Private Sector Subpoenas

Fusion GPS Case
Key Excerpts from 2018 District Court Opinion

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On Jan. 4, 2018, D.C. District Judge Richard Leon upheld a subpoena issued by the House Permanent Select Committee on Intelligence to obtain bank records related to the subject of an investigation, Bean LLC doing business as Fusion GPS. He overruled multiple objections to the subpoena and dismissed the case. *Bean LLC v John Doe Bank*, 291 F.Supp.3d 34 (D.C.C. 2018). Here are key excerpts from the district court's 26-page opinion; each excerpt consists of a direct quotation taken from the text of the opinion, with no changes in punctuation but with footnotes omitted.

Fusion's multiple objections insufficient

Fusion [is] seeking to enjoin the Bank from complying with the Subpoena on the ground that it is overly broad, unauthorized, and requests records of Fusion's business transactions that are irrelevant to the Committee's investigative inquiry. While the Committee and Fusion were able to negotiate a narrowing of the thousands of records responsive to the Subpoena, they unfortunately were not able to agree to seventy of those records. As to these, Fusion asserts that the Subpoena violates its First Amendment rights to speech and association, as well as its rights under certain financial privacy laws. … Fusion's renewed motion … is DENIED.

No separate investigative resolution required

Fusion's theory appears to be that every Congressional investigation must be authorized by a separate formal resolution in order to qualify as legitimate legislative activity. To say the least, that is wishful thinking! In considering the scope of the Congressional investigative power, the Supreme Court has required only a grant of authority "sufficient to show that the investigation upon which the [committee] had embarked concerned a subject on which 'legislation could be had.'" … Here, the House Rules authorize the Committee to "review and study on a continuing basis laws, programs, and activities of the intelligence community."

No line-by-line review

This Court, however, lacks the authority to restrict the scope of the Committee's investigation in the manner plaintiff suggests. Congress's power to investigate "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Eastland*, 421 U.S. at 504 n.15, 95 S.Ct. 1813. Indeed, "[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959). And the Supreme Court has left no doubt that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate." *Eastland*, 421 U.S. at 504, 95 S.Ct. 1813. While Fusion is correct that "Congress' investigatory power is not, itself, absolute" and that it "is not immune from judicial review," Pl.'s Renewed Mot. 5, this Court will not — and indeed, may not — engage in a line-by-line review of the Committee's requests. *Cf. McSurely v. McClellan*, 521 F.2d 1024, 1041 (D.C. Cir. 1975) ("There is no requirement that every piece of information gathered in [a Congressional] investigation be justified before the judiciary.").

No reasonable possibility and plainly incompetent or irrelevant standards

Instead, where, as here, an investigative subpoena is challenged on relevancy grounds, "the Supreme Court has stated that the subpoena is to be enforced `unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the ... investigation.'" *Senate Select Comm. on Ethics v. Packwood*, 845 F.Supp. 17, 21 (D.D.C. 1994) (quoting *United States v. R. Enterprises, Inc*., 498 U.S. 292, 301, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991)). In determining the proper scope of the Subpoena, "this Court may only inquire as to whether the documents sought by the subpoena are `not plainly incompetent or irrelevant to any lawful purpose [of the Committee] in the discharge of [its] duties.'" *Packwood*, 845 F.Supp. at 20-21 (quoting *McPhaul v. United States*, 364 U.S. 372, 381, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960)). And "[t]he burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Texaco, Inc*., 555 F.2d 862, 882 (D.C. Cir. 1977). After reviewing the record in this case, I cannot say that the documents sought by the Subpoena are "plainly incompetent or irrelevant" to the Committee's lawful purpose.

No reliance on Fusion assurances

While Fusion assures the Court that the requested records do not, in fact, contain any transactions that are pertinent to the Committee's Russia investigation, Pl.'s Renewed Mot. 9-11, "it is manifestly impracticable to leave to the subject of the investigation alone the determination of what information may or may not be probative of the matters being investigated." *Packwood*, 845 F.Supp. at 21. This is particularly true here, where the full scope of the Committee's investigation is classified, and thus plaintiff cannot possibly know the complete justifications for the Committee's requests for certain documents.

Subpoena valid even if unfruitful results
Because the Committee possesses the power to investigate Russian active measures directed at the 2016 Presidential election, and there is a reasonable possibility that the records requested will contain information relevant to that investigation, the Subpoena is not impermissibly broad, even if the records turn out to be unfruitful avenues of investigation. See *Eastland*, 421 U.S. at 509, 95 S.Ct. 1813 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function — like any research — is that it takes the searchers up some `blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.").

