
15 committee having just been set up for Benghazi, but I
16 believe at least a couple elements of there were to
17 investigate whether the response to the oversight
18 investigation was appropriate. That certainly was a topic
19 that was addressed in a recent letter to Secretary Kerry.

20 So this is not something where this is a
21 one-off, and if we actually just allow them a legal ruling
22 saying that they could have access to our work file would
23 only have application to this case, this would create a
24 new authority and precedent for allowing them to routinely
25 look into our oversight files when they either -- because

1 they think something is wrong there or just as a routine
2 part of asking for oversight on the underlying substantive
3 matter.

4 So that's -- I guess I just want to emphasize
5 from our perspective, even though the deliberative process
6 privilege is obviously more well established in the case
7 law because it applies in situations other than just the
8 pleas executive vis-a-vis Congress, this is a special type
9 of privilege that really doesn't come to pass except when
10 we're trying to resist a request from Congress. And that
11 is why it has been something that we've asserted before
12 and that we believe has a proper foundation.

13 But more to your point about what do we do next,
14 I think our position has been that the Court has the case
15 before it now. We're not disputing the jurisdictional
16 ruling, but it should make the most limited ruling at this
17 point on the law, on the narrow legal question before the
18 Court, and potentially send the parties back to further
19 mediation with that ruling in mind.

20 Of course, we could try to attempt to mediate
21 further before that the judge's opinion were to -- before
22 Your Honor's opinion were to issue. But I do think that
23 that would make sense. As to whether we provided enough
24 of a basis for the Court to actually enter judgment for
25 us, assuming that you were to recognize the full scope of

1 the privilege that we've asserted, I believe we have put
2 that before the Court. We have a declaration at the point
3 which is to describe the categories of documents that are
4 at issue and show the Court how they fit within the
5 congressional response work product framing that was the
6 basis of the privilege here.

7 Now, were the Court to issue a ruling that had a
8 more narrow conception of what that privilege would be, at
9 that point we would be happy to provide some additional
10 information to the Court to make clear, you know, what
11 portion of our documents were subject to that privilege.
12 But I do think that the Colburn declaration was designed,
13 and if there were any questions, we would be happy to
14 supplement that to show that there were categories of
15 documents at issue here, all of which map on to the
16 privilege claim made.

17 And I would also note that --

18 THE COURT: Okay. I didn't understand
19 Mr. Kircher's abandonment argument before, and I don't
20 think you've abandoned your argument. But I -- I don't
21 believe I was quite aware until you started to speak how
22 much you've broadened your argument.

23 The Deputy Attorney General's letter, as was
24 pointed out by the committee says deliberative,
25 deliberative, deliberative, deliberative over and over

1 again. Your brief cites me to deliberative process cases.
2 And now you're saying, even if they are not deliberative,
3 if they are just generally anything related to our
4 internal response to them, there's something even broader
5 than the deliberative process privilege that lives under
6 the executive privilege umbrella that we're asserting.

7 So that's a little bit news to me, frankly. I'm
8 not sure it exists. We're having enough trouble with even
9 the deliberative process privilege that they don't think
10 you're even entitled to that much. They clearly don't
11 think you're entitled to anything, and they point out in
12 other pleadings where you've said some of it isn't even
13 deliberative.

14 So everybody has agreed that there is some stuff
15 in there that isn't deliberative that you're saying is
16 privileged anyway. So I hear you.

17 I think -- I certainly believe in the first half
18 of the privilege. I don't know if I believe that there is
19 a basis to go further. If I agree with you that it's
20 broad as it is, then I guess it's all privilege but we
21 still have to do a balancing. If I am going to do a
22 balance, don't I need to know the content of the
23 documents, because wouldn't the balance be different?

24 So it seems like I'm going to need to know the
25 content of the documents in more detail, no matter which

1 way I go.

