

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INCORPORATED,)	
)	
Plaintiff,)	Civil Action
)	No. 12-1510
v.)	
)	July 8, 2014
U.S. DEPARTMENT OF JUSTICE,)	4:00 p.m.
)	
Defendant.)	Washington, D.C.
)	
)	

**TRANSCRIPT OF STATUS CALL PROCEEDINGS
BEFORE THE HONORABLE JOHN D. BATES,
UNITED STATES DISTRICT COURT JUDGE**

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AFTERNOON SESSION, JULY 8, 2014

00:00 2 (4:03 p.m.)

00:00 3 THE COURTROOM CLERK: Your Honor, we have civil action

00:00 4 12-1510, *Judicial Watch, Inc. versus Department of Justice.*

00:00 5 Counsel, I would ask that you please approach the bench

00:00 6 and identify yourselves for the record, starting with the

00:00 7 plaintiffs.

00:00 8 MR. BEKESHA: Good afternoon, Your Honor. Michael Bekesha

00:00 9 on behalf of Judicial Watch. Along with me is Tom Fitton,

00:00 10 president and Judicial Watch representative representing Judicial

00:00 11 Watch.

00:00 12 THE COURT: All right. Good afternoon.

00:00 13 MR. WOMACK: Hello, Your Honor. Eric Womack from the

00:00 14 Department of Justice on behalf of the defendant. With me at

00:00 15 counsel table is John Tyler.

00:00 16 THE COURT: Good afternoon to you, too. All right. I

00:00 17 don't think this is going to be a very long hearing because the

00:00 18 papers aren't very long. The stay has been pretty long and it's

00:00 19 lasting impact, but let's talk about whether it should be lifted,

00:00 20 and I think we should hear from you first, Mr. Bekesha.

00:01 21 MR. BEKESHA: Thank you, Your Honor. As you just

00:01 22 indicated, the stay has been ongoing for quite some time now.

00:01 23 THE COURT: 16 months.

00:01 24 MR. BEKESHA: 16 months. It's been two years since we

00:01 25 sent our FOIA request, about 18, 19 months since we filed the

00:01 1 complaint, and to date we still don't know how many records are
00:01 2 responsive to our requests, what types of records, what the
00:01 3 records are, and whether or not any of the records could be
00:01 4 segregated. At this point we believe the case should proceed.

00:01 5 THE COURT: Well, what's changed between now and the last
00:01 6 time the stay was entered which really was with your consent?

00:01 7 MR. BEKESHA: What changed was there was a hearing before
00:01 8 Judge Jackson and during --

00:01 9 THE COURT: So?

00:01 10 MR. BEKESHA: And during that hearing -- prior to that it
00:01 11 was unclear whether or not Judge Jackson was going to have a
00:01 12 hearing or if she was going to just rule on the papers. It was
00:01 13 our belief that since she acted fairly quickly on the
00:02 14 jurisdictional issue, that she may rule quickly on the merits of
00:02 15 the case.

00:02 16 After sitting and listening and rereading the transcript
00:02 17 from the hearing, it seemed to be clear that a decision won't be
00:02 18 all that soon, and even if there is a decision, it's going to be
00:02 19 complicated. Also, during the hearing, an attorney for Attorney
00:02 20 General Holder seemed to suggest that some records may or could
00:02 21 be available under FOIA that may not be available in the subpoena
00:02 22 context.

00:02 23 THE COURT: But if that's true, that wasn't a revelation
00:02 24 to you, it was only a revelation that they happened to say it,
00:02 25 right?

00:02 I MR. BEKESHA: I think it's always been our position that
00:02 2 that may be the case, but it's the first time that I believe the
00:02 3 Justice Department has acknowledged that there may be a
00:02 4 difference between the records and how they will respond to a
00:02 5 FOIA request versus a congressional subpoena, and I think at this
00:02 6 point, in light of that, as well as the period of time that we've
00:02 7 waived, it's appropriate for at least a Vaughn index to be
00:03 8 produced. In a lot of FOIA litigation these days, we work with
00:03 9 agencies prior to briefing on the merits but prior to summary
00:03 10 judgment, receive a draft Vaughn index, we're able to analyze
00:03 11 which records are being withheld and decide whether or not --

00:03 12 THE COURT: I don't want to accuse you of being naive, but
00:03 13 they've been negotiating and talking about narrowing the other
00:03 14 case and maybe releasing some records for months and months and
00:03 15 months, as you will acknowledge. What makes you think that
00:03 16 you're going to make any progress with them?

00:03 17 MR. BEKESHA: I think when you have two branches of
00:03 18 government as much as it's in the courtroom, it's a political
00:03 19 battle. Neither side is willing to give in.

00:03 20 THE COURT: No, but they want to avoid a judicial
00:03 21 decision. They're not afraid of a judicial decision in a FOIA
00:03 22 case, they have that all the time, but in the subpoena context
00:03 23 where Congress and the executive branch are going at it, the
00:03 24 courts have recognized and, indeed, this Court has recognized and
00:03 25 the Department of Justice and various administrations have

00:04 I recognized there is an advantage to avoiding the issue being
00:04 2 presented to and decided by the Court ultimately.

00:04 3 MR. BEKESHA: That's correct, Your Honor, but I'm not
00:04 4 quite sure if that's present in this case. They've gone to
00:04 5 settlement discussions, mediation numerous times, and there
00:04 6 hasn't been any success, at least that's available to the public.
00:04 7 About three weeks ago Judge Jackson indicated to the parties that
00:04 8 they should meet and confer again, and if they don't succeed at
00:04 9 settling the dispute, that she would again send it to another
00:04 10 judge to handle the mediation.

00:04 11 THE COURT: But if you're right that we're a long ways in
00:04 12 that case from a merits resolution, then your request to lift the
00:04 13 stay and proceed with litigation in this case is inevitably going
00:04 14 to be some duplication, is it not?

