



Private Sector Subpoenas

Backpage.com Case Key Excerpts from 2016 District Court Opinion Upholding Subpoena

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On Aug. 5, 2016, D.C. District Judge Collyer upheld a Senate subpoena and ordered compliance with the subpoena by Backpage's CEO, Carl Ferrer. *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C. 2016). Here are key excerpts from the district court's 32-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.

Failure to comply

Mr. Ferrer refuses to comply fully with the October 1, 2015 subpoena. He has failed to conduct a full search for responsive materials and has not provided a privilege log to the Subcommittee.

Senate procedures

On February 29, 2016, the Subcommittee presented a resolution to the Senate Committee on Homeland Security and Governmental Affairs authorizing and directing the Senate Legal Counsel to bring a civil action under 28 U.S.C. § 1365 to enforce the first three requests of the October 1, 2015 subpoena. See S. Rep. No. 114-214 (2016). On March 17, 2016, the Senate adopted said resolution by a vote of 96-0. See 162 Cong. Rec. S1561 (daily ed. Mar. 17, 2016). The Subcommittee asks the Court to enforce the following parts of the subpoena:

1. Any documents concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines.

2. Any documents concerning advertising posting limitations, including but not limited to the “Banned Terms List,” the “Grey List,” and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process.

3. Any documents concerning reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*

Oct. 1, 2015 Letter and Subpoena (emphasis in original). The Subcommittee points out that Backpage has only produced a total of 65 pages of documents responsive to these requests — “21 pages of which were publicly available”

Civil enforcement of Senate subpoena

The Subcommittee filed the instant civil action to enforce its subpoena pursuant to 28 U.S.C. § 1365. ... The statute strips this Court of its customary authority to modify or quash a subpoena. It allows the Court only to decide whether to enforce the subpoena brought before it.

Senate can sue to enforce part of a subpoena

The statute’s legislative history makes clear that “the court’s jurisdiction is limited to *the matter Congress brings before it*, that is whether or not to aid Congress is enforcing the subpoena or order.” *Id.* (emphasis added). It is the Senate’s constitutional prerogative to decide what to bring before the Court. *See Senate Select Committee on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C.), *stay denied*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers) (enforcing a narrower documentary subpoena under § 1365). As the Subcommittee correctly states, “By granting the Application, the Court would not be *modifying* the subpoena in any way, but merely enforcing the parts of the subpoena brought before it.” Mot. at 23 (emphasis in original). Accordingly, the Subcommittee’s relief is permitted by the statute and the Court has subject matter jurisdiction.

Legislative purpose and authority to investigate

Mr. Ferrer argues that the subpoena lacks a legislative purpose and does not seek information that is pertinent to an investigation within the Subcommittee’s jurisdiction or power. A cursory review of the Subcommittee’s investigatory authority and actions in this instance demonstrate that these objections are just wrong. The Subcommittee is authorized to study or investigate, *inter alia*: (1) organized criminal activity in interstate or international commerce; (2) the adequacy and need to change Federal Laws targeting organized crime in interstate or international commerce to protect the public; (3) “all other aspects of crime and lawlessness within the United States which have an impact upon or affect the national health, welfare, and safety” Undoubtedly, the use of the Internet for human and sex trafficking, as defined by statute, involves organized criminal activity in interstate or international commerce and can affect the national health, welfare, and safety. ... It is noteworthy that 96 Senators voted to enforce the subpoena, indicating strong agreement with the Subcommittee’s authority.

No specificity in resolution required

Mr. Ferrer retorts that the Subcommittee cannot rely on Section 230 because it was “mentioned nowhere in the Subcommittee’s authorizing resolution, it is not addressed in the Subpoena or its cover letter, and was never broached in the voluminous correspondence between Backpage and the Subcommittee staff.” Opp’n at 33. ... The Supreme Court has stated that it is not necessary for a Senate resolution authorizing an investigative committee to “declare in advance what the [S]enate meditated doing when the investigation was concluded.” *In re Chapman*, 166 U.S. 661, 670 (1897).

No court review of Senator motives

Mr. Ferrer argues further that the Subcommittee’s subpoena and investigation should not be legitimized because the “goal is more prosecutorial than legislative.” Opp’n at 37. Mr. Ferrer has consistently argued that the actual purpose and intent of the Subcommittee’s inquiry is to condemn and punish Backpage. He cites statements made by Members of Congress and State officials criticizing Backpage as evidence of a larger governmental effort to target the company. Mr. Ferrer misperceives the Court’s role, which is not to determine the validity of the legislative purpose by “testing the motives of committee members” based on public statements. *Watkins*, 354 U.S. at 200. “Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly’s legislative purpose is being served.”

