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JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM

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II. Executive Summary

More than two centuries ago, this country adopted the Constitution as the blueprint and basis for our federal government. While this framework has been amended over the years, the system of checks and balances among the Legislative, Executive, and Judicial branches remains firmly intact. Congress passes laws, and the Executive branch implements them. The Constitution further makes clear that the power of the purse lies with Congress—"No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law[.]" This requirement ensures that the Executive branch does not spend taxpayer money without the approval of Congress.

The Administration, however, has done just that. Since January 2014, the Administration has been paying for the cost sharing reduction (CSR) program established by the Patient Protection and Affordable Care Act (ACA) without a lawful congressional appropriation. This action is a clear constitutional violation of the most fundamental tenet of appropriations law.

Found under Section 1402 of the ACA, the CSR program requires health insurance companies that offer qualified health plans to reduce co-payments, deductibles, and other out-of-pocket expenses for eligible beneficiaries. Section 1412(c)(3) authorizes the federal government to make direct payments to insurance companies to offset estimated costs incurred by providing these CSRs to eligible beneficiaries. Nothing in the ACA provides an appropriation or a source of funding for the CSR program. Therefore, the Administration needed to request an appropriation from Congress to make CSR payments to insurance companies.

The Administration, however, has been making CSR program payments through a permanent appropriation, found at 31 U.S.C. § 1324. This appropriation can only be used to disburse money for specific, enumerated programs, including tax refunds and several enumerated refundable tax credits. Congress must amend this appropriation to include other programs. Congress did just that for one part of the ACA—the premium tax credit. Congress did not do so, however, for the CSR program. Nevertheless, the Administration has been funding the CSR program through this permanent appropriation.

The House Committee on Energy and Commerce and the House Committee on Ways and Means launched an investigation in February 2015 to understand the rationale behind the Administration's decision to fund the CSR program through the permanent appropriation, including who made that decision. The committees' questions have included: Why did the Administration initially request an annual appropriation for the CSR program from Congress? How was that decision made? Who made it? When did the Administration determine that an annual appropriation for the CSR program was not necessary? Who made that decision? When was the decision made to use the permanent appropriation at 31 U.S.C. § 1324 to fund the CSR payments, and on what grounds?

Despite the Administration's relentless efforts to obstruct the committees' investigation, the committees have been able to shed some light on the Administration's decision.

The Administration knew it could not use the permanent appropriation to fund the CSR program.

After Congress passed the ACA, the Administration took multiple actions that indicated it understood that it needed an annual appropriation to fund the CSR program. For example, beginning in 2011, during its planning efforts to develop a payment mechanism for the ACA premium tax credits, the Administration understood that it could not use the 31 U.S.C. § 1324 permanent appropriation to pay for the CSR program. The ACA established the premium tax credit (PTC)—a refundable tax credit available to eligible taxpayers—under Section 1401. The ACA also amended 31 U.S.C. § 1324 to specifically allow the use of this permanent appropriation to pay for premium tax credits. The ACA, however, did not detail the process through which the Department of Health and Human Services (HHS) would make the advanced payments for premium tax credits (APTC) from the 31 U.S.C. § 1324 permanent appropriation, given that the Internal Revenue Service (IRS) manages that permanent appropriation.

Ultimately, the Administration settled on using an allocation account structure—which created a sub-account or "child account" from which HHS could draw funds for APTC payments. CSR payments, however, were never a part of this planning process. In fact, a Memorandum of Understanding (MOU) between IRS and the Centers for Medicare and Medicaid Services (CMS) was signed in January 2013 regarding how to administer APTC payments, but it did not address CSR payments.

Moreover, as the Administration was developing the allocation account payment structure for APTC payments, the Department of the Treasury wrote a memorandum to the Office of Management and Budget (OMB) asserting that although the 31 U.S.C. § 1324 permanent appropriation would be used to make the APTC and PTC payments, it could not be used to make CSR payments. The memorandum stated that "there is currently no appropriation to Treasury or to anyone else, for purposes of the cost-sharing payments."[1]

The Administration requested an annual appropriation for the CSR program, but shortly thereafter, informally withdrew the request.

Further demonstrating that the Administration knew that Congress did not fund the CSR program in the ACA itself, the Administration initially requested an annual appropriation for the program. On April 10, 2013, the Administration submitted its FY 2014 budget request to Congress. This budget requested $3.9 billion for the CSR program.

Also on April 10, 2013, OMB submitted to Congress its sequestration preview report explaining what would happen to the President's budget in the event of sequestration. According to this OMB report, the $3.9 billion the Administration had requested to fund the CSR program was subject to a mandatory 7.3 percent budget cut under sequester mandates. Notably, most permanent appropriations—including the permanent appropriation for tax refunds and credits—were not subject to sequestration. OMB's revised sequestration report, submitted to Congress on May 20, 2013, similarly reflected a 7.2 percent budget reduction for the CSR program.

[1] Memorandum from U.S. Dep't of the Treasury to Office of Mgmt. and Budget (July 31, 2012) [hereinafter Treasury APTC Memorandum].

On July 11, 2013, the Senate Committee on Appropriations expressly denied the President's request for nearly $4 billion to fund the CSR program. Between April 10, when the President submitted his budget request and OMB issued its Sequestration Preview, and July 11, when the Senate Committee on Appropriations' denied the appropriation request, HHS Assistant Secretary for Financial Resources Ellen Murray engaged in several key conversations about the source of funding for the CSR program, including: (1) a telephone conversation with someone in the Executive Office of the President, the name of whom the Administration refuses to disclose; (2) a conversation with HHS General Counsel William Schultz; and (3) a telephone conversation with the then-Staff Director of the Senate Appropriations Committee. During the telephone conversation with the Senate Appropriations Committee, Ms. Murray informally withdrew the Administration's FY 2014 request for the annual appropriation for the cost sharing reduction program. Rather than include the withdrawal in the President's formal budget amendment, the Administration took the highly unusual step of withdrawing the appropriations request via a telephone conversation.

The Administration developed a new—albeit illegal—path forward to pay for the CSR program.

Around the same time that the Administration informally withdrew its CSR funding request, OMB began to develop a memorandum justifying another way to fund the CSR program. The Administration has refused to provide the committees with a copy of this memorandum—even pursuant to two congressional subpoenas. Nevertheless, the committees learned through witness testimony that the memorandum provided OMB's final legal analysis and justification for making CSR payments using the premium tax credit account—the account funded through the 31 U.S.C. § 1324 permanent appropriation.

In late 2013, OMB shared this memorandum with top Administration officials at several departments and agencies. For example, OMB showed the memorandum to both the Treasury and HHS general counsel offices. Additionally, then-OMB General Counsel Geovette Washington briefed then-Attorney General Eric Holder on the issue. According to witness testimony, the Attorney General personally approved the legal analysis in the memorandum.

High-level IRS officials raised concerns about this plan, but the decision had already been made.

Toward the end of 2013, several high-level IRS officials began raising concerns about the source of funding for the CSR program. The first CSR payments were scheduled to be paid out at the end of January 2014. Only a couple of months earlier, the IRS learned that the Administration would be using an IRS-administered permanent appropriation—not subject to sequestration—to fund the CSR program instead of an annual appropriation to HHS. According to the former-IRS Chief Risk Officer, "[t]he question at hand became whether or not the [ACA] actually authorized, appropriated those dollars using the permanent appropriation [under 31 U.S.C. § 1324]."[2] After the IRS raised these concerns to OMB, OMB permitted the IRS officials to review its memorandum at the Old Executive Office Building. At this meeting, OMB officials instructed the IRS officials not to take notes or take a copy of the memorandum with them. The

[2] H. Comm. on Ways & Means, Deposition of David Fisher, at 53 (May 11, 2016) [hereinafter Fisher Depo.].

legal memorandum did not alleviate all of the IRS officials' concerns that the Administration's course of action violated appropriations law.

A few days later, the IRS held an internal meeting with IRS Commissioner John Koskinen. The IRS officials who attended the OMB meeting were given an opportunity to raise their concerns directly to the Commissioner. Although Commissioner Koskinen listened to those concerns, the Administration already had decided to move forward with its plan. The Administration intended to make the CSR payments through the premium tax credit account. At the meeting with Commissioner Koskinen, participants reviewed a final Action Memorandum to Treasury Secretary Jacob Lew. This Action Memorandum, which recommended that the IRS administer the CSR payments through the § 1324 permanent appropriation in the same way it administered the APTC payments, had already been approved by Secretary Lew. Despite two subpoenas issued by two congressional committees, the Administration has produced only a redacted version of the final Action Memorandum to the committees and has not provided any legal basis or explanation for the redactions.

When Congress started asking questions about the source of funding, the Administration refused to provide answers.

For well over a year, the committees have steadily pursued requests for documents and testimony about the Administration's funding of the CSR program. Using a number of different tactics, the Administration has impeded and obstructed the investigation at every turn. This level of obstruction by an Administration is unprecedented at both the Committee on Energy and Commerce and the Committee on Ways and Means.

The Administration has, in part, attempted to argue that the ongoing *House v. Burwell* litigation effectively preempts any oversight by the committees of the CSR program. It does not. The lawsuit involved no discovery. The parties stipulated to the facts. The question before the court was purely a question of law. The committees' separate and independent oversight inquiry focuses on the underlying facts surrounding the Administration's decisions. Nevertheless, the Administration has attempted to use the lawsuit to excuse it from cooperating with the committees' oversight.

The Administration has refused to comply with subpoenas issued by Congress. As of the drafting of this report, neither the Department of the Treasury, nor the Department of Health and Human Services, nor the Office of Management and Budget are in compliance with subpoenas issued by the committees. None of the three have produced a meaningful number of responsive documents. None of the three have certified that their production is complete or produced a log of documents withheld from the committees, or even provided a legal basis—to the extent one applies—to justify withholding large amounts of information from Congress. Further, the committees have evidence that the Department of the Treasury has not even conducted a reasonable search for documents responsive to the subpoena and the committees' document requests dating back for eighteen months.

The Department of the Treasury has refused to confirm to the Committee on Ways and Means whether it ever delivered deposition subpoenas to witnesses. Treasury counsel refused to

let the witnesses answer the committee's questions regarding when—or if—they had received their own subpoenas, and Treasury counsel itself refused to provide that information to the committee. This failure raises questions about the courtesies provided by Congress to the Administration and its employees with respect to the service of congressional subpoenas.

The Department of the Treasury limited its employees' and former employees' testimony to Congress by issuing testimony authorizations to witnesses based on over-broad *Touhy* regulations inconsistent with federal law. The Treasury regulations, found at 26 C.F.R. § 301.9000, require IRS employees to obtain permission from the IRS before speaking to Congress, and then to limit their speech to Congress to those topics approved by the IRS, at risk of losing their jobs if they do not meet the terms dictated by the IRS. Treasury used these regulations, and the testimony authorizations based on them, to unilaterally and grossly restrict the testimony that current and former IRS officials were permitted to provide to Congress. Furthermore, Treasury selectively and inconsistently enforced the terms of the testimony authorizations by allowing witnesses to answer certain questions clearly prohibited by the authorizations without objection.

The Department of Health and Human Services and the Office of Management and Budget also severely restricted the scope of testimony provided by current and former employees. Lawyers for the Administration repeatedly instructed witnesses not to answer substantive questions regarding the source of funding for the CSR program. Despite repeated inquiries from committee counsel, Administration counsel refused to provide a valid justification for restricting the witnesses' testimony. The excuses provided—that the Administration can withhold information that seeks internal or interagency deliberations, or seeks information it deems protected by a vague and undefined "confidentiality interest," or "embeds a deliberative fact" into a question the Administration did not want a witness to answer—are not legally cognizable bases on which the Administration can withhold information from Congress.

The Administration further instructed witnesses not to answer purely factual questions—including questions seeking the names of individuals involved in decisions about the source of funding for the CSR program, or confirmation of the occurrence of meetings about the CSR program. When asked what barred the witnesses from answering these questions, Administration lawyers explained that the Executive branch has "confidentiality interests" and "heightened sensitivities" that allow it to withhold this information from Congress. When asked to explain the basis of those "interests" and "sensitivities," Administration lawyers refused to do so. No such legal privilege exists—nor has one ever existed—that supports the Administration's position that it can withhold purely factual information from Congress.

The position of the Administration—that it can unilaterally block from disclosure to Congress the answer to any question that seeks internal or interagency communications, or an undefined "confidentiality interest," or even a fact that it does not want Congress to know—effectively exempts the entire Executive branch from congressional oversight.

Finally, lawyers for the Administration pressured at least one witness into following the restrictions set forth in his testimony authorization issued by the IRS after the witness questioned the Administration's ability to limit his testimony. The answers this witness provided in a

compelled deposition—without Treasury counsel present—provided more insight into the Administration's decision-making process than did testimony from any other individual. His answers also shed light onto why the Administration restricted the testimony of every other witness—going so far as to not letting witnesses answer questions about the names of individuals involved—and why the Administration has failed to comply with the committees' document subpoenas.

Congress relies on access to documents and witnesses from the Executive branch in order to conduct the oversight critical to a functioning government. The Administration's actions in restricting the scope of testimony provided by witnesses and refusing to provide documents to the committees shows that it does not believe in transparency. Instead, the Administration's actions make clear it believes congressional oversight to be an unnecessary nuisance. As a result, the committees are left with no choice but to conclude that the Administration has intentionally obstructed this investigation. The Administration did so because it broke the law and violated the Constitution in funding the CSR program through the permanent appropriation for tax refunds and credits.

III. Findings

- The Administration began to have discussions about the source of funding for the cost sharing reduction program after Congress passed the Patient Protection and Affordable Care Act in 2010.

- In 2012, the Administration developed an allocation account structure to pay for the premium tax credits. At that time, Treasury counsel concluded that 31 U.S.C. §1324—the permanent Treasury appropriation for tax credits—could not be used to make CSR payments.

- HHS' typical budget process is—for the most part—a thorough, institutionalized, and well-documented process.

- The Administration can withdraw an appropriation request without going through the formal and documented budget amendment process.

- The Administration requested an annual appropriation of almost $4 billion for the cost sharing reduction program in its FY 2014 budget request, submitted to Congress on April 10, 2014.

- According to OMB's April 10, 2013 sequestration preview report, the annual appropriation for the cost sharing reduction program would have been subject to a 7.3 percent reduction if the sequester went into effect.

- The Administration did not submit a formal budget amendment withdrawing its request for the annual appropriation for the cost sharing reduction program.

- Between April 10, 2013 and July 11, 2013, in an unusual move, the Administration informally withdrew its request for an annual appropriation for the cost sharing reduction program by calling the Senate Committee on Appropriations.

- OMB prepared a memorandum that provided the Administration's legal analysis and justification for funding the cost sharing reduction program through the premium tax credit account.

- OMB shared its memorandum with both the Treasury and HHS general counsel offices in late 2013.

- OMB shared its memorandum with Attorney General Eric Holder in late 2013 and briefed him on the issue.

- Some senior IRS officials raised concerns about the source of funding for the CSR program.

- OMB shared its memorandum with IRS officials in a meeting weeks before the first cost sharing reduction payments were to be made. The IRS officials were not permitted to take notes at the meeting or take a copy of the memorandum.

- After reviewing the memorandum, some of the IRS officials still had concerns about the source of funds, and wanted to make sure that these payments were not in violation of appropriations laws or the Antideficiency Act.

- Secretary Lew approved an Action Memorandum dated January 15, 2014, authorizing the IRS to administer the cost sharing reduction payments in the same manner as the advanced premium tax credit payments.

- A few days after the meeting at OMB to review OMB's memorandum, several high-level IRS officials met with IRS Commissioner John Koskinen to discuss how the Administration planned to fund the cost sharing reduction program. It was clear that the decision had already been made to move forward with making the cost sharing reduction payments through the premium tax credit account.

- The Administration could not make cost sharing reduction payments until a Memorandum of Understanding was in place.

- The Administration did not request an annual appropriation for the cost sharing reduction program in its FY 2015 budget request, submitted to Congress on March 14, 2014.

- The Administration has not complied with subpoenas issued by the United States Congress.

- The Department of the Treasury improperly withheld and redacted documents responsive to the committees' subpoenas without any valid legal basis to do so.

- The Department of the Treasury did not undertake a reasonable or thorough search for records responsive to the committees' subpoenas.

- The Department of Health and Human Services improperly withheld documents responsive to the committees' subpoenas without any valid legal basis to do so.

- The Office of Management and Budget improperly withheld documents responsive to the committees' subpoenas without any valid legal basis to do so.

- The Department of the Treasury did not provide deposition subpoenas issued by the Committee on Ways and Means to the relevant deponents in a timely manner.

- The Department of the Treasury has promulgated *Touhy* regulations that—contrary to federal statute—limit the rights of IRS employees to provide information to Congress.

- Treasury used its *Touhy* regulations and Testimony Authorizations to prohibit current and former IRS employees from providing testimony to Congress about the source of funding for the CSR program.

- Treasury officials selectively enforced the Treasury Authorizations by allowing witnesses to answer certain questions prohibited by the authorizations without objection.

- HHS and OMB imposed scope restrictions to prevent current and former employees from providing full and complete testimony to the Congress.

- HHS counsel prevented witnesses from answering substantive questions regarding the cost sharing reduction program, citing the need to protect "internal deliberations" and "confidentiality interests" as justification to withhold information from Congress.

- Witnesses were instructed not to reveal to Congress the names of White House and Department of Justice officials involved in decisions regarding the cost sharing reduction program.

- OMB prevented a witness from answering factual questions regarding the dates or times of a meeting or conversation, refusing to invoke a legal privilege to justify withholding the information from Congress.

- The Administration sought to withhold information from Congress by effectively claiming the deliberative process privilege. That privilege does not apply in this instance.

- The Department of the Treasury pressured at least one witness into following the restrictions set forth in his Testimony Authorization after the witness questioned Treasury's ability to limit his testimony.

IV. Background

A. The ACA Authorizes Cost Sharing Reductions and Premium Tax Credits

On March 23, 2010, President Obama signed the ACA into law.[3] The law imposed numerous taxes and regulations affecting health insurance offered to individuals and families, including a mandate requiring all individuals to obtain insurance or pay a penalty. The ACA also created several new entitlement programs aimed at helping people pay for health insurance coverage. These entitlements included an expansion of the Medicaid program, as well as subsidies available to individuals who purchase coverage through health insurance exchanges created by the law.

The law's exchange subsidies consist of two components:

1. Premium Tax Credits (PTC): A refundable tax credit available for eligible taxpayers who purchase a qualified health plan (QHP) on the health insurance exchanges created by the ACA.[4] The government can pay this credit to insurance companies in advance to offset an individual's monthly premium (in which case it is known as an Advanced Premium Tax Credit (APTC)), or a taxpayer may claim it as a credit on a tax return.

2. Cost Sharing Reductions (CSR): The law requires insurance companies to reduce copayments, deductibles, and other expenses paid by eligible beneficiaries. The law authorizes the federal government to offset the cost of these reductions by making payments to the insurance companies.[5]

The law established a process to determine an applicant's eligibility for PTCs and CSRs in advance, which allows individuals to have PTCs applied to their monthly premiums and qualify for cost sharing reductions.[6]

1. Section 1401 Establishes Premium Tax Credits

Section 1401 of the ACA added Section 36B to the Internal Revenue Code, establishing the PTC. This credit is available to taxpayers with incomes between 100 and 400 percent of the federal poverty level (FPL). In order to qualify for the credit, eligible individuals cannot have an offer of coverage through their employer, or be enrolled in a government program like Medicaid.[7] Additionally, to claim the credit, the taxpayer must purchase a QHP through one of the health insurance exchanges created by the law. The PTC amount is based on the taxpayer's

[3] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).
[4] 26 U.S.C. § 36B.
[5] 42 U.S.C. § 18071.
[6] 42 U.S.C. § 18081 and 18082.
[7] 26 U.S.C. § 36B(c)(2)(B)(i).

income, family size, and the price of a benchmark health plan.[8] For eligible individuals, the government can pay the credit in advance to the insurance companies so that the insurance companies reduce those individuals' premiums. These payments are referred to as advanced premium tax credits (APTC).[9]

2. Section 1402 Establishes the Cost Sharing Reduction Program

Section 1402 of the ACA created the CSR program. The statute requires insurers to reduce co-payments, deductibles, and other out-of-pocket costs for eligible insured individuals. These individuals must have an income between 100 and 250 percent of the FPL, must be eligible for PTCs, and must have purchased a specific type of QHP on the exchange.[10]

Although the ACA authorizes the government to offset insurance companies' expense for the cost of providing cost sharing reductions, the law did not designate any funds for such payments.[11]

3. How Advanced Premium Tax Payments Work

One of the key features of the ACA is the creation of the health insurance exchanges, government-created entities that facilitate the purchase of health insurance. The exchanges also make determinations about insurance purchasers' eligibility for APTCs and CSRs when individuals sign up for coverage.[12] Sections 1411 and 1412 of the ACA outline this process. The exchanges connect with various federal agencies such as the IRS, the Social Security Administration, the Department of Homeland Security, and others to verify eligibility information provided by applicants. Based on this information, the exchanges determine whether an individual qualifies for APTC and CSR, and, if so, in what amounts.

While both the APTC and PTC reduce premiums, they operate differently from each other. As the name implies, insurance purchasers receive the benefit of APTCs in advance. An exchange projects an estimate of an individual's income, family size, and other information and makes the APTC payment to the individual's insurance company based on those projections. At the end of the tax year, those individuals must reconcile the amount of the APTCs they received with the amount of the PTC to which they are actually entitled.[13] That is, if taxpayers receive too much in APTC, they must repay the excess payment to the government. If taxpayers receive too little in APTC, they are able to claim the difference as a refund on their tax returns for that year.[14]

[8] 26 U.S.C. § 36B(b)(2)(B)(i).
[9] 42 U.S.C. § 18082(c)(2).
[10] 42 U.S.C. § 18071(b)(1).
[11] 42 U.S.C. § 18082(c)(3).
[12] 42 U.S.C. § 18081(a).
[13] 26 U.S.C. § 36B(f).
[14] *Id.*

4. How Cost Sharing Reductions Work

Cost sharing reductions are different from both APTC and PTC. CSRs are not a tax credit, and they do not affect premium costs. The CSR program requires insurance companies to reduce co-payments, deductibles, and other out-of-pocket costs for eligible insurance purchasers. While APTC payments can be applied to any metal level health plans (bronze, silver, gold, or platinum), CSRs are available only if an eligible individual chooses a silver level plan.[15] Further, unlike with the APTC, an individual receiving a cost sharing reduction receives no payment, and is not required to reflect the reduction on any IRS tax filing.

For example, an APTC-eligible individual with an expected income equal to 175 percent of the federal poverty level (approximately $20,790 in 2016) who enrolls in a silver plan on the exchange will see the actuarial value of the plan increase from 70 percent to 87 percent. This means that the individual will be required to pay approximately 13 percent of the total covered costs (as opposed to 30 percent), with the health plan covering the rest. Under the ACA, the government is authorized to provide a payment to the insurer to cover the expected cost of providing these reductions.[16]

Unlike APTCs, individuals are not required to reconcile any excess CSRs that they may have received: if an insurance company reduces co-payments or deductibles too much for an individual, that company cannot recoup the cost from that policyholder. On the other hand, if an insurance company does not reduce costs enough for an individual, that person cannot claim additional CSRs on a tax return.

5. Premium Tax Credit Payment Mechanism

The ACA amends a permanent indefinite appropriation established for the payment of specifically listed income tax refunds and specifically listed tax credits by adding premium tax credit payments to the list of approved tax credits that can be paid out of the permanent appropriation.[17] The IRS manages this particular appropriation, which is used for other tax refund payments as well as the PTC and APTC. This created a logistical problem for APTC payments: the Centers for Medicare and Medicaid Services (CMS) determines applicants' eligibility for APTC payments and makes the payments to issuers, but cannot directly use the permanent indefinite appropriation to make the payments because it is managed by the IRS.[18]

To resolve this problem, the IRS created a sub account—known as an "allocation account" or a "child account" within the "parent" tax-credit appropriation account—which CMS

[15] 42 U.S.C. § 18071(b)(1).
[16] U.S. Dep't of Health & Human Servs., Notice of Payment and Benefit Parameters for 2014 Plan Year, 78 Fed. Reg. 15481(Mar. 11, 2013).
[17] Patient Protection and Affordable Care Act, Pub. L. No 111-148, Section 1401(d)(1), 124 Stat. 119 (Mar. 23, 2010).
[18] U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF INSPECTOR GEN. AND TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE ACCOUNTING STRUCTURE USED FOR THE ADMINISTRATION OF PREMIUM TAX CREDITS (Mar. 31, 2015) [hereinafter HHS OIG/TIGTA PTC REPORT].

can access.[19] CMS provides the IRS an estimate of the funds needed to make APTC payments in a given year, and the IRS transfers the necessary funds into the allocation account.[20] CMS then directs payments to insurers from the allocation account.[21]

In January 2013, CMS and the IRS signed a Memorandum of Understanding (APTIC MOU) that outlined the roles and responsibilities of both agencies for administering APTC payments and making the payments from the § 1324 permanent appropriation.[22] The APTC MOU did not apply to CSR payments—CMS established a separate account intended for CSR payments and requested an annual appropriation of approximately $4 billion to make CSR payments in fiscal year 2014.[23]

At some point, however, the Administration changed its strategy for making CSR payments. In response to questions posed by Senators Mike Lee and Ted Cruz, then-Office of Management and Budget Director Sylvia Mathews Burwell wrote that HHS would not be using the account set up by CMS for the CSR program to make CSR payments. Instead, for "efficiency" purposes, payments would be "paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid."[24]

The IRS accordingly set up a second allocation account specifically for CSR payments within the premium tax credit account.[25] The IRS and CMS signed a second MOU specifically related to CSR payments on January 2014 (the CSR MOU), just days before the first payments were to be made.[26] As with APTC payments, CMS would inform the IRS how much it estimated CMS would need for the year, the IRS would then transfer the requested funds into the child account, and CMS would pay the insurers through that account.[27]

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Memorandum of Understanding between the Internal Rev. Serv. and the Ctrs. for Medicare & Medicaid Servs., MOU13-150 (Jan. 2013).
[23] Ctrs. for Medicare and Medicaid Servs., Justification of Estimates for Appropriation Committees for Fiscal Year 2014 (2013).
[24] Letter from Hon. Sylvia Mathews Burwell, Office of Mgmt. and Budget, to Hon. Ted Cruz and Hon. Mike Lee, U.S. Senate (May 21, 2014).
[25] Memorandum of Understanding between the Internal Rev. Serv. and the Ctrs. for Medicare & Medicaid Servs., MOU14-127 (Jan. 2014) [hereinafter CRS MOU].
[26] *Id.*
[27] *Id.*

B. The Cost Sharing Reduction Program Requires an Annual Appropriation

The U.S. Constitution reserves to Congress decisions regarding taxation and spending. With regard to spending, the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"[28] The power of the purse is one of Congress' most important roles, and it is essential to maintain the separation of powers envisioned by the founders to ensure that representatives of the American people determine how taxpayer funds are spent.

Appropriations can take different forms. Typically, Congress appropriates funds for a given program on an annual basis through an appropriations bill. Occasionally, Congress enacts permanent appropriations that provide funds until Congress repeals or modifies the appropriation. In these instances, payments can be made without the need for Congress to pass any additional appropriations legislation.

The Executive branch may only spend money that Congress has appropriated. Originally passed in 1870 to curb Executive branch abuses, the Antideficiency Act prohibits any federal officer or employee from "involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made . . . ."[29] If a U.S. government officer or employee violates the Antideficiency Act, that person "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office."[30] Further, if the officer or employee "knowingly and willfully" violates the Act, that person can be sentenced for up to two years in prison and fined up to $5000.[31]

Congress has a process that guides the creation and funding of programs it establishes. Generally, Congress establishes programs through authorization acts and funds them through appropriations acts. Legislative committees with jurisdiction over a particular program develop authorization legislation. Congress can authorize programs on an annual basis or for any other length of time specified in statute. Appropriations committees then consider whether to appropriate funds for the Executive branch to use in implementing or maintaining programs. While authorizations often prescribe specific funding amounts, they do not in themselves appropriate any funds unless explicitly stated, as described below. As the Government Accountability Office (GAO), the foremost experts on appropriations law, explains, authorizing legislation "is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act."[32]

In order for legislation to constitute an appropriation, the law must meet clear requirements. While it is not necessary for legislation to use the word "appropriation," "an

[28] U.S. CONST. art. I, § 9, cl. 7.
[29] 31 U.S.C. § 1341.
[30] 31 U.S.C. § 1350.
[31] *Id*.
[32] GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2–56 (4th ed. 2016).

appropriation must be expressly stated" and "cannot be inferred or made by implication."[33] Additionally, appropriations must meet two specific criteria: they must (1) designate that payment is to be made, and (2) indicate a source of funds to be used. Unless the law meets both criteria, it does not constitute an appropriation. As the GAO explains, "[b]oth elements of the test must be present. Thus a direction to pay without a designation of the source of funds is not an appropriation."[34]

Congress both authorized and funded the premium tax credit program in the ACA. Section 1401 of the ACA added Section 36B to the Internal Revenue Code, which authorizes the PTC program.[35] Additionally, Section 1401 amended an existing permanent appropriation—31 U.S.C. § 1324—and designated the permanent appropriation as the source of funding for the PTC program.[36] The appropriation's statutory language also limits payments from the appropriation to only tax refunds and specific credit provisions within Internal Revenue Code, including the PTC provision, Section 36B.[37]

With respect to the CSR program, however, Congress provided only an authorization, and not an appropriation, in the ACA. The CSR program is not a tax provision and not codified within the Internal Revenue Code. Further, there is no language in the ACA or anywhere else tying the CSR program to the 31 U.S.C. § 1324 appropriation.[38] Despite statements by the Administration, it has never been a principle of appropriations law that an authorized program can be funded from the account of another program simply for "efficiency" purposes if Congress does not appropriate money to the program.

C. *House v. Burwell* Lawsuit

On November 21, 2014, the U.S. House of Representatives filed a lawsuit against Secretary Burwell, Secretary Lew, and the Departments of Health and Human Services and the Treasury.[39] Among other claims, the complaint alleged that the cost sharing reduction payments made pursuant to Section 1402 of the ACA violated article I, section 9, clause 7 of the Constitution and the Administrative Procedure Act.[40] On September 9, 2015, Judge Collyer of the U.S. District Court for the District of Columbia held that the House had standing to pursue these claims because the claims were "predicated on a constitutional violation."[41] The lawsuit involved no discovery. The parties stipulated to the facts. The question before the court was purely a question of law.

On May 12, 2016, Judge Collyer ruled in favor of the House on the merits of the claim. She wrote:

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[33] *Id. at* 2–54.
[34] *Id. at* 2-–23.
[35] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).
[36] *Id.* (amending 31 U.S.C. § 1324 by adding "36B" to the list of tax credits available to be paid from the permanent appropriation).
[37] 31 U.S.C. § 1324.
[38] Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).
[39] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Complaint (D.D.C. Nov. 21, 2014).
[40] *Id*. at 17–18, 22–23.
[41] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Memorandum Op. at 32 (D.D.C. Sept. 9, 2015).

> This case involves two sections of the Affordable Care Act: 1401 and 1402. Section 1401 provides tax credits to make insurance premiums more affordable, while Section 1402 reduces deductibles, co-pays, and other means of "cost sharing" by insurers. Section 1401 was funded by adding it to a preexisting list of permanently-appropriated tax credits and refunds. Section 1402 was not added to that list. **The question is whether Section 1402 can nonetheless be funded through the same, permanent appropriation. It cannot.**[42]

In other words, the court concluded that the Administration *unconstitutionally* paid for the CSR program through the permanent appropriation for tax credits and refunds. The litigation is still pending, waiting for the appeals process to conclude.

D. The Committees' Investigation

The committees' oversight inquiry is separate and independent from the lawsuit. It focuses on the underlying facts surrounding the Administration's decision to fund the CSR program using the § 1324 permanent appropriation. On the other hand, the lawsuit focuses on the legality of the Administration's decision and does not delve into the reasons why the Administration shifted course.

For more than a year, the committees have requested documents, witness testimony, and other information from the Administration about the source of funding for the CSR program. From the outset, the committees have clearly stated the purpose of their investigation: to fully understand the facts surrounding the Administration's decisions to fund the cost sharing reduction program from the permanent appropriation for tax refunds and credits. In the course of this investigation, the committees have sent fifteen letters, issued six subpoenas for documents, and conducted twelve transcribed interviews of current and former Administration officials involved in decisions regarding the source of funding for the CSR program. The Committee on Ways and Means additionally issued four subpoenas for testimony and conducted one deposition.

Throughout this investigation, the Administration has argued that the *House v. Burwell* litigation effectively preempted any oversight by the committees into the cost sharing reduction program. At every turn, the Administration has conflated the committees' separate and independent factual inquiry with the legal arguments posed by both sides in the litigation. The Departments of Health and Human Services and the Treasury have accused the committees of "utilizing oversight to accomplish inappropriate litigation objectives," including by conducting interviews "in an attempt to elicit information outside the bounds of traditional district court discovery."[43]

[42] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Op. at 1 (D.D.C. May 12, 2016).
[43] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Jan. 19, 2016).

There was, however, no discovery in the lawsuit. Because the lawsuit purely focused on the legality of the Administration's decision, the only relevant, and stipulated, fact was that the Administration made the CSR payments from the permanent appropriation for tax refunds and credits. The Administration has failed to explain how the committees can seek information "outside the bounds of…discovery" in a case with no discovery. Further, at no time has the Administration explained why the *House v. Burwell* litigation prevents the committees from exercising their constitutional oversight responsibilities.

In refusing to acknowledge the committees' separate and fact-based inquiry, the Departments wrote, "If, as we suspect, our agencies ultimately prevail, that would eliminate the legal issue that is the stated predicate for the oversight." In fact, the Administration did not prevail. But, as the committees have maintained throughout this investigation, the committees' questions could not and would not be answered by the lawsuit, regardless of which party prevailed on the merits. The committees' questions are fundamentally different: they seek to understand the facts underlying the Administration's decisions, not the legality of the final decision itself.

At every turn, the Administration has misrepresented and distorted the scope of Congress' authority to conduct oversight of the laws it has passed, and of the circumstances of this present case. It has attempted to argue that Congress' constitutional oversight authority is somehow suspended while litigation is pending. It has argued that while Congress may have "authority" to conduct oversight, there is no "need" while the issue is being litigated. But none of these arguments are valid.

Under the powers set forth in the Constitution, Congress has an obligation to understand the facts of the Administration's decisions here. The committees have an oversight interest in the laws and regulations passed by Congress, and must ensure that the Administration spends taxpayer dollars prudently and in accordance with the law. That oversight interest cannot be tolled as the Administration requests. Further, it is the committees of the United States House of Representatives, not the Administration, that have sole authority to determine the type of information necessary to conduct effective oversight. The lawsuit did not, and will not, answer the committees' questions about the source of funding for the CSR program. The answers to these questions are ones that Congress alone must seek.

The committees' investigation is extensively detailed in Section VII.

V. After Requesting an Annual Appropriation for the Cost Sharing Reduction Program, the Administration Withdraws Its Request via a Telephone Conversation

The Administration requested an annual appropriation to make cost sharing reduction payments to insurance companies in the President's Fiscal Year 2014 (FY 2014) Budget submitted to Congress on April 10, 2013. Yet, a year later, the President's FY 2015 Budget did not include any such request. What happened during that intervening time? The Administration surreptitiously decided to pay for the CSR program through a Department of the Treasury managed-permanent appropriation dedicated to funding tax credits and refunds.