00:04 15 MR. BEKESHA: It may be. It's unclear. As I started off,
00:05 16 Your Honor, we don't know what records are being withheld. We
00:05 17 don't know how many records are being withheld. And also, based
00:05 18 on the other proceedings, it seems as though not all records are
00:05 19 being withheld under the executive privilege now but under the
00:05 20 deliberative process privilege, so there are a lot of issues
00:05 21 that --

00:05 22 THE COURT: Of nonconstitutional or constitutional
00:05 23 dimensions?

00:05 24 MR. BEKESHA: A little bit of both according to -- or
00:05 25 based on the last hearing, and so we think that the best solution

00:05 1 right now is for a Vaughn index to be provided so we can see how
00:05 2 many records there are, we see the claims of exemption, and we
00:05 3 see what types of records, and Judicial Watch can assess whether
00:05 4 or not it's appropriate to brief the issue or it's appropriate
00:05 5 not to brief the issues. A lot of times, Your Honor, I'll look
00:05 6 at a Vaughn index and we'll recognize there is a proper claim of
00:05 7 exemption there, and once the government satisfies their burden,
00:05 8 we're happy with dismissing the case. You know, that seems to be
00:06 9 different from --

00:06 10 THE COURT: But that's not a real advantage to lifting the
00:06 11 stay because that's the same posture we're in currently; you
00:06 12 don't have the records, so there's no real advantage there in
00:06 13 terms of any -- avoiding any prejudice, to the extent that you're
00:06 14 not going to get records. The only advantage, it seems to me,
00:06 15 has to be in your achieving the goal of obtaining records.

00:06 16 MR. BEKESHA: That's correct, Your Honor, but we're moving
00:06 17 forward. I mean, I guess the problem is we've been here now 16
00:06 18 months, two years after, and there's been no progress. We sent a
00:06 19 FOIA request, we have a statutory right to send a FOIA request,
00:06 20 to receive a response, to litigate any denial of records, and
00:06 21 nothing's happened.

00:06 22 THE COURT: The basic legal question with respect to
00:06 23 deliberative process privilege is that two-part inquiry whether
00:06 24 the documents are predecisional and deliberative.

00:07 25 MR. BEKESHA: Yes, Your Honor.

00:07 1 THE COURT: And that's the same inquiry in the case -- the
00:07 2 House Committee case before Judge Jackson and before me, that
00:07 3 inquiry just on whether there's a deliberative process privilege,
00:07 4 correct?

00:07 5 MR. BEKESHA: No, Your Honor. With all due respect, there
00:07 6 are several issues in the other litigation, one being whether or
00:07 7 not the Justice Department may claim deliberative process
00:07 8 privilege in response to a congressional subpoena. If the Court
00:07 9 finds that the Justice Department may do so, then the analysis is
00:07 10 whether it's properly being withheld under the deliberative
00:07 11 process, and both parties in that case seem to agree that
00:07 12 deliberative process privilege is the same in that context as it
00:07 13 is in FOIA. I would respectfully disagree. I think there's a
00:07 14 different standard, and so I think there are two separate issues
00:07 15 before the Court.

00:07 16 THE COURT: Different standard on the nonconstitutional
00:07 17 deliberative process privilege?

00:07 18 MR. BEKESHA: Yes, Your Honor.

00:07 19 THE COURT: How so?

00:07 20 MR. BEKESHA: In civil litigation -- Well, there's a
00:08 21 difference between "in theory" and "in practice." In theory,
00:08 22 deliberative process --

00:08 23 THE COURT: That's theoretical in and of itself, but go
00:08 24 ahead.

00:08 25 MR. BEKESHA: In FOIA litigation, Exemption Five is

00:08 I supposed to cover all civil discovery privileges and adopt them
00:08 2 100 percent. The D.C. Circuit seems to have separated from that,
00:08 3 and there's a little bit of a different argument and burden under
00:08 4 deliberative process now under FOIA and under the civil context
00:08 5 which would be a congressional subpoena.

00:08 6 THE COURT: Well, we'll see. I don't want to opine on
00:08 7 what the correct standard is in this preliminary setting.

00:08 8 Now, it's possible, of course, that Judge Jackson could
00:08 9 totally moot this case by her rulings, correct?

00:08 10 MR. BEKESHA: No, Your Honor. At some point --

00:08 11 THE COURT: Well, couldn't she effectively do so if she
00:09 12 ordered release of the vast trove of documents that you're
00:09 13 seeking if they were released to the Committee; presumably, if
00:09 14 not challenged, then there would be no objection to releasing
00:09 15 them to you, an effective mootness, even if not a technical
00:09 16 mootness.

00:09 17 MR. BEKESHA: I don't think so, Your Honor. Judge Jackson
00:09 18 would order a release of records to the House Committee and the
00:09 19 House Committee would then decide whether or not the records
00:09 20 should be released to the public. The House Committee may not
00:09 21 release the records to the public, Judge Jackson cannot order the
00:09 22 House Committee to release the records to the public, and so
00:09 23 we're in a position where the records could be released under
00:09 24 that, and the Justice Department could take the position that
00:09 25 that was one case, we're not going to respond in the same way in

00:09 1 the FOIA context, withhold the records, and then the public --

00:09 2 THE COURT: I think you could paint lots of scenarios

00:09 3 where it wouldn't moot, but it's also possible that it would moot

00:10 4 because that might not happen.

00:10 5 MR. BEKESHA: It's possible, yes.

00:10 6 THE COURT: And again, that would be a way to avoid

00:10 7 unnecessary duplication. Now, tell me, to the extent that you

00:10 8 have a crystal ball, if I were to lift the stay and this matter

00:10 9 were to move forward, why do we expect that I would reach a

00:10 10 decision before Judge Jackson would resolve the pending summary

00:10 11 judgment motions?

