IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	Case No. 14-cv-01967-RMC

PLAINTIFF UNITED STATES HOUSE OF REPRESENTATIVES' OPPOSITION TO DEFENDANTS' MOTION FOR CERTIFICATION OF THIS COURT'S ORDER OF SEPTEMBER 9, 2015, FOR INTERLOCUTORY APPEAL

The Court has ruled – in keeping with all applicable precedent in this Circuit and elsewhere – that "the House of Representatives has standing [and a cause of action] to pursue its allegations that [Defendants] violated Article I, § 9, cl. 7 of the Constitution when they spent public monies that were not appropriated by the Congress." Mem. Op. at 42-43 (Sept. 9, 2015) (ECF No. 41); *see also* Order at 1 (Sept. 9, 2015) (ECF 42). In so ruling, the Court – correctly – did not find that there was "substantial ground for difference of opinion [on the standing or cause of action issues]," and did not determine that an "immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

In a transparent effort to delay any final ruling for months (and perhaps years) – and thereby to enable billions of additional taxpayer dollars that Congress has not appropriated to flow out the Treasury door – Defendants ask the Court to make those statutory findings now. *See* Defs.' Mot. for Certification of this Ct.'s Order of Sept. 9, 2015, for Interlocutory Appeal

(Sept. 21, 2015) (ECF No. 44) ("*Burwell* Section 1292(b) Motion"). The Court should deny this motion for two principal reasons.

First, there is *no substantial ground* for difference of opinion on the standing (or cause of action) issues, just as there was not when the Executive sought two years ago immediately to appeal the district court's determination that a House Committee had standing (and a cause of action) to sue to enforce its subpoena to the Attorney General. *See* Order, *Comm. on Oversight & Gov't Reform v. Holder*, No. 1:12-cv-01332 (Nov. 18, 2013) (ECF No. 59) ("*Holder* Section 1292(b) Order") (court found Section 1292(b) motion so lacking in merit that it denied motion without waiting for Committee's opposition: "The Court is not of the opinion that its denial of the motion to dismiss [on standing and cause of action grounds] involves a controlling question of law as to which there is a substantial ground for difference of opinion."), attached as Ex. A.

Second, because there are no facts in dispute here and no discovery is required, the merits of the House's claims can be briefed and resolved very quickly on cross motions for summary judgment. The entire case then can be appealed as a package (to the benefit of the Court of Appeals), rather than being appealed piecemeal as Defendants propose and as this Circuit strongly disfavors. A single appeal, in turn, will guarantee a prompt *final* resolution of the entire case, all while ensuring that if the House is correct on the merits, the unconstitutional outflow of taxpayer dollars will be closed down as promptly as possible. In statutory terms, a denial (not a grant) of the *Burwell* Section 1292(b) Motion is the course best calculated to "materially advance the ultimate termination of th[is] litigation." 28 U.S.C. § 1292(b).

APPLICABLE LEGAL STANDARDS

Subject to certain limited exceptions, only "final decisions" are appealable. 28 U.S.C. § 1291. "The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy

against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *U.S. v. Nixon*, 418 U.S. 683, 690 (1974); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) ("Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment.'" (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945))); *Cobbledick v. U.S.*, 309 U.S. 323, 324-25 (1940) ("Finality as a condition of review is an historic characteristic of federal appellate procedure.").

Relief under Section 1292(b) "is granted rarely and only under 'exceptional circumstances.'" *Arias v. DynCorp*, 856 F. Supp. 2d 46, 53 (D.D.C. 2012) (citing *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 54 (D.D.C. 2009)); *see also, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000) ("certification under § 1292(b) is reserved for truly exceptional cases"); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996) (only "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment" (quotation marks omitted)); *Judicial Watch, Inc.*, 233 F. Supp. 2d at 20 (Section 1292(b) appeals "rarely allowed"); *Virtual Def. and Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (same).[1]

[1] Courts in other Circuits agree. *See, e.g., Huggins v. FedEx Ground Package Sys.*, 566 F.3d 771, 775 (8th Cir. 2009) ("permitting appeals before final judgment causes delay, expense, and duplication of appellate process . . . . No special circumstances exist in this case to indicate that the legislative weighing of costs and benefits that led to the final-judgment rule, a rule, incidentally, that has been the law ever since 1789, should not be respected here." (quoting *Bullock v. Baptist Mem'l Hosp.*, 871 F.2d 58, 60 (8th Cir. 1987))); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1380 (11th Cir. 2008) (detailing concern expressed in legislative history about use of interlocutory appeals for delay); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) ("Section 1292(b)'s legislative history reveals that . . . it is a rare exception to the final judgment rule that generally prohibits piecemeal appeals."); *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) ("The legislative history of subsection (b) of section 1292 . . . indicates that it was to be used only in extraordinary cases[.]"); *Milbert v. Bison Labs., Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) ("It is quite apparent from the legislative history of the Act of September 2, 1958, that Congress intended that section 1292(b) should be sparingly applied.").

Finally, Defendants bear the substantial burden of establishing that they are entitled to such extraordinary relief. *See, e.g.*, *Vila v. Inter-Am. Inv. Corp*., 596 F. Supp. 2d 28, 30 (D.D.C. 2009) (moving party bears "the burden of establishing all three [statutory] elements."); *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 121 (D.D.C. 2009). Such a burden is not carried, as Defendants maintain, by "respectfully submit[ting] that fair-minded jurists could disagree with the Court's conclusion," *Burwell* Section 1292(b) Mot. at 19, or by characterizing the underlying dispute as "political," *id.* at 1.

ARGUMENT

I. The Court's Standing Decision Is Not Based on a Controlling Question of Law As to Which There Is a Substantial Ground for Difference of Opinion.

1. "The threshold for establishing the 'substantial ground for difference of opinion' with respect to a 'controlling question of law' . . . is a high one." *Judicial Watch, Inc.*, 233 F. Supp. 2d at 19; *see also United States ex rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 165 (D.D.C. 2014). Courts in this Circuit consistently have held that that high threshold is not met absent a "split in this district or this circuit regarding any controlling issue of law[.]" *Arias*, 856 F. Supp. 2d at 54; *see also, e.g.*, *Nat'l Cmty. Reinvestment Coal.*, 597 F. Supp. 2d at 122 (denying Section 1292(b) motion where movant failed to identify a split within district on underlying issue); *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 246 F.R.D. 39, 43 (D.D.C. 2007) (same); *Holder* Section 1292(b) Order at 2 (same).

