House Subpoena Power Wins In McGahn Case, With Caveats

By **Andrew Wright, David Rybicki and Nancy Iheanacho** (August 6, 2021)

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In a one-page opinion, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, dismissed the lawsuit brought by the U.S. House of Representatives' Committee on the Judiciary seeking to enforce its subpoena of former President Donald Trump's White House counsel Donald F. McGahn.[1]

More significant, though, was that the en banc court vacated a prior panel ruling that had thrown into doubt the House's power to obtain federal judicial enforcement of its subpoenas.

The case — Committee on the Judiciary v. McGahn — called into question the viability of a critical tool used to compel cooperation with House investigations.

This short, final disposition by the full D.C. Circuit vacated a divided three-judge panel opinion handed down in August 2020 that held the House was powerless to seek judicial enforcement of its subpoenas against an executive branch official without a statute expressly conferring that right of action.[2]

While there were some issues specific to a subpoena directed at an executive branch official, some of its reasoning could have led to similar challenges by private sector parties subpoenaed by Congress.

By vacating the judgment, the full D.C. Circuit vindicated House subpoena power for now.

However, because the en banc panel did not reject the logic or reasoning of the prior opinion, Congress may face a similar challenge to its enforcement remedies in future litigation.

Background

In April 2019, the House Judiciary Committee subpoenaed McGahn, seeking documents and public hearing testimony about then-special counsel Robert Mueller's investigation into Russian interference in the 2016 presidential elections.

McGahn claimed absolute immunity from testifying before Congress.[3] Over the course of the next two years, the controversy generated congressional contempt proceedings, multiple judicial hearings and significant judicial opinions.

The en banc court reviewed — and vacated — a panel majority opinion authored by then-U.S. Circuit Judge Thomas Griffith, joined by U.S. Circuit Judge Karen Henderson, holding that the House's lawsuit should be dismissed.

Judge Griffith reasoned that Congress has not authorized the House to file suit in federal court to enforce congressional subpoenas.

The opinion focused on the separation-of-powers issues presented when Congress subpoenas executive branch officials. The panel noted that the Senate has a statute authorizing it to seek judicial enforcement of its subpoenas, but that the Senate statute "expressly excludes suits that involve executive-branch assertions of 'governmental privilege.'"[4]

Thus, the court reasoned, the lack of affirmative statutory authorization for the House to seek judicial enforcement of a subpoena, especially one involving an interbranch dispute, meant federal courts should decline to recognize an implied cause of action arising from the U.S. Constitution itself.

Its core holding that the courts would not recognize an implied cause of action is a logic that extends beyond congressional-executive disputes to subpoenas of private companies and individuals. As such, Judge Griffith's logic would have been a boon for private parties seeking to resist a congressional subpoena.

The en banc reversal reaffirmed the House's subpoena power, with the court writing during the earlier round of briefing over the House's standing to sue, that "[p]ermitting Congress to bring this lawsuit preserves the power of subpoena that the House of Representatives is already understood to possess."[5]

After the 2020 presidential election, the parties engaged in intensified settlement negotiations.

On Feb. 18, the D.C. Circuit further delayed the matter for two months, adopting a proposal by the Biden administration — over the objections of House Democrats — to postpone the proceedings.

A number of constitutional separation-of-powers issues were implicated by these delays that stemmed from the executive branch's benefit from the status quo.

The Biden administration would presumably like to preserve its ability to argue that its senior officials enjoy executive immunity from testimony; therefore, it was in no hurry to obtain a D.C. Circuit ruling.

The House, in contrast, expressed its desire for a speedy judicial win in order to pry information out of a reluctant executive branch.

Ultimately, on June 4, McGahn sat for a transcribed interview on a set of proscribed topics, and the House Judiciary Committee subsequently released the transcript.

Thereafter, the House and the U.S. Department of Justice filed a joint motion to dismiss and consent motion to vacate the prior panel ruling.

What This Means

House Speaker Nancy Pelosi, D-Calif., issued a statement characterizing the ruling as a win for House subpoena power:

> This ruling reinstates a prior en banc ruling that supported the authority of the Congress to enforce subpoenas and to conduct oversight on behalf of the American people. This decision, which maintains long-standing precedent and Article I

> authority, is a victory for the rule of law, for our Constitution's system of checks and balances and for the American people.

While Pelosi rightly notes that vacating the prior decision was critical to the House retaining a potential federal judicial enforcement remedy, it was only a qualified victory for the House. Nothing about the D.C. Circuit forecloses a future executive branch administration from raising the same arguments.

First, the DOJ — notwithstanding the transition from President Trump to President Joe Biden — has not altered its litigation position.

The department, in agreeing to a joint filing seeking dismissal of the suit after McGahn's transcribed interview, specifically asserted that it maintains its view that the House does not have authority to seek enforcement against executive branch officials.

All the department conceded in the joint motion to dismiss was this:

> While the Executive Branch believes the panel's opinion was correct, it also agrees that the en banc Court should vacate that opinion in the interest of accommodation between the branches.[6]

As such, while the court opinion that was so damaging to the House may be vacated, the issue of whether the House needs a statute to authorize judicial enforcement of its subpoenas has not been substantively resolved by either the D.C. Circuit or the U.S. Supreme Court.

Second, it took two years and an intervening presidential election for the House to get a negotiated agreement to obtain partial information within the scope of the original subpoena. Thus, the political calendar can, in practical terms, overtake the judicial resolution.

Third, the en banc D.C. Circuit may have vacated the opinion, but it did so without rejecting its reasoning. Therefore, future litigants may still argue that the House does not have a cause of action to enforce its subpoenas in federal court without running afoul of D.C. Circuit precedent.

In sum, the House may continue to seek judicial enforcement of subpoenas against the executive branch, but it will likely face another round of protracted litigation.

In addition, this litigation may generate new arguments by private sector actors that wish to resist a congressional subpoena.

In general, however, this litigation, at its end, leaves House subpoena power largely intact, especially for private parties.

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[1] Order, Committee on the Judiciary v. McGahn, 1:19-cv-02379 (D.C. Cir. en banc, July 13, 2021).

[2] Order, Committee on the Judiciary v. McGahn, 1:19-cv-02379 (D.C. Cir., Aug. 31, 2020).

[3] Subpoena, U.S. House of Representatives, Committee on the Judiciary, of Donald F. McGahn, II (Apr. 22, 2019).

[4] Order, Committee on the Judiciary v. McGahn, 1:19-cv-02379 (D.C. Cir., Aug. 31, 2020), at3 (quoting 28 U.S.C. § 1365(a)).

[5] Order, Committee on the Judiciary v. McGahn, 1:19-cv-02379 (D.C. Cir. en banc, Aug. 7, 2020).

[6] Joint Motion to Dismiss Appeal, and Consent Motion to Vacate Panel Opinion, Committee on the Judiciary v. McGahn, 1:19-cv-02379 (D.C. Cir., June 10, 2021).