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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

-----	:
DAWN CURRY PAGE, et al.	:
	:
Plaintiff	:
v.	: Civil Action
	: No. 3:13CV678
VIRGINIA STATE BOARD	:
OF ELECTIONS	: April 29, 2014
Defendant	:
-----	:

COMPLETE TRANSCRIPT OF MOTION TO QUASH SUBPOENAS
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 (The proceedings in this matter commenced at
2 10:55 a.m.)

3
4 THE CLERK: Civil Action No. 3:13CV00678,
5 Dawn Curry Page, et al. v. Virginia State Board of
6 Elections, et al.

7 Will counsel please stand, name the parties
8 that they represent, and state their names for the
9 record?

10 MR. ROCHE: Good morning, Your Honor.

11 John Roche on behalf of the plaintiffs. And
12 I'd like to apologize to the Court for my tardiness.

13 THE COURT: Well, I'm sorry that you had
14 difficulty, and particularly in the rain. It's really
15 a lot of fun to deal with tires in the rain.

16 MR. ROCHE: I ran headlong into Murphy's law.
17 Thank you for your patience.

18 THE COURT: Well, you'll recover from it.

19 MR. BRADEN: Mark Braden representing Chris
20 Marston.

21 MS. WALRATH: Jennifer Walrath also
22 representing Mr. Marston.

23 MR. OLDHAN: Dalton Oldhan also representing
24 Chris Marston.

25 THE COURT: All right. This is a motion to

1 quash the subpoenas, etc, docket No. 61. We're down
2 to the issue of the documents subpoenaed to Mr.
3 Marston; is that right?

4 MR. ROCHE: That's correct, Your Honor.

5 THE COURT: All right. So the motion to
6 quash. Who's going to argue --

7 MR. BRADEN: Mark Braden, Your Honor.

8 THE COURT: All right, Mr. Braden.

9 MR. BRADEN: Your Honor, Chris Marston has
10 produced those documents which are relevant under the
11 subpoena and has refused to produce the documents on
12 which he is asserting the privilege of his clients,
13 the Speaker of the Virginia House of Delegates and the
14 Republican members of the House of Delegates. He is
15 asserting their privilege. And that's the basic
16 misunderstanding that appears to be coming from the
17 plaintiff in this case; the notion that this is a
18 privilege of the General Assembly. It is not a
19 privilege of the General Assembly.

20 Legislative privilege is a privilege of
21 individual members and these individual members are
22 asking our client to assert the privilege.

23 THE COURT: They haven't appeared, though, to
24 assert the privilege.

25 MR. BRADEN: He's asserting it for them.

1 He's been directed to assert the privilege of his
2 clients and his employers. And so they have the right
3 to have him assert the privilege. Otherwise, he would
4 be waiving it for them, and he does not have that
5 right. So he is asserting the privilege for them.

6 And why does he have this privilege? We hear
7 an argument that he doesn't have this privilege
8 because he doesn't receive a paycheck from the General
9 Assembly. That's not the issue.

10 THE COURT: But he doesn't.

11 MR. BRADEN: He does not. He absolutely does
12 not receive a paycheck.

13 THE COURT: He's paid by some Republican
14 campaign organization.

15 MR. BRADEN: He's paid by the House
16 Republican Caucus.

17 THE COURT: No, not the Caucus.

18 MR. BRADEN: The House Republican Campaign
19 Caucus.

20 THE COURT: There's a big difference between
21 the House Republican Caucus. That is a group that
22 functions within the House, a group of legislators.
23 The House Republican Campaign is a different issue,
24 isn't it?

25 MR. BRADEN: Well, it's actually a different

1 issue, although, of course, it's the same people.

2 THE COURT: Well --

3 MR. BRADEN: I think the question, and I
4 believe the Court's analysis --

5 THE COURT: Is it the same people or is it
6 the same organization? It's a different organization,
7 isn't it?

8 MR. BRADEN: I would suggest to Your Honor
9 that it is, in fact, most certainly the same people
10 and I believe effectively it's the same organization.

11 THE COURT: How can that be?

12 MR. BRADEN: That it's the same people?

13 THE COURT: That it's the same
14 organization --

15 MR. BRADEN: Well.

16 THE COURT: -- based on his affidavit.

17 MR. BRADEN: Well --

18 THE COURT: I think we need to get the matter
19 straight based on the facts that exist. And as I
20 understand it, it's a different organization. You and
21 I can belong to Club A, and we can also belong to Club
22 B, and we're members of both, but we need to determine
23 whether he is in Club A or Club B, so to speak.

24 MR. BRADEN: Well, Your Honor --

25 THE COURT: His affidavit seems to say that

1 he's in the Republican campaign group.

2 MR. BRADEN: He most certainly receives a
3 check from the Virginia Republican Campaign Caucus.
4 There's no question about that. If the question is:
5 does he represent and is he employed as --

6 THE COURT: You call it the Republican
7 Campaign Caucus. That isn't what it is according to
8 his affidavit. It's the House Republican Campaign
9 Committee.

10 MR. BRADEN: Committee.

11 THE COURT: And that's a different thing. A
12 caucus, as I understand it, to the extent that's
13 actually a useful concept in state legislation, is the
14 group of Republicans who have membership in the
15 General Assembly, the House of Delegates. And the
16 Campaign Committee is an entirely different
17 organization as I understand it.

18 Am I right about that?

19 MR. BRADEN: I think you're right in the
20 sense it's an entirely different organization. It
21 simply happens to be the same people.

22 THE COURT: Or some of the same people, not
23 all.

24 MR. BRADEN: Well, I believe, Your Honor,
25 that the House Campaign Caucus --

1 THE COURT: It's not a caucus.

2 MR. BRADEN: The campaign committee.

3 THE COURT: You have to stopping calling it
4 that because it isn't that. It's a campaign
5 committee.

6 MR. BRADEN: The campaign committee's
7 membership is identical to the House Republican
8 Caucus. These are the same individuals.

9 THE COURT: Is there something in the record
10 that can tell me that or do I have to rely on what you
11 assert?

12 MR. BRADEN: I don't think there's anything
13 actually presented in the record on that fact, Your
14 Honor. I believe, though, that it's something that
15 the Court can take judicial notice of since it simply
16 is the reality that the campaign committee and the
17 caucus are composed of the same individuals, but we're
18 happy to provide you additional materials to that
19 effect.

20 THE COURT: You need to have provided what
21 you're providing at the outset. We've already had to
22 delay this process significantly because you didn't
23 and changed your approach in the reply brief. And so
24 I don't really want to have to do that again. The
25 trial is coming up here on the 20th of May, and I

1 would prefer to go ahead and get it solved on the
2 basis of what we have before us, Mr. Braden, if we can
3 do that.