A. In 2010, the Administration Begins to Discuss How to Fund the Cost Sharing Reduction Program

FINDING: The Administration began to have discussions about the source of funding for the cost sharing reduction program after Congress passed the Patient Protection and Affordable Care Act in 2010.

High-level discussions about the source of funding for the CSR program began soon after the law's enactment. During the fall of 2010, several top IRS officials—including Associate Chief Counsel Mark Kaizen, Deputy Associate Chief Counsel of General Legal Services Linda Horowitz, and Chief of the Ethics and General Law Branch of General Legal Services Kirsten Witter—discussed the source of funding issue both internally and with OMB, specifically with OMB attorney Sam Berger. Associate Chief Counsel Linda Horowitz testified:

> Q. Do you remember if that was the first that you had been made aware of a question about source of funding, around December 2013?
>
> A. It was not the first time.
>
> Q. Do you remember what the first time was?
>
> A. I think sometime in 2010.
>
> Q. Do you remember how you became aware of that?
>
> A. Not specifically, no.
>
> Q. Do you remember with whom you had those conversations?
>
> A. I certainly had those conversations internally within our own office in GLS. And I believe there were some conversations with folks outside of IRS as well.

Q. And when you say "outside of IRS"–

A. Other agencies.

Q. Would that be HHS?

A. I'm not sure.

Q. Would it be OMB?

A. **It was OMB. Yes, I recall that.**

Q. **Okay. Who at OMB have you worked the most with on this issue?**

A. **Counsel from OMB.**

Q. **Do you remember their names?**

A. **I remember only one name. That's Sam Berger.**

Q. Okay. Did you work with Mr. Berger back in 2010 on this question?

A. Yes. Sorry.[44]

According to Ms. Horowitz, the conversations took place specifically within her office—which handles appropriations law questions—and between her office and OMB. She stated:

Q. And who in your office was working on that question in 2010?

A. Kirsten Witter, who is the branch chief in the Ethics and General Government Law Branch, and Mark Kaizen, who is my immediate supervisor who is the associate chief counsel in General Legal Services.

Q. Did they communicate with OMB as well, or was it just you that was communicating?

A. I believe we all communicated with OMB.

Q. Did you have conference calls where everyone was communicating with OMB at that point?

[44] H. Comm. on Ways & Means, Transcribed Interview of Linda Horowitz, at 20–23 (Apr. 22, 2016) [hereinafter Horowitz Tr.] (Although Ms. Horowitz could not recall when in 2010 the conference call occurred, according to public records, Mr. Berger graduated from law school in 2010 and began his tenure at OMB in September 2010).

A. I recall one conference call.

Q. And I'm sorry. Was that around 2010, or was that around 2013?

A. I'm referencing 2010.[45]

As early as 2010, the Administration began having conversations about how to fund the CSR program. Based on subsequent actions, the Administration appeared to believe that the CSR program required an annual appropriation.

B. The Administration Develops a Plan for the Mechanics of Making Premium Tax Credit Payments

FINDING:	**In 2012, the Administration developed an allocation account structure to pay for the premium tax credits. At that time, Treasury counsel concluded that 31 U.S.C. § 1324—the permanent Treasury appropriation for tax credits—could not be used to make CSR payments.**

Section 1402 of the ACA authorized the CSR program, but did not provide a funding source for CSR payments.[46] Conversely, the ACA specifically provided funding for the PTCs through 31 U.S.C. § 1324, a permanent Treasury appropriation.[47] The ACA's PTC provisions, however, did not detail how HHS would be able to use a Treasury appropriation to make advanced payments as specified in the statute.[48]

Therefore, the Administration took steps early on to determine how to make the APTC payments authorized by and appropriated in the ACA. Ultimately, OMB decided that HHS and Treasury should use an allocation account structure. An allocation account is used "when a law requires departments (or agencies) to transfer budget authority to another Federal entity."[49] A 2015 report by the HHS Office of Inspector General (OIG) and the Treasury Inspector General for Tax Administration (TIGTA) described the steps the Administration took to set up a payment structure for APTC payments.[50]

As the Administration developed its plan to make the PTC payments, it also analyzed the statutory language surrounding the CSR program.

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[45] Horowitz Tr.18–23 (emphasis added).
[46] Patient Protection and Affordable Care Act, Pub. L. No 111-148, Sec. 1402, 124 Stat. 119 (2010).
[47] Patient Protection and Affordable Care Act, Pub. L. No 111-148, Sec. 1401(d), 124 Stat. 119 (2010).
[48] Patient Protection and Affordable Care Act, Pub. L. No 111-148, Sec. 1412, 124 Stat. 119 (2010).
[49] HHS OIG/TIGTA PTC REPORT, *supra* note 18. According to OMB, "Allocation means a delegation, authorized in law, by one agency of its authority to obligate budget authority and outlay funds to another agency. When an agency makes such a delegation, the Treasury Department establishes a subsidiary account called a 'transfer appropriation account', and the receiving agency may obligate up to the amount included in the account." Office of Mgmt. and Budget, OMB Circular A-11, Sec. 20, at 22 (June 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2015.pdf.
[50] HHS OIG/TIGTA PTC REPORT, *supra* note 18.

1. Inter-Agency Discussions on How to Implement the Premium Tax Credit Program Begin in 2011

In late 2011, HHS, Treasury, and OMB discussed options for how the Administration would make advanced premium tax credit payments. IRS Deputy Chief Financial Officer Greg Kane explained that the IRS began working with a number of other agencies and departments to implement the advanced premium tax credit program. He stated:

> Q. And in your capacity as Deputy CFO at the IRS, how have you been involved in the implementation of the Patient Protection and Affordable Care Act?
>
> A. So my role was to provide advice in regard to how we would account for, test internal controls, and administer the account from which payments would be made.
>
> Q. What projects did you work on with relation to the ACA?
>
> A. **So, in late 2011, we began working with CMS, HHS, IRS and Treasury, and OMB to prepare for the implementation of the advanced premium tax credit and the premium tax credit.** I am a part of the ACA program office meetings for other provisions to see if they would have any impact on financial reporting or financial accounting and provide input if I see anything that they need to be advised of.[51]

2. In a Memorandum Regarding Premium Tax Credit Payments, Treasury Acknowledges that the ACA did Not Provide an Appropriation for the Cost Sharing Reduction Program

In 2012, the Administration examined the possibility of using an allocation account structure to make premium tax credit payments. According to TIGTA and HHS OIG, "the IRS had no prior experience with allocation accounts in connection with tax refund activity and was concerned initially with the legality of this approach."[52] Mr. Kane confirmed that using allocation accounts was a unique arrangement for the IRS. Mr. Kane stated:

> Q. Is this the first time, to your awareness, that CMS and Treasury have worked together to have an account to make payments?
>
> A. Yeah. Based on the uniqueness of the law, where the Secretary of HHS makes determination and we make payment, IRS had never

[51] H. Comm. On Ways & Means, Transcribed Interview of Greg Kane at 30–31 (Mar. 10, 2016) [hereinafter Kane Tr.] (emphasis added).
[52] HHS OIG/TIGTA PTC REPORT, *supra* note 18.

> had any experience in administering, you know, an account like that.[53]

At OMB's request, Treasury prepared a memorandum analyzing the legal basis on which the IRS could make these payments using an allocation structure.[54] The committees obtained this memorandum, which, in part, examines whether the ACA provides a source of funding for the CSR program (see below). Despite the IRS' concerns, Treasury concluded in the memorandum that "ACA §§ 1411 and 1412 may be interpreted to authorize the transfer of funds from Treasury's refund appropriation to an HHS allocation account for purposes of making the advanced payments of the tax credit."[55]

Although Treasury's memorandum focused on whether an allocation account for APTC payments was allowed by the statute, it also mentioned advanced payments for CSRs. When discussing the meaning of the statutory direction in the ACA that the "Secretary of the Treasury shall make the advanced payment" for premium tax credits,[56] Treasury counsel wrote:

> We note that section 1412(c)(3) [related to advanced payments for cost sharing reductions] contains similar language to section 1412(c)(2)(A) with respect to the cost-sharing payments under section 1402 **for which the Secretary of the Treasury has no funding or program responsibility**.[57]

Treasury continued that "[s]uch a reading, of course, would not be applicable to the largely parallel language in section 1324(c)(3); **there is currently no appropriation to Treasury or to anyone else, for purposes of the cost-sharing payments to be made under section**."[58] At this point in 2012, Treasury understood that the 31 U.S.C. § 1324 appropriation would be available for APTC payments, but not for CSR payments where "the Secretary of the Treasury has no funding or program responsibility."[59] Additionally, based on its analysis, Treasury believed no appropriation for CSR payments existed at the time.[60] The entirety of Treasury's analysis related to the CSR program is produced below:

[53] Kane Tr. at 34.
[54] Treasury APTC Memorandum, *supra* note 1.
[55] *Id.*
[56] Patient Protection and Affordable Care Act Section 1412(c), codified at 42 U.S.C. § 18082 (c).
[57] Treasury APTC Memorandum, *supra* note 1 (emphasis added).
[58] *Id.* (emphasis added).
[59] *Id.*
[60] *Id.*

Role of the Secretary of the Treasury

Finally, the direction to the Secretary of the Treasury to make the advanced payment under section 1412(c)(2)(A) should not preclude reading sections 1411 and 1412 as requiring certification of payments by HHS, whether directly under the statute or as a consequence of a transfer of funds to an HHS allocation account.. Section 1412(c)(2)(A) can be read simply as a direction to the Secretary of the Treasury to make the payment to the issuer of a qualified health plan on a specified schedule rather that to the taxpayer who would normally receive the payment for a refundable credit. We note that section 1412(c)(3) contains language similar to section 1412(c)(2)(A) with

[1] In 1996, 31 USC 1304(a)(2) was amended to substitute the Secretary of the Treasury for the Comptroller General.

respect to the cost-sharing payments under section 1402 for which the Secretary of the Treasury has no funding or program responsibility. Therefore, we believe that the statute should be read in accordance with its plain meaning as referring to Treasury's disbursing authority and instructing the Secretary to whom to make the payment and when. This reading does not alter the overall statutory scheme placing programmatic responsibility for the advanced payments of the tax credits with HHS.

We acknowledge that other statutes authorize or require agencies to "pay" or "make payments" when the payments will in fact be made by Treasury's Financial Management Service (FMS) under its statutory disbursing function. Even if OMB disagreed that section 1412(c)(2)(A) referred to FMS's disbursing function, it would not follow that IRS was required to certify payments under the statute. Although the reference to the Secretary of the Treasury in section 1412(c)(2)(A) must be presumed to have meaning, the plain meaning of "shall make the advance payment" is not "shall certify the advance payment." Moreover, as discussed above, a requirement that Treasury certify the payments determined by HHS would be hollow at best. There is no reason to assume that Congress would have imposed such an illogical requirement, much less that it would have done so through oblique language.

Instead, the reference to the Secretary of the Treasury can be read to refer, not to the mechanics of the payment process, but to the source of funds. Title 31 U.S.C. § 1324, amended by section 1401 to cover refunds under section 36B of the tax code, appropriates funds "to the Secretary of the Treasury." Thus, the language requiring that the Secretary of the Treasury shall make the payments can be read simply to mean the payments shall be made from funds available to that Secretary.[2] Had Congress written section 1412(c)(2)(A) to say that "[t]he Secretary [of HHS] shall make the advance payment . . ." it would have been at best unclear whether the appropriation under 31 U.S.C. § 1324 was available for that purpose.

Such a reading, of course, would not be applicable to the largely parallel language in section 1324(c)(3); there is currently no appropriation, to Treasury or to anyone else, for purposes of the cost-sharing payments to be made under that section. However, this does not suggest that section 1412(c)(2)(A) should be read to require certification of payments by Treasury; such a reading would be equally inapplicable to section 1412(c)(3). Rather, if the latter section does not refer to the FMS disbursement function, its meaning can be determined only in connection with whatever statute ultimately appropriates funds for the cost-sharing payments.

[2] Such a reading would not make the notification to the Secretary of the Treasury of HHS advance determinations, as required under section 1412(c)(1), superfluous. Regardless of who performs the payment certification function, Treasury will require such notice to ensure that budgetary resources are available, and ultimately to reconcile advance payments with individual tax returns.

3. OMB Makes the Final Decision Regarding Advanced Premium Tax Credit Accounting Structure

Despite the IRS' concerns with the legality of the allocation account approach,[61] OMB ultimately decided to move forward and use an allocation account to make the APTC payments. On August 6, 2012, an official in OMB's Health Division emailed HHS and Treasury officials to inform them that OMB had decided that "an allocation account arrangement between Treasury and HHS is the most logical way to move forward:"[62]

From: Toner, Richard W. [redacted]
Sent: Monday, August 06, 2012 11:05 AM
To: Tompkins, Heather (HHS/ASFR) [redacted] Carlile, Saesha
Cc: Kelley, Curtis (HHS/ASFR) [redacted] Reilly, Thomas M.; Martin, Kathryn
Subject: APTC Implementation

Heather and Saesha,

Thank you for your patience while we reviewed the APTC financial management issue with our colleagues.

In response to your request for OMB views on the issue, we have reached the conclusion that an allocation arrangement between Treasury and HHS is the most logical way to move forward. As the next step, we'd like to reconvene the group that met previously and discuss the implementation of this approach.

If you could send some dates and times that work on your end for the week of August 13th (preferably not the 13th), that would be great.

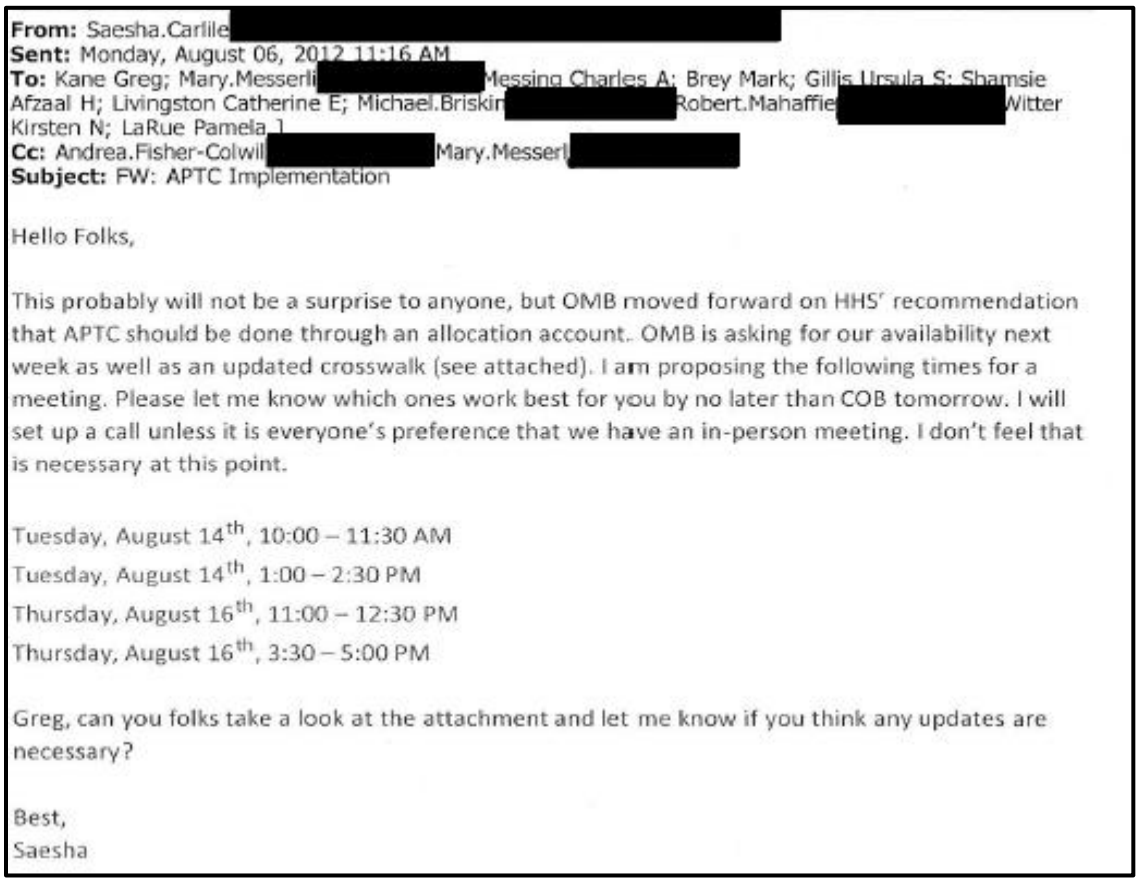
In the meantime, if each agency could update the crosswalk you submitted previously (attached) assuming an allocation arrangement, that might be a good way to determine if and where any remaining areas of disagreement exist.

Let me know if you have any questions. Thanks.

Rich Toner
Health Division
Office of Management & Budget

The Treasury recipient forwarded the email to Gregory Kane, Kirsten Witter, and other Treasury officials and commented that, "[t]his probably will not be a surprise to anyone, but OMB moved forward on HHS's recommendation that APTC should be done through an allocation account":[63]

[61] *Id.* at 8.
[62] Email from Richard Toner, Office of Mgmt. & Budget, to Heather Tompkins, U.S. Dep't of Health & Human Servs., and Saesha Carlile, U.S. Dep't of the Treasury (Aug. 6, 2012, 11:05 a.m.).
[63] Email from Saesha Carlile, U.S. Dep't of the Treasury, to Gregory Kane, Kristen Witter, *et al*., U.S. Dep't of the Treasury (Aug. 6, 2012, 11:16 a.m.).



From: Saesha.Carlile[redacted]
Sent: Monday, August 06, 2012 11:16 AM
To: Kane Greg; Mary.Messerli[redacted]Messina Charles A; Brey Mark; Gillis Ursula S; Shamsie Afzaal H; Livingston Catherine E; Michael.Briskin[redacted]Robert.Mahaffie[redacted]Witter Kirsten N; LaRue Pamela J
Cc: Andrea.Fisher-Colwil[redacted]Mary.Messerl[redacted]
Subject: FW: APTC Implementation

Hello Folks,

This probably will not be a surprise to anyone, but OMB moved forward on HHS' recommendation that APTC should be done through an allocation account. OMB is asking for our availability next week as well as an updated crosswalk (see attached). I am proposing the following times for a meeting. Please let me know which ones work best for you by no later than COB tomorrow. I will set up a call unless it is everyone's preference that we have an in-person meeting. I don't feel that is necessary at this point.

Tuesday, August 14th, 10:00 – 11:30 AM
Tuesday, August 14th, 1:00 – 2:30 PM
Thursday, August 16th, 11:00 – 12:30 PM
Thursday, August 16th, 3:30 – 5:00 PM

Greg, can you folks take a look at the attachment and let me know if you think any updates are necessary?

Best,
Saesha

4. IRS and CMS Sign a Memorandum of Understanding in January 2013 to Govern the Payment of Advanced Premium Tax Credits but Not Cost Sharing Reductions

In January 2013, IRS and CMS signed a Memorandum of Understanding regarding the administration of APTC payments (APTC MOU). According to the APTC MOU:

> This Memorandum of Understanding (MOU) between the Internal Revenue Service (IRS) and the Centers for Medicare and Medicaid Services (CMS) identifies the roles and responsibilities of each party for program operations **supporting the payment of and accounting for the advance payment of the premium tax credit (APTC) under section 1412 of the Patient Protection and Affordable Care Act (PPACA)**.[64]

This agreement applied only to the payment of premium tax credits. Nowhere in the nine page document are CSRs mentioned.[65] In fact, in the same time frame, HHS created a separate

[64] Memorandum of Understanding between the Internal Rev. Serv. and the Ctrs. for Medicare & Medicaid Servs., MOU13-150 (Jan. 2013) (emphasis added).
[65] *Id.*

account to make CSR payments once Congress appropriated funds. IRS Deputy Chief Financial Officer Greg Kane testified:

> Q. So, aside from that child [allocation] account we were just discussing, was a different account ever established to make the cost sharing reduction payments?
>
> A. There was.
>
> Q. Where was that established?
>
> A. There was one in the original HHS budget.
>
> Q. The account would have then been located at HHS? Is that accurate?
>
> A. Correct.
>
> ***
>
> Q. How did you become aware of that account?
>
> A. **So, in the early stages of 2011, 2012, when we were all getting prepared, the cost sharing reduction discussions were with HHS and OMB, and we were talking about the APTC/PTC process.**
>
> Q. **And at that point you became aware that HHS had already set up an account?**
>
> Treasury Counsel. **That's a "yes" or "no" question.**
>
> A. **Yes.**[66]

As shown, the Administration decided to use an allocation account structure to make APTC payments. In the same legal memorandum justifying this approach, however, Treasury counsel concluded that the 31 U.S.C. § 1324 permanent Treasury appropriation was available for APTC payments, but not for the CSR payments. Treasury counsel also believed no appropriation for CSR payments existed at that time.

Around this same time, HHS was preparing its FY 2014 budget request to submit to Congress. HHS had already created a separate account to make payments for the CSR program—likely in preparation for requesting an annual appropriation for the program in its FY 2014 budget.

[66] Kane Tr.at 44–45 (emphasis added).

C. The Administration Requests an Annual Appropriation for the Cost Sharing Reduction Program

At the same time that the Administration was finalizing its APTC payment structure, it was also preparing its request for an annual appropriation for the CSR program through HHS' annual budget process.

1. The Typical HHS Budget Process

FINDING: HHS' typical budget process is—for the most part—a thorough, institutionalized, and well-documented process.

Each year, the Executive branch embarks on an institutionalized process to draft and prepare the President's annual budget request to Congress. Each department and agency holds countless meetings, prepares several budget drafts and accompanying charts, and engages in extensive negotiations within the department or agency as well as with OMB to finalize its budget request. HHS is no different—its budget process is similarly in-depth and institutionalized.

HHS' Office of the Assistant Secretary for Financial Resources orchestrates the HHS budget process.[67] Typically, HHS' budget process begins during the spring of a given year and finishes when the President's final budget request is submitted to Congress the following February. For example, HHS began preparing its proposed FY 2017 budget during the spring of 2015. The President submitted his FY 2017 Budget to Congress in February 2016.

a. HHS Prepares Its Initial Budget Request

HHS begins to prepare its budget request during the spring the year before the President's final budget request is submitted to Congress. The process begins when the Department sends instructions to each of its operating divisions. Assistant Secretary for Financial Resources Ellen Murray described these instructions during her transcribed interview with the committees. She stated:

> [The operating divisions] asked for, of course, by program, their recommendation for budget request. They're asked for any statutory language that they would request. They're asking for justification for their dollar request. There's information[] about FTE [full-time employees], you know, a lot of detailed information, IT specifics and so on.[68]

[67] *See* Office of the Ass't Sec. for Fin. Resources, U.S. Dep't of Health and Human Servs., http://www.hhs.gov/about/agencies/asfr/index.html ("The Office of the Assistant Secretary for Financial Resources (ASFR) provides advice and guidance to the Secretary on all aspects of budget, financial management, grants and acquisition management, and to provide for the direction and implementation of these activities across the Department.").

[68] H. Comm. on Energy & Comm., Transcribed Interview of Ellen Murray, at 14 (Mar. 4, 2016) [hereinafter Murray Tr.].

After the operating divisions receive the instructions and prepare the requested information, HHS begins meetings with the operating divisions during the summer. Ms. Murray stated:

> Q. So once [the operating divisions] start submitting information that you requested, via the instructions, what then happens?
>
> A. We have meetings with each operating division and the larger staff divisions. Included in those meetings is what is called the Secretary's Budget Council, which includes the deputy secretary, and some of the senior officials, and the office of the secretary, and myself, and my staff, and we have a fulsome discussion of their budget request. Obviously, we concentrate on those areas of proposed reductions or increases or new programs.
>
> Q. Apart from the instructions that you submitted, are there other documents that are created during this summer process?
>
> A. Well, as each operating division comes and gives a short introduction, they provide usually a PowerPoint presentation. But it's really to facilitate sort of a fulsome discussion of their request. We talk about duplications with other agencies. We have an interest in secretarial priorities. Opioids, mental health; those are particularly addressed. So it's a very good discussion, but it's mainly on initiatives.
>
> Q. So mainly, it sounds like during the summer there's a lot of meetings that are happening and discussions about what's going to be important to make sure to have in HHS's budget request?
>
> A. Right.[69]

As the Assistant Secretary for Financial Resources, Ms. Murray's role is to lead these budget meetings with the Secretary's Budget Council. Ms. Murray testified:

> I think my biggest role is really to lead these budget meetings and to talk about the budget the Agency is proposing. Ask questions, ask questions about areas of concern, maybe program integrity issues that have come up in programs.
>
> I'm a lot focused on duplication, focused on our priorities. We then have to make some recommendations to the Secretary, and so that's another whole round of meetings where she has to make tough choices between different requests to come up with our final proposal to OMB.[70]

[69] *Id.* at 14–15.
[70] *Id.* at 17.

Deborah Taylor, the former Chief Operating Officer for the Centers for Medicare and Medicaid Services (CMS), one of HHS' operating divisions, similarly described the HHS summer budget process. During her transcribed interview with the committees, she stated:

> [S]ometime in the summer, OPDIVs [the operating divisions] typically do a presentation to the Secretary's budget council, where they explain their budget requests; they walk through any places where they maybe deviated from Department instructions.[71]

After the operating divisions submit their budget requests to HHS, the department makes decisions on those requests and then passes them back—or returns them—to the operating divisions. Ms. Taylor testified:

> And then the Department gives a passback. They either accept the budget as proposed, or they make some changes to it. Agencies have an opportunity to appeal it, and then, at that point, the Department has a process for sending it to OMB for approval.[72]

Meanwhile, as HHS is preparing its initial budget request, the Office of Management and Budget (OMB) issues its Circular A-11.[73] This document provides guidance to the Executive branch on how to prepare and submit a particular fiscal year budget and execute the budget.[74] Typically, the OMB Circular A-11 is issued during the summer before the President's final budget is submitted to Congress. The Executive branch agencies and departments have usually begun to prepare their budget requests when OMB issues its Circular A-11.

b. OMB's Fall Review

HHS submits its initial budget request to OMB around Labor Day. Ms. Murray described the submission:

> This submission includes the primary part of—it is a letter from the Secretary that describes our initiatives, describes the budget, but then there's a lot of required tables that are included, [by the] FTE, dollar amounts.[75]

After OMB receives HHS' budget request—along with the other Executive branch departments' and agencies' budget requests—it begins its "fall review." During OMB's fall review, OMB

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[71] H. Comm. on Energy & Comm., Transcribed Interview of Deborah Taylor, at 15 (Apr. 14, 2016) [hereinafter Taylor Tr.].
[72] *Id.*
[73] *See, e.g.*, Office of Mgmt. & Budget, Preparation, Submission, and Execution of the Budget, Circular A-11 (June 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2015.pdf.
[74] *See, e.g.*, Office of Mgmt. & Budget, Memorandum to the Heads of Executive Departments and Establishments, Preparing, Submitting, and Executing the Budget, Transmittal Memorandum No. 89 (June 30, 2015) *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/2015_letter.pdf.
[75] Murray Tr. at 16.

meets directly with HHS and its operating divisions about HHS' budget request submission. Ms. Murray stated:

> Q. So after HHS submits its budget request to OMB in roughly September –
>
> A. Around Labor Day.
>
> Q. – what's the next step? What happens next?
>
> A. Well, OMB meets with each of our operating divisions. There's a lot of questions back and forth between OMB and my staff. OMB has internal meetings that we're not part of, and they give us what's called pass-back, which is sort of their response to our budget request, and that happens right after Thanksgiving.
>
> Q. So during this fall review, OMB does at points engage with you and the Agency and staff as it's hashing out the budget request?
>
> A. They actually have meetings with each of our operating divisions, but there is probably daily communication between my staff and analysts at OMB.[76]

After OMB completes its fall review, it passes back its budget decision to HHS. This passback, which generally occurs around late November, is a separate, stand-alone document. Ms. Murray testified:

> Q. Just going back to the pass-back, what exactly does it look like? Is it what you submitted with –
>
> A. No, it's a separate document.
>
> Q. It's a totally different looking document?
>
> A. Yes.[77]

Usually, OMB's decisions in the passback do not perfectly align with HHS' original request. Ms. Murray stated that OMB "come[s] back with their decision, which would be in most cases different than what we requested."[78]

[76] *Id.* at 17.
[77] *Id.* at 20.
[78] *Id.* at 19.

c. HHS' Appeals Process

When HHS receives the passback, it decides whether and what budget decisions to appeal. The Department often makes an appeal. Assistant Secretary Murray testified that in "[m]y experience, we have always appealed the decision."[79] HHS appeals the decision by sending a formal appeal letter to OMB. Ms. Murray stated:

> Q. So when HHS appeals OMB's budget decisions, how does that process work?
>
> A. We send a formal appeal letter to OMB.
>
> Q. And does the letter include the different items that HHS is appealing?
>
> A. Yes.
>
> Q. Is there any other—I'm assuming—document attachments to the letter?
>
> A. No. The letter is pretty general. And I don't mean to jump in, but this is really a collegial process to document final determination on sort of large policy issues. So nuts and bolts may not necessarily be addressed in these letters.
>
> Q. With respect to the individual items that are being appealed though, what information is provided to make the case and the appeal?
>
> A. There would often be a justification on our part as to why we would disagree.
>
> Q. Is that within the letter?
>
> A. Often it is.[80]

Although HHS sends a formal letter appealing OMB's budget decisions, HHS begins to communicate with OMB about its appeal before the letter is sent. Ms. Murray testified about her and her office's role in the appeals process:

> Q. What exactly is your role?

[79] *Id.*
[80] *Id.* at 20–21.

A. Well, I would actually work with my staff to draft the appeal letter based on secretarial decisions. And I would be in communication with OMB as we work out some of these issues verbally.

Not everything may be captured in these letters. Again, this is two officers attempting to collegially put together what we think is the best budget for HHS.[81]

HHS, specifically the Office of the Assistant Secretary for Financial Resources, appears to handle the appeals process. The operating divisions, however, also play a role. Former CMS Chief Financial Officer Deborah Taylor testified:

Q. If the appeal involves the CMS component of the budget, would you be involved at that point?

A. So "involved" may be the Department saying to us: We think we're going to appeal this; are you okay with that?

And, typically, we will say yes. Or it is: We don't think we are going to appeal this; do you have any strong objections?

Q. If the Department does appeal something that affects the CMS budget, do you play any role in preparing documents or any sort of materials to support the appeal?

A. It depends, but I think we – you know, depending on how much help they would need, yes, we could certainly be asked to do that.[82]

After OMB receives HHS' letter appealing aspects of OMB's budget decision, OMB makes a final determination. Assistant Secretary Murray explained that she is not part of the final decision-making, but she emphasized that HHS and OMB try to come to a consensus. She stated:

Q. Do you know who actually makes the decisions on the appeals? Is it different? Is it usually at a very high level, or do you know how that works?

A. I would not be part of those discussions. They would be at OMB.[83]

Assistant Secretary Murray later testified:

Q. Going back to the appeals process quickly, if there is a disagreement between HHS and OMB, with respect to the funding

[81] *Id.* at 22.
[82] Taylor Tr. at 19.
[83] Murray Tr. at 22.

> for a specific program, who makes the final decision? Which agency makes the final decision on what will be included in the budget?
>
> A. I would like to think that we would come to a consensus, but if, obviously OMB is part of the Office of the President.
>
> Q. So does OMB have the final decision ultimately?
>
> A. I would like to think that our final decisions have been one of consensus where we agree to OMB's number.[84]

d. The President Submits His Budget to Congress

After the appeals process is complete, HHS works to finalize its budget and submits it to OMB. Assistant Secretary Murray stated:

> During the period after we finish the appeals until the budget is submitted to Congress, we are working with our operating divisions at OMB to figure out our congressional justifications. We put together a document called the budgeting brief which summarizes our budget for HHS.
>
> We sometimes review language that OMB is going to include in their budget documents that relate to OMB. We are preparing the Secretary for hearings. It's a busy time.[85]

Typically, the President's final budget request is submitted to Congress around the first week of February, although it is sometimes submitted late.

e. The Department Discusses the Budget Request with Congress

Once the President submits his proposed budget to Congress, HHS begins to engage directly with Congress through budget hearings and frequent communications with the congressional appropriations committees. Ms. Murray testified:

> Q. After the budget is submitted to Congress, what role does HHS have at that point?
>
> A. Once the budget is submitted to Congress, we begin the hearings, as you're well aware, and we work with the Secretary and prepare for those hearings. We work with our appropriations committees and other committees, giving technical assistance, discussing our proposals, and we follow closely the process through Congress.

[84] *Id.* at 23.
[85] *Id.* at 23–24.

Q. What is your role throughout this process?

A. I communicate with the appropriations committees. I work with the Secretary to keep her apprised of the process, and then we start the next year.

Q. So do the appropriations committees ask for additional information from HHS other than what's included in the formal submission?

A. Yes, they do.

Q. Can you describe the type of information they may request.

A. They may ask the justification for a particular number. They may ask information about how many grants this number would allow the program to put out. They may ask clarifying questions about language. It's a continual back-and-forth process.

Q. Does HHS provide answers to the questions from the appropriators?

A. We try to be very responsive to our appropriators. We deal with them individually.

Q. What do you mean by that?

A. Well, we have Democrat and Republican, Senate and House, so we call them the four corners, so there's discussions with all four groups. We actually have—some of our programs—we're funded in three different subcommittees, so there's twelve subcommittees with which we work.

Q. Can you tell us the timeframe typically in which the conversations with the appropriations committees take place?

A. They would begin probably the day we send up the budget and would continue until the night before they markup their bill.[86]

According to Assistant Secretary Murray, HHS has an ongoing dialogue with the appropriations committees until they pass the respective appropriations bills. Through this dialogue, HHS provides technical assistance, addresses questions, and produces additional information in response to requests. Meanwhile, HHS has started the budget process for the next fiscal year.

[86] *Id.* at 24–25.

f. The President Can Amend His Budget through a Budget Amendment

FINDING: The Administration can withdraw an appropriation request without going through the formal and documented budget amendment process.

After the President submits his proposed budget to Congress, it can still be amended through a formal budget amendment. According to the OMB Circular A-11, amendments "are proposed actions that revise the President's Budget request and are transmitted prior to completion of action on the budget request by the Appropriations Committees of Both Houses of Congress."[87] The circular describes the process, including when OMB will consider an amendment and what an agency needs to submit to OMB.[88] Assistant Secretary Murray described the budget amendment process from her experience. She testified:

> Q. After the President submits his budget to Congress, his budget request to Congress, is there a process for him to revise that request if—after it has already been submitted?
>
> A. I understand. The President could issue a budget amendment.
>
> Q. Can you describe briefly how that process works, to your understanding?
>
> A. Well, again, that would be a collaborative process between the agency in question and the White House, and it would reflect a change in the initial submission of the budget.[89]

She further stated:

> Q. Have you been involved, or do you get involved if HHS—if there is an amendment that the White House is going to submit to Congress that affects HHS? Do you or HHS get involved with that process?
>
> A. Yes.
>
> Q. In what way?
>
> A. As we would [with] the original budget, certainly communication between the two offices as to the substance and the amount of that request.[90]

[87] Office of Mgmt. and Budget, Circular No. A-11, Section 110—Supplementals and Amendments 2 (2015).
[88] *Id.*
[89] Murray Tr. at 70.
[90] *Id.* at 71.

