Trump Impeachment Trials: McGahn subpoena and Congressional oversight

What Comes Next?
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This February, a panel of three D.C. Circuit judges rejected the House Judiciary Committee’s request for testimony from Don McGahn, former White House Counsel, finding that the Committee lacked Article III standing to enforce a congressional subpoena in federal court. Framing the issue as one of separation of powers, the court declined to intervene in what it described as a purely political dispute between the executive and legislative branches. The ruling was a significant setback for the House in their efforts to force the Trump administration to comply with Congressional subpoenas and to yield to Congressional oversight more generally. Interestingly, in March, the D.C. Circuit Court of Appeals vacated the three-judge panel’s decision and opted to hold a rehearing en banc on April 28, 2020. Despite court proceedings around the country being delayed as a result of COVID-19, it is expected that this hearing will go forward as planned. This article looks at what we can expect to see in that hearing and what impact a decision could have.

Who Is Don McGahn?
Donald F. McGahn II first served as Donald Trump’s campaign counsel during Trump’s 2016 campaign for president. On November 25, 2016, Trump named McGahn as White House Counsel. At first, McGahn played a significant role in securing judicial nominations and appointments. Eventually, his name became better known in connection with his role in the Special Counsel investigation. In May 2017, Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to oversee an investigation into allegations of Russian interference in the 2016 presidential election. The investigation’s scope soon broadened past questions of Russian interference when Trump took several actions that raised questions about whether he had obstructed justice. These actions included President Trump’s comments and actions during the firing of FBI Director James Comey and President Trump’s attempts to fire Special Counsel Mueller. McGahn was interviewed by investigators from the Special Counsel’s office on at least five separate occasions and eventually McGahn became the most-cited witness in the 448-page Report on the Investigation into Russian Interference in the 2016 Presidential Election (the “Mueller Report”), which was submitted to Attorney General William Barr on March 22, 2019.

Why Was Don McGahn Subpoenaed?
In March 2019, the Committee on the Judiciary of the House of Representatives, pursuing leads developed by the Special Counsel, began an investigation into President Trump’s possible obstruction of justice, public corruption, and other abuses of power. On March 4, 2019, Jerrold Nadler, the Chairman of the Judiciary Committee, sent a letter to McGahn asking that he voluntarily provide the Committee with certain documents relating to Trump’s possible obstruction of justice. In response, McGahn's private counsel submitted a letter to the Judiciary Committee on March 18, 2019, indicating that the document request was forwarded to the White House and to the Trump Campaign, because those entities “are the appropriate authorities to decide the scope of access to these documents, including whether a claim of executive, attorney-client and/or attorney work product privilege would protect such information from disclosure.” Then, on April 22, the Committee issued a subpoena ordering McGahn to produce documents pertaining to 36 specific topics, including the FBI's investigation of Michael Flynn, the termination of James Comey, former Attorney General Jeff Sessions’ recusal decision, and the Special Counsel's investigation, and testify before the Committee.
McGahn was the first former White House employee to receive a subpoena for documents and congressional testimony in response to the Special Counsel’s investigation. The deadline for the requested documents was May 7, 2019 and McGahn was expected to testify on May 21, 2019. In a May 7, 2019, letter from White House Counsel Pat Cipollone, the White House explained that McGahn should not turn over the requested documents because they implicated executive branch confidentiality interests and executive privilege. In several letters, Chairman Nadler informed McGahn that, absent a court order directing otherwise, McGahn must appear before the Committee and testify on May 21, 2019 or the Committee would hold him in contempt. Nadler explained that because the Committee intended to focus on the very topics covered in the Special Counsel’s Report there could be no valid assertion of executive privilege given that President Trump declined to assert any privilege over McGahn’s testimony in connection with the Special Counsel’s investigation.

