Legal Sidebar

Three Parties, Two Cases, One Set of Documents; Not a Fast and Furious Resolution

11/10/2014

This is part one of a two-part series discussing efforts in federal court to force the Department of Justice to disclose documents relating to Operation Fast and Furious that are subject to both a congressional subpoena and an assertion of executive privilege by the President. Read part two here.

It has been well over two years since the House held Attorney General Eric Holder in contempt of Congress for his failure to comply with a Committee on Oversight and Government Reform (Committee) subpoena. Although the Attorney General was not prosecuted for criminal contempt, and the controversy over Operation Fast and Furious remains unresolved, the D.C. District Court nonetheless currently has its hands full with two cases related to the operation. Each case, one filed by the Committee and the other filed by Judicial Watch, a non-profit organization, asks the court to order the Department of Justice (DOJ) to turn over documents that the President has asserted are protected by executive privilege. Together, the two cases may demonstrate the significant difference between the public's ability to access privileged information from the executive branch and Congress's authority to do so. The cases may also provide clarification on executive privilege and the scope of Congress's oversight authority.

The Fast and Furious controversy erupted in early 2011 when it was reported that firearms found at the scene of a shootout in which a U.S. Border Patrol agent was killed had been allowed to pass to criminals in Mexico by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). On February 4, 2011 the DOJ sent a letter to Congress denying that the ATF had any knowledge of the "gun walking" operation. The Committee nonetheless continued its investigation, which was reinvigorated in December of 2011 when DOJ withdrew the February 4th letter, conceding that it had contained "inaccurate information" about the depth of DOJ's knowledge of ATF's actions and that the operation itself was "fundamentally flawed."

At this point the Committee investigation shifted to the question of how the DOJ had provided the Committee with such inaccurate information; why it took almost ten months to correct the mistake; and whether the agency had sought to obstruct the Committee's investigation by providing misleading information. In that vein, the Committee narrowed its focus to documents created after February 4th relating to DOJ's response to the Committee investigation. Following a series of subpoenas and negotiations, the Attorney General ultimately refused to turn over certain documents, citing the President's determination that the information was protected by executive privilege. The House subsequently voted to hold the Attorney General in contempt of Congress for his refusal to comply with the subpoena *and* simultaneously authorized the Committee to file a civil lawsuit in federal court to enforce the subpoena. While the DOJ announced that a criminal contempt of Congress prosecution against the Attorney General was not forthcoming (as discussed in a previous Sidebar), the Committee did file the civil lawsuit in August 2012. While the House was considering contempt, Judicial Watch filed a Freedom of Information Act (FOIA) request for all documents covered by the President's claim of executive privilege. Thus, both lawsuits seek the exact same set of documents.

Both *Committee on Oversight and Government Reform v. Holder* (*Holder*) and *Judicial Watch v. DOJ* (*Judicial Watch*) have been making their way through the D.C. District Court. The district court judge in each case has ordered the DOJ to provide the court with a list of documents it is withholding and a description of why the document is privileged and protected from disclosure. On November 4, DOJ provided the Committee with all of the remaining documents not covered by a privilege and a detailed list of the material being withheld, either in full or in part, pursuant to a privilege. Although the DOJ released over 64,000 pages of documents, the documents are redacted to continue to prevent the disclosure of

privileged information. Neither case has yet reached the merits of the privilege question.

In discussing the import of these cases, perhaps it is best to first address what the cases will not resolve. Neither case concerns contempt of Congress or the DOJ's decision not to prosecute the Attorney General. These cases are strictly focused on whether the documents in question may be withheld from a private party under FOIA, or when subpoenaed by a congressional committee conducting an authorized investigation. Even if the court were to side with the Attorney General and hold that the documents in question are, in fact, privileged and were properly withheld from the Committee, that decision would in no way negate, or remove, the Attorney General's contempt citation.