The Administration can also amend the President's budget request through informal and undocumented means. Ms. Murray testified:

> Q. So if a request for supplemental funds is requested, that would be an amendment to the budget request?
>
> A. That would be a budget amendment, yes.
>
> Q. **What if the administration decides it no longer needs funds for something, would that also require a budget amendment request?**
>
> A. **That request could be made to the Hill through a budget amendment, or through a less formal means.**
>
> Q. **Could you describe the less formal means there which that could be [r]elayed?**
>
> A. **That could be done simply as I decided with the CSR program, where I made a call to the appropriations clerk.**[91]

As demonstrated, HHS' budget process is—for the most part—a thorough, institutionalized, and documented process. HHS' final budget request is the product of not just several drafts of tables and budget justifications, but also countless meetings and communications between its operating divisions and the main Department as well as between HHS and the President's Office of Management and Budget. The President then publishes his budget request as a statement of his Administration's priorities and submits it to Congress for consideration. The Administration, however, can also amend its final budget request by simply calling one of the congressional appropriations committees.

2. The President's FY 2014 Budget Includes a Request for an Annual Appropriation

FINDING:	**The Administration requested an annual appropriation of almost $4 billion for the cost sharing reduction program in its FY 2014 budget request, submitted to Congress on April 10, 2013.**

The President's FY 2014 Budget—submitted to Congress on April 10, 2013—included a request for an annual appropriation for the CSR program. At what point HHS decided to include an appropriation request in the Department's budget request is unclear. HHS counsel repeatedly refused to allow witnesses to answer the committees' questions about when or whether the Administration decided to include a request for an annual appropriation for the CSR program in the FY 2014 budget.

[91] *Id.* at 72–73 (emphasis added).

a. HHS' FY 2014 Budget Process

Similar to a typical budget cycle, HHS started preparing its FY 2014 budget request during summer 2012. HHS submitted its initial budget request to OMB around Labor Day 2012. Initially, HHS allowed Ms. Murray to answer whether HHS' initial request to OMB included an annual appropriation for the CSR program. Ms. Murray testified:

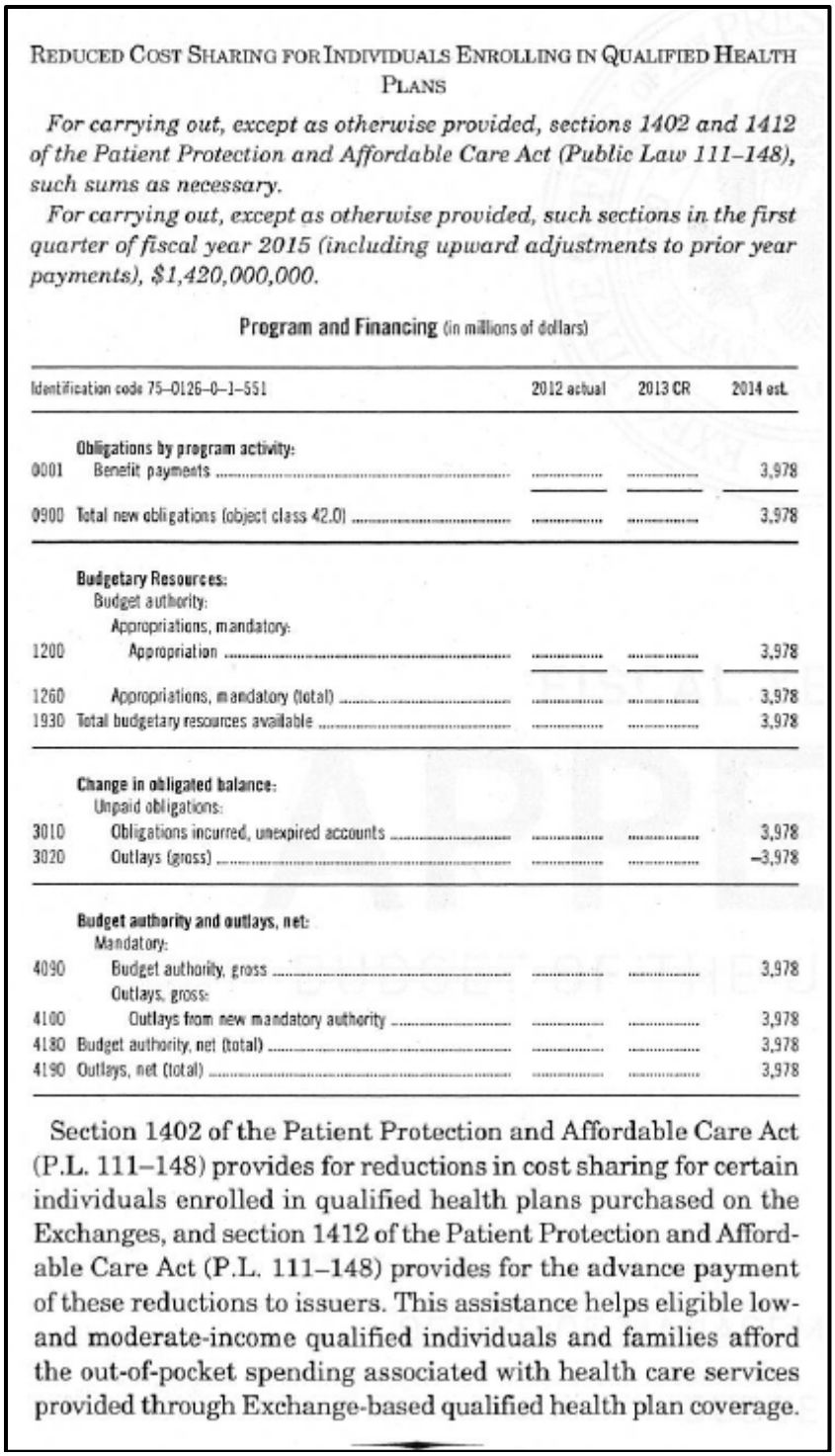
> Q. Do you recall when HHS submitted its budget, its fiscal year 2014 budget to OMB?
>
> A. I believe, again, at the Labor Day timeframe.
>
> Q. Did HHS request an annual appropriation for the Cost Sharing Reduction Program when it submitted its request to OMB?
>
> HHS Counsel 1. I'm going to caution the witness not to reveal the substance of internal interagency deliberations.
>
> Committee Counsel. This is a factual question. It's a yes or no answer whether it was included. It doesn't speak to internal deliberations.
>
> HHS Counsel 1. Do you think it's okay?
>
> HHS Counsel 2. Yes.
>
> HHS Counsel 1. Okay. The witness can answer.
>
> A. **We did. We did request an appropriation.**[92]

This was the first and only time HHS allowed a witness to answer questions about whether HHS' draft budget requests included a request for an annual appropriation for the CSR program. From that point forward, HHS claimed that the committees' questions jeopardized HHS' confidentiality interests in these internal deliberations and refused to allow witnesses to answer.

b. President's FY 2014 Budget Request to Congress

The President's FY 2014 Budget included a request for an annual appropriation for the cost sharing reduction program. The President's budget requested:

[92] *Id.* at 26–27 (emphasis added).



REDUCED COST SHARING FOR INDIVIDUALS ENROLLING IN QUALIFIED HEALTH PLANS

For carrying out, except as otherwise provided, sections 1402 and 1412 of the Patient Protection and Affordable Care Act (Public Law 111–148), such sums as necessary.

For carrying out, except as otherwise provided, such sections in the first quarter of fiscal year 2015 (including upward adjustments to prior year payments), $1,420,000,000.

Program and Financing (in millions of dollars)

Identification code 75–0126–0–1–551		2012 actual	2013 CR	2014 est.
	Obligations by program activity:			
0001	Benefit payments			3,978
0900	Total new obligations (object class 42.0)			3,978
	Budgetary Resources:			
	Budget authority:			
	Appropriations, mandatory:			
1200	Appropriation			3,978
1260	Appropriations, mandatory (total)			3,978
1930	Total budgetary resources available			3,978
	Change in obligated balance:			
	Unpaid obligations:			
3010	Obligations incurred, unexpired accounts			3,978
3020	Outlays (gross)			–3,978
	Budget authority and outlays, net:			
	Mandatory:			
4090	Budget authority, gross			3,978
	Outlays, gross:			
4100	Outlays from new mandatory authority			3,978
4180	Budget authority, net (total)			3,978
4190	Outlays, net (total)			3,978

Section 1402 of the Patient Protection and Affordable Care Act (P.L. 111–148) provides for reductions in cost sharing for certain individuals enrolled in qualified health plans purchased on the Exchanges, and section 1412 of the Patient Protection and Affordable Care Act (P.L. 111–148) provides for the advance payment of these reductions to issuers. This assistance helps eligible low- and moderate-income qualified individuals and families afford the out-of-pocket spending associated with health care services provided through Exchange-based qualified health plan coverage.

In total, the Administration requested almost $4 billion for the CSR program in FY 2014.[93]

[93] Office of Mgmt. and Budget, The Budget for the U.S. Government Fiscal Year 2014, Appendix 448 (Apr. 10, 2013).

CMS' budget justifications also explained how and why it requested nearly $4 billion for the CSR program. In its overview of the budget request, it states:

> CMS requests funding for its **five annually-appropriated accounts** including Program Management (PM), discretionary Health Care Fraud and Abuse Control (HCFAC), Grants to States for Medicaid, Payments to the Health Care Trust Funds (PTF) and **beginning in FY 2014, Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans (Cost Sharing Reductions**.[94]

The budget justification further explains the request for the CSR program:

> **The FY 2014 request for Reduced Cost Sharing for Individuals Enrolled in Qualified Health Plans is $4.0 billion in the first year of operations** for Health Insurance Marketplaces, also known as Exchanges. CMS also requests a $1.4 billion advance appropriations for the first quarter of FY 2015 in this budget to permit CMS to reimburse issuers who provided reduced cost-sharing in excess of the monthly advanced payments received in FY 2014 through the cost-sharing reduction reconciliation process.[95]

CMS also stated in its conclusion that its "request includes funding for a new appropriation for reduced cost-sharing provided to individuals enrolled in plans through the Marketplaces, beginning in 2014."[96] The President's FY 2014 Budget and the CMS budget justifications submitted with the budget are clear: the Administration requested an annual appropriation for the CSR program.

3. OMB Submits its Sequestration Report to Congress

FINDING:	**According to OMB's April 10, 2013 sequestration preview report, the annual appropriation for the cost sharing reduction program would have been subject to a 7.3 percent reduction if the sequester went into effect.**

The Budget Control Act of 2011, as amended by the American Taxpayer Relief Act of 2012, required nearly across-the-board budget cuts for most annually appropriated programs.[97] Known as "sequestration," the cuts would reduce federal spending by more than $1 trillion over ten years. Most permanent appropriations—including the permanent appropriation for tax credits and refunds—were not subject to sequestration.[98] On April 10, 2013, the same day the President submitted his FY 2014 Budget, OMB sent Congress its *OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on*

[94] U.S. Dep't. of Health and Human Servs., Ctrs. for Medicare and Medicaid Servs., Justifications of Estimates for Appropriations Committees, Fiscal Year 2014, at 2 (April 10, 2013) (emphasis added).
[95] *Id.* at 7 (emphasis added).
[96] *Id.*
[97] Budget Control Act of 2011, Pub. L. 112-25 (2011).
[98] 2 U.S.C. § 905(d).

the Joint Committee Reductions for Fiscal Year 2014.[99] Similar to other annual appropriations, the report confirmed that the CSR program would be subject to sequestration.[100]

Centers for Medicare and Medicaid Services					
009-38-0115 Affordable Insurance Exchange Grants					
Nondefense	Mandatory	Appropriation	1,343	7.3	98
009-38-0126 Reduced Cost Sharing for Individuals Enrolling in Qualified Health Plans					
Nondefense	Mandatory	Appropriation	3,978	7.3	290
009-38-0511 Program Management					
Nondefense	Mandatory	Appropriation	253	7.3	18
Nondefense	Mandatory	Spending authority	944	7.3	69
		Account Total	1,197		87

According to the OMB report, approximately 7.3 percent, or $290 million, of the annual appropriation for the CSR payments would be subject to sequestration and unavailable to pay insurance companies if the sequester went into effect. Under the terms of the ACA, however, the insurance companies still would be required to reduce cost sharing for qualified insurance purchasers. OMB's revised sequestration report, submitted to Congress on May 20, 2013, similarly reflected a 7.2 percent budget reduction for the CSR program.

At what point other agencies outside of OMB, including HHS, discovered that the CSR program would be subject to sequestration is unclear. But based on subsequent events, it is reasonable to assume that the sequestration report factored into the Administration's decision to find a separate source of funding for the CSR program—one that was not subject to sequestration.

4. The President Did Not Withdraw His Request for an Annual Appropriation for the CSR Program with a Budget Amendment

FINDING: The Administration did not submit a formal budget amendment withdrawing its request for the annual appropriation for the cost sharing reduction program.

The President submitted his FY 2014 Budget to Congress on April 10, 2013. On May 13, 2013, the Administration submitted a formal budget amendment.[101] That budget amendment, however, did not withdraw the original request for an annual appropriation for the CSR program.

[99] OFFICE OF MGMT. AND BUDGET, OMB SEQUESTRATION PREVIEW REPORT TO THE PRESIDENT AND CONGRESS FOR FISCAL YEAR 2014 AND OMB REPORT TO THE CONGRESS ON THE JOINT COMMITTEE REDUCTIONS FOR FISCAL YEAR 2014 (April 10, 2013) (OMB submitted a corrected version on May 20, 2013 that reduced the cut to the CSR program to 7.2 percent, or $286 million.).

[100] *Id.* at 23; Budget Control Act of 2011, Pub. Law No. 112-25 (Aug. 2, 2011).

[101] Letter from President Barack Obama to the Hon. John Boehner, Speaker, U.S. House of Reps. (May 17, 2013), enclosing Letter from Hon. Sylvia M. Burwell, Dir., Office of Mgmt. and Budget, to the President (May 16, 2013), enclosing amendments to FY 2014 Budget for various departments, including U.S. Dep't of Health and Human Servs., H. Doc. No. 113-31.

D. The Administration Informally Withdraws Its Appropriation Request by Phone

FINDING:	**Between April 10, 2013 and July 11, 2013, in an unusual move, the Administration informally withdrew its request for an annual appropriation for the cost sharing reduction program by calling the Senate Committee on Appropriations.**

Although the budget amendment process is formal and documented, in this case, the Administration took an informal and undocumented route to withdraw the Administration's request for billions of dollars for the CSR program. Rather than including the withdrawal in the President's formal budget amendment submitted to Congress on May 17, 2013, Administration officials testified that the Administration informally withdrew the appropriation request via a telephone call to the then-Staff Director of the Senate Committee on Appropriations.

1. The Administration Tells the Court that it Informally Withdrew the Request by Not Requesting an Appropriation in its FY 2015 Budget Request

In the *House v. Burwell* litigation, the Administration claimed that it informally withdrew the request by not requesting the annual appropriation in its subsequent FY 2015 budget request to Congress. During oral argument, the Administration mentioned that it withdrew its request after it initially made the request based on principles of appropriations law. The Administration stated:

> There was initially a request and that request was later withdrawn because the administration took a second look and realized that there were principles of appropriations law that made the request unnecessary.[102]

After the oral argument, the Court took the unusual measure of requesting that the Administration provide evidence of how the Administration withdrew the request. The Court's Order directed the parties to:

> [S]ubmit a stipulated record of the request(s), consideration, and funding decisions for Section 1401 and 1402 of the Affordable Care Act in the FY 2014 Appropriation Bills, including **any action by the Defendant(s) to withdraw the funding request for Section 1402**, with supporting documentation.[103]

The Administration submitted a response to the Court, and, in a footnote, claimed that its statement during the oral argument referred to OMB not requesting an annual appropriation in the FY 2015 budget. The Administration stated:

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[102] *U.S. House of Reps. v. Burwell*, No. 14-cv-01967, Tr. of Rec. at 23 (D.D.C. May 28, 2015).
[103] *U.S. House of Reps. v. Burwell*, No. 14-cv-01967, Minute Order (D.D.C. June 1, 2015) (emphasis added).

> **The reference of a withdrawal is to OMB's submission of the Fiscal Year 2015 Budget, which did not request a similar line item.** Defendants' counsel did not intend to suggest that there was a separate formal withdrawal document, and apologizes for being unclear on that point.[104]

In other words, the Administration claimed that it implicitly withdrew its request for annual appropriation for the CSR program by not including it in its FY 2015 budget request to Congress, and not through a separate, explicit action, like a telephone call asking the Senate Appropriations Committee to remove it from the appropriations bill.

2. Assistant Secretary for Financial Resources Ellen Murray Calls the Senate Appropriations Committee

On July 11, 2013, the Senate Committee on Appropriations issued its report, which denied the Administration's request for an annual appropriation for the CSR program.[105] This is the only budget request impacting the Department of Health and Human Services denied by the Senate Committee on Appropriations. The report provided no reason or justification for denying the request. This report stated:

> REDUCED COST SHARING FOR INDIVIDUALS ENROLLING IN QUALIFIED HEALTH PLANS
>
> Appropriations, 2013 .....
> Budget estimate, 2014 ..... $3,977,893,000
> Committee recommendation .....
>
> The Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance for individuals enrolling in qualified health plans purchased through the Health Insurance Marketplace, as provided for in sections 1402 and 1412 of the ACA.
>
> This program helps eligible low- and moderate-income individuals and families afford the out-of-pocket costs associated with healthcare services.

Ms. Murray, however, knew that the committee would deny the Administration's appropriation request before it issued its report. She testified:

> Q. Were you aware before that report was released on July 11 that the Senate Appropriations Committee would not be [recommending an appropriation for the CSR program]—
>
> A. Yes.

[104] *U.S. House of Reps. v. Burwell*, No. 14-cv-01967, Joint Submission in Response to This Court's June 1, 2015 Minute Order (D.D.C. June 15, 2015) (emphasis added).

[105] S. Comm. on Appropriations, *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Bill, 2014*, 113th Cong. (S. Rept. 113-71).

Q. You knew before the report. When did you know?

A. I spoke to the staff director, Erik Fatemi.

Q. Roughly when?

A. To the best of my recollection, the June or July timeframe.

Q. But it was before that report was released?

A. Correct.

Q. Is that one conversation with Mr. Fatemi or were there several?

A. I can remember one specific conversation.

Q. **What do you recall about that conversation?**

A. **I called Mr. Fatemi and said they would not need an appropriation for the Cost Sharing Reduction Program.**[106]

Although the Administration had formally asked for an annual appropriation in its FY 2014 budget request to Congress, it suddenly determined it no longer needed one. Ms. Murray stated:

Q. Did you provide an explanation to Mr. Fatemi about why an appropriation was not necessary?

HHS Counsel. Thank you.

Witness: Yes, we did. Yes, I did.

Q. What explanation did you provide to him?

A. I told him that there was already an appropriation for the program, and we did not need the bill to include one.[107]

Mr. Fatemi did not ask why the Administration no longer wanted the annual appropriation for the CSR program. Ms. Murray testified:

Q. What did you say would be the appropriation for the CSR program?

[106] Murray Tr. at 35–36 (emphasis added).
[107] *Id.* at 37.

A. I do not believe I was specific with Erik Fatemi, and he did not ask.

Q. Did you tell him anything about the basis for that decision?

A. I did not.

Q. And he did not even question –

A. I did not.

Q. He did not ask you any questions about what money would be used to fund that program?

A. He did not.[108]

Assistant Secretary Murray amended the President's FY 2014 budget request by calling the Senate Appropriations Committee to withdraw an appropriations request. The Administration could have withdrawn its request through the formal budget amendment process. Instead, it unusually withdrew the request through a phone call, leaving no record of the "amendment." In fact, it is so rare that Assistant Secretary Murray cited only this example—withdrawing the request for an annual appropriation for the CSR program via a telephone call to the Senate Appropriations Committee—as a way to informally amend the President's budget request. She stated:

Q. So if a request for supplemental funds is requested, that would be an amendment to the budget request?

A. That would be a budget amendment, yes.

Q. **What if the administration decides it no longer needs funds for something, would that also require a budget amendment request?**

A. **That request could be made to the Hill through a budget amendment, or through a less formal means.**

Q. **Could you describe the less formal means there which that could be [r]elayed?**

A. **That could be done simply as I decided with the CSR program, where I made a call to the appropriations clerk.**[109]

[108] *Id.* at 55.
[109] *Id.* at 72–73 (emphasis added).

Additionally, HHS General Counsel William Schultz was not even aware of "less formal means" to amend the President's budget request. Mr. Schultz testified:

> Q. But do you specifically – are you specifically aware of any less formal ways that revise or change a budget request?
>
> A. I'm not sure what you mean.
>
> Q. Sure. So my understanding, and I'm not a budget expert, is that there is a formal amendment process by which the Administration can change its budget request. We've also learned that there are less formal ways, such as phone calls, to change a budget request. So are you aware of any less formal ways?
>
> A. I mean, I wouldn't have any knowledge of that.[110]

Although the Administration requested an annual appropriation for the CSR program in its FY 2014 budget request to Congress, it decided shortly after submitting that budget request—which took almost a year to draft and prepare—that it no longer needed one. Instead of including this withdrawal in its formal budget amendment, the Administration chose to wipe out a request for billions of taxpayer dollars through an undocumented, informal telephone call the Senate Committee on Appropriations. This unusual move ensured that there was no record that the Administration had changed its mind about how to fund the CSR program.

3. The Administration has Meetings and Makes Phone Calls Before the Senate Appropriations Committee Denies the Appropriation Request

Prior to the Senate Committee on Appropriations denying the appropriations request for the CSR program, and prior to Ms. Murray calling the committee to withdraw the request, but after the FY 2014 budget request was submitted to Congress, high level officials within the Administration held meetings and had telephone conversations about the CSR program. Despite shaky memories and the Administration's obstruction, this investigation shed light on some of these conversations. Ms. Murray recalled one conversation with HHS General Counsel William Schultz. She testified:

> Q. Did any meetings take place between April 10 of 2013 [and] your conversation with the Senate Appropriations staff director about the Cost Sharing Reduction Program?
>
> A. Yes.
>
> Q. When did those meetings take place?

[110] H. Comm. on Energy & Comm., Transcribed Interview of William Schultz, at 60–61 (Apr. 26, 2016) [hereinafter Schultz Tr.].

A. I can't give a specific date but within that time period.

Q. Was it May?

A. I don't remember a specific date.

Q. Do you recall the number of meetings?

A. I do not. I remember one specific conversation.

Q. Was that conversation with one individual or with multiple individuals?

A. With one.

Q. Do you recall any other conversations around that time about the appropriation requests for the Cost Sharing Reduction Program?

A. Again, I'm trying to be responsive but very careful not to misspeak, and I don't have any other specific recollections of conversations or meetings.

Q. **The conversation you recollect, was that with an HHS official?**

A. **Yes, it was.**

Q. **Who was that official?**

A. **General counsel, William Schultz.**

Q. And that conversation between you and Mr. Schultz was about the Cost Sharing Reduction Program and about whether or not it needed an annual appropriation?

HHS Counsel. So if you stopped your question after the first part, she would be able to answer that question.

Committee Counsel. If I stopped it at Cost Sharing Reduction Program?

HHS Counsel. Yes.

Q. Was that conversation about the Cost Sharing Reduction Program?

A. Yes.

Q. Was it about the fiscal year 2014 budget request?

HHS Counsel. That is, I think, crossing the line into internal deliberations.[111]

Ms. Murray also recalled another conversation with someone from the Executive Office of the President, but HHS counsel would not allow her to provide the name of this person. Ms. Murray stated:

Q. Do you recall any conversations with – about the Cost Sharing Reduction Program before or after that report in the summer of 2013 with anyone outside of HHS, apart from the Senate Appropriations staff director?

A. I do.

Q. With whom, or with what agency or capacity were they in?

A. With the office of the – Executive Office for the President.

Q. Did you have any other conversations with anybody from Congress about the Cost Sharing Reduction Program in the summer of 2013?

A. Not to my recollection.

Q. Do you recall when the conversation with the Executive Office of the President took place?

A. I do not.

Q. Was it after the Senate report was released in July?

A. It was before.

Q. **Do you recall who the conversation was with?**

HHS Counsel 1. **You can answer that.**

Witness. **Yes, I do.**

Q. **Who was the conversation with?**

HHS Counsel 1. **Again, because of our deliberative interests in maintaining executive branch confidentiality, Ms. Murray is not prepared to answer that question today.**

[111] Murray Tr. at 41–42 (emphasis added).

Q. **This conversation was with—this conversation was with somebody from the Executive Office of the President was [regarding] the Cost Sharing Reduction Program, correct?**

A. **Yes, it was.**[112]

Despite the Administration's refusal to provide information to Congress and allow witnesses to answer Congress' questions, this investigation has yielded evidence suggesting that the key decision-making about how to fund the CSR program likely occurred between April 2013 and July 2013. The Administration requested an annual appropriation for the CSR program in its FY 2014 budget request submitted to Congress on April 10, 2013. On that same day, OMB submitted its sequestration preview report to Congress stating that the CSR program would be cut by 7.3 percent in the event of sequestration. On July 11, 2013, the Senate Committee on Appropriations denied the request. Between April 10 and July 11, Assistant Secretary Murray called the Senate Committee on Appropriations to withdraw the Administration's request for an annual appropriation. Also during that time, Ms. Murray had a least one conversation with the Executive Office of the President and at least one conversation with HHS General Counsel William Schultz about the CSR program.

[112] *Id.* at 63–64 (emphasis added).

VI. The Administration Surreptitiously Raids a Permanent Appropriation to Pay for the Cost Sharing Reduction Program

A. OMB Drafts a Memorandum to Justify Paying for the Cost Sharing Reduction Program through the Premium Tax Credit Account

FINDING: OMB prepared a memorandum that provided the Administration's legal analysis and justification for funding the cost sharing reduction program through the premium tax credit account.

OMB attorneys prepared a memorandum, which allegedly provided the legal basis for the decision to make CSR payments from the premium tax credit account. The Administration has refused to provide this memorandum to Congress—even pursuant to subpoena. Nevertheless, Administration witnesses made it clear during transcribed interviews and a deposition that this memorandum was key to obtaining buy-in from the highest levels of the Administration to move forward with paying for the CSR program through the PTC account.

1. OMB Looks for Sources of Funding for the Cost Sharing Reduction Program

By June 2013—shortly after OMB submitted its sequestration report and around the same time Assistant Secretary Ellen Murray called the Senate Committee on Appropriations to informally withdraw the Administration's request for an annual appropriation—OMB began developing a legal justification to justify an alternative source of funding for the CSR program. In June 2013, Geovette Washington became OMB's General Counsel. Soon after, Ms. Washington became aware that "there were questions about the funding that was available for the cost sharing program."[113] One of her staff counsels, Sam Berger, briefed her on the issue. Ms. Washington stated:

> Q. Are you familiar with the Affordable Care Act Cost Sharing Reduction Program?
>
> A. Yes.
>
> Q. In what context?
>
> A. During my time at OMB, there were questions about the funding that was available for the cost sharing program.

[113] H. Comm. on Ways & Means, Transcribed Interview of Geovette Washington, at 20 (May 6, 2016) [hereinafter Washington Tr.].

Q. When did those questions first arise?

A. I first became aware that this was an issue right after I arrived at OMB.

Q. Who made you aware of the issue?

A. My staff briefed me on this issue that they had been working on before I arrived, and I don't recall. It would have been Sam [Berger].[114]

Ms. Washington and Mr. Berger also worked with other agencies affected by this issue. Ms. Washington stated that Mr. Berger worked directly with the HHS General Counsel's Office. She testified:

Q. Do you know if [Sam Berger] was working with anyone outside of OMB on the issue?

A. Yes.

Q. With whom?

A. So as a matter of course, because this is an issue that would have involved other agencies, he would have been working—as a general matter, we would work with the agencies that were involved, and my memory is that he had been in discussions with other the relevant agencies on the issue.

Q. When you say the relevant agencies, was he in communication with HHS?

A. Yes.

Q. **Do you know with whom in HHS?**

A. **We worked with the General Counsel's Office at HHS.**

Q. **Do you recall any of the names of those individuals?**

A. **My primary contact would have been the general counsel, Bill Schultz.[115]**

[114] *Id.* at 20–21.
[115] *Id.* at 22–23 (emphasis added).

Ms. Washington testified that she spoke directly with the HHS General Counsel, William Schultz, as well as the Treasury General Counsel's Office about the source of funding issue for the CSR program. She stated:

> Q. Did you talk directly with Mr. Schultz?
>
> A. Yes.
>
> Q. Did you talk with anyone at Treasury?
>
> A. Yes.
>
> Q. With whom over there?
>
> A. I would have worked with people in the General Counsel's Office over there.
>
> Q. Do you recall the names of those people?
>
> A. God, my memory is bad. Chris Meade, the general counsel.[116]

HHS General Counsel William Schultz also remembers discussing the CSR program with Ms. Washington during the summer and fall of 2013. Mr. Schultz testified:

> Q. Going back to my question, you said that you recalled having discussions or conversations during the summer or fall, late 2013, with folks both at the White House and OMB. What are the names of the OMB officials that you recall having meetings with?
>
> A. The one I recall is with general counsel, Geovette Washington. I think there are others, but I don't even know their names.
>
> Q. Do you recall how many times you met with Geovette Washington?
>
> A. No.
>
> Q. Was it more than once?
>
> A. Yes.
>
> Q. Do you recall generally when you met with Ms. Washington?
>
> A. You mean what timeframe?

[116] *Id.* at 23–24.

Q. Yes.

A. I mean, generally, it's in the timeframe you're talking about, the summer or fall of 2013.[117]

Ms. Washington also consulted with the Department of Justice regarding the source of funds for the CSR program, although OMB counsel refused to allow Ms. Washington to provide the names of those with whom she consulted.[118] Ms. Washington stated:

Q. Did you ever talk with anyone at the Department of Justice about the Cost Sharing Reduction Program?

A. Yes, I did.

Q. Do you remember if those conversations occurred before or after the January 14th [*sic*] meeting that we've discussed at length today?

OMB Counsel: Ms. Washington has acknowledged that she consulted or discussed this with the Department of Justice, but she is not going to discuss individual interactions that she had with the Department of Justice.[119]

Ultimately, Ms. Washington stated that she "recall[ed] conversations with officials at the Department of Justice about cost sharing reductions in 2013."[120] Ms. Washington's testimony clarifies OMB's role in addressing the source of funding issue for the CSR program: although OMB consulted with other agencies, including HHS, Treasury, and the Department of Justice, OMB took the lead in identifying a source of funding to make the CSR payments.

2. OMB Prepares a Memorandum that Allegedly Supports Funding the Cost Sharing Reduction Program Using the Appropriation for Tax Credits and Refunds

At some point in 2013, OMB drafted a memorandum that allegedly explained the legal basis for making CSR payments from the 31 U.S.C. § 1324 permanent Treasury appropriation dedicated to tax credits and refunds.[121] Former OMB General Counsel Geovette Washington explained the purpose of the memorandum. She testified:

[117] Schultz Tr. at 39.
[118] Washington Tr. at 87.
[119] *Id.* at 85.
[120] *Id.* at 87.
[121] *See* Fisher Depo. at 28, 50; Washington Tr. at 44–45.

Q. In some cases, a high level official has to sign off on the course of administrative actions. In order to make the cost sharing reduction payments, was signoff on the memo necessary?

A. Can I ask you a question about your question?

Q. Of course.

A. So in the course of my time in the government, there were processes – clearance processes is what we called them. Before you could … say, the director could take action, people had to sign.

Is that the type of process you're asking me?

Q. Exactly.

A. No. That was not the purpose of this memo.

Q. What was the purpose of the memo?

A. The purpose of the memo was to discuss the available funding for the Cost Sharing Reduction Program.[122]

Ms. Washington acknowledged that the memorandum was addressed to her. She stated:

Q. To whom was the memo addressed then?

A. The memo was addressed to me.

Q. And who wrote the memo?

A. The memo was from members of my staff.

Q. Do you recall which members?

A. Sam Berger, John Simpkins, and Steve [Aitken].

Q. Did you help edit this memo?

OMB Counsel. Ms. Washington is not going to discuss the drafting or editing of the memo.[123]

[122] Washington Tr. at 49–50.
[123] *Id.* at 44–45.

This memorandum was integral to the Administration's decisions regarding funding the CSR program. It became the legal basis on which the Administration depended to justify making CSR payments from an appropriation meant to pay for tax credits and refunds, and it was reviewed and approved by the highest levels of the Administration.

3. OMB Shows the Memorandum to the Treasury and HHS General Counsel Offices

FINDING: OMB shared its memorandum with both the Treasury and HHS general counsel offices in late 2013.

After OMB prepared its memorandum, it shared it with different agencies at meetings held at OMB. These in-person meetings appeared to occur in late 2013. For example, OMB showed the memorandum to the Treasury's General Counsel's Office. Ms. Washington stated:

> Q. When did you show this memo to people at Treasury?
>
> A. I don't recall the time.
>
> Q. Did you E-mail it to them?
>
> A. No.
>
> Q. Did they see it in person?
>
> A. Yes.
>
> Q. Do you recall who from Treasury saw the memo?
>
> A. I don't recall, but I was talking to people in the General Counsel's Office. Our contact on – generally, on matters when we're talking about appropriations issues, we deal primarily with the General's Counsel Office. As I previously testified, I was talking to people in the General Counsel's Office.
>
> My practice would have been to talk to people – if I was going to the share the final memo with people, it would have been people in the General Counsel's Office.
>
> Q. Was that before this meeting, the January 13, 2014 meeting?
>
> A. I believe, yes. Yes.[124]

OMB also shared it with the HHS General's Counsel's Office. Ms. Washington testified:

[124] *Id.* at 42–43.

Q. When did you show the memo to people at HHS?

A. I don't recall a time. I don't recall a date.

Q. Was it before this meeting?

A. Yes.

Q. And to whom did you show it at HHS?

A. So the memo, the final memo, would have been shared with someone in the General Counsel's Office. Let me be clear. I'm not sure that I – because I don't recall a specific meeting, I'm not sure that I'm the person who did it. It may have been someone on my staff who did it.

Q. Would Sam Berger be the person on your staff most likely to do that?

A. Mostly likely, it would have been Sam.[125]

HHS General Counsel William Schultz also acknowledged reviewing OMB's memorandum. He testified:

Q. How did you receive a copy of the memorandum?

A. I didn't receive a copy. I reviewed it.

Q. Where did you review the memorandum?

A. At OMB.

Q. Were you given a copy to take with you from OMB?

A. No. No.

Q. Do you recall when, approximately, you reviewed the memorandum at OMB?

A. I believe it would be in the fall, maybe late fall of 2013.

Q. Were any other HHS employees with you when you reviewed the memorandum?

A. I don't know for sure, but it's likely that Ken Choe was there, my

[125] *Id.* at 43–44.

deputy.

Q. Do you recall if anyone from other agencies were present when you reviewed the memorandum?

A. No. I don't recall anybody else from another agency.

Q. It was just yourself and Mr. Choe?

A. From outside OMB.

Q. Okay. Do you recall which OMB officials were present?

A. I recall Geovette Washington.[126]

Administration lawyers would not allow witnesses to answer more questions about the review of OMB's memorandum.

4. Attorney General Eric Holder Reviews OMB's Memorandum

FINDING: OMB shared its memorandum with Attorney General Eric Holder in late 2013 and briefed him on the issue.

At some point during this process in fall or winter 2013, Ms. Washington briefed Attorney General Eric Holder on the CSR funding issue. He also reviewed and signed off on the analysis contained in OMB's memorandum. Former IRS Chief Risk Officer David Fisher testified that he recalled that Attorney General Eric Holder had reviewed and approved the memorandum. In an exchange with Congressman Jim McDermott, Mr. Fisher stated:

Q. Do you know specific names of individuals who reviewed and approved the memo?

A. The only name that I recall that was mentioned was Eric Holder, the Attorney General.

***

Mr. McDermott. This document you held, was there at any point anyplace where people's initials had been put on it as having read it or approved it or anything?