00:10 12 MR. BEKESHA: You may not, Your Honor, but you may. But

00:10 13 again, Judicial Watch, we believe we have a right to move

00:10 14 forward. We believe that we've waited respectfully and patiently

00:10 15 long enough and that we should move forward, and some records may

00:10 16 be produced. Oftentimes during briefing, as you know in the FOIA

00:10 17 context, records may be released because they're analyzed and

00:10 18 looked at a second time. We really just want the process to take

00:10 19 place, the process we believe we're entitled to, we believe the

00:11 20 law allows us, and so --

00:11 21 THE COURT: So, if Judge Jackson rules in her case that

00:11 22 the deliberative process privilege applies but that the documents

00:11 23 are not protected by the privilege either on a nonconstitutional

00:11 24 or some constitutional grounds, and orders the documents released

00:11 25 to the Committee, and the Department of Justice decides to take

00:11 I an appeal, and let's say either Judge Jackson or the D.C. Circuit
00:11 2 enters a stay pending an appeal, as is likely to happen in that
00:11 3 context, what should happen in this case? Should this case,
00:11 4 nonetheless, go forward perhaps with this Court ordering release
00:11 5 of the documents?

00:11 6 MR. BEKESHA: I think this case -- this Court should move
00:11 7 forward on this case as is appropriate under FOIA. We're not a
00:11 8 party in that case, we're not part of the briefing. We may see
00:12 9 records, we may not.

00:12 10 THE COURT: But if I order release of the records while it
00:12 11 was still pending in the D.C. Circuit, would you agree that it
00:12 12 should, nonetheless, be stayed pending appeal, this case, the
00:12 13 order of release should then be stayed pending appeal?

00:12 14 MR. BEKESHA: I think the Department of Justice at that
00:12 15 point would decide whether or not they were going to appeal your
00:12 16 ruling and ask for a stay.

00:12 17 THE COURT: Let's assume that they did.

00:12 18 MR. BEKESHA: At that point, yes, because our case, you
00:12 19 would -- this Court would make a ruling, and the appeal process
00:12 20 would take place. It's what happens in the FOIA context every
00:12 21 day. This is an ordinary run of the mill FOIA case and it should
00:12 22 proceed as such, and when the time comes, if the time comes, we
00:12 23 can address it then, but oftentimes the government -- the Court
00:12 24 rules against the government, they appeal, and of course they ask
00:12 25 for a stay because it doesn't make sense to appeal the disclosure

00:12 I of records if they're already being produced.

00:12 2 THE COURT: Do I -- in this FOIA context, do I ultimately
00:13 3 reach -- Well, do I proceed this way? Is the first question
00:13 4 whether the deliberative process privilege applies, which is the
00:13 5 two part inquiry, and then I have to grapple with some balancing
00:13 6 question as to the need of Judicial Watch for the documents
00:13 7 versus any privilege assertion?

00:13 8 MR. BEKESHA: In the D.C. Circuit it's a two-part test. I
00:13 9 do not believe, unfortunately, that there is a need-balancing
00:13 10 test with the deliberative process privilege under FOIA.

00:13 11 THE COURT: All right. What else do you want to tell me?

00:13 12 MR. BEKESHA: I have nothing else at this time, Your
00:13 13 Honor.

00:13 14 THE COURT: All right. Let's hear from the government.
00:14 15 Mr. Womack.

00:14 16 MR. WOMACK: Thank you, Your Honor.

00:14 17 THE COURT: 16 months is a long time.

00:14 18 MR. WOMACK: 16 months is a long time, but that's
00:14 19 because --

00:14 20 THE COURT: Fast approaching an indefinite stay, isn't it?

00:14 21 MR. WOMACK: Actually, I don't think it is, Your Honor,
00:14 22 and I think one of the interesting things here is that this is
00:14 23 anything other than, as your February 2012 order recognized, the
00:14 24 ordinary run of the mill FOIA case. It is, as we all know here,
00:14 25 a FOIA case that followed upon the dispute between the political

00:14 1 branches over congressional subpoena for records and the
00:14 2 President's assertion of executive privilege, and what it seeks
00:14 3 here is to disclose records to the public that are being sought
00:14 4 in the underlying subpoena case.

00:14 5 THE COURT: But the extraordinary nature of it wouldn't
00:14 6 really be reached unless and until I ordered the documents be
00:14 7 produced to Judicial Watch. Everything else up to that point is
00:14 8 just sort of routine, except there's some interesting and,
00:15 9 perhaps, sensitive legal issues along the way, but nothing that
00:15 10 really impacts the executive branch's interests that led to the
00:15 11 assertion of the executive privilege in the House Committee case.
00:15 12 Nothing will really be threatened until I order release. So why
00:15 13 shouldn't we move forward with this case now after this long
00:15 14 period of waiting to see if the other case would get resolved in
00:15 15 some expeditious manner, either on the motion to dismiss on
00:15 16 jurisdictional grounds or through a settlement being reached or
00:15 17 through a prompt ruling on summary judgement, none of which has
00:15 18 happened? Why shouldn't we at least get the process going here
00:15 19 and move forward? There's no harm to the executive branch, is
00:15 20 there?

00:15 21 MR. WOMACK: I would actually take exception to that, Your
00:15 22 Honor, and there's probably a couple of reasons why. First is
00:15 23 that the same reasons that justify the entry of the stay
00:15 24 originally, judicial economy, judicial efficiency, and respect
00:16 25 for the negotiation accommodations for the political branches.

00:16 1 THE COURT: Judicial economy and judicial efficiency are
00:16 2 my problem, not your problem.

00:16 3 MR. WOMACK: Correct.

00:16 4 THE COURT: That's not a burden on the executive branch.

