

COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

DEPOSITION OF: DAVID FISHER

Wednesday, May 11, 2016

Washington, D.C.

The deposition in the above matter was held in the Ways and Means Library, Longworth House Office Building, commencing at 9:22 a.m.

Present: Representatives Roskam, Meehan, Levin, and
McDermott.

Appearances:

For the COMMITTEE ON WAYS AND MEANS:

AMANDA NEELY, COUNSEL FOR OVERSIGHT

MACHALAGH CARR, STAFF DIRECTOR FOR OVERSIGHT

BRIGHTON HASLETT, LEGISLATIVE ASSISTANT FOR OVERSIGHT

MEINAN GOTO, PROFESSIONAL STAFF FOR OVERSIGHT

DREW CROUCH, MINORITY STAFF DIRECTOR FOR OVERSIGHT

MELENIE EGORIN, MINORITY PROFESSIONAL STAFF FOR HEALTH

KAREN MCAFFEE, MINORITY CHIEF TAX COUNSEL

Ms. Carr. Good morning.

This is a deposition of David Fisher conducted by the House Committee on Ways and Means. This deposition is occurring under a subpoena issued by Chairman Brady as part of the committee's investigation of the Affordable Care Act's cost-sharing reduction program.

Before I get into my preamble, I'll mark the subpoena as exhibit 1 and enter it into the record.

[Fisher Exhibit No. 1

Was marked for identification.]

Ms. Carr. Mr. Fisher appeared voluntarily in a previous interview but declined to answer several questions, so we are proceeding with the subpoena in place.

Will the witness please state your name for the record?

The Witness. David Miles Fisher.

Ms. Carr. My name is Machalagh Carr, and I am Oversight staff director for Chairman Brady's committee staff.

I will now ask everyone present at the table from the committee to introduce themselves for the record.

Ms. Neely. Amanda Neely, Ways and Means Oversight counsel, the majority staff.

Ms. Haslett. Brighton Haslett, Ways and Means majority.

Mr. McDermott. Jim McDermott, Representative from Seattle.

Mr. Levin. Congressman Sandy Levin.

Mr. Roskam. Congressman Peter Roskam.

Ms. McAfee. Karen McAfee. I'm the chief tax counsel for the minority.

Ms. Egorin. Melenie Egorin, Ways and Means minority.

Mr. Crouch. Drew Crouch, Ways and Means minority staff.

Mr. Goto. Meinan Goto, with Ways and Means majority.

Ms. Carr. Because the witness is compelled to be here by subpoena, we are operating pursuant to the House's procedures for the use of staff deposition authority, which covers the guidelines for today's deposition. We will have copies of the rules here with us today, and you were earlier provided copies of those rules. I will go over them briefly for the record.

Under the procedures, all witnesses who appear before the committee may be accompanied by their own personal counsel. Today, Mr. Fisher, you are appearing without counsel. Do you understand that you have a right to counsel?

The Witness. Yes.

Ms. Carr. The way the questioning will proceed is in rounds. The majority will ask the first questions for up to an hour, and then the minority will have an opportunity to ask questions for an equal period of time if they choose. We will adhere to the 1-hour time limit, and I will manage the clock so we know exactly how much time is remaining on any given round.

Questions may only be asked by a member of the committee or a staff attorney designated by the chairman or ranking member.

We will rotate back and forth, 1 hour per side, until we are out of questions and the deposition will be over.

As I mentioned, we are operating under compulsion. Unlike in a voluntary interview setting, the witness is required to answer all questions posed except to preserve a privilege.

The witness may object to a question to preserve a privilege and not for any other or other reason, such as if the answer would be uncomfortable or confidential. If the witness objects to a question, the objection should be stated clearly and in a nonargumentative manner.

Staff are not permitted to raise formal objections. Only the witness may do so.

The chairman will rule on the objections after the deposition is adjourned, and there is a process in the procedures for the use of House deposition authority for adjudicating any objections. If under those rules it is determined that the witness must answer a question he previously objected to, we will schedule another deposition date for him to come back and provide those answers.

With respect to objections, be apprised that the U.S. House of Representatives and the committee do not recognize any purported nondisclosure privileges associated with common law, including deliberative process privilege and any purported contractual privilege such as a nondisclosure agreement.

As you can see, there is an official reporter taking down

everything we say to make a written record, so we ask that you give verbal responses to all questions.

It is also important that we don't talk over one another so the court reporter may take down a clear record. Do you understand?

The Witness. Yes.

Ms. Carr. We want you to be able to answer questions in the most complete and truthful manner possible, so we will take our time. If you have any questions or if you do not understand our questions, please let us know.

If you honestly don't know the answer to a question or do not remember, it is best not to guess. Please give your best recollection. And it is okay to tell us if you learned the information from someone else. Just indicate how you came to know the information. If there are things you don't know or can't remember, just say so, and please inform us who, to the best of your knowledge, might be able to provide a more complete answer.

We'd like to be able to take a break whenever is convenient for you. This can be after every hour of questioning, after a couple rounds, or whatever you prefer.

During a round of questioning, if you need anything, a glass of water or a break, please just let us know. We will go off the record and stop the clock.

Procedures for the use of staff deposition authority

require a member of the committee to be present during the deposition. Mr. Fisher has a right under the rules to waive the requirement in writing.

Mr. Fisher, you have not waived that requirement. Is that correct?

The Witness. Correct.

Ms. Carr. In a moment, you will be placed under oath. Title 18, section 1621, of the United States Code requires that you answer all questions truthfully when you are under oath. Also, title 18, section 1001, requires that you answer questions from Congress truthfully. Do you understand?

The Witness. Yes.

Ms. Carr. This also applies to questions posed by congressional staff. Do you understand?

The Witness. Yes.

Ms. Carr. Witnesses who knowingly provide false testimony could be subject to criminal prosecution. Do you understand?

The Witness. Yes.

Ms. Carr. Is there any reason that you are unable to provide truthful answers to today's questions?

The Witness. No.

Ms. Carr. Pursuant to committee rules, the witness will be sworn in before providing testimony during a deposition.

[Witness sworn.]

Ms. Carr. I'd like to also note that the content of what

we discuss here is confidential. We ask that you not speak about what we discuss in this deposition to any outside individuals other than your counsel, about what was asked, or your responses.

At this time, are there any comments from the minority?

Mr. Levin. I will make a brief comment.

As we have expressed before, we strongly oppose this deposition. It's unprecedented. It was done without any consultation with the minority.

Also, it's the same subject matter as a lawsuit begun by the very people who have undertaken this deposition -- the same people. The House majority filed a lawsuit. It's on the very same subject matter.

And what's even more interesting is that the attorneys on both sides have stipulated to the facts. So there is no disagreement in the lawsuit as to the facts upon which the case will proceed in court.

Also, the administration has made available employees of the administration for questioning.

So I just want to be clear that this is another effort by the majority to try to undermine the Affordable Care Act. That's what this is all about.

As I said before, this subpoena is unprecedented and is contradictory to the effort in a lawsuit. The majority is trying to have it kind of both ways. They file a lawsuit, they stipulate to the facts, and now the court will decide. In the meanwhile,

they undertake a fishing expedition, the main purpose of which is political and nothing else but to try to undermine the ACA after having, what, 50-plus efforts on the floor of the House.

Thank you.

Ms. Carr. The time is now 9:30. And my colleague, Amanda Neely, will start the first hour of questions for the majority.

EXAMINATION

BY MS. NEELY:

Q Mr. Fisher, have you reviewed any documents to prepare for today's deposition?

A Yes.

Q What did you review?

A Portions of the Affordable Care Act.

Q Would you be more specific about the portions that you reviewed?

A Sections 1401, 1402, 1411, 1412, and section 36B of the Internal Revenue Code.

Q Did you review any other documents to prepare for today's deposition?

A The House rules.

Q Did you discuss this deposition with anyone?

A I informed my employer. I informed my family.

Q Did you discuss it with anyone at the IRS?

A No. I mean, I had one very brief conversation with the Treasury counsel that had been with me last week. The day

or so after that transcribed interview, we just had a very brief discussion. That's my only contact with anyone in the administration.