That is exactly the situation here. Defendants have not identified, because they cannot, any split in this district or Circuit on the standing question this Court resolved. On the contrary, *every court* that has considered the issue has agreed that a duly authorized Legislative Branch entity, asserting an institutional injury, has Article III standing to sue an Executive Branch

agency in federal court. *See U.S. v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT&T I*") ("clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 4 (D.D.C. 2013) (House Committee has standing to sue Attorney General to enforce committee subpoena: "There is federal subject matter jurisdiction over this complaint, and it alleges a cause of action that [the Committee] has standing to bring."); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008) ("[T]he Committee has standing to enforce its duly issued subpoena through a civil suit."); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 85 (D.D.C 1998) ("*Census Case*") ("[The House] has properly alleged a judicially cognizable injury through its right to receive information by statute and through the institutional interest in its lawful composition . . . .").[2] Indeed, no court anywhere ever has endorsed the extreme position advanced in this case by Defendants that Congress can never sue to remedy an unconstitutional act by the Executive Branch.

As they did earlier when arguing the standing question itself, Defendants either ignore these rulings or treat them as mere aberrations. And, as they also did before, Defendants rely exclusively on a collection of cases – *Raines*; *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) – that involved *individual* Member plaintiffs who were not authorized to sue by the chambers of which they were Members. Those holdings are patently inapposite, as we pointed

[2] Supreme Court precedent also supports the House's standing here. *See Coleman v. Miller*, 307 U.S. 433 (1939); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (June 29, 2015) (expressly reaffirming premise of *Coleman*); *see also Raines v. Byrd*, 521 U.S. 811, 829 (1997) (noting, in denying standing to six *individual* Members of Congress, that "[w]e attach some importance to the fact that [the Members] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit").

out earlier, *see* Opp'n of the [House] to Defs.' Mot. to Dismiss the Compl. at 38 n.21 (Feb. 27, 2015) (ECF No. 22), and as this Court explicitly recognized, *see* Mem. Op. at 24-27. Particularly in the face of repeated, consistent on-point holdings – *AT&T I*, *Holder*, *Miers*, *Census Case* – the cases Defendants cite do not give rise to the kind of "split in this district or this circuit regarding any controlling issue of law," *Arias*, 856 F. Supp. 2d at 54, that is a *necessary* predicate to any Section 1292(b) certification.

Indeed, just two years ago, another court in this district denied a virtually identical Section 1292(b) motion filed by another Executive Branch official. *Compare Burwell* Section 1292(b) Motion *with* Def.'s Mot. for Certification . . . , *Comm. on Oversight & Gov't Reform v. Holder*, No. 1:12-cv-01332 (D.D.C. Nov. 15, 2013) (ECF No. 57) ("*Holder* Section 1292(b) Motion"), attached as Ex. B. In the *Holder* case, a House Committee sued the Attorney General to enforce its subpoena for documents that concerned the Department of Justice's ill-fated and ill-conceived Operation Fast and Furious. The district court denied the Attorney General's motion to dismiss for lack of Article III standing, *see Holder*, 979 F. Supp. 2d at 4, 26, and he then moved under Section 1292(b) (just as Defendants have done here). Without waiting for the Committee's opposition, the district court summarily denied the motion because the "[Attorney General] has not pointed to any precedent that would supply the grounds for a difference of opinion." *Holder* Section 1292(b) Order at 2. So too here.

2. The law of this Circuit also is clear that "continued disagreement with the trial court's decision" is not enough to justify the grant of a Section 1292(b) motion. *Arias*, 856 F. Supp. 2d at 54 (quoting *Graham v. Mukasey*, 608 F. Supp. 2d 56, 57 (D.D.C. 2009)); *see also Barko*, 4 F. Supp. 3d at 165-66 ("Mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory

requirements for an interlocutory appeal." (citation and quotation marks omitted)); *Nat'l Cmty. Reinvestment Coal.*, 597 F. Supp. 2d at 122 (denying motion for interlocutory appeal where movant "simply reiterated [its] position").

Here, "reiteration" and "vehement disagreement" are all Defendants can muster in support of their motion for extraordinary relief. Indeed, the vast bulk of their motion is devoted *solely* to articulating yet again the same standing arguments Defendants advanced in support of their failed motion to dismiss. *See Burwell* Section 1292(b) Motion at 7-18.[3] That reiteration serves only to confirm what everyone already knows: Defendants really, really disagree with the Court's September 9 ruling, and the Executive really, really does not want to be called to account in a court of law by the Legislative Branch – *under any circumstance*.[4]

But neither Defendants' reiteration, nor the exaggerated nature of their rhetoric, nor the sincerity of the Executive's desire to operate in a Constitution-free zone vis-a-vis the Article I Branch of the federal government, are sufficient under the law of this Circuit to justify Section

[3] The House does not propose to reargue the standing issue here; its position is reflected in the pleadings it filed earlier in this case. However, in declining to relitigate the standing issue here, the House does not concede the accuracy of Defendants' various characterizations of the Affordable Care Act ("ACA") and other legislation, many of which characterizations are not in fact accurate. *See, e.g.*, *Burwell* Section 1292(b) Mot. at 4 (mischaracterizing ACA as "giv[ing] the insurance issuer the legal right to a payment from the government," and as requiring Defendants to establish program for "the unified administration of advance payments"); *id.* at 12 (mischaracterizing Continuing Appropriations Act, 2014).

[4] *See also, e.g.*, *Holder* Section 1292(b) Motion (virtually identical arguments advanced by Executive in contending that district court's ruling that House Committee had standing to enforce congressional subpoena to Attorney General should be certified for immediate appeal); Br. for the United States as Amicus Curiae . . . , *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314), 2015 WL 209078, at *9 ("separation-of-powers doctrine . . . bar[s] . . . suit by Congress against the Executive Branch"); Br. for the Appellants, *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 619297, at *23 (similar); Tr. of Oral Arg. at 70, *Comm. on the Judiciary v. Miers*, No. 08-cv-00409 (D.D.C. June 23, 2008) (DOJ: "[T]here are only two ways for Article III courts to adjudicate disputes before them. One is through lawsuits brought on behalf of individuals aggrieved by the conduct of the defendant, whether it be another individual or the government. The other way is for the executive branch to enforce federal statutes, under its express power under Article II, to take care that the laws be faithfully executed. *There is no third way*." (emphasis added)), pertinent pages attached as Ex. C.