2 MS. HARTNETT: Well, just on -- to the point of
3 whether, you know, kind of -- we've tried at least --
4 through the use of the Attorney Genera work product case
5 law and some of the other material we cited, I think we've
6 tried to make clear in the briefs, and we apologize if it
7 wasn't more clear, that the assertion here being documents
8 created in the deliberative process, including some
9 nondeliberative documents, would be again, that's -- it's
10 the whole process of our deliberation regarding how to
11 respond to congress. And so that's why we both relied on
12 the deliberative process case law but also drew the
13 analogy to Hickman v Taylor and the work product case law,
14 acknowledging that there are not cases on point decided if
15 there is a congressional --

16 THE COURT: But even work product case law does
17 not protect the file. You have to look at the document.
18 How many times are judges given documents that don't have
19 any thoughts and impressions in it. It's not work
20 product. It's factual. So the thing you're analogizing
21 to isn't an analogy at all.

22 MS. HARTNETT: More an analogy as to why
23 nondeliberative material -- the nondeliberative material
24 could be important in a system why you're trying to
25 preserve two equal sides coming at each other and trying

1 to preserve a sphere of confidentiality, but we agree
2 that -- we were not arguing that the attorney work product
3 doctrine itself covers the documents.

4 It was really more to help provide a broader
5 legal basis for the assertion here, which again is based
6 on -- there's not case law, because that's not what forms
7 the basis of the executive privilege. The doctrine has
8 flowed from a principle that began and assertions over
9 time, and it agreed that all opinions are not judicial
10 authority. But they are the public explanation, and
11 there's a couple that actually just lay out all the
12 assertions over time.

13 For us to understand and to -- to limit
14 ourselves to make sure we're not asserting privilege over
15 material that is not properly within the scope. And
16 that's why here we have the two previous assertions
17 that -- of the same sort, and those assertions themselves
18 drew on prior case law and prior assertions.

19 And so, anyway, that's -- that's the -- the
20 separation of powers rationale and others that we've
21 described, and have been presented to the committee
22 throughout. So the notion that this was somehow a common
23 law assertion from the start I think is simply not played
24 out in all the letters that we've -- you know, that are --
25 that have been exchanged between the parties, and

1 certainly not the Attorney General's letter to the
2 President from last -- from June of 2012, make clear that
3 this was a constitutional privilege. And then he
4 explained those past assertions that were on all fours.

5 THE COURT: I -- I grant you that. I think this
6 case has always had those concerns, and even that aspect
7 of the privilege has those concerns. So I'm not unaware
8 of those concerns, but the fact that we're talking about a
9 congressional subpoena also throws the Constitution on the
10 other side of the equation as well.

11 MS. HARTNETT: We believe that comes in through
12 me, but yes, you're right, Your Honor, there is another
13 cite here.

14 THE COURT: Is there anything that you wanted to
15 say that my questions didn't get you to in your remarks?
16 Because I think I don't have any more questions for you at
17 this point. So if you want to just take a minute, that's
18 fine.

19 MS. HARTNETT: I'm just on the need point, which
20 I think was your question before I started possibly
21 answering a different question. It's just that, you know,
22 I think we believe that kind of consistent with our
23 jurisdictional briefing that the Court should issue the --
24 you know, the most narrow ruling that it believes
25 appropriate at this juncture, that we have tried to lay

1 out the Colburn declaration that types of materials at
2 issues, so the Court should be able to have an
3 understanding of those. We agree that if you were to
4 sustain a privilege over these documents, we think, based
5 on that, the Court could enter a judgment for us and
6 return the dispute along with others to the political
7 process where we can continue to have them.

8 But short of that, we would want to -- I think
9 it would make sense for the parties to try to mediate
10 before a more elaborate proceeding -- proceedings were to
11 follow about need. Because I think that does weigh the
12 Court toward the area that it had sought to avoid in the
13 jurisdictional ruling.

14 THE COURT: All right. Thank you.

15 MS. HARTNETT: Thank you.

16 THE COURT: I want to hear -- I guess I want to
17 hear from Mr. Kircher.

18 MR. KIRCHER: Your Honor, may I just say one
19 thing?

20 THE COURT: One thing.

21 MR. KIRCHER: All right. One.

22 Understand that the privilege that they are
23 articulating here today, the committee will do better
24 under FOIA. We will do better issuing FOIA requests to
25 the Department of Justice to get this information than we

1 will pursuant to Article I. Because they are well beyond
2 deliberative and well beyond --

3 THE COURT: I take your -- I understand your
4 point.

5 MR. KIRCHER: Thank you.

6 THE COURT: All right. Thank you.

7 Just for the court reporter's benefit, I'm going
8 to go on to the second motion, but this isn't going to
9 take very long, I can assure you. Let me hear from the
10 committee first on the motions to strike. I just have a
11 couple of questions for you.