Q Who initiated that discussion?

A I did.

Q Did you receive any documents from the Department of Treasury prior to this deposition?

A Nothing since the transcribed interview.

Q On May 2nd, 2016, the committee received from the Department of the Treasury a memorandum from Leonard Oursler, National Director of Legislative Affairs, which was directed to you, Mr. Fisher. The subject line was "Testimony Authorization."

A Uh-huh.

Q I'd like to admit that memo as exhibit 2.

[Fisher Exhibit No. 2

Was marked for identification.]

Ms. Neely. And we would just like to put on the record that the committee disagrees with the Department of the Treasury and the IRS that these agencies have the authority to limit what information its employees share with the United States Congress. Not only is it improper, but it is illegal and it is against the law to deny or interfere with Federal employees' rights to furnish information to Congress pursuant to 5 United States Code, section 7211, and the First Amendment.

And, Mr. Fisher, whether you choose to answer questions today or not is your decision. As described by Ms. Carr previously, if a question is subject to privilege, then you can articulate that, but, otherwise, you're compelled to answer questions here today.

Mr. Levin. Could I suggest -- we can't really understand what you're saying.

Ms. Neely. I will try to speak up.

Mr. Levin. Okay.

Ms. Neely. Thank you.

Mr. Levin. I'm not sure the witness can either, but --

Ms. Neely. Mr. Fisher, please let me know if you can't hear what I'm saying.

The Witness. I will.

Ms. Neely. Thank you.

BY MS. NEELY:

Q Mr. Fisher, has anyone given you any instructions about your testimony here today?

A No.

Q Do you recall the first time that you heard of the cost-sharing reduction program generally?

A It would have been fall of 2013, late fall of 2013.

Q In what context did you become aware of it?

A There was a discussion I had with the Deputy Chief Financial Officer at the IRS regarding some, at the time, sort

of accounting-related issues associated with the pending payments that would come from the cost-sharing program when that program would start, which I believe was the end of January 2014, was when the first payment was due.

As the Chief Risk Officer, I am commonly engaged with senior leaders from around the IRS. And there was a potential concern about these payments. So it was from the Deputy Chief Financial Officer's perspective.

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

A Correct.

Q Do you recall specifically what month he approached you?

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

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

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

So there was an introductory comment, I think, sort of from

both sides here. As I'm getting into, now, things that clearly I was unable to answer last week and am going to be answering this week, can I have 30 seconds to just explain that?

Q Yes, sir.

A So I followed, as we all recall, the Treasury's guidance last week based on this testimony authorization, which had clear limitations associated with it, and was unable to answer questions consistent with that and the administration's guidance at the transcribed interview.

The purpose of the phone call that I initiated last week with Treasury was to inquire, after reading the House rules, receiving the subpoena, and being aware that the only restriction -- or the only reason to restrict answering questions under the subpoena would be privilege, and posed that to the administration, of whether or not they were planning to go to court and assert executive privilege around the deliberative process.

I posed that. I did not receive an answer. I still have not gotten any answer back. I sent Treasury a note yesterday, so we didn't talk, but I sent them a note simply identifying that I had not heard from them. I'm assuming or deducing that no privilege is being asserted and have no further guidance from them regarding this.

So I'm here under subpoena. It would have been far preferable to me for the executive branch and legislative branch

to resolve this dispute independently and not sort of put me in the middle of being the arbiter of what to say or what questions to answer and what not to answer.

But we are here under subpoena. I have no privilege assertion from the executive branch, which is the reason why I'm here to answer any of your questions without limitation.

I wanted to walk through my thought process in trying to balance the equities here on the backs of an individual who should not be balancing those equities. Yet the administration had an opportunity to try to move forward on some other step along the lines of privilege. They clearly have chosen not to do that. I'm in no position to do that. I'm here to answer your questions.

I'm sorry. If we can go back to Mr. Kane and your question about sequestration.

Q Thank you for that statement, Mr. Fisher.

When you first spoke with Mr. Kane --

A Yes.

Q -- what concern did he express to you?

A It was his initial understanding -- and so I'm going off of what he told me. I don't have firsthand knowledge of this. This is through what he informed me.

And I'll say, by the way -- my sense is his name may come up a couple of times in this conversation -- he is an outstanding civil servant. He's been in the public service for over 30 years. Just a phenomenal financial management lead, has done

great work at the Internal Revenue Service.

And in doing what I'm about to describe, he was absolutely just doing his job. He identified a risk. Risks are there to be identified. They exist. It's management's job to then figure out what to do with those risks once they're identified. That's what we try to do in enterprise risk management programs, is to have people see things that they're not sure what the right thing to do is, some outcome could occur, and they want to engage senior leaders into making sure they have all the information necessary to make a good decision. He did exactly that.

It was his understanding that HHS either had or was going to submit a budget request -- or, through the budget process, a request for an appropriation for the cost-sharing program. That would be subject to sequester.

And it's relevant to the IRS because the IRS is the one who's actually, quote, writing the check, if you will, disbursing the funds. The way the law was written, HHS identifies the need for a payment to the Treasury. Treasury then has the IRS go make the payment. But, from an accounting standpoint, payment is on the IRS's books. And, therefore, the IRS would need to decide whether or not to sequester those funds if sequestration kicked in.

The original understanding, I believe, from Mr. Kane was that these funds were going to be appropriated funds and, therefore, subject to the sequester. But it had recently come

to his attention that the budget request, I believe, had been withdrawn and that the expectation was that these payments would come out of the permanent appropriation, from which refunds and other credits like the Advance Premium Tax Credit would be paid. And that appropriation is not subject to sequester.

So this was entirely an accounting-related discussion related to, you know, appropriations law, as to whether or not the payments for this part of the Affordable Care Act would be subject to sequestration. And he wasn't exactly sure because of what he saw as somewhat of a shift in where the funds had originally been planned to come out of, which would've been subject to the sequester, to now this change in thought process which would no longer make it necessary to sequester any of those funds.

Q Do you know with whom Mr. Kane talked with HHS about this issue, what called the issue to his attention?

A I don't have direct knowledge of that. I know he had conversations with people at HHS. With whom, I have no idea.

Q Did HHS express any concerns to Mr. Kane, to your awareness, about the funding for the CSR program?

A I don't have knowledge of any of those conversations.

Q If you could help me understand a little bit about the accounting issue here, when HHS was going to request the funds in their budget, their section of the budget, would those funds have resided at HHS or would they have resided at Treasury for

IRS's disbursal?

A So the accounting was confusing to me even at the time. And my discussion this morning is entirely based on memory. So, like I said, I haven't talked to anyone or looked at documents other than the law.

But, as I recall, the funds would -- let me step back. So, clearly, for the things that are in the permanent appropriation, then obviously that's a Treasury payment that's subject to the authority of the Treasury Department.

Q For the premium tax credits and other tax credits and refunds.

A For things that are authorized under the permanent appropriation covered in section, I think -- I'd have to look at the section in 31 USC that talks about the refund and credit account.

Whether the funds for the cost-sharing program would've been in the IRS's books or the HHS, I actually don't know where those would've been resided. It was not in the IRS's budget request. I do know that.

And you showed me last week, which was the first time I had seen, during the transcribed interview, two documents that indicated HHS budget requests and then, I think, a Senate document, if I recall, that showed something to the effect of the \$3.9 billion at one point had been in some official request. Whether those would've been sitting in the HHS books or the IRS

books, I don't know.

I do recall there was this issue that we touched on briefly last week in general about payments related to the Affordable Care Act were, in essence, going to be authorized in terms of amount and who the payee or -- whoever we're paying to would've been authorized by HHS but paid by IRS.

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

Whether or not that \$3.9 billion would have been in the IRS books or HHS books, I don't know.

Q Do you know if the IRS ultimately got that detailed information they would need for an audit trail?

A My understanding at the time that I left the IRS was that the full automated procedures and system changes had not occurred yet but that there were processes in place, control processes, that were negotiated between the different accounting organizations as to where the detail would be kept and that it was still to be worked out -- you know, auditor access to the other organization, because HHS's auditors are going to need to

have access to the end-to-end trail as well as IRS's auditors would have to have access.