1292(b) relief here. Defendants will have an opportunity to make their "no-standing ever" pitch to the Court of Appeals; they are not entitled to that opportunity now, in the middle of this case.

II. The Court's Cause of Action Decision Does Not Involve a Controlling Question of Law As to Which There Is a Substantial Ground for Difference of Opinion.

Almost in passing, Defendants also suggest there is a substantial ground for difference of opinion on the cause of action issue. *See Burwell* Section 1292(b) Mot. at 19-20. This aspect of their motion suffers from the same infirmities that pervade the standing aspect of their motion.

Notably, *every court* that has considered the issue has agreed that a duly authorized Legislative Branch entity, asserting a constitutional violation, has a valid constitutional cause of action against the offending Executive Branch agency or official. *See, e.g.*, *Holder*, 979 F. Supp. 2d at 23 (House committee has cause of action to enforce congressional subpoena issued to Attorney General: "[W]here the Constitution is the source of the right allegedly violated, no other source of a right – or independent cause of action – need be identified." (quoting *Miers*, 558 F. Supp. 2d at 81)); *Miers*, 558 F. Supp. 2d at 94 ("[T]he Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power.").

This Court's conclusion that "the House has an implied cause of action under the Constitution itself," Mem. Op. at 38, is wholly in keeping with that line of cases, and Defendants are unable to identify a single decision in this Circuit (or elsewhere) to the contrary. The best they can do is "respectfully disagree" with th[is] Court's decision, and assert that they believe "fair-minded jurists could disagree with the Court's conclusion." *Burwell* Section 1292(b) Mot. at 19-20. But "[m]ere disagreement [and conclusory assertions] . . . do[] not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an

interlocutory appeal." *Barko*, 4 F. Supp. 3d at 165-66 (citation and quotation marks omitted); *see also supra* at 4-6.[5]

III. Certification Will Not Materially Advance the Ultimate Determination of This Suit.

Notwithstanding Defendants' promise to seek expedited briefing if they ultimately are permitted to appeal, *see Burwell* Section 1292(b) Mot. at 21, a denial – not a grant – of the *Burwell* Section 1292(b) Motion is the course best calculated to "materially advance the ultimate termination of th[is] litigation," for the following reasons.

1. This case is primed to be resolved on its merits very promptly. There are no facts in dispute; there is no ambiguity or uncertainty in the record; no discovery is required to enable the case to proceed to briefing on, and resolution of, the merits. Accordingly, this is not a case where an interlocutory appeal is needed to "avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). Quite the contrary.

Indeed, because of the manner in which Defendants have sought to frame the case – characterizing the House's claim (albeit incorrectly) as a mere disagreement concerning the implementation of a statute – they forced the parties to write at length about the merits of the controversy in the context of Defendants' motion to dismiss.

Defendants compounded this when they falsely stated at oral argument that the Administration *withdrew* its FY 2014 request for an annual appropriation for the Section 1402 Offset Program. *See* Tr. of Mot. Hr'g at 23 (May 28, 2015) (ECF No. 31) ("There was initially a request and that request was later withdrawn[.]"). That misrepresentation led directly to the

[5] Since Defendants cannot satisfy Section 1292(b)'s requirements with respect to the House's cause of action under the Constitution, their arguments regarding the Court's alternative cause of action holdings – the Declaratory Judgment Act and the Administrative Procedure Act, *see* Mem. Op. at 36-38 – are beside the point since it would be manifestly inconsistent with this Circuit's policy against piecemeal appeals to certify an alternative basis for a particular ruling.

filing of the Joint Submission on June 15, 2015, and two additional rounds of supplemental briefing.[6] All those additional pleadings addressed in detail the merits question of whether Defendants, consistently with the Constitution, could tap the permanent appropriation established by 31 U.S.C. § 1324 to make Section 1402 Offset Program payments, where (i) that statutory appropriation, on its face, is limited to "refunds" due on individual tax accounts and "refunds due from [specified] credit provisions" of the Internal Revenue Code, and (ii) Section 1402 Offset Program payments indisputably are neither.

As a result of all this, the parties (and the Court) already are intimately familiar with the underlying facts and the merits arguments; thus the merits of the House's claims can be briefed up in the form of cross motions for summary judgment and resolved particularly quickly. As the Court is aware, the House has proposed a three-step briefing schedule under which merits briefing would be completed within a mere 11 weeks of the filing of Defendants' Answer. *See* Pl.'s Resp. to Court's September 9, 2015 Order (Sept. 21, 2015) (ECF No. 43).[7]

2. Section 1292(b) certifications are particularly inappropriate where, as here, "certification is sought from a ruling made shortly before trial [or, in this case, a summary disposition]." *Hulmes v. Honda Motor Co., Ltd.*, 936 F. Supp. 195, 212 (D.N.J. 1996), *aff'd*, 141 F.3d 1154 (3d Cir. 1998); *see also Grosdidier v. Chairman, Broad. Bd. of Governors*, 774 F. Supp. 2d 76, 122 (D.D.C. 2011), *aff'd in part sub nom. Grosdidier v. Broad. Bd. of Governors*,

[6] *See* Joint Submission in Resp. to This Court's June 1, 2015 Minute Order (June 15, 2015) (ECF No. 30); U.S. House of Representatives' Suppl. Mem. Concerning Defs.' Mot. to Dismiss (July 1, 2015) (ECF No. 33); Defs.' Suppl. Mem. in Supp. of Their Mot. To Dismiss the Compl. (July 1, 2015) (ECF No. 34); Defs.' Suppl. Reply Mem. in Support of Their Mot. to Dismiss the Compl. (July 17, 2015) (ECF No. 35); U.S. House of Representatives' Resp. to Defs.' Suppl. Mem. (July 17, 2015) (ECF No. 37).

[7] Even Defendants' (predictably) longer proposed schedule would have merits briefing completed within 15 weeks of the filing of Defendants' Answer. *See* Defs.' Resp. to This Court's Order with Respect to the Filing of a Joint Proposed Briefing Schedule (Sept. 23, 2015) (ECF No. 48).