00:16 5 MR. WOMACK: Correct, but it also -- I think those
00:16 6 interests actually did, in your order, explain that what was
00:16 7 happening in the underlying case was that the Court, Judge
00:16 8 Jackson, was eventually going to have of to decide certain issues
00:16 9 that were fundamental issues of first impression, and in this
00:16 10 case it actually does not, as counsel for Judicial Watch
00:16 11 suggests, raise only the issue of nonconstitutional deliberative
00:16 12 process. What Judge Jackson signaled in oral argument and what
00:16 13 we heard after that is that that case is, in fact, proceeding at
00:16 14 pace. She actually asked the parties to go back to negotiation.
00:16 15 That ended at the end of June. We are currently in mediation
00:16 16 until the end of July. And Judge Jackson has signaled that after
00:16 17 that she intends to issue a ruling as to the merits of the case
00:16 18 on summary judgment, and in there she has signaled, and it is, of
00:17 19 course, not final until it is actually issued, but she has
00:17 20 signaled that she is going to rule for the government in part and
00:17 21 rule for the Committee in part, and what she intends to recognize
00:17 22 is some form of constitutional executive privilege grounded on
00:17 23 the deliberative process theory.

00:17 24 Following that order, what she has signaled she will do is
00:17 25 ask for the Department to provide additional information, and as

00:17 1 Your Honor knows from the *Myers* case, it is a difficult question
00:17 2 as to what form that additional information would take, and that
00:17 3 is, in fact, an issue that has been litigated in *Myers* and may be
00:17 4 litigated in the Jackson case, but there would be an order
00:17 5 requiring additional information that would then be, we believe,
00:17 6 made available to the public. So in that case she's actually
00:17 7 already proceeding to issue the Vaughn. If this Court were now
00:17 8 at the eleventh hour to lift the stay, then the past 16 months
00:17 9 have, in fact, been meaningless.

00:17 10 THE COURT: Is this really the eleventh hour? The
00:17 11 eleventh hour is a phrase that indicates the twelfth hour is soon
00:17 12 to come. I don't think that's where we are. Eleven hours may
00:18 13 have passed, but who knows how many more are yet to come?

00:18 14 MR. WOMACK: Yes, Your Honor. We do have the summary
00:18 15 judgment briefs fully briefed. We have oral argument. We have
00:18 16 had negotiations following that that ends in July, and the only
00:18 17 point I'm trying to make is that this is not something where the
00:18 18 stay was entered, no progress has been made here, and there's
00:18 19 simply nothing going on in the underlying case.

00:18 20 THE COURT: No, I don't think nothing's going on. I just
00:18 21 think it's pretty darn slow, and I'm not throwing stones at the
00:18 22 government, the House Committee, the other party in that case, or
00:18 23 at Judge Jackson in any way, shape or form, but things are going
00:18 24 slowly there.

00:18 25 Now, those kinds of cases involving executive privilege

00:18 I should go cautiously and slowly, but here's my concern,
00:18 2 Mr. Womack. This idea of an indefinite stay is something that I
00:18 3 resisted and, quite frankly, the Department of Justice has said
00:18 4 no, no, no, that's not what we're after here, that's not what
00:19 5 should happen, but I see it -- at a certain point there's a
00:19 6 reality test, and I see it happening, even if not in one step, I
00:19 7 see it happening in a series of steps. It's already been 16
00:19 8 months. It's going to be several months more before Judge
00:19 9 Jackson issues a ruling, trust me, at least several months more.
00:19 10 When she issues that ruling, if it's a final appealable ruling,
00:19 11 and there may be more steps yet to come after that ruling, but
00:19 12 even if it's a final appealable ruling, my guess is one side or
00:19 13 the other is going to take an appeal. I know you're going to be
00:19 14 standing in front of me saying, continue the stay. Let's assume
00:19 15 that I have kept the stay in place. You're going to say,
00:19 16 continue the stay during that appeal. That's another year or
00:19 17 two. It is an indefinite stay in effect, is it not?

00:20 18 MR. WOMACK: If we were to simply say let's not address
00:20 19 that when the point in time comes, in other words, when we know
00:20 20 that Judge Jackson has issued a ruling and that somebody has
00:20 21 taken it up, and instead of at that time analyzing and saying,
00:20 22 What is the posture, are both parties going to go up, has one
00:20 23 party decided now that her ruling will simply be final and they
00:20 24 won't take her up, if that is the case, it should be decided at
00:20 25 the time that that occurs. That's why this is not an indefinite

00:20 I stay, because each point of significant moment in the underlying
00:20 2 House Committee litigation, this Court has done what it is
00:20 3 responsibly duty bound, I believe, in its discretion to do when
00:20 4 issuing a stay of this nature, which is to analyze the stay in
00:20 5 place at the time and say, Is it now appropriate to lift. And
00:20 6 with all due respect, Your Honor, I think now would be the worst
00:20 7 time because we do have Judge Jackson signaling that she is about
00:20 8 to take a momentous step of issuing a ruling and requiring
00:20 9 something akin to a Vaughn.

00:20 I0 If this Court were to order a Vaughn prior to a ruling, it
00:21 I1 could potentially affect the nature of the ruling. Who knows
00:21 I2 what would happen if she wanted the --

00:21 I3 THE COURT: What's the harm of my ordering a Vaughn issue
00:21 I4 [sic] impacting the nature of her ruling? If she looks at it and
00:21 I5 treats it with respect, but conscientiously decides what she
00:21 I6 should do, I don't see where the harm is from that.

00:21 I7 MR. WOMACK: The only harm is it tends to take a different
00:21 I8 direction than Judge Jackson has taken in the House Committee
00:21 I9 litigation, which is --

00:21 20 THE COURT: Judge Jackson is an adult. She can decide
00:21 21 whether I speak wisely or not. She's perfectly capable of that.

00:21 22 MR. WOMACK: Absolutely, Your Honor, and it's not just
00:21 23 what you say, it's the nature of producing a Vaughn. As you know
00:21 24 from the Myers litigation, the executive branch has taken
00:21 25 positions on whether or not it is appropriate to produce a

00:21 I Vaughn, whether a court can order the production of Vaughn
00:21 2 vis-à-vis --

00:21 3 THE COURT: What happens if she says that -- let's first
00:22 4 look at it just on the basis of deliberative process privilege
00:22 5 without any constitutional elements. If she says, yes, these
00:22 6 documents are covered by a deliberative process privilege, is
00:22 7 that the end of the inquiry before her?