Frequently, in the Federal Government, people have to sign off on stuff—

[126] Schultz Tr. at 41–42.

The Witness. Yep.

Mr. McDermott. —before it comes to a meeting. Did you see any formal acknowledgment by anybody that they had actually read this and approved it?

The Witness. On the document, no. There was the comment – I don't recall seeing anything to that effect on the memo. The reference to the Attorney General was made verbally. It was not noted on the memo.

Mr. McDermott. Made by whom?

The Witness. Ms. Washington.

Mr. McDermott. Ms. Washington said, "The Attorney General has seen this and approves of it"?

The Witness. It stood out in my mind only because there was sort of a lighthearted comment along those lines, that it appeared to be this was the first time she had met the Attorney General. And she was relatively new to OMB. And it stood out in my mind that it sort of made an impression on her, the fact that she had an opportunity to brief the Attorney General himself.

So that was really the only reason that it's a recollection of mine, is that she had made this sort of anecdote along the lines of having had the first opportunity to brief the Attorney General personally. That was the only reason his name, I believe, came up.[127]

5. White House Meetings Regarding the Cost Sharing Reduction Program

Administration officials appear to have discussed the CSR program in meetings at the White House. For example, former HHS General Counsel William Schultz testified:

Q. Do you recall who those conversations were with at either the White House or OMB during this time period?

A. Well, I recall some people they were with, yeah.

Q. Who were these people?

HHS Counsel. **He's not going to get into participants in White House**

[127] Fisher Depo. at 31–33.

meetings.

Committee Counsel. Why?

HHS Counsel. We have certain Executive Branch confidentiality interests.[128]

Similarly, former OMB General Counsel Geovette Washington testified:

> Q. Exhibit 7 is another White House Visitor Record Request from November 27th at 11 a.m. with Mr. Choe, Mr. Delery, Mr. Gonzalez, Mr. Meade, Mr. Schultz, Mr. Verrilli. Do you remember attending a meeting on November 27, 2013 at the White House with those persons I just listed?
>
> OMB Counsel. As I mentioned, the Executive Branch has significant confidentiality interests in internal discussions or interagency deliberations and Ms. Washington is not going to discuss interagency deliberations today.
>
> Q. The committee disagrees that the question has called for any kind internal deliberations at all, just merely the existence of the meeting. Are you willing to answer whether or not you attended a meeting with those individuals listed?
>
> A. I am not authorized to answer that question today.[129]

White House Visitor Access Records indicate that another meeting with the same participants took place the day prior, on November 26, 2013.[130]

Because the Administration refused to provide any information about meetings at the White House regarding the CSR program, this investigation has been unable to confirm whether the source of funds for the CSR program was a topic of discussion at these meetings.

[128] Schultz Tr. at 33–34 (emphasis added).
[129] Washington Tr. at 87–88.
[130] White House Visitor Access Records released 2013, *available at* https://www.whitehouse.gov/briefing-room/disclosures/visitor-records.

6. The IRS Expresses Concerns about the Cost Sharing Reduction Program's Source of Funds

FINDING: Some senior IRS officials raised concerns about the source of funding for the CSR program.

As OMB was preparing and vetting its legal memorandum both internally and with other agencies, senior officials at the IRS expressed concerns about the funding source for the CSR program. For example, IRS employees raised questions about establishing sufficient IRS audit trails, especially because CMS would be directing CSR payments out of an IRS-managed account. Former IRS Chief Risk Officer David Fisher explained:

> And there was a concern, an internal control concern, as well, just from an accounting standpoint, of an auditor looking for the full audit trail, as I believe IRS was getting summary information and the details were going to be in the HHS books, if you will. **And so there was already some confusion and concern about IRS from an audit standpoint, about being able to trace these payments all the way back to the source, which is fundamental for a financial audit.**[131]

IRS officials also expressed confusion over whether the funds for the CSR payments would be subject to the sequester. In late fall 2013, Mr. Kane approached both the Chief Risk Officer and the IRS Chief Counsel's office to express those concerns. Mr. Fisher testified:

> Q. Do you recall the first time that you heard of the cost-sharing reduction program generally?
>
> A. It would have been fall of 2013, late fall of 2013.
>
> Q. In what context did you become aware of it?
>
> A. There was a discussion I had with the Deputy Chief Financial Officer at the IRS regarding some, at the time, sort of accounting-related issues associated with the pending payments that would come from the cost-sharing program when that program would start, which I believe was the end of January 2014, was when the first payment was due.
>
> As the Chief Risk Officer, I am commonly engaged with senior leaders from around the IRS. **And there was a potential concern about these payments. So it was from the Deputy Chief Financial Officer's perspective.**

[131] Fisher Depo. at 19 (emphasis added).

Q. And the Deputy Chief Financial Officer was at that time Gregory Kane?

A. Correct.

Q. Do you recall specifically what month he approached you?

A. No. It would have been late fall, probably October, maybe November.

Q. What concern did Mr. Kane raise to you about the CSR program?

A. The concern was related to sequestration. And in his role, as planning for the potential sequester, he needed to identify all funding sources that needed to have the sequester applied against it. **And he raised a little confusion about the funding source for the cost-sharing program, as to whether or not that source was going to be subject to sequester or not subject to sequester.**[132]

Mr. Fisher further stated:

> It was [Deputy Chief Financial Officer Greg Kane's] understanding that HHS either had or was going to submit a budget request – or, through the budget process, a request for an appropriation for the cost sharing program. That would be subject to sequester.
>
> And it's relevant to the IRS because the IRS is the one who's actually, quote, writing the check, if you will, disbursing the funds. The way the law was written, HHS identifies the need for a payment to the Treasury. Treasury then has the IRS go make the payment. But, from an accounting standpoint, payment is on the IRS's books. And, therefore, the IRS would need to decide whether or not to sequester those funds if sequestration kicked in.
>
> The original understanding, I believe, from Mr. Kane was that these funds were going to be appropriated funds and, therefore, subject to the sequester. **But it had recently come to his attention that the budget request, I believe, had been withdrawn and that the expectation was that these payments would come out of the permanent appropriation, from which refunds and other credits like the Advance Premium Tax Credit would be paid. And that appropriation is not subject to sequester.**
>
> **So this was entirely an accounting related discussion related to, you know, appropriations law, as to whether or not the payments for this**

[132] *Id.* at 12–13 (emphasis added).

> **part of the Affordable Care Act would be subject to sequestration.** And he wasn't exactly sure because of what he saw as somewhat of a shift in where the funds had originally been planned to come out of, which would've been subject to the sequester, to now this change in thought process which would no longer make it necessary to sequester any of those funds.[133]

Around that same time, Mr. Kane also expressed his concerns to IRS Deputy Associate Chief Counsel Linda Horowitz. Ms. Horowitz testified:

> Q. Has anyone come to you with questions about the cost sharing reduction program?
>
> A. Yes.
>
> Q. Did those questions pertain to how the payment process was set up?
>
> A. Generally, yes.
>
> Q. Who came to you with questions?
>
> A. The CFO Office.
>
> Q. Do you recall whom within the CFO Office?
>
> A. I think it was Greg Kane, the deputy CFO.
>
> Q. When did he come to you with those questions?
>
> A. I think in December of 2013.
>
> Q. Did he first approach you in person or over email or by telephone?
>
> A. I'm not sure.
>
> Q. After the initial approach, did you communicate with him any more about the cost sharing reduction program?
>
> A. Yes.
>
> Q. How did those communications take place?
>
> A. I think they were telephonic, but I'm not – I can't be certain.

[133] *Id.* at 16–17 (emphasis added).

Q. At a high level, would you describe why he was coming to you personally about those issues?

A. So he came to me because I work with Greg on a lot of fiscal law issues. We have a, you know, client/attorney relationship. So he came to me on that particular issue with regard to the source of funding for those payments.[134]

According to Ms. Horowitz, Mr. Kane's questions were related to the source of funding for the CSR program. Ms. Horowitz testified:

Q. You had indicated that there were questions about the source of the funding as the general kind of parameters of the issue. Is that the same issue that was discussed both in 2010 [with OMB] and in 2013 [with Mr. Kane]?

A. Yes.

Q. And when you say "source of funding," is it a larger question of kind of the traditional source of funding as an issue of appropriations law when, as you discussed, when describing fiscal year law, or was it a question of more the mechanical which account makes payments?

A. At what time?

Q. Either. How about 2010?

A. In 2010, I think it was simply the question of the source of the funding.[135]

In late 2013, the discussions initially revolved around whether CSR payments would be subject to the sequester. According to Mr. Fisher, in the beginning of 2014, the discussion shifted to a broader question regarding the legality of using the premium tax credit appropriation to make CSR payments. Mr. Fisher testified:

Q. Did the questions about the sequester expand into broader questions about appropriations law from late 2013 to the beginning of 2014?

A. Yes.

Q. Do you understand how that expansion occurred?

[134] Horowitz Tr. at 18–19.
[135] *Id.* at 21–22.

A. I could sort of track the evolution. How it occurred, I don't know.

Q. You said you could track the evolution?

A. Well, I mean, if the question is what was the nature of the change or evolution of the discussion regarding appropriations law associated with the cost sharing reduction payments, I can recall how it evolved. I don't remember, sort of, who, what, when in terms of what instigated it or things along those lines. So that was what I thought your initial question was. So that one, the answer is no.

Q. Would you describe how it evolved?

A. Sure.

Given our understanding that the intent was to use the permanent appropriation, then the sequestration question was no longer – it was moot, because the permanent appropriation is not subject to sequester. So any concerns related to sequestration and the accounting for it and those kinds of things that had been the genesis of some of the early discussions were no longer relevant.

The question at hand became whether or not the statute actually authorized, appropriated those dollars using the permanent appropriation. And as we said just before the break, there was question on the cost sharing reduction payments. There was no question on the Advance Premium Tax Credit, which, as outlined in section 1401 of the Affordable Care Act, which introduces section 36B of the Internal Revenue Code under the section I had previously highlighted, was clear in the intent, expectation, and authorization to use the permanent appropriation as the funding source, the account for the Advance Premium Tax Credits.

In section 1402 that describes the cost sharing reduction payments, there was no such reference to the Internal Revenue Code. Actually, as I recall reading last night, there was one reference to section 36B of the Internal Revenue Code in section 1402, but it was a definitional point about defining what an individual is or something like that. It had nothing to do with payments. So there was a reference to the Internal Revenue Code but not in the kind that you would, I think, naturally interpret as meaning, "Go use the permanent appropriation based on this." It was simply a definitional reference.

> **Other than that, there was nothing clear in the statute that I believe the accounting folks are always looking for. Before they go, you know, touch that permanent appropriation, they want to make sure that that is legally authorized.**[136]

According to Mr. Fisher, Mr. Kane was concerned about the use of the permanent appropriation as a source of funds for the CSR program because such a use was contrary to his experience. Mr. Fisher testified:

> [I]n Mr. Kane's experience—and he's been at the IRS for a long time—was that **every time the use of the permanent appropriation for a new credit had come about, it had been explicitly referenced in the statute**, just like it was for the Advance Premium Tax Credit, but, to our reading in the next section, was not done for the cost-sharing reduction payments.[137]

7. Top IRS Officials Attend a Meeting at OMB to Review the Memorandum

FINDING:	**OMB shared its memorandum with IRS officials in a meeting weeks before the first cost sharing reduction payments were to be made. The IRS officials were not permitted to take notes at the meeting or take a copy of the memorandum with them.**

After IRS officials raised concerns about how the Administration planned to fund the CSR program, OMB organized a meeting to allow several IRS officials to review its memorandum providing the Administration's legal justification for the sources of funds. At the meeting, the IRS officials were given an opportunity to review the memorandum, but were not permitted to take notes or take the memorandum with them. After reviewing the memorandum, the officials were given an opportunity to ask some questions. The answers provided by OMB did not alleviate everyone's concerns that this was a correct and legal course of action.

a. The Purpose of the Meeting

The first CSR payments were supposed to be paid to insurance companies at the end of January 2014.[138] Yet, in early January, IRS officials still had concerns about the source of funding for the payments. Around this time, IRS General Counsel William Wilkins reached out to OMB General Counsel Geovette Washington regarding the source of funding for the CSR payments. Shortly after Mr. Wilkins reached out to her, Ms. Washington invited IRS officials to meet with her at the Old Executive Office Building. The meeting took place on January 13, 2014. The IRS officials in attendance were: IRS General Counsel William Wilkins, Chief Financial Officer Robin Canady, Deputy Chief Financial Officer Greg Kane, Chief Risk Officer David Fisher, Associate Chief Counsel Mark Kaizen, Deputy Associate Chief Counsel of

[136] Fisher Depo. at 52–54 (emphasis added).
[137] Fisher Depo. at 63 (emphasis added).
[138] Kane Tr. at 40.

General Legal Services Linda Horowitz and Chief of Ethics and General Law Branch of General Legal Services Kirsten Witter.[139] Several OMB officials also attended including OMB General Counsel Geovette Washington and OMB lawyers Sam Berger, Steve Aitken, and John Simpkins.[140] Mr. Wilkins testified:

> Q. I'll represent that this is a printout of several of the columns from the White House visitors log from January 13, 2014.
>
> Do you see your name here on this list in the highlighted portion?
>
> A. Yes.
>
> Q. Do you recall this meeting at the White House?
>
> A. It was in the Old Executive Office Building, but yes. I do recall it.
>
> Q. Sorry. Apologies. It is the White House visitors log, but you're right. It is the OEOB, as noted on the visitors log.
>
> Do you recall the purpose of this meeting?
>
> A. Yes.
>
> Q. **What was the purpose of this meeting?**
>
> A. **The purpose was to hear from the general counsel of Office of Management and Budget on legal analysis surrounding appropriations for cost sharing payments.**
>
> Q. Who was the general counsel of the Office of Management and Budget at that time?
>
> A. Geovette Washington.
>
> ***
>
> Q. **Who initiated this meeting?**

[139] White House Visitors Access Records released 2014, *available at* https://www.whitehouse.gov/briefing-room/disclosures/visitor-records.

[140] Washington Tr. at 51; *see also* H. Comm. on Ways & Means, Transcribed Interview of David Fisher, at 16–17 (May 3, 2016) [hereinafter Fisher Tr.]; H. Comm. on Ways & Means, Transcribed Interview of William Wilkins, at 53 (Mar. 17, 2016) [hereinafter Wilkins Tr.]; H. Comm. on Ways & Means, Transcribed Interview of Mark Kaizen, at 18–19 (Apr. 15, 2016) [hereinafter Kaizen Tr.].

A. **I believe that invitation came from Geovette Washington, but I had earlier put in a call to her which may have led to the invitation.**

Q. **Did you ask her to hold this meeting?**

A. **No.**

Q. **But is it fair to say that a conversation between you and her prompted this meeting?**

A. **Yes.**

Q. Do you recall how far in advance you spoke with her before January 13?

A. Only a few days. Less than a week.[141]

Ms. Washington also recalled the meeting. She stated:

Q. Do you recall why this meeting was initiated?

A. Yes.

Q. Why was this meeting initiated?

A. The first payments on the Cost Sharing Reduction and Premium Tax Credit Programs were needing to be made at the end of January. **We at OMB had discussed the final – shown the final memo to people in the office at Treasury and at HHS and we needed to show the memo to the people at IRS so that they could understand the rationale for the payments.**[142]

Mr. Fisher was not originally invited to attend the meeting at OMB. After learning about the meeting, however, he requested to attend because he believed, as the Chief Risk Officer, he should attend. Mr. Fisher explained:

A. But I think my insights to that point had led me to believe that there was at least some risk here and it was appropriate for the Chief Risk Officer to be involved in the discussion and requested that I be permitted to attend. And that was, you know, approved without any difficulty, and the Chief Counsel made those arrangements for me to attend.

[141] Wilkins Tr. at 52–54 (emphasis added)..
[142] Washington Tr. at 42 (emphasis added).

So it would have been an informal understanding sometime during the week leading up to the meeting. And then I suggested that I think the Chief Risk Officer should be there. That request was granted without questions.

Q. What was the risk, specifically, that you identified?

A. **Entirely related to appropriations law and whether or not the utilization of the permanent appropriation for the cost-sharing program had been appropriately appropriated by the law, you know, through the vehicle of the statute. And that was, I'll say, unclear at the time. And that was the purpose, that we were going to go understand the administration's thought process in coming to the conclusion that, yes, that could be used.**

Q. At the January 13th, 2014, meeting.

A. That was really the purpose of that meeting.[143]

Mr. Fisher further explained that he believed the meeting was held to address the IRS' concerns about how the CSR program would be funded. In an exchange with Congressman Jim McDermott, he testified:

Mr. McDermott. Just to follow up on Mr. Roskam's question, why do you think that meeting occurred?

The Witness. The meeting at the Office of Management and Budget?

Mr. McDermott. Yes. Yes.

The Witness. So it was set up prior to my even knowing about the meeting, but my understanding, through the accounting folks, is that the IRS had raised some concerns and was looking for, whether it was a legal analysis or – something more authoritative that would provide confidence that these payments were, in fact, authorized out of the permanent appropriation.

Because that – my understanding of past practice had been, every time the permanent appropriation had been referenced and utilized for credit payments or for refunds because that's what it's for, is for refunds and credit payments, specific credit payments – there had always been a discrete update to the Internal Revenue Code. It's my understanding that it always occurred.

***

[143] Fisher Depo. at 25–26 (emphasis added).

> **And we, the IRS, were looking for the administration's perspective on this. From an appropriations law standpoint, is this an appropriate thing, to use the permanent appropriation?**[144]

These senior IRS officials were understandably concerned about the legality of making the CSR payments through a permanent appropriation. Hearing of these concerns, OMB called the meeting to provide these IRS officials the Administration's legal justification for doing just that—raiding a permanent appropriation to make the CSR payments.

b. What Happened at the Meeting

The January 13, 2014 meeting took place at the Old Executive Office Building at the White House complex. OMB officials distributed hard copies of the OMB memorandum to the IRS officials and gave them a chance to review it. After the IRS officials reviewed the memorandum, they were given an opportunity to ask some brief questions before the meeting concluded. Mr. Fisher testified:

> Q. Could you describe what happened at that meeting?
>
> A. So a bunch of us went in vans from the IRS to the Old Executive Office Building. We were taken into the General Counsel's conference room. There were some brief introductions of the IRS attendees and the OMB attendees.
>
> We were given a memo to read. **We were instructed we were not to take notes and we would not be keeping the memo, we'd be giving it back at the end of the meeting. But we had an opportunity to read the detailed memo identifying why – or justifying the payments out of the permanent appropriation.**
>
> The OMB team left the room. The IRS team stayed in the room. We all individually read the memo. At the end of that, the OMB people came back in. There was some brief conversation with a small number of questions that were asked and answered back and forth. The meeting concluded, and we got in the vans and went back to the IRS.[145]

As Mr. Fisher stated, Ms. Washington instructed the IRS officials that they could review the legal memorandum, but they could not take notes or take the document with them. Associate General Counsel Mark Kaizen further testified:

> A. We were provided a written document to take a look at.

[144] *Id.* at 49–50 (emphasis added).
[145] *Id.* at 26–27 (emphasis added).

Q. Did you keep a copy of that document?

A. No.

Q. Was each person in the room given a copy of the document?

A. No.

Q. How many copies, approximately, were distributed?

A. I don't remember the number of documents. There just wasn't enough for everybody, so there was some sharing that was taking place.

Q. Did you take notes on the document?

A. No.

Q. Were you instructed not to take notes?

A. Yes.[146]

c. The OMB Memorandum's Rationale

Although OMB refused to produce the memorandum to Congress—even pursuant to a subpoena—the committees received testimony describing the contents of the memorandum. For example, Mr. Fisher testified:

Q. What did the memo discuss?

A. I guess, in my words, it would be **a rationale for why using the permanent appropriation for the cost sharing reduction payments was appropriate.**

* * *

Q. What was the rationale in the memo?

A. I don't recall most of the details of the memo, in large part because it didn't make much of an impression on me. It was a lengthy, sort of, list of small justifications of individual things trying to identify why the administration believed that it was Congress' intent to have the payments for both the Advance Premium Tax Credit and

[146] Kaizen Tr. at 21–22.

> the cost sharing reduction payment being made in the same manner.
>
> And there was allusions to a statement that had been made on the floor. There were allusions, I believe, to statements that might have been made in the media. There was the coupling of the fact that in section 1412, the payment authorization section, is that both of these payments were in the same section, for both the Advance Premium Tax Credit and the cost sharing reduction payment both being referenced and discussed in section 1412.
>
> And there were a number of other justifications on why the administration concluded that it was appropriate to use that appropriation for these payments. But, as I recall, there was no sort of single, main argument. It was more of a collection of almost a commentary on elements that, in total, would draw the conclusion that these payments out of the permanent appropriation would be appropriate.[147]

Mr. Fisher further testified:

> **Because it became clear that, while we were seeing the memo for the first time here in mid-January, this memo had been discussed both within the Office of Management and Budget and in the Justice Department.** Whether there were other parties involved in those discussions, I don't know, but those were the two that stood out that had been involved in, you know, supporting or approving of Mr. Berger's memo.
>
> And our understanding, as I believe it was explained in the meeting, was that the administration has gone through the legal analysis and has come up with the opinion that, based on the information contained in this memo, it was appropriate to use the permanent appropriation to pay for not only the Advance Premium Tax Credit but also the cost-sharing reduction payments.
>
> And that was the administration's conclusion, and, therefore, the payments should be made. I mean, I think that was the assumption out of that legal analysis that the administration had performed, is that the law as stated should now be fulfilled, with HHS identifying to whom and how much payments should be made for the cost-sharing reduction program. That information would be communicated to the Treasury Department, and the IRS would then go make those payments out of the permanent appropriation based on this legal analysis.[148]

[147] Fisher Depo. at 27–28 (emphasis added).
[148] *Id.* at 29 (emphasis added).

At the meeting, OMB characterized the document as the Administration's legal analysis and conclusion regarding the source of funding for the CSR program. Mr. Fisher testified:

> Q. You said initially that one of the lines of questioning was a question of whether this document was a decision or what type of document it was.
>
> A. Uh-huh.
>
> Q. What was the answer to that question?
>
> A. So it was characterized as: **This is the administration's legal analysis, that a conclusion has been made, a legal conclusion has been made, and that it was appropriate to move forward on the payments per the schedule, beginning in late January, using the permanent appropriation.**
>
> So that was their legal conclusion. And I think the expectation was that it would be now followed in practice by the implementing agencies.[149]

OMB organized the meeting to provide the Administration's "legal conclusion" to these IRS officials and to let them know they could move forward with making the CSR payments from the permanent appropriation. OMB believed everyone was on the same page following the meeting. In fact, after the meeting, then-OMB General Counsel Washington testified: "I would have told the director [Sylvia Mathews Burwell] that the meeting had occurred and that things seemed to be fine."[150]

8. IRS Officials Still Have Concerns Following Review of OMB's Memorandum

FINDING:	**After reviewing the OMB memorandum, some of the IRS officials still had concerns about the source of funds, and wanted to make sure that these payments were not in violation of appropriations laws or the Antideficiency Act.**

After the meeting at OMB, on the drive back to the IRS, the IRS officials who reviewed the OMB memorandum were not in consensus about the merits of OMB's legal analysis of the source of funds issue. Mr. Fisher testified that "as we returned to the IRS, there was a discussion about what do we do next. The group was not in consensus on the merits of the argument as conveyed to us through the memo and in this discussion."[151]

[149] *Id.* at 29–30 (emphasis added).
[150] Washington Tr. at 57.
[151] Fisher Depo. at 33.

Mr. Fisher and others suggested that the group should meet with Commissioner Koskinen before the first payment was to be made to ensure he was fully informed on the issue. He testified:

> **And I know I was certainly one of the advocates for setting up a meeting with the Commissioner of the IRS to make sure he's fully informed**.
>
> Exactly like we talk about in enterprise risk management, that's exactly what we're there to do, is to identify potential risks, manage them where we can, and things that rise to the level of the enterprise that really require senior-level engagement, it's our job to bring that to his attention.
>
> **And I don't believe I was the only one, but I was certainly one of the advocates for making sure that we set up a meeting with the Commissioner between that date and when the first payment was to be made.** I wanted to make sure that we had that discussion before the payment date, which, again, was late January.[152]

Mr. Fisher raised concerns that the CSR payments potentially violated the Antideficiency Act during the course of that conversation. He testified:

> Q. During the course of these discussions about the meeting with Commissioner Koskinen, did you or anybody else raise the topic of the Antideficiency Act?
>
> A. So, just to be clear, there was one discussion. It was not plural. It was a single meeting. And, yes, I raised those concerns. [153]

Mr. Fisher continued:

> **There could be many other people who think this is about health care. To us, this was not about health care. And I know that's hard to believe for some people, but this was about appropriations law**, which those of us—I was a CFO in the Federal Government at the Government Accountability Office. For those of us who work in financial management, when it comes to the Antideficiency Act, which has criminal penalties associated with it, we take it very seriously. **The IRS takes its audit very seriously. And we wanted to make sure that these payments were not going to be in violation of appropriation law and the Antideficiency Act. That's what this was all about.**[154]

[152] *Id.* at 33–34 (emphasis added).
[153] *Id.* at 36.
[154] *Id.* at 34 (emphasis added).

The IRS officials were given an opportunity to review the Administration's legal analysis and justification—which had already been reviewed and approved by the Attorney General of the United States—for funding the CSR program through the same appropriation as the premium tax credit. The IRS officials' concerns that this course of action violated appropriations law were noted, but not addressed or ameliorated by OMB's legal memorandum.

B. The Administration Begins to Prepare to Make Cost Sharing Reduction Payments

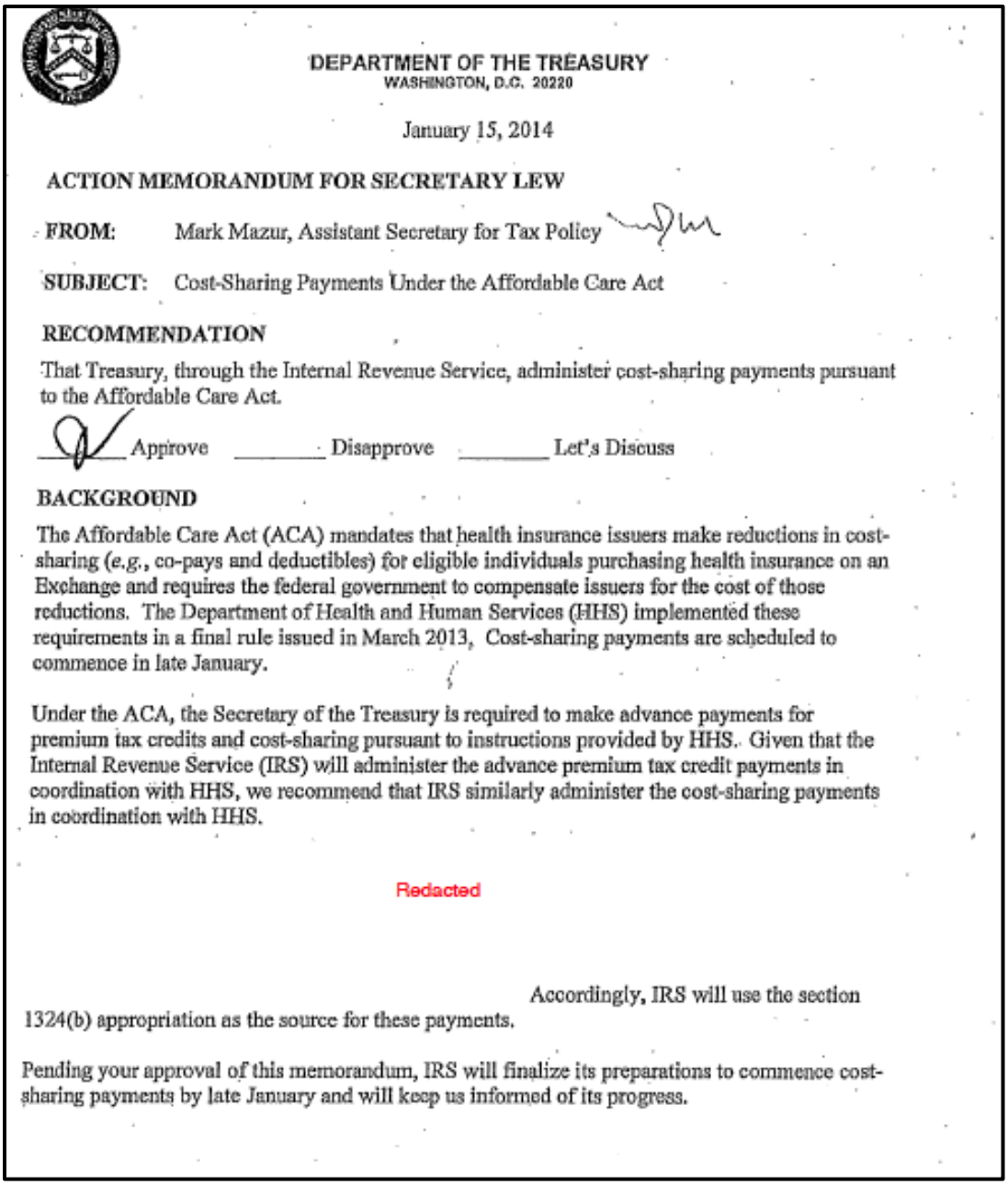
FINDING:	**Secretary Lew approved an Action Memorandum dated January 15, 2014, authorizing the IRS to administer the cost sharing reduction payments in the same manner as the advanced premium tax credit payments.**

While the Administration attempted to assuage the concerns of the IRS officials, Treasury Secretary Lew approved an Action Memorandum authorizing the IRS to administer the CSR payments in the same manner as the APTC payments. Although the IRS officials had an opportunity to raise their concerns to IRS Commissioner John Koskinen, by the time of that meeting, the Administration already had decided to move forward. It appears that the Action Memorandum was approved before the meeting with Commissioner Koskinen took place.

1. Secretary Lew Authorizes the IRS to Administer Cost Sharing Reduction Payments

On January 15, 2015—two days after the IRS officials met with OMB about OMB's legal memorandum—Treasury Assistant Secretary for Tax Policy Mark Mazur provided Treasury Secretary Lew an "Action Memorandum" for his approval.[155] The final Action Memorandum states, "[g]iven that the Internal Revenue Service (IRS) will administer the advance premium tax credit payments in coordination with HHS, we recommend that IRS similarly administer the cost-sharing payments in coordination with HHS."[156] The final memorandum (see below) reflected that Secretary Lew approved the recommendation and authorized the action. Only after the committees served subpoenas and only after a witness acknowledged in a transcribed interview did Treasury produce this final memorandum. But Treasury only produced a redacted version of the document to the committees:

[155] Action Memorandum from Mark Mazur, Ass't Sec'y for Tax Policy, U.S. Dep't of the Treasury, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, *Cost-Sharing Payments Under the Affordable Care Act* (Jan. 15, 2014).
[156] *Id.*



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 15, 2014

ACTION MEMORANDUM FOR SECRETARY LEW

FROM: Mark Mazur, Assistant Secretary for Tax Policy

SUBJECT: Cost-Sharing Payments Under the Affordable Care Act

RECOMMENDATION

That Treasury, through the Internal Revenue Service, administer cost-sharing payments pursuant to the Affordable Care Act.

____ Approve _____ Disapprove _____ Let's Discuss

BACKGROUND

The Affordable Care Act (ACA) mandates that health insurance issuers make reductions in cost-sharing (*e.g.*, co-pays and deductibles) for eligible individuals purchasing health insurance on an Exchange and requires the federal government to compensate issuers for the cost of those reductions. The Department of Health and Human Services (HHS) implemented these requirements in a final rule issued in March 2013. Cost-sharing payments are scheduled to commence in late January.

Under the ACA, the Secretary of the Treasury is required to make advance payments for premium tax credits and cost-sharing pursuant to instructions provided by HHS. Given that the Internal Revenue Service (IRS) will administer the advance premium tax credit payments in coordination with HHS, we recommend that IRS similarly administer the cost-sharing payments in coordination with HHS.

Redacted

Accordingly, IRS will use the section 1324(b) appropriation as the source for these payments.

Pending your approval of this memorandum, IRS will finalize its preparations to commence cost-sharing payments by late January and will keep us informed of its progress.

Although Mr. Mazur sent the Action Memorandum to the Secretary, he had only a minimal recollection of the details surrounding the purpose and creation of the document. Mr. Mazur's interview, however, raised questions about whether the Action Memorandum was an unusual mechanism for authorizing how the CSR payments were to be funded. He testified:

> Q. Were you asked to prepare this memorandum?
>
> A. I don't have a specific memory of being asked by a particular person to prepare this.

Q. Was this something that you would have done without being asked?

A. I am not sure I would have been asked or it would have been a group decision to do. But it would have come to my attention, somehow, to do that.

Q. If it had been a group decision, who would have been involved, either by name or by title, in kind of the determination that such a memo was necessary?

A. I can't recall any specific individuals on this. But in terms of topics you would have – I would expect the budget office.[157]

Mr. Mazur further testified that, while preparing this memorandum was within the scope of his office's responsibilities, the memorandum was outside the normal course of what his office handles. Underscoring the unusual nature of this memorandum, he could not even identify who or even what division within his office would be responsible for preparing such a document. He stated:

Q. So – and the way that the office is broken down, which division of the office would be responsible for creating a document of this nature?

A. Again, for a document like this, it could be any one of a number of people in my office or in the Treasury Department.

We have no one on my staff who directly works on this topic, you know. We work on revenue issues, revenue proposals. This topic seems to be outside that. So it is hard for me to say which of my direct reports

Q. So this is outside of – I am sorry.

A. **It is hard for me to say which of my direct reports would do this topic.**

Q. **So if this is beyond the scope of what your office does, why would you be in the position to make the recommendation to the Secretary of how to implement the program?**

A. **I disagree it is beyond the scope of what my office does.**

Q. Okay.

[157] H. Comm. on Ways & Means, Transcribed Interview of Mark Mazur, at 22–23 (Apr. 28, 2016) [hereinafter Mazur Tr.].

A. My office does work on implementing the Affordable Care Act.

Q. Who in your office works on implementing the Affordable Care Act?

A. Of our 100 people, probably 40 of them, depending

Q. Who is the direct report to you that deals with this subject matter?

A. Of what subject matter are you asking about?

Q. Implementation of the cost share reduction payments –

A. I do not have a direct report who works on that particular topic.

Q. **Okay. Do you have a direct report who has reports to them who work on that particular topic?**

A. **This particular topic is so narrow and outside of what our normal office is that I can't think of a direct report who I would say, "This is their job."**

Q. **Okay. So it is so narrow and outside of the normal course, but you have no recollection as to who could have prepared this document?**

A. **Correct.**[158]

Further, Mr. Mazur was unable to explain why his office—the office responsible for tax policy and tax provisions in the President's budget—prepared this Action Memorandum for Secretary Lew. In fact, cost sharing reductions would rarely fall within his purview, because they are not revenue (tax) provisions. Mr. Mazur stated:

Q. Going back to your role in the President's budget, just for my own knowledge, you were discussing the receipts side of things.

A. Yes.

Q. Did the advanced premium tax credits fall within the receipt side of things?

A. **So the advanced premium tax credits are a tax credit. When our staff was estimating the baseline receipts for the Federal**

[158] *Id.* at 30–33 (emphasis added).