4 Excuse me for interrupting. Go right ahead.

5 MR. BRADEN: Well, I would suggest to Your
6 Honor whether he receives a paycheck from the Campaign
7 Committee or he receives a paycheck from the General
8 Assembly is, in fact, effectively irrelevant for the
9 analysis that should be done as to whether or not he's
10 entitled to legislative privilege.

11 The question of whether or not he is entitled
12 to assert legislative privilege for his clients, for
13 those people who thought he was acting as their agent,
14 is a question of what his function was. Was he the
15 staff for this process for the Republicans in the
16 Virginia legislature? And the answer to that is yes.
17 If he wasn't, the person is unidentifiable. He
18 provided that staff function.

19 So if we're going to not recognize him, his
20 ability to assert that privilege, then it simply won't
21 exist except for the actual members themselves, which
22 is most certainly not the position of the Fourth
23 Circuit and not the position the Supreme Court has
24 taken on this issue.

25 THE COURT: But the Virginia General

1 Assembly, according to statute, has a way to specify
2 and identify and pay people to do staff work if they
3 think it's an integral part of what they're doing,
4 don't they? Isn't that provided under the statute?

5 MR. BRADEN: Absolutely.

6 THE COURT: He wasn't selected or paid or
7 anything pursuant to those statutes, was he?

8 MR. BRADEN: He was not selected or paid
9 pursuant to those statutes. That most certainly did
10 not mean that he did not perform the function his
11 affidavit said he did, which is provide the staff
12 for -- he was the principal staff person for the
13 Speaker of the House and for the Republican members of
14 the House of Delegates. That's an undeniable fact.
15 That's what happened. That's what his affidavit --
16 there's no contravening. There's no other person that
17 can be identified.

18 THE COURT: He can be deposed on that topic,
19 I suppose, can't he?

20 MR. BRADEN: He can be deposed on that topic.

21 THE COURT: And find out what he actually
22 did.

23 MR. BRADEN: You could find out what his
24 position was. Most certainly to try to ask him
25 questions about what advice he provided to the members

1 would impede on both privileges that we're asserting
2 for him, both the legislative privilege and
3 attorney-client privilege. The issue really is a
4 functional one.

5 THE COURT: But they haven't asked to depose
6 him in connection with this determination.

7 MR. BRADEN: We've received no request for
8 his deposition at this time. So the issue is really
9 one of what's the privilege about. So let's look at
10 it -- because if you don't look at this from a
11 functional point of view, then you've missed the whole
12 purpose of the privilege.

13 The privilege is to permit a legislative body
14 to function efficiently. Our jurisprudence and our
15 form of government has recognized this in the context
16 of executive bodies. We have this judicially
17 recognized concept of executive privilege. We have
18 this constitutionally recognized notion of legislative
19 immunity, and what flows from this is this legislative
20 privilege.

21 And I would suggest to Your Honor you would
22 have difficulty functioning as the judge if the
23 discussions between your clerks or other members of
24 the bench were made public. This is what we're
25 talking about here. We're trying to preserve the

1 ability of the Virginia House of Delegates to
2 function.

3 And if we're going to permit their actual
4 staff person, the person who actually performed the
5 staff work for the redistricting process, if we're
6 going to permit those types of discussions to become
7 public, then legislative privilege has no meaning.

8 Virginia, as is the case in many southern
9 states, does not really have partisan staff. The
10 legislative redistricting process is a partisan
11 process.

12 THE COURT: They have the ability to retain
13 whoever they want and pay them out of funds available
14 to the General Assembly to serve whatever staff
15 functions they deem are important or integral to their
16 work, don't they?

17 MR. BRADEN: They have the ability to hire
18 staff. They have not traditionally hired staff to
19 perform those types of partisan --

20 THE COURT: What difference does the fact
21 they have traditionally hired or not hired such staff
22 make to the analysis here?

23 MR. BRADEN: I think it makes no difference.
24 In fact, I think it makes no difference who writes the
25 check. It's simply a question -- the legislative

1 privilege question is simply a question of what that
2 person does and what that person's relationship is
3 with the elected member.

4 And I would assert to you there's no -- no
5 one is arguing, I don't believe, I have seen no
6 document here arguing that this person didn't do what
7 he said he did, he wasn't the person on the floor with
8 the Speaker, on the floor with the members advising
9 them on a daily basis on this process. He performed
10 those staff functions. It's not a question of who
11 wrote him a check. It's a question of what he was
12 doing. This is a functional analysis.

13 So he, as the agent for the members, has the
14 same privilege that they do, and he's required to
15 assert that privilege. And what the General
16 Assembly's position is on it is irrelevant because
17 it's a personal privilege for these individuals.

18 The Speaker of the House has asked him to
19 assert this. He had that type of relationship with
20 the Speaker of the House.

21 It is simply not possible to have this
22 privilege function if you're going to move it out of
23 the analysis. We see some analysis from other states
24 where there's talk of people who are not on the paid
25 staff as not being eligible, but if you read all those

1 cases very carefully, you're looking at people that
2 are in the context of outside folks, not people who
3 are reporting directly to the people who vote.

4 I think it's very interesting, and it's
5 always nice to be able to quote your opponent's brief
6 where they talk about the case from Illinois, and one
7 of their principal cases that they're discussing, the
8 *Committee for a Fair and Balanced Map v. Illinois*
9 *State Board of Elections*.

10 I hate to read from briefs making arguments,
11 but this one's unavoidable. You can see the quote on
12 page 4 and 5, and I would suggest to you that the
13 telling argument from those cases is although these
14 groups may have heightened interest in the outcome of
15 the redistricting process, they could not vote for or
16 against the Redistricting Act, and they did not work
17 for someone who could. The answer is, our client did
18 work for someone who could vote for and against this
19 matter.

20 Now, we have proposed -- we're also asserting
21 attorney-client privilege on some of the documents,
22 and, clearly, most of the documents that we're
23 proposing privilege on are legislative privilege.
24 There are 88 documents we're proposing attorney-client
25 privilege. Of those 88 documents, 60 of them we're

1 also asserting legislative privilege. So there are
2 only 28 documents in which we're asserting either
3 attorney-client privilege or a work product privilege.

4 And all those documents we believe are --

5 THE COURT: How can there be a work product
6 privilege?

7 MR. MARSTON: When I say "work product," it's
8 basically there's a common interest. There are a
9 handful of documents --

10 THE COURT: Whoa, whoa, whoa. Wait a minute.
11 Work product doctrine is a doctrine that's very
12 specific in its contours, and there are elements that
13 are required to be proven in order to claim that
14 protection of those documents under the work product
15 doctrine.

16 Are you now telling me that -- from what
17 you've just said, I construe that you're really not
18 asserting the work product doctrine.

19 MR. BRADEN: What we're asserting is a common
20 interest.

21 THE COURT: Well, the answer to that question
22 is?

23 MR. BRADEN: The answer to the question is
24 no. What we're asserting is that the vast majority of
25 the documents are between the lawyer and the client.