00:22 8 MR. WOMACK: That is not, Your Honor, how I understand she
00:22 9 intends to proceed, but if you want to talk about the
00:22 10 hypothetical, I can. What she has indicated is that she is going
00:22 11 to recognize the constitutional deliberative process privilege
00:22 12 that is a form of executive privilege and then analyze it
00:22 13 according to the case law that follows the --

00:22 14 THE COURT: So let's say she does that and then she does a
00:22 15 two-part inquiry of whether the documents are deliberative and
00:22 16 predecisional, which is the same as a nonconstitutional
00:22 17 deliberative process privilege, and then goes on to the balancing
00:22 18 for the constitutional privilege, if she decides that the
00:22 19 documents are protected by this constitutional deliberative
00:22 20 process privilege, does that moot this case, or is there the
00:23 21 possibility of this case still going forward because the
00:23 22 constitutional balancing, which is a balancing of the House
00:23 23 Committee's interests involving the House Committee's interests,
00:23 24 isn't really the assessment that would be made here in this FOIA
00:23 25 case?

00:23 I MR. WOMACK: No, it's not. The important thing is what --

00:23 2 THE COURT: So this case would go forward, more or less.

00:23 3 MR. WOMACK: Importantly, what I think counsel recognized,

00:23 4 I think correctly, is that in the FOIA context -- and it wouldn't

00:23 5 just simply be deliberative process, it would be a B5 recognition

00:23 6 of the constitutional executive privilege. Under either

00:23 7 situation in the FOIA context, there isn't that same need

00:23 8 balancing in B5 for either the constitutional executive privilege

00:23 9 or deliberative process, so respectfully they would look to it,

00:23 10 and, frankly, if there's a valid assertion of executive

00:23 11 privilege, we would raise that under B5 and we would claim that

00:23 12 that satisfies --

00:23 13 THE COURT: But it's a different balancing analysis

00:23 14 because the House Committee and Judicial Watch are not the same.

00:23 15 MR. WOMACK: So if they were balancing analysis, then

00:24 16 perhaps Judicial Watch would have different -- and we certainly

00:24 17 would have different interests in the documents, but that

00:24 18 balancing analysis would not take place. The question for the

00:24 19 Court here would be, is that a privilege that is recognized in

00:24 20 ordinary civil discovery, and we would say, due to Judge

00:24 21 Jackson's ruling, the answer would be yes.

00:24 22 THE COURT: What's the scenario in terms of Judge

00:24 23 Jackson's rulings that this case is mooted out and I don't have

00:24 24 to proceed with deciding issues relating to Judicial Watch's

00:24 25 claim for documents?

00:24 1 MR. WOMACK: I think it's very possible and I think highly
00:24 2 likely that she would issue a ruling that could be determinative
00:24 3 on executive privilege; however, I would say --

00:24 4 THE COURT: Determinative or do you mean persuasive?

00:24 5 MR. WOMACK: I would say determinative on the existence.
00:24 6 If she finds that there is a constitutional and executive
00:24 7 privilege, I think that would be determinative of the issue.

00:24 8 THE COURT: Determinative under what theory, *res judicata*,
00:24 9 collateral estoppel?

00:24 10 MR. WOMACK: No, under the theory -- no, not under the
00:24 11 terms of -- you would not be bound by that holding.

00:24 12 THE COURT: Then why do you use the word determinative?

00:25 13 MR. WOMACK: I shouldn't use the term determinative.
00:25 14 Perhaps I should say highly probative. I think if another court
00:25 15 in this circuit --

00:25 16 THE COURT: So I would still have to go forward with the
00:25 17 case and decide whether I was persuaded?

00:25 18 MR. WOMACK: But you wouldn't actually, I think, have to
00:25 19 go through the same length of analysis. You could simply point
00:25 20 to Judge Jackson and say this is a privilege -- a constitutional
00:25 21 executive privilege that has been recognized in ordinary civil
00:25 22 discovery and, therefore, we believe it's valid --

00:25 23 THE COURT: And I could use her -- the Vaughn index
00:25 24 provided in that case.

00:25 25 MR. WOMACK: It would be there.

00:25 I THE COURT: Is there a scenario in which no Vaughn index
00:25 2 will be provided in her case?

00:25 3 MR. WOMACK: As we understand how she intends to proceed,
00:25 4 Your Honor, there is no scenario in which some form of
00:25 5 description of the documents would not be provided.

00:25 6 THE COURT: And just the economy of doing that is a reason
00:25 7 to continue the stay for a lengthy -- a potentially lengthy
00:25 8 period -- I won't use the term "indefinite" -- in your view?

00:25 9 MR. WOMACK: Absolutely, Your Honor. Speaking as the line
00:26 10 attorney, I would like not to do it twice, but in addition it
00:26 11 is --

00:26 12 THE COURT: Well, you do it once and then the second time
00:26 13 is easy, Mr. Womack.

00:26 14 MR. WOMACK: Well, the problem is you never know what the
00:26 15 second time is going to be, and that's the interesting thing,
00:26 16 that a Vaughn is not simply a Vaughn because this is a case of
00:26 17 first impression in the House Committee litigation, so we will be
00:26 18 instructed by Judge Jackson as to what form that description
00:26 19 should take, and we believe that that would then provide Judicial
00:26 20 Watch with certain information at that point.

00:26 21 THE COURT: The Vaughn index may be different in that case
00:26 22 or in that context in that case than in this case.

00:26 23 MR. WOMACK: We're not certain exactly how it's going to
00:26 24 come out because she hasn't ordered us --

00:26 25 THE COURT: Because you know what a Vaughn index would

00:26 I look like in this case.