Government, they would take into account those tax credits that were paid as a reduction in receipts. So yes.

Q. And so are the cost share reduction payments also treated as – in that same manner?

A. **I am not aware of how the cost sharing reduction payments are treated, in terms of the federal budget, how they flow through.** I do know that the premium tax credits are treated as a tax credit, and so they count as a minus on individual income tax receipts when individuals claim that.[159]

Mr. Mazur did not know how CSR payments were treated and could not identify who in his office would have handled this issue, yet he and his office were responsible for an Action Memorandum that recommended the IRS treat CSR payments in the same manner as APTCs.

Further demonstrating that this Action Memorandum was unusual, according to multiple witnesses, action memoranda were atypical, especially in this situation, where it was used to direct how a program should be executed. Mr. Mazur stated:

Q. When you say that you, Treasury, prepare hundreds of memoranda a year, are they action memoranda?

A. So in my office we have all different kinds of memoranda we prepare. Action memoranda are, I guess, one of those categories.

Q. What are action memoranda typically used for?

A. Typically to get the approval of a principal or a decision maker on a particular topic.

Q. This particular one was initialed by Secretary Lew. Who else typically initials or signs action memoranda?

A. In the Department of the Treasury it would depend on what the level of decision is. So there would be action memoranda for people who are going to go speak at an event, and the recommendation would be, "Speak at Event X," and they sign it. So whoever is doing that speech would sign that. And so it is a whole range of things.

Q. Could you just give us a couple of more examples about types of issues action memoranda are used for?

[159] *Id.* at 55–56 (emphasis added).

A. So I would think a couple of possible uses of action memoranda: speaking events; sending a formal letter or a formal report to someone; approving accounting for payments, I guess, as in this case. There is a range of things.

Q. Have you ever seen another action memoranda approving, like you said, a payment method for anything else?

A. I can't recall, but that doesn't mean they don't exist.[160]

The Chief of the IRS's Ethics and General Government Law Branch Kirsten Witter testified that she had not seen an action memorandum like this one before. She stated:

Q. **Have you seen an action memorandum like this before?**

A. **Not precisely like this, no.**

* * *

Q. Have you seen action memoranda before?

A. Yes.

Q. **What generally do action memoranda do?**

A. **The ones I have seen have generally been to permit the acceptance of gifts to the agency.**[161]

The IRS General Counsel understood the Action Memorandum to be a "decision document that authorized and commanded action,"[162] but he also stated that he could not recall ever seeing an action memorandum before. He testified:

Committee Counsel. Mr. Wilkins, when you received the document that was signed, did you understand it to be a final document or did you have an opinion on it one way or the other?

A. I understood it to be a decision document that authorized and commanded action.

Committee Counsel. Thank you.

Q. Are action memoranda typically used at Treasury?

[160] Mazur Tr. at 19–20.
[161] H. Comm. on Ways & Means, Transcribed Interview of Kirstin Witter, at 23–25 (April 8, 2016) [hereinafter Witter Tr.] (emphasis added).
[162] Wilkins Tr. at 37.

A. I couldn't tell you one way or the other.

Q. Have you ever received an action memorandum before?

A. I don't think so.[163]

Based on these IRS counsels' testimony, this Action Memorandum—seeking the Secretary's approval to fund the CSR program through the permanent appropriation—was unusual.

Ultimately, Mr. Mazur acknowledged that he made the recommendation to Secretary Lew to administer the CSR payments similar to how the APTC credit payments were being administered. Mr. Mazur testified:

> Q. Do you see the next sentence, where it says, "Given that the Internal Revenue Service, IRS, will administer the advanced premium tax credit payments in coordination with HHS, we recommend that IRS similarly administer the cost sharing payments in coordination with HHS"?
>
> A. Yes.
>
> **Q. Who is the "we" making that recommendation?**
>
> **A. The "we" would be me.**[164]

On or around January 15, 2014, Treasury Deputy General Counsel Roberto Gonzalez emailed the final Action Memorandum to Mr. Wilkins.[165] After receiving the final Action Memorandum, Mr. Wilkins shared it with staff within the General Counsel's General Legal Services Office, including Mark Kaizen and Linda Horowitz, as well as staff within the CFO's office.[166]

[163] *Id.* at 37-38.
[164] Mazur Tr. at 26–27 (emphasis added).
[165] Wilkins Tr. at 33–34.
[166] *Id.* at 38–39.

2. Commissioner Koskinen Meets with Concerned IRS Officials

FINDING:	**A few days after they met at OMB to review OMB's memorandum, several high-level IRS officials met with IRS Commissioner John Koskinen to discuss how the Administration planned to fund the cost sharing reduction program. It was clear that the decision had already been made to move forward with making the cost sharing reduction payments through the premium tax credit account.**

Within a few days of the OMB meeting where IRS officials reviewed OMB's legal memorandum, a meeting was scheduled with IRS Commissioner John Koskinen. Former IRS Chief Risk Officer David Fisher explained the meeting:

> Q. Do you recall – or could you explain what happened in the course of that meeting?
>
> A. **So the Commissioner gathered together all of the people who had attended the meeting at OMB. There were some additional attendees that would typically attend a senior-leader meeting with the Commissioner** – as I recall, his chief of staff, his deputy chief of staff, the Deputy Commissioner for Services and Enforcement –
>
> Q. Who was that?
>
> A. John Dalrymple was there. There may have been a couple of others. But it was sort of the typical senior folks that you would expect to be with the Commissioner when a meeting of some import was taking place.[167]

Mr. Fisher described the meeting as a "free and open discussion."[168] Participants, including Commissioner Koskinen, discussed the final Action Memorandum from Mark Mazur to Secretary Lew and that the Department of Justice had seen and approved OMB's legal memorandum. Mr. Fisher stated:

> [Commissioner Koskinen] was informed of – well, two things. There was a memo that was circulated at that meeting that you shared with me last week in the transcribed interview that showed – I believe it was a memo from Mark Mazur to Secretary Lew that Secretary Lew had signed and initialed "Approve" that was more of the directive kind of note that Treasury had concluded that – now it was Treasury's counsel – had concluded that these payments were appropriate. I recall that memo. We discussed that briefly. And that was provided – I don't remember who

[167] Fisher Depo. at 38 (emphasis added).
[168] *Id.*

> brought that memo. It was either through the Chief of Staff or Chief Counsel – was brought to the group, and the Commissioner became aware of that.
>
> **He had also been informed that the Justice Department had seen the memo and had been approving of it, obviously was aware of OMB's position.** This is, again, mostly through the General Counsel or Chief Counsel's communication to the Commissioner. **And so there was a very strong consensus of the people who had been in the loop on this at, you know, fairly senior positions in government that these payments were appropriate.**[169]

Mr. Fisher admitted that he was in the dissent at the meeting. As the Chief Risk Officer, he expressed concerns about the risk associated with making the CSR payments through a permanent appropriation when the law does not expressly authorize such payments. He testified:

> I was in the dissent. I think I was wearing two hats in that perspective. **As the Chief Risk Officer, I felt there was some risk to making these payments with respect to the appropriations law and the Antideficiency Act, recognizing that there were other opinions on the other side.** I expressed that I felt that the memo that we read was not compelling to me to counter my concerns about the Appropriations Act issues related to the payment, as I read the law over and over again to try to convince myself, you know, what's the appropriate reading of this, recognizing that many others have now come to a different conclusion.[170]

Mr. Fisher felt that Commissioner Koskinen gave him the opportunity to express his concerns, even though the IRS ultimately decided to move forward with making the CSR payments through Treasury's permanent appropriation for tax credits. Mr. Fisher stated:

> [Commissioner Koskinen] listened to my concerns and thanked me, actually, in the meeting for expressing those concerns **but felt the appropriate course was to go forward and make the payments, you know, per the strong majority of folks who believed that they were appropriate**.[171]

As documents and testimony indicate, by the time the IRS officials had met with Commissioner Koskinen, it appeared that a decision to use the permanent appropriation had already been made. OMB and the Department of Justice had blessed this course of action. Secretary Lew had already signed the Action Memorandum.

[169] *Id.* at 39 (emphasis added).
[170] *Id.* at 39–40 (emphasis added).
[171] *Id.* at 40 (emphasis added).

3. A Memorandum of Understanding between the IRS and CMS Sets Forth How to Make Cost Sharing Reduction Payments

FINDING: The Administration could not make cost sharing reduction payments until a Memorandum of Understanding was in place.

At the same time that IRS officials raised concerns about the source of funding for the CSR program, IRS Deputy Chief Financial Officer Greg Kane began drafting a Memorandum of Understanding (MOU) to govern the CSR payment process. He testified:

> Q. Did you help create this memorandum of understanding?
>
> A. Yes, I did.
>
> Q. When did you begin working on this MOU?
>
> A. Around the first of January.
>
> Q. First of what year?
>
> A. First week of January 2014.
>
> Q. Were there previous versions of the MOU that you worked on?
>
> A. Of this particular MOU? No.
>
> Q. **Would you just explain generally what the MOU does?**
>
> A. **So the memorandum of understanding clearly calls out the roles and responsibilities because of the shared process on what CMS does, what IRS does. There are references to the internal control process.**
>
> And then the introduction and overview section were written by all the counsels – HHS, IRS, CMS, and Treasury – to ensure that these documents based on the process wouldn't have to be revisited multiple times if there were changes and people leaving organizations and all that; it would only have to be revisited if the process were to change.[172]

The Administration could not begin making CSR payments to the insurance companies until an MOU for CSR payments was in place. Mr. Kane stated:

[172] Kane Tr. at 36–37.

> Basically, this Memorandum of Understanding had to be in place so that they could begin to execute the process, and for any funds that were going to be moved into their allocation account for purposes of making the PTC, cost sharing payments done prior to the end of January.[173]

He further testified:

> Q. Would you just explain generally what the MOU does?
>
> A. So the memorandum of understanding clearly calls out the roles and responsibilities because of the shared process on what CMS does, what IRS does. There are references to the internal control process.
>
> And then the introduction and overview section were written by all the counsels – HHS, IRS, CMS, and Treasury – to ensure that these documents based on the process wouldn't have to be revisited multiple times if there were changes and people leaving organizations and all that; it would only have to be revisited if the process were to change.[174]

On January 17, 2014, CMS CFO and Director of the Office of Financial Management Deborah Taylor, CMS Deputy Director of Operations, Center for Consumer Information and Insurance Oversight James Kerr, and IRS Chief Financial Officer Robin Canady all signed the MOU governing how CMS and the IRS would make CSR payments.[175] On the first page, the MOU notes that "[p]er OMB guidance, CSR are not subject to sequestration."[176] Several days later, on approximately January 22, 2014, the Administration made the first CSR payments to insurance companies from funds appropriated for tax credits.[177]

[173] *Id.* at 56.
[174] Kane Tr. at 36–37.
[175] CRS MOU, *supra* note 25.
[176] *Id*.
[177] Email from CMS Clearances to numerous HHS personnel (Jan. 21, 2014, 12:23 p.m.) (including a draft blog released to be rolled out "as early as . . . 1/22" that stated that "[t]oday, CMS is pleased to report that we are making the first payments to Marketplace health insurers on behalf of consumers who are receiving financial assistance with their premiums and cost-sharing.").

C. The Administration Does Not Request an Annual Appropriation in its FY 2015 Budget Request

FINDING:	**The Administration did not request an annual appropriation for the cost sharing reduction program in its FY 2015 budget request, submitted to Congress on March 14, 2014.**

While the Administration was finding and justifying another way to fund the CSR program, HHS began preparing its FY 2015 budget request. HHS counsel refused to let its witnesses answer whether this budget included a request for an annual appropriation for the CSR program at any stage in the lengthy process. But when the President submitted his final budget request to Congress on March 14, 2014, it did not include any request for appropriations for the CSR program. HHS Assistant Secretary for Financial Resources Ellen Murray testified:

> Q. Did that fiscal year 2015 budget request to Congress include a request for an annual appropriation from the Cost Sharing Reduction Program?
>
> A. It did not.
>
> Q. Do you know why not?
>
> A. We believed that we had an appropriation through the Treasury Department, and an appropriation through the Labor-H bill was not necessary.
>
> Q. Which particular appropriation?
>
> A. The appropriation for the tax credit.[178]

As this investigation has shown, the Administration initially believed that it needed an annual appropriation to fund the cost sharing reduction program—the FY 2014 budget would not have included a request for an annual appropriation for the CSR program if this were not true. Although the Affordable Care Act provided funding for the advanced premium tax credits, it did not do the same for the CSR program. Nevertheless, despite requesting an annual appropriation in its FY 2014 budget request submitted to Congress on April 10, 2013, the Administration switched course.

Around the same time that it understood that the CSR appropriation would be subject to sequestration, the Administration called the Senate Committee on Appropriations to informally withdraw its budget request. The Administration has refused to tell Congress who ultimately made the decision to withdraw the request. Meanwhile, the Administration scrambled to create a legal justification for raiding the premium tax credit account to pay for the cost sharing reduction program. A few high level IRS officials raised concerns about this course action, fearing it

[178] Murray Tr. at 77.

violated appropriations law. These same concerns were the basis of the district court's May 11, 2016 decision finding the Administration's actions unconstitutional.[179] But despite these valid concerns, the Administration went forward and began making CSR payments from the premium tax credit account by the end of January 2014.

[179]*See U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967 , Op. (D.D.C. May 12, 2016).

VII. The Administration has Obstructed the Committees' Investigation

For more than a year, the committees have sought to understand the facts surrounding the Administration's decision to fund the cost sharing reduction program using the § 1324 permanent appropriation for tax refunds and credits. This investigation arose out of a concern that the source of funds was unconstitutional—and a federal court recently decided just that.[180]

To fully understand the rationale and process for the Administration's decision, the committees have sought answers to a number of questions, including:

- Who first identified the APTC account as a potential source of funds for the CSR program?
- When and how was that appropriation identified?
- Why did the Administration initially request an annual appropriation for the CSR program before deciding to informally withdraw it?
- Did sequestration play a role in the Administration's decision to fund the CSR program through the APTC account?
- Who at the White House and the Department of Justice was involved in these decisions?

Unfortunately, the Administration has undertaken extraordinary efforts to frustrate the committees' investigation and to prevent it from answering these and other legitimate questions. Since the start of this investigation, the Administration has:

- Failed to comply with the committees' subpoenas;
- Failed to timely deliver subpoenas issued by the Committee on Ways and Means to Administration employees;
- Relied on an overbroad regulation inconsistent federal law to limit information provided to Congress;
- Unilaterally restricted the scope of the testimony that current and former employees provided to Congress;
- Instructed witnesses who appeared before the committees to not fully answer questions posed by Congress; and

[180] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Op. (D.D.C. May 12, 2016).

- Pressured at least one witness who questioned the Administration's testimonial restrictions.

On numerous occasions, the Administration has cited the ongoing litigation as a justification for its refusal to cooperate with the committees' investigation. The Administration has misrepresented and distorted the scope of Congress' authority to conduct oversight of the laws passed by Congress, and of the circumstances of the present case. It has attempted to argue that Congress' constitutional oversight authority is somehow suspended while litigation is pending. It has argued that while Congress may have "authority" to conduct oversight, there is no "need" while the issue is being litigated. But none of these arguments are valid.

From the outset, the committees have clearly stated the purpose of their investigation: to fully understand the facts surrounding the Administration's decisions to fund the cost sharing reduction program from the permanent appropriation for tax refunds and credits. The lawsuit did not, and will not, answer the committees' questions about the source of funding for the CSR program because the committees' factual questions are fundamentally different from the legal issues presented in the *House v. Burwell* litigation.

Under the powers set forth in the Constitution, Congress has an obligation to understand the facts of the Administration's decisions here. The committees have an oversight interest in the laws and regulations passed by Congress, and must ensure that the Administration spends taxpayer dollars prudently and in accordance with the law. That oversight interest cannot be tolled as the Administration requests. Further, it is the committees of the United States House of Representatives, not the Administration, that have sole authority to determine the type of information necessary to conduct effective oversight.

Section A details the numerous steps the committees have undertaken to obtain information from the Administration, while Section B details the obstructive tactics used by the Administration to impede the committees' work.

A. Background of the Committees' Investigation

1. The Committees Initiate the Investigation and Request Documents and Information

On February 3, 2015, then-Ways and Means Committee Chairman Paul Ryan and Energy and Commerce Committee Chairman Fred Upton wrote to Treasury and HHS requesting documents and information about the Administration's decision to make CSR payments to the insurance companies without an appropriation. The committees explained the basis for the request:

> Congress has never appropriated any funds to permit the administration to make any Section 1402 Offset Program payments to insurance companies. Despite lacking an appropriation, Centers for Medicare and Medicaid Services ("CMS") Administrator Marilyn Tavenner informed the House Committee on Oversight and Government Reform in December 2014 that

> insurers, "have been paid a cumulative total of $2.7 billion in advance [Section 1402 Offset Program payments through the November 2014 payment cycle."
>
> Article I of the U.S. Constitution expressly prohibits the expenditure of public funds without an appropriation made by law. Accordingly, it appears the Department of Health and Human Services ("HHS") has directed the Treasury Department to make payments to insurers for the Section 1402 Offset Payments, and that the Treasury Department has made and continues to make these payments, even though no funds are lawfully available to do so.[181]

In the same letters, the committees requested that the Departments produce documents relating to:

> 1. The administration's decision to make Section 1402 Offset Program payments to insurers, despite a lack of appropriation to do so; and
>
> 2. The administration's abrupt reversal in course from its FY 2014 budget submission to Congress, in which it requested an "annual" appropriation to fund the Section 1402 Offset Program payments, to its FY 2015 Budget submission, which did not include [an] annual appropriation request.[182]

On February 25, 2015, more than a week past the letter's deadline, the committees received a three-paragraph response from both Departments referring Chairmen Ryan and Upton to the Department of Justice (DOJ). The Departments wrote, in part:

> As you know, the House of Representatives has filed a lawsuit against the Department of the Treasury and the Department of Health and Human Services asking the court to end these cost-sharing reduction payments. Your letters relate to matters that are the subject of the House lawsuit. The Department of Justice, which represented both defendants, filed a brief in the case on January 26, 2015. **For matters raised in this litigation, we refer you to the Department of Justice.**[183]

Regarding the committees' requests and questions, the Department provided only one sentence of responsive information:

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[181] Letters from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, and Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv. (Feb. 3, 2015) (citations omitted).

[182] *Id.*

[183] Letters from Randall DeValk, Acting Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Feb. 25, 2015) (referring to *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967 (D.D.C. filed Nov. 21, 2014)) (emphasis added).

> Cost-sharing reduction payments continue to be made to insurers on behalf of consumers and the cumulative amount of these payments for 2014 is $2.997 billion.[184]

The response did not otherwise answer any of the committees' questions or include any documents.

Nearly six months later, the Departments had not provided any documents to the committees. On July 7, 2015, the committees wrote again to the Departments to reiterate the request for documents and information. The committees wrote:

> We remain concerned that the administration is unlawfully and unconstitutionally misappropriating funds to make Section 1402 Offset Program payments to insurance companies. To understand the [Departments'] administration of the cost-sharing reduction program, the committees sent you a letter on February 3, 2015 requesting information and documents. To date, the [Departments have] not provided any documents or information in response to that request.[185]

The committees asked that the Departments produce all responsive documents and information by July 21, 2015. The committees concluded:

> If [the Departments] fail to produce the documents and information, the committees will have no choice but to consider the use of the compulsory process to obtain them.[186]

On July 21, 2015, the Departments responded to the committees' letters. The Departments' response again failed to address the committees' requests. Specifically, the response explained neither the Administration's decision to make the CSR payments from the permanent appropriation for tax credits and refunds, nor why the Administration requested an annual appropriation to fund the CSR payments in the fiscal year 2014 budget before reversing course. Instead, the Departments merely provided a summary of the legal arguments presented by the Administration in the *House v. Burwell* litigation.

In the same letters, the Departments explicitly refused to produce the documents requested by the committees. The Departments wrote:

> As we wrote in our February 25, 2015 response to you, the House of Representatives has filed a lawsuit against Treasury and HHS asking the court to end cost-sharing reduction payments. Your letters contain document requests that relate to the issues raised by the complaint the

[184] *Id.*
[185] Letters from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, and Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv. (July 7, 2015).
[186] *Id.*

> House filed in that case. In January of this year, the Department of Justice, which represents both defendants, filed a motion to dismiss the case on the grounds that the suit is not justiciable. However, the court has not yet ruled on that motion, and the case remains pending. **It would therefore be premature for our agencies to address your document requests, as they relate to the issues raised in the lawsuit.**[187]

The Departments did not provide any other explanation for why they would not produce the requested documents and information to the committees.

2. The Administration Delays and Impedes Scheduling Transcribed Interviews

Given the Departments' explicit refusal to provide the requested documents, the committees next attempted to understand the Administration's decisions about the source of funding for the CSR program through witness testimony. To that end, the committees wrote to the Departments on December 2, 2015 requesting transcribed interviews of eight current and former employees of the Departments of Health and Human Services and the Treasury. The committees again explained the purpose of the oversight inquiry, which was separate from the legal issues involved in the *House v. Burwell* litigation. They wrote:

> **The Committees seek to fully understand the facts** that led to the administration's initial request for an annual appropriation to fund the CSR program payments to insurers, and the administration's subsequent actions, after Congress had rejected the appropriation request, to nevertheless pay insurers with funds from the permanent appropriation for tax refunds and credits. **Congress has a constitutionally-based responsibility to oversee all aspects of the administration's actions related to the CSR program.**[188]

The committees asked the Departments to make the requested individuals available for interviews no later than December 16, 2015. The committees concluded that, if the Departments "fail[ed] to timely respond or schedule the requested interviews," the committees would have no choice but to resort to compelled process. Not only did the Departments fail to make the requested individuals available for interviews by December 16, 2015, but they failed to even respond to the letter by that date.

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[187] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (July 21, 2015) (emphasis added).

[188] Letters from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, and Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv. (Dec. 2, 2015) (emphasis added).

On December 18, 2015, two days after the deadline, the Departments responded to the committees' letters.[189] Once again, the response focused entirely on the legal arguments at issue in the *House v. Burwell* litigation—even referring the committees to a recently-filed litigation brief for "further information regarding the basis for the conclusion that Congress intended for cost-sharing reduction payments to be funded through a permanent appropriation."[190] The Departments' response, however, in no way addressed the factual issues central to the committees' separate and independent oversight inquiry. The Departments also failed to address the committees' request for witness interviews.

At this juncture, and given the Departments' refusal to produce documents and refusal to make witnesses available, the committees prepared to issue subpoenas for the documents and information required to complete the investigation. As commonly occurs before the issuance of a congressional subpoena, committee staff called the Departments' staff to discuss service of subpoenas for documents and depositions.

On January 19, 2016, the Departments wrote to the committees again, claiming that the *House v. Burwell* litigation prevented the Departments from complying with the committees' requests for documents and interviews. In rejecting the Committees' request for transcribed interviews, the Departments wrote:

> Conducting the interviews you request on these topics could compromise the integrity of the judicial proceedings by circumventing the established rules of discovery and procedure, including judicial determination of the applicability of privileges designed to protect litigants in civil litigation. Indeed, as noted above, the House has expressly acknowledged that discovery is not required in this case, a point with which we and the district court agree. Two House committees requesting interviews about agency action on the same day that the House has relied on those actions in litigation against those same agencies raises the appearance of utilizing oversight to accomplish inappropriate litigation objectives.[191]

Once again, the Departments improperly conflated the committees' factual oversight inquiry with the legal issues involved in the litigation. The Departments further failed to explain how the facts gathered in the committees' investigation could be used to "accomplish inappropriate litigation objectives." As the Departments themselves pointed out, the *House v. Burwell* litigation required no discovery. Because the only issue involved was whether the Administration could legally make CSR payments from the permanent appropriation for tax refunds and credits, the only relevant fact was that the Administration made CSR payments using the permanent appropriation.

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[189] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Dec. 18, 2015).
[190] *Id.*
[191] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Jan. 19, 2016) (citations omitted).

The Departments' letter concluded by formally offering the committees a briefing with HHS Assistant Secretary for Financial Services Ellen Murray. HHS staff had informally conveyed this offer several days prior during a phone call with committee staff. At this point, and with the hope that Ms. Murray would answer the committees' questions, the committees agreed to postpone the issuance of subpoenas to HHS until after that briefing.[192] More than six weeks later, Ms. Murray provided a transcribed interview to the committees. In that interview, HHS counsel refused to permit her to answer most of the committee's basic and straightforward questions about the source of funding of the CSR program.

Ultimately, the committees conducted transcribed interviews of twelve current and former Administration employees. In the course of these interviews, counsel for the Administration present at the interviews prevented employees from answering most of the committees' questions about the source of funding for the CSR program.

The Committee on Ways and Means also deposed a former IRS official. Through this deposition, the committees finally gained some insight into the Administration's decision to fund the CSR program using the permanent appropriation for tax credits and refunds.

3. The Administration Refuses to Produce to the Committees a Final OMB Memorandum

The Office of Management and Budget drafted a legal analysis regarding the revised source of funding for the CSR program, which it shared with top Administration officials. The committees learned of this memorandum in the course of the transcribed interviews. On April 25, 2016, the committees wrote to OMB requesting a copy of this memorandum. The committees wrote:

> In recent transcribed interviews with Treasury officials, several officials described a legal memorandum drafted by the Office of Management and Budget regarding the funding of the CSR program. The memorandum was shared with several Treasury officials around January 2014. The Committees requested the document from both the Department of Treasury and the Department of Health and Human Services, but both departments have informed the Committees that they do not have a copy of the memorandum in their possession.[193]

On May 3, 2016, OMB refused to produce the requested document voluntarily, citing the Executive branch's "confidentiality interests in such pre-decisional deliberations and analysis," and the need to protect against the "chilling effect on future deliberations that would follow"

[192] Ways and Means Committee staff offered a similar accommodation to the Department of the Treasury—namely, that the Committees would postpone the issuance of subpoenas if the Department provided a similar briefing. Treasury did not accept this offer of an accommodation from Ways and Means.

[193] Letter from Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Shaun Donovan, Dir., Office of Mgmt. & Budget (April 5, 2016).

disclosure of the document.[194] Instead, OMB offered a "summary of the government's legal analysis supporting the funding of the ACA's cost-sharing reduction program."[195] The committees subsequently informed OMB via staff telephone calls that a summary written in 2016 about a memorandum drafted in 2013 would not be sufficient, and that the committees required production of the actual memorandum.

4. Due to the Administration's Explicit Refusal to Produce Documents and Testimony, the Committees are Forced to Issue Subpoenas

For nearly a year, the Departments refused to voluntarily produce documents on the source of funding for the CSR program. Between February 2015 and January 2016, the Departments did not produce a single document.

On January 20, 2016, the committees issued subpoenas requiring the Department of the Treasury to produce documents related to the source of funding for the CSR program. The subpoenas compelled Treasury to produce:

> All documents and communications referring or relating to budget requests and the source of funding for cost-sharing reduction payments made by the Administration to health insurance issuers under Section 1402 of the Patient Protection and Affordable Care Act.[196]

The subpoenas required that Treasury produce unredacted documents to the committees by February 3, 2016—one year to the day that the committees first requested information regarding the CSR program.

Also on January 20, 2016, and after Treasury did not voluntarily provide transcribed interviews or even a briefing with requested officials, the Ways and Means Committee issued deposition subpoenas to three IRS officials. The committee issued these subpoenas to Chief Counsel William Wilkins; former CFO Robin Canady; and Deputy CFO Gregory Kane.[197]

On May 4, 2016, the committees issued subpoenas compelling the Department of Health and Human Services to produce documents related to the source of funding for the CSR program. The subpoenas required HHS to produce:

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[194] Letters from Tamara Fucile, Assoc. Dir. of Legis. Affairs, Office of Mgmt. & Budget, to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (May 3, 2016).

[195] *Id.*

[196] Subpoena to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, from H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, from H. Comm. on Energy & Commerce (Jan. 20, 2016).

[197] Subpoena to William Wilkins, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Robin Canady, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Gregory Kane, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Was & Means (Jan. 20, 2016).

> All documents and communications referring or relating to budget requests and the source of funding for cost-sharing reduction payments made by the Administration to health insurance issuers under Section 1402 and/or 1412(c)(3) of the Patient Protection and Affordable Care Act.[198]

Also on May 4, 2016, the committees served subpoenas on the Office of Management and Budget compelling production of the memorandum requested by the committees, which OMB refused to produce voluntarily. The subpoenas required OMB to produce:

> All drafts, including the final version, of a memorandum drafted by Office of Management and Budget (OMB) personnel related to the Cost-Sharing Reduction program of the Patient Protection and Affordable Care Act, a version of which was distributed by OMB personnel to select Internal Revenue Service officials on January 13, 2014, at a meeting in the Old Executive Office Building.[199]

On May 12, 2016, Judge Collyer of the U.S. District Court for the District of Columbia rendered her decision on the merits of the *House v. Burwell* litigation. Judge Collyer held that the Department of the Treasury and the Department of Health and Human Services made billions of dollars in CSR payments to health insurers without an appropriation, and in violation of the Constitution.

On May 20, 2016, the committees wrote to Treasury, HHS, and OMB demanding immediate production of all documents responsive to the subpoenas. The committees wrote:

> Much of the Administration's objection to the Committees' oversight is seemingly rooted in its purported concerns about disclosing information related to the ongoing litigation brought by the House regarding the cost sharing reduction program. As we explained to you in December, the litigation did not deprive the Committees of their respective oversight authorities and obligations, and was not a valid basis for the Department to refuse to respond to congressional oversight requests.
>
> * * *
>
> The district court's ruling that the cost sharing reduction payments made by your Department violated the U.S. Constitution clearly demonstrates that misconduct has occurred. We remind you that the deliberative process privilege, if grounds for one ever existed, "disappears entirely when there is any reason to believe government misconduct [has]

[198] Subpoena to Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Servs., from H. Comm. on Ways & Means (May 4, 2016); Subpoena to Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Servs., from H. Comm. on Energy & Commerce (May 4, 2016).

[199] Subpoena to Hon. Shaun Donovan, Dir., Office of Mgmt. & Budget, from H. Comm. on Ways & Means (May 4, 2016); Subpoena to Hon. Shaun Donovan, Dir., Office of Mgmt. & Budget, from H. Comm. on Energy & Commerce (May 4, 2016).

occurred." Therefore, we expect your Department to immediately produce all documents responsive to the subpoenas.[200]

Neither Treasury, nor HHS, nor OMB have produced any additional documents to the committees since May 12, the date of Judge Collyer's ruling.

B. The Elements of the Administration's Obstruction

While the committees have steadily pursued requests for documents and information for over a year, the Administration has employed a number of different tactics to impede and obstruct the committees' investigation. For the past year, the Administration has:

- Failed to comply with the committees' subpoenas;
- Failed to timely deliver subpoenas issued by the Committee on Ways and Means to Administration employees;
- Relied on an overbroad regulation inconsistent with federal law to limit information provided to Congress;
- Unilaterally restricted the scope of the testimony that current and former employees provided to Congress;
- Instructed witnesses who appeared before the committees to not fully answer questions posed by Congress; and
- Pressured at least one witness who questioned the Administration's testimonial restrictions.

Given the level and types of obstruction, it appears that the Administration is using these tactics to keep information about the source of funding for the CSR program out of the hands of Congress, and therefore out of the hands of the American people.

[200] Letter from Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Servs. (May 20, 2016) (similar letters sent to Hon. Shaun Donovan, Director, Office of Mgmt. & Budget and Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury).

1. The Administration has Not Complied with the Committees' Subpoenas

FINDING: The Administration has not complied with subpoenas issued by the United States Congress.

Each subpoena issued by the committees was accompanied by extensive instructions. The deposition subpoenas issued by the Committee on Ways and Means were also served with a copy of the staff deposition authority rules promulgated by the House of Representatives, as required by the rules of the House.

The subpoenas for documents demanded that the Departments produce responsive records "in unredacted form" as described by the various subpoena schedules. Instructions provided with the subpoenas explained the steps the Departments should take if documents were missing, redacted, or otherwise withheld. For example, the relevant instructions for the subpoena issued by the Committee on Energy and Commerce to HHS require:

> 10. If compliance with the subpoena cannot be made in full, compliance shall be made to the extent possible, and your production shall be accompanied by a written explanation of why full compliance is not possible.
>
> 11. In the event that a document or part of any document is withheld on any basis, provide the following information concerning each and every document or part of any such document withheld from production: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of author and addressee to each other. Note that subpoenas and requests issued by the U.S. House of Representatives and its Committees are not limited by: any of the purported non-disclosure privileges associated with the common law, including but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.
>
> 12. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipient(s)) and explain the circumstances by which the document ceased to be in your possession, custody, or control.[201]

[201] Subpoena to Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv., from H. Comm. on Energy & Commerce (May 4, 2016).

The subpoena instructions further call for the relevant Department to provide a certification once document production is completed. For example, the relevant instruction for the subpoena issued by the Committee on Energy and Commerce to HHS requires:

> 18. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee or identified in a log provided to the Committee, as described in Paragraph 11 above.[202]

As of the drafting of this report, neither the Department of the Treasury, nor the Department of Health and Human Services nor the Office of Management and Budget were in compliance with subpoenas issued by the committees. None of the three have produced all responsive documents. None of the three have certified that production is complete or produced a log of documents withheld from the committees, or even provided a valid legal basis—to the extent one applies—to justify withholding large amounts of information from Congress. Further, testimony from Administration officials demonstrates that the Department of the Treasury has not conducted a reasonably thorough search for documents responsive to the subpoena.

The Administration's CSR program was a multi-department endeavor. Decisions regarding the source of funding were made not just at one Department, but between at least three different components of the Executive branch, and involving some of the highest ranking officials in the government. It is inconceivable that there are so few documents responsive to the six subpoenas issued by the two committees.

As detailed below, the Administration took the position that all documents not already publicly available are somehow shielded from congressional oversight—and therefore shielded from the American people—without any basis in law, precedent, or fact. Indeed, the Supreme Court has reaffirmed that Congress has the power to investigate the agencies tasked with carrying out the laws Congress promulgates. The Court explained:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to other who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which

[202] *Id.*

> is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[203]

Moreover, the Administration took this position while refusing to assert any claim of privilege—to the extent any applies—over the documents sought by the committees. Asserting a privilege requires the Administration to provide information justifying the claim of privilege to Congress or a court. Yet, despite its refusal to assert a privilege, the Administration effectively asserted the deliberative process privilege by withholding documents that relate to "internal Executive branch deliberations," among other purported justifications.

Even if it were applicable here, the deliberative process privilege is a privilege that may be invoked by the Executive in response to a request for internal, or deliberative, documents or testimony. A proper invocation of the privilege involves two prongs: (1) the documents and communications must be predecisional, or created prior to the agency or department reaching a final decision, and (2) they must be deliberative.[204] To be deliberative, a document or communication must relate to the thought processes or opinions of relevant officials—the information cannot be purely factual.[205] This privilege, when applicable, protects only predecisional documents—final documents cannot be withheld.

The deliberative process privilege is not absolute; it can be overcome by a showing of need.[206] Moreover, the privilege "disappears altogether when there is any reason to believe government misconduct [has] occurred."[207] Here, a federal district court has ruled that the Administration spent monies to make CSR payments without an appropriation, in violation of the Constitution and the Antideficiency Act.[208] But even without that finding of illegality on the part of the Administration, the committees merely need to demonstrate a plausible claim of waste, fraud, abuse, or maladministration to overcome an assertion of the deliberative process privilege.