And I believe the detail was going to still be in the hands of HHS, the summary was going to be in the hands of IRS, and there would have to be some coordination between the accounting organizations and the auditors to be able to do that kind of tracing. Because, at the time, I don't believe the full automation of that detail, if it ever was going to be transmitted in detail, I don't believe was in place.

And this was just, you know, standard internal control, financial accounting kind of concern that you would expect the Deputy Chief Financial Officer to identify as a potential risk that needed either monitoring or mitigation.

Q During this late-2013 timeframe, do you recall having any conversations with anyone at Treasury, not the IRS but larger Treasury, about this issue?

A Personally, no.

Q Do you recall anybody else talking with people at Treasury about this issue?

Mr. Levin. What's that question?

Ms. Neely. Does he recall anyone else speaking to Treasury about this issue?

Mr. Levin. Does he recall anybody else talking to Treasury?

Ms. Neely. For instance, if they reported back to him that

they had spoken with Treasury.

Mr. Levin. I think you should, if I might say, make sure you ask a clear question so he can give an answer.

Ms. Neely. Yes, sir.

Mr. Levin. You asked does he know anybody else. Okay.

BY MS. NEELY:

Q Do you know if anyone else within the IRS talked to anybody at larger Treasury about this issue?

A I don't have any direct knowledge of that.

Q Do you know if anyone else at IRS talked to anyone at HHS about this issue besides Mr. Kane?

A Mr. Kane's the only one that I spoke with. If there was staff involvement, again, I have no direct knowledge.

Q After Mr. Kane approached you, what happened after that, relating to this issue?

A So, from my standpoint, again, as Chief Risk Officer, I was now aware of the risk, which is exactly the protocol that we want our people to follow. At the time, it did not rise to the level of, you know, a significant enterprise risk that needed to have some immediate response from the Risk Management Office. It was for awareness purposes.

The teams were working the issue, and, again, the question being related to sequestration, accounting, internal controls. And for some period of time, it was the kind of thing where the financial management team was working this issue, and

periodically I would see Mr. Kane and we would chat about progress along those lines. And that probably continued for a month or so.

Q Who on the financial management team, to your understanding, was working on this issue?

A The only one I know directly was Mr. Kane.

Q To your understanding, when was it determined that the permanent appropriation would be used to make the cost-sharing reduction payments?

A So it had been raised as a possibility in my initial discussion with Mr. Kane on the question regarding sequestration. At the time, it was more of, "We're a little confused about this, and we want to learn a little bit more," because we were getting somewhat conflicting information on perhaps a different original strategy and now a different approach. And so that potential had been raised in my initial conversation with him about sequestration.

I would say over the subsequent month, as we got into November, perhaps closer to December, it became clear that that was the intent, was to use the permanent appropriation to pay the cost-sharing reduction payments.

Q You said the IRS had received conflicting instructions about --

A Not instructions. Again, as I described earlier, there was this original awareness of the budget request that HHS

had put forward at some point but then had been withdrawn. And, again, this is through Mr. Kane, from an accounting standpoint, thinking that was the original approach, or an approach, that had him thinking what do from a sequestration standpoint. And somewhere in this timeframe he had been alerted to the fact that that was no longer the approach, or appeared to be no longer the approach, and that the approach would be to utilize the permanent appropriation.

So, again, that had been raised, but it was still confusing at the time, and the team had to work through this a little bit to find out a little bit more -- is this a change? Was this the original strategy? -- and make sure that they had a good foundation for utilizing the permanent appropriation for these payments.

And that's what the accounting team was doing in this period that I described from, you know, late October into November. And sometimes it takes some time to get to the core elements, especially when it's not all within your agency. There's other equities that were involved here that he needed to track down and clarify.

Q Do you know why that shift occurred from HHS requesting an appropriation versus using the permanent appropriation for the CSR payments?

A No.

Q Was this concern documented in any way in that

late-2013 time period?

Mr. Levin. What concern?

Did you understand the question?

BY MS. NEELY:

Q Was this risk that you identified related to the cost-sharing reduction program and the sequester, was that documented at any point during this late-2013 --

A Not to my knowledge. My insight was in verbal conversations with Mr. Kane, which was pretty standard for my engagement with senior leaders, you know, around the IRS. We have lots of informal conversations, which is, again, the culture and climate that we were trying to foster, where people would be open to having these kinds of conversations and sharing information that could potentially be a risk.

Q Moving into January of 2014 --

A Okay.

Q -- do you know if anyone at the IRS documented anything about the source-of-funding issue related to the cost-sharing reduction program?

A Not to my knowledge. I don't recall any documentation from the IRS.

Q You attended a meeting at the Old Executive Office Building with the Office of Management and Budget on January 13th, 2014. Is that right?

A Correct.

Q How did you learn that that meeting was happening?

A So, in the week leading up to that meeting, sometime during the week leading up to that meeting, I became aware that the meeting was going to occur. I don't recall precisely. We had, again, lots of meetings. We had morning stand-ups with the Commissioner. We had regular interaction where people would go around the table and say what's happening today, that kind of stuff. It could have been one of those meetings. It could have been something that Mr. Kane told me. I'm not completely sure.

I was not, as we discussed last week, part of the original invitation to that meeting, which, again, was not terribly surprising because the focus was on the accounting and the legal side of this, so the financial management team and the legal team were the ones that were prominently going to be participating in this meeting.

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

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

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

A Entirely related to appropriations law and whether or not the utilization of the permanent appropriation for the cost-sharing program had been appropriately appropriated by the law, you know, through the vehicle of the statute.

And that was, I'll say, unclear at the time. And that was the purpose, that we were going to go understand the administration's thought process in coming to the conclusion that, yes, that could be used.

Q At the January 13th, 2014, meeting.

A That was really the purpose of that meeting.

Q Could you describe what happened at that meeting?

A So a bunch of us went in vans from the IRS to the Old Executive Office Building. We were taken into the General Counsel's conference room. There were some brief introductions of the IRS attendees and the OMB attendees.

We were given a memo to read. We were instructed we were not to take notes and we would not be keeping the memo, we'd be giving it back at the end of the meeting. But we had an opportunity to read the detailed memo identifying why -- or justifying the payments out of the permanent appropriation.

The OMB team left the room. The IRS team stayed in the room. We all individually read the memo. At the end of that, the OMB people came back in. There was some brief conversation with a small number of questions that were asked and answered back and

forth. The meeting concluded, and we got in the vans and went back to the IRS.

Q What did the memo discuss?

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

Q And what was that rationale?

A So --

Mr. Levin. I'm going to leave. I just have to go to a hearing.

The Witness. Okay.

I'm sorry. Could you repeat the question?

BY MS. NEELY:

Q What was the rationale in the memo?

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

And there was allusions to a statement that had been made on the floor. There were allusions, I believe, to statements that might have been made in the media. There was the coupling of the fact that in section 1412, the payment authorization

section, is that both of these payments were in the same section, for both the Advance Premium Tax Credit and the cost-sharing reduction payment both being referenced and discussed in section 1412.

And there were a number of other justifications on why the administration concluded that it was appropriate to use that appropriation for these payments. But, as I recall, there was no sort of single, main argument. It was more of a collection of -- almost a commentary on elements that, in total, would draw the conclusion that these payments out of the permanent appropriation would be appropriate.

Q And who did you understand wrote the memo?

A The OMB attorney Sam Berger was identified as the author. He was in the meeting, and he participated in answering some of the clarification questions that occurred after we read the memo.

Q What clarification questions were raised?

A So there weren't very many. The discussion was relatively brief. There was a process-related question that I recall -- and, again, this is based on pure recollection of the things that stood out and were retained in memory. There was the process question of, you know, is this memo guidance? Is it a decision? You know, what are we actually, sort of, reading here in terms of an outcome? And, sort of, who had been involved in the review of this memo?

Because it became clear that, while we were seeing the memo for the first time here in mid-January, this memo had been discussed both within the Office of Management and Budget and in the Justice Department. Whether there were other parties involved in those discussions, I don't know, but those were the two that stood out that had been involved in, you know, supporting or approving of Mr. Berger's memo.