00:26 2 MR. WOMACK: Yes, Your Honor. In fact, I think that she
00:26 3 is thinking along the lines she's indicated, the parties would
00:26 4 have something similar to a Vaughn index. We just don't know
00:26 5 exactly what it will be until we see her ruling.

00:26 6 THE COURT: And again, I know I'm repeating myself to some
00:26 7 extent, but tell me why it is that the government would be harmed
00:27 8 as opposed to the inefficiency for the Court. Why would the
00:27 9 government be harmed if I remove the stay and let this case start
00:27 10 forward at least through a Vaughn index and the discussions that
00:27 11 the plaintiff's counsel wish to have in an attempt to narrow
00:27 12 issues and, perhaps, have some documents released? What is the
00:27 13 harm that would be experienced by the executive branch --

00:27 14 MR. WOMACK: -- I think --

00:27 15 THE COURT: -- other than your workload?

00:27 16 MR. WOMACK: Thank you, Your Honor, I appreciate that. I
00:27 17 think fundamentally, the House Committee litigation is, in
00:27 18 essence, a dispute between the two political branches that raises
00:27 19 a question of first impression that has never been decided by any
00:27 20 Federal Court and that, frankly, has involved massive
00:28 21 negotiations in settlement, as well as multiple briefings on the
00:28 22 nature and essence of that privilege, as well as what information
00:28 23 needs to be provided about the documents, and that has also been
00:28 24 something that has been repeatedly raised by the Committee as not
00:28 25 having been provided to them ever, a Vaughn or description of the

00:28 I documents. So if this Court were to now say, Let's proceed
00:28 2 despite having a stay in place for the past 16 months, let's
00:28 3 proceed and have a Vaughn ordered just when Judge Jackson has
00:28 4 signaled that she's about to do the same thing, consistent and
00:28 5 accompanying a ruling on the merits of the executive privilege,
00:28 6 we believe that that is inappropriately taking a step beyond and
00:28 7 in front of the case that should be driving this litigation which
00:28 8 is the House Committee litigation.

00:28 9 THE COURT: Now, there's been some reliance on comments
00:28 10 made by your colleague at the Department of Justice in the
00:28 11 hearing.

00:28 12 MR. WOMACK: Yes.

00:28 13 THE COURT: Do you want to have any comment on that?

00:28 14 MR. WOMACK: I would. I think that counsel's
00:28 15 representation of counsel's comments at the hearing are
00:29 16 mischaracterizing those comments. What counsel intends to say is
00:29 17 that if there were no -- in other words, if this were in the
00:29 18 ordinary course and there were a FOIA request and there was no
00:29 19 political dispute between the legislative and executive branches,
00:29 20 then it is possible -- just as it is in the commendation process
00:29 21 with Congress -- for the executive branch to make a
00:29 22 discretionally release. That is not this case. This case is a
00:29 23 situation where we already have the president of the United
00:29 24 States asserting executive privilege over the subset of documents
00:29 25 that they now seek in this FOIA case and that there is preceding

00:29 I litigation between the political branches that involves
00:29 2 settlement negotiations over those very documents. And so
00:29 3 certainly in this litigation we're not going to turn around
00:29 4 and -- if something is covered executive privilege, we think it
00:29 5 would be withholdable under B5 in this case.

00:29 6 THE COURT: Why wouldn't one think that forcing some
00:29 7 activity in this case might have a positive effect on the parties
00:30 8 in the House Committee case deciding to engage in further
00:30 9 discussions and, perhaps, reaching some accommodation or partial
00:30 10 accommodation?

00:30 11 MR. WOMACK: I think the danger --

00:30 12 THE COURT: It's those kinds of events that usually do
00:30 13 prompt further discussions and, perhaps, fruitful discussions.

00:30 14 MR. WOMACK: I think the difference here, Your Honor, is
00:30 15 that once you light a fire, you never really know how far it's
00:30 16 going to spread, so I just don't think you're able to predict,
00:30 17 once you order something that is as significant to both cases as
00:30 18 a Vaughn index, to be produced that provides an extensive
00:30 19 description of the documents, that that will somehow weigh in
00:30 20 favor of the parties coming closer to a resolution; it could have
00:30 21 the opposite affect. So I would caution Your Honor in being able
00:30 22 to predict the way that would go. I don't want to get into
00:30 23 the --

00:30 24 THE COURT: Just theoretically, why would it have an
00:30 25 opposite effect?

00:30 I MR. WOMACK: Because certainly, as Congress has said in
00:31 2 public statements all along, they have sought more information
00:31 3 about the documents, they want public information about the
00:31 4 documents. And so if they are getting that from this court, I
00:31 5 think it definitely alters the calculus for settlement and
00:31 6 potentially alters the way that Judge Jackson orders a Vaughn in
00:31 7 the underlying House Committee litigation.

00:31 8 THE COURT: So anything that either side would get would
00:31 9 only be really Judicial Watch getting something out of lifting
00:31 10 the stay; you think the change, the sensitive calculus of the
00:31 11 parties in the House Committee case because it may be that
00:31 12 whatever that thing is, you mentioned getting the Vaughn index,
00:31 13 is part of the negotiation process between the parties in the
00:31 14 House Committee case?

00:31 15 MR. WOMACK: So more eloquently than I could have said,
00:31 16 Your Honor. I do want to add, Your Honor, that another issue
00:31 17 that should not be overlooked is that -- and I think Your Honor
00:31 18 can understand this critically from your experience in the Myers
00:31 19 case -- the relations between the branches are very sensitive,
00:32 20 and --

00:32 21 THE COURT: That's one word for it these days.

00:32 22 MR. WOMACK: That is one word for it. And I think that
00:32 23 small impacts and small effects have very real consequences, and
00:32 24 so I think that that should be counted on. It is a very delicate
00:32 25 situation.

00:32 I THE COURT: All right, Mr. Womack, what else would you
00:32 2 like to tell me?