Under the position advanced by the Administration here, agencies could withhold internal or deliberative documents from Congress for any reason imaginable—even if they simply included an embarrassing comment. It is for this precise reason that any purported assertion of the deliberative process privilege can be so easily overcome. Furthermore, the Supreme Court has already dismissed the Administration's argument that producing documents containing internal deliberations to Congress would create a "chilling effect," discouraging agency employees from providing candid advice. In *NLRB v. Sears, Roebuck & Co.*, the Supreme Court stated:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency

[203] *McGrain v. Daugherty*, 273 U.S. 135, 174–75.
[204] *In re Sealed Case (Espy)*, 121 F.3d. 729 (D.C. Cir. 1997).
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Op. at 1 (D.D.C. May 12, 2016).

> employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure.][209]

a. The Department of the Treasury has Produced only 31 pages of Documents to the Committees, Including a Redacted Version of a "Final" Action Memorandum Signed by Secretary Lew

FINDING:	**The Department of the Treasury improperly withheld and redacted documents responsive to the committees' subpoenas without any valid legal basis to do so.**

When the committees issued subpoenas to the Department of the Treasury on January 20, 2016, Treasury had not produced a single page of documents in response to the committees' requests. Since the subpoenas have been issued, Treasury has produced only 31 pages of documents, one of which included substantial redactions. In addition, the committees have evidence that the Department has not even undertaken a reasonably thorough search for documents responsive to the subpoenas.

The committees' subpoenas issued to Treasury required that the Department produce all responsive records by February 3, 2016. On that day Treasury responded—not with a production of documents, but with a letter. The Department wrote:

> Prior to your recent subpoena, the Committee last requested documents from us on July 7, 2015. We responded at that time that it would be premature to address the response for documents given the pending litigation. We recognize that the Committee's subpoena is broader than the Committee's initial requests for documents, and we are moving forward with a search for responsive materials.[210]

On March 9, 2016, Treasury produced 30 pages of documents to the committees on the eve of the first transcribed interview of a Treasury official. The documents included:

- Memorandum of Understanding between the Internal Revenue Service (IRS) and the Centers for Medicare & Medicaid Services (CMS) related to the CSR program;

- Advance Premium Tax Credit, Cost Sharing Reductions, and Basic Health Program Cycle Memorandum, Internal Revenue Service, FY 2015 Financial Statement Audit; and

[209] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (emphasis in original).
[210] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Feb. 3, 2016).

- IITC and BITC Reports from the second quarter of fiscal year 2014 through the first quarter of fiscal year 2016, among other documents.

Each of the documents produced was responsive to the subpoena, as well as to the committees' original request.

On March 16, 2016, Treasury produced one additional document—a final, one page "Action Memorandum." This document was also responsive to the subpoena and to the committees' original request. But Treasury did not produce the document until after a witness described it during his transcribed interview, and even then, only after the committees specifically requested that Treasury provide this document. Furthermore, the document produced to the committees contains significant redactions.

As discussed throughout this report, the final Action Memorandum, which was signed by Secretary Lew, authorized the IRS to make CSR payments from the § 1324 permanent appropriation for tax refunds and credits. Moreover, and despite this being a final authorizing document, Treasury redacted a significant portion of this document. Despite multiple requests from the committees, including during subsequent transcribed interviews, Treasury has not provided the committees with any basis—let along a valid legal one—for the redaction. For instance, during Mr. Wilkins's transcribed interview, Committee counsel and Treasury counsel discussed the redaction in the final Action Memorandum. Counsels stated:

> Q. Do you see this portion that is redacted?
>
> A. Yes.
>
> Q. In white. It says "redacted," right?
>
> A. Yes, I see those redactions.
>
> Q. Have you previously seen the text that's covered by the redactions?
>
> A. Yes.
>
> Q. Do you recall generally what that text pertained to?
>
> Treasury Counsel. You can answer yes or no.
>
> Mr. Wilkins. Yes, generally.
>
> Q. What category of information does that text pertain to? Is it legal? Is it advice? Is it other analysis?
>
> Treasury Counsel. So, Amanda, we're happy to engage with you, you know, offline about the basis for the redaction, but Mr. Wilkins

isn't here to – you know, to sort of testify about the basis for the redaction in this interview.

Committee Counsel 1: It would be helpful to have that discussion because I'm sure you saw the instructions that we provided in the subpoena for these documents which require that you provide a log of reasons for redactions, and so far you have not provided any reason for this redaction.

Treasury Counsel. So I think we understand your position on that. The document was just produced yesterday. I'm happy to discuss that with you.

Committee Counsel 2. Just so the record is clear, we did ask yesterday for an explanation of the redaction, and none has been forthcoming, so we will continue to await that.[211]

Treasury has never asserted any legal basis on which the Department may withhold information from Congress, instead cloaking itself in an effective assertion of the deliberative process privilege. It has raised the specter of the deliberative process privilege, but never actually asserted it. Treasury has not provided a valid legal basis to redact documents or withhold them from the committees, because no legal privileges apply in this instance. The Department has further failed to provide a log identifying the documents withheld from the committees, as required by the instructions provided with the subpoena.

Furthermore, there is no conceivable basis—let alone a legal one—for the Department of the Treasury to withhold part of the rationale for a final decision made by a cabinet-level official authorizing expenditures that could total $130 billion over ten years. As the Supreme Court made clear in *NLRB v. Sears, Roebuck & Co.*, the rationale behind a final decision cannot be withheld—"the public interest in knowing the reasons for a policy actually adopted by an agency"[212] requires that Treasury disclosure the rationale here and produce an unredacted version of the final Action Memorandum to the committees.

[211] Wilkins Tr. at 44–45.
[212] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

b. The Department of the Treasury has Not Undertaken a Reasonable—Let Alone a Thorough—Search for Records Responsive to the Committee's Subpoenas

FINDING: The Department of the Treasury did not undertake a reasonable or thorough search for records responsive to the committees' subpoenas.

Testimony from Administration officials demonstrates that the Department of the Treasury never undertook a thorough search for responsive documents, as required by the subpoena instructions. During a series of transcribed interviews with current and former Treasury and IRS officials, Treasury counsel appearing on behalf of the Department repeatedly refused to allow the witnesses to answer questions regarding whether they had collected documents pursuant to the committees' subpoenas. For example, Mr. Kane testified:

> Q. Between February 3rd, 2015, and today, has anyone ever instructed you to collect documents relating to the cost-sharing reduction program?
>
> Treasury Counsel. So I think this is another – you know, for the same reasons that we discussed a few moments ago, I think this is another question that is not among the things that Mr. Kane's here to discuss here.[213]

Similarly, Ms. Witter testified:

> Q. Ms. Witter, has anyone told you to collect records relating to the cost-sharing reduction program either recently or in the past year?
>
> Treasury Counsel. So, Amanda, that question about efforts that Ms. Witter has undertaken or not undertaken to respond to the committee's oversight requests, you know, is another area that we are not prepared to go into today. We have had some discussions with you, obviously, about documents. I'm happy to continue those discussions and that accommodations process.
>
> But Ms. Witter is here voluntarily today and is prepared to answer your questions about cost-sharing reduction payments consistent with the interests articulated in our correspondence. And so our suggestion would be to sort of move on to those questions. If there are other unresolved issues, we are happy to continue the dialogue with you about those.[214]

And, in a third instance, Mr. Kaizen testified:

[213] Kane Tr. at 22.
[214] Witter Tr. at 12–13.

Q. Has anyone instructed you to collect records related to the Cost Sharing Reduction Program?

Treasury Counsel. So, Amanda, I think that raises the same issue that I was explaining in response to the prior question.[215]

One witness, however, answered the question before Treasury counsel instructed him not to. Mark Mazur—the author of the Action Memorandum signed by Secretary Lew—said that no one had instructed him to collect records relating to the CSR program.[216] Mr. Mazur testified:

Q. Thank you. Has anyone asked you to collect records relating to the cost-sharing reduction program?

A. No.[217]

As the drafter of the memorandum authorizing the Department to make CSR payments from the permanent appropriation for tax credits and refunds, Mr. Mazur clearly possessed documents responsive to the committees' subpoenas. Mr. Mazur's interview took place on April 28, 2016, more than two months after the committees issued subpoenas to the Department and well over a year after the committees sent the original document requests.

The interviews also proved that records regarding the CSR program that Treasury and HHS should have collected and produced do exist. For instance, Mr. Mazur stated that he would have received the Action Memorandum returned with Secretary Lew's signature via email,[218] and Mr. Kane said that he received an electronic calendar invitation for the January 13, 2014 OMB meeting.[219] Similarly, IRS Chief Counsel Bill Wilkins received the Action Memorandum from Treasury Deputy General Counsel Roberto Gonzalez via email.[220] The committees have not received any of these documents.

Given this evidence, it is clear that the Department has not undertaken a reasonable, let alone thorough, search for responsive records pursuant to the subpoenas.

[215] Kaizen Tr. at 12–13.
[216] Mazur Tr. at 10.
[217] Mazur Tr. at 10.
[218] Mazur Tr. at 40–41.
[219] Kane Tr. at 71.
[220] Wilkins Tr. at 34–35.

c. The Department of Health and Human Services has Not Produced All Records Responsive to the Subpoenas, and has Not Cited Any Valid Legal Basis to Withhold Any Materials

FINDING:	**The Department of Health and Human Services improperly withheld documents responsive to the committees' subpoenas without any valid legal basis to do so.**

Since February 2015, HHS has made only three productions of documents to the committees. One of these productions consisted of only one substantive document, and another production consisted entirely of publicly available documents. The third production—the first containing any non-final internal documents—came only after each committee issued subpoenas compelling the production of all responsive documents. HHS continues to withhold information from the committees that it argues "implicates significant Executive Branch confidentiality interests in internal deliberations."

On March 3, 2016, more than a year after the committees first requested documents, HHS made its first production to the committees. The production consisted entirely of publicly available documents, and included excerpts from the Administration's fiscal year 2014 and 2015 budget requests, and five filings from the *House v. Burwell* litigation. In other words, the Department did not produce any documents the committees could not already access. In producing the documents, HHS acknowledged that it was withholding those that related to "internal Executive Branch deliberations" because they implicated "confidentiality interests."

On March 18, 2016, HHS produced two additional documents to the committees: a memorandum of understanding between the IRS and CMS that Treasury had recently produced to the committees, and a memorandum sent to Ellen Murray before her transcribed interview that "la[id] out the parameters of what she was authorized to discuss."[221] Once again, HHS refused to produce materials that it asserted "implicate[d] significant Executive Branch confidentiality interests."[222]

On May 6, 2016, HHS made a third production of documents to the committees. This was the first production made pursuant to the subpoena issued on May 4, 2016, and the first to include any non-final internal documents. For a third time, however, HHS refused to produce documents that, in its opinion, "implicate[d] significant Executive Branch confidentiality interests."[223]

HHS has failed to comply with the committees' subpoenas for documents. The stated reason that the Department is withholding information from Congress—that the materials

[221] Letters from Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Mar. 18, 2016).
[222] *Id*.
[223] Letters from Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (May 6, 2016).

"implicate significant Executive Branch confidentiality interests"—is vague and overbroad, and appears designed to block the committees from their pursuit of the facts surrounding the funding of the CSR program.

HHS has asserted no valid legal basis on which it can withhold this information from Congress, and has failed to provide a log of materials identifying the documents withheld from the committee, as required by the instructions provided with the subpoena. By citing the need to protect "internal Executive Branch deliberations" and "important Executive Branch confidentiality interests," HHS is effectively claiming the deliberative process privilege. This privilege, however, cannot be used to shield final documents or factual information. It further cannot be used to shield deliberative information when there are allegations of wrongdoing, let alone a finding of illegal and unconstitutional Executive branch actions by a federal court.

d. The Office of Management and Budget has Refused to Produce a Memorandum Subpoenaed by the Committees, and has Not Cited any Valid Legal Basis to Withhold the Document

FINDING: The Office of Management and Budget improperly withheld documents responsive to the committees' subpoenas without any valid legal basis to do so.

The committees subpoenaed OMB to compel production of a final memorandum regarding the source of funding for the cost sharing reduction program. On May 4, 2016, the committees subpoenaed OMB, requiring the office to produce the final memorandum. On May 18, 2016, in response to the subpoenas served by the committees on May 4, OMB again offered only "a summary of the government's legal analysis associated with the funding sources for the cost-sharing reduction program."[224] OMB explained that it would not produce the actual document because "the OMB memorandum contains internal deliberations and legal analysis associated with the funding sources for the cost-sharing reduction program."[225]

The document the committees seek provided the final advice of OMB and served as a basis for the Administration's final decision to use the permanent appropriation to fund the CSR program. A synopsis of this widely-reviewed memorandum, written years later, does not provide the information necessary to answer the committees' questions. And, similar to the responses of Treasury and HHS to subpoenas issued by the committees, OMB has not asserted a claim of privilege to withhold the document, nor provided a log justifying the withholding of the document as required by the subpoena.

As with Treasury and HHS, OMB is attempting to claim the protections of the deliberative process privilege without invoking the privilege because OMB knows full well that the privilege does not apply. The privilege cannot be used to shield final documents. Further, as

[224] Letters from Tamara Fucile, Assoc. Dir. of Legislative Affairs, Office of Mgmt. & Budget, to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (May 18, 2016).
[225] *Id.*

the Supreme Court made clear in *NLRB v. Sears, Roebuck & Co*, the privilege does not protect the rationale behind a final decision.[226] It also cannot be used to shield deliberative information when there are allegations of wrongdoing, let alone a finding of illegal payments by a federal court.

The Departments of the Treasury and HHS and the Office of Management and Budget have each explicitly refused to produce documents responsive to the committees' subpoenas. All have failed to provide logs detailing the documents withheld from the committees and the legal basis upon which they are withheld. Further, in withholding all internal and inter-agency documents from the committees, the Departments and OMB are effectively claiming the deliberative process privilege—which is inapplicable in these instances—without actually invoking the privilege.

Congress' oversight prerogatives would be severely undermined if it accepted the proposition that an agency could unilaterally decide to block disclosure of internal deliberations to Congress. This practice encourages agencies to withhold any documents that show flaws or limitations in the agency's position. These actions demonstrate that the Administration is engaging in obstruction tactics for the purpose of denying the United States Congress information and documents necessary to oversee the CSR program and to preserve its constitutional prerogative to determine how taxpayer money should be spent.

2. Treasury has Refused to Confirm to the Committee on Ways and Means whether the Department Timely Delivered Deposition Subpoenas to Witnesses

FINDING:	**The Department of the Treasury did not provide deposition subpoenas issued by the Committee on Ways and Means to the relevant deponents in a timely manner.**

The issuance of a subpoena by a committee of the United States Congress imposes a legal obligation on the individual to whom the subpoena is directed. By its very nature, a subpoena compels specific action by a specific individual in a specific time frame. It is therefore necessary that subpoenaed individuals know about the legal obligations imposed on them by a subpoena.

As a courtesy to Administration employees, congressional committees customarily serve subpoenas for employees' testimony by allowing agencies to accept service on behalf of their employees in lieu of serving individuals the subpoenas directly. The department accepting service also assumes a responsibility of its own—that it will timely notify the subject that a subpoena has been issued to him or her, and deliver the subpoena and accompanying instructions to that person.

[226] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

On January 20, 2016, the Committee on Ways and Means issued deposition subpoenas to three IRS officials: Chief Counsel William Wilkins; former CFO Robin Canady;[227] and Deputy CFO Gregory Kane.[228] Each subpoena required the relevant deponent to appear before the Committee on Ways and Means and provide testimony on dates in late February and early March 2016. A Treasury Deputy Assistant Secretary for Legislative Affairs accepted service on behalf of these employees.[229]

In the normal course of its investigation, the committee sought to verify that Treasury timely provided notice of the subpoenas, and a copy of the subpoenas, to the employees themselves. Remarkably, however, Treasury has refused to confirm whether the Department ever provided those subpoenas and their attachments to the witnesses. Treasury has also refused to provide the date on which the witnesses were made aware of the subpoenas. Not only has the Department itself refused to answer these standard questions, but Treasury counsel has further prevented the witnesses themselves from telling the Committee on Ways and Means when they received the subpoenas.

All evidence, however, suggests that Treasury did not give the subpoenas and accompanying documents to the witnesses in a timely manner. Five days prior to the first scheduled deposition, on February 18, 2016, committee staff still had not heard from counsel for the witnesses. On that day, Treasury counsel informed Ways and Means staff that Robin Canady, who was scheduled to testify on February 23, 2016, was out of the country.[230] The next day, however, Treasury counsel called Ways and Means staff again to say that the IRS Chief Counsel's Office had learned the previous evening that Mr. Canady had already returned to the country, suggesting that Treasury had not previously been in touch with Mr. Canady about his deposition.

Further, during interviews of the three employees,[231] Treasury counsel refused to allow the witnesses to answer questions about the subpoenas, including when—or even if— they had

[227] At the time the subpoena was issued, the committees believed that Mr. Canady was a current employee of the Internal Revenue Service. In fact, he had retired from the IRS shortly before the subpoena was issued. The Department of the Treasury arguably should not have even accepted service on behalf of a former employee. At a minimum, the Department should have immediately informed the committees that Mr. Canady had retired from federal service.

[228] Subpoena to William Wilkins, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Robin Canady, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Gregory Kane, Internal Rev. Serv., U.S. Dep't of the Treasury, from H. Comm. on Was & Means (Jan. 20, 2016).

[229] Email from Deputy Assistant Sec'y of Legis. Affairs, U.S. Dep't of the Treasury, to Committee Counsel, H. Comm. on Ways & Means (Jan. 20, 2016).

[230] Email from Maj. Oversight Staff Dir., H. Comm. on Ways & Means, to Deputy Assistant Sec'y of Legis. Affairs, U.S. Dep't of the Treasury. (Feb. 19, 2016).

[231] As an accommodation to the Department and the witnesses, the Committee on Ways and Means agreed to conduct the proceedings as transcribed interviews instead of depositions, thus allowing Treasury counsel to attend the proceedings. *See* 161 Cong. Rec. E21 (daily ed. Jan. 7, 2015) (statement of Rep. Sessions, Procedures for Use of Staff Deposition Authority), *available at* https://www.congress.gov/crec/2015/01/07/CREC-2015-01-07.pdf. The Procedures prohibit counsel for an agency under investigation to attend depositions, but under the practices of the Committee on Ways and Means, agency counsel may attend transcribed interviews.

received the subpoenas and accompanying documents from the Department.[232] For example, Treasury counsel permitted Mr. Wilkins to testify that he was "aware" of the deposition subpoena issued to him by the Committee on Ways and Means, but did not permit him to testify about when he received a copy of the subpoena. He testified:

> Q. Are you aware that Chairman Brady sent you personally a subpoena to testify at deposition, Mr. Wilkins?
>
> A. Yes.
>
> * * *
>
> Q. Mr. Wilkins, are you willing to tell us when you received a copy of that subpoena?
>
> Treasury Counsel. So for the reasons I've stated, we're not in a position to answer that question today. It's not what we're here voluntarily to discuss with the committee. And so on that basis, I instruct you not to answer.[233]

Similarly, Mr. Kane testified:

> Q. Are you aware that Chairman Brady sent you a subpoena to testify at a deposition?
>
> Treasury Counsel. You can answer that "yes" or "no."
>
> A. Yes.
>
> Q. When did you become aware of that subpoena?
>
> Treasury Counsel. I think this is another question that we're not in a position to answer today.[234]

Mr. Kane did answer, however, that "[t]he only letters I saw was eventually in the news article that had my subpoena in it where you could click on things. **That was the first time, when I went through that, I saw any of the documents that were going back and forth.**"[235]

During Mr. Wilkins' interview, counsel for the Committee on Ways and Means explained the importance of knowing if and when the Department provided the subpoena to the witness. Counsel for Treasury disagreed, claiming this was not information the committee needed to have in this instance. Counsel stated:

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[232] Kane Tr. at 26-27; Wilkins Tr. at 18–19. Counsel refused to allow Robin Canady to state whether he had received his subpoena, as well, although that interview was not transcribed.
[233] Wilkins Tr. at 18–23.
[234] Kane Tr. at 26.
[235] *Id.* at 19 (emphasis added).

Committee Counsel. But to be clear, we think that this is a little separately situated from the earlier questions, which you have made your position clear on.

The subpoena itself was actually issued directly to Mr. Wilkins by the chairman, not to the Department of the Treasury, and it's a legally binding document that requires his attendance at a deposition. So whether or not he received it and when he received it is vitally important to this committee's investigative work, as well as the prerogative of Congress to be able to conduct oversight.

I understand that you are saying that you would like us to be able to move forward with mutually agreeable practice, but if we have no way of knowing when or if the witnesses receive a legally-binding document, then we are in a very untenable position in enforcing this document. And so without an assurance of the date when he received the subpoena, and frankly, that the date he received the subpoena is the date it was issued, that's not a practice that we will be able to continue going forward. So I would ask you to consider allowing the witness to answer the question of when he received the subpoena.

Treasury Counsel. Right. So as I explained, and we talked about this offline, and to sort of restate, we honestly don't understand the issue here, given that each of these witnesses, we've arranged for them to appear voluntarily. If there is an issue with respect to going forward and continuing the practice of agencies accepting service of subpoenas, we are more than happy to work through that issue with you.

If there is some additional information you need, I'm happy to talk about what that information is and how to provide it to you. But I think we have a difference of views as to whether this line of questioning implicates the interest we've articulated about sort of protecting our ability to respond to congressional investigations.[236]

A Department that accepts service of a subpoena on behalf of one of its employees has an obligation to send the subpoena and any attachments to the employee as soon as practicable. Treasury has refused to confirm whether or when it provided lawfully-issued congressional subpoenas to the relevant deponents after a Treasury official accepted service on the deponents' behalf, even in informal telephone calls with staff. These refusals strongly suggest that Treasury failed in its obligation to provide the subpoenas to the relevant deponents after accepting service on their behalf. This failure raises questions about the courtesy provided by Congress to the Administration and its employees whereby congressional committees allow agency officials to accept service on behalf of their employees instead of serving individuals directly.

[236] Wilkins Tr. at 20–21.

3. The Department of the Treasury Issued Testimony Authorization Memoranda to Witnesses Based on Over-Broad Touhy Regulations

Before most IRS witnesses appeared before the committees, Treasury provided the witnesses a "Testimony Authorization" outlining the topics Treasury had decided the employee could and could not discuss.[237] These memoranda are issued "[p]ursuant to Delegation Order 11-2 and 26 C.F.R. 301.9000-1" and are based on Treasury's so-called *Touhy* Regulations.

In *United States ex rel. Touhy v. Ragen*, the Supreme Court held that the federal Housekeeping Statute permitted the DOJ to prohibit agency officers and employees from releasing "official files, documents, records and information," except in the Attorney General's discretion.[238] The Housekeeping Statute allows Executive branch agencies to prescribe regulations regarding the "custody, use, and preservation of its records, papers, and property."[239]

Seven years after the Court decided *Touhy*, Congress added a provision to the Housekeeping Statute explaining that that the statute "does not authorize withholding information from the public or limiting the availability of records to the public."[240]

Almost all agencies now have implemented some version of *Touhy* regulations to govern their record management and explain what employees may and may not do with agency records. While many of those rules are appropriate, Treasury relied on their *Touhy* regulations to obstruct this investigation and prevent witnesses from speaking freely with Congress. In those instances, a federal statute, specifically 5 U.S.C. § 7211, trump the regulations. The statute, which protects the right of federal employees to provide information to Congress, states:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.[241]

Treasury's *Touhy* regulation, however, does precisely that.

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[237] Treasury Testimony Authorizations directed to Greg Kane, Robin Canady, Kirsten Witter, Mark Kaizen, Linda Horowitz, and David Fisher. Treasury staff sent emails to Ways and Means staff articulating similar limitations for Mr. Mazur's testimony. Mr. Wilkins did not receive a testimony authorization, likely because Delegation Order 11-2 gives him the same authority as the Commissioner to provide testimony. *See* IRS Delegation Order 11-2, Internal Rev. Manual at 1.2.49.3.

[238] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

[239] 5 U.S.C. § 301, previously codified at 5 U.S.C. § 22. The current version states that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public." *Id.*

[240] H. R. Rep. No. 85-1461, *as reprinted in* 1958 U.S.C.C.A.N. 335.

[241] 5 U.S.C. § 7211.

a. Treasury has Promulgated Extensive **Touhy** *Regulations that Allow the Department to Limit Information Current and Former IRS Employees Can Provide to Congress*

FINDING:	**The Department of the Treasury has promulgated *Touhy* regulations that—contrary to a federal statute—limit the rights of IRS employees to provide information to Congress.**

Treasury's *Touhy* regulations and Testimony Authorizations impede congressional oversight, discourage congressional whistleblowers and the public airing of wrongdoing, and intrude on the prerogatives of Congress. Except in certain cases inapplicable here, the regulation provides:

> [W]hen a request or demand for IRS records or information is made, no IRS officer, employee, or contractor shall testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a committee or subcommittee of the Congress without a testimony authorization.[242]

The regulation defines a testimony authorization as:

> [A] written instruction or oral instruction memorialized in writing within a reasonable period by an authorizing official that sets forth the scope of and limitations on proposed testimony and/or disclosure of IRS records or information issued in response to a request or demand for IRS records or information. A testimony authorization may grant or deny authorization to testify or disclose IRS records or information . . . .[243]

The regulation, which applies to current and former officers, employees, and contractors of the IRS, provides explicit instructions about what one should do upon receiving a request from Congress. The regulation requires:

> An IRS officer, employee, or contractor who receives a request or demand in an IRS congressional matter shall notify promptly the IRS Office of Legislative Affairs. The IRS officer, employee or contractor who received the request or demand shall await instructions from the authorizing official.[244]

If the IRS decides that it does not want the relevant employee to disclose information to Congress, the courts, or another body, the regulation states that the IRS can prohibit the person from speaking. The regulation states:

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[242] 26 C.F.R § 301.9000-3.
[243] 26 C.F.R. § 301.90000-1.
[244] 26 C.F.R. § 301.9000-4(e).

> If, in response to a demand for IRS records or information, an authorizing official…determines that the demand for IRS records or information should be denied, the authorizing official shall request the government attorney or other representative of the government to oppose the demand and respectfully inform the court, administrative agency or other authority, by appropriate action, that the authorizing official…has issued a testimony authorization to the IRS officer, employee, or contractor that denies permission to testify or disclose the IRS records or information.[245]

Further, if Congress, a court, or another authority insists that the relevant IRS official provide testimony or other information, the regulation requires the individual to risk contempt of court or Congress by refusing to disclose the information sought. The regulation states:

> In the event the court, administrative agency, or other authority rules adversely with respect to the refusal to disclose the IRS records or information pursuant to the testimony authorization…the IRS officer, employee or contractor who has received the request or demand shall, pursuant to this section, respectfully decline to testify or disclose the IRS records or information.[246]

If a current or former IRS officer, employee, or contractor violates the regulation, the IRS can subject him or her to severe penalties. The regulation states:

> Any IRS officer or employee who discloses IRS records or information without following the provisions of this section or § 301.9000-3, may be subject to administrative discipline, up to and including dismissal. Any IRS officer, employee, or contractor may be subject to applicable contractual sanctions and civil and criminal penalties[.][247]

While such punishment may be reasonable in instances in which an IRS employee discloses information protected by law, such as taxpayer files,[248] as applied to requests from Congress for information about IRS procedures, actions, and decisions, it is inconsistent with 5 U.S.C. § 7211. Treasury's *Touhy* regulations also, on their face, prevent whistleblowers and other concerned employees from disclosing malfeasance at the IRS, and may also run afoul of other federal statutes protecting disclosures made by whistleblowers.

[245] 26 C.F.R. § 301.9000-4(f).
[246] 26 C.F.R. § 301.9000-4(g).
[247] 26 C.F.R. § 301.9000-4(h).
[248] *See* 26 U.S.C. § 6103 (prohibiting disclosure of taxpayer information except in specified circumstances).

b. Treasury Used Its Touhy *Regulations to Prohibit Employees from Answering Questions from Congress about the CSR program*

FINDING:	**Treasury used its *Touhy* regulations and Testimony Authorizations to prohibit current and former IRS employees from providing testimony to Congress about the source of funding for the CSR program.**

The Testimony Authorizations given to most of the Treasury employees who appeared before the committees all provide that "[p]ursuant to Delegation Order 11-2 and 26 C.F.R. 301.9000-1, you are authorized to appear and give testimony, subject to the limitations listed below." The Testimony Authorizations provided one area in which the witness could provide testimony, and twelve areas in which they could not. These twelve prohibited areas of testimony greatly narrowed the one area in which witnesses could provide testimony. In fact, the Testimony Authorizations specifically prohibited witnesses from speaking about the exact issues Congress had been investigating for more than a year: namely, the deliberations and decisions surrounding the Administration's choice to use the § 1324 permanent Treasury appropriation to make the CSR payments. The Testimony Authorizations state:[249]

Unless prohibited in the next section, you may:

- Testify as to facts of which you have personal knowledge in your official capacity regarding cost-sharing reduction payments under the Affordable Care Act.

You may not:

- Testify as to facts of which you have no personal knowledge;
- Speculate as to matters of which you have no sure knowledge;
- Testify in response to general questions concerning the positions, policies, procedures, or records of the Internal Revenue Service that are not relevant to the investigation or reasonably calculated to lead to the discovery of relevant information;
- Testify as to any current litigation;
- Testify regarding legal advice provided, the thought processes of agency personnel or answer hypothetical questions;

[249] Memorandum from Leonard T. Oursler, Nat'l Dir. of Legis. Affairs, Internal Rev. Serv., to David Fisher, Former Chief Risk Officer, Internal Rev. Serv. (April 21, 2016).

- Disclose information about internal IRS deliberations, or deliberations between IRS and Treasury or other Executive Branch agencies or offices, regarding cost-sharing reduction payments under the Affordable Care Act;
- Testify as to any criminal investigation by the Treasury Inspector General for Tax Administration and his staff; agents and employees of the Federal Bureau of Investigation; and/or attorneys, agents and employees of the Department of Justice;
- Testify as to other cases or other matters of official business not relevant to the investigation or reasonably calculated to lead to the discovery of relevant information;
- Disclose information that may tend to identify a confidential informant, if any;
- Disclose returns or return information protected by I.R.C. sec. 6103, if any;
- Disclose tax convention information subject to I.R.C. § 6105, if any.
- Disclose information that is secret pursuant to Fed. Crim. P. 6(e), if any.

Treasury counsel instructed witnesses to refrain from not to answering numerous questions posed by Committee staff on the grounds that they were outside the scope of the Treasury's unilateral Testimony Authorization. Further, during Mr. Wilkins's transcribed interview, Treasury counsel stated that the Department has a say in whether or not Mr. Wilkins responded to questions. Treasury counsel stated:

> Committee Counsel. Right. But the question is to Mr. Wilkins, and he can either answer it or not answer it as he sees fit. As general counsel of the IRS, I'm sure he's capable of answering the question and making that judgment for himself.
>
> So the simple question is, are you willing to answer the question as to when you became aware of the subpoena issued by Chairman Brady of the Committee on Ways and Means?
>
> Treasury Counsel. And I just want to say – I just want to make clear that – and this may be another area where we have a difference of views. And I'm happy to, you know, discuss this with you, you know, offline in greater detail. But I – you know, **with respect to his official capacity actions, the agency does have, you know, a sort of say in how that works. It's not solely Mr. Wilkins' decision.** And so we think it's unfair to put him on the spot in the way that you're trying to do.

> We've tried to be very transparent with you about what these witnesses are going to be here voluntarily to talk about and what we're not going to be in a position to talk about. And this is a question that we're not in a position to discuss.[250]

Given Treasury counsel's statement, counsel for Ways and Means made clear to the witness that the Department could not restrict him from answering the committees' questions. Counsel stated:

> Committee Counsel. I want to be really clear, the committee disagrees with that position. Your ability to speak to Congress is guaranteed by law. Your right to speak to Congress is guaranteed under the First Amendment, and it is actually not the decision of the agency as to what you can answer. If you would like to take their guidance, of course, you're welcome to do that, you know that. But I want to make the record clear that we do not agree that the Department of the Treasury or the department -- or IRS itself has a legal right to restrict you from providing information to the United States Congress.
>
> Treasury Counsel. I just want to say we have a different view about that, you know.[251]

Treasury counsel's statement that he had a "different view" about the ability of the Department of the Treasury or the IRS to restrict an individual from providing information to Congress is extremely concerning. Any such restriction by the Department of the Treasury, or any other department or agency of the Executive branch, would be in violation of the First Amendment and 5 U.S.C. § 7211.

These regulations and testimony authorizations require IRS employees to get permission from the IRS before speaking to Congress, and then to limit their speech to Congress to those topics approved by the IRS, or else risk losing their jobs. By their explicit terms, they prevent whistleblowers and other concerned parties from disclosing malfeasance at federal agencies, and they are inconsistent with 5 U.S.C. § 7211, which protects federal employees' right to speak to Congress. Moreover, it is clear from the limitation prohibiting witnesses from testifying about the Administration's deliberations regarding the CSR payments that the Department intended to use the Testimony Authorizations to prohibit witnesses from testifying about the entire subject of the committees' investigation.

[250] Wilkins Tr. at 22.
[251] *Id.* at 24.

c. Treasury Officials Enforced Testimony Authorizations Inconsistently

FINDING: Treasury officials selectively enforced the Treasury Authorizations by allowing witnesses to answer certain questions prohibited by the authorizations without objection.

Treasury itself demonstrated that the Testimony Authorizations were unsupported by legal authority and served only as a means to prevent officials and employees from turning over information to Congress that the agencies would rather keep private. Throughout the interviews, the agencies enforced the authorizations selectively. While agency counsels repeatedly prevented witnesses from answering questions posed by Majority staff, they allowed Minority staff to ask questions that implicated topics explicitly covered by the testimony authorizations.

Each authorization stated that, among other topics, witnesses may not "testify as to any current litigation."[252] Yet, during each transcribed interview of a current or former Treasury or IRS employee, the Minority staff of the Committee on Ways and Means asked a prepared set of questions about the *House v. Burwell* litigation. They asked each witness:

- In your understanding, is there ongoing litigation related to Section 1402 of the Affordable Care Act, which governs the cost-sharing subsidies?
- To your understanding, who filed that lawsuit?
- Who are the defendants in that lawsuit?
- In your understanding, what is the status of that lawsuit?
- Is it your understanding that both sides have stipulated that there are no material facts in dispute?
- To your understanding, what is the nature of the claims that are raised by the plaintiffs in the lawsuits?
- In your understanding, are you here today to discuss the same issues that are currently the subject of that lawsuit?[253]

Treasury counsel allowed each witness to respond to all of those questions without objection or interference.[254] During former IRS Chief Risk Officer David Fisher's interview, however, Ways and Means Majority counsel noted that, while those questions fit squarely within

[252] *See, e.g.*, Memorandum from Leonard T. Oursley, Nat'l Dir. of Legis. Affairs, Internal Rev. Serv., to Mark Kaizen, Gen. Legal Servs., Office of Chief Counsel, Internal Rev. Serv., Testimony Authorization (Apr. 6, 2016).
[253] Kane Tr. at 111-13; Wilkins Tr. at 49–51; Witter Tr. at 48–50; Horowitz Tr. at 57–58; Kaizen Tr. at 45–47; Mazur Tr. at 57–58.
[254] Kane Tr. at 111-13; Wilkins Tr. at 49–51; Witter Tr. at 48–50; Horowitz Tr. at 57–58; Kaizen Tr. at 45–47; Mazur Tr. at 57–58.

the Testimony Authorizations' prohibitions, agency counsel allowed Mr. Fisher to answer them anyway.[255] Counsel asked:

> According to the testimony authorization that we've discussed at length today that you received from the Department of Treasury, the Administration claims to limit your testimony, that you're not permitted to, quote, testify as to any current litigation.
>
> It seems to us that the Department of Treasury has not objected to four or five questions that the Minority just raised about the ongoing litigation and it's seems as though if not for Treasury's restriction, you would be willing to answer our questions. So in light of the four questions that the Minority just posed, I just have two additional questions on the topic of the ongoing litigation.
>
> Do you have any concerns about the legality of the cost-sharing reduction payments?[256]

Demonstrating the selective enforcement of the Testimony Authorizations, Treasury counsel objected and instructed Mr. Fisher not to answer the Majority's questions, stating why, in Treasury counsel's opinion, the witness could answer the Minority's questions. Treasury counsel stated:

> Treasury Counsel. So, Machalagh, that question, as you know, is very different from a question about, you know, publicly-available information about the ongoing status of the litigation and goes right to the core of the interests we've articulated in our prior correspondence.
>
> Committee Counsel. The testimony authorization simply says to ongoing litigation. I fail to see the distinction.
>
> Treasury Counsel. I'm happy to continue discussions with you about that.
>
> Majority Counsel. For the record, no objections were made when the Minority asked questions about something that's explicitly prohibited by the testimony authorization.
>
> Q. Did you have any concerns about this while you were chief risk officer at the IRS?
>
> Treasury Counsel. That question raises the same concern.[257]

[255] Fisher Tr. at 124–26.
[256] *Id.* at 125.
[257] *Id.* at 125–26.

