UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES	:	CR No. 12-CV-1332
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:

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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

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

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

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

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

a legitimate subject of a legislative inquiry.

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 The Attorney General subsequently informed Congress that the letter was incorrect and the letter was officially withdrawn in December of the same year.

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

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

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

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

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

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

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

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

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

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

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

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

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

this disconnect in its brief as well.

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

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

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

not conversations with the President himself.

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

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

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

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

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

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

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

MR. KIRCHER: Thank you, Your Honor.

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

apologize on behalf of the committee.

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

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

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

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

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

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

MR. KIRCHER: The privilege letter.

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

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

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

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

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

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

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

the other or both of those.

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But so what we --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KIRCHER: Uh-huh.

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

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

THE COURT: I know that.

MR. KIRCHER: Okay.

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

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

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

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

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

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

MR. KIRCHER: Well, the Benghazi committee was

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

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

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

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

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

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

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

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

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

THE COURT: Right.

MR. KIRCHER: We still need the documents.

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

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

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

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

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

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

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

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

MR. KIRCHER: He was a high ranking official.

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

MR. KIRCHER: Okay.

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

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

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

THE COURT: That's what a lie is.

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

THE COURT: Come on.

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

Something went wrong here. The wheels fell off

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

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

MR. KIRCHER: Okay.

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

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

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

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

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

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

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

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

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

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

THE COURT: I have questions for them.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Smidgen.

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

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

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

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

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

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

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

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

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

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

THE COURT: Right.

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

presidential --

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

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

THE COURT: All right.

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

THE COURT: Well --

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

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

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

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

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

Let me just back up for one question just to get

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KIRCHER: Which they have not identified.

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

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

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

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

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

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

MR. KIRCHER: Right.

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

MR. KIRCHER: Well, I disagree obviously.

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

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

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

THE COURT: Please do. Take your time.

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: All right. Thank you.

Let me hear from the Department of Justice.

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

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

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

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

MS. HARTNETT: There is --

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

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

about the deliberative process from which this privilege comes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. You moved for summary

judgment.

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

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

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

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

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

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

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

So clearly if you can do that, why would your

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

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

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

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

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

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

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

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

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

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

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

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

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

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

generated in our deliberations about how to respond to Congress.

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

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

MR. KIRCHER: Well, Your Honor --

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

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

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

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

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

MS. HARTNETT: Correct. Yes.

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

Was *Espy* wrong?

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

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

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

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

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

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

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

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

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

law assertion. And the reason why the Court --

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

MS. HARTNETT: Yes. Both probably.

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

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

And again, Nixon itself had a footnote

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

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

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

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

What is the decision that these documents preceded?

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

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

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

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

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

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

MS. HARTNETT: Yes.

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

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

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

THE COURT: But inevitable.

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

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

they have --

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

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

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

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

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

looked at in reaching his conclusions?

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

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

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

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

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

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

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

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

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

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

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

Is that what I need to do next?

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

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

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

MS. HARTNETT: Well --

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. HARTNETT: 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.

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

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

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

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

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

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

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

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

And I would also note that --

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

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

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

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

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

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

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

way I go.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

MS. HARTNETT: Thank you.

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

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

THE COURT: One thing.

MR. KIRCHER: All right. One.

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. Because they are well beyond deliberative and well beyond --

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

MR. KIRCHER: Thank you.

THE COURT: All right. Thank you.

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

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

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

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

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

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

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

MR. ROSENBERG: Your Honor certainly can treat

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

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

MR. ROSENBERG: That's right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

MR. ROSENBERG: Thank you, Your Honor.

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

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

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

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

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

MS. HARTNETT: Sorry.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Okay. Thank you.

MS. HARTNETT: Thanks.

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

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

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

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

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

All right. Thank you very much, everybody.

(Proceedings adjourned at 11:59 a.m.)