00:32 3 MR. WOMACK: Unless Your Honor has further questions, I
00:32 4 don't have anything further.

00:32 5 THE COURT: All right. Thank you. And Mr. Bekesha,
00:32 6 something further?

00:32 7 MR. BEKESHA: Yes, Your Honor. When Mr. Womack was
00:32 8 talking about a potential Vaughn index or something that Judge
00:32 9 Jackson may order, he kept saying something akin to a Vaughn
00:32 10 index, some form of a Vaughn index, something to describe the
00:32 11 records, as he talks about the *Myers* case and talks about what
00:32 12 can be ordered, separation of powers, that's only in response to
00:32 13 a congressional subpoena. A Vaughn index in this instance in a
00:32 14 FOIA case is proper, and so their questions, even if Judge
00:33 15 Jackson orders the identification of records, as Your Honor seems
00:33 16 to indicate, that it may not actually be a Vaughn index, it may
00:33 17 be something else.

00:33 18 So, there's a difference there. Even what Judge Jackson
00:33 19 orders may not be sufficient under FOIA. FOIA allows for,
00:33 20 requires a Vaughn index, and that's what we're asking for in this
00:33 21 case.

00:33 22 Mr. Womack talked about the House Committee keeps asking
00:33 23 for a Vaughn index and they haven't received one to date, and the
00:33 24 reason is because it's a political fight between two branches of
00:33 25 government and whether or not constitutionally one branch of

00:33 I government can order another branch to provide a Vaughn index.

00:33 2 That's why this is an ordinary FOIA case where a Vaughn index --

00:33 3 THE COURT: So you're getting three branches involved

00:33 4 because it's a -- the branch ordering of a Vaughn index is

00:33 5 actually the judicial branch.

00:33 6 MR. BEKESHA: Yes, Your Honor, so it gets even more

00:33 7 confusing, and that's why we're standing here before you today.

00:34 8 We've patiently, respectfully waited 16 months. When the stay

00:34 9 was first granted, I believe we proposed a Vaughn index at that

00:34 10 time, so this isn't a new concept that we're bringing to the

00:34 11 Court's attention. It's our way of trying to move this case

00:34 12 forward, even if it's a little bit. It's a significant step, and

00:34 13 we believe we've waited long enough.

00:34 14 THE COURT: Well, if I knew that Judge Jackson was issuing

00:34 15 a ruling in that case of some dimension -- I'm not clear whether

00:34 16 it resolves all issues; it probably doesn't, but if I knew she

00:34 17 was going to be issuing a ruling in that case within the next

00:34 18 three to four weeks, wouldn't it be wise for me to -- prudent, at

00:34 19 least, to hold off on lifting the stay until after that happened

00:34 20 and see what happens there?

00:34 21 MR. BEKESHA: It could be, but based on what you've heard

00:35 22 today from the Justice Department, I think even with some type of

00:35 23 ruling, whatever it is, it's going to be complicated, there's

00:35 24 going to be one branch of government ordering one or two other

00:35 25 branches of government to do something --

00:35 I THE COURT: Well, complicated doesn't mean that I
00:35 2 shouldn't continue the stay, it may mean that I should, if it's
00:35 3 going to be complicated, so I can see just what kind of impact it
00:35 4 has and what bearing it might have here, rather than speculating.
00:35 5 If something is complicated, it means be cautious, wait and see
00:35 6 what it actually is.

00:35 7 MR. BEKESHA: I think it's complicated not with respect to
00:35 8 our case but the positions that both parties are taking in the
00:35 9 other litigation, whether or not the Justice Department, if it's
00:35 10 a final order or final judgment that's appealable, whether or not
00:35 11 they appeal the jurisdictional issue; if Judge Jackson orders the
00:35 12 production of a Vaughn index, whether or not that interferes with
00:36 13 or has some constitutional questions in it, so there is -- even a
00:36 14 ruling by Judge Jackson in three to four tweaks isn't going to be
00:36 15 the end of it, which means we could be up here again in three to
00:36 16 four weeks before Your Honor talking about the same issues.
00:36 17 Should you wait another three to four weeks or three to four
00:36 18 months?

00:36 19 THE COURT: I understand that continuing the stay involves
00:36 20 that. There's no question about it.

00:36 21 MR. BEKESHA: So we just think we've -- this case being an
00:36 22 ordinary FOIA case requesting a subset of records, we don't even
00:36 23 know how many of the records there are, that most likely these
00:36 24 records are sitting in a box somewhere in the Justice Department,
00:36 25 a Vaughn index can be created, you know, in the appropriate

00:36 1 amount of time, and at that point the parties can meet and confer
00:36 2 and we can move forward.

00:36 3 THE COURT: Well, what did Mr. Womack say? And help me
00:36 4 out with remembering this. What is the estimate on when Judge
00:36 5 Jackson is going to rule? She indicated some --

00:37 6 MR. BEKESHA: I wasn't sure if he gave an estimate.

00:37 7 THE COURT: I thought he said something about July or --
00:37 8 Mr. Womack, did you give me some indication of some likely point
00:37 9 in time that Judge Jackson is likely to rule?

00:37 10 MR. WOMACK: Your Honor, we do not know from Judge Jackson
00:37 11 when she intends to rule. What we do know is that mediation is
00:37 12 not never ending; mediation is only scheduled to go to the end of
00:37 13 July, and after that mediation ceases, she told us she will then
00:37 14 be working on the opinion.

00:37 15 THE COURT: So it could be many months?

00:37 16 MR. WOMACK: It could be many months, but it also might be
00:37 17 a shorter period than that. And if this Court felt that we
00:37 18 needed to readdress the stay on an interim basis, as it's been
00:37 19 doing, then that seems like a wise choice.

00:37 20 THE COURT: Would you agree that if she had done nothing
00:37 21 over the next two years, that maybe the time would come to lift
00:37 22 the stay?

00:37 23 MR. WOMACK: I would think that there would still be
00:37 24 reason not to lift the stay in that case given the enormous
00:38 25 importance of the issues she's deciding.