Chairman, 709 F.3d 19 (D.C. Cir. 2013) ("'strong congressional policy against . . . obstructing or impeding an ongoing judicial proceeding by interlocutory appeals'" (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002))); *Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, 2015 WL 128042, at *5 (S.D. Cal. Jan. 8, 2015) (where, as here, "an interlocutory appeal would delay resolution of the litigation, it should not be certified"); Order Denying Mot. to Certify . . . , at 4, *Medina v. Catholic Health Initiatives*, No. 1:13-cv-01249 (D. Colo. Oct. 27, 2014) (ECF No. 241) (where, as here, "granting an interlocutory appeal will delay, rather than expedite, the ultimate outcome of the trial," permission to appeal should be denied).

3. This is not a case where Defendants stand to be harmed by a denial of their motion. If the *Burwell* Section 1292(b) Motion is denied, and if Defendants ultimately were to prevail (either on standing grounds or on the merits), they would be able to make all Section 1402 Offset Program payments (even if some of those payments were delayed). That is, Defendants lose *nothing* by proceeding to the merits now, and then having the jurisdictional and merits issues go up on appeal together.

On the other hand, an interlocutory appeal would significantly aggravate the injury to the House because billions of unappropriated taxpayer dollars would continue to flow out the Treasury door while the Circuit Court considered the appeal. *See* Pl.'s Opp'n to Defs.' Mot. to Defer the Filing of a Joint Proposed Briefing Schedule at 2-3 (Sept. 23, 2015) (ECF No. 47) (estimating that current expenditure of unappropriated funds exceeds $250 million per month). Even if the House ultimately prevailed on an interlocutory appeal (as it is confident it would), that interim injury may not be remediable when the House ultimately prevails on the merits. In short, further delay serves no purpose other than to prolong Defendants' unconstitutional actions.

4. Similarly, this is not a case where Defendants' standing claims "w[ould], as a practical matter, be effectively unreviewable following trial [or summary disposition]." *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P.*, 297 F. Supp. 2d 90, 100 (D.D.C. 2003). If this Court proceeds to resolve the merits now, as the House urges, Defendants still will have the opportunity to pitch their standing and cause of action arguments to the Court of Appeals when the party that loses on the merits appeals. Defendants lose nothing by waiting until this Court issues a final judgment.

5. Finally, given that an appeal in this case seemingly is inevitable, this Court should take into account the fact that the Court of Appeals plainly would benefit from considering the jurisdictional and merits issues together. This is so, both because one appeal is less burdensome than two, and because the standing issue and the merits are closely intertwined here as a result of the manner in which Defendants have sought to frame the dispute. As noted above, Defendants have elected, repeatedly, to characterize this case as a disagreement concerning the implementation of a statute. That characterization (inaccurate though it may be) has forced this Court already to delve into the merits, *see, e.g.*, Mem. Op. at 7-11, and it will force the Court of Appeals to do the same thing when it considers Defendants' standing contentions. Given this, it makes far more sense, as a matter of simple practicality and judicial efficiency, for this Court to deny the *Burwell* Section 1292(b) Motion.

On the other side of the equation, the best Defendants can produce in support of their contention that an immediate appeal would "materially advance the ultimate termination of the litigation" is a collection of sky-is-falling type assertions that are wrong, irrelevant, or both.

a. Defendants say "[a]n opinion from this Court captioned as the resolution of a dispute between components of the two political Branches would inevitably be perceived as an Article III court's endorsement of one side over the other . . . ." *Burwell* Section 1292(b) Mot. at 22.

The whole point of litigation, of course, is for the judiciary to endorse the position of one of the parties to a dispute. However, that reality – let alone the hypothesized "perception" of some unidentified individual or group – simply has nothing to do with whether an interlocutory appeal would materially advance the ultimate termination of this litigation. Indeed, under Defendants' logic, every ruling that preceded a final determination in every case would merit a Section 1292(b) certification.

b. In a similar vein, Defendants say "a later appellate decision . . . could not and would not eliminate the public perception that a court had acted as a referee between the House and the Executive." *Id.* at 23. Whether or not that is true, it is equally beside the point. Neither Section 1292(b), nor any case law of which we are aware, makes "the public perception" in any way relevant to the issue now before the Court. Moreover, maintaining the constitutional vitality of our system of separation of powers is the most basic responsibility of the federal judiciary, and the courts in this Circuit more than once have discharged that responsibility by resolving the merits of disputes between the Articles I and II Branches, notwithstanding any "public perception."[8] Whatever "public perceptions" of judicial rulings may be (or be imagined to be), they are not guideposts for this Court's discharge of its Article III responsibilities.

c. Finally, Defendants say "this Court's opinion could prompt the House to bring new lawsuits against the Executive Branch." *Id.* This Court and others already have rejected this

[8] *See, e.g.*, *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009) (resolving Speech or Debate Clause issue in favor of House Member in case in which House appeared as amicus in opposition to Executive); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) (same); *Miers*, 558 F. Supp. 2d at 105-06 ("The Court holds . . . that Ms. Miers (and other senior presidential advisors) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute."); *Census Case*, 11 F. Supp. 2d at 104 ("[T]his court finds that the [Executive's] use of statistical sampling to determine the population for purposes of the apportionment of representatives in Congress among the states violates the Census Act."); Order at 4-5, *Comm. on Oversight & Gov't Reform v. Holder*, No. 1:12-cv-01332 (D.D.C. Aug. 20, 2014) (ECF No. 81) (directing Attorney General to produce withheld documents responsive to congressional subpoena).

bedraggled old saw that the Executive trots out each time a congressional entity challenges it in federal court for overstepping its constitutional bounds. *See, e.g.*, Mem. Op. at 42 ("The Court is also assured that this decision will open no floodgates . . . ."); *Miers*, 558 F. Supp. 2d at 96 (rejecting argument that "hearing this case opens the floodgates for similar litigation").

Indeed, despite prior favorable legislative standing rulings dating back to *Coleman* in 1939 and *AT&T I* in 1976, congressional entities have filed only a very small number of such cases. What the Executive never seems to grasp is that (i) congressional entities are not motivated to sue just because they can, and (ii) there are many institutional and structural disincentives to such suits. Rather, Congress sues when, as here, the Executive's encroachment on, or interference with, congressional powers leaves Congress with no other viable alternative.[9]

In any event, the imagined possibility of additional litigation has no bearing on whether an immediate appeal would "materially advance the ultimate termination of *th[is]* litigation."