12 I've read the motion, and so I'm not going to
13 let you give your introductory argument. Your -- your
14 pleading says I shouldn't rely on the cases the Attorney
15 General cites about using hearsay in declarations because
16 they arise in the FOIA context and they arise in the APA
17 context. But aren't you also expressly relying on FOIA
18 case law when you're telling me that the department hasn't
19 made out the elements of the privilege? Isn't everybody
20 citing FOIA cases to me?

21 MR. ROSENBERG: I think it's important to make a
22 distinction between concepts that might apply with respect
23 to disclosure of documents and response to requests, and
24 concepts that should apply for purposes of creating a
25 factual record on summary judgment. Setting aside what

1 the FOIA cases may have to say and what effect they may
2 have on the Court's determination of what should be
3 discoverable and what shouldn't be, the FOIA cases and the
4 leeway granted to the agencies cases is unique to FOIA
5 context and summary judgment. And that leeway is not
6 required in the context of congressional requests for
7 documents from executive agency.

8 THE COURT: Was this plea really necessary? I
9 mean, is there any likelihood that the Coburn declaration
10 is going to be taken as evidence of what the committee was
11 thinking any more than the committee's repeated use of the
12 word "lied" is evidence that the letter was a knowing
13 falsehood?

14 I mean, if I tell everybody I know hearsay when
15 I see it, and I know rhetoric when I see it, I'm going to
16 give it the weight it deserves, I mean, it wasn't a
17 factual declaration. There were facts in it, but he also
18 went through essentially a legal discussion about why we
19 have this privilege in the first place. I know that.

20 Does -- does this motion to strike really
21 matter? Do I -- if I understand and give everybody the
22 weight that their rhetoric deserves, do we need to deal
23 with this? And if I deny the government's cross motion
24 for summary judgment, is it moot?

25 MR. ROSENBERG: Your Honor certainly can treat

1 the motion to strike as an assertion of objections and
2 where they were well taken, sustain those objections and
3 disregard the material that is improper under Rule 56.
4 But in a circumstance like this where the violations of
5 the rule are so extensive and so pervasive, and it's so
6 difficult to tease them out from what would otherwise be
7 proper Rule 56 material, the appropriate remedy is to
8 strike it.

9 THE COURT: Well, aren't there some hearsay and
10 opinions in your exhibits to them? Such as you attached
11 transcript from Mr. Melson who says about three times, I
12 think, my view, my characterization. That's not facts.

13 MR. ROSENBERG: That's right.

14 THE COURT: So should I strike that, too, while
15 I'm at it?

16 MR. ROSENBERG: The difference between what you
17 get in the Melson transcript, for example, or a letter
18 with an identifiable declarant is that in these
19 declarations they make assertions that clearly are based
20 on hearsay or statements made by others but you can't
21 identify who they are.

22 Now, the Court, under the rule has discretion to
23 permit things that would be reducible to admissible form,
24 even if they are hearsay, but the problem is when couched
25 in statements made by the declarants alone without

1 identifying the specific sources on whom they are relying,
2 who is to say. We have no idea if this is one layer of
3 hearsay, two layers of hearsay, three layers of hearsay.

4 The Melson transcript is a transcript of
5 something he said. We know who said it. And if it got to
6 that point, we can have him come in and say -- say
7 something. That's dealing with the hearsay issue. But
8 now whether it's -- the Court should consider his opinion
9 or his views, that's a totally separate argument from the
10 hearsay problem.

11 THE COURT: Well, I mean, one thing that makes
12 me wonder about how much I have to deal with this is what
13 fact or consequence the declaration is material to. The
14 whole discussion about the history and purpose of the
15 executive privilege is in their brief. It's a legal
16 argument. He's a lawyer. When he gets to this is what
17 the documents contain, that's factual.