00:38 1 THE COURT: And how about three years?

00:38 2 MR. WOMACK: I do think, Your Honor, not to dodge the
00:38 3 question, there may be an issue of prejudice if we're talking
00:38 4 about three or four years, but that's not what we're talking
00:38 5 about, we're talking about a case that continued --

00:38 6 THE COURT: How about two -- why is it different, the
00:38 7 prejudice question, different for two years versus three years?
00:38 8 Why don't you come up to the microphone. I'm being unfair to the
00:38 9 court reporter by questioning you standing at counsel table.
00:38 10 What I'm searching for is: At a point in time, you're willing to
00:38 11 say, Oh, yes, there may be some point in time, multiple years,
00:38 12 but why is it different with a stay that goes on for three or
00:38 13 four years than a stay that goes on for two or three years or a
00:38 14 stay that goes on for two years? What's the difference?

00:38 15 MR. WOMACK: I think, Your Honor, that what I did not mean
00:38 16 to say is that it's not just simply a matter of counting days. I
00:38 17 don't think that's it. What I understood Your Honor was
00:38 18 suggesting was that Judge Jackson had simply heard an oral
00:39 19 argument, sent us to mediation, and then did nothing, and the
00:39 20 case just lapsed into a gray area.

00:39 21 THE COURT: Right.

00:39 22 MR. WOMACK: I think that at some point, if it looked like
00:39 23 there wasn't actually activity occurring, then in the interest of
00:39 24 economy, judicial efficiency, as well as the harm to plaintiff,
00:39 25 at some point it may become real, but that's not where we are

00:39 1 right now. The Court is actively trying to decide very difficult
00:39 2 issues and, frankly, as you know, that just takes time, and I
00:39 3 don't think she should be punished for needing the appropriate
00:39 4 amount of time to do that.

00:39 5 THE COURT: None of us are punishing Judge Jackson.
00:39 6 Please. I don't think that any of my rulings that are being
00:39 7 urged on me by the Judicial Watch counsel or that I might be
00:39 8 contemplating are any kind of punishment for Judge Jackson.

00:39 9 What if Judge Jackson stated publicly, "I intend to rule
00:40 10 in August of 2015." Would you say to me the day after that
00:40 11 public statement, Judge Bates, you should continue the stay in
00:40 12 this case?

00:40 13 MR. WOMACK: I think what we would say, Your Honor, is
00:40 14 that that is the case that, frankly, drives at the -- it is the
00:40 15 case that involves a dispute between the political branches where
00:40 16 settlement discussions are ongoing and there are still reasons
00:40 17 not to issue rulings that -- punishment was a poor choice of
00:40 18 word -- but has real effect on the House Committee litigation, so
00:40 19 I would still think there would be reasons not to lift the stay
00:40 20 at that point. But if that order were issued, and I certainly
00:40 21 think it would be appropriated for Your Honor to call the parties
00:40 22 in here and discuss whether, in light of that order, the
00:40 23 circumstances have changed. We might take the position it has
00:40 24 not, but those right now are purely hypotheticals because she is
00:40 25 proceeding --

00:40 1 THE COURT: That's what judges do, is ask hypothetical
00:40 2 questions.

00:40 3 MR. WOMACK: Yes, Your Honor.

00:40 4 THE COURT: And that's what counsel do to try to avoid
00:41 5 answering them. No bad reflection on you. All right. Let me
00:41 6 let Mr. Bekesha continue his presentation briefly.

00:41 7 MR. BEKESHA: I just had one more point, Your Honor.
00:41 8 There's a lot of concern about how this FOIA litigation will
00:41 9 interfere or cause complications with Congress. Quite frankly,
00:41 10 all FOIA requests that Judicial Watch sends to some degree has
00:41 11 spurred action between the two branches of government. Most
00:41 12 recently we had FOIA litigation in a separate case over some of
00:41 13 the Benghazi related materials, information was released to
00:41 14 Judicial Watch, and my understanding is, because of that, a
00:41 15 select committee was created on the Hill. So if the standard is
00:41 16 now whether or not Judicial Watch sending and litigating FOIA
00:41 17 requests is going to interfere with the branches of government,
00:41 18 then Judicial Watch should give up doing FOIA litigation.

00:42 19 THE COURT: I think the point that they're making is a
00:42 20 little more refined than that, and that is that this is a
00:42 21 particularly sensitive context because it involves the assertion
00:42 22 of an executive privilege. Was an executive privilege asserted
00:42 23 in the Benghazi --

00:42 24 MR. BEKESHA: I do not believe it was, but when it comes
00:42 25 to the FOIA litigation in the case before you, it's executive

00:42 I privilege, it's deliberative process, it's Exemption 5 under
00:42 2 FOIA.

00:42 3 THE COURT: I agree with you with respect to the FOIA
00:42 4 case, but the sensitive they're expressing is the relationships
00:42 5 between the two branches of government in the context where an
00:42 6 executive privilege has been asserted in reaction to a
00:42 7 congressional subpoena.

00:42 8 MR. BEKESHA: That is what that case is about, and that's
00:42 9 why that case is complicated, and this case is a little bit
00:42 I0 cleaner, a little bit clearer, and a little bit more simple.
00:42 I1 That's why we urge the Court to respectfully lift the stay and
00:42 I2 order the production of a Vaughn index and allow the parties to
00:42 I3 meet and confer after that. Thank you, Your Honor.

00:42 I4 THE COURT: All right. Thank you, all, very much. I will
00:43 I5 chew on this and get out a ruling on the motion to lift the stay
00:43 I6 some time in the, hopefully, relatively near future, and I
00:43 I7 appreciate the briefing and the argument by all concerned. Thank
00:43 I8 you.

00:43 I9 (Proceedings adjourned at 4:46 p.m.)

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C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Scott L. Wallace, RDR, CRR
Official Court Reporter

Date