Nonetheless, the cases may well provide much needed insight into the scope of executive privilege, or to be more specific, insight into the deliberative process prong of executive privilege. The D.C. Circuit, in an important 1997 case entitled *In re Sealed Case (Espy)*, articulated two forms of executive privilege: the presidential communications privilege (PCP) and the deliberative process privilege (DPP). Both privileges protect the executive branch decision-making process and are grounded in the notion that the executive branch must be able to discuss different options and approaches candidly without fear that its communications will later become public.

According to the D.C. Circuit in *Espy*, the PCP is a constitutionally based privilege that preserves the confidentiality of direct decision making of the President. The privilege, therefore, protects only those communications that are authored by, or solicited and received by, the President or presidential advisors with close "operational proximity" to the President. Because the President was apparently not involved in internal DOJ deliberations relating to Operation Fast and Furious, and because the Attorney General does not have "operational proximity" to the President, the DOJ has not asserted the PCP in either *Holder* or *Judicial Watch*. Thus, that prong of executive privilege does not appear to be in play.

Both *Holder* and *Judicial Watch* instead focus on the DPP—it is the primary ground asserted by the Attorney General for withholding the post-February 4th documents that the Committee and Judicial Watch seek. The DPP is much broader than the PCP in that it protects the decision-making process of the entire executive branch, not just the President. The DPP is intended to protect the "'quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." A document is only protected under the DPP if it is (1) "predecisionsal" (i.e., communications made prior to reaching an agency decision) and (2) "deliberative" (i.e., communications relating to the thought process of executive officials that are not "purely factual"). Additionally, while the existence of a PCP claim will protect an entire document from disclosure, the existence of a DPP will not protect an entire document—the government must segregate and disclose non-privileged factual information in the document. Accordingly, in its November 4th production of documents to the Committee, the DOJ disclosed the non-privileged portions of the documents being withheld. However, it redacted portions of the documents it believes fall under the DPP so as to continue to withhold information covered by the privilege.

Part two will discuss important questions regarding the scope of the DPP that may be addressed as *Holder* and *Judicial Watch* move forward.

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Legal Sidebar

Three Parties, Two Cases, One Set of Documents: Continued

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This is part two of a two-part series discussing efforts in federal court to force the Department of Justice to disclose documents relating to Operation Fast and Furious that are subject to both a congressional subpoena and an assertion of executive privilege by the President. Read part one here.

As discussed in part one of this series, *Committee on Oversight and Government Reform v. Holder* (*Holder*) and *Judicial Watch v. DOJ* (*Judicial Watch*) are two cases pending in the D.C. District Court that seek the disclosure of the same set of documents held by the Department of Justice (DOJ) relating to Operation Fast and Furious, a controversial "gun-walking" operation run by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). *Holder* and *Judicial Watch* may shed light on three important questions regarding the disclosure of executive branch information over which an assertion of executive privilege (either the presidential communications privilege (PCP) or the deliberative process privilege (DPP)) has been made.

1) Is the DPP a constitutional or court-created common law privilege?

Whether the DPP is grounded in the Constitution or common law is a fundamental threshold question in *Holder*, the suit filed by the Committee on Oversight and Government Reform (Committee). Congress's oversight authority is limited by constitutional restrictions and privileges (such as the PCP), but Congress is generally *not* required to recognize common law privileges. For example, congressional committees typically exercise discretion in whether to recognize a claim of attorney-client privilege, an established common law privilege. If the DPP similarly finds its basis in the common law, then it too may be an insufficient justification for withholding documents in the face of a congressional subpoena. Indeed, the Committee has argued, based on language in *In re Sealed Case* (*Espy*), a 1997 D.C. Circuit case discussing the bounds of the PCP and DPP, that the DPP is a wholly common law privilege and must be distinguished from the constitutionally based PCP. Accordingly, the Committee contends that the Attorney General's reliance on the DPP as grounds for withholding documents subject to a congressional subpoena must be rejected.

