IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES,	)	
Plaintiff,	)	Case No. 1:12-cv-1332 (ABJ)
v.	)	
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR A PARTIAL STAY OF, AND PARTIAL RELIEF FROM, THE COURT'S ORDER OF AUGUST 20, 2014

Defendant respectfully moves the Court to stay, during the pendency of the district court litigation, that part of its Order of August 20, 2014, that requires defendant to produce to plaintiff by October 1, 2014, all non-deliberative documents or non-deliberative portions of documents over which Executive Privilege had been claimed; to extend, until December 15, 2014, the deadline by which defendant must provide a detailed list identifying all deliberative documents or deliberative portions of documents it will continue to withhold under Executive Privilege; and to modify the Court's Order so that defendant not be required to "specify" on its detailed list "the decision that the deliberations contained in the document precede." In support of this Motion, defendant respectfully refers the Court to the accompanying Memorandum of Points and Authorities and the attached Declaration of Allison C. Stanton. A proposed order is also attached.

Counsel for plaintiff has indicated that plaintiff objects to the relief sought by this motion.

Dated: September 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2014, I caused a true and correct copy of the foregoing Defendant's Motion for a Partial Stay of, and Partial Relief From, the Court's Order of August 20, 2014 to be served on plaintiff's counsel electronically by means of the Court's ECF system.

/s/ Gregory Dworkowitz
GREGORY DWORKOWITZ

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Plaintiff,	)	
v.	)	Case No. 1:12-cv-1332 (ABJ)
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A PARTIAL STAY OF, AND PARTIAL RELIEF FROM, THE COURT'S ORDER OF AUGUST 20, 2014, AND IN OPPOSITION TO PLAINTIFF'S MOTION TO CLARIFY

INTRODUCTION

On August 20, 2014, this Court ordered the Department of Justice ("Department") to produce to the Committee on Oversight and Government Reform, U.S. House of Representatives ("Committee"), a detailed list describing all records or portions thereof that the Department intends to continue to withhold as exempt from compelled disclosure to Congress based on Executive Privilege, as well as produce to the Committee all information, by October 1, 2014, that has been withheld under the assertion of Executive Privilege, but which the Court has said should not be withheld pursuant to the deliberative process privilege. The Department respectfully requests that this Court grant it partial relief from the Order, and also deny the Committee's motion of August 25, 2014, that asks the Court to amend its earlier Order and impose additional requirements. In particular, the Department requests a modification of the

current schedule to allow it time to review the withheld documents and to create the detailed list ordered by the Court, and requests that, consistent with established law, the Court modify in certain respects the requirements imposed on the Department to describe its privileged records for Congress.

The Court's Order requiring the Department to produce to the Committee non-deliberative material over which the President asserted Executive Privilege in response to a congressional subpoena is an injunctive order that would permit an immediate appeal as of right. *See* 28 U.S.C. § 1292(a)(1). The Court should stay its Order requiring the disclosure of records during the pendency of this case to avoid the possibility of piecemeal appeals to the D.C. Circuit, and to allow for the orderly and efficient resolution of the issues that remain before this Court.

The attached declaration, moreover, makes clear that the identification and processing of such non-deliberative documents (or portions thereof) in line with this Court's order for production to the Committee, as well as the creation of a detailed list for the Committee to identify for it the information that the Department intends to continue to withhold under Executive Privilege, will require a significant expenditure of time and resources. Thus, even if the Court declines to stay its injunctive order during the pendency of this case, the Court should not require the Department to produce non-deliberative documents, or the list for the Committee, until December 15, 2014, at the earliest.

Finally, the Department respectfully requests that the Court amend its Order to omit the Court's requirement that, in the detailed list, the Department "specify the decision that the deliberations contained in the document precede." Order (ECF No. 81) ("Summ. J. Order") at 4. The Supreme Court has made clear that the applicability of the common law deliberative process privilege does not "turn[] on the ability of an agency to identify a specific decision in connection

with which a memorandum is prepared." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). And the D.C. Circuit has held that "[a]ny requirement of a specific decision after the creation of the document would defeat the purpose of the [deliberative process privilege]." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (emphasis omitted). In light of this clear precedent, the Court should amend its Order to omit that requirement, and further deny the Committee's request that the Department—in addition to identifying specific decisions—provide the dates on which such decisions were made, and identify to the Committee any policies to which such decisions would be relevant. *See, e.g.*, *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 575 F.2d 932, 935 (D.C. Cir. 1978) ("While [plaintiff] correctly notes that the end product of these Air Force deliberations . . . is not a 'broad policy' decision, that deliberation is nonetheless a type of decisional process that [the deliberative process privilege] seeks to protect from undue public exposure.").

BACKGROUND

In December 2013, the Committee filed a motion for summary judgment (ECF No. 61), and in January 2014, the Department filed a cross-motion for summary judgment (ECF No. 63). On August 20, 2014, the Court held a status conference at which it denied the parties' cross-motions for summary judgment without prejudice from the bench. Later that day, the Court issued a written Order to the same effect. (ECF No. 81.)

The Court directed the Department to conduct a "document-by-document analysis and determine which records" are properly withheld by the Executive from production to the Committee under the congressional subpoena because the records are covered by the deliberative process privilege as described in the Court's ruling. Summ. J. Order at 4. The Court further instructed the Department to "prepare a detailed list that identifies and describes the material in a

manner sufficient to enable resolution of any privilege claims." *Id.* (quotation marks and citations omitted). The Court explained that the "list should set forth not only the author and recipient(s) and the general subject matter of the record being withheld, but the basis for the assertion of the privilege; in particular, defendant should specify the decision that the deliberations contained in the document precede." *Id.* The Court further directed that the Department produce the list to the Committee, "along with all of the non-privileged records," by October 1, 2014. *Id.* at 5.