And our understanding, as I believe it was explained in the meeting, was that the administration has gone through the legal analysis and has come up with the opinion that, based on the information contained in this memo, it was appropriate to use the permanent appropriation to pay for not only the Advance Premium Tax Credit but also the cost-sharing reduction payments.

And that was the administration's conclusion, and, therefore, the payments should be made. I mean, I think that was the assumption out of that legal analysis that the administration had performed, is that the law as stated should now be fulfilled, with HHS identifying to whom and how much payments should be made for the cost-sharing reduction program. That information would be communicated to the Treasury Department, and the IRS would then go make those payments out of the permanent appropriation based on this legal analysis.

That was one line of questioning that -- Mr. Berger and Ms. Washington, the OMB General Counsel, were the principal people who were involved in providing responses. As I indicated

last week, there were two or three other people from OMB in the room that I don't recall really saying anything, and I don't remember their names. So that was one of the lines of questioning.

Q You said initially that one of the lines of questioning was a question of whether this document was a decision or what type of document it was.

A Uh-huh.

Q What was the answer to that question?

A So it was characterized as: This is the administration's legal analysis, that a conclusion has been made, a legal conclusion has been made, and that it was appropriate to move forward on the payments per the schedule, beginning in late January, using the permanent appropriation.

So that was their legal conclusion. And I think the expectation was that it would be now followed in practice by the implementing agencies.

Q Would it be fair to characterize that as a directive, as an instruction to move forward?

A I don't know if I would use that term, yes or no. I don't know. I mean, there was no formal action note at the end that says, "Thou shalt go do this." It was more, "Here's our legal justification. Wanted to make sure that you're aware of it." And I think the expectation was that the actions that I just described would occur.

I'm not sure, you know, if a word, a specific word, would characterize what that communication was implied to mean, in terms of a "directive," quote, or something along those lines. That was not my term, and I'm not sure if it would be appropriate or not.

Q Fair enough.

You said that one of the questions raised was who had reviewed and approved the memo.

A Yes.

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

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

Q You mentioned Ms. Washington. Was it your sense that she had approved the memo as well?

A Oh, people in the room? I mean, clearly, Mr. Berger approved it. He wrote it. Ms. Washington also approved. And I had no reason to believe any of the other OMB people in the room had any -- they didn't express any concerns or support one way or another. Again, they were relatively silent. But the two OMB people who were talking in the meeting approved of the conclusion.

Mr. McDermott. May I ask a question?

Ms. Neely. Yes, sir.

Mr. McDermott. This document you held, was there at any

point anyplace where people's initials had been put on it as having read it or approved it or anything?

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

The Witness. Yep.

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

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

Mr. McDermott. Made by whom?

The Witness. Ms. Washington.

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

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

So that was really the only reason that it's a recollection of mine, is that she had made this sort of anecdote along the

lines of having had the first opportunity to brief the Attorney General personally. That was the only reason his name, I believe, came up.

I don't recall any initials or signatures on the memo itself.

BY MS. NEELY:

Q In the course of that discussion, do you recall if anyone else in the administration, from Treasury or HHS, if their name was mentioned as approving or reviewing the memo?

A I don't recall any other names being mentioned.

Q What happened after that meeting, immediately after and then the next couple of weeks?

A So, as we returned to the IRS, there was a discussion about what do we do next. The group was not in consensus on the merits of the argument as conveyed to us through the memo and in this discussion. And I know I was certainly one of the advocates for setting up a meeting with the Commissioner of the IRS to make sure he's fully informed.

Exactly like we talk about in enterprise risk management, that's exactly what we're there to do, is to identify potential risks, manage them where we can, and things that rise to the level of the enterprise that really require senior-level engagement, it's our job to bring that to his attention.

And I don't believe I was the only one, but I was certainly one of the advocates for making sure that we set up a meeting

with the Commissioner between that date and when the first payment was to be made. I wanted to make sure that we had that discussion before the payment date, which, again, was late January.

Q You said you wanted to set up a meeting with the Commissioner. Was that because you disagreed with the analysis in the memo?

A I had concerns about the analysis in the memo, yes.

Q Who else had concerns about the analysis, to your understanding?

A I'd say the only person who also shared some of my concerns, you know, in particular related to appropriations law -- which this was entirely about appropriations law. There could be many other people who think this is about health care. To us, this was not about health care.

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

And so Mr. Kane, I think, had some reservations still, even

after, you know, reading the memo and going to the meeting. I don't believe there was as much concern with most of the other folks.

Again, there were three people in the meeting from the financial and accounting world -- the Chief Financial Officer, who I think had some reservations, but they were not overwhelming, and -- actually, the other person was from the legal team, but, you know, the appropriations inside counsel for things like shutdown, sequestration, and other issues related to the Antideficiency Act and things like that, actually, I don't recall her expressing an opinion.

Q And who is that person?

A Kirsten Witter I believe her name is.

Q And we can introduce as exhibit 3 the White House logs of people who were in that meeting, if that's a useful reference for you in the course of this discussion.

A Sure.

[Fisher Exhibit No. 3

Was marked for identification.]

Mr. McDermott. Would you identify what this exactly is in the record?

Ms. Neely. This is a White House visitors access log. It's a screenshot of that from January 13th, 2014, identifying this meeting that we were talking about at the White House at 3:30 p.m., January 13th, 2014, the visatee name being Geovette

Washington, who was the OMB General Counsel at the time.

Mr. McDermott. Okay. Thank you.

Ms. Neely. You are welcome.

BY MS. NEELY:

Q During the course of these discussions about the meeting with Commissioner Koskinen, did you or anybody else raise the topic of the Antideficiency Act?

A So, just to be clear, there was one discussion. It was not plural. It was a single meeting. And, yes, I raised those concerns.

Q And what happened in the course of that meeting, the meeting that you discussed prior to the meeting with Mr. Koskinen?

A I'm sorry, I just want to make sure which meeting I'm talking about.

Q Of course. So you had the OMB meeting.

A Right.

Q And then you said that you and other people who were in the meeting talked about getting a meeting together with Mr. Koskinen.

A Correct.

Q What happened in the course of that meeting?

A The meeting with the Commissioner?

Q No, the meeting where you talked with people about having the meeting with the Commissioner.

A Oh, that was not a meeting. Again, that was in the drive back to the IRS and probably in hallway conversations, you know, "Hey, when's that meeting going to get scheduled," kind of thing.

The Chief Counsel was the Commissioner's point person on this --

Q Bill Wilkins?

A Yes, Mr. Wilkins. And so I think there was at least one occasion where I might have, you know, asked Bill, you know, so when are we scheduling that meeting? And he said, I've got it, we're scheduling it, you know, it'll be before the payments. You know, that was my primary concern, is that we do bring the Commissioner into the final decisionmaking and awareness process and that it be done before the payments were made.

There were a couple of these informal discussions. Mr. Wilkins set up the meeting, and then we held the meeting. But there was no actual meeting in between. There was no gathering of anybody. It was more just discussion to make sure we get the meeting with the Commissioner.

Q Thanks for that clarification.

A Okay.

Q Do you recall the date of the meeting with the Commissioner?

A I don't. It was probably within roughly a week of the January 13th meeting, but, again, I don't have notes or anything

specific that would tie it down. It was before the payment was due to be made, and it was after the 13th, which is a relatively small window. So it was within a week or so.

Q Do you recall -- or could you explain what happened in the course of that meeting?

A So the Commissioner gathered together all of the people who had attended the meeting at OMB. There were some additional attendees that would typically attend a senior-leader meeting with the Commissioner -- as I recall, his chief of staff, his deputy chief of staff, the Deputy Commissioner for Services and Enforcement --

Q Who was that?

A John Dalrymple was there. There may have been a couple of others. But it was sort of the typical senior folks that you would expect to be with the Commissioner when a meeting of some import was taking place.

And it was a free and open discussion, as Commissioner Koskinen really always does in his management approach. He is not only a phenomenal leader but one of the best managers we've ever had in government. And his advocacy for transparency of opinions was, frankly, a major support component of our enterprise risk management program. And he not only, you know, talked the talk, he walked the walk. And his management style was to make sure, if a decision needed to be made and he needed to be in the loop, we would hold those meetings, and we always

have a free and open exchange.

