Executive Privilege Case

Fast and Furious Case
Key Excerpts from 2018 District Court Opinion

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On Oct. 22, 2018, D.C. District Judge Amy Berman Jackson denied a motion to vacate her 2014 and 2016 rulings in the Fast and Furious case. *House Committee on Oversight and Government Reform v. Sessions,* Case No. 16-5078 (D.D.C. Oct. 22, 2018). Here are key excerpts from her 24-page opinion, each excerpt of which consists of a direct quotation taken from the text of her opinion, with no changes in punctuation but with footnotes omitted.

Denial of motion to vacate rulings
Because neither the balance of the equities nor the public interest weigh in favor of vacatur, the Court will deny the parties' motion.

Executive privilege and deliberate process at issue
On October 11, 2011, the Committee issued the subpoena to the Attorney General that lies at the heart of this lawsuit. See Am. Compl. ¶ 8. While a large volume of materials was produced, the Department informed the Committee on June 20, 2012 that the President had asserted executive privilege over all relevant documents dated after February 4, 2011. Id. ¶ 14. On August 13, 2012, the Committee filed this action to compel the production of those records, which had been withheld on the grounds that they were covered by the deliberative process prong of the executive privilege.

2014 ruling on jurisdiction
After the lawsuit was filed, the Department of Justice moved to dismiss it. It took the position that this Court did not have – or should decline to exercise – jurisdiction over what the Department characterized as a political dispute between the executive and

legislative branches of the government. … Citing *United States v. Nixon*, 418 U.S. 683 (1974), [the district court] ruled that it had not only the authority, but the responsibility, to resolve the conflict. … To give the Attorney General the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint.

Deliberative process privilege can be invoked
The Committee contended that as a matter of law, the executive branch could not invoke the deliberative process privilege in response to a Congressional subpoena. … On August 20, 2014, in the first of the two orders at issue in the pending motion, the Court ruled against the Committee on that issue. *Holder*, 2014 WL 12662665. It determined that there is a constitutional dimension to the deliberative process aspect of the executive privilege, and that the privilege could be properly invoked in response to a legislative demand.

No blanket assertion of deliberative process privilege
However, the Court also found that the Attorney General's blanket assertion of the privilege over all records generated after a particular date could not stand, because no showing had been made that any of the individual records satisfied the legal prerequisites for the application of the privilege. *Holder*, 2014 WL 12662665, at *2. The Department was ordered to review the responsive records to identify those records that were both pre-decisional and deliberative and to produce any that were not. Id. at *2. It was also ordered to create a detailed list identifying all records that were being withheld on privilege grounds.

Privilege applies to deliberations over Congressional and media inquiries
Based upon authority from this Circuit, it found that records containing the agency's internal deliberations over how to respond to Congressional and media inquiries were entitled to protection under the deliberative process privilege. *Id.*

Privilege can be overcome by showing of need
[T]he Court also acknowledged, citing *Espy*, 121 F. 3d at 737–38, that the privilege is a qualified one that can be overcome by a sufficient showing of need for the material.

Disclosure of documents negates privilege
[T]he Court concluded that there was no need to balance the Committee's need for the records against the impact their disclosure could have on candor in future executive decision making because the Department had already disclosed the records itself.

Complete document production provides no legal basis for vacatur
The first order in August 2014 denied the parties' cross motions for summary judgment without prejudice, and it called for the production of some records and the creation of a detailed list justifying any withholdings by a date certain. *Holder*, 2014 WL 12662665, at *3. The defendant complied with the order fully as of November 4, 2014, see Comm.'s Notice of Disputed Claims and Other Issues, and the order included no ongoing

obligations. The January 2016 Order then required the Department to produce the deliberative records described in the list to the Committee. See 156 F. Supp. 3d at 106. That too has been accomplished. … Thus, the Orders bear no resemblance to continuing injunctions that call for ongoing supervision or involvement by a Court. … Accordingly, there is no legal basis to vacate the Orders under Rule 60(b)(5).

Judicial opinions are presumptively correct and valuable

The parties explain that they are seeking vacatur because they "have reached a negotiated resolution of their dispute, contingent on vacatur of only the two specified orders." … [I]n *Bancorp*, the Supreme Court stated that judicial opinions "are presumptively correct and valuable to the legal community as a whole. They are not merely the property of the private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." … This is particularly true in this case where the adversaries and amici that briefed and argued their positions before the Court were not private litigants, but all were government entities or individual officials whose mission is to serve the public.

Opinions on a rarely-litigated constitutional issue

Furthermore, the D.C. Circuit has expressed the view that "the precedential power of an opinion is a reason arguing against vacatur." ... Because disputes between the political branches "are normally settled through negotiation and accommodation," *Miers*, 558 F. Supp. 2d at 85, the issues addressed in the orders can be said to fall within the "rarely-litigated" category, and that militates against vacatur.

Late settlement

[T]he Supreme Court has observed that a settlement at this stage does not weigh in favor of vacating an order, because granting vacatur after appeal may create an incentive not to settle earlier in the process.

Not only did the parties fail to take advantage of multiple opportunities to achieve a mediated solution while the case was pending, but the case was virtually over when they came to this vaunted accommodation – the Court had already ordered the production of the documents that had been withheld on deliberative process privilege grounds, and they had already been turned over. … So there was little if anything to negotiate, and the only real change in circumstance since the filing of the appeal has been the change in political leadership at the Department of Justice in the wake of the Presidential election. This suggests that the primary, if not the sole, objective of the conditional settlement and the pending motion is to erase the Court's prior rulings.

Precedents created by earlier rulings

During the course of this litigation pitting two branches of the United States government against one another, the Court determined: that the dispute was justiciable and that Congress could seek to enforce its duly issued subpoena in this Court; that the executive branch could invoke the deliberative process prong of the executive privilege to shield records from production to the legislature; that the privilege could not be asserted on a blanket basis, though, but only on a document-by-document basis; that the privilege

covered internal deliberations concerning communications with Congress or the media; and that the privilege was not absolute and could be waived or overcome by a showing of need. These are all issues that could very well arise again in the future.

Usefulness of rulings despite political power shifts
When this Court ruled that it had jurisdiction to hear the dispute between Congress and the Attorney General, it cited another district court's opinion in *Committee v. Miers*, not because it was required to follow it, but because it independently reached the same conclusion. However, it found the opinion to be persuasive and instructive in that process, and it had access to the ruling on the jurisdictional question even though that dispute was ultimately resolved among the parties. Judges find other judges' opinions to be helpful when they are considering difficult questions, even if they ultimately disagree with them, and that is one reason why these rulings should remain on the books. Also, the concordance between the two opinions – written by different judges, at times when different political parties were in control of the House and were running the Department of Justice – is a powerful illustration of the fact that under the Constitution, the rule of law endures even when power changes hands, and no matter which party's interests are affected by its application. This is why the mere fact that the leadership of the Department of Justice has changed should not be deemed to be a circumstance that warrants extraordinary equitable relief, and it is yet another reason that the public interest would not be served by vacatur in this case.

On May 8, 2019, DOJ and the House filed a joint pleading with the D.C. Circuit that voluntarily dismissed the case with prejudice.