Also in its August 20, 2014 Order, the Court stated that, if the parties found it "necessary to propose an alternative schedule," they could "jointly file a proposed alternative schedule by September 2, 2014." *Id.* Should the parties disagree as to scheduling, the Court further stated that the Department could, for good cause shown, "file any request to extend the schedule" by the same date. *Id.* at 5-6.

On August 25, 2014, the Committee, over the Department's objection, filed a motion that asks the Court's to amend its August 20 Order and impose additional requirements. (ECF No. 83). The Committee proposes that the Court's August 20 Order be

> clarified as follows: the "detailed [privilege] list" to be prepared by defendant Attorney General pursuant to the Court's August 20, 2014 Order shall include, for each record as to which the Attorney General continues to assert a claim of privilege, (i) the date on which such record was created and/or transmitted, and (ii) the date of any asserted underlying policy decision with respect to which the Attorney General contends the record is "pre-decisional."

Pl.'s Proposed Order (ECF No. 83-1) at 1 (alterations in original). The Department informed the Committee that it would respond substantively to the Committee's motion by today's date.[1]

[1] In another case currently pending in this District, a plaintiff, proceeding pursuant to the Freedom of Information Act, is seeking the same documents that are at issue here. *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 12-1510 (D.D.C.) (JDB). The Court in that later-filed case

ARGUMENT

I. THE COURT'S INJUNCTIVE ORDER REQUIRING PRODUCTION OF DOCUMENTS TO THE COMMITTEE SHOULD BE STAYED PENDING RESOLUTION OF THE REMAINING ISSUES BEFORE THIS COURT, OR, ALTERNATIVELY, STAYED UNTIL DECEMBER 15, 2014

The Department seeks a partial stay, pending resolution of all issues before the district court, of the Court's Order, which requires production to the Committee of documents that the President has withheld as exempt from congressional subpoena due to Executive Privilege, but which are not covered by the deliberative process privilege as articulated by the Court. "The power to stay proceedings, especially as to the ramifications of its own orders, is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Kansas City Southern Ry. Co. v. United States*, 282 U.S. 760, 763 (1931). Indeed, the D.C. Circuit has advised that a district court has "broad discretion to control its docket." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Kansas City Southern*, 282 U.S. at 763.

The Department respectfully submits that a stay until conclusion of this litigation in district court of the Order to produce non-deliberative records over which the President asserted Executive Privilege is justified to avoid the possibility of piecemeal appeals from this Court's orders. Because the Court "rejected the Government's legal position" as to some bases for its withholdings from the Committee under the Executive Privilege, and because the Court ordered

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has issued an order requiring the Department to submit a *Vaughn* index describing the withheld material by October 1, 2014 (but has not ordered any material to be produced). Prior to August 20, the Department was intending to seek relief from that Court regarding that requirement, and will file such motion shortly.

the Government to disclose non-deliberative documents or portions of documents that it had sought to withhold under Executive Privilege, the Court's Order is injunctive in nature, and therefore gives rise to a right to take an immediate appeal under 28 U.S.C. § 1292(a)(1). *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005).

If the Court does not grant a stay of the production requirement, and the Department decides to appeal the Court's injunctive order, the D.C. Circuit could then be called upon to evaluate the orders this Court has issued leading to the injunction at the same time that this Court is considering additional issues relating to the documents that would, according to the Court's analysis, be potentially withheld as deliberative. If this Court then were to issue a later order that required the production of additional information to the Committee, and the Department were to appeal from such an order, the Department would be required to file piecemeal appeals from two different production orders rather that a single appeal from a final order. The Department respectfully submits that it would be preferable for the parties, this Court, and the D.C. Circuit to avoid potentially proceeding in this fashion.

Nor does a stay of the production requirement until the end of the district court litigation turn on this Court's agreement with the Department's position. While the Department recognizes that the Court was not persuaded by all of the Department's arguments for withholding the documents under Executive Privilege, at the very least the Department has raised important and complex legal issues in a dispute between the Executive and Legislative Branches that could ultimately be resolved in the Department's favor by the D.C. Circuit, *see Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (granting motion to stay even though the court "ultimately did not agree with defendants' position on the merits"), especially when this Court has recognized that "there is little authority

that bears directly" on the merits of this case, Tr. of Status Conf. at 5 (Aug. 20, 2014) (portions attached hereto at Ex. A), and certainly none foreclosing the Department's position.[2]

Granting a stay of the production requirement until the conclusion of proceedings before this Court also would not unduly prejudice the Committee. Granting a stay only "postpones the moment of disclosure assuming that [plaintiff] prevails by whatever time" it takes to resolve the remaining issues in this case. *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). Absent some articulation from the Committee of a particularized interest for its investigation in the *non-deliberative* documents, the Committee's preference to obtain the documents sooner rather than later cannot outweigh everyone's interest in avoiding possible piecemeal appeals. Nor is it unusual that a requestor of documents is required to wait until the relevant litigation is complete before receiving documents. *See, e.g., Charles v. Office of the Armed Forces Med. Examiner*, 979 F. Supp. 2d 35, 41 (D.D.C. 2013) ("This Court granted Defendants' motion to stay pending appeal the portion of the March 27th Order that required disclosure of the final autopsy reports and related records."). Because of the unprecedented nature of this litigation, the issue has not been addressed before in the context of the President's response to a congressional subpoena, but similar interests that favor a stay of production in typical civil litigation favor such an approach here and, indeed, weigh more heavily toward ensuring an orderly process in an inter-Branch dispute. The public interest thus favors a stay of