Committee is equivalent of grand jury
[A]t this stage of the proceedings, the Committee is acting as the "legislative branch equivalent of a grand jury, in furtherance of an express constitutional grant of authority." *Packwood*, 845 F.Supp. at 21. It is "well-established that such investigative bodies enjoy wide latitude in pursuing possible claims of wrongdoing, and the authority of the courts to confine their investigations is extremely limited." *Id*.

Significant separation of powers principles at play
[C]onscious of the significant separation of powers principles at play in this litigation, and in light of my finding that the records the Committee has requested could reasonably produce information relevant to the general subject of the Committee's inquiry, I need inquire no further into the scope of the Subpoena in this case.

Financial records not protected by First Amendment
Plaintiff alleges that the Committee's disclosure requests violate the private nature of plaintiff's relationships with its customers — relationships that plaintiff claims are protected by the First Amendment. But plaintiff points to *no* authority to support its theory that the freedom of association protects financial records. And this is not surprising, given that commercial transactions do not give rise to associational rights, even where the subjects of those transactions are protected by the First Amendment. Indeed, courts have uniformly held that the kind of commercial relationships Fusion seeks to shield from governmental inquiry here are not protected as associational rights under the First Amendment.

To hold otherwise would be to allow any entity that provides goods or services to a customer who engages in political activity to resist a subpoena on the ground that its client engages in political speech. Surely, to recast a line from the great Justice Robert H. Jackson, the First Amendment is not a secrecy pact!

Presumption of committee compliance with House confidentiality rules
The mere fact that confidential information was disclosed to the public, without more to show that the Committee played a role in the disclosure, casts no doubt on the Committee's compliance with its executive session rules. This is especially true in light of the fact that Fusion itself has played a role in publicizing aspects of this litigation and the Committee's investigation. *See, e.g.,* Jeremy Herb & Evan Perez, *Fusion GPS Partners Plead Fifth Before House Intel*, CNN, Oct. 18, 2017, (noting that *Fusion's attorney* revealed that

Fusion's principals invoked their Fifth Amendment rights not to answer questions before the Committee). Therefore, absent evidence to suggest that the Committee will not follow its own rules — and plaintiff has presented this Court with none — I must presume that those rules are being followed. *See In re Navy Chaplaincy*, 850 F.Supp.2d 86, 94 (D.D.C. 2012) ([W]ell-settled case law ... requires a court to presume that government officials will conduct themselves properly and in good faith.").

No RFPA protection

[P]laintiff has no rights under the RFPA [Right to Financial Privacy Act] because it is not a "person" who may qualify as a "customer" for the purposes of that statute. A "customer" is defined under the RFPA as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution." 12 U.S.C. § 3401(5). A "person" is defined in the RFPA as "an individual or a partnership of five or fewer individuals." Id. at § 3401(4). Plaintiff is a limited liability company organized under Delaware law, see Compl. ¶ 6; it is not a partnership or an individual. Fusion insists that a limited liability company "is akin to a limited partnership," and thus it should be treated as a customer under the RFPA. Pl.'s Reply 18. But in construing the terms of the RFPA, I "adher[e] strictly to the explicit, unambiguous definition of customer found in the Act."

No GLBA protection

The GLBA [Gramm Leach Bliley Act] applies to the disclosure of "nonpublic personal information" of a "consumer." 15 U.S.C. § 6802(a). The Act defines a "consumer" as "an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes" or "the legal representative of such an individual." Id. at § 6809(9). Plaintiff is a limited liability company, not an individual, *see* Compl. ¶ 6, and thus the GLBA does not shield plaintiff from the Committee's document requests.

Committee procedures adequately protect confidentiality

The Subpoena at issue in today's case was issued pursuant to a constitutionally authorized investigation by a Committee of the U.S. House of Representatives with jurisdiction over intelligence and intelligence-related activities — activities designed to protect us from potential cyber-attacks now and in the future. The Subpoena seeks the production of records of financial transactions that have a "reasonable possibility," *Packwood*, 845 F.Supp. at 21, of producing information relevant to that constitutionally authorized investigation. Although the records being sought by the Subpoena are sensitive in nature — and merit the use of appropriate precautions by the Committee to ensure they are not publicly disclosed — the nature of the records themselves, and the Committee's procedures designed to ensure their confidentiality, more than adequately protect the sensitivity of that information.

On the day after the opinion was issued, Fusion GPS filed a motion to stay the proceedings pending appeal, but the bank produced the disputed documents to the House Committee before the court ruled on the motion. Fusion GPS did not file an appeal. There are no further proceedings in this matter.