1 There are some documents in which, a handful of
2 documents, in which we are providing information back
3 and forth with the counsel to the Senate Committee.
4 And we would suggest to you Your Honor that it's
5 fairly obvious why there would be a common interest
6 between the counsel to the Senate Committee and the
7 counsel to the Governor's Office on the passage of a
8 legislative or congressional plan.

9 You simply cannot pass a plan without their
10 support, and you simply cannot enact a lawful plan
11 where everyone agrees on what a lawful plan would be
12 without the counsels for those various players in the
13 process agreeing on the contours of what would be a
14 lawful plan.

15 THE COURT: Have you anywhere identified for
16 me the 88 documents where the attorney-client
17 privilege is claimed and the 28 documents or the 22
18 documents that the claim is there's a common interest
19 privilege?

20 MR. BRADEN: Yes. Your Honor, if you have
21 the log in front of you, you'll see that there's a
22 calling for privilege in which it lists legislative
23 privilege. If you go down on the very first page,
24 you'll see that there's a document on page 1 where
25 it's legislative privilege and attorney-client

1 privilege.

2 THE COURT: And 18 is the document?

3 MR. BRADEN: Yes, that's the one in the first
4 page.

5 THE COURT: And it's a document sent by Mr.
6 Marston.

7 MR. BRADEN: Yes.

8 THE COURT: To Mr. Haughton, who is with the
9 Republican Campaign Committee.

10 MR. BRADEN: That's correct.

11 THE COURT: Right.

12 MR. BRADEN: Yes.

13 THE COURT: And Mr. Haughton is a staff
14 member; he's not a legislator?

15 MR. BRADEN: That is correct.

16 THE COURT: Then it says, Email chain
17 containing communication between Republican members of
18 House of Delegates and staff and consultant/legal
19 counsel advising House Republicans regarding
20 redistricting and other matters. Is that what we're
21 talking about?

22 MR. BRADEN: Yes, Your Honor.

23 THE COURT: How can I tell what is
24 legislative and what's attorney-client from that
25 description?

1 MR. BRADEN: Well, I think in fact you're
2 right, Your Honor. It's very difficult to pull those
3 apart because I think it's appropriately asserted --

4 THE COURT: I'm not asking you whether they
5 can be pulled apart. I'm asking you how does a court
6 look at an entry like that and determine -- let me go
7 back.

8 Let's suppose I conclude you're not correct
9 about the legislative privilege. How do I determine
10 that it is an attorney-client privilege from this
11 description?

12 MR. BRADEN: Well, Mr. Marston is the
13 counsel, as indicated on this log and as indicated in
14 his affidavit. He is providing this document to the
15 Chief of Staff for the House Campaign Committee who
16 was effectively the Chief of Staff for the Speaker of
17 the House and the House Republican.

18 THE COURT: There's nothing in the record
19 that lets me understand that that's the case. That's
20 the first time I've heard that. And certainly it's
21 not being provided to anybody who can tell him to
22 claim a privilege, is it?

23 MR. BRADEN: Well, we're not -- we're not
24 claiming that Mr. Haughton has the privilege. He does
25 not have the privilege. The privilege is the

1 privilege of the Speaker of the House who employs him,
2 who is effectively his boss, who tells him what to do
3 and the other members of the Republican Caucus, or in
4 this case, the Republican Campaign Committee. Those
5 individuals -- he doesn't have -- the privilege, the
6 legislative privilege, isn't his.

7 THE COURT: I'm not talking about the
8 legislative privilege. I'm talking about the
9 attorney-client privilege.

10 MR. BRADEN: The attorney-client privilege.
11 This document is entitled to that because he's
12 providing legal advice to the agent of the Speaker.

13 THE COURT: But there's nothing in the log
14 that says that.

15 MR. BRADEN: Well --

16 THE COURT: Where does it say that?

17 MR. BRADEN: I see the description here where
18 it says, Email chain containing communication between
19 Republican members of the House of Delegates, staff
20 consultant, legal counsel advising them regarding
21 redistricting and other legal matters. That would
22 seem to be a reference, I would think.

23 THE COURT: It doesn't say "other legal
24 matters." It says "other matters."

25 MR. BRADEN: Other matters.

1 THE COURT: It's your responsibility in
2 preparing a log to give the Court and the other side
3 sufficient information upon which to decide if there
4 is an attorney-client privilege or not. And I'm
5 having trouble figuring out how I would find that.

6 I understand your answer, though. Go ahead.

7 MR. BRADEN: Well, Your Honor, needless to
8 say, we did provide this log under some significant
9 time constraints.

10 THE COURT: Just a minute, Mr. Braden. Let's
11 get this straight. Mr. Chockley seemed to have
12 mentioned something about it in a scheduling call, but
13 you were given extra time to do it. And the fact of
14 the matter is this is a relatively small task in the
15 overall scheme of all the litigation that we see in
16 the court. And you were given the extra time that you
17 asked for to perform the job.

18 So the fact that you did it under a
19 relatively short time frame is not an excuse for not
20 knowing what it is that is required to be provided in
21 order to successfully claim a privilege or to perform
22 or to supply a proper privilege log.

23 So let's leave that out and go on with
24 anything else you have to say, but the time
25 constraints don't seem to me to be very -- they are

1 not very significant here actually.

2 MR. BRADEN: I understand the Court's point.
3 At the beginning of this process we did, of course,
4 initially file some motions in the hope that we could
5 avoid filing the privilege log since we were not
6 parties to this litigation, and the cost on the third
7 party was quite substantial.

8 So most certainly I understand the Court's
9 view that that was improper, that we did attempt to
10 avoid the expenditure of these resources initially in
11 this process and to try to avoid creating this
12 document.

13 Marston is the counsel to the Republican
14 members of the House of Delegates in Virginia. He
15 provided them legal counsel for the redistricting
16 process. We've identified those documents here. We
17 believe it's sufficient on its face, but if the Court
18 desires us to provide these documents for in camera
19 review, we're happy to do that.

20 THE COURT: Well, in camera review, generally
21 you have to accompany it with a detailed explanation
22 of each document and why it is entitled to whatever
23 privilege that you claim because the Court simply
24 cannot just make an intelligent in camera review
25 without looking at each individual document and

1 understanding your position.

2 Often that particular exercise is
3 accomplished by grouping documents and saying, There
4 are 50 documents, and each of them fit the same mold,
5 and once you decide it for one, you decide it for all.
6 But none of that has been done in this case. There's
7 been no request for in camera review, even though the
8 law would have permitted you to have made it. And
9 there's been no filing of any papers that would permit
10 an intelligent in camera review. And, of course, the
11 other side is entitled to your paper so that they can
12 respond to it if they want to.

13 You don't have to disclose the details of the
14 document in order to properly explain why you're
15 getting a privilege, but that's how it's usually and
16 traditionally done, and has been for years, and it
17 hasn't been done here. So I don't see how at this
18 juncture I could do that. But you're talking about 88
19 documents, or 20 documents, or how many?