[2] It also remains the Department's view that the Court lacks jurisdiction over this dispute between the Political Branches, which involves the President's claim of Executive Privilege in response to a congressional subpoena and the request by the Committee to enforce its demands for information from the Executive Branch, but the Court denied the Department's motion under 28 U.S.C. § 1292(b) for certification of an interlocutory appeal on the issue, and we do not repeat those arguments here. The Department notes as well that the process of balancing competing interests that this Court contemplates further supports the Department's view that this dispute lies outside the bounds of justiciability.

any production requirement to the end of the district court litigation so as to permit any appeal of the significant issues presented by this case to proceed in an orderly manner.[3]

In the alternative, if the Court does not stay its production order pending resolution of this case in this Court, a stay of production is warranted until at least December 15, 2014, given the practical impossibility of reviewing before that time the full group of documents withheld under Executive Privilege. *See also infra* Part II. As explained in the attached Declaration of Allison C. Stanton ("Stanton Decl.") (attached hereto as Ex. B), in order to comply with the Court's Order, the Department must conduct a line-by-line review of over 15,000 documents, consisting of approximately 64,000 pages. *See* Stanton Decl. ¶¶ 3, 6. That review must, as contemplated by the Court's Order, identify deliberative information within those documents and separate such material from factual material not so inextricably intertwined with the deliberative portions of the documents that disclosure would inevitably reveal the government's deliberations. *See* Summ. J. Order at 2-3. The review for deliberative material, by itself, will be time-intensive, particularly given that a very significant portion of the documents claimed as deliberative are emails, which by their nature require a more time-consuming review than other documents. *See* Stanton Decl. ¶ 7.

The review will additionally prove time-intensive due to the need to redact other materials not at issue in this litigation, such as personal identification information and law-

[3] If the Court does not at present stay its injunctive order, and the Department decides to appeal, the Department reserves the right to again seek a stay from this Court in order to preserve its ability to prosecute the appeal. *See In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) ("Disclosure followed by appeal . . . is obviously not adequate in [privilege] cases—the cat is out of the bag."), *superseded by statute on other grounds as stated in Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). Similar concerns would justify a stay of any final order requiring production to the Committee. If unable under those circumstances to obtain a stay pending appeal in this Court, the Department could then seek one from the D.C. Circuit.

enforcement sensitive information. *Id.* ¶¶ 8-9, 13. The Committee brought this suit in order to challenge the validity of the President's assertion of Executive Privilege, and to compel production of those materials that were withheld on the basis of that privilege assertion. As should not be surprising, the withheld documents also embody information that has nothing to do with this lawsuit, the withholding of which is unrelated to the assertion of Executive Privilege. For example, some of the withheld documents include personal identification information (such as personal emails, phone numbers, etc.). *Id.* ¶ 9. This lawsuit does not implicate the withholding of such materials, and, as a result, any such materials would need to be redacted prior to disclosure of documents to the Committee. Similarly, as might be expected with documents connected to oversight into a law enforcement investigation, some of the materials that were withheld as a result of the assertion of Executive Privilege may *also* contain sensitive materials related to law enforcement investigations. *Id.* ¶ 8. Not only is the withholding of such materials not implicated by this suit, the Committee affirmatively disclaimed any immediate demand for production of such materials. *See* H.R. Rep. No. 112-546, at 38-39 (2012) (explaining that contempt was not premised on non-provision of law enforcement material because Committee had agreed to defer submission of the same to "accommodate the Department's interest in successfully prosecuting criminal defendants in this case"). A relatively small volume of materials implicates these concerns, and the Department would be willing to submit such materials for *in camera* review to confirm their nature. But, nonetheless, because such materials must be identified from the full set of withheld documents, this additional process adds to the time required for review.[4]

[4] The Department explained during summary judgment briefing that some of the withheld material implicated "common-law and statutory privileges," Def.'s Mem. in Supp. of Def.'s Mot.

Sensitive law enforcement and personal privacy information can be and regularly is redacted from whatever documents are provided to Congress during the typical accommodation process between the Political Branches. *See, e.g.*, Decl. of M. Faith Burton (ECF No. 63-1) ¶¶ 4-6. The Department therefore must search for, document and withhold that material. *See id.* Given the general nature of the withheld documents—those pertaining to the manner in which the Department responded to congressional inquiries about a law enforcement operation conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives—the review must identify and redact sensitive law enforcement material, including discussions between Department officials regarding the underlying law enforcement actions and about criminal prosecutions. Stanton Decl. ¶ 8. Further, before any disclosure of the relevant material would be appropriate (if at all), personal privacy information and material unrelated to Fast and Furious would also have to be considered for redaction. *Id.* ¶ 9. As the Stanton Declaration explains, reviewing the withheld material to protect these various types of information requires careful review by various government officials, and Department estimates that this process cannot be completed before December 15, 2014. *Id.* ¶ 16.

For all these reasons, the Department asks that the Court's Order requiring the production of documents be stayed until the conclusion of proceedings in the district court. In the alternative, the Department respectfully asks that it be given at a minimum until December 15, 2014, to produce the non-deliberative material over which Executive Privilege was claimed. The

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for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. (ECF No. 63) at 33 n.10, but indicated that the Court "need not reach" any of those issues because "the constitutionally-based privilege issues in this case [should be] dispositive," Def.'s Reply in Supp. of Def.'s Mot. for Summ. J. (ECF No. 71) at 5 n.2. The Committee accordingly understood that the documents involved "common law privilege claims" as well. Pl.'s Consolidated Mem. (ECF 68) at 9.