CONCLUSION

The House commenced this litigation nearly a year ago and, at the outset, urged the Court to consider the jurisdictional and merits issues together. *See* Mem. . . . in Supp. of Pl.'s Mot. for Briefing Schedule . . . (Jan. 30, 2015) (ECF No. 21-1). Defendants asked the Court first to consider only their jurisdictional defenses, and the Court acceded to that position. Defendants

[9] *See, e.g.*, *Miers*, 558 F. Supp. 2d at 106 ("[I]f the Executive's absolute immunity argument were to prevail, Congress could be left with no recourse to obtain information that is plainly *not* subject to any colorable claim of executive privilege."); *Census Case*, 11 F. Supp. 2d at 94 ("The only recourse would be to re-conduct the census, even though doing so would come too late for the House to fulfill its duties to oversee a constitutional census every decade. Furthermore, while the subsequent full headcount was being conducted, the House of Representatives would be unlawfully composed.").

A much greater danger than Congress suing too much is Congress not being able to sue at all – the extreme position Defendants advocate – since that would vastly expand the power of the Article II Branch at the expense of the Congress, and seriously undermine our system of checks and balances upon which the individual liberty of each of us ultimately depends.

took their best shot and lost; now the Court should resolve the House's claims. This Court already has held that "the mere fact that there is a conflict between the legislative and executive branches . . . does not preclude judicial resolution of the conflict." Mem. Op. at 20 (quoting *AT&T I*, 551 F.2d at 390). That fact also does not justify Defendants' transparent efforts to delay further still the Court's resolution of the merits of this conflict.

Accordingly, for all the reasons articulated above, the Court should deny the *Burwell* Section 1292(b) Motion and set a briefing schedule for resolution of the merits.

Respectfully submitted,

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October 5, 2015

CERTIFICATE OF SERVICE

I certify that on October 5, 2015, I served one copy of the foregoing Plaintiff United States House of Representatives' Opposition to Defendants' Motion for Certification of This Court's Order of September 9, 2015, for Interlocutory Appeal by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 14-cv-01967-RMC

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States, Defendant.	)	Civil Action No. 12-1332 (ABJ)

ORDER

Defendant has moved this Court to certify its September 30, 2013 order denying defendant's motion to dismiss for lack of jurisdiction pursuant to 28 U.S.C. § 1292(b). He argues that the Court's ruling on the justiciability of the Committee's action to enforce its subpoena is "of potentially great significance for the balance of power between the Legislative and Executive Branches." Def.'s Mot. for Certification of this Ct.'s September 30, 2013 Order of Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) [Dkt. # 57] ("Def.'s Mot.") at 1, quoting *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). The motion will be denied.

The statute on interlocutory decisions provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [s]he shall so state in writing in such order. The Court of Appeals . . . may

> thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it with ten days after entry of the order.

28 U.S.C. § 1292(b). The Court notes at the outset that according to the terms of section 1292(b), the possibility of an interlocutory appeal under this provision is supposed to be triggered by a statement by the district judge included in the order to be appealed. *Id.* The order dated September 30, 2013 contained no such statement. But assuming that a party may move under this provision for the district judge to certify an issue for appeal, the predicate must still be established. And here, the Court cannot make the necessary finding.

While the Court agrees with defendant's characterization of the matter as significant, that is not the test. As the authority cited by defendant indicates, the Court must objectively determine whether the issue for appeal is one on which there is a substantial ground for dispute. *See In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 33142129, *2 (D.D.C. Nov. 22, 2000) ("It is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged rulings when deciding whether the issue of appeal is truly one on which there is a substantial ground for dispute.")

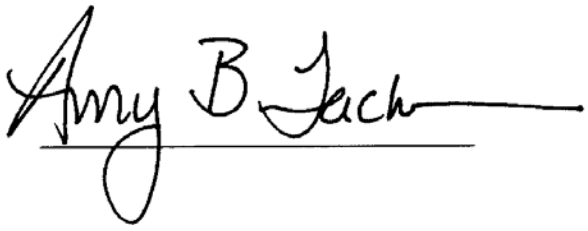
The Court is not of the opinion that its denial of the motion to dismiss involves a controlling question of law as to which there is a substantial ground for difference of opinion. As explained in the Memorandum Opinion, the ruling was based upon Supreme Court precedent and Circuit precedent, and it was decided in accordance with an opinion issued by another judge of this court in a substantially similar matter: *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Defendant has not pointed to any precedent that would supply the grounds for a difference of opinion; *Raines v. Byrd*, 521 U.S. 811 (1997), which found that individual members of Congress did not have standing to challenge the constitutionality of a legislative enactment, does not govern this action.

Defendant also cites *Reese v. BP Exploration Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) and *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) and suggests that the Court should certify the issue for appeal because the case presents novel and difficult questions of first impression. Def.'s Mot. at 5. It is true that in *Reese*, the Ninth Circuit observed that a district judge could find grounds for a difference of opinion even if there have been no decisions that directly conflict with his or her application of the law, and it stated, "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal . . . ." 643 F.3d at 688. But nothing in that statement about what a district court *may* do changes the fundamental principle that "interlocutory appeals under 28 U.S.C. §1292(b) are rarely allowed, and the party seeking interlocutory review has the burden of persuading the court that 'exceptional circumstances justify a departure from the basic policy of postponing appellate review . . . .'" *In re Vitamins Antitrust Litig.*, 2000 WL 33142129, *1. It is also correct that in *Al Maqaleh*, the court was persuaded that "given the novelty of the issues courts could reasonably differ" with its application of a new multi-factored test, and it certified the question. 620 F. Supp. 2d at 55. But coming in the wake of *Miers*, this case did not present a question of first impression, and the defense has failed to persuade the Court that similar extraordinary circumstances pertain.

In its motion, defendant points the Court to the fact that the Court of Appeals issued a stay pending appeal in the *Miers* case. Def.'s Mot. at 1, 6–7. But that ruling did not involve an interlocutory appeal, and it was not based upon any finding that there were "substantial grounds" for a difference of opinion on the question of justiciability. The district judge had issued an order to produce documents and a decision denying a claim of immunity that were immediately appealable, and so, in the opinion cited, the court determined that it had jurisdiction to hear the

appeal. *Miers*, 542 F.3d at 910. The court did state: "The present dispute is of potentially great significance for the balance of power between the Legislative and Executive Branches." 542 F.3d at 911. But that was the entire sentence. The court did not state whether that was the reason it granted the stay pending appeal or whether that was the reason it denied the request for expedition and called for full briefing without the pressure of a shortened schedule. Here, *if* the Court ultimately orders defendant to do anything, he will have an opportunity to ask both this Court and the Court of Appeals to stay the execution of that order if the conditions for a stay – which are different than the conditions for an interlocutory appeal – are present. The Court expresses no opinion at this time as to how that motion would be resolved.

