THE DNC EMAIL RULING

The folks that read and participate at Emptywheel are, in my humble opinion, without any question the best anywhere at deconstructing email issues and cases, and it sure looks to me like some of the people litigating these various matters are picking up on that too. That being the case, who could possibly deny you more fodder?

The Democratic National Committee has been suing the DOJ in DC District Court to obtain some 68 pages of emails relaing to the US Attorney purge. The main reporting to date has been from Politico:

> A federal judge has handed the White House a legal victory in a battle with the Democratic National Committee over e-mails related to U.S. attorney firings.
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> District Judge Ellen Huvelle of the U.S. District Court for the District of Columbia ruled Thursday that the DNC does not have a right under the Freedom of Information Act to 68 pages of e-mails sent between White House and Justice Department officials simply because the White House e-mail traffic was transmitted on a server controlled by the Republican National Committee.
> …
> In dismissing the DNC lawsuit, Huvelle ruled that it was "based on the false factual premise that White House officials only used their RNC e-mail accounts for political communications."
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> Additionally, Huvelle decided that just because an RNC server was used to send the messages – 68 pages out of more than 5,000 which have been denied to the DNC – it is not enough to automatically disqualify the Justice Department from claiming a FOIA exemption in refusing to

> release them.
>
> "It is therefore clear that RNC e-mail accounts were used (rightly or wrongly) both for official and RNC business, and thus the nature of the server is not necessarily informative as to whether the document contained official or political communications," Huvelle wrote in her opinion.

I think there are two issues to be contemplated here. The first is the relative propriety of Huvelle's decision, and foundation therefor, in the DNC case, and the second is what implications it may have for the greater mass of contentious email issues that are percolating in our midst. Here is the full opinion rendered by Judge Huvelle in *Democratic National Committee v. United States Department of Justice*, CV 20070-712 (ESH-DDC).

There were originally 5,337 pages of emails responsive to the DNC's FOIA request, but agreement was reached as to all but 68 pages. All of the e-mails at issue were sent between officials in the White House and the Department of Justice and were sent to or from an e-mail address with the domain name "GWB43.com" pertain to matters such as "responding to an upcoming Congressional hearing, formulating official responses to inquiries from outside the Executive Branch, suggesting a plan of action for the appointment of a U.S. Attorney or conferring on issues arising from such appointments, recommending revisions to documents, and pfor the hiring of new Department personnel." The sole basis for the DOJ production refusal was FOIA Exception Number 5, contained in 5 USC 552 (b)(5) which provides that the FOIA

> does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . .

The critical discussion by Judge Huville is, in condensed form, as follows:

> First, plaintiff's position is based on the false factual premise that White House officials only used their RNC e-mail accounts for political communications. While plaintiff is correct that RNC e-mail accounts were originally "supposed" to be used exclusively for political communications (see Pl.'s Ex. 3 at 5), it is clear from plaintiff's own exhibits that, in fact, this supposition did not become reality.
> …
> It is therefore clear that RNC e-mail accounts were used (rightly or wrongly) both for official and RNC business, and thus the nature of the server is not necessarily informative as to whether the document contained official or political communications.
> …
> Given this apparently flagrant violation of the Presidential Records Act, plaintiff contends the Court should not treat the requested e-mails as official presidential communications to which the presidential communications privilege applies under FOIA.
> …
> However, the administration's violation of the Presidential Records Act is, as plaintiff acknowleges (id. 8), not before this Court, and it cannot serve as a basis for determining whether the government has properly invoked Exemption 5. Moreover, plaintiff fails to point to any case law that would indicate that the server where an e-mail is housed is relevant to its treatment under FOIA. Rather, under D.C. Circuit precedent, it is the content, not the form, of the communication that determines whether it is properly exempt under Exemption 5.
> …

> Therefore, because the form of the document does not factor into the analysis under FOIA, the Court cannot adopt a per se rule that any e-mails sent on the RNC servers are not covered by FOIA. In the absence of such a per se rule, the remainder of plaintiff's argument collapses.

That is the Reader's Digest synopsis, but the devil is always in the details, so if this really interests you, by all means, read the entire decision with footnotes. I think the first thing to keep in mind is that this decision was made strictly within the context of a FOIA request; the DNC would not have had standing in any other circumstance, so this is a pretty limited ruling and I don't think anyone should get to exercised that it went south.

Notwithstanding the above, I have some issue with the way the decision blithely dispensed with the executive privilege element, which really was given short shrift. The court strains to make the claim that the DNC relies solely on the argument that the emails are reachable because they were on the RNC server; however, skips right over the impact that the fact that they were distributed to the independent third party and how that seriously undermines the executive deliberative process privilege claim. The White House knowingly and intentionally used this non-secure and violative means of communication, that distributed through non-involved parties; if they don't act in any manner consistent with a privileged communication, how is this not a privilege buster? There are certainly arguments that might could be made to overcome the thought that this was a direct waiver of privilege, but it is pretty hard to understand how the Court, even on it's own if necessary, didn't address the clear *prima facie* appearance of a direct waiver. Bottom line, if it is viewed through the restricted lens the court set forth, this might be a correct decision; given the more detailed

full view that should have occurred, not so much maybe.

Now for the more fun part of this exercise, namely what can we take away from the decision? I think there are several goodies in there that may be useful in various places of interest to us. First off, even Judge Huvelle can't escape making the conclusion that the facts exhibit willful violations of the PRA and Hatch Act, notwithstanding her reticence in making such a formal determination because that was not issue before the court. Albeit it in dicta, there is a good deal that supports a lot of arguments and suppositions that have long been made in the discussions at Emptywheel and TNH. I believe Marcy, and many others will find the contents of Footnote 3 of the decision to be of interest.

> Pustay has categorized the 68 contested pages into six numbered groups. Group 3 includes an e-mail from the White House to DOJ forwarding an e-mail about an impending Congressional hearing and soliciting assistance and an e-mail chain regarding an internal White House discussion about how to respond to an inquiry from the North Dakota Attorney General's Office. Group 6 includes a set of e-mails from the White House to members of the Judicial Selection Committee ("JSC") advising on dates, times, and locations of JSC meetings and listing the participants and portions of two e-mail communications discussing a proposed plan of action regarding nominations. Group 21 includes one e-mail chain between the White House and DOJ in which the correspondents discuss potential candidates for a United States Attorney position and develop a selection process. Group 25 includes portions of two e-mails chains discussing how to handle DOJ's response to a controversy regarding the nomination of a United States Attorney and portions of one e-mail chain in

> which the response to a news article about the replacement of a U.S. Attorney is discussed. Group 26 consists of various e-mails regarding the impending appointment of United States Attorneys, including a discussion of hiring issues and background information on the candidates. Finally, Group 28 is comprised of portions of e-mail communications discussing the merits and logistics of hiring of a particular individual to work at DOJ.