Department does not make this request lightly, but, as explained in the Stanton Declaration, that date is, by the Department's best good-faith estimate, the earliest that the Department could complete its review of the approximately 64,000 pages of documents at issue. *Id.*

II. THE DEPARTMENT REQUIRES ADDITIONAL TIME TO REVIEW AND PROCESS DOCUMENTS IN CONNECTION WITH THE COURT'S ORDER TO PROVIDE A DETAILED LIST DESCRIBING THE WITHHELD MATERIALS

The Department also respectfully requests that the Court extend the deadline by which the Department must provide the Committee with a list describing the material that it maintains is protected by the Executive Privilege even under the Court's summary judgment ruling, as contemplated by the Court's August 20, 2014 Order. *See* Summ. J. Order at 5-6 (providing the Department with an opportunity to file a request to extend the schedule by today's date). As explained in the Stanton Declaration, in light of the nature of the privilege asserted in this inter-Branch dispute, the approximately 15,000 documents (64,000 pages) that are subject to the President's assertion of Executive Privilege in response to the congressional subpoena have not been previously reviewed under the standard required by the Court's Order, which calls for a line-by-line review for deliberative information. Stanton Decl. ¶ 6. Nor have prior reviews—given that the Department withheld the documents over which the President asserted Executive Privilege in their entirety—identified all of the material in which government employees and third parties have personal privacy interests, or all law enforcement sensitive material contained in the documents, all of which must be done as part of the process of creating the list ordered by the Court. *Id.* ¶¶ 8-9.

In order to now conduct that review, the Civil Division has made available significant additional resources. The Civil Division will task approximately ten additional attorneys—attorneys who will be removed from their usual duties—to conduct the document-by-document,

line-by-line review of records required by the Court. *Id.* ¶ 11. Even with these additional resources, given the careful review that must be conducted to complete the Department's list of withheld material, and given the sheer volume of the records at issue, the Department is unable to meet the current October 1, 2014 deadline.

As an initial matter, the Civil Division attorneys who will be newly assigned to this case for purposes of the document review will have to be familiarized with the case and the documents at issue. *Id.* ¶ 12. Each page of the documents will then have to be reviewed by the Civil Division attorneys, line-by-line, to identify all deliberative information in the documents, as well as information that is law enforcement sensitive or information that implicates personal privacy. *Id.* This review is complicated by the fact that the documents contain multiple email chains, subsets of which are repeated across documents, such that the documents will often have to be compared against one another in order to ensure consistency. *Id.*

The Department's review and creation of a detailed list will also require consultation with those components that have equities and expertise in the underlying information in order to describe the withheld materials. *Id.* ¶ 13. While the Civil Division attorneys will attempt to expedite this review by having the components review the documents concurrently with the review by the Civil Division, those components face resource and time constraints imposed by their ordinary Freedom of Information Act ("FOIA") and litigation responsibilities. *Id.* Once the review of the documents has concluded, Civil Division attorneys will need to prepare a detailed list of the documents that complies with this Court's specifications. *Id.* ¶¶ 14-15. In a case brought under the FOIA, a review of this size would ordinarily take multiple months, if not years. *Cf. Int'l Counsel Bureau v. U.S. Dep't of Defense*, 723 F. Supp. 2d 54, 59-60 (D.D.C. 2010) ("[S]earches that last a year or more are not uncommon in FOIA cases."). The

Department is taking extraordinary steps to devote the resources necessary to collapse that time to fourteen weeks in light of the Department's understanding that this Court has asked for the review and detailed list to be completed in an expedited fashion. Stanton Decl. ¶ 16. This estimate takes into account the substantial work already done by the Department to familiarize itself with the documents in the database. *Id.* However, owing to the number of documents at issue, the coordination required across the Executive Branch, and the complexity of the issues presented, the Department's best, good-faith estimate is that it would need until December 15, 2014 to complete a list and produce non-privilege documents as ordered by the Court. *Id.* Accordingly, and based on the information provided in the Stanton Declaration, the Department respectfully asks for an extension of time to provide its list until that date.

III. CONSISTENT WITH CONTROLLING LAW, THE COURT SHOULD MODIFY WHAT INFORMATION MUST BE INCLUDED IN THE DEPARTMENT'S LIST

Among other requirements, the Court has ordered the Department in its list of deliberative process material to "specify the decision that the deliberations contained in the document precede." Summ. J. Order at 4. The Department respectfully submits that such information would not be required to justify withholdings under the common law deliberative process privilege in typical civil litigation, let alone a deliberative process privilege rooted in the Constitution, as has been recognized by this Court. The Order should accordingly be amended to omit that requirement in this inter-Branch dispute that involves the constitutionally rooted Executive Privilege.

The Court should, moreover, summarily deny the Committee's motion for additional relief—styled as a motion to "clarify" the Court's August 20 Order—that the Department be ordered to provide a significant amount of additional information in its list. The Committee has not identified any authority in support of the relief it seeks, and the caselaw in the civil discovery

and FOIA context demonstrates, to the contrary, that the Committee's request is unwarranted for similar reasons.