Accordingly, defendant's motion is DENIED.



AMY BERMAN JACKSON
United States District Judge

DATE: November 18, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 14-cv-01967-RMC

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MOTION FOR CERTIFICATION OF THIS COURT'S SEPTEMBER 30, 2013 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

INTRODUCTION

This Court's September 30, 2013 Order denying Defendant's Motion to Dismiss demonstrates that this Court's ruling regarding the reviewability of the President's claim of Executive Privilege in response to a Congressional subpoena is "of special consequence" to the relationship between the Branches and the constitutional separation of powers. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110-11 (2009). And it presents questions that have not yet been resolved by the Circuit, and therefore merits certification for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See id*. Indeed, the Circuit already has acknowledged the significance of such questions in another matter, although it did not ultimately adjudicate that case. The Circuit granted a stay of the *Miers* decision based, in part, on its conclusion that the implications of a justiciability ruling over this type of inter-Branch dispute are "of potentially great significance for the balance of power between the Legislative and Executive Branches." *Comm. on the Judiciary of the United States House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). The significance and novelty of the issues at hand, and that the Circuit has not yet resolved them, make certification warranted here.

A decision by the D.C. Circuit now on the threshold issues presented would, if decided in Defendant's favor, conclude the litigation because the case would be dismissed. That would preserve the resources of the parties and this Court from further litigation. It also would avoid further judicial proceedings on the merits of the Executive Privilege dispute between the Branches in a case where such proceedings may ultimately be wholly unnecessary if the Circuit rules that the matter does not belong in the courts to begin with. And those judicial proceedings, themselves, would compromise the separation of powers under the Defendant's view of the

issues. Thus, the D.C. Circuit should have the opportunity to resolve the fundamental issues of whether such proceedings can even take place, before those proceedings move forward.

Therefore, in light of the "potentially great significance" of the issues that are presented by Defendant's Motion to Dismiss, and decided by the Court's September 30, 2013 Order, Defendant respectfully requests that this Court certify its decision for interlocutory appeal and stay further proceedings pending the disposition of that appeal. *Miers*, 542 F.3d at 911.

Pursuant to Local Civil Rule 7(m), counsel for Defendant has consulted with counsel for Plaintiff, who indicates that the Committee intends to advise the Court of its position on the Attorney General's motion once it has reviewed the motion papers.

BACKGROUND

On October 15, 2012, Defendant moved to dismiss the present suit, in which the Committee seeks post-February 4, 2011 documents related to its allegations of obstruction and responsive to paragraphs 1, 4, 5 and 10 of the subpoena issued to Defendant. The motion argued, among other things, that judicial involvement in a dispute concerning the Committee's efforts to obtain enforcement of a subpoena against the Executive Branch is inconsistent with the process of negotiation and accommodation between the two Branches, which has historically governed such disputes, and would result in a concomitant harm to the separation of powers. *See* ECF No. 13. The motion raised various bases for dismissal, including the Committee's lack of standing and the Court's lack of constitutional or statutory jurisdiction, the absence of a cause of action, and the compelling reasons to invoke the discretionary power of this Court to refuse to exercise jurisdiction over this dispute between the political Branches. *See id.*

On September 30, 2013, the Court denied Defendant's motion with respect to the first count of the Committee's Amended Complaint. *See* Mem. Op., ECF No. 52. The Court held

that, for reasons detailed in its Opinion and "set forth in [*Committee on the Judiciary v.*] *Miers*," 558 F. Supp. 2d 53 (D.D.C. 2008), "neither the Constitution nor prudential considerations require judges to stand on the sidelines." *See id*. at 4. Rather, in the Court's view, "the narrow legal question posed by the complaint is precisely the sort of crisp legal issue that courts are well-equipped to address and routinely called upon to resolve." *Id*. In addition, the Court expressed its view that "[t]here is federal subject matter jurisdiction over this complaint, and it alleges a cause of action that plaintiff has standing to bring." *Id*.

With respect to the second count of the Committee's Amended Complaint, requesting a "declaratory judgment that the Presidential Communications Privilege would not apply 'in the event' the defendant invokes it in the future," the Court held that the claim was "entirely hypothetical and speculative." *Id*. at 36 n.10. Accordingly, the Court dismissed that count of the Amended Complaint *sua sponte*. *Id*.

On October 25, 2013, in response to the Court's Orders, the parties submitted a joint status report concerning a schedule for future proceedings in this matter, including whether the parties are amenable to further mediation. Upon consideration of that report, this Court returned the parties to mediation, to conclude by December 16, 2013, and ordered that any motion pursuant to 28 U.S.C. § 1292(b) be filed by November 15, 2013.

ARGUMENT

I. THIS COURT SHOULD CERTIFY ITS SEPTEMBER 30, 2013 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

This Court may certify an order for interlocutory appeal if it concludes that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This Court's Order satisfies these three

requirements for certification: (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *APCC Services, Inc. v. Sprint Communications Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003). Moreover, the Supreme Court has explained in the specific context of privilege that 1292(b) certification is most appropriate when a decision "involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases." *Mohawk Indus.*, 558 U.S. at 110-11. The Court's Order, one of "potentially great significance for the balance of power between the Legislative and Executive Branches," therefore should be certified. *Miers*, 542 F.3d at 911; *cf. Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 790-91 (D.C. Cir. 1971) (per curiam) (noting certification of question relating to assertion of executive privilege).

A. This Court's Order Involves a Controlling Question of Law

"Under section 1292(b), a question of law is controlling if it would require reversal if decided incorrectly." *Howard v. Office of the Chief Admin. Officer of the United States House of Reps.*, 840 F. Supp. 2d 52, 55 (D.D.C. 2012) (internal quotations omitted). "Controlling questions of law include issues that would terminate an action if the district court's order were reversed." *APCC Services*, 297 F. Supp. 2d at 96. Thus, for example, decisions resolving issues of subject matter jurisdiction involve a controlling question of law. *See id*. (citing *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *United States ex rel. Wis. v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984)).

The arguments presented in Defendant's Motion to Dismiss, including the Committee's lack of standing, the Court's lack of constitutional or statutory jurisdiction to decide Count I of Plaintiff's Amended Complaint as well as the absence of a cause of action, and the compelling

reasons not to entertain an action for equitable relief in these extraordinary circumstances, are foundational threshold issues that would be dispositive of this litigation. Accordingly, there can be no dispute that the Court's Order rejecting those arguments involves a controlling question of law.