In this case, there were really just a couple of perspectives. He was informed of -- well, two things. There was a memo that was circulated at that meeting that you shared with me last week in the transcribed interview that showed -- I believe it was a memo from Mark Mazur to Secretary Lew that Secretary Lew had signed and initialed "Approve" that was more of the directive kind of note that Treasury had concluded that -- now it was Treasury's counsel -- had concluded that these payments were appropriate. I recall that memo. We discussed that briefly. And that was provided -- I don't remember who brought that memo. It was either through the Chief of Staff or Chief Counsel -- was brought to the group, and the Commissioner became aware of that.

He had also been informed that the Justice Department had seen the memo and had been approving of it, obviously was aware of OMB's position. This is, again, mostly through the General Counsel or Chief Counsel's communication to the Commissioner.

And so there was a very strong consensus of the people who had been in the loop on this at, you know, fairly senior positions in government that these payments were appropriate.

I was in the dissent. I think I was wearing two hats in that perspective. As the Chief Risk Officer, I felt there was some risk to making these payments with respect to the appropriations law and the Antideficiency Act, recognizing that

there were other opinions on the other side. I expressed that I felt that the memo that we read was not compelling to me to counter my concerns about the Appropriations Act issues related to the payment, as I read the law over and over again to try to convince myself, you know, what's the appropriate reading of this, recognizing that many others have now come to a different conclusion.

The Commissioner gave me plenty of time to air my concerns. And, in the end, he made the decision that I actually would expect him to make. It was a decision that I disagreed with. But when a senior leader, an agency head, has brought his senior advisers together, he is given a lot of information -- there was nothing held back. He had, I think, a presentation that did appear to him to be compelling, that these payments out of the permanent appropriation were appropriate, again, with multiple components within the executive branch concurring that that's the appropriate thing to do, including the memo that we had in hand from the leadership at the Treasury Department.

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

Q You mentioned the memo that was distributed. I'd actually like to introduce that memo as exhibit 4.

[Fisher Exhibit No. 4

Was marked for identification.]

BY MS. NEELY:

Q If you could take a look at it.

A Okay.

Q In the previous interview, you had said that the language felt familiar and that it looked similar to something you had seen. Do you now recall if this memo was actually what you saw during that meeting?

A Yeah, well, my initial confusion last week was I had recalled that it was a memo from Secretary Lew, and I think, as we looked at the memo last week, it reminded me that it was actually from someone else but he had approved it with the initial. And, for some reason, in my recollection, the memo was from him.

That's why I was confused, because the words sounded very familiar, but I was looking for the "from" tag being from the Secretary. And then after I had sort of gotten back and looked at the "Approve"/"Disapprove"/"Let's Discuss" line, it jogged my memory that, no, it was somebody else wrote the memo but the Secretary had initialed it under "Approve." And then the language and everything became consistent, that I'm confident that this was the memo that we saw in that meeting.

Q Do you see the portion that's redacted?

A I see the word "redacted" and blank space.

Q Right, right. Was the memo that you saw during that meeting redacted?

A I don't recall any redaction to the version that we saw, but I also don't recall any of the specific language that would have been in there.

Q Do you recall whether the memo that you saw in the meeting with Commissioner Koskinen, did it include language based on the memo that you saw at OMB?

A Not that I recall. It may have, perhaps, in this redacted space. I don't recall. The discussion of the memo and the individual participants' interpretation of that memo from the meeting for the IRS people was verbally discussed --

Mr. McDermott. Can I raise the objection of -- or at least a question? He said he didn't remember what's in the redacted area. Then you asked him to speculate about what might be in it. Is that what I'm hearing?

Ms. Neely. My understanding is that the memo that he saw was not redacted. So I'm asking for his general recollection of what he saw in that memo, not necessarily in this redacted space, but in the memo that he saw, what did it address.

The Witness. And I don't recall any specific references to the memo we read at the Old Executive Office Building meeting in this memo. My recollection was that that original memo was characterized verbally in the meeting with Commissioner Koskinen by those of us who had attended, and so we discussed it. But

I don't recall it being in this, although it may have been. I don't recall.

BY MS. NEELY:

Q Was there discussion in January at any point about what would happen if the CSR payments were not made to the insurance companies?

A Actually, I don't recall that discussion.

Q Was there a discussion of what would happen if the CSR payments were subject to the sequester, in relation to the insurance companies?

A I think we had sort of moved past that discussion. That had been the initial, sort of, instigator of looking into this, I believe, was the potential sequester-related issue, but that was no longer front and center. So I don't recall it being discussed much after that early timeframe.

Q After this meeting with Commissioner Koskinen, what happened with relation to the funding source for the cost-sharing reduction issue after that meeting?

A That was the last I really heard of the issue. My understanding is that the payments were -- the process was followed according to the law, is that HHS identified the payments to be made, the IRS made the payments from the permanent appropriation, and that would be the procedure going forward on -- it was either -- I think it's a monthly basis -- it could've been quarterly, but I think it's a monthly basis -- going forward.

And, frankly, up until recently, it's not something -- I mean, I was not involved after that point. It just became that was how we were going to do business, and we executed the business, you know, per the approval of the Commissioner.

Mr. McDermott. Could you tell us how soon after this meeting you left the IRS?

The Witness. I left the IRS on Memorial Day weekend, so it would have been end of May.

Mr. McDermott. Four months --

The Witness. About 4 months later.

Ms. Carr. So it is now 10:25. We've been asking questions for just about 1 hour. This is a good time to take a quick break.

Mr. Roskam. Can I just -- real quick.

Ms. Carr. Still on the record.

Mr. Roskam. You mentioned that you raised objections in the meeting.

The Witness. Yes.

Mr. Roskam. Do you recall others who raised objections?

The Witness. I would say Mr. Kane and/or Mr. Canady -- so Mr. Canady being the CFO, Mr. Kane being the Deputy CFO -- I would say voiced some concern; I wouldn't say "objections." My sense was that they were not necessarily completely convinced that, from an appropriations standpoint and an accounting standpoint, this was totally authorized, but they were not objections. Mine was more the stronger dissent.

Mr. Roskam. Were there voices that were stronger than yours or yours was the strongest in dissent?

The Witness. On the dissent side, I would say mine was the strongest.

Mr. Roskam. The practice of receiving a memo and then having the memo retrieved, did that happen at this same meeting? The reason I'm asking, I stepped out, and I just want to make sure that we didn't jump to another meeting.

The Witness. Oh, okay.

Mr. Roskam. So we're talking about the same meeting?

The Witness. No, we've got the two different meetings. The one was at OMB --

Mr. Roskam. Okay.

The Witness. -- and then the subsequent meeting with the Commissioner of the IRS was approximately a week later.

Mr. Roskam. Okay.

The Witness. So these are two different meetings.

Mr. Roskam. Glad I asked.

The Witness. Yeah.

Mr. Roskam. So the meeting where the memo was presented, you read it, and then it was retrieved, that was the OMB meeting. Is that right?

The Witness. Correct.

Mr. Roskam. Did you come to an understanding about why you couldn't take the memo with you or you couldn't stay in possession

of the memo?

The Witness. Not entirely. As I recall, I asked two questions in that meeting, one of them was to this point. And, again, my concern was, from a financial audit standpoint, if down the road our auditors determined that these payments were inappropriate -- and it was speculation at this point. It wasn't what we were determining; it was what our auditors might determine down the road, of whether or not the permanent appropriation was an appropriate account to use, and, if not, that would obviously have a direct impact on the financial statement audits for the Internal Revenue Service.

I asked the question whether, if that arose as an actuality, would we be able to use this memo at that time to share with the auditors that this was the legal justification that the administration had put forward, you know, sort of supporting documentation, if you will, that would be part of, you know, best accounting practices. If you were making a decision, you would document that for the record and be able to share that with the auditors down the road.