A. The Court Should Not Require the Department to Identify Specific Decisions to Which Deliberations Relate

The Supreme Court has made clear that the applicability of the common law deliberative process privilege does not "turn[] on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). Rather, an agency withholding material pursuant to that privilege in civil litigation "must establish what deliberative *process* is involved." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998) (emphasis added) (quotation marks and citation omitted); *see also, e.g.*, *Petrucelli v. Dep't of Justice*, --- F. Supp. 2d ---, 2014 WL 2919285, at *11 (D.D.C. June 27, 2014) ("To show that a document is predecisional, the agency need not identify a specific final agency decision; it is sufficient to establish what deliberative process is involved, and the role played by the documents at issue in the course of that process." (quotation marks and citation omitted)); *Soghoian v. OMB*, 932 F. Supp. 2d 167, 179 (D.D.C. 2013) (rejecting argument that "to show a document is pre-decisional, the court must pinpoint an agency decision or policy to which the document contributed." (quotation marks and citations omitted)).

The distinction between identifying a decision and identifying a deliberative process is meaningful. The D.C. Circuit has explained that "[a]ny requirement of a specific decision after the creation of the document would defeat the purpose of the [privilege]." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (emphasis omitted). This is because the fundamental purpose of the deliberative process privilege is to protect against chilling the candor of deliberative communications. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) ("The deliberative process privilege rests on the obvious realization that

officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions by protecting open and frank discussion among those who make them within the government.'" (quoting *Sears, Roebuck*, 421 U.S. at 151) (internal citation omitted)); *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearance and for their own interests to the detriment of the decisionmaking process."); *see also Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Housing & Urban Dev.*, --- F. Supp. 2d ---, 2013 WL 5314457, at *7 (D.D.C. Sept. 24, 2013) ("[T]he deliberative process privilege rests on the principle that 'the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.'" (quoting *Wolfe v. U.S. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc))). A deliberative process privilege requiring identification of a specific decision would not provide meaningful protection for the decisionmaking process. *See Access Reports*, 926 F.2d 1192 ("At the time of writing the author could not know whether the decisionmaking process would lead to a clear decision, establishing the privilege, or fizzle, defeating it. Hedging his bets, he would be drawn into precisely the caution, or the Aesopian language, that the [privilege] seeks to render unnecessary."); *cf. Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) ("A privilege contingent on later events—such as whether the draft ultimately evolved into a final agency position—would be an uncertain privilege, and as the Supreme Court has said, an uncertain privilege is 'little better than no privilege at all.'" (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981))). Accordingly, in *Access Reports*, the D.C. Circuit reversed the lower court for holding, among other things, that the Department of Justice could not withhold material as deliberative because

the Department could not "'pinpoint' a later decision to which the document contributed." 926 F.2d at 1193.

Because of this clear precedent, this Court should amend its Order of August 20 to remove the requirement that the Department "specify the decision that the deliberations contained in the document precede." Summ. J. Order at 4. Such a requirement would be inappropriate in typical litigation over the common law deliberative process privilege, and there is especially no basis for requiring this additional information under the unprecedented circumstances of the present case—where the privilege on which the Department relies in a dispute with another Branch of government has its "roots in the constitutional separation of powers." *Id.* at 2 (quotation marks and citation omitted).

B. The Court Should Reject the Committee's Attempts to Require Provision of Additional Information

It necessarily follows from the well-settled proposition (discussed in the preceding section) that the Department should not be required to identify any "specific decision[s]" to which its deliberations relate, *Sears, Roebuck*, 421 U.S. at 151 n.18, that the Department should not be required to identify the "the date of any asserted underlying . . . decision," as the Committee now seeks, Mem. of P. & A. (ECF No. 83) ("Pl.'s Clarification Mem.") at 2. Indeed, the Committee has not directed this Court to any authority in support of its position, even in the context of civil discovery or FOIA litigation. Rather, and purporting to seek "clarification," *id.* at 2 n.1, the Committee avers merely that "it will be difficult, if not impossible, for the Committee effectively to analyze the Attorney General's list without knowing pertinent dates," *id.* at 2.

The Committee fails to explain how knowing the date on which a deliberative process culminates is necessary to determine whether withheld information is deliberative. Nor can it.

For example, if a Department official recommends conveying a point in a proposed letter to the Committee, it makes no difference if the letter in question was sent that day, that month, that year, or never at all. *See Nat'l Sec. Archive*, 752 F.3d at 463 (rejecting conception of privilege "contingent on later events"). The Court contemplates that the Department will give the Committee "an opportunity" to decide if it will continue to challenge the Department's withholdings, Summ. J. Order at 5, and the Committee will be able to make such a determination without knowing the dates (if any) on which relevant deliberative processes ended. The law of this Circuit requires no more. *Cf., e.g.*, *Access Reports*, 926 F.2d at 1193.[5]

The Committee also asks this Court to require the Department to identify the "policy" decisions to which deliberative material relates. *E.g.*, Pl.'s Clarification Mem. at 2; Pl.'s Proposed Order at 1. The Court should reject this request in light of the Committee's repeated failure to identify any authority in support of this position.

Whether deliberative material must relate to a specific "policy" decision was the subject of an extended colloquy between the Court and the Committee at the May summary judgment hearing. *See* Tr. of Mots. Hrg. (May 15, 2014) (portions attached hereto as Ex. C) at 29-32. During this discussion the Court asked the Committee several times what authority it had "for the proposition that the decision that's being deliberated about has to be a formal—a policy decision." *Id.* at 30; *see also, e.g.*, *id.* at 32 ("[W]here does this concept that it has to be a policy decision come from as opposed to a decision about which people deliberate internally?"). The Committee expressed its view that only deliberations concerning "policy" are protectable, *see,*

[5] In addition to requesting that the Department include on its detailed list the dates of decisions to which deliberations relate, the Committee requests as well that the Department include the dates on which records were "created and/or transmitted." The Department does not object to including the creation or transmittal date of records that are included on the list, and is in fact intending to include such information.

e.g., *id.* at 32 ("I think they have to be policy-oriented kinds of decisions. I think that's what the case law says."), but it could not identify any cases in support of its position then, *see id.*, and has not brought forth any authority since.