First Amendment objections to Senate subpoena

Mr. Ferrer makes three arguments in this respect: (1) the subpoena constitutes an abuse of the investigative process that encroaches on his First Amendment rights; (2) the subpoena is part of a concerted effort to target Backpage and punish protected speech; and (3) the subpoena is overly broad and unduly burdensome and produces a chilling effect on speech.

Searching for documents does not abridge First Amendment rights

At the outset, the Court rejects Mr. Ferrer’s argument that, as CEO of Backpage, he has a First Amendment right not to conduct a full and comprehensive search for responsive documents and not to file a privilege log. Backpage counsel told the Subcommittee that it had not conducted a “complete search” and that “to be required to conduct such a search and review in light of the significant overbreadth and First Amendment infirmities of the Subpoena would in itself be constitutionally inappropriate.” Nov. 16, 2015 Letter at 2. There is simply no legal or factual support for the proposition that being required to search for responsive documents would abridge Mr. Ferrer’s protected freedoms of speech or press. Mr. Ferrer does not possess an absolute right to be free from government investigation when there are valid justifications for the inquiry.

First Amendment does not prevent Congressional inquiry

Mr. Ferrer correctly told the Subcommittee in a letter that “[t]he Constitution tells us that — when freedom of speech hangs in the balance — the state may not use a butcher knife on a problem that requires a scalpel to fix.” Aug. 6, 2015 Letter (quoting *Cooper*, 939 F. Supp. 2d at 813). The problem is that the Constitution also tells us that Mr. Ferrer

cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority.

No factual basis to assert all emails are protected by First Amendment

[M]erely searching for responsive documents does not limit or chill First Amendment rights. ... [H]aving failed to perform the customary duties associated with a subpoena, Backpage has no basis in fact to assert that all employee emails are protected First Amendment communications. ... Mr. Ferrer has had ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log with an explanation for any withheld material. Having done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts.

Failure to weigh interests

Notably absent from Mr. Ferrer's briefs and letters is the required weighing of the alleged intrusion on his First Amendment rights against the asserted governmental interest in the subpoenaed information for its investigation on Internet sex trafficking. ... Mr. Ferrer merely invokes the First Amendment in general terms and states that the Subcommittee's need for the information does not automatically override his constitutional rights. He engages in no legal analysis to weigh his rights against the Subcommittee's asserted interest.

Senate interests outweigh Ferrer/Backpage interests

On this record, the Court finds that to the extent the Subpoena implicates Mr. Ferrer's protected freedoms, it is only in an incidental and minimal fashion. In comparison, the subpoenaed information is highly relevant to the Subcommittee's investigation and potential legislation on Internet sex trafficking. Understanding the magnitude of Internet sex trafficking and how to stop it substantially outweighs Mr. Ferrer's undefined interests. Even if Mr. Ferrer's activities did not involve commercial speech and were entitled to greater scrutiny, the record shows that the subpoena's impact on Mr. Ferrer's First Amendment freedoms is "so slight" that the Subcommittee's interests must prevail.

Failure to show unreasonable burden

[T]he Court notes that it is "to be expected" that "some burden" would result from the production of responsive documents to a subpoena; however, such burden "is necessary in furtherance of the [Subcommittee's] legitimate inquiry and the public interest." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). "The burden of showing that the request is unreasonable is on the subpoenaed party," and this "burden is not easily met where, as here, the [Subcommittee's] inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* ... There is nothing unusual, unreasonable, or overly broad about requiring a party to search for all responsive documents on a specific subject or topic. ... Notwithstanding the Subcommittee's efforts to narrow its document requests and minimize the supposed burden on Backpage, Mr. Ferrer refused to consider such an approach.

No Due Process claim

The Due Process Clause of the Fifth Amendment of the Constitution, which provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,” includes protections for both substantive and procedural due process. U.S. Const. amend. V; *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755-56 (2005). It cannot be invoked to protect oneself from a congressional investigation merely because the investigation may be inconvenient or undesirable. . . . Mr. Ferrer cannot seriously argue that the Subcommittee’s “shifting demands violate due process,” Opp’n at 42, when the demands have shifted precisely to accommodate Mr. Ferrer’s concerns and facilitate Backpage’s compliance.

Ten days to comply

Mr. Ferrer shall comply forthwith with the October 1, 2015 Subpoena of the Subcommittee and produce to the Subcommittee all documents responsive to requests 1, 2, and 3 of the subpoena no later than 10 days from the date of this Opinion.

Mr. Ferrer appealed the district court’s ruling to the D.C. Circuit Court of Appeals. The D.C. Circuit later dismissed the case as moot and vacated the district court’s decision. There are no ongoing proceedings in this matter.