20 MR. BRADEN: Well, we're talking about,
21 depending upon the Court's decision on the legislative
22 privilege issue, there are only 28 documents we're
23 asserting attorney-client privilege where we are not
24 also asserting attorney-client privilege.

25 THE COURT: Well, how many of them are you

1 asserting the attorney-client privilege and the
2 legislative privilege?

3 MR. BRADEN: There are 60 documents in which
4 we're asserting both privileges.

5 THE COURT: Sixty documents?

6 MR. BRADEN: Sixty documents where we're
7 asserting both. Twenty-eight in which we're asserting
8 only attorney-client.

9 THE COURT: Do those documents in either of
10 those categories lend themselves to a circumstance by
11 which review of, say, just as an example, one would
12 permit resolution of all 60 or of some larger segment
13 of them other than the one, or are they all such
14 discrete and different documents that they would have
15 to be reviewed individually in order to make a
16 decision?

17 MR. BRADEN: No, I think it would be possible
18 to break them up into groups that could be identified
19 separately. There are pieces that have been
20 specifically identified and would, I think, instantly
21 be recognized as memos since they at the top say
22 "attorney-client privilege."

23 THE COURT: Mr. Braden, I'm sorry, but just
24 saying "attorney-client privilege" doesn't make it so.
25 There's a test in the Fourth Circuit about what

1 qualifies for attorney-client privilege that began
2 sometime ago in the *Jones* case. So I can't just look
3 at the document that says "attorney-client privilege."

4 MR. BRADEN: No, but, Your Honor, I didn't
5 quite finish. Those particular documents are pretty
6 clearly memos specifically discussing legal positions
7 and analysis of the Voting Rights Act and the Supreme
8 Court's jurisprudence. I would think that they would
9 be easily and instantly recognized as advice from the
10 attorney to the client. And so those, because of the
11 nature of what they were, they've got that type of
12 heading on them, so I would think it would be easy to
13 put aside the small group of memos that are readily
14 recognizable by any counsel as being the type of memo
15 providing a general framework for redistricting.

16 Of course, many of these are simple email
17 chains which simply we can identify. The reason why
18 there are so many documents is a lot of these are
19 different documents, even though theoretically they
20 are single -- you could have viewed them as a single
21 document, we have identified them as a separate
22 document because, effectively, they are different
23 emails of the same message.

24 So it is, I believe, possible to go through
25 here and provide to you a way to do this that would be

1 manageable and easy.

2 THE COURT: But you do understand, Mr.
3 Braden, that we have a trial in what, 22 days or 23
4 days, or something like that? And if you were going
5 do this, this is something that should have been done
6 as part of your original exercise for it is the
7 traditional way to do it.

8 So what is the consequences, I suppose, of
9 having not done it so that I do have a way of
10 reviewing them in camera?

11 MR. BRADEN: Well, Your Honor, I understand
12 your statement. Our initial effort here was, again as
13 a third party, we attempted to avoid that undertaking.
14 We have provided all the documents that we believe
15 these two privileges don't apply to already to the
16 parties in this case. We wished -- our client wished
17 initially to avoid the very substantial cost of taking
18 these additional steps. We're not a party to this
19 litigation.

20 I understand that we've been directed to do
21 this. We've taken the steps to attempt to do this. I
22 understand that the --

23 THE COURT: You keep saying you're not a
24 party and you're correct. But the other part of your
25 argument is that your client isn't intimate to the

1 fundamental decisions at issue in the litigation.

2 If this is another situation where I think I
3 understand that it's understandable that people want
4 to avoid the cost of litigation, but in reality if
5 your client has the critically important role that you
6 say he does, one would have expected that, under all
7 the cases, there was going to have to be a real
8 examination of what these documents were all about in
9 order to be able to claim protections.

10 So I think that argument sort of falls on
11 deaf ears to say that we're at this point now because
12 your client wanted to avoid the expense of doing what
13 the law requires to be done. So that argument doesn't
14 help me a great deal.

15 I guess the real question I was trying to get
16 at is: What's the consequence of not having done what
17 was necessary to be done to demonstrate adequately the
18 privilege here?

19 MR. BRADEN: Well, on the legislative
20 privilege --

21 THE COURT: I'm talking about
22 attorney-client.

23 MR. BRADEN: On the attorney-client
24 privilege --

25 THE COURT: I apologize.

1 MR. BRADEN: I believe that we provided in
2 the logs sufficient information to make that
3 determination. We have provided descriptions of it.
4 We've provided where the documents came from. Who it
5 went to. They have been examined by counsel, both
6 initially by the counsel Chris Marston, and they have
7 been examined by us, and there's a relatively small
8 number of documents which I think really, simply, the
9 description on the forms is sufficient enough to make
10 that determination.

11 Obviously, looking individually, these
12 documents would inform the Court, us dividing them up
13 into separate groups would inform the decision-making
14 process, but we simply believe it's sufficient on the
15 face, the materials that we have provided.

16 Again, we're literally talking about here,
17 since we believe the legislative privilege applies,
18 we're only talking about 28 documents, a very small
19 universe on which we're not asserting legislative
20 privilege.

21 THE COURT: All right. Excuse me. Thank you
22 very much.

23 MR. BRADEN: Thank you.

24 THE COURT: I don't mean to cut you off. I
25 meant thank you for answering that question. It helps

1 me understand where you stand on it.

2 Is there anything else that you'd like to
3 take up?

4 MR. BRADEN: No, Your Honor.

5 THE COURT: All right. Mr. Roche.

6 MR. ROCHE: Good morning again, Your Honor.
7 John Roche on behalf of the plaintiffs.

8 As Your Honor knows, evidentiary privileges
9 are disfavored, and Mr. Marston has the burden of
10 coming forward and proving that any of these
11 privileges, as he's asserted, actually do apply.

12 And I think based on the facts as they exist
13 and as Your Honor pointed out, I don't think Mr.
14 Marston has met his burden here. He does not work for
15 the General Assembly or any of the individual members.
16 He's paid by a partisan political committee. There is
17 a statute that provides for the General Assembly to
18 hire and a pay staff. That was not utilized here.

19 THE COURT: What's the significance of not
20 utilizing it?

21 MR. ROCHE: I think the significance is it
22 demonstrates that Mr. Marston is an independent
23 outside consultant. And so then we have to ask, is
24 there any precedent for applying legislative privilege
25 to outside consultants? And we're not aware of any.

1 The cases we've cited in our brief, the
2 Northern District of Illinois case that counsel
3 mentioned, *Committee for a Fair and Balanced Map*, the
4 *Baldus* case from the Eastern District of Wisconsin,
5 those cases touch on that issue, and they found that
6 outside consultants are not subject to the privilege.

7 In fact, when you discuss these sorts of
8 matters with outside consultants, the privilege is
9 vitiated. It's waived. So we contend that he does
10 not work for the General Assembly and therefore is not
11 covered by legislative privilege.