The Court should reject the Committee's claim that a "policy" decision is a prerequisite to assertion of the deliberative process privilege. This Court explained just last year that "[t]he fact that the decision-making activity d[oes] not relate to a particular . . . policy decision does not remove the documents from the protection of [the deliberative process privilege]." *Shurtleff v. U.S. Envtl. Prot. Agency*, 991 F. Supp. 2d 1, 14 (D.D.C. 2013). Accordingly, the Court should reject the Committee's request to require the Department to identify "policy" decisions to which its deliberations relate. *See, e.g.*, *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 575 F.2d 932, 935 (D.C. Cir. 1978) ("While [plaintiff] correctly notes that the end product of these Air Force deliberations . . . is not a 'broad policy' decision, that deliberation is nonetheless a type of decisional process that [the deliberative process privilege] seeks to protect from undue public exposure."); *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008) (rejecting argument that material is not deliberative because "these are not deliberations on substantive agency policy"); *In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 29 (D.D.C. 2008) ("Significantly, . . . the privilege serves to protect the processes by which 'governmental decisions' as well as 'policies' are formulated."); *see also Access Reports*, 926 F.2d at 1196 ("The[agency] sought the memo in part as ammunition for the expected fray, in part as advice on whether and when to duck. It was . . . somewhat like a staffer's preparation of 'talking points' for an agency chief about how to handle a potentially explosive press conference."); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010) ("Because the handling of [the] case was controversial, it is understandable that

. . . numerous discussions involving the controversy took place and required multiple decisions.").

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court grant the Department's Motion for a Partial Stay of, and Partial Relief from, the Court's Order of August 20, 2014, and deny the Committee's motion to clarify.

Dated: September 2, 2014

Respectfully submitted,

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/s/ Gregory Dworkowitz
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2014, I caused a true and correct copy of the foregoing Defendant's Memorandum of Points and Authorities in Support of its Motion for a Partial Stay of, and Partial Relief From, the Court's Order of August 20, 2014, and in Opposition to Plaintiff's Motion to Clarify to be served on plaintiff's counsel electronically by means of the Court's ECF system.

/s/ Gregory Dworkowitz
GREGORY DWORKOWITZ

Comm. on Oversight & Gov't Reform, U.S. House of Reps. v. Holder, No. 12-1332 (ABJ)

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A PARTIAL STAY OF, AND PARTIAL RELIEF FROM, THE COURT'S ORDER OF AUGUST 20, 2014, AND IN OPPOSITION TO PLAINTIFF'S MOTION TO CLARIFY

Ex. A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Committee on Oversight and Government Reform, United States House of Representatives, Plaintiff, vs. Eric H. Holder, Jr., Defendant.	File No: 12-CV-1332 Date: August 20, 2014 Time: 11:03 a.m. STATUS CONFERENCE

TRANSCRIPT OF STATUS CONFERENCE
HELD BEFORE
THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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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 have revealed the Agency's deliberative processes.

The Committee filed this action to declare that assertion to be invalid and to enforce the subpoena. And the action was filed on August 13, 2012. The complaint was amended in January 2013 after the incoming 113th Congress reissued the subpoena.

The Attorney General moved to dismiss the case on standing and jurisdictional grounds raising separation of powers concerns, but I found that the legitimacy of a claim of executive privilege fell within this Court's jurisdiction, and I directed the parties to brief the merits. I received the briefs and we held the hearing.

Notwithstanding the length of the briefs, there is little authority that bears directly on this particular issue. But based on my review of everything that's been presented to me at this point, I'm going to deny both the motion for summary judgment and the cross-motion for summary judgment without prejudice at this time.

What authority there is that is binding on me indicates that courts recognize a deliberative process privilege as a form of executive privilege. Both parties

Comm. on Oversight & Gov't Reform, U.S. House of Reps. v. Holder, No. 12-1332 (ABJ)

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A PARTIAL STAY OF, AND PARTIAL RELIEF FROM, THE COURT'S ORDER OF AUGUST 20, 2014, AND IN OPPOSITION TO PLAINTIFF'S MOTION TO CLARIFY

Ex. B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant.	Case No. 1:12-cv-1332 (ABJ)

DECLARATION OF ALLISON C. STANTON

I, Allison C. Stanton, do hereby declare and state:

1. I am the Director of E-Discovery, FOIA, and Records in the Office of the Assistant Attorney General, Civil Division, Department of Justice ("Department"). I joined the Department in October 2010 as the Director of E-Discovery. My responsibilities were subsequently expanded to also include supervision of all FOIA and Records functions for the Civil Division in 2012. In addition to my role in developing e-discovery best practices and policies for the federal government, I routinely provide legal and procedural advice to Department attorneys and agency counsel on developing discovery and document review plans. Throughout my twelve year career I have personally participated in and supervised numerous high profile and complicated discovery matters. I have broad experience assessing discovery resources needs and plans for a variety of organizations. I also conduct trainings on e-discovery and discovery issues and have spoken and written extensively on e-discovery and discovery

topics. I make the following statements based on my personal knowledge and upon information furnished to me in the course of my official duties.