Although not yet reaching the merits in *Holder*, district court judge Amy Berman Jackson appears to have already rejected the Committee's argument that the DPP is a *purely* common law privilege fully distinguishable from the PCP. In oral argument, Judge Jackson stated that "neither *Espy* nor any of the other cases I read seem to indicate that only the [PCP] raises constitutional concerns." In an August 20th order denying motions for summary judgment from both parties, Judge Jackson confirmed that while the D.C. Circuit characterized the DPP as "originat[ing] as a common law privilege" in *Espy*, the circuit court also stated that "some aspects of the [DPP] ...have roots in the constitutional separation of powers." As a result, she rejected the Committee's argument that "the only privilege the executive can invoke in response to a subpoena is the [PCP]." If Judge Jackson explicitly holds that the DPP is more than a common law privilege, that ruling would be a major clarification of the distinctions between the PCP and the DPP drawn in *Espy*. On November 4th, in complying with Judge Jackson's order, the DOJ supplied the Committee with the remaining withheld non-privileged documents and a detailed list of documents that it continues to withhold based on a privilege. The DOJ's letter accompanying this document production specifically references redactions made based on its belief that the DPP applies to certain portions of documents.

The state of affairs in the Freedom of Information Act (FOIA) context is much more straightforward. Under FOIA, documents protected by *either* constitutional *or* common law privileges are specifically protected from disclosure to the public. Therefore, regardless of the DPP's legal foundations, any documents that are both pre-decisional and deliberative will likely be protected from disclosure to Judicial Watch in its FOIA lawsuit.

2) What showing of need is required to overcome a DPP assertion?

Even if the DPP were built on more than a common law foundation, it is still a qualified privilege and, at least in *Holder*, can be overcome by a strong showing of need. As such, Judge Jackson has recognized that she will have to engage in some sort of balancing test to determine whether the documents, although protected by the DPP, must nevertheless be produced to the Committee. The standards for that balancing test remain unclear. With respect to the PCP, the D.C. Circuit in *Espy* appears to have established a clearer test: the requesting party must show that the document is "demonstrably critical to the responsible fulfilment of the Committee's function." The D.C. Circuit has not articulated a parallel standard for overcoming the DPP; however, a reduced showing of need would presumably be accepted. Judge Jackson has acknowledged that a "lower threshold" will likely be required as "congressional or judicial negation of the PCP is subject to greater scrutiny than denial of the deliberative privilege."

In the FOIA context, no showing of need can overcome a proper assertion of the DPP. Congress rejected any balancing of interests in ensuring that privileged documents remain exempt from disclosure. Therefore, if the *Judicial Watch* court were to determine that the documents requested properly fell within the DPP, Judicial Watch would not be entitled to disclosure of the documents, regardless of its asserted need.

3) How will the court determine which documents are privileged?

In *Holder*, Judge Jackson does not appear to be willing to rely solely on DOJ's word that the withheld documents fall within the DPP. Instead, she has suggested that she will conduct an *in camera* review of any documents for which the application of the privilege is disputed, both to make an independent determination about the privilege's application, and to weigh the interests of disclosure against the interests served by keeping the document confidential. Some courts have adopted a similar approach in cases dealing with the state secrets privilege. In those cases, most courts have determined that *in camera* review is necessary when the court is not convinced by the executive branch's assertions that certain documents contain protected state secrets. Potentially complicating matters, DOJ has asserted privilege over "approximately 15,000 documents, extending over 64,000 pages." While those pages have now been disclosed to the Committee, they were provided with numerous redactions. The sheer number of potentially disputed documents in *Holder* may make *in camera* review difficult and impractical.

Similarly, in FOIA cases such as *Judicial Watch*, district judges are authorized to conduct an *in camera* review of disputed documents. However, the ultimate decision of whether to inspect the content of documents is left to the broad discretion of the judge. The D.C. Circuit has suggested that "[i]f the agency's affidavits 'provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.'"

Ultimately, the potentially different resolutions of these two cases may provide valuable lessons on how access to executive branch documents may differ depending on the requester. If the *Judicial Watch* court determines that the documents withheld by DOJ are covered by executive privilege, under FOIA, Judicial Watch will not be able to gain access to the privilege documents. Alternatively, if the *Holder* court determines that the subpoenaed documents are covered by executive privilege, the Committee may still be able to provide a sufficient showing of need to overcome the privilege and achieve disclosure. Such is the potential force of a constitutionally rooted oversight power.

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