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SEC ENFORCEMENT

Constitutional Limitations on an SEC Investigation of a House Committee

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A current case, *Securities and Exchange Commission v. The Committee on Ways and Means of the U.S. House of Representatives and Brian Sutter*, No. 14-mc-00193 (S.D.N.Y.), constitutes the most recent flare up of the historical tensions between the executive and legislative branches—tensions that frequently arise when one branch investigates the other.

On November 13, 2015, the U.S. District Court for the Southern District of New York entered an order compelling the Ways and Means Committee and Brian Sutter, a former Committee staff member, to disclose certain documents that the defendants sought to protect from disclosure. As the court's order demonstrates, the Speech or Debate Clause, U.S. Constitution, Article 1, Section 6, provides a key constitutional protection that limits executive power to investigate.

Here is the background:

The Securities and Exchange Commission (SEC) is investigating whether certain information regarding the U.S. Centers for Medicare and Medicaid Services' (CMS) 2014 reimbursement rates for the Medicare Advantage program was leaked improperly to the public before CMS announced those rates, and whether such a leak resulted in prohibited insider trading.

In April 2013, the SEC staff opened a formal investigation into the source of the information apparently leaked and the circumstances of any leak.

The SEC believes that Brian Sutter, former Staff Director of the U.S. House of Representatives Committee on Ways and Means' Subcommittee on Health, may have been a source of information apparently provided to Greenberg Traurig LLP about the Medicare Advantage rates.

According to the SEC, a Height Securities, LLC analyst received information from a lobbyist and attorney at Greenberg Traurig about the 2014 Medicare Advantage rates and then provided that information to its clients in a ''flash report'' prior to CMS's public announcement.

On May 6, 2014, the SEC issued subpoenas to the Committee on Ways and Means and to Mr. Sutter, seeking a broad range of documents from two months in 2013, including:

- Records from Mr. Sutter's work telephones;
- Documents showing Mr. Sutter's personal and work telephone numbers and email addresses;
- Documents concerning any communications between Mr. Sutter and any member or employee of Greenberg Traurig;

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- Documents concerning any communication between Mr. Sutter and CMS; and,
- Documents created by Mr. Sutter or contained in his files related to the Medicare Advantage rates, among other topics.

Both the Committee on Ways and Means and Mr. Sutter have refused to comply with the subpoenas, asserting, among other objections, that they are protected by the Speech or Debate Clause. In many circumstances, the Speech or Debate Clause shields the legislature, including congressional staff like Mr. Sutter, from investigation by the executive branch. This constitutional shield is fundamental to the balance of powers in our constitutional democracy.

The Speech or Debate Clause

The Founding Fathers' choice to include the Speech or Debate Clause in the Constitution was informed by a hard fought struggle in England. Successive Tudor and Stuart monarchs had used criminal and civil laws to intimidate English legislators. Because of this historical intimidation by the executive, the English Bill of Rights of 1689 declared ''[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.''

The Founding Fathers included very similar language in the U.S. Constitution: ''for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.'' As the Supreme Court recognized in *United States v. Johnson*, 383 U.S. 169 (1966), the Speech or Debate Clause was approved ''at the Constitutional Convention without discussion and without opposition.''

James Madison wrote in the Federalist Papers that ''power is of an encroaching nature'' and ''it ought to be effectually restrained from passing the limits assigned to it.'' The Speech or Debate Clause is just such a restraint. When it applies, as the Supreme Court held in *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491(1975), the protections afforded by the ''Speech or Debate Clause are absolute.''

In 1880, the Supreme Court held in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), that the Speech or Debate Clause applies, not just to ''words spoken in debate,'' but more broadly ''to things generally done in a session of the House by one of its members in relation to the business before it.'' This concept has developed so that courts now decide whether Speech or Debate Clause immunity applies by determining whether a congressional action falls within the ''legitimate legislative sphere.''