2. I am aware of the Order entered in this case on August 20, 2014 ("Order"), in which the Court ordered the Department to produce to the Committee on Oversight and Government Reform, U.S. House of Representatives ("Committee"), a detailed list describing all records or portions of records that the Department intends to continue to withhold as exempt from compelled disclosure to Congress based on Executive Privilege, as well as produce to the Committee all information, by October 1, 2014, that had been withheld under the assertion of Executive Privilege, but which the Court has said should not be withheld pursuant to the deliberative process privilege. I explain herein the volume and complexity of the records at issue in this case, the nature of the review previously conducted of these records, and that completion of the tasks required by the Court's Order—including that we "conduct [a] document-by-document analysis"; complete a line-by-line review to identify "segregable factual sections of documents that do not fall under the deliberative process privilege"; and produce a "detailed list" that must not only contain document identifying information but also identify "the general subject matter of the record being withheld" as well as "the basis for the assertion of the privilege"—will not be achievable in the time currently provided in the Court's Order. Order (ECF No. 81) at 4, 5. The government will need until December 15th to complete the review and detailed list ordered by the Court. Given the task at hand, meeting the October 1, 2014 deadline presents a practical impossibility.

The Documents at Issue

3. On June 20, 2012, the President asserted Executive Privilege over documents that were responsive to a subpoena issued in October 2011 by the Committee to the Attorney General, and that were created in the course of the Department's deliberations regarding how to

respond to congressional and related media inquiries about Operation Fast and Furious. This assertion covered approximately 15,000 documents consisting of approximately 64,000 pages. The President asserted Executive Privilege over the entirety of the documents, and the documents were accordingly withheld in full.

4. The documents that are subject to the President's assertion of Executive Privilege were assembled by the Department during the Committee's investigation into Operation Fast and Furious, and placed by the Department in a database for storage and safekeeping. The documents have since been reviewed from time to time during the course of this case in order to inform the Department's internal assessment of its litigation position, and to provide guidance to the Department as it developed a means to achieve, if possible, a compromised settlement of this case with the Committee.

5. Because the President asserted Executive Privilege over the entirety of the documents, all previous reviews that were conducted of the documents at issue in this case did not encompass the document-by-document, line-by-line deliberative process privilege review that is now required of defendant by the Court's Order of August 20, 2014. During the prior reviews, the Department did not identify what specific information contained in these records was law enforcement sensitive, such as information relevant to wiretaps or investigative techniques and procedures, or grand jury information. Nor during the prior reviews did the Department identify what specific information pertaining to individually identified persons might be subject to privacy protection.

The Review of Records Required by the Court Will Be Complex and Extensive

6. Separating deliberative from non-deliberative information in approximately 64,000 pages of records as ordered by the Court will require careful, considered line-by-line

review of every page. Due to the volume of documents at issue, additional and new reviewers must be assigned to this matter who do not yet have detailed knowledge of this case. Moreover, each reviewer assigned to this task must have time to learn the context and background of individual documents in order to accurately determine the documents' deliberative nature and the deliberative process or processes to which individual communications potentially relate. Further, a deliberative process review is an iterative process that often requires reviewers to return to and revise preliminary redactions on previously considered documents as the review process goes forward. This revising process is necessary as the reviewers learn more about the overall context of the decision-making process through the review of additional documents. Indeed, it is possible that, through this process of return and revision, documents that are initially identified as deliberative during this review may be determined later to be non-deliberative.

7. In addition, the vast majority of the documents at issue are emails which, in a deliberative process review, generally require a more time-consuming review than other documents. For example, while formal memoranda and official reports often contain readily ascertainable deliberations of issues and recitation of facts, including headers and other indicators that easily explain the context and sensitivity of the issues discussed, it is generally more difficult in a deliberative process review to ascertain the nature and specific context of individual emails due to their fragmented and informal structure. Authors of emails often assume email recipients are knowledgeable of an email's context without further explanation. Additionally, emails reviewed in a vacuum can appear to contain vague references or digressive non-sequiturs. The lack of context and abbreviated discussion make the review of emails for the deliberative process privilege particularly difficult and time consuming because the underlying purpose and content of the discussion is essential to the privilege analysis.

8. Given the nature of the documents and the Department's previous reviews of the documents for settlement purposes, the Department is aware that there is also material within the approximately 15,000 withheld documents that is law enforcement sensitive. The Committee in this case sought to obtain information concerning the manner in which the Department responded to congressional inquiries about a law enforcement investigation known as Operation Fast and Furious. Accordingly, some of the documents responsive to the Committee's subpoena, and at issue in this case, contain discussions between Department officials regarding the underlying investigation. The review this Court has ordered will necessarily require the Department to consult with law enforcement entities regarding all potentially sensitive law enforcement information. This type of information is regularly redacted by the Department in its production of documents to Congress, to Freedom of Information Act ("FOIA") requestors, and to parties in civil discovery.

9. The Department will also have to take care to ensure that personal privacy information and material unrelated to Operation Fast and Furious is protected as well. The Department regularly redacts such information from its productions to Congress, to FOIA requestors, and to parties in civil discovery. Within the documents that were identified as responsive to the Committee's subpoena, there are, for example, personal phone numbers and email addresses, planning for personal travel, and also confidential, sensitive details concerning other sensitive Department business that has no relevance to the subject of the Committee's inquiry. It is often the case that a single email can sometimes contain information about multiple subjects, and the Department must be able to protect sensitive discussions having nothing to do with the subject matter of this case, but are nonetheless contained in documents that are otherwise responsive to the subpoena.