18 Is there any reason why those parts I can't
19 accept? I mean, do I have to get it from Eric Holder
20 because he's the defendant?

21 MR. ROSENBERG: The biggest problem with talking
22 about the nature and the contents of the records is that,
23 based on the four corners of these declarations, there's
24 nothing showing that these declarants actually laid eyes
25 on them. If the Court were inclined to adopt principles

1 from the FOIA context and allow the declarant's to relate
2 hearsay from people that work in their office and they
3 received information in their official capacity, there are
4 still limits on the appropriate things -- the types of
5 information that it can relate.

6 And when a declarant, at least in the FOIA
7 context, is going to talk about the nature and the
8 contents of documents, that person has to swear that they
9 actually reviewed the documents. If they are going to
10 talk about the search for responsive records, which is a
11 duty that agencies have under FOIA to conduct an adequate
12 search, it's not enough that they know something about the
13 search. They have to be the person who supervised it.
14 And it's not just -- you know, they can't speak for every
15 single component in the entire agency if there are
16 multiple components involved. They have to be the person
17 who is intimately familiar with the procedures used, the
18 terms used for the search, the places that are searched.
19 And if they are not that person, they are not a proper
20 declarant.

21 THE COURT: Well, if I determine -- and, again,
22 I caution everybody that I think about things after
23 hearings and I haven't decided this case yet.

24 If I -- if I decide that they haven't given me
25 enough to establish the privilege and they have to give me

1 a particularized showing, some sort of indexlike
2 substance, is this moot?

3 MR. ROSENBERG: These declarations do not give
4 you enough information to make the determination on
5 balancing.

6 THE COURT: Right. So let's say I say I don't
7 even know if they are privileged yet; give me something
8 else. Your motion for summary judgment is denied without
9 prejudice. You need to support your assertion of the
10 privilege on a more individualized basis.

11 At that point is this controversy, your piece of
12 this, the motion to strike, moot?

13 MR. ROSENBERG: Not the entire motion. There
14 are paragraphs in the declarants that discuss the contents
15 and nature of records. Those will have to be supplemented
16 for the Court to do the balancing, if it gets to that.
17 But there are all these other aspects of the declarations
18 involving arguments, conclusory assertions, opinions, all
19 the things that you mentioned before that are still
20 improper, irrespective of -- you know, that don't have
21 anything to do necessarily with the content and the nature
22 of the records involved.

23 So, no, the motion would not be moot with
24 respect to those aspects.

25 THE COURT: All right. Thank you.

1 MR. ROSENBERG: Thank you, Your Honor.

2 THE COURT: All right. Is there someone on the
3 Attorney General's side that wants to talk about the
4 motion to strike briefly?

5 The Colburn declaration is certainly largely not
6 factual. It doesn't really look like typical FOIA
7 declaration. There are many introductory paragraphs that
8 are lawyerly descriptions of the importance of negotiation
9 and accommodation, the history of negotiation and
10 accommodation, justifications for the privilege.

11 So is it your position that those are facts that
12 appropriately go in a declaration? I mean, doesn't he
13 have a point about that?

14 MS. HARTNETT: Your Honor, I think we -- we
15 believe our declarations are appropriate and consistent
16 with the rules, to the extent that they provide -- these
17 are official capacity declarants. They are providing
18 information that we hoped would be helpful to the Court
19 and based on, you know, their personal knowledge
20 meaning --

21 THE COURT: But are they facts? They seem to be
22 legal conclusions largely. Are you talking about --

23 MS. HARTNETT: Sorry.

24 THE COURT: -- the historical importance of
25 negotiation and accommodation, are we really talking about

1 facts anymore? Isn't that what you told me in your brief?

2 MS. HARTNETT: I think the most important part
3 of the declaration from our -- from our perspective is to
4 show the Court what the documents are that were being
5 withheld under the claim of privilege and how they map on
6 to our theory.

7 THE COURT: All right. About halfway through
8 the declaration we get to the fact portion, which is what
9 these documents consist of and how they fit under the
10 privilege. So if facts that are going to be material to
11 my ruling on the motion for summary judgment are material,
12 don't they have to be presented by people with knowledge?