12 Even if the privilege applies, which we don't
13 concede that it does, but even if it does, we think
14 that the balance of hardships tips in favor of
15 allowing these documents to come in.

16 The legislative privilege is less important
17 when you're talking about staff members as opposed to
18 actual members. Here we contend we're not talking
19 about a staff member, so it's even more attenuated.

20 The documents are potentially relevant and
21 can't be obtained any other way that we can see.

22 THE COURT: I thought the balance that you
23 were talking about was one called into play where
24 there is as substantial federal interest.

25 MR. ROCHE: Exactly.

1 THE COURT: Where we're dealing with a
2 privilege claimed by a state legislator.

3 MR. ROCHE: Exactly. And we think the
4 privilege of a state legislator has to yield when a
5 significant federal interest is at stake. And,
6 clearly, one is here in a congressional redistricting
7 case that has raised issues of racial gerrymandering.
8 We think that's of paramount federal interest and so
9 should give way here even if the Court finds that
10 legislative privilege applies.

11 THE COURT: Well, criminally, the only places
12 where that particular analogy has been applied is in
13 criminal cases; isn't that the case? The overriding
14 issue was a criminal prosecution.

15 MR. ROCHE: The Northern District of Illinois
16 case I believe touched on this as well and found that
17 it applied. It also gave way in a congressional
18 redistricting case. That was the *Campaign for a Fair*
19 *and Balanced Map*. There may have been some discussion
20 of that as well in the *Baldus* case out of the Eastern
21 District of Wisconsin, but I'm fairly certain that
22 there was some discussion of that in the Northern
23 District of Illinois case. And the Court discussed
24 that and then extended it to, in that particular case,
25 to a congressional redistricting matter. So there is

1 at least one case that has hit on that issue.

2 And as far as the attorney-client privilege,
3 it doesn't automatically apply, of course, just
4 because an attorney is involved in communications. So
5 the fact that they've designated Mr. Marston as legal
6 counsel in some of the entries on their privilege log
7 I don't think tells us much.

8 Most, if not all, of the entries, they don't
9 differ at all from the other entries made where they
10 are invoking legislative privilege. So there's no
11 reflection that legal advice was sought or given.

12 So we would contend that the entries on the
13 log are insufficient and constitute a waiver at this
14 late stage of the game.

15 THE COURT: How about the entries such as on
16 page 21, document B217? It's preceded by three zeros,
17 but 217.

18 Email communication between legal counsel to
19 and staff of House Republicans reflecting legal advice
20 regarding redistricting. Isn't that a sufficient
21 description?

22 MR. ROCHE: That is one such sufficient
23 description.

24 THE COURT: You agree that this is
25 sufficient?

1 MR. ROCHE: Anything reflecting legal advice
2 given or received I think would suffice.

3 THE COURT: But the one right above it, which
4 is also attorney-client and legislative, doesn't have
5 anything about legal advice. It says, "Email
6 communication between legal counsel to the Virginia
7 House Republican caucus and staff advising House
8 Republicans regarding redistricting legislation." It
9 doesn't talk about legal advice. It can be political
10 advice, for example.

11 MR. ROCHE: Correct. And there are several
12 entries like that. We think that that issue, plus the
13 fact that many of these communications, and this goes
14 to both of the privileges, appear to involve third
15 parties who --

16 THE COURT: How do we know that?

17 MR. ROCHE: Well, the entries are a little
18 cryptic because, apparently, I guess Mr. Haughton is
19 actually staff for -- Chief of Staff for the Speaker
20 of the House, if I recall correctly. I don't want to
21 put words in counsel's mouth.

22 THE COURT: That's what he said.

23 MR. ROCHE: But I think he's identified in
24 the log several places, if I recall, as staff of the
25 Virginia House Republican Campaign Committee, which is

1 in, I think, the next document down on page 21,
2 B000223. We would contend that's a third party.
3 There are others.

4 THE COURT: Who is the third party there?

5 MR. ROCHE: Well, Mr. Haughton. He's
6 identified here as being from the Virginia House
7 Republican Campaign Committee.

8 THE COURT: He's not even Mr. Marston.

9 MR. ROCHE: Correct. It looks like this
10 particular email is from Mr. Haughton to Mr. Marston.
11 This is not a great example of the attorney-client
12 privilege. We assume they are just asserting
13 legislative privilege here. But we would contend that
14 the House Republican Campaign Committee is not part of
15 the General Assembly. So just looking at the face of
16 this entry --

17 THE COURT: How do we know what the House
18 Republican Campaign Committee is?

19 MR. ROCHE: Well, that's another issue.
20 They've really not, I don't think, sufficiently
21 explained what it is, what it does, and why simply
22 because someone receives a paycheck from the House
23 Republican Campaign Committee but works substantially
24 with members of the General Assembly, that they are in
25 fact employees of the General Assembly or employees of

1 those individual members.

2 I don't think there's any way for us to
3 unpack that here. And it's their burden to come
4 forward and explain that, which I don't think they've
5 done.

6 THE COURT: Well, Mr. Braden said you could
7 take judicial notice of it.

8 MR. ROCHE: I don't know how -- I don't know
9 what we would base that on. Judicial notice of what?
10 Of his statement to that effect?

11 THE COURT: Of its composition. I don't know
12 how you do it, but --

13 MR. ROCHE: I don't either, and I think
14 that's really the issue is that they have the burden
15 to prove this privilege, and I just don't think that
16 they've made it over that bar explaining why this
17 apparently outside group, somehow its employees, its
18 paid personnel, if they work with members of the House
19 of Delegates suddenly become their staff. That hasn't
20 been unpacked or explained sufficiently, I don't
21 believe.

22 THE COURT: Well, on page 6, document No.
23 000272 from Marston to somebody named Clark Benson, a
24 consultant to Republican members of the Virginia House
25 of Delegates. He, clearly, is not -- I mean, I can't

1 tell what he is. He, clearly, is not identified
2 sufficiently for me to understand why he would get the
3 benefit of the attorney-client privilege.

4 MR. ROCHE: Correct. And there's some
5 others. Steve Ellis and John Morgan, I think, are
6 identified at various places as consultants to the
7 Virginia House of Delegates. So that's the issue
8 here.

9 There's been no explanation of how these
10 folks might have had a common interest, what that
11 common interest was, what the nature and scope of that
12 common interest was.

13 And so based on this log, we don't think that
14 there's -- that they've met their burden of asserting
15 either of the privileges, frankly, and they both have
16 been waived if you just look at the face of the
17 document with all these third parties that are
18 apparently involved without an explanation of how
19 those third parties are still -- they still fall under
20 the protection of either privilege.

21 So we would argue that even if either one
22 applied theoretically, that they've been waived.

23 THE COURT: How does he waive it?

24 MR. ROCHE: Excuse me?

25 THE COURT: How does he waive the privilege

1 by providing it to another consultant for the Virginia
2 House of Delegates, a member of the Virginia House of
3 Delegates? How is that a waiver?

