Private Sector Subpoenas

Backpage.com Case
Key Excerpts from 2017 Appeals Court Opinion

Prepared by Elise Bean
Levin Center at Wayne Law

On Aug. 9, 2016, Backpage.com CEO Carl Ferrer appealed the district court decision ordering his compliance with a subpoena for documents issued by the Senate Permanent Subcommittee on Investigations. On May 16, 2017, a D.C. Circuit 3-judge panel, with Judges Judges Srinivasan, Tatel and Wilkins, unanimously ruled that, because Mr. Ferrer had turned over some documents, PSI had completed its investigation, and PSI was no longer seeking any materials, the case was moot. *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080 (D.C. Cir. 2017). At Mr. Ferrer's request and without objection from the Senate, the appeals court also vacated the district court's rulings. Here are key excerpts from the appeals court's 14-page opinion, each excerpt of which consists of a direct quotation taken from the text of the panel's opinion, with no changes in punctuation but with footnotes omitted.

Procedural posture

The District Court granted the Subcommittee's application on August 5, 2016, ordering Ferrer to comply with the subpoena within ten days. Ferrer immediately noticed an appeal and sought a stay in the district court, our court, and the Supreme Court, all of which denied his request.

On September 13, the day the Supreme Court denied a stay, Ferrer produced some 110,000 pages of documents, moved the district court for an extension to complete production, and, for the first time in that court, invoked attorney-client and work-product privileges as to a subset of the yet-to-be produced documents. Although the district court granted a short extension, it rejected as untimely Ferrer's assertion of privilege. Ferrer again appealed, and this court denied a stay pending appeal except with respect to the documents Ferrer claims are privileged.

Ferrer turned over all concededly non-privileged documents in late November. … [O]n January 10, 2017, the Subcommittee held its last hearing, issued a final report on sex trafficking (including a lengthy appendix featuring certain documents Backpage produced), and closed the investigation. Two weeks later, the Subcommittee moved to dismiss this appeal, arguing that these subsequent events had mooted the case and deprived this court of jurisdiction.

Claim for relief

Ferrer concedes that no controversy remains as to the privileged documents he withheld, which the Subcommittee has never received and no longer wants. Subcommittee Mot. at 12; Oral Arg. Rec. 2:45–3:05. Nonetheless, he insists, the dispute remains live because the court may still provide at least some "effectual relief" by ordering the Subcommittee to return, destroy, or refrain from further publishing and distributing the documents Ferrer produced.

Speech or Debate Clause protects documents in Congress' possession

[T]he Speech or Debate Clause … provides that, "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. Although the Speech or Debate Clause chiefly functions to immunize Members of Congress from civil or criminal liability arising from "actions [falling] within the 'legislative sphere,'" *Doe v. McMillan*, 412 U.S. 306, 312 (1973), its protections extend far more broadly. In *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), our court held that the Clause affords Congress a "privilege to use materials in its possession without judicial interference," even where unlawful acts facilitated their acquisition. … *Brown & Williamson* and *Hearst* thus make clear that the separation of powers, including the Speech or Debate Clause, bars this court from ordering a congressional committee to return, destroy, or refrain from publishing the subpoenaed documents. Because we can provide Ferrer with no "effectual relief whatever," *Church of Scientology*, 506 U.S. at 12, the case has become moot.

Senate's inherent subpoena power

In ordering compliance with the Subcommittee's subpoena, the district court merely aided the Senate in effectuating its inherent subpoena power. The Subcommittee did not thereby necessarily invite the courts' interference with constitutionally protected legislative activity.

Enjoining distribution of investigative materials

To be clear, we take no position on whether courts are powerless to enjoin individual members—or the committees of which they are a part—from disseminating investigative materials whose contents have no relationship to legislative functions or whose distribution would arguably violate the law. See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (investigative activities "must be related to, and in furtherance of, a legitimate task of the Congress"). That issue is not before us. The Subcommittee obtained the documents in service of legitimate legislative purposes and Ferrer makes no claim that publishing them is "otherwise actionable" under any law.

> **District court judgments vacated**
> Ferrer asks that we vacate the district court's judgments if we dismiss the case as moot. … [G]iven that the Subcommittee itself does not oppose vacatur, we vacate the district court's judgments and dismiss the case as moot.

There are no ongoing proceedings in this matter.