And so, while there was no real explanation as to why we couldn't keep the memo, I did ask the question of whether or not we could have access to it if that occurred. And the answer I got back was, yes, if our auditors down the road found a concern related to the source of these payments and the IRS wanted to be able to reference or actually show that full memo to our

auditors to help them understand why we did so -- I asked that question, and the answer was, yes, we would make it available under those circumstances.

Mr. Roskam. How was the exchange of the memo conducted? Could you just describe it just generally? In other words, did you come into a meeting and people sat down and a memo was distributed and it was disclosed to you, "You can read this, but we need this back"? Am I overcharacterizing that? Did it happen in a different way? Can you just walk through in your own --

The Witness. That's pretty accurate.

Mr. Roskam. Is that a common practice, asking for memos back on things that are being described as authoritative?

The Witness. It was not a common practice in my 10 years in government at the three agencies where I worked. I can only talk about common practice in my personal experience.

Mr. Roskam. In your personal experience, to your recollection, did it ever happen before, as you can recall?

The Witness. There could have been some circumstance when I was at Defense with classified material where --

Mr. Roskam. Setting aside classified material.

The Witness. I don't recall another occurrence. Again, there could have been a time in Defense -- not for, sort of, a legal kind of document. It could've been more just, you know, for an eyes-only kind of thing, even if it wasn't classified,

where, again, in the defense world, you get different kinds of classifications even below the Secret level, where they might not want the physical documents to be handed around.

And so I would narrowly answer, in circumstances in Defense, there may have been a couple of occurrences where information that even wasn't classified perhaps was then withdrawn at the end of the meeting for more sensitivity kinds of purposes. But it certainly was -- if it occurred at all, it would have been extremely uncommon, in my experience.

Mr. Roskam. My recollection of your testimony is -- and forgive me if this -- I don't mean this to be cumulative. But my memory is that you were not given an answer -- or no one explained why the memo was to be retrieved. Is that right?

The Witness. I don't recall any explanation for that. It was just simply stated.

Mr. Roskam. Did you come away with an impression as to why it was being retrieved?

The Witness. It would just be speculation on my part. I, you know --

Mr. Roskam. What's your speculation?

The Witness. The only reason I can imagine that somebody wouldn't want something retained is that they wanted to have some kind of contained distribution for whatever purpose. I don't know their purpose. They clearly wanted to have that information only shared with a select group of folks. They must

have had some reason why they wanted limited distribution. I don't know what that reason was.

Mr. Roskam. Okay. Thank you.

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

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

Mr. McDermott. Yes. Yes.

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

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

And that did occur with the Advance Premium Tax Credit, where section 1401 of the Affordable Care Act creates section 36B of the Internal Revenue Code. And that basically becomes an appropriation then, because section 36B is part of this

broader -- I referenced it earlier, and I didn't get it right, so I may as well look it up.

I have it. Here it is. So 31 USC, section 1324, is an appropriation for utilization of the permanent appropriation account. And my understanding is, from Mr. Kane, that in all previous instances any utilization of the permanent appropriation under what I just described had always been discretely articulated in law, like the creation of section 36B for the Advance Premium Tax Credit, but there was no clear reference in the section regarding the cost-sharing reduction payments to the Internal Revenue Code in the Affordable Care Act.

And so that was the -- the IRS was raising a risk that there was confusion as to whether or not using the permanent appropriation was appropriate for the cost-sharing reduction payments since there was no specific reference to the Internal Revenue Code in the Affordable Care Act regarding cost-sharing reduction payments based on the way we were reading it at the time.

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

That's why the meeting, I believe, in the discussions between the IRS financial management team and the IRS counsel, who were the original invitees to this meeting at OMB, was they were looking for that clarification, and didn't want to make it

just an IRS decision, but let's get more people involved.

And I think that's when we discovered that this effort with Mr. Berger had been going on. And then we were given the opportunity to meet with him and see the memo that he had prepared on this topic.

Mr. McDermott. When you talk about a discrete reference to the IRS code, is that in the law itself, 1324, or is it something done in the IRS rules and regulations there have to be? Or where is this?

The Witness. My understanding from Mr. Kane, it was past practice every time that the permanent appropriation had been authorized for a new credit of some sort. And there's, I don't know, a dozen or so times that that's occurred, give or take a few.

As he informed me, which was part of his concern, was that every time that had been done for a new credit or to amend something to do with an existing credit, there was a reference in the law to that section of the Internal Revenue Code that would make it clear that the permanent appropriation was where Congress and I guess the administration, who's signing off on the law, would want or authorize the use of it.

So I don't know that there is anything that says it must, but my understanding from Mr. Kane is that that had happened in all previous instances.

Mr. McDermott. This practice.

The Witness. It was the practice, correct. And I don't believe he had expressed that there had been exceptions to that practice. As he expressed it to me, which, again, caught my attention, is that it was the consistent practice, perhaps in all cases. And I believe, as he said, it was in all cases that had occurred.

Mr. McDermott. Okay.

Ms. Carr. The time is now 10:38, and we'll go off the record.

[Recess.]

Ms. Carr. It's 10:51. Back on the record.

Ms. Neely. As we just said off the record, the minority has reserved their time in full until at least after this hour of questions from the majority staff.

BY MS. NEELY:

Q Mr. Fisher, you had said that in late 2013 Mr. Kane had come to you with concerns about sequester issues relating to the cost-sharing reduction program and at the OMB meeting on January 13th, 2014, what was discussed there were appropriations law questions.

A Correct.

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

A Yes.

Q Do you understand how that expansion occurred?

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

Q You said you could track the evolution?

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

Q Would you describe how it evolved?

A Sure.

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

The question at hand became whether or not the statute actually authorized, appropriated those dollars using the permanent appropriation. And as we said just before the break, there was question on the cost-sharing reduction payments. There was no question on the Advance Premium Tax Credit, which,

as outlined in section 1401 of the Affordable Care Act, which introduces section 36B of the Internal Revenue Code under the section I had previously highlighted, was clear in the intent, expectation, and authorization to use the permanent appropriation as the funding source, the account for the Advance Premium Tax Credits.

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

Other than that, there was nothing clear in the statute that I believe the accounting folks are always looking for. Before they go, you know, touch that permanent appropriation, they want to make sure that that is legally authorized. And in just reading the statute, that was at best unclear, which, again, was the purpose of having greater clarity, perhaps, coming from the administration's point of view on their thought process on the appropriateness of using the permanent appropriation because --

Mr. Meehan. Could you take a moment and demonstrate how

it's unclear?

There is the principle of *exclusio alterius*. You know, *inclusio*, the old theory, if something is articulated specifically in a statute, then Congress' intent is articulated in that statute. And the lack of the alternative means that the intent is clearly not put in there.

So where there is an articulation on one purpose of the funding, how do you take it to say that it doesn't speak to another purpose for the funding?

The Witness. So, I don't understand part of your reference, what you said earlier in the Latin and stuff like that.

Mr. Meehan. Well, it's -- you can go back and look at the terms, but it's a principle of statutory construction --

The Witness. My understanding --

Mr. Meehan. -- that whenever there is a clear intent that is articulated in a statute, alternative interpretations are discarded because Congress has chosen to articulate the purpose, and, therefore, by implication, the courts would find that they have chosen not to include the other things.

The Witness. So I can only give my understanding of how appropriations law works. And I know we used to have -- when I was in the Defense Department, the National Defense Authorization Act, as an authorization bill, would certainly express the intent of Congress when it's passed, and it would have even dollar amounts in it, yet no one in the Defense

Department took that as an appropriation. That didn't give us the authority to go spend dollars from an account. We needed an appropriation that would tell us the actual amount and the account to go use.

So, with that as a premise, my reading of the Affordable Care Act sections that I've identified, I would be looking for not only an intent from an authorization perspective, but if there was an appropriation associated with it, I would expect to see an explicit reference to an amount and an account.

For the Advance Premium Tax Credit, section 1401 of the Affordable Care Act, that exists. You have an expressed intent from, "Here is what's being authorized and the business rules associated with it," and you have an account to use, which is with the creation of section 36B added to the Internal Revenue Code, which is explicitly stated that that is an appropriation that can be used for refunds and specific credits that have been passed.