Substantial Resources and Additional Time Will Be Required to Comply with the Court's Order

10. Compliance with the Court's Order will require substantial time and a significant expenditure of resources.

11. The Civil Division will task approximately ten additional attorneys to conduct the document-by-document, line-by-line privilege review of records required by the Court. This is a significant expenditure of human resources, as these attorneys will be removed from their current assigned duties. Even with these additional resources, given the careful review that must be conducted to comply with the Court's August 20th Order, and given the volume of the records at issue, the Department is unable to meet the current October 1, 2014 deadline.

12. As an initial matter, the Civil Division attorneys who will be newly assigned to the case for purposes of the document review will have to be familiarized with the complexities of this case and the documents at issue. Each page of the documents will then have to be reviewed by the Civil Division attorneys, line-by-line, to identify all deliberative information in the documents, information that may be law enforcement sensitive, and information that may implicate personal privacy. This review is complicated by the fact that the documents contain multiple email chains, subsets of which are repeated across documents, such that the documents will often have to be compared against one another in order to ensure consistency in analysis and redaction.

13. The Department's review will also require consultation as appropriate with Department and other Executive Branch entities that have equities, knowledge, or expertise in the underlying information. While the Civil Division attorneys will attempt to expedite such review by having stakeholders review the documents concurrently with the review by the Civil

Division, those entities face resource and time constraints imposed by, for example, their ordinary FOIA responsibilities that must be statutorily satisfied by the end of the fiscal year (September 30th) and other litigation deadlines and responsibilities.

14. Once the review of the documents has concluded, Civil Division attorneys will need to prepare a "detailed list that identifies and describes the [withheld material] in a manner sufficient to enable resolution of any privilege claims." Order at 4. The list must set forth at a minimum the author, recipient(s), and "general subject matter of the record being withheld," as well as "the basis for the assertion of the privilege." *Id.* I understand that additional requirements for the list—including "specify[ing] the decision that the deliberations contained in the document precede," "the date on which such record was created and/or transmitted," and "the date of any asserted underlying policy decision"—are the subject of litigation, and depending on how the Court resolves those issues, the Department may be ordered to provide some or all of this additional information as well.

15. Creating this detailed list according to the Court's specifications, by itself, will require a tremendous amount of work on behalf of the Department. The Civil Division attorneys involved will be required to describe each of the Department's withholdings across approximately 64,000 pages of documents in some detail. Although the reviewing attorneys will endeavor to describe the withheld materials as they are reviewed, the reviewing attorneys must also coordinate with other entities having equities in the documents at issue for their review as well. It will take substantial additional time after the review of documents is complete to ensure that these thousands of entries are accurate, consistent, compliant with the Court's direction, and appropriately protective of the underlying information. Notwithstanding the detail required by this Court's August 20th Order, reviewers will have to be careful to make sure that the detailed

list does not undo the privileges that are being asserted by revealing the information that would be protected. The detailed list itself will be hundreds, if not thousands, of pages. This work cannot be completed in the time currently allotted by the Court.

16. The Department, however, is taking extraordinary steps to devote the resources necessary to accelerate the total time needed to review the documents at issue and to describe all withheld documents or portions of documents in a detailed list in the fourteen weeks we are requesting. In light of the Department's understanding that this Court has asked for the review and detailed list to be completed in an expedited fashion, we will be moving the complicated and detailed process ordered by the Court faster than normally possible. The new estimated deadline of December 15th takes into account the substantial work already done by the Department to familiarize itself with the documents in the database. However, due to the number and complexity of documents at issue, the multiple layers of review required, and the difficulty of the issues thereby presented, the Department's best, good faith estimate at this time is that it will be able by December 15, 2014 to complete the list and produce the non-deliberative documents (if production is not further stayed by this Court or the D.C. Circuit).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 2nd day of September, 2014.

Allison C. Stanton

Comm. on Oversight & Gov't Reform, U.S. House of Reps. v. Holder, No. 12-1332 (ABJ)

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A PARTIAL STAY OF, AND PARTIAL RELIEF FROM, THE COURT'S ORDER OF AUGUST 20, 2014, AND IN OPPOSITION TO PLAINTIFF'S MOTION TO CLARIFY

Ex. C

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

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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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant.	)	Case No. 1:12-cv-1332 (ABJ)

[PROPOSED] ORDER

Upon consideration of Defendant's Memorandum of Points and Authorities in Support of its Motion for a Partial Stay of, and Partial Relief From, the Court's Order of August 20, 2014, and in Opposition to Plaintiff's Motion to Clarify August 20, 2014 Order, it is hereby

ORDERED that Plaintiff's Motion to Clarify August 20, 2014 Order is **DENIED**; and it is

FURTHER ORDERED that Defendant's Motion for a Partial Stay of, and Partial Relief From, the Court's Order of August 20, 2014 is **GRANTED**; and it is

FURTHER ORDERED that the requirement that Defendant produce the non-privileged documents to Plaintiff is **STAYED** during the pendency of the district court litigation; and it is

FURTHER ORDERED that the deadline by which Defendant must produce the detailed list of documents being withheld under Executive Privilege to Plaintiff is, for good cause shown, **EXTENDED** until December 15, 2014; and it is

FURTHER ORDERED that the Court's Order of August 20, 2014 (ECF No. 81) is **AMENDED** to reflect that Defendant is no longer required to specify the decision that the deliberations contained in the document precede.

SO ORDERED.

_____

AMY BERMAN JACKSON
United States District Judge

DATE:

Appendix

Pursuant to Local Rule 7(k), below is a list of the names and addresses of all attorneys entitled to be notified of entry of this order.

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