



Congressional Subpoenas of Presidential Advisers: The Impact of *Committee on the Judiciary v. McGahn*

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The House of Representatives obtained another judicial victory last week in the continued confrontation with the Trump Administration over the scope of Congress’s investigative powers. In *Committee on the Judiciary v. McGahn*, the U.S. District Court for the District of Columbia (D.C. District Court) held that former White House Counsel Donald McGahn is legally required to appear before the House Judiciary Committee. Though the D.C. District Court’s order has been temporarily stayed by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), the lower court ruling is significant in that it squarely rejects the Department of Justice’s (DOJ) argument that presidential advisors like McGahn enjoy absolute immunity from compelled congressional testimony. Instead, if the district court’s ruling goes into effect, McGahn must appear before the committee and invoke specifically applicable privileges where appropriate. The district court opinion joins other recent judicial decisions supporting congressional access to information, including a district court [order](#) granting the Judiciary Committee access to grand jury materials connected to the Mueller Report and multiple decisions, including [two](#) at the [appellate level](#) rejecting the President’s attempts (in his private capacity) to quash House committee subpoenas for his financial records. The House, however, has yet to receive the benefits of any of these decisions, all of which have been [stayed](#) in one [form](#) or another as appeals proceed to higher courts. (This includes today’s Second Circuit decision in *Trump v. Deutsche Bank* which, by its own terms, is stayed for seven days to allow for a petition to the Supreme Court for a possible extended stay.) Thus, the practical impact of *McGahn* and other cases on the House impeachment investigation is yet uncertain.

The *McGahn* opinion is not the first from the D.C. District Court rebuffing DOJ’s assertion that White House advisers cannot be compelled to provide testimony to a congressional committee. As discussed in greater detail in this [previous Sidebar](#), the 2008 decision of *Miers v Committee on the Judiciary* rejected this same argument when raised by the George W. Bush Administration to prevent former White House Counsel Harriet Miers from appearing before the House Judiciary Committee as part of an investigation into the firing of U.S. Attorneys. In ruling that Miers was compelled to appear, the district court reasoned that the DOJ’s “asserted absolute immunity claim” was “entirely unsupported by existing case law.” The [McGahn opinion](#) took a similar tack, holding that the DOJ’s immunity assertion with respect to McGahn

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“has no principled justification” and “no basis in law.” Absolute immunity, the district court reasoned, is a “fiction” that “simply does not exist.”

It is too soon to predict the impact the *McGahn* opinion will have on the current dispute between the House and the executive branch over committee access to the testimony of presidential advisers. This is especially true since the DOJ has already appealed the decision to the D.C. Circuit and obtained a temporary stay on the district court’s order.

But there are reasons to believe that the decision will lend support to the House’s ongoing investigations of the President. First, the court’s holding that presidential advisers must respond to valid congressional subpoenas for testimony will likely improve Congress’s ability to obtain testimony not only from McGahn, but also perhaps from [other officials](#) who are currently withholding testimony in the House impeachment investigation. For example, some [current](#) and former White House advisers who have thus far refused to testify have suggested that they would be amenable to judicial guidance on how to navigate competing and [incompatible demands](#) from Congress’s subpoena for testimony and the President’s directive not to testify. The *McGahn* opinion arguably provides that guidance, [holding](#) that “individuals who have been subpoenaed ... must appear for testimony in response to that subpoena—i.e., they cannot ignore or defy congressional compulsory process, by order of the President or otherwise.” However, the opinion—which [some say](#) should not be read to address testimonial immunity for those that give the President advice on issues of national security or foreign affairs—does not appear to have influenced the decisions of officials like former Deputy National Security Adviser [Charles Kupperman](#), who is awaiting a decision on a separate claim pending before the D.C. District Court.

More broadly, the *McGahn* opinion conforms to the [series of prior decisions](#) holding that the House and Senate have authority to bring—and the courts have authority to adjudicate—legal claims to enforce committee subpoenas. Despite DOJ’s contentions to the contrary, the *McGahn* opinion concluded that “history and past practice plainly support judicial resolution of stalemates between the Legislature and the Executive branch with respect to the rights that the law establishes and the duties that the law imposes.” This includes the legal duties and obligations imposed by a congressional subpoena. The court’s decision, coupled with a series of earlier lower court rulings, recognize that the courts are an available avenue for the House to combat non-compliance with subpoenas issued to executive branch officials. This may provide the House with additional leverage in ongoing negotiations and may further incentivize executive branch compliance.

However, there are also reasons to believe that the *McGahn* opinion’s practical impact will be somewhat limited, at least with respect to the current impeachment investigation.

First, while the court’s order states that McGahn must respond to the subpoena and appear for testimony, it also explained that he retains the ability to assert privilege in response to specific questions. As [stated](#) by the court:

whether or not the law requires the recalcitrant official to release the testimonial information that the congressional committee requests is a separate question, and one that will depend in large part on whether the requested information is itself subject to withholding consistent with the law on the basis of a recognized privilege.

In short, the district court held that McGahn must show up, but he may refuse to answer specific questions if the answer appropriately implicates an applicable privilege. As has been [seen before](#), assertions of various executive privileges can significantly restrict the amount of information a committee ultimately obtains from a witness. This is especially significant with respect to McGahn, given that much of what the committee appears to be seeking relates to his communications and interactions with the President. The mere fact that a communication involves the President and his adviser, or the President and his attorney, does not necessarily bring it within the protective umbrella of [executive privilege](#), but those confidential communications between the President and his advisers that are made to assist the President

in his decision-making are, in the words of the Supreme Court, “[presumptively privileged](#).” That presumption can be overcome by Congress, but persuading the executive branch of the committee’s view that its interest in obtaining information outweighs the President’s interest in confidentiality in a given scenario may require another court case.