4 MR. ROCHE: Well, if that person is an
5 outside consultant, they're not a staff member.
6 They're not a voting member of the House of Delegates.
7 And so I would contend they're an outside third party
8 that has been brought into this process, and
9 information has been shared with them, and the cases I
10 mentioned earlier from the Northern District of
11 Illinois and the Eastern District of Wisconsin hold
12 that once you bring those sort of outside experts or
13 consultants in, privilege no longer applies. You've
14 waived it by not keeping it confidential.

15 And I think the same applies to the
16 attorney-client privilege unless there is some sort of
17 common interest doctrine argument to be made, but I've
18 not seen that developed at all in the record. So we
19 can't assess that either.

20 THE COURT: Looking at the legislative
21 privilege, is it, in your view, a qualified privilege
22 amenable to the kind of categorical tests articulated
23 in *In Re: Grand Jury Case of the Third Circuit*? Or is
24 it to be tested under some multifactor test such as
25 the one in the New York case, that's *Pataki* and others

1 in New York?

2 MR. ROCHE: I think it's a qualified
3 privilege that only applies to -- it applies most
4 strongly to members of the particular legislature
5 you're talking about.

6 THE COURT: But it applies to staff, too.

7 MR. ROCHE: And can also -- I think that's
8 where you get into -- it becomes more tenuous as
9 you're talking about staff, but it can apply to staff,
10 and then, I think, it becomes tenuous to the point of
11 breaking if you're talking about people removed from
12 staff. And I think that's what we're talking with
13 here with Mr. Marston. I don't think there's a
14 sufficient record here to conclude that he is a staff
15 member or an employee of the General Assembly. And if
16 he were, there would have been a resolution. He would
17 have been paid out of the contingent fund pursuant to
18 the statute. None of that happened.

19 And there's been no explanation of how
20 someone from an apparently separate campaign committee
21 outside of the General Assembly can become a staff
22 member just by working a great deal with folks.

23 I think there are probably lots and lots of
24 lobbyists and consultants who work every day with
25 members, and they're subject matter experts and I'm

1 sure are very helpful in many ways to those folks, but
2 I don't think that sort of constant contact or even if
3 they're helping mark up legislation or submitting
4 drafts of legislation for consideration that may be
5 extremely helpful to members who aren't subject matter
6 experts, I don't think any of that converts them into
7 staff members. And I think that's where the privilege
8 applies and that's where it falls apart here.

9 THE COURT: In the federal Congress, it's
10 fairly well known that markup sessions are attended by
11 people who aren't part of staff at all.

12 Is there anything in the record that a
13 similar process occurred here?

14 MR. ROCHE: I'm not aware that there is
15 anything in the record like that, Your Honor.

16 THE COURT: We were talking about legislative
17 privilege and I expect Mr. Braden will want to address
18 this later. I'm a little unclear in your view what is
19 the reach of legislative privilege. Does it include
20 nondisclosure of documents as well as the protection
21 against testimony or is it just protection against
22 testimony?

23 MR. ROCHE: I think the case law indicates
24 that, again, it's strongest with regard to testimony
25 and becomes more and more tenuous as you're talking

1 about documents. And if you're talking about
2 documents from a non-legislator, and I think
3 particularly here, talking about documents in the
4 hands of a non-staff person even, then it becomes very
5 tenuous.

6 So I think it does apply strongest to
7 testimony and is applied with some less rigor as to
8 simply a document subpoena. That's my understanding
9 of the case law anyway.

10 THE COURT: So here you just seek the
11 documents. You don't seek to have Mr. Marston have to
12 testify by deposition or otherwise.

13 MR. ROCHE: Correct.

14 THE COURT: Well, how are you going to use
15 the documents if you don't have him testify to
16 authenticate them?

17 MR. ROCHE: Well, I suppose that we'll have
18 to amend our witness list once we see these documents
19 if we think that there's a need to do that. We can't
20 really -- I guess, we haven't gotten to that bridge
21 yet because we don't have the documents.

22 THE COURT: All right.

23 Anything else, Mr. Roche?

24 MR. ROCHE: No, sir. Thank you.

25 THE COURT: Mr. Braden.

1 MR. BRADEN: Your Honor, they're not unusual
2 occurrences. I appeared to have confused the record
3 on some of this. So let me --

4 THE COURT: A say that again. I missed some
5 it.

6 MR. BRADEN: I managed in my earlier argument
7 to confuse the record a little bit. So I'd like to
8 clear it up if I could.

9 I would like to go to what is in the record
10 that's been presented to this court, which is the
11 declaration of Christopher Marston. If you look at
12 point three in his declaration, "I was the executive
13 director of and counsel to the Virginia House
14 Republican Caucus, which consists of the Republican
15 members of the Virginia House of Delegates."

16 So I think the record then is clear on who he
17 represents and is executive director of; the Virginia
18 House Republican Caucus, which consists of the
19 Republican members of the Virginia House of Delegates.

20 THE COURT: But that isn't who paid him.

21 MR. BRADEN: That is not who paid him. And I
22 would suggest to this court that there is nothing
23 available anywhere in the jurisprudence of this area
24 where who pays makes the decision as to legislative
25 privilege.

1 THE COURT: But none of the cases that you've
2 cited or that he's cited, for that matter, involve
3 situations where there are state statutes defining how
4 the General Assembly when it wants to do something
5 that's important to the General Assembly retains staff
6 or doesn't. And maybe I missed those statutes, but I
7 didn't see them.

8 MR. BRADEN: Your Honor, I think the question
9 is retained. This is not -- again, I think --

10 THE COURT: I'm sorry. The question is what?

11 MR. BRADEN: The word that you used was
12 "retained," and I think you're exactly right in the
13 sense if we're using it in the context of who gets
14 paid to do what. But that payment is not the decisive
15 issue here. It's the functional issue.

16 You were concerned about not who's writing a
17 check. In a sense, it's the same issue in the context
18 of attorney-client. I mean, an attorney most
19 certainly could be paid by someone other than a client
20 that has no effect on the attorney-client relationship
21 between the attorney and the client. Who pays the
22 check has no effect on it.

23 Who pays Mr. Marston, where that check comes
24 from, has no effect on his actual function as a staff
25 person for the members.

1 THE COURT: I don't think they're arguing
2 that the payment question is determinative of the
3 attorney-client privilege. I think, if I understand
4 their argument correctly, the statutes are
5 determinative of the claim of legislative privilege
6 because if the General Assembly thought somebody was
7 important enough or a job was important enough to be
8 done for its essential functioning, that is the
9 General Assembly's functioning, then the statutes of
10 Virginia provide a mechanism for that person to become
11 a staff member of the General Assembly or one of its
12 members or a committee, and that person then is paid
13 out of the funds available to the General Assembly.