B. There Is a Substantial Ground for Difference of Opinion on the Threshold Issues Underlying The Order

The need for a "substantial ground for difference of opinion" on the matters at issue requires neither certainty that the underlying decision was incorrect nor doubt by the Court about the correctness of its decision. After all, a substantial ground for difference of opinion may exist even when "a substantially greater number of judges have resolved the issue one way rather than another." *In re Vitamins Antitrust Litigation*, No. 99–197 TFH, 2000 WL 33142129, at *2 (D.D.C. Nov. 22, 2000) ("Although this Court firmly believes that the facts of this case warrant a ruling in favor of application of the Federal Rules to jurisdictional discovery, the Court recognizes that the arguments in support of the opposite conclusion *are not insubstantial*.") (emphasis added). Accordingly, "when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese v. BP Exploration Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); *see also Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) (finding a substantial ground for difference of opinion in light of "the novelty of the issues" and the fact that "courts could reasonably differ" in their application).[1]

[1] Especially in the separation-of-powers context, the D.C. Circuit has at times disagreed with the views of the district courts that have addressed the same issues. *See, e.g.*, *Miers*, 542 F.3d at 911 (granting stay of order requiring former counsel to the President to comply with congressional subpoena); *United States v. Rayburn House Office Bldg., Room 2113*, 497 F.3d 654 (D.C. Cir. 2007) (reversing district court order involving seizure of legislative records); *Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 208 (D.C. Cir. 2013) (reversing district court order

A number of the issues raised in Defendant's Motion to Dismiss, including the proper interpretation of *Raines v. Byrd*, 521 U.S. 811 (1997), in the context of congressional subpoena enforcement, were also presented by the Executive Branch and decided by the district court in *Miers*. *See* 558 F. Supp. 2d 53. None of those issues has been decided by a Court of Appeals, however, post-*Raines*.[2] The *Miers* litigation was ultimately resolved before the D.C. Circuit acted on the merits. The D.C. Circuit did, however, have an opportunity to consider and opine on the significance of the issues when the Executive Branch sought a stay pending its appeal as of right from the district court's decision in *Miers*. The D.C. Circuit there recognized the seriousness of the issues presented on appeal – issues that included those decided by this Court's September 30, 2013 opinion. According to the D.C. Circuit, those issues are "of potentially great significance for the balance of power between the Legislative and Executive Branches." *See Miers*, 542 F.3d at 911. The D.C. Circuit then proceeded to grant the Executive's request for a stay pending appeal despite the fact that the subpoena that formed the basis for the Committee's lawsuit was about to expire. *See id*.

The seriousness of the jurisdictional issues presented in *Miers* was echoed by Judge Tatel, who concurred in the decision to grant the stay. Judge Tatel noted that the standard for a stay includes a showing of likelihood of success on the merits of appeal, which requires "'questions going to the merits so serious, substantial, difficult and doubtful, as to make them a

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in part and directing the Secret Service to treat records of visitors to the White House as agency records subject to the FOIA).

[2] Defendant recognizes that this Court disagrees with Defendant's view of the novelty of the issues presented, as well as the impact of the Supreme Court's decision in *Raines* on these issues. *See, e.g.*, Mem. Op. at 18-19. However, it is undisputed that these are issues that have not been resolved by the D.C. Circuit post-*Raines*, and that the D.C. Circuit recognized the issues to be "of potentially great significance for the balance of power" between the Branches when granting a stay pending appeal as of right in *Miers*.

fair ground for litigation and thus for more deliberative investigation.'" 542 F.3d at 912 (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Excepting a testimonial immunity issue that is not present in this case, Judge Tatel noted that this standard was satisfied by the remaining "issues before" the court on appeal—the same issues that are, *inter alia*, presented by the present case. *Id*.

In addition to the weighty issues presented here that were recognized as such in *Miers*, this Court's September 30, 2013 ruling also rejected Defendant's significant argument regarding the lack of statutory subject matter jurisdiction (an argument that was not addressed by the district court in *Miers*). Specifically, 28 U.S.C. § 1365(a), which authorizes subpoena-enforcement actions brought by the Senate, contains an express carve-out for cases against Executive Branch officials. That express limitation would be rendered superfluous if, as plaintiffs contend, 28 U.S.C. § 1331 (the general federal question provision for federal court jurisdiction) provides jurisdiction over all congressional subpoena enforcement actions. Particularly in light of the courts' obligation to construe statutes to avoid constitutional questions, Sections 1331 and 1365(a) are best read to foreclose rather than authorize federal court jurisdiction over the subpoena enforcement action here. This significant question, to which the Circuit has not yet spoken, also supports certification of interlocutory review here.

Defendant understands that this Court has concluded that "this case presents the sort of question that the courts are traditionally called upon to resolve." *See* Mem. Op. at 36 (citing "the enforcement of subpoenas, in both civil and criminal litigation, and even administrative proceedings" as well as FOIA litigation). This case presents a critically distinct *context*, however – to which the D.C. Circuit has not yet spoken post-*Raines*, but has recognized as extremely significant. This is so because, unlike routine subpoena enforcement, this dispute involves a

direct confrontation between the political Branches – each with resources that they can levy in a political dispute such as the present, *see* Reply in Supp. of Def.'s Mot. to Dismiss at 4-9, ECF No. 27. And in other settings involving subpoena enforcement, there is a pending civil or criminal case or proceeding otherwise properly within the jurisdiction of the court or an administrative agency in which the subpoena and its enforcement are ancillary, and in which there is an established judicial role. Here, by stark contrast, there is no constitutional or statutory basis and no pedigree deeply rooted in history for a suit by a House of Congress to compel compliance with one of its subpoenas in a suit against a coordinate Branch.