The District Court's Practical Speech or Debate Clause Order

On June 20, 2014, the SEC filed suit against the Committee on Ways and Means and Mr. Sutter, seeking to compel them to comply with the subpoenas. On July 11, 2014, the district court postponed indefinitely the deadlines for taking testimony or producing documents pursuant to the subpoenas pending the court's resolution of the issue.

The SEC has taken the position that the documents sought are related to the disclosure of nonpublic information, which disclosure, in the SEC's view, does not constitute legitimate legislative activity. In contrast, the Committee on Ways and Means and Mr. Sutter have taken the position that the subpoenas seek exclusively legislative documents and testimony related to legitimate legislative activity, and that the Speech or Debate Clause bars enforcement of the subpoenas.

On November 13, 2015, the district court ordered the Committee on Ways and Means and Mr. Sutter to comply with the SEC's subpoenas but only to the extent not prohibited by the Speech or Debate Clause.

The district court engaged in a thoughtful review of Speech or Debate Clause precedent. The court concluded that, during the period covered by the SEC's subpoena, ''the Committee and its Health Subcommittee were actively considering potential legislation to address the scheduled 25-percent reduction in Medicare physician payment rates, and were engaged in formal and informal information gathering designed to inform that effort.'' Thus, some of the Committee on Ways and Means and Mr. Sutter's actions during that time period certainly constituted legitimate legislative activity within the legitimate legislative sphere and ''implicate[d] the protections provided by the Speech or Debate Clause.''

But not necessarily all of their activities. The district court emphasized that the Clause ''does not protect the dissemination of information outside of Congress'' and does not prohibit inquiry into illegal conduct. In order to walk the line between compelling the production of unprotected information and upholding the Speech or Debate Clause, the court placed careful limitations on the compelled production. The court's key holdings follow.

(1) The district court compelled production of Mr. Sutter's statements to the outside law firm Greenberg Traurig. But the court held that communications from the law firm to Mr. Sutter that reflect ''informal information gathering concerning a matter that might be the subject of legislation'' need not be produced.

(2) Although the court compelled production of certain responsive documents ''that do not have legislation as their subject, but are merely administrative or personal in nature,'' the court ordered again that, to the extent those documents reflect formal or informal information gathering, the documents need not be produced.

(3) The court explained that the Committee and Mr. Sutter must produce responsive documents, regardless of whether those documents reflect attempts by the Committee or Mr. Sutter to influence the executive branch. In the district court's view, cajoling the executive branch does not constitute legislative activity.

(4) The court compelled production of documents concerning the confirmation of Marilyn Tavenner as the CMS Administrator by the U.S. Senate. The court reasoned that ''[a] House committee or subcommittee has no direct role to play in connection with the confirmation of a Presidential nominee.'' Still, the court excepted from production documents related ''to a legislative plan'' concerning the confirmation.

(5) The court required production of Mr. Sutter's ''personal and work numbers and email addresses,'' which the court held were ''not even arguably legislative.'' The court directed that telephone records be pro-

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duced ''subject to redaction'' to excise references to legislative acts.

(6) The court required the Committee and Mr. Sutter to produce and submit a privilege log identifying those responsive documents that the Committee and Mr. Sutter believe to be protected by the Speech or Debate Clause.

The district court initially ordered that the Committee and Mr. Sutter ''comply with the SEC's subpoenas,'' as limited by the court's order, within 10 days. On November 25, 2015, the Committee and Mr. Sutter noticed their appeal to the U.S. Court of Appeals for the Second Circuit, Case No. 15-3818 (2d Cir.), and also moved the district court to stay its order enforcing in part the SEC's administrative subpoenas. Although the SEC opposed the motion, the district court stayed enforcement of the subpoenas pending appeal. The Second Circuit has ordered the Committee and Mr. Sutter to file their opening brief by March 4, 2016.

Given the importance of the district court's order to inter-branch relations and indeed the structure of our democracy, the Second Circuit's ultimate decision in this case likely will be of some importance as to the ongoing frictions that occur when one branch of government seeks to investigate the other. This is a case worth watching.