Moreover, it is unclear whether the district court’s decision in *McGahn* will itself trigger a change in DOJ policy. As noted, the D.C. District Court in *McGahn* rejected the very arguments that were made by the DOJ more than a decade ago in *Miers*. Yet the DOJ and the Office of Legal Counsel have [maintained](#) that *Miers* was wrongly decided and, as a district court opinion, not controlling beyond the facts of the case. It’s not clear whether a second district court decision reaching the same result will cause the DOJ to alter its approach to testimony by presidential advisers in future cases. Though as noted above, the *McGahn* decision could inform the behavior of former officials who are not bound by DOJ policy. But absent the President or the Attorney General voluntarily altering executive branch policy or allowing advisers to testify, an appellate level decision rejecting absolute immunity may very well be necessary for DOJ to change its position on the adviser immunity question.

Obtaining that appellate level decision will likely proceed on a time line that does not match the pace of the House impeachment investigation. In fact, one of the chief criticisms of using the courts to enforce subpoenas has been the [time required](#) to obtain a final and enforceable judicial order. In *Miers*, the district court issued its decision on July 31, 2008, just over four months after the case was filed. The government then obtained a temporary stay of the district court opinion, followed by a [stay pending appeal](#) to the D.C. Circuit. The appeal took some eight months (which included an intervening presidential and congressional election) before a [settlement](#) was reached by the parties in which Miers agreed to provide closed-door testimony. The D.C. Circuit, which never issued a decision on the merits, finally dismissed the case in October 2009. Although it is difficult to predict judicial scheduling, the *McGahn* litigation could proceed along a similar time line. Like *Miers*, the initial decision issued in *McGahn* took approximately four months. Also like *Miers*, the DOJ has already appealed the decision and obtained a temporary stay of the district court decision from the D.C. Circuit. Under that order, the D.C. Circuit is scheduled to hear oral arguments on January 3, 2020—not on the merits of the case, but on the DOJ’s motion for a more permanent stay pending appeal. If the procedural similarities to *Miers* continue, and a stay pending appeal is issued, it may be some time before the D.C. Circuit rules in the case.

The House has argued against any stay and may ask the appellate court to expedite its merits review, which could speed up the process, but it is worth noting that this request was made and [rejected](#) in conjunction with the issuance of the stay in *Miers*. The context of that decision, however, was unique and much different from the current scenario. At the time the D.C. Circuit issued the stay in *Miers* and denied the House’s motion to expedite, a congressional and presidential election was less than a month away, and a new Congress would begin in three months. “[E]ven if expedited,” the D.C. Circuit [reasoned](#), “this controversy will not be fully and finally resolved by the Judicial Branch” by the start of the new Congress. Noting that the dispute was “of potentially great significance for the balance of power between the Legislative and Executive Branches,” the D.C. Circuit found it prudent to permit the “new President and the new House an opportunity to express their views on the merits of the lawsuit.” Although the D.C. Circuit will not rule on the DOJ motion for a more permanent stay in *McGahn* until January 2020 at the earliest, the D.C. District Court recently took the view that these distinctions between the *McGahn* and *Miers* cases meant that a permanent stay pending appeal was unwarranted (though the D.C. District Court’s [denial](#) of a stay pending appeal has no effect upon the D.C. Circuit’s separate administrative stay of the lower court’s order, which remains controlling).

In addition to the uncertainty about when the D.C. Circuit may review the merits of the *McGahn* decision, it is also worth noting that the D.C. District Court’s opinion in *McGahn* did not directly address the House’s impeachment power, including how or whether an [impeachment investigation](#) accords the House greater access to executive branch information than in more common legislative investigations. This is

despite the fact that the Judiciary Committee [argued](#) that the McGahn subpoena was issued partly to determine “whether to approve articles of impeachment with respect to the President or any other Administration official.” The court appears to have at times drawn an implicit distinction between the Judiciary Committee investigation that gave rise to the McGahn subpoena, which principally related to the Mueller Report, and the current House impeachment investigation. The D.C. District Court [noted](#) for example, that the issuance of the McGahn subpoena “pre-dates the formal impeachment inquiry that the Speaker of the House announced on September 24, 2019.” Had the court articulated its conception of the investigative powers that attach to impeachment, that could have given some insight to the political branches as to whether courts will approach information access disputes between Congress and the President differently depending on whether they arise in the course of an impeachment investigation or a more typical legislative or oversight inquiry. That discussion, in turn, may have been relevant to any assertion of privileges by McGahn or other witnesses called upon to testify in the House’s ongoing impeachment investigation. For example, the House Judiciary Committee has previously concluded that executive privilege does not apply in an impeachment investigation. The court did not address that type of argument in *McGahn*, but instead [found](#) whether specific information “can be withheld from the committee on the basis of a valid privilege” to be a “very different question” not before the court.

The *McGahn* opinion may favorably impact Congress’s ability to obtain testimony from presidential advisers, but perhaps not immediately. Much depends on the speed and outcome of the appeals process. But even if the district court’s ruling is upheld, judicial rejection of absolute immunity does not guarantee Congress access to all information in the possession of presidential advisers. Once an adviser appears, the amount of information a committee is ultimately able to obtain may still hinge on whether privileges are asserted, and if so, how the committee responds.

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