At this point, the witness, Mr. Fisher, interjected to protest Treasury counsel's inconsistent advice to him. He stated:

> I should have been advised, frankly, not to answer his question and I'm disappointed that I wasn't.
>
> The counsel here has advised throughout the entire morning things consistent with the authorization and I have followed every one of their pieces of guidance. It wasn't for me to go back and reread the authorization. That's what they're here for.
>
> Now that you've pointed it out, I look at the authorization and I should not have answered your questions because I also agree that it's inconsistent with the authorization. That doesn't – just because that has now been broken, that doesn't, to me, open any additional breaks in my testimony with respect to the things that are covered or not covered under the authorization.
>
> My position is the authorization holds and the things that I was prevented from discussing earlier remain prevented from being discussed as the questions I just answered related to litigation should have been covered and I should have been counseled not to answer them.[258]

This selective enforcement raises additional concerns about Treasury's promulgation of its *Touhy* regulations, and the subsequent reliance on those regulations in the course of the committee's interviews. Treasury has created a system in which the Department is the final arbiter of what a current or former official, employee, or contractor can say to Congress. Furthermore, Treasury can apparently amend the restrictions on an individual's testimony on the fly, and allow a witness to answer questions the Department views as favorable, but refuse to permit a witness to answer questions the Department deems unfavorable.

[258] *Id.* at 126.

4. HHS and OMB also Limited the Scope of Their Employees' and Former Employees' Testimony to the Committees

FINDING: HHS and OMB imposed scope restrictions to prevent current and former employees from providing full and complete testimony to Congress.

HHS and OMB also dramatically and unilaterally limited the scope of the testimony current and former employees were permitted to provide to the committees. Both entities precluded witnesses from providing information about internal agency deliberations, or deliberations between agencies within the Executive branch. Such restrictions are inconsistent 5 U.S.C. § 7211, cited above.

OMB Associate Director of Legislative Affairs Tamara Fucile sent a letter to the committees prior to the transcribed interview of Geovette Washington substantially and unilaterally limiting the scope of Ms. Washington's testimony. The letter stated:

> During the interview, Ms. Washington will not be in a position to disclose information about internal OMB deliberations or other Executive Branch deliberations in which OMB participated regarding the CSR program. The Executive Branch has significant confidentiality interests in these internal deliberations, including an interest in avoiding the chilling effect on future deliberations that would inevitably result from such disclosures.[259]

OMB relied on this letter to prevent Ms. Washington from answering the overwhelming majority of the committees' questions, including purely factual questions the answers to which are protected by no legal privilege. The broad testimonial restrictions imposed by this memorandum are inconsistent with 5 U.S.C. § 7211.

While OMB did not explicitly cite its own *Touhy* regulations as a basis for limiting Ms. Washington's testimony, it is concerning that the regulations do not expressly protect disclosure to Congress. OMB's *Touhy* regulations are codified at 5 C.F.R. § 1305.1. The regulation applies whenever a subpoena, order, or other demand of information from OMB is issued "in litigation (including administrative proceedings)."[260] The regulation requires that:

> No employee or former employee of OMB shall, in response to a demand of a court or other authority, produce any material contained in the files of OMB, disclose any information relating to materials contained in the files of OMB, or disclose any information or produce any material acquired as part of the performance of the person's official duties, or because of the

[259] Letters from Tamara Fucile, Associate Dir. of Legis. Affairs, Office of Mgmt. and Budget, to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Apr. 27, 2015)
[260] 5 C.F.R. § 1305.1.

> person's official status, without the prior approval of the General Counsel.[261]

The regulation further requires that the employee or former employee must refuse to produce the material or information even if a court so rules, thus risking contempt of court. The regulation states:

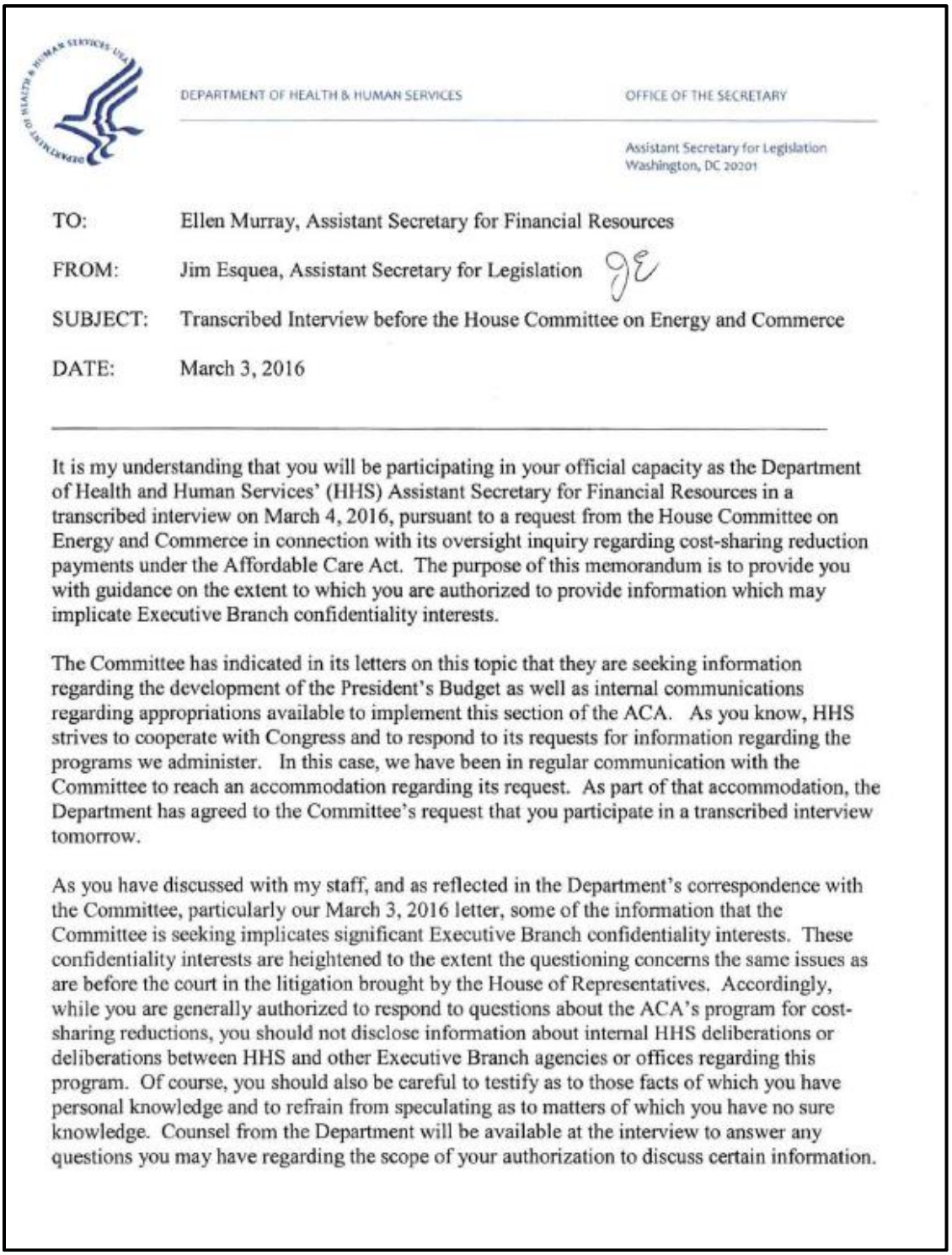
> If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 1305.3(c) pending receipt of instructions from the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand.[262]

While the regulation makes clear that it applies "in litigation (including administrative proceedings)," OMB should amend the regulation to clearly protect the rights of OMB employees to provide information to Congress under 5 U.S.C. § 7211.

HHS' *Touhy* regulations, codified at 45 CFR 2.1, expressly exempt congressional requests or subpoenas for testimony or documents from its *Touhy* procedures.[263] Despite this exemption, however, HHS still dramatically, and unilaterally, restricted the scope of the testimony the Department would permit the witnesses to provide to Congress.

HHS Assistant Secretary for Legislation Jim Esquea sent each witness a memorandum providing "guidance on the extent to which you are authorized to provide information which may implicate Executive Branch confidentiality interests."[264]

[261] 5 C.F.R. § 1305.2.
[262] 5 C.F.R. § 1305.4 (citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).
[263] 45 C.F.R. § 2.1(a), (d)(2).
[264] *See, e.g.*, Memorandum from Jim Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Ellen Murray, Assistant Sec'y for Fin. Res., U.S. Dep't of Health & Human Servs. (Mar. 3, 2016).



DEPARTMENT OF HEALTH & HUMAN SERVICES — OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

TO: Ellen Murray, Assistant Secretary for Financial Resources

FROM: Jim Esquea, Assistant Secretary for Legislation JE

SUBJECT: Transcribed Interview before the House Committee on Energy and Commerce

DATE: March 3, 2016

It is my understanding that you will be participating in your official capacity as the Department of Health and Human Services' (HHS) Assistant Secretary for Financial Resources in a transcribed interview on March 4, 2016, pursuant to a request from the House Committee on Energy and Commerce in connection with its oversight inquiry regarding cost-sharing reduction payments under the Affordable Care Act. The purpose of this memorandum is to provide you with guidance on the extent to which you are authorized to provide information which may implicate Executive Branch confidentiality interests.

The Committee has indicated in its letters on this topic that they are seeking information regarding the development of the President's Budget as well as internal communications regarding appropriations available to implement this section of the ACA. As you know, HHS strives to cooperate with Congress and to respond to its requests for information regarding the programs we administer. In this case, we have been in regular communication with the Committee to reach an accommodation regarding its request. As part of that accommodation, the Department has agreed to the Committee's request that you participate in a transcribed interview tomorrow.

As you have discussed with my staff, and as reflected in the Department's correspondence with the Committee, particularly our March 3, 2016 letter, some of the information that the Committee is seeking implicates significant Executive Branch confidentiality interests. These confidentiality interests are heightened to the extent the questioning concerns the same issues as are before the court in the litigation brought by the House of Representatives. Accordingly, while you are generally authorized to respond to questions about the ACA's program for cost-sharing reductions, you should not disclose information about internal HHS deliberations or deliberations between HHS and other Executive Branch agencies or offices regarding this program. Of course, you should also be careful to testify as to those facts of which you have personal knowledge and to refrain from speculating as to matters of which you have no sure knowledge. Counsel from the Department will be available at the interview to answer any questions you may have regarding the scope of your authorization to discuss certain information.

Each memorandum instructed, "you should not disclose information about internal HHS deliberations or deliberations between HHS and other Executive Branch agencies or offices regarding [the cost sharing reduction] program."[265]

[265] *See, e.g., id.*

Similar to OMB, HHS relied on this letter to prevent each HHS witness from answering the committees' substantive questions about the source of funding for the cost sharing reduction program. HHS counsel did not allow witnesses to provide purely factual information, such as the names of individuals involved in various decisions, and did not allow witnesses to answer substantive questions about the source of funding. Further, the broad testimonial restrictions imposed by this memorandum are inconsistent with 5 U.S.C. § 7211. On no occasion did counsel for the Administration provide the committees with a valid legal basis for restricting the testimony of witnesses appearing before Congress.

5. Lawyers for the Administration Did Not Allow Witnesses to Answer Substantive Questions about the CSR Program

From the start of this investigation, the committees were clear that they sought to understand the basis for the Administration's decision to fund the cost sharing reduction program through the permanent appropriation for tax refunds and credits, including who made relevant decisions about the source of funding. When the Departments refused to voluntarily produce documents to the committees, the committees sought to interview relevant fact witnesses. Each letter requesting interviews provided information on the scope of the interviews. For example, the committees' December 2, 2015 letters to Treasury and HHS each stated:

> The Committees seek to fully understand the facts that led to the administration's initial request for an annual appropriation to fund the CSR program payments to insurers, and the administration's subsequent actions, after Congress had rejected the appropriations request, to nevertheless pay insurers with funds from the permanent appropriation for tax refunds and credits.[266]

The committees' March 22, 2016 letter to Secretary Lew requesting additional transcribed interviews included the same statement, using nearly identical language, regarding the scope of the interviews.[267] The committees' letters to former Administration officials also asked that they "participate in a transcribed interview about the CSR program."[268] There was no question that the committees sought substantive information on the rationale for the Administration's decisions on the source of funding, including who made those decisions.

Yet, throughout every interview, counsels for the Administration consistently sought to prevent the witnesses from answering questions posed by the committees, effectively claiming some form of the deliberative process privilege in withholding large swaths of information from Congress.

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[266] Letters from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, and Hon. Sylvia Burwell, Sec'y, U.S. Dep't of Health & Human Serv. (Dec. 2, 2015).

[267] Letter from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (Mar. 22, 2016).

[268] Letters from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Geovette Washington, Marilyn Tavenner, & David Fisher (Mar. 22, 2016).

A proper invocation of the deliberative process privilege involves two prongs: (1) the information must be predecisional, or created prior to the agency or department reaching a final decision, and (2) the information must be deliberative.[269] To be deliberative, a document or communication must relate to the thought processes or opinions of relevant officials—the information cannot be purely factual.[270] This privilege, when applicable, protects only predecisional documents—information about a final decision, including the rationale for the decision, cannot be withheld.

The deliberative process privilege is not absolute; it can be overcome by a showing of need.[271] Moreover, the privilege "disappears altogether when there is any reason to believe government misconduct [has] occurred."[272] The actions of the Administration in illegally making CSR payments from the permanent appropriation—as recently decided by a federal court—make the privilege inapplicable. Further, the testimony withheld by the Administration in this investigation far exceeds the bounds of the deliberative process privilege, even if it were to be applicable in this instance.

a. Counsel for HHS Instructed Witnesses Not to Answer Substantive Questions About the Source of Funding for the CSR Program

FINDING:	**HHS counsel prevented witnesses from answering substantive questions regarding the cost sharing reduction program, citing the need to protect "internal deliberations" and "confidentiality interests" as justification to withhold information from Congress.**

HHS counsel repeatedly instructed witnesses not to answer substantive questions regarding the source of funding for the CSR program. Despite numerous inquiries from Committee counsel, HHS counsel refused to provide a valid justification for restricting the witnesses' testimony. The reasons provided—that the Department can withhold information that seeks internal or interagency deliberations, or seeks information it deems protected by a vague and undefined "confidentiality interest," or "embeds a deliberative fact" into a question the Department does not want a witness to answer—are not legally cognizable bases on which the Administration can withhold information from Congress.

Nearly every topic regarding the source of funding for the CSR program was deemed off limits by HHS counsel. For example, Ms. Murray could not answer questions about OMB's involvement in the initial request for an annual appropriation:

> Q. Do you recall when OMB did pass back its decision to HHS, what its decision was, with regard to the request for an annual appropriation for the Cost Sharing Reduction Program?
>
> HHS Counsel. So just to be clear, **from our perspective that that**

[269] *In re Sealed Case (Espy)*, 121 F.3d. 729 (D.C. Cir. 1997).
[270] *Id.*
[271] *Id.*
[272] *Id.*

question calls for the witness to reveal internal interagency deliberations and so Ms. Murray is not in a position to be able to answer that question today.

Committee Counsel. Are you instructing her not to answer the question?

HHS Counsel. I'm explaining to the committee that obviously we are working hard to accommodate your interests in this investigation consistent with our interests in the executive branch's deliberative interests.

And so she's not – consistent with the letter that we sent you last night – prepared to answer that question today, but we'd be happy to talk about ways to address your interests after this interview.[273]

Or on whether any budget appeals during HHS' FY 2014 budget process implicated the CSR program:

Q. Do you recall whether there was any appeals that involve the Cost Sharing Reduction Program?

HHS Counsel. **And, again, because of the confidentiality interests of the executive branch, Ms. Murray is not prepared to answer that question today.**

Committee Counsel. Are you instructing the witness not to answer that question?

HHS Counsel. I am explaining that at this moment in this interview today, for the reasons laid out in our letter, consistent with the scope for this particular interview, that Ms. Murray is not prepared to answer that question today.[274]

Or on when HHS determined it did not need an annual appropriation for the CSR program:

Q. When did HHS determine that it didn't need an annual appropriation for the Cost Sharing Reduction Program?

HHS Counsel. **So to the extent that that question requires you to disclose the contents of internal deliberations relating to this issue, then I would caution you not to include those in your answer.**

[273] Murray Tr. at 28 (emphasis added).
[274] *Id.* at 30–31 (emphasis added).

> I would also caution you that this is a question about what HHS knows and that you should only answer as to your personal knowledge.[275]

Or on whether HHS requested an annual appropriation for the CSR program in the fiscal year 2015 budget:

> Q. At that point, did HHS request annual appropriations for the Cost Sharing Reduction Program?
>
> HHS Counsel. For the reasons that we talked about, **answering that question would require – would implicate the deliberative confidentiality interests that we have talked about, so Ms. Murray is not in a position to answer that question today.**
>
> Committee Counsel: It is a factual question, it calls for a yes-or-no answer, we believe the answer to this question is distinguishable from any communications that may have taken place during that time.
>
> HHS Counsel. I think the issue is that what we are talking about here is the communication between HHS and OMB, that is an interagency communication prior to the release of the President's budget. **And, so, that is a pre decisional deliberative communication.**[276]

In addition, HHS counsel did not consistently apply the agency's own determinations as to whether or not a question called for "internal deliberations." Ms. Murray testified:

> Q. Did HHS request an annual appropriation for the Cost Sharing Reduction Program when it submitted its request to OMB?
>
> HHS Counsel 1. **I'm going to caution the witness not to reveal the substance of internal interagency deliberations.**
>
> Committee Counsel. This is a factual question. It's a yes or no answer whether it was included. It doesn't speak to internal deliberations.
>
> HHS Counsel 1. Do you think it's okay?
>
> HHS Counsel 2. Yes.
>
> HHS Counsel 1. Okay. The witness can answer.

[275] *Id.* at 38 (emphasis added).
[276] *Id.* at 67–68 (emphasis added).

Witness: We did. We did request an appropriation.[277]

Almost immediately thereafter, however, HHS counsel decided that Ms. Murray should not have answered that question because it was an "internal deliberation." The interview continued:

> Q. Do you recall when OMB passed back its decision to HHS's budget request?
>
> A. You know, I do not. That was a year where we were on a CR and there was not a final CR, I don't believe, until March of 2013. My memory is that the process was late, so I don't remember when OMB passed back. It could have been later than regular process would dictate.
>
> HHS Counsel. I'm just going to interject here. We're sort of working through the process and the scope issues relating to this.
>
> **Ms. Murray provided an answer at my direction to that question, but I just want to make sure that the record reflects that from our perspective the question did ask for an answer relating to internal deliberations relating to the budget request**.
>
> So I just want to make sure that the record reflects that **from our perspective that question was within the scope of a question about internal deliberations relating to the budget process.** I just want to be clear for the record going forward.
>
> Committee Counsel. The question was a factual question. It called for a yes or no answer. It didn't call for any internal deliberations.
>
> HHS Counsel. But it called for the contents of an internal deliberation of an internal deliberative document between two agencies, between HHS and OMB. I'm happy to continue. I just wanted to make sure in order not to prejudice our sort of interests going forward. I just wanted to make sure that the record reflected that.[278]

At various times, HHS counsel explained that a witness could not answer a question because it "embedded a deliberative fact." For example, Committee staff asked Ms. Murray how she learned of HHS' determination that it did not need an annual appropriation for the CSR program:

> Q. How did you learn of this decision?

[277] *Id.* at 26–27 (emphasis added).
[278] *Id.* at 26–28 (emphasis added).

HHS Counsel. Again, so I'm going to caution the witness that to the extent that you're going to answer something that is going to reveal – I actually don't think that you can answer that question without revealing the substance of the determination because of the way the question is phrased.

Committee Counsel. Who told you?

HHS Counsel. Then we have the same problem. **If the question embeds the deliberative fact, then she wouldn't be able to reveal the identity of the person with whom, if anybody, she had the conversation because the deliberative fact is embedded in the question.**

Committee Counsel. **To the extent the deliberative process even applies, and, obviously, we disagree on that –**

HHS Counsel. I appreciate that.

Committee Counsel. – you know, **the witness has to segregate out facts. Not everything is deliberative just because it involved individuals at HHS. So in our opinion, facts that can be segregated out from any internal deliberations must be answered.**

HHS Counsel. I appreciate that. And I think the problem that we're having here is when the question embeds a deliberation, when the question is so specific as to what the conversation was about then she's in a situation where answering the question would reveal the deliberation.[279]

In another interview, committee staff asked Mr. Schultz whether the CSR program was discussed at a meeting that White House visitor records indicated he attended:

Q. Do you know whether the Cost-Sharing Reduction Program would have been discussed at this meeting.

HHS Counsel. He's not going to get into specifics of White House meetings.

Committee Counsel. I'm asking him a yes or no question, whether he knows if a particular policy was discussed at the meeting.

HHS Counsel. I understand.

[279] *Id.* at 39–40 (emphasis added).

[Witness confers with counsel.]

HHS Counsel. Again, the witness is here to voluntarily answer questions, but he's not going to get into the specifics of what was discussed at meetings involving White House officials.

Committee Counsel. Jessica is not asking for substance. She's asking if he recalls whether the Cost-Sharing Reduction Program was discussed.

HHS Counsel. Understood, but that embeds a deliberative fact when you're asking him.

Committee Counsel. Well, I mean, if the answer is yes, then it's either, yes, he recalls that it was discussed or, yes, he recalls that it was not discussed. If the answer is no, then he doesn't recall, but I don't understand how that embeds a deliberative fact.

HHS Counsel. He is here voluntarily. He's answered a number of your questions, but, again, we are not to going to get into specifics of White House meetings, going meeting by meeting. He's said he had meetings at the White House on CSR, but that's as far as he's going to go.

Committee Counsel. **Can you identify the deliberative fact that is embedded in the question so we can try to rephrase it?**

HHS Counsel. **As I said, he is not going to get into specifics of White House meetings.**[280]

When committee staff directly asked HHS counsel to identify the "deliberative fact" embedded in the question, HHS counsel would not, or could not, do so.

The position of HHS counsel that the Administration can block from disclosure to Congress the answer to any question that seeks internal or interagency communications, or an undefined "confidentiality interest," or "embeds a deliberative fact," exempts the entire executive branch from congressional oversight. Accordingly, during Ms. Murray's interview, committee counsel asked HHS counsel to clarify the position. Counsel stated:

Committee Counsel. So it is the Department's position that all communications and all documents would be subject to this privilege that you are claiming?

HHS Counsel. Again, and we have talked about on a number of occasions, we are working very hard to be in a position where we can

[280] Schultz Tr. at 51–53 (emphasis added).

accommodate your interests consistent with our executive branch confidentiality interests.

Committee Counsel. I understand that. Can you provide an answer to the question, please, whether this would apply to all documents that went through HHS and other agencies?

HHS Counsel. I think that we need to take this on a question-by-question basis, and a document-by-document basis, and sitting here today -- and also, to some extent, this is for the purposes of this interview today. We agreed to come here as a significant accommodation to your interests, subject to certain scopes, and we can certainly continue to have these conversations. But today for today's interview, the particular question that you have asked is not a question that Ms. Murray is prepared to answer today.

Committee Counsel. I will just note, again, for the record, that the scope is one that was set by the Department, not set by the committee, and we very much disagree with that scope.[281]

Committee counsel explained the concerns with HHS' position that no internal or interagency communications could be disclosed to Congress:

> We obviously disagree with the letter the Department sent last night. The Department does not get to set the terms and conditions of congressional oversight. That's something that this committee gets to do.
>
> We also have severe concerns with the scope limitations the Department has placed writ large. **That scope would exempt the entire executive branch from congressional oversight and obviously we think that's a bit of an extreme position. We have a number of questions with respect to what appears will be deemed internal deliberations by the Department.**[282]

HHS counsel did not relent and did not allow Ms. Murray or any subsequent witnesses to answer the committees' substantive questions about the CSR program. HHS' unilateral decision—made without any valid justification—to instruct witnesses not to answer substantive questions about the source of funding for the CSR program effectively exempted all decisions about the source of funding from the committees' investigation.

[281] Murray Tr. at 68.
[282] *Id.* at 28–29 (emphasis added).

b. Witnesses Were Not Permitted to Answer Questions about the Names of Individuals Involved in Decisions about the Source of Funding for the CSR Program Employed at the Department of Justice and the White House

FINDING:	**Witnesses were instructed not to reveal to Congress the names of White House and Department of Justice officials involved in decisions regarding the cost sharing reduction program.**

HHS counsel did not permit witnesses to identify the names of individuals involved in decisions about the source of funding for the CSR program who work or worked at the White House. For example, Ms. Murray testified that she spoke with someone in the Executive Office of the President about the CSR program between April and July 2014. HHS counsel, however, did not permit her to tell Congress with whom she spoke. Ms. Murray testified:

> Q. Do you recall when the conversation with the Executive Office of the President took place?
>
> A. I do not.
>
> Q. Was it after the Senate report was released in July?
>
> A. It was before.
>
> Q. Do you recall who the conversation was with?
>
> HHS Counsel. You can answer that.
>
> Witness. Yes, I do.
>
> Q. Who was the conversation with?
>
> HHS Counsel. Again, because of our deliberative interests in maintaining executive branch confidentiality, Ms. Murray is not prepared to answer that question today.[283]

HHS counsel also instructed Mr. Schultz not to reveal the names of individuals at the White House involved in decisions regarding the CSR program. He testified:

> Q. Do you recall who those conversations were with at either the White House or OMB during this time period?
>
> A. Well, I recall some people they were with, yeah.
>
> Q. Who were these people?

[283] *Id.* at 63–64.

HHS Counsel. He's not going to get into participants in White House meetings.

Committee Counsel. Why?

HHS Counsel. We have certain Executive Branch confidentiality interests.[284]

Committee counsel asked HHS counsel to explain what barred Mr. Schultz from identifying individuals he worked with at the White House. HHS counsel only answered that the Executive branch has "confidentiality interests" in withholding the names of White House employees involved in decisions regarding the CSR program from Congress. HHS counsel explained:

Committee Counsel. Okay, but before we go to that, what specifically bars him from telling us which White House officials?

HHS Counsel. **We have certain confidentiality interests.** They are only heightened by lawsuit brought by the House. This is an accommodations process. As you've seen, he has answered a lot of questions, but he is not prepared at this time to talk about White House participants.

Committee Counsel. **Can you identify those confidentiality interests for us –**

HHS Counsel. **We have certain confidentiality interests.** We've articulated them in our letters and we've had conversations with you.

As I say, he has answered a number of questions. He's here voluntarily, and if we could proceed, he's happy to answer questions on a question-by-question basis.

Committee Counsel. **Those confidentiality interests have not been specifically identified. It's been very vague and overbroad.** Specifically, with regard to this, what is the specific confidentiality interest, the identity of who these people are?

HHS Counsel. I mean, we're talking about the development of the President's budget and that whole process. So that's something the Executive Branch has a longstanding interest in protecting the nature of those confidential communications.

Committee Counsel. We appreciate your position. We disagree with it,

[284] Schultz Tr. at 33–34 (emphasis added).

but we understand in part what you're saying, but I'm just a little confused about why the identity of the people would also be protected by this. **Is there a specific privilege that you're asserting to withhold these names?**

HHS Counsel. **What I can say is the confidentiality interests are particularly strong when we're talking about presidential advisors and presidential staff, and that's what we're talking about here.**

Committee Counsel. **Even the names of the people involved?**

HHS Counsel. **Correct.**[285]

HHS counsel refused to provide additional information to the committees on why it would not permit witnesses to reveal the identity of White House staff involved in discussions about the CSR program. Committee staff sought to clarify from HHS counsel on the basis for which they were withholding the names of these individuals:

Committee Counsel. Are you saying that because these are internal deliberations? Is that why you don't want to disclose the names of these individuals?

HHS Counsel. **I'm saying, again, we have confidentiality interests.** They are particularly strong when we're dealing with presidential staff and advisors.

Committee Counsel. Are these staff that aren't known to work at the White House? I mean, they're federal employees.

HHS Counsel. As we've articulated to you in our letters and, again, **we have confidentiality interests.** They are heightened by the lawsuit. What you're talking about, **we are getting into areas that involve presidential advisors and staff and the confidentiality interests are only heightened.**

This is an accommodations process. We're happy to continue these discussions.

Committee Counsel. Can you tell us what the decision involved in this is that you don't want to reveal the identity of individuals? I can only assume that this is some of sort of deliberative process privilege that you're seeking to invoke here. Can you tell us what the decision is specifically that prevents the department from identifying the names of the individuals who participated in the

[285] *Id.* at 34–36 (emphasis added).

conversations, not the substance?

HHS Counsel. As we said, we are not going to get into internal deliberations about the President's budget. We are not prepared today to talk about these participants. We're happy to continue the conversation, but at this point in time, we're not prepared to get into that.

Committee Counsel. **When you're seeking to withhold information from Congress because it's deliberative, there are a couple prongs the department has to meet to make a valid showing on that issue. The information must not only be deliberative, but it must also be predecisional.**

So can you identify for us what the decision is that you are holding this information back from the Congress?

HHS Counsel. You know, Mr. Schultz is here voluntarily. He's answering your questions. **We're not prepared today to go further than this, but, again, we are happy to continue these discussions.** This is an accommodation process between the agency and the committee.

Committee Counsel. **So then it sounds like you are not willing to identify the decision for us today; is that correct?**

HHS Counsel. **We are telling you that we have confidentiality interests heightened by the lawsuit brought by the House.**[286]

The Administration cannot withhold factual information such as the names of individuals involved in various meetings or decisions from Congress. Counsel explained:

Committee Counsel. We have, as Jessica mentioned at the start of the interview today, we have grave concerns about the scope that has been set by the department. **I'm not aware of a privilege that would allow someone to withhold the names of people who participated in conversations or meetings.**

For instance, when you're creating a privilege log of information that you are withholding from the Congress or from parties in litigation, that log includes the names of people involved on the E-mail or in the conversation. You know, **the fact that you are not even willing to answer some simple foundational questions about the grounds on which the department is withholding this information is very concerning and it's something that this**

[286] *Id.* at 36–38 (emphasis added).

committee does not agree with.

HHS Counsel. Understood, and this is an accommodations process. We're happy to continue the conversation going forward.[287]

OMB counsel similarly refused to allow Ms. Washington to identify the names of individuals she met with or otherwise spoke to at the Department of Justice and the White House who were involved in decisions related to the source of funds for the CSR program. At no time did OMB claim any privilege or provide any clear reason for refusing to permit Ms. Washington to disclose this information to Congress. Ms. Washington testified:

Q. Exhibit 7 is another White House Visitor Record Request from November 27th at 11 a.m. with Mr. Choe, Mr. Delery, Mr. Gonzalez, Mr. Meade, Mr. Schultz, Mr. Verrilli. Do you remember attending a meeting on November 27, 2013 at the White House with those persons I just listed?

OMB Counsel. As I mentioned, the Executive Branch has significant confidentiality interests in internal discussions or interagency deliberations and Ms. Washington is not going to discuss interagency deliberations today.

Q. The committee disagrees that the question has called for any kind internal deliberations at all, just merely the existence of the meeting. Are you willing to answer whether or not you attended a meeting with those individuals listed?

A. I am not authorized to answer that question today.

Committee Counsel. Thank you.

Q. Have you ever met with Kathy Ruemmler or talked with Kathy Ruemmler about the Cost-Sharing Reduction Program?

OMB Counsel. **Ms. Washington is not going to discuss any interactions she may or may not have had with any White House personnel.**

Committee Counsel. A few minutes ago, you suggested that if we asked specific names and asked if she's ever talked to them about the Cost-Sharing Reduction Program, she could answer that question, but that does not apply to White House personnel?

[287] *Id.* at 38–39 (emphasis added).

OMB Counsel. **Ms. Washington is not going to discuss any conversations that she may have had with White House personnel.**

Q. Ms. Washington, did you have any conversation with Roberto Gonzalez about the Cost-Sharing Reduction Program?

A. I believe I previously testified that I did.

Q. Do you believe those –

A. To the extent that that is the person who was the deputy general counsel at Treasury. . . .

Q. Do you remember having conversations with Don Verrilli about the Cost-Sharing Reduction Program?

OMB Counsel. **Again, Ms. Washington described that she had conversations generally with the Department of Justice, but she is not going to discuss the specifics of those conversations.**

Committee Counsel. So, previously, you allowed her to answer whether she talked about the CSR program with Kenneth Choe, I believe Stuart Delery, Robert Gonzalez, Chris Meade, William Schultz. We're asking about one more person on this list of people, and I don't see the distinction between Mr. Verrilli versus these other individuals on this list that you allowed her to answer the same questions.

OMB Counsel. I don't think she answered the question with respect to Stuart Delery or a Department of Justice official.

Q. Ms. Washington, with whom did you speak at the Department of Justice about the Cost-Sharing Reduction Program.

OMB Counsel. **Again, Ms. Washington is not going to discuss conversations that she may have had with Department of Justice officials, particular officials, if, in fact, she had those conversations.**[288]

Neither HHS nor OMB counsel provided a justification for why witnesses could not disclose the names of White House or DOJ officials involved in decisions regarding the source of funding for the CSR program. Further, even if HHS or OMB had asserted a legal privilege over the names of individuals involved—which neither did—no privilege exists that would protect the *names* of individuals involved in a conversation.

[288] Washington Tr. at 87–90 (emphasis added).

c. OMB Counsel Refused to Allow an OMB Witness to Answer Questions Regarding the Dates or Times of Meetings or Conversations with Other Administration Officials About the CSR Program

FINDING:	**OMB prevented a witness from answering factual questions regarding the dates or times of a meeting or conversation, refusing to invoke a legal privilege to justify withholding the information from Congress.**

Understanding who participated in what meetings or conversations, and when, was a critical component of the committees' investigation. Setting out a clear timeline of when the Administration made decisions regarding the source of funding is necessary to understand why and how the Administration decided that it did not, in fact, need an annual appropriation to make CSR payments after it initially requested one in fiscal year 2014.