13 MS. HARTNETT: The declarant does have
14 knowledge. Some of it has been provided to him by others
15 that are -- he works with. That's regularly part of how
16 we submit official capacity declarants. He has personal
17 knowledge based on his own information and information
18 provided to him in his official capacity.

19 To the extent the Court would like a further
20 specification of the documents, we're happy to provide
21 that and make sure that it's as complete as the Court
22 would seek. But the point is for the instant motion is
23 that this declaration is appropriate, and even the legal
24 part, that's not dissimilar from the information that is
25 regularly provided to Courts, particularly here in this

1 Court where you face cases involving new -- you know,
2 distinct areas of legal concern or legal frame works that
3 may be relatively novel.

4 And so, like, for example, there was a recent
5 case, the Rawls court case I think before Your Honor where
6 there was an official capacity declarant that at least
7 provided some legal background as a segue into the meat of
8 the declaration.

9 And so I guess the point here is particularly in
10 light of some of the representations that were made in the
11 brief on the opening summary judgment brief about the
12 nature of oversight process and how it all works, I think
13 we thought in the course of providing information about
14 the document themselves, it would also be helpful to
15 provide information from someone who's practiced oversight
16 for several decades at the department to provide some of
17 that context in a more factual matter.

18 But at the end of the day, the Court should
19 really -- to the extent that the Court finds the
20 information useful could consider it in summary judgment,
21 but as we explained in our brief, there's really no basis
22 for a separate free-standing motion to strike or a need to
23 strike that. It should just be considered and given the
24 weight it's due in the course of the Court's ruling on the
25 summary judgment.

1 THE COURT: So if I say I am going to consider
2 it and give it its weight it's due and I know a legal
3 conclusion when I see one, and I know hearsay when I see
4 it, that's how I can rule on the motion to strike?

5 MS. HARTNETT: I think the Court would not need
6 to resolve that. It could either deny it as unnecessary
7 and incorporate whatever points that's been made in the
8 motion to -- within the summary judgment ruling itself.
9 And that was, as we pointed out, what the notes to Rule 56
10 suggest would be the proper procedure. And I think that
11 some of the case law that we've cited from this Court
12 makes it clear that the Court would just be able to give
13 it the weight that it's due.

14 THE COURT: All right. Okay. Thank you.

15 MS. HARTNETT: Thanks.

16 THE COURT: I appreciate everyone's
17 participation in the hearing this morning and the patience
18 in getting through the long hearing this morning.
19 Notwithstanding my comments about the tone of the brief, I
20 appreciated the briefs from both sides. It's always
21 wonderful to be told that you're deciding something that
22 no one has ever decided before. So I'm going to be
23 thinking about it, and I'm going to be thinking about it
24 hard.

25 I think, though, you bolt have a very clear idea

1 of what my concerns are about the positions being put
2 forward by both sides. So while I have this under
3 advisement, I'm going to ask you to meet and confer with
4 each other. What is today? Today is May 15 apparently.

5 And so I'm going to ask you to submit a joint
6 status report by May 30 indicating to me whether the
7 parties are agreed or not about whether they had like to
8 be referred back to Judge Rawstein at this time. You
9 don't have to tell me why or why not.

10 I understand you both feel very strongly about
11 your legal positions in this matter. But I think you have
12 some indication about what the likely -- what some
13 possible outcomes could be. And so you can think about
14 how you'd like to handle that and let me know. And if you
15 need more time, because these are matters that you have to
16 run up multiple flag poles, you can jointly request more
17 time and I'll be happy to give it to you.

18 All right. Thank you very much, everybody.

19 (Proceedings adjourned at 11:59 a.m.)
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1:12-cv-1510 (JDB)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

[PROPOSED] ORDER

Upon consideration of Plaintiff’s Motion to Lift Stay and the entire record herein, it is hereby ORDERED that:

1. Plaintiff’s Motion to Lift Stay is **GRANTED**.

SO ORDERED.

DATE: _____

The Hon. John D. Bates, U.S.D.J.