14 As I understand their argument, they're not
15 saying the payment makes the difference here either
16 necessarily. What makes the difference is that the
17 General Assembly clearly did not consider them to be
18 sufficiently important to its mission, and its
19 determination, and its sufficient functioning because
20 it did not retain Mr. Marston. That's what I
21 understand.

22 Isn't that your argument, Mr. Roche?

23 MR. ROCHE: Yes, Your Honor.

24 THE COURT: That's what you're not addressing
25 and that I was trying to get you into.

1 MR. BRADEN: Your Honor, I'm happy to address
2 that.

3 That would be a relevant analysis if it was
4 the General Assembly's privilege. It is not the
5 General Assembly's privilege. The privilege does not
6 go to the General Assembly. It doesn't go to the
7 Senate. It doesn't go to the House. It goes to the
8 individual member. That's abundantly clear, I think,
9 from all the cases.

10 THE COURT: So are you saying that under the
11 Virginia statutes, a person could not be hired and
12 retained under those statutes to serve, as Mr. Marston
13 did, as counsel to Mr. Haughton, as you put it? Are
14 you saying that couldn't happen?

15 MR. BRADEN: I'm not saying that it couldn't
16 happen. But what I'm saying is that does not have to
17 happen for an individual to perform the staff
18 function, which would then entitle them to legislative
19 privilege.

20 It's not -- again, it's the individual member
21 and the actual function of their agent. There is no
22 dispute -- I mean, we have an affidavit. I have not
23 seen a dispute of the fact that Mr. Marston played the
24 key staff function for redistricting for the Speaker
25 of the House and Republican members. That's not

1 disputed.

2 The only dispute here was he wasn't an
3 employee; he wasn't paid by the State of Virginia.
4 And the argument being because he wasn't that, he's
5 not entitled to this.

6 THE COURT: That's the point I'm trying to
7 get you to address is they're not arguing that. They
8 are arguing that the fact that he was not put to work
9 under the auspices of the statute demonstrates that he
10 is not the kind of essential, functional person that
11 you claim he is. That's their argument. Now, whether
12 that's right or not is a different issue.

13 But you're oversimplifying it and glossing
14 over the argument to say that the whole issue is just
15 one of payment. At least that's how I think Mr. Roche
16 has made his argument clear. And it does trouble me,
17 given the presence of these statutes, and so that's
18 why I was asking you to address that without focusing
19 on the payment part of it.

20 MR. BRADEN: Let me see if I can focus on
21 that and the reality of how this process goes.

22 It won't be any surprise to this Court to
23 realize that the redistricting process is the single
24 most partisan process of a legislative body. Very
25 difficult. Many members of legislative bodies will

1 say that during their term in the legislature, the
2 most difficult process they had was the redrawing
3 process. It's highly partisan. No one doubts that
4 whatsoever.

5 THE COURT: Mr. Braden, I don't have anything
6 that allows me to make that finding, though, in the
7 record. And the fact of the matter is, one can find a
8 number of very, very difficult issues that the General
9 Assembly confronts that put as much heat on them as
10 redistricting does, if not more, to wit: The most
11 recent battles about the governor's transportation
12 bills. But I draw that from the newspapers, and
13 that's not part of the record here, and neither is
14 what you're saying.

15 MR. BRADEN: Your Honor, let's suggest
16 another step back. Then we have to -- the reality is,
17 according to the affidavit, he was the principal staff
18 person for the Speaker of the House and the Republican
19 members of the House of Delegates. The process in
20 Virginia, and I believe it's undoubtedly in the record
21 or will be in the record before this Court at some
22 stage --

23 THE COURT: Well, we can't deal with what
24 will be in the record because I haven't had a chance
25 to see it. We have to only deal with what is in the

1 record.

2 MR. BRADEN: Your Honor --

3 THE COURT: So let's take what is in the
4 record if you'll help me.

5 MR. BRADEN: What we have in the record is
6 the statement of Chris Marston saying he was the
7 principal staff person for the Speaker of the House
8 and the House Republican delegates. The plan was
9 passed at the direction of the Speaker of the House
10 and the House Republican delegation. So they were the
11 ones who drafted the plan and passed the plan.

12 His function was the chief staff person.
13 There's nothing in the record identifying any other
14 person doing this. There's no record available to
15 this court of any other Virginia person being hired by
16 the General Assembly to do this.

17 It's possible that, I guess, the General
18 Assembly could have done this without any staff, but
19 that does seem to be unlikely.

20 THE COURT: They could have done it by hiring
21 and dealing with staff the way the Virginia law says
22 they're supposed to. What they've done is do it in a
23 way -- and, you see, there are consequences to doing
24 it that way.

25 MR. BRADEN: I would suggest, Your Honor,

1 there are consequences of doing it that way if you are
2 going to reject the way the courts have regularly
3 analyzed this as a functional analysis.

4 THE COURT: The argument that he's making,
5 though, is that by not going through this process, you
6 have -- the record demonstrates that looking at it as
7 a functional analysis, he isn't the kind of person who
8 is sufficiently essential to the legislator's job to
9 fall within the reach of the functional analysis no
10 matter what you call him. That's his argument.

11 Now, whether it's right or not is a different
12 issue, but that's what he's saying.

13 MR. BRADEN: I think that conflicts with the
14 reality of what's happening here.

15 THE COURT: All right.

16 MR. BRADEN: That is, he was the principal
17 staff person. He performed that function. To say
18 that he can't do that because he wasn't hired, well,
19 that simply belies the reality.

20 THE COURT: It isn't what he's saying. You
21 keep repeating that and that isn't his argument. It's
22 not in his papers that way. But I think I understand
23 your point on it.

24 So let's go to the question of the
25 legislative privilege and whether it is a privilege of

1 protection against testimony or also a provision of
2 protection against disclosure of documents as opposed
3 to testimony.

4 MR. BRADEN: Yes. I believe it extends
5 beyond simply testimony.

6 THE COURT: And what cases do you rely on to
7 reach that view?

8 MR. BRADEN: Well, in particular, I would
9 look -- and this, of course, involved a case that
10 doesn't even involve an actual employee of a
11 legislative body. If you'd look at *ACORN v. City of*
12 *Nassau*, that applies specifically.

13 Most certainly, they were looking to get
14 documents in the *Gravel* case in addition to testimony
15 from his congressional aides.

16 *EEOC v. The Washington Suburban Sanitation*
17 *Commission* most certainly is in the context of not
18 only deposing people, but is to reach documents.

19 I'm a little bit at a loss as to how you pull
20 the two apart. As you've rightfully observed, it's
21 difficult to understand the usefulness of these
22 documents if you're not going to depose Chris Marston.
23 I guess they have --

24 THE COURT: I didn't say that. I asked him
25 how he was going to get them into evidence if he

1 doesn't depose him and get them authenticated.