When you then look at the section that covers the cost-sharing reduction payments, there is clearly an intent that the Congress was looking to have those payments made, but there was no reference, from an appropriations standpoint, to an account. So that's the distinction that I draw.

BY MS. NEELY:

Q So, Mr. Fisher, turning back to the timeline, in that late fall/December time period of 2013, when Mr. Kane first came

to you, he raised sequester concerns. Had he also identified this appropriation concern that you're talking about now, or did that come up in the course of those conversations at some other point?

A I don't recall that being expressed at the outset. Because, again, at the outset, the question was sequester.

Q Right.

A Which is complicated enough from an accounting standpoint. Especially with all the different kinds of accounts and outlays that the IRS has, getting that right, you know, takes some real thought and effort and sometimes even parsing of language just to make sure what accounts are affected or not. Because, in general, most accounts were affected, but there were exceptions, and the IRS had some of those exceptions. And so this was the natural course of accountants doing what they are supposed to do.

That was initially all we really focused on. As it became clearer that that was not going to be an expected issue because of the migration -- well, not migration -- the path to use the permanent appropriation, which is not subject to sequester, the sequester issue sort of went off the table. And that's when this subsequent question of whether or not an appropriation has been made to use the permanent account specific to cost-sharing reduction payments -- that was the question.

And there was concern raised from the accounting folks. I

raised concern from a risk standpoint. And then we engaged with the broader community at OMB. We got guidance from Treasury, Justice Department involved, IRS's counsel that ultimately concluded that the payments were appropriate.

And, as I said previously, given the strong consensus to support that perspective that was presented to the Commissioner, I was certainly not surprised that he supported that with this level of senior advice given to him as, you know, what should we go do. He made the choice that I bet you 99 out of 100 people would have made. It's just one that I happen to disagree with in terms of my understanding of both appropriation law and my reading of the statute.

Q When did --

A And I expressed that. And, again, I was not in the final determination, and my position did not carry the final say, and I was okay with that.

Mr. Meehan. Could you take a minute to articulate what concerns you had?

The Witness. Well, it's what I tried to articulate before. It's --

Mr. Meehan. I'll be quiet after this. I just want him to answer this.

The Witness. The language is very different, to me, in sections 1401, 1402, 1411, and 1412 about how the statute talks about Advance Premium Tax Credits, which is a credit, which is

what the permanent appropriation is for, refunds and credits -- that's what it specifically says. It's for refunds and credits. And those credits have to be ones that have been specifically authorized. And there's a list of which those are.

Every reference to the Advance Premium Tax Credit -- probably not every -- the majority of references to the Advance Premium Tax Credit reference section 36B. It's multiple times in the statute. Clear linkage between what's covered in section 36B, which is both an authorization and an appropriation. It has authorization-like language where it says the business rules about how this credit payment -- or who's eligible, how it's going to work -- authorization language. But it also, because it references 36B, which is a permanent appropriation -- that, I believe, was clear understanding that this was not only the kind of payments and business rules but also the source of funds. And that linkage, if you go through the statute, you see multiple references of Advance Premium Tax Credit, IRS section 36B, over and over and over again.

There is no such reference that I could find in any of those sections that specifically links the cost-sharing reduction payments, which, again, is not a credit -- it's a payment, was the word that was used. Cost-sharing reduction payments are not linked to the Internal Revenue Code, as far as I could tell, directly anywhere.

Now, others have drawn that link and have come to a

conclusion that it was implied, or they inferred, they came to that conclusion. That position carried the day. It wasn't my reading.

My reading was every reference to -- including the payment section in 1412 about the cost-sharing reduction payments was to section 1402 of the Affordable Care Act. And section 1402 of the Affordable Care Act, unlike section 1401, section 1402 has no link to any appropriation language. There is no linkage to the permanent appropriation, nor is there any link to any other appropriation that was indicating what account these funds should be paid from.

And while I guess there were some who saw this as sort of an intermingled requirement -- Congress' intent is to do both of these things, and since one is authorized to be paid out of a certain account, then the other is as well -- that's not my typical reading of things related to appropriations. I would have expected to see specific reference to an appropriation in 1402 as well as 1401.

And as you read the parallels that exist throughout these sections in the Affordable Care Act, Advance Premium Tax Credit over and over again is linked to an appropriation, the permanent appropriation. Cost-sharing reduction payments, in my interpretation, are not linked to an appropriation. In fact, it's linked to something, section 1402, for which there is no appropriation language in there. It's pure authorization kind

of stuff based on business rules and how the things should be performed.

A plausible interpretation could be, well, Congress may have thought it was appropriate to use the permanent appropriation for one thing and annual appropriations for the other. That was how I read the law. Is there a viable reading of the law in a different context? Well, again, I would leave that to others to decide.

Based on my background in financial management, as being a CFO in the Federal Government, as well as being a Chief Risk Officer, applying those insights to the words on the page, that's how I interpreted what was being authorized and appropriated. And I didn't see anything -- and I'm happy to look at the law again, but I did last night, and I'm still not seeing that language that we would be looking for that shows in section 1402 or in section 1412, yes, we want you to make these cost-sharing payments, this is what they are, who's eligible, how to make them, and from what account we're appropriating them.

And that was the distinction that I was drawing at the time, and shared that, and, again, that argument did not carry the day.

BY MS. NEELY:

Q Mr. Fisher, going back to these conversations with Mr. Kane, and he had approached you about questions about the sequester, at what point did the IRS learn that HHS had withdrawn its appropriation request?

A That must have been at the beginning, because that would be the only reason that the sequester issue would have come up.

Q The beginning? Sorry.

A Oh, within my initial engagement with Mr. Kane in late fall 2013. I was guessing October, November.

Sequester would not have been an issue other than this change that we heard about, where originally there was an appropriation request that was started through the process. When and where it came out of the process, I have no idea. But the IRS became aware that the intent was to use the permanent appropriation instead of the original account.

And that raised the questions of -- that's, I believe, what triggered the questions around sequester, because sequestration works differently for an annual appropriation than it does for the permanent appropriation.

Q Do you recall what the question was exactly that Mr. Kane brought to you about sequester?

A I don't think he brought a question. He raised a risk. He raised a concern that he had become aware of and wanted to learn more about. He didn't know enough at the time when he first raised it, but he learned that there was some change that might affect the sequestration accounts.

And, again, that being a point of sensitivity for any accountant, is to want to make sure that they're implementing

sequester properly. And given that the rules around these two different appropriation accounts are different for sequestration and originally he thought it was going to come out of one account, now he's learning it's going to come out of a different account -- the payments are still a couple of months away, so there wasn't an urgent, "We've got to do something this second." But it was, "We need to look into this," and figure out are we -- first, you know, is this, in fact, happening? You know, has this, in fact, been a change in approach? Kind of confirm that, because this was still sort of early information. And then, if it is happening, the most immediate question was, what does that do to our sequestration strategy? And then, subsequent to that, it became more, well, let's go back and look at the law and make sure that an appropriation to use the permanent appropriation had actually been explicitly expressed.

And, as we said previously before the break, in Mr. Kane's experience -- and he's been at the IRS for a long time -- was that every time the use of the permanent appropriation for a new credit had come about, it had been explicitly referenced in the statute, just like it was for the Advance Premium Tax Credit, but, to our reading in the next section, was not done for the cost-sharing reduction payments.

Q You said in reference, I think, to the OMB meeting that you had learned that efforts with Mr. Berger about this issue had been going on.

A Uh-huh.

Q Do you have a sense of when those efforts with Mr. Berger began?

A No. But it had clearly been referenced that he had been sort of working on this memo and briefing other people. I think from the time that we had asked for the meeting and the meeting was held was less than a week. Clearly, there had been activity with respect to the research associated with the memo, the compiling of it, and briefings within other parts of the executive branch had occurred. Whether that was for a couple weeks, a couple months, several months, I have no way of knowing.

Q I know you said that you were aware that Mr. Holder had seen the memo and asked --

A That's what Ms. Washington had said.

Q Right. And I know you said that you couldn't recall names of other people who had seen it. But are you aware if other agencies in general saw the memo?