In light of this unique constitutional context, this Court's Order denying Defendant's Motion to Dismiss does not present merely a question of "the applicability of privileges or exclusions asserted by the executive" that is akin to that in "the FOIA litigation that comprises a significant portion of this court's docket." Mem. Op. at 36. Rather, if this Court denies Defendant the opportunity to raise its foundational threshold objections in the D.C. Circuit at this juncture of the litigation, this Court will proceed to decide the validity of the President's view of the scope of Executive Privilege and its applicability to deliberative and other materials sought by Congress that were "created after the investigative tactics at issue in [Operation Fast and Furious] had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation." Letter from the Attorney General at 2, June 19, 2012, available at http://www.justice.gov/olc/2012/ag-ff-exec-priv.pdf. As the Attorney General's June 19, 2012, letter to the President explained, the documents covered by the President's claim of Executive Privilege were created in the course of the Department's deliberative process concerning the Department's response to congressional and related media inquiries; however, they do not all contain material that would be considered

deliberative under common law or statutory standards. The Executive Branch has recognized that confidential material prepared in conjunction with responding to Congress – regardless of whether such material is itself deliberative – is congressional response work product subject to a claim of Executive Privilege, akin to the privilege over attorney work product. Because the President's assertion of Executive Privilege in this context is constitutionally grounded, it is not limited to documents that are "deliberative" under common law or statutory standards. *See* Letter from the Attorney General at 3, June 19, 2012 ("Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise 'significant separation of powers concerns,' by 'significantly impair[ing]' the Executive Branch's ability to respond independently and effectively to matters under congressional review.") (internal citation omitted). Such a situation "implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings." *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997).

In short, the matters to be resolved if this case proceeds – including the validity of the President's view of the scope of Executive Privilege in response to a congressional subpoena – are of both first impression and great constitutional import for the separation of powers between the political Branches. And, once that inquiry is undertaken, harm to the separation of powers and the Executive Branch interests will have occurred, even if that inquiry by the Court is subsequently ruled improper by the Circuit. Accordingly, the merits of this case should not be reached without definitive resolution by the Circuit of the jurisdictional and other threshold issues implicated by this Court's order, which determines whether the matter should proceed in court at all.

C. Certification Would Materially Advance the Disposition of the Litigation

"When there are substantial grounds for difference of opinion as to a court's subject matter jurisdiction, courts regularly hold that immediate appeal may materially advance the ultimate termination of the litigation." *Al Maqaleh*, 620 F. Supp. 2d at 55 (internal quotations omitted). "[I]n the event that it is ultimately found that this Court lacks jurisdiction to litigate [this] case[], it would be far better for all concerned, including plaintiff[], to have these matters resolved now, as opposed to sometime in the distant future." *APCC Services*, 297 F. Supp. 2d at 100. This is particularly so here, where judicial resolution by this Court of the proper scope of Executive Privilege would itself cause the harm to the separation of powers and the Executive Branch that Defendant seeks to prevent.

Indeed, "[a]n immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed." *Id.* Absent settlement (which depends on the willingness of both parties to achieve a negotiated resolution), or an immediate appeal, this Court will proceed toward deciding the scope of the President's assertion of Executive Privilege in response to a congressional demand, and will do so absent a definitive ruling from the Circuit that such a novel judicial inquiry, in a suit instituted by a Committee of Congress, is appropriate under the law, including the Constitution. The very experience of participating in such proceedings will cause harm – to the Defendant, the Executive Branch, and the separation of powers – that cannot be reversed if the D.C. Circuit ultimately rules in Defendant's favor on the threshold questions presented. In light of the harm to the separation of powers that such an adjudication would entail, including the impact of such proceedings on the negotiation process between the political Branches – a process that has generally proceeded without judicial involvement since the inception of congressional oversight

– Defendant's jurisdictional objections should be resolved by the Circuit before this Court takes such a momentous step.

II. SHOULD THIS COURT CERTIFY ITS SEPTEMBER 30 ORDER FOR APPEAL, DEFENDANT RESPECTFULLY REQUESTS THAT THIS COURT STAY FURTHER PROCEEDINGS PENDING APPEAL

Should this Court decide that certification of its ruling for interlocutory appeal is proper pursuant to Section 1292(b), the same factors supporting that decision weigh in favor of a stay of further proceedings pending the outcome of the appeal, considering as well the economy of time and effort for the court, counsel, and the parties. Acting pursuant to its authority to stay proceedings pending resolution of an appeal under Section 1292(b), the D.C. Circuit determined in *Miers* that a stay was warranted, and it did so there even though the stay risked mooting the case before it. *See* 542 F.3d 909.

In light of the constitutional importance of the dispositive jurisdictional and prudential issues decided by this Court's September 30, 2013 Order, a stay is warranted pending resolution of those issues on appeal.

CONCLUSION

For the preceding reasons, this Court should grant Defendant's Motion for Certification and stay proceedings pending appeal.

Dated: November 15, 2013

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2013, I caused a true and correct copy of the foregoing Motion and the attached Proposed Order to be served on plaintiff's counsel electronically by means of the Court's ECF system.

/s/ Eric Womack
ERIC R. WOMACK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 14-cv-01967-RMC

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,	
Plaintiff,	CA No. 08-0409 (JDB)
v.	Washington, D.C.
HARRIET MIERS, JOSHUA BOLTEN,	Monday, June 23, 2008 10:00 a.m.
Defendants.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	IRVIN B. NATHAN, ESQ. Office of General Counsel 219 Cannon House Office Building Washington, D.C. 20515 202-225-9700
For the Defendants:	CARL NICHOLS, ESQ. U.S. Department of Justice 20 Massachusetts Avenue, NW Washington, D.C. 20530 202-514-2356
Court Reporter:	Bryan A. Wayne, RPR, CRR Official Court Reporter U.S. Courthouse, Room 6714 333 Constitution Avenue, NW Washington, D.C. 20001 202-354-3186

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

MR. NICHOLS: How about up? At a level of generality, Your Honor, I think there are only two ways for Article III courts to adjudicate disputes before them. One is through lawsuits brought on behalf of individuals aggrieved by the conduct of the defendant, whether it be another individual or the government.

The other way is for the executive branch to enforce federal statutes, under its express power under Article II, to take care that the laws be faithfully executed. There is no third way. And so I don't even know whether the courts necessarily apply a standing analysis when the executive branch sues in federal court. I think it's the tradition that the executive branch can prosecute or otherwise enforce federal statutes and federal laws in the Article III courts.

THE COURT: So the answer in part is that in this dispute, as in prior disputes between the two political branches, over a congressional subpoena, the executive branch can take it to court and get a resolution because the executive branch has standing, but Congress cannot take it to court because Congress doesn't have standing. That's part of the answer?

MR. NICHOLS: I think there's a significant difference between a lawsuit filed --

THE COURT: But the proposition that I just expressed, is that a proposition that you agree with?