2 MR. BRADEN: Well, and doesn't call him as a
3 witness.

4 THE COURT: Well, the answer to that is he
5 asks to you stipulate. If you refuse to stipulate, he
6 gets to take a deposition for authentication. And I
7 can't imagine you would quarrel over the authenticity
8 of documents, the validity of which you have vouched
9 for in your logs.

10 So I don't think he's got a real problem, but
11 if he does, that's how he would deal with it, I
12 suppose.

13 All right. I've got your position then on
14 the nondisclosure as well as testimony. You rely on
15 *ACORN*, *Gravel* and the *EEOC* cases.

16 MR. BRADEN: Yes.

17 THE COURT: Anything else that you think we
18 need to take up?

19 MR. BRADEN: Well, let me, again, go to --
20 there seems to be some question as to what the
21 composition of the House Republican Campaign Committee
22 is.

23 Point eight of the affidavit, page 2, "Due to
24 the limited appropriations for staff salaries, I was
25 paid as an independent contractor by the House

1 Republican Campaign Committee, which is composed
2 solely of the members of the Virginia House Republican
3 Caucus."

4 So I wasn't clear -- I certainly was not
5 clear in my answer to the Court when you originally
6 asked that question. I think the record, though,
7 is --

8 THE COURT: But they are different entities?

9 MR. BRADEN: What?

10 THE COURT: The House Republican Caucus is a
11 different entity.

12 MR. BRADEN: That's right.

13 THE COURT: And the Campaign Committee is
14 subject to different regulatory laws and serves an
15 entirely different function than does the caucus; is
16 that correct?

17 MR. BRADEN: Entirely different caucus I
18 think is an exaggeration. But in the earlier point --

19 THE COURT: Materially different. The Caucus
20 operates to deal with the passage of legislation
21 within the House and the dealing of the business
22 within the House, as I understand it. The Campaign
23 Committee operates to get people elected. Am I wrong?

24 MR. BRADEN: I believe you're correct in
25 those. Those are, shall we say, slightly entangled.

1 But let me point out point three in the declaration of
2 Mr. Marston. "I was the executive director of and
3 counsel of the Virginia House Republican Caucus, which
4 consists of the Republican members of the Virginia
5 House of Delegates." That's his declaration. That's
6 his position.

7 It's our position in that function in the
8 sworn affidavit he did the staff work for the creation
9 of the plan for the Republican members of the House.

10 THE COURT: All right.

11 MR. BRADEN: Thank you, Your Honor.

12 THE COURT: What is the volume, the number of
13 pages, the number of inches or feet or whatever of the
14 60 documents you claim are subject to attorney-client
15 privilege?

16 MR. BRADEN: If Your Honor will excuse me for
17 just a minute, I will quickly come back to you with a
18 good estimate.

19 THE COURT: One of them can stand and tell me
20 that from the table. That's all right.

21 MS. WALRATH: Your Honor, Jennifer Walrath.

22 I would estimate most of the documents are
23 between one and four pages. So we're talking probably
24 a couple hundred pages of documents.

25 THE COURT: How long will it take you to get

1 me those documents and to identify on them so I don't
2 have to go back and compare which ones are subject to
3 a claim of both privileges and which ones are subject
4 to a claim of just one of the privileges?

5 MS. WALRATH: Well, Your Honor, certainly we
6 could extract from the log just listing out those
7 documents separately if that would be of assistance.

8 THE COURT: That's not what I'm talking
9 about. He wants me to review the documents in camera.
10 If I'm going to review them in camera, I don't want to
11 have to go root around through the log and see, well,
12 is this one or both. I want you to put on that
13 document --

14 MS. WALRATH: Oh, to mark the document --

15 THE COURT: By a Post-it or something that
16 says "attorney-client privilege" and "legislative
17 privilege," and put the document number, and I can
18 find it to the extent that I need anything in the log,
19 but I can look at them quickly. Then I need an
20 explanation if they're not self-explanatory for why
21 it's attorney-client privilege.

22 MS. WALRATH: Your Honor, they are in an
23 electronic database and we have ways to mark them that
24 is quite efficient. I would estimate that it would
25 take us maybe a day or two to get that to you. Also

1 depending on in what manner we had to actually
2 physically get them from D.C. down to Richmond.

3 THE COURT: Well, as Judge Merhige says, You
4 have to travel them down here.

5 You can email them. What I like is to have
6 it in a notebook tabbed and keyed to the particular
7 document that is the document on the index and then a
8 cover sheet that explains why it's subject to
9 privilege. And in this instance, I need to know on
10 the face of the document so I won't have to root
11 through the log whether the claim is of both
12 privileges or only one.

13 He said there was a total of 60. And of
14 those, 28 were only attorney-client privilege, I
15 believe.

16 MS. WALRATH: There are 88. There are 60
17 that are both and 28 that are only --

18 THE COURT: Well, that's what I thought he
19 said at the beginning. Then I got it confused. All
20 right. So there are 88.

21 MS. WALRATH: But if we were to do something
22 in paper organized, I would appreciate having a couple
23 of days to put that together.

24 THE COURT: Well, I understand that, but
25 we're working on a really short fuse here, and this is

1 something that I think probably ought to have been
2 done earlier.

3 So if I'm to be making an in camera review,
4 that's the only way I can do it intelligently. So
5 today you get you can get somebody started on it by
6 telephone, can't you?

7 MS. WALRATH: Possibly. I'm the principal
8 person working on this, but I can see what I can do.

9 THE COURT: You have an IT person that can
10 get them going, can't you?

11 MS. WALRATH: I'll see what I can do. I'll
12 get someone on it today.

13 THE COURT: So you can get them down here
14 tomorrow afternoon by the end of the day or first
15 thing the next morning?

16 MS. WALRATH: I think first thing the next
17 morning. I can do it overnight FedEx.

18 THE COURT: All right. Or you can have
19 somebody drive them down here. That was the
20 old-fashioned way before FedEx came.

21 MS. WALRATH: Considering D.C. traffic, we'll
22 see what we can do.

23 THE COURT: And if you get a flat tire, you
24 get the same exemption he got.

25 MR. ROCHE: Thank you, Your Honor.

1 THE COURT: All right. Thank you all very
2 much. I've appreciate your assistance and your
3 argument.

4 You do you want the transcript, gentlemen,
5 lady?

6 MR. BRADEN: No, Your Honor.

7 MR. ROCHE: No, Your Honor.

8 THE CLERK: Your Honor, I'll make
9 arrangements with her to have them -- if she's going
10 to FedEx them to my attention, I'll bring them up to
11 chambers. That will save a little time.

12 THE COURT: That will be fine. Thank you
13 very much.

14
15 (The proceedings were adjourned at 12:00
16 noon.)

17
18 I, Diane J. Daffron, certify that the
19 foregoing is a correct transcript from the record of
20 proceedings in the above-entitled matter.

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22
23
24
25

DIANE J. DAFFRON, RPR, CCR

DATE