A Not to my knowledge. The only reference I recall was the one with respect to the Justice Department. Clearly, OMB. Subsequent when we got the Treasury document, that they had been involved. OMB, Justice, Treasury --

Q When you said Treasury had been involved --

A Well, had had some awareness of the memo, which I assume helped precipitate this decision document or action memorandum, as it's called. So I assume they didn't do this

without some insight to that behavior. Although maybe they did. I would assume that there would be some insight there. But beyond that, I don't know.

Q Regarding the source of funding for the cost-sharing reduction program, did you ever speak with Roberto Gonzalez about that issue or work with him on that issue?

A The name sounds familiar, but I am not sure who that is.

Q With Christopher Meade?

A Again, you have to help me with who these people are.

Q The Treasury General Counsel and Deputy General Counsel.

A Oh. No. No, when I talked to the Treasury General Counsel, it was a different person and it was months before on a totally different topic.

Q When you said that you --

A At least I don't -- maybe Chris Meade was involved. Just, I'm not familiar with -- certainly no discussions on this topic did I ever have with Treasury Counsel. I'm getting fuzzy on the names. It gets confusing.

Q When you said one of the risks that this issue posed to the IRS related to audit trails and wanting to ensure that you had proper audit trails --

A Correct.

Q -- what auditors conduct the audits you were concerned

about?

A So the auditor for the IRS is the Government Accountability Office, is the financial auditor for IRS.

Q Do you know if they ever raised any questions regarding the source of funding for the cost-sharing reduction program?

A Not to my knowledge.

Q Would the Treasury Inspector General also be considered an auditor?

A Not a financial statement auditor.

Q And that's the auditor you're --

A Right. Because my concern was the -- when I say "audit," in this case it's in the traditional financial statement audit, the annual audit that's performed by, you know, an accounting firm. In this case, GAO also does not only the consolidated -- audited the consolidated financial statements of the Federal Government, GAO also has statutory responsibilities to perform audits for a select group of agencies.

Other agencies, some of them use their Inspectors General to do financial statement audits; others use outside independent accounting firms. But for the IRS, GAO is the auditor, the financial statement auditor. And so the Treasury Inspector General does not do financial statement audits. They do program audits, performance audits, investigations, and other things along those lines.

Ms. Neely. Mr. Fisher, I think that's all that we have for you today. The minority staff will now have an opportunity to ask questions. We can either take a break or move forward.

Mr. Crouch. Let's take a short break.

Ms. Neely. Let's go off the record, then, at 11:15.

[Recess.]

Mr. Crouch. We're back on the record at 11:18. And Mr. McDermott had some questions for the witness.

Mr. McDermott. Mr. Fisher, I want to thank you for coming and talking about how decisions are made inside the bureaucracy. We write laws out here, and then they get implemented, and sometimes we're not aware exactly how it works.

How many meetings have you been to where there was a dispute within the Department about how a particular issue should be resolved or administered?

The Witness. So my answer would somewhat be based on the characterization of a "dispute." Strong disagreement --

Mr. McDermott. Well, let's go back and say, tell me what you think this was in this particular instance. What word would you use?

The Witness. I would say there was certainly a disagreement --

Mr. McDermott. Disagreement. Okay.

The Witness. -- on the interpretation of the statute as it relates to appropriations law. Disagreements are not that

unusual.

Mr. McDermott. They're not that unusual?

The Witness. They're not that unusual. This was perhaps a more -- probably a stronger disagreement than is typical, but disagreements certainly occur all the time in the course of, you know, meetings where all sides get aired on their perspectives.

I'm trying to think through the case at the IRS with Commissioner Koskinen. You know, oftentimes, it's certainly desirable to resolve those disputes before you get to the agency head, if possible, amongst other senior colleagues. But I think part of the transparency drive that the Commissioner was trying to institute with an enterprise risk management program was to make sure that if there was disagreement or risks that had been identified that were not being resolved and he needed to be part of the resolution, then he wanted them brought to him. That's what he felt was his responsibility as the agency head.

I would say that did not occur very often, that it would get to his level. But I wouldn't think this was the only time that had occurred.

Mr. McDermott. He wasn't at this meeting, the January 14th meeting.

The Witness. The Commissioner was not at the meeting at OMB.

Mr. McDermott. He was not at that meeting.

The Witness. No. He was looking for his senior

staff -- the appropriate folks from Counsel, the CFO organization, and his Chief Risk Officer were representing him at that meeting.

Mr. McDermott. And who was asked to come to that meeting?

The Witness. I believe the IRS requested the meeting to gain additional thoughts on the appropriateness of these payments from OMB's perspective. They are the Office of Management and Budget. That's not unusual, to engage OMB on questions about accounting-related activities or budget-related activities. Those discussions occur regularly.

This was a little unusual, in that it wasn't just a phone call or a meeting; it was sort of a gathering where a memo was provided and, again, we weren't allowed to keep. So that part of it was a little unusual.

But I believe the IRS requested the meeting principally for Counsel and the CFO folks to go and meet with the appropriate people at OMB to have a discussion about this. And whether I covered it today or in last week's discussion, I became aware of the meeting, I was aware of the concern that had been raised previously, and, as Chief Risk Officer, I asked to attend. And so I was the last add to the meeting. But I think that's sort of how it came about.

Mr. McDermott. And there was this memo circulated there. Did you, when you went back to your office, take no notes whatsoever --

The Witness. That's correct.

Mr. McDermott. -- about what had occurred?

The Witness. That's correct.

Mr. McDermott. Is that common practice, for you to have a meeting or a phone call with somebody about what -- you're discussing an issue, that you don't jot down, I just talked to John Johnson about X, Y, and Z, and I recommended this or I said this? I mean, you never take notes?

The Witness. I actually take notes more than almost anybody at the IRS. One of the things I found at the IRS is that people at the IRS often do not take notes. It actually was sort of an interesting observation as part of that approach. But I actually typically take lots of notes. But I take them during the meeting. I almost never would go back after the fact and take notes or write a memo for myself or something like that. That would be very unusual for me.

I took no notes in the meeting at OMB because we were told not to take notes. And I actually thought about this the other day: I didn't take notes at the meeting with the Commissioner the subsequent week either, and the time where I'm not taking notes is when I am personally actively engaged in the discussion. Then I don't get distracted by taking notes; I need to be in the present and focusing on the discussion.

And since I was fairly engaged in that, I don't recall, I don't have any notes, you know, from either of those two meetings,

for different reasons. But, actually, I used to take notes all the time, but in the meeting, almost never after the fact. I don't recall really ever doing that.

Mr. McDermott. So everything you have talked about in this deposition is from your memory.

The Witness. That's correct. I've said that, I think, very clearly.

Mr. McDermott. So you have no written account of it. You've worked at GAO.

The Witness. Correct.

Mr. McDermott. Isn't it GAO's procedure that when they're presenting materials prior to the release of a report or a testimony, even when briefing the congressional requesters of the report or testimony, to present the material, number them, and collect them at the end of the meeting?

The Witness. So I was the Chief Administrative Officer and Chief Financial Officer at GAO. I didn't work on the side of the organization that did audits, engaged congressional staff on those things. I didn't participate in the business process you just described. So I don't know what the practice is.

Mr. McDermott. So you --

The Witness. I ran internal operations: budget, finance and accounting, security facilities, human resources, IT. Internal operations was my scope of responsibility at GAO. So I actually don't know what their practice is.

Mr. McDermott. And so you're -- okay. As long as you don't know, I can't question you any further.

The Witness. No, I mean, it could be their practice. I just don't know.

Mr. McDermott. Sure.

Mr. Crouch. Actually, if we could go off the record, I think we're about to have a vote, sir, roll call in the committee on the markup.

[Recess.]

Ms. Carr. Back on the record at 11:26.

That concludes our questions from both the majority and the minority. We thank you very much on behalf of the committee and on behalf of Chairman Brady for coming in today, and we very much appreciate your time.

That concludes the deposition, 11:26.

[Whereupon, at 11:26 a.m., the deposition was concluded.]

CERTIFICATE OF DEPONENT

I have read the foregoing 74 pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

A handwritten signature in black ink, appearing to read 'David Fisher', written in a cursive style. The signature is positioned above a horizontal line.

David Fisher