Ms. Washington played a central role in providing the legal justification for the source of funds used to make CSR payments. Yet, OMB counsel prevented Ms. Washington from answering questions about meetings and conversations she had about the source of funding for the CSR program. For example, OMB counsel allowed Ms. Washington to answer that she met with Treasury's General Counsel in 2013,[289] and that she did not meet with anyone from the IRS in 2013,[290] but refused to allow her to answer questions regarding when she met with Mr. Schultz, HHS's General Counsel. OMB counsel justified preventing the witness from answering these factual questions not by invoking any sort of legal privilege—she explicitly refused to do that—but by citing the "confidentiality interests" of the Executive Branch. Ms. Washington testified:

> Q. At what point did you have conversations with Mr. Schultz at HHS?
>
> OMB Counsel. **Ms. Washington is not going to get into like particular – the time period of particular discussions or conversations that she may have had with individuals in the development of this issue.** She's just spoken generally that she had a conversation with Mr. Schultz about this issue.
>
> Committee Counsel. We're not asking deliberative – the content of the conversations. We are asking about the timing of when issues became – were brought to the attention of OMB or when issues were brought to the attention of Ms. Washington. Just basic factual question of time are not at all deliberative.
>
> OMB Counsel. Can you repeat your question?

[289] *Id.* at 24 (Ms. Washington testified that she worked with Chris Meade, the General Counsel of the Department of the Treasury).
[290] *Id.*

Committee Counsel. Sure.

Q. At what point did you have conversations with Mr. Schultz?

We just talked about when she spoke with Mr. Berger and when she spoke with people at the IRS. It's the same question pertaining to Mr. Schultz.

OMB Counsel. Well, but it pertains to interagency deliberations, not something internal to OMB or just, you know, a general discussion that she may have had with her staff, but when you talk about interagency deliberations about a particular topic, there's a heightened sensitivity there. **So, therefore, Ms. Washington is not going to discuss the individual interactions that she had with a particular person about this subject.**

Committee Counsel. With all due respect, this is not asking for any deliberative information. It's just at what point did she have a conversation with Mr. Schultz, just a month.

OMB Counsel. On a particular topic.

Committee Counsel. And she's already acknowledged that she had conversations with Mr. Schultz.

OMB Counsel. That's right.

Committee Counsel. **I don't think the time period of that is going to implicate any sort of deliberative issue.**

OMB Counsel. **She has discussed that she has had conversations with Mr. Schultz about this topic, and, you know, the particulars or the specific conversations and when those might have occurred is not something we're going to discuss today.**

Committee Counsel. I'm sorry. **There is absolutely nothing deliberative about the date in which a conversation took place.** We're asking very high-level process questions about the development of one issue. We are not asking about the substance of the interagency deliberations or even at the point about the internal deliberations that would have happened at OMB.

The factual existence of a conversation is not protected by any legal privilege and never has been. We're just asking for facts.

OMB Counsel. **So we're not asserting a legal privilege, to be clear, but we are saying that there are heightened sensitivities and confidentiality interests in particular conversations that Ms. Washington may have had.** If you'd like to speak generally and ask her, you know, was it in 2013, then I think that's something we could discuss, but in terms of zeroing in on a particular conversation that she may have had with a particular person on a particular topic, that, we believe has a heightened sensitivity.[291]

Committee counsel asked OMB counsel to explain these "heightened sensitivities." OMB counsel, however, could not do so. The interview continued:

Committee Counsel. **Could you explain the heightened sensitivity?** I hope that we can have a fruitful interview and that this can continue, but I'm very nervous based on the statements that you're making right now that we'll be able to make any actual progress.

OMB Counsel. Well, it seems like you're trying to zero in on a particular meeting that she may have had or may not have had, depending on the nature of the answer. **Particular specific conversations that she had with respect to this topic and the interagency deliberations that she may have had on this topic have a heightened sensitivity.**

Committee Counsel. **Can you articulate what that heightened sensitivity is?** You articulated when we began that she was aware of the January meeting that we were going to ask questions about and was prepared to talk about it.

OMB Counsel. I mentioned that we would talk about the January meeting in particular because I knew that the committee had an expressed interest and has articulated an interest in that meeting. So as a result, we are willing to be **extra accommodating** to the committee and to allow Ms. Washington to discuss that general meeting given what we understand to be a significant interest to the committee; however, **as you know, conversations between attorneys on a particular matter is an institutional interest of the Executive Branch and, as a result, that is why she will not be discussing particular conversations that she had with those attorneys.**

Committee Counsel. **The committee does not recognize that heighten sensitivity, and I do not, frankly, fully understand the heightened sensitivity that you are trying to articulate; but,**

[291] *Id.* at 24–27 (emphasis added).

again, we are not asking about the substance or interagency deliberations between Ms. Washington or any of the people that we have named so far. We are merely asking for when, for dates and times and facts, which are absolutely not deliberative.

So I think we'll just continue with the questions.

Q. Ms. Washington, did you speak with Mr. Schultz in 2013?

A. Yes, about cost-sharing reductions.

Q. About cost-sharing reductions. What timeframe in 2013 did these conversations or conversation happen?

OMB Counsel. Again, I think we just went over that **we're not going to get into particular conversations and particular dates and particular conversations between attorneys of the Executive Branch to address this specific issue.**[292]

Shortly thereafter, OMB counsel refused to allow Ms. Washington to answer if she met Mr. Schultz in person:

Committee Counsel. Ms. Washington, did you ever meet in a face-to-face meeting with Mr. Schultz to discuss cost-sharing reduction payments?

OMB Counsel. As I said, because you're asking her a specific question about a particular meeting on a particular topic, we think that that is something that she should – that she will not discuss today. She already acknowledged that she discussed cost-sharing reductions with him.

Committee Counsel. I asked if she had met with him face to face.

OMB Counsel. So you're asking her about a particular meeting on a particular topic.[293]

OMB counsel did, however, allow Ms. Washington to answer whether she talked with him on the telephone.

Q. Did you ever speak with him on the phone about the Cost-Sharing Reduction Program?

[292] *Id.* at 27–29 (emphasis added).
[293] *Id.* at 34.

A. Yes.[294]

When confronted with this inconsistency, OMB counsel could not articulate why she permitted Ms. Washington to answer questions about whether and when she spoke with Mr. Schultz on the phone, but not in person. Instead, OMB counsel stated that she could have prevented the witness from answering questions about the telephone calls if she so desired. Counsel stated:

> Q. Did he ever come to OMB to meet with you about the Cost-Sharing Reduction Program?
>
> OMB Counsel. Again, Ms. Washington is not going to talk about particular meetings that she had with –
>
> Committee Counsel. So you will let her answer questions about telephone conversations because those don't count as meetings, but you will not let her answer conversations about face-to-face meetings?
>
> OMB Counsel. Well, Ms. Washington will not talk about particular meetings that she had with respect to cost-sharing reductions, and I was –
>
> Committee Counsel. The line seems to be a little bit inconsistent here.
>
> OMB Counsel. **Well, we could have easily cut it off with respect to those calls as well, but in an effort to be accommodating, she answered those questions.**[295]

Throughout the interview, OMB counsel could not articulate why she permitted Ms. Washington to answer questions about conversations or meetings with some individuals, but not others. She further could not articulate why she did not allow Ms. Washington to answer questions about the dates or times on which various meetings occurred. At no time during the interview did OMB counsel provide a legally-cognizable reason for the extreme limitations placed on Ms. Washington's testimony.

[294] *Id.* at 34.
[295] *Id.* at 35–36 (emphasis added).

d. The Administration Failed to Provide Any Valid Legal Grounds for Instructing Witnesses Not to Answer Substantive Questions Posed by the Committees

FINDING: The Administration sought to withhold information from Congress by effectively claiming the deliberative process privilege. That privilege does not apply in this instance.

Throughout the interviews, the Administration repeatedly instructed witnesses not to answer substantive questions about the source of funding for the CSR program. At no time during the course of the investigation did any lawyer for the Administration invoke or otherwise provide any legally-recognized basis upon which the information was withheld. Instead, Administration lawyers provided excuses such as the need to protect internal deliberations—including interagency communications—and unspecified "Executive branch confidentiality interests." That position allows the Administration absolute discretion over what it will and will not provide to Congress and fundamentally undermines the principles of congressional oversight.

The Administration effectively sought to cloak itself in the deliberative process privilege without actually invoking the privilege—because it was not applicable. Even if one were to assume that the Executive branch could use this privilege to withhold information from Congress, the nature of the information sought by the committees and the Executive branch's actions would make it inapplicable in this situation.

Even if it were applicable here, the deliberative process privilege is a privilege that may be invoked by the Executive in response to a request for internal, or deliberative, documents or testimony. A proper invocation of the privilege involves two prongs: (1) the documents and communications must be predecisional, or created prior to the agency or department reaching a final decision, and (2) they must be deliberative.[296] To be deliberative, a document or communication must relate to the thought processes or opinions of relevant officials—the information cannot be purely factual.[297] The Executive branch is required to disclose factual information that can be segregated from other material potentially protected by the deliberative process privilege.[298]

Because factual information is expressly not protected by the deliberative process privilege, the Administration cannot withhold information such as the names of persons involved in decisions or the dates and times of meetings. Further, no other legal privilege would protect purely factual information of this sort.

Additionally, the deliberative process privilege is not absolute; it can be overcome by a showing of need.[299] Moreover, the privilege "disappears altogether when there is any reason to believe government misconduct [has] occurred."[300] Overcoming the privilege carries such a low

[296] *In re Sealed Case (Espy)*, 121 F.3d. 729 (D.C. Cir. 1997).
[297] *Id.*
[298] *Id.*
[299] *Id.*
[300] *Id.*

bar because, otherwise, agencies could withhold internal or deliberative material from Congress for any reason imaginable. The Administration could use the privilege to protect discovery of actual misconduct, shield information that shows flaws or limitations in an agency's position, or simply hide an embarrassing comment.

Finally, the deliberative process privilege cannot be used to withhold information about a final decision, including the rationale for that decision. The Supreme Court made this clear in *NLRB v. Sears, Roebuck & Co.*, dismissing the Administration's argument that such rationales cannot be provided to the committees.[301]

Given the Administration's illegal actions to fund the CSR program without a congressional appropriation, it cannot now withhold key testimony from Congress by effectively claiming that the information is protected by the deliberative process privilege. Thus, the Administration, without any legal grounds to do so, instructed witnesses not to answer substantive and other factual questions.

6. Lawyers for the Department of the Treasury Pressured at Least One Witness into Following Restrictions Set Forth in his Testimony Authorization

FINDING:	**The Department of the Treasury pressured at least one witness into following the restrictions set forth in his Testimony Authorization after the witness questioned Treasury's ability to limit his testimony.**

The Administration successfully limited the testimony of most of their current and former employees by sending Administration counsels to attend the interviews. These counsels instructed witnesses not to provide full and complete answers to the Committees' questions. The counsels who attended—from Treasury, HHS, and OMB—all represented their Department or Office. At no point in time did they represent the interests of the individuals appearing before the Committee.

One witness, however, did not want agency counsel to accompany him. Former IRS Chief Risk Officer David Fisher spoke by telephone with Ways and Means Committee staff at approximately 4:00 p.m. on April 28, 2016 to confirm the date, time, and location of his transcribed interview, as well as discuss logistics of the interview process.[302] During that call, staff informed Mr. Fisher that he had the right to invite counsel—either agency counsel or personal counsel—to attend the interview with him.[303] Mr. Fisher told Committee staff that he did not believe that Treasury counsel represented his interests and did not wish for them to attend the interview.[304] Mr. Fisher also stated that he had already spoken to Treasury counsel and told them he did not want representatives from that office to attend his interview.[305]

[301] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).
[302] Fisher Tr. at 23.
[303] Phone call between David Fisher and Maj. Staff, H. Comm. on Ways & Means (Apr. 28, 2016).
[304] *Id.*
[305] *Id.*

After Mr. Fisher's conversation with Ways and Means counsel, Mr. Fisher received an email from IRS Counsel John McDougal. Mr. Fisher testified:

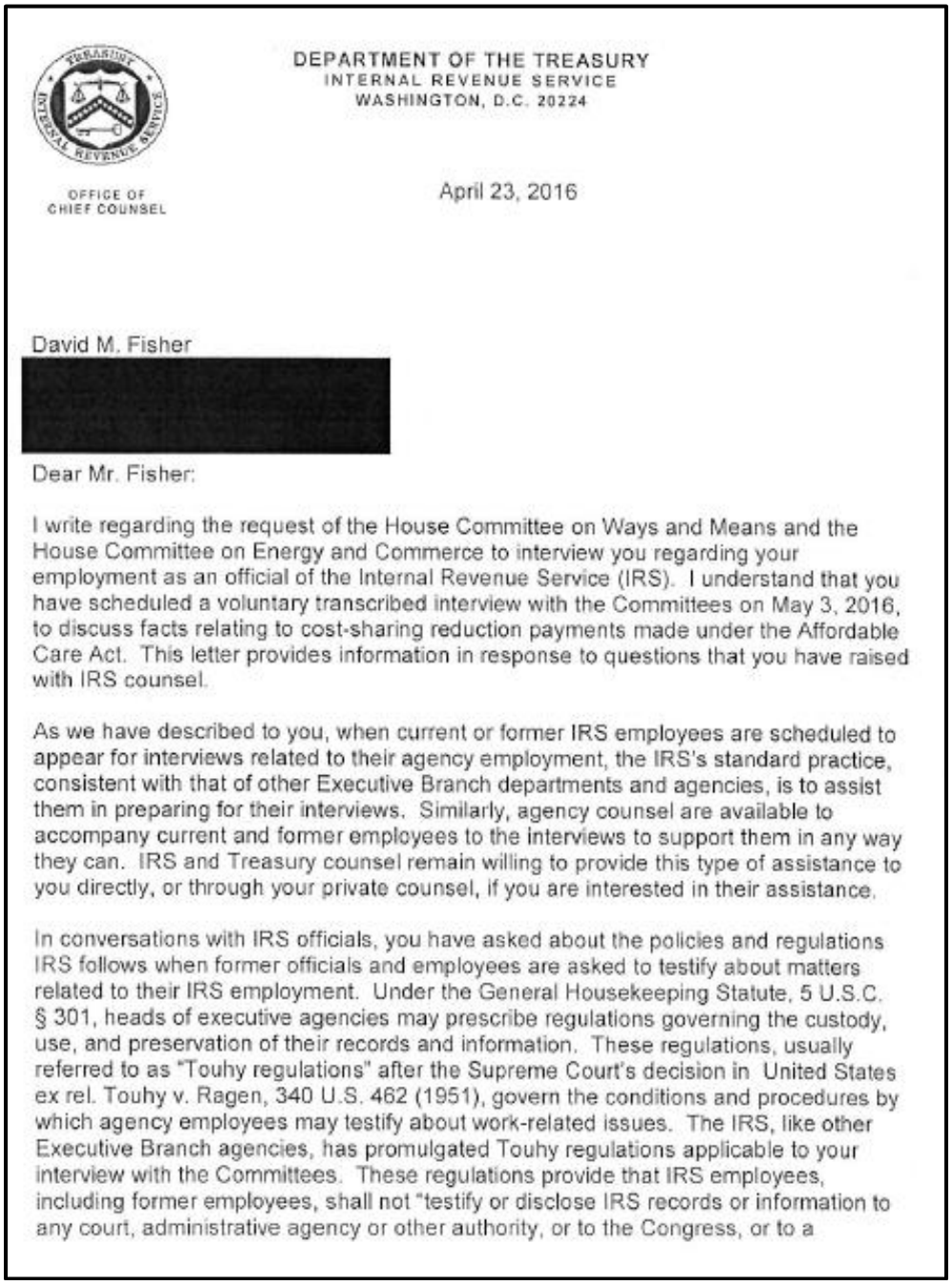
> Q. Mr. Fisher, when did you first see this testimony authorization?
>
> A. Thursday, again, late afternoon or early evening
>
> Q. Was that before or after the telephone call that you had with Machalagh Carr and myself?
>
> A. After. In fact, almost immediately after, as I recall.
>
> Q. Who sent this testimony authorization to you?
>
> A. John McDougal, counsel for IRS.[306]

The Testimony Authorization was one of four documents Mr. Fisher received from Mr. McDougal "almost immediately after" his phone call with Ways and Means staff. Mr. Fisher testified:

> Q. Other than the testimony authorization form, did you receive any other documents from the Department of the Treasury?
>
> A. Yes.
>
> Q. What were they?
>
> A. So most explicitly, I received a cover letter that came along with the authorization and I received copies of two regulations, Treasury Department regulations, covering this topic of deliberative process.
>
> Q. Who sent you the documents?
>
> A. All four documents came in the E-mail from Mr. McDougal on Thursday.
>
> Q. Who had written the cover letter or who signed it?
>
> A. Drita Tonuzi, Associate Chief Counsel, Procedure and Administration, which I believe is at the IRS. It could have been at Treasury. The letterhead is Office of Chief Counsel, Internal Revenue Service.[307]

[306] Fisher Tr. at 14–15.
[307] *Id.* at 19.

The cover letter states:[308]



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

April 23, 2016

David M. Fisher
[redacted]

Dear Mr. Fisher:

I write regarding the request of the House Committee on Ways and Means and the House Committee on Energy and Commerce to interview you regarding your employment as an official of the Internal Revenue Service (IRS). I understand that you have scheduled a voluntary transcribed interview with the Committees on May 3, 2016, to discuss facts relating to cost-sharing reduction payments made under the Affordable Care Act. This letter provides information in response to questions that you have raised with IRS counsel.

As we have described to you, when current or former IRS employees are scheduled to appear for interviews related to their agency employment, the IRS's standard practice, consistent with that of other Executive Branch departments and agencies, is to assist them in preparing for their interviews. Similarly, agency counsel are available to accompany current and former employees to the interviews to support them in any way they can. IRS and Treasury counsel remain willing to provide this type of assistance to you directly, or through your private counsel, if you are interested in their assistance.

In conversations with IRS officials, you have asked about the policies and regulations IRS follows when former officials and employees are asked to testify about matters related to their IRS employment. Under the General Housekeeping Statute, 5 U.S.C. § 301, heads of executive agencies may prescribe regulations governing the custody, use, and preservation of their records and information. These regulations, usually referred to as "Touhy regulations" after the Supreme Court's decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), govern the conditions and procedures by which agency employees may testify about work-related issues. The IRS, like other Executive Branch agencies, has promulgated Touhy regulations applicable to your interview with the Committees. These regulations provide that IRS employees, including former employees, shall not "testify or disclose IRS records or information to any court, administrative agency or other authority, or to the Congress, or to a

[308] Letter from Drita Tonuzu, Associate Chief Counsel, Procedure and Admin., Internal Rev. Serv., U.S. Dep't of the Treasury, to David Fisher (Apr. 23, 2016).

committee or subcommittee of the Congress without a testimony authorization." 26 C.F.R. §§ 301.9000-3(a); 301.9000-1(b). The regulations define "IRS information" to include "any information acquired by an IRS officer or employee, while an IRS officer or employee, as part of the performance of official duties." 26 C.F.R. § 301.9000-1(a). Thus, as the Internal Revenue Manual describes this regulation, "former employees and contractors who receive a request or demand for IRS records or information . . . must receive authorization to disclose such information." Internal Revenue Manual 34.9.1.3(4). For your convenience, we have enclosed a copy of these materials.

So that you may discuss IRS information with the Committees in your upcoming interview consistently with the IRS's Touhy regulations, we have also enclosed a testimony authorization. This document identifies the IRS information you are authorized to discuss with the Committees and is identical in substance to those received by the other current and former IRS employees who have been interviewed by the Committees in this matter. In particular, the testimony authorization clarifies that you are not authorized to disclose information about internal IRS deliberations, or deliberations between IRS and Treasury or other Executive Branch agencies or offices, regarding the cost-sharing reduction payments under the Affordable Care Act. Consistent with longstanding practices across administrations, the Executive Branch has significant confidentiality interests in such deliberations, based on the chilling effect on future deliberations that would inevitably result from their disclosure.

You have also asked about executive privilege. The Supreme Court has emphasized, in Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367 (2004), that executive privilege is "an extraordinary assertion of power 'not to be lightly invoked'" and that it should be "avoided whenever possible." As recognized by President Reagan's 1982 Memorandum on Procedures Governing Responses to Congressional Requests for Information (which continues to govern the Executive Branch's responses to congressional oversight), "[h]istorically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches." Treasury and the IRS are engaged in an ongoing accommodation process with the Committees with respect to the matter that is the subject of your interview.

Please let us know if you or your counsel has any questions regarding the policies and regulations of the IRS described above, including the enclosed testimony authorization, or questions about your upcoming interview. As noted above, IRS and Treasury counsel remain available to assist you in this process. They would be happy to meet with you in advance of the interview to answer your questions or assist you in any way they can, and they are willing to accompany you to the interview if you feel it would be beneficial. You or your counsel may direct questions to Charles Pillitteri at [redacted]

Sincerely,

Tonuzi Drita [redacted]

Drita Tonuzi
Associate Chief Counsel
Procedure & Administration

What the IRS' letter did not state is that 5 U.S.C. § 7211 specifically provides that no one may interfere with a federal employee's right to speak to Congress. Although the IRS claims here that its restrictions are just like other agencies that have issued *Touhy* regulations, other agencies specifically exempt congressional information requests from their regulations' restrictions like

HHS' regulations, or make clear that the regulations apply only in litigation, as OMB's do. Here, however, the IRS makes plain that it forbids its employees and former employees from speaking to Congress without explicit permission from the IRS.

Further, while Treasury lawyers told Mr. Fisher over the telephone that a "deliberative interest" protected the information Mr. Fisher had to share about the CSR program, Treasury suggested in its letter to him that they were in fact not asserting a legal privilege. Once again, the Department sought to avail itself of a legal privilege without explicitly claiming it.

In addition to the cover letter and Testimony Authorization, Mr. McDougal had previously provided Mr. Fisher with a White House Office of Legal Counsel opinion and other regulations and opinions about restrictions on agency employees sharing information with Congress.[309]

Three days after Mr. Fisher asserted to Committee staff that he did not wish for Treasury counsel to accompany him because they did not represent his interests and Treasury sent him the cover letter and Testimony Authorization, on Monday, May 2, a Deputy Assistant Secretary for Legislative Affairs at the Department of the Treasury emailed Committee staff about Mr. Fisher's interview. Attaching a Testimony Authorization for Mr. Fisher, she wrote, "In addition, Mr. Fisher has asked Treasury counsel to attend the interview tomorrow to provide advice regarding the scope of the authorization."[310]

Between April 28 and May 2, Mr. Fisher had two telephone conversations with Treasury counsel regarding his interview. In those calls, Treasury counsel provided instructions on the upcoming interview, including about how to respond to questions that asked about deliberative discussions. Mr. Fisher testified:

> Q. Did you receive any oral instructions from Treasury or the IRS about what you were or were not allowed to say today?
>
> A. Yes.
>
> Q. What were they?
>
> A. It was guidance on how to conform to the restrictions in the authorization, and so we had a little role play yesterday on the type of questions that could be answered and the type of questions that could not be answered per the authorization.
>
> Q. What are some examples of the questions that could not be answered?

[309] Fisher Tr. at 20.

[310] Email from Deputy Assistant Sec'y, Legis. Affairs, U.S. Dep't of the Treasury, to Maj. Oversight Staff Dir., H. Comm. on Ways & Means (May 2, 2016, 12:08 p.m.).

A. So in addition to, again, the list of items here, **the one that we spent the most time discussing was Bullet 6, which was on disclosing information about internal IRS deliberations or deliberations between IRS and Treasury or other Executive Branch agencies or offices regarding cost-sharing reduction payments under the Affordable Care Act.** So the deliberative process portion was the main portion of our discussion about what I could or could not talk about.

Q. How were the limitations on what you could disclose about the deliberative process described to you?

A. Could you be more specific?

Q. What was said to you about deliberative process?

A. So, fundamentally, that it's the Executive Branch's position that communication that is delivered in a deliberative fashion that ultimately leads to some decision is, in essence, not authorized for discussion at this particular hearing, and that includes my recollections of who said what to whom as well as my own recollections of what I might have said during those discussions that ultimately led up to a decision.

Q. Who gave you these instructions?

A. The Treasury counsel to my right.

Q. Mr. Crimmins?

A. And – both.

Q. When did they give you these instructions?

A. Yesterday.[311]

As part of his conversations with Treasury, Mr. Fisher also discussed the constitutionality of Treasury restricting his statements to Congress. He testified:

Q. Was that the only conversation that you had about deliberative process with Treasury or IRS counsel?

A. No.

Q. What were the other discussions?

[311] Fisher Tr. at 15–17 (emphasis added).

A. We had discussions about the – we had discussions about the constitutionality of the authorization.

Q. What did you say about the constitutionally of the authorization?

A. **I expressed some doubt as to whether or not these restrictions were not an infringement upon my own constitutional rights.**

Q. What was their response?

A. They gave a reasoned explanation as to why and some history about why the Executive Branch has historically at times served to protect its own deliberative interest to allow people to have free and open discussion without fear of being pointed out later on down the road and has embraced this – again, I'm reluctant to use the word "privilege", but to me, privilege of not allowing its employees, former employees, or contractors to sort of breach that, which is the essence of what I see in the authorization.[312]

During the course of the phone conversations, Treasury counsel also implied that there would be repercussions if Mr. Fisher did not follow the Testimony Authorization instructions. He testified:

Q. To your understanding, are there any repercussions if you do not abide by the authorization?

A. There certainly would be repercussions or could be repercussions if I was still an employee. It's unclear to me what, if any, repercussions would occur for a former employee.

Q. **Did anyone articulate any repercussions that could be imposed?**

A. **Not explicitly.**

Q. – if you did not abide –

A. I apologize. Go ahead and finish.

Q. If you did not abide by the instructions.

A. No explicitly.

Q. **Did they implicitly articulate any repercussions?**

[312] *Id.* at 17–18 (emphasis added).

A. **They represented the Executive Branch's position that the regulations that were in effect when I was an employee still cover me and, therefore, if nothing else, I would be violating those regulations, which in and of itself is a repercussion to be perhaps breaking a rule that I was under, constitutional objections aside.**[313]

Concerned by the pressure Treasury exerted on Mr. Fisher, and heightened by the discussion between Mr. Fisher and Treasury counsel about the implications of not following the Department's instructions, Committee counsel asked him to explain what happened between Thursday, April 28, when he told Committee staff that he did not believe Treasury represented his interests, and Monday, May 2 when Treasury staff informed the Committee that Treasury counsel would appear with Mr. Fisher. Mr. Fisher testified:

Q. Will you tell this committee what changed between 5:00 on Thursday and 12:08 on Monday when Treasury informed the committee that you had asked them to attend?

A. What changed was shortly after our phone call, I received the four documents that I've mentioned, the cover letter, the two regulations, and the testimony authorization, and I needed to decide the degree to which that authorization would impact my ability to answer some or all of your questions.

I spoke with Treasury about this, as I mentioned on Friday. I spoke with additional counsel. I weighed the different equities involved between the two branches of government and the two very different opinions that I had received in my more informal conversations with you all as well as with the Treasury counsel.

I weighed the responsibilities associated with the regulations which were in effect when I was an employee, even though I, honestly, was not aware of them, against the First Amendment Constitutional protections, I think that Amanda just alluded to, and my conclusion was while I may have an opinion on the merits of those arguments, I am not in a position to be the arbiter of that dispute.

If at some point in the future that the accommodation process comes to some sort of different conclusion, if there is a third-party finding of some sort that would provide some other definitive interpretation of which of these conflicting pieces of guidance actually trumps the other, then I would be in the position again to take a look at that additional information and I'd always weigh new information if it came along to see if that would change my

[313] *Id.* at 18-19 (emphasis added).

> position; but right now, I'm not in a position to be the arbiter of that dispute. So I need to be conservative in my approach, which is to abide by the authorization I've been provided.[314]

Mr. Fisher was put in an untenable situation: Congress requested information from him, and he was willing to provide it, but Treasury threatened him with an overly broad, inapplicable regulation.

Ultimately, the Ways and Means Committee subpoenaed Mr. Fisher to testify at a deposition the following week. Under the Procedures for Staff Deposition Authority issued by the House of Representatives Committee on Rules, Treasury counsel would not be allowed to attend. At that deposition, Mr. Fisher spoke freely and provided detailed information regarding his and Mr. Kane's concerns about paying for the CSR program from the § 1324 permanent appropriation. In the time between the transcribed interview and the deposition, Mr. Fisher asked Treasury if it planned to invoke a specific privilege to protect the information. He received no reply. Mr. Fisher testified:

> So I followed, as we all recall, the Treasury's guidance last week based on this testimony authorization, which had clear limitations associated with it, and was unable to answer questions consistent with that and the administration's guidance at the transcribed interview.
>
> The purpose of the phone call that I initiated last week with Treasury was to inquire, after reading the House rules, receiving the subpoena, and being aware that the only restriction – or the only reason to restrict answering questions under the subpoena would be privilege, and posed that to the administration, of whether or not they were planning to go to court and assert executive privilege around the deliberative process.
>
> I posed that. I did not receive an answer. I still have not gotten any answer back. I sent Treasury a note yesterday, so we didn't talk, but I sent them a note simply identifying that I had not heard from them. I'm assuming or deducing that no privilege is being asserted and have no further guidance from them regarding this.
>
> So I'm here under subpoena. It would have been far preferable to me for the executive branch and legislative branch to resolve this dispute independently and not sort of put me in the middle of being the arbiter of what to say or what questions to answer and what not to answer.
>
> But we are here under subpoena. I have no privilege assertion from the executive branch, which is the reason why I'm here to answer any of your questions without limitation.

[314] *Id.* at 24–25.

> I wanted to walk through my thought process in trying to balance the equities here on the backs of an individual who should not be balancing those equities. Yet the administration had an opportunity to try to move forward on some other step along the lines of privilege. They clearly have chosen not to do that. I'm in no position to do that. I'm here to answer your questions.[315]

Treasury went to great lengths to prevent Mr. Fisher from providing full and complete answers to the committees' questions about the CSR program—and the reasons for the Administration's obstruction became clear during his deposition. The answers he gave in provided more insight into the Administration's decision-making processes than those of any other individual the committees interviewed with agency counsel present. His answers also shed light onto why the Administration has restricted the testimony of every other witness—going so far as to not letting witnesses answer questions about the names of individuals involved in the decision-making process—and why the Administration has failed to comply with the committees' document subpoenas.

In summary, the Administration has undertaken numerous specific actions to obstruct the committees' investigation. The Administration has:

- Failed to comply with the committees' subpoenas;
- Failed to timely deliver subpoenas issued by the Committee on Ways and Means to Administration employees;
- Relied on an overbroad regulation inconsistent with federal law to limit information provided to Congress;
- Unilaterally restricted the scope of the testimony that current and former employees provided to Congress;
- Instructed witnesses who appeared before the committees to not fully answer questions posed by Congress; and
- Pressured at least one witness who questioned the Administration's testimonial restrictions.

The Administration took the position that all information—be it in the form of documents or testimony—not already publicly available are somehow shielded from congressional oversight without any basis in law, precedent, or fact. The Administration did so while refusing to assert any claim of privilege—to the extent any even apply—over the documents sought by the committees. Yet, despite refusing to assert a privilege, the Administration effectively

[315] Fisher Depo. at 14–15.

asserted the deliberative process privilege in withholding documents and restricting witness testimony implicating, in the Administration's opinion, "internal Executive branch deliberations," among other purported justifications.

Congress' oversight prerogatives would be severely undermined if an agency could unilaterally decide to block disclosure of internal deliberations to Congress. This practice encourages agencies to withhold any documents that show flaws or limitations in the agency's position. Under the position advanced by the Administration here, agencies could withhold internal or deliberative documents from Congress for any reason imaginable—even if they simply included an embarrassing comment. It is for this precise reason that the deliberative process privilege can be so easily overcome. And the privilege is clearly overcome here, where a federal district court has already ruled the actions of the Administration to be unconstitutional.

The actions of the Administration—the self-styled most transparent administration in history—to conceal information about the CSR program from Congress and the American people are unacceptable. They may also be illegal. Obstructing a congressional investigation is a crime:

> Whoever corruptly . . . or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress, shall be fined under this title, imprisoned not more than 5 years or . . . both.[316]

It is also against the law to hinder federal employees in providing information to Congress.[317] Taxpayer dollars may not be used to pay the salaries of federal officials who deny or interfere with federal employees' rights to furnish information to Congress in connection with any matter pertaining to their employment.[318]

The federal obstruction laws reflect the fact that Congress' constitutionally based right of access to information is critical to the integrity and efficacy of its oversight and investigative

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[316] 18 U.S.C. § 1505.
[317] 5 U.S.C. § 7211.
[318] Div. E, § 713 of P.L. 113-235 ("No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—
(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or, (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).").

activities. Without effective oversight, Congress cannot be an effective steward of the taxpayers' dollars.

VIII. Conclusion

The Patient Protection and Affordable Care Act did not—and still does not—provide funding for the cost sharing reduction program. The Administration knew that. Internal Administration memoranda acknowledged that fact. Actions taken by the Administration in 2012 and 2013 demonstrated that fact. And indeed, the Administration initially requested an annual appropriation to fund the CSR program, knowing that the ACA did not provide a source of funding for the program and thus necessitated further Congressional action.

Yet, for reasons still unclear, the Administration informally withdrew that request by surreptitiously calling the Senate Committee on Appropriations, leaving no paper trail and hiding its actions from the public, before Congress denied it. The Administration then concocted a *post hoc* justification to raid the premium tax credit account—which was lawfully funded through the 31 U.S.C. § 1324 permanent appropriation—to pay for the CSR program. It memorialized this legal justification in an OMB memorandum reviewed by very senior Administration officials at multiple departments, including the Attorney General himself. IRS officials expressed concerns about funding the CSR program through this permanent appropriation. How could the Administration fund the CSR program this way without violating appropriations law? But when they expressed those concerns, they were essentially told that the decision had been made. Like it or not, the Administration was going forward with funding the CSR payments through the 31 U.S.C. § 1324 permanent appropriation. And it did so knowing that it would violate appropriations law, the Antideficiency Act, and ultimately, the United States Constitution.

The committees persistently pursued the facts underlying the Administration's decision to illegally fund the CSR program through a permanent appropriation. Because of the Administration's obstruction, however, many questions remain unanswered. When exactly did the Administration decide to pull its request for the annual appropriation? Did OMB's April 10, 2013 sequestration report affect that decision? Who decided that the Administration should pull the appropriation request and find a different source of funding, and why that was deemed necessary? Who instructed HHS Assistant Secretary for Financial Resources Ellen Murray to call the Senate Committee on Appropriations to withdraw the request? What does OMB's memorandum say? What did the Treasury Department redact from the final Action Memorandum that Secretary Lew signed?

These questions and others remain because the Administration has refused to cooperate, going to great lengths to obstruct the committees' investigation at every step. The Administration has refused to produce documents, despite lawfully-issued congressional subpoenas. The Administration has refused to allow witnesses to answer questions—even factual questions such as who and when. It has attempted to cloak its obstruction by essentially claiming an inapplicable legal privilege, yet insisting at every turn that it has not, in fact, claimed such a privilege. And in at least one instance, the Administration has intimidated a witness to chill his willingness to answer Congress' questions.

This is unacceptable. The Executive branch should not be permitted to shield how, when, and why it makes decisions from the American public—especially in this instance, in which the Administration decided to *unconstitutionally* spend taxpayer dollars that Congress did not appropriate. Congress is a co-equal branch of government and the branch most accountable to and representative of the American people. As such, the Executive branch must respect the constitutional powers and duties assigned to Congress, including the power to appropriate funds and the duty to conduct oversight over the laws it enacts. Unfortunately, the Administration has failed to do so here. The American people need and deserve better from their representative government.