On May 20, the day before McGahn was expected to testify, Cipollone informed McGahn that President Trump was instructing McGahn not to appear, and Cipollone attached a letter from the Office of Legal Counsel of the Department of Justice opining that McGahn was immune from compelled congressional testimony concerning matters occurring during his service as a senior advisor to the President. McGahn’s private attorney likewise informed the Committee that McGahn would not testify, but suggested McGahn would comply with an “accommodation” reached by the Committee and the White House. The disagreement between the House Judiciary Committee (subpoena McGahn) and the executive branch (defying the subpoena) led to an interbranch information dispute — a fundamental disagreement between two branches of government. Ultimately, as a result of the White House’s invocation of absolute testimonial immunity, McGahn did not appear to testify on May 21.

The House Judiciary Committee filed suit in the United States District Court for the District of Columbia to compel McGahn to testify before Congress. In its suit, the Judiciary Committee identified McGahn as “the Judiciary Committee’s most important fact witness in its consideration of whether to recommend articles of impeachment and its related investigation of misconduct by the president, including acts of obstruction of justice described in the special counsel’s report.” The complaint argued that McGahn’s refusal to testify impeded the Committee’s ability to determine whether to approve articles of impeachment, pass new legislation addressing the types of misconduct the Mueller Report described, and conduct the Committee’s constitutionally authorized oversight duties.

In a lengthy opinion, the District Court ruled that McGahn must testify pursuant to the Committee subpoena, but, as discussed below, on appeal, a three-judge panel from the D.C. Circuit Court of Appeals ruled that the House could not sue to enforce a subpoena.

**D.C. Circuit Court of Appeals Decision**

On February 28, 2020, in a 2-1 decision, a three-judge panel of the D.C. Circuit Court of Appeals decided that Article III of the U.S. Constitution forbids federal courts from resolving this type of interbranch information dispute and that the parties lacked standing to sue. Judge Griffith, writing for the majority, grounded his opinion in the separation of powers and held that the Court “lack[s] authority to resolve disputes between the legislative and executive branches until their actions harm an entity ‘beyond the [Federal] Government.’” The court found that the Judiciary Committee’s dispute with the executive branch does not have any bearing on the rights of individuals or harm an entity beyond the federal government, and therefore is unfit for judicial resolution.

Separation of powers principles animate Article III of the Constitution. Article III circumscribes the jurisdiction of the federal courts and articulates that federal courts only have standing to hear “Cases” or “Controversies” within the meaning of Article III. The Supreme Court has interpreted this provision of the Constitution to determine that a case or controversy must consist of an actual dispute between parties over the legal rights that remain in conflict at the time the case is presented. Furthermore, the Court’s jurisprudence prohibits the federal courts from providing general advice to other branches.

In this case, Judge Griffith stated that the Article III standing analysis is “especially rigorous’ when [the court] is asked to decide whether the action of ‘one of the other two branches of the Federal Government was unconstitutional.” When such an issue arises, the court must ask two questions. First, if the dispute is “consistent with a system of separated powers” and second, whether the claim is “traditionally thought to be capable of resolution through the judicial process.” The court concluded that the dispute presented did not meet either condition.
The court’s opinion incites the political question doctrine, which refers to the idea that when an issue is so politically charged, federal courts, an apolitical branch of government, should not decide the case. The D.C. Circuit found that the subpoena dispute qualified as a political question and specifically stated, “[f]ew cases could so concretely present a direct clash between the political branches.” The court opined, in line with the political question doctrine, that Article III restricts the role of the federal courts to maintain political neutrality. Thus, the court’s role is not to adjudicate interbranch disputes, which are “deeply political and often quite partisan.” The court claimed that because they would not be able to resolve this case without declaring the action of either the House or the executive branch unconstitutional, they should avoid deciding the case.

The court further opined that if they ruled that the Committee was able to enforce the subpoena through the courts, Congress would be able to enforce any subpoena through the courts. The courts would then play the role of supervising the other two branches of government, which is outside of its role as prescribed in Article III. The court also predicted that if they enforced the subpoena in this case, they would regularly be asked to enforce similar subpoenas, stating, “[t]he walk from the Capitol to our courthouse is a short one, and if we resolve this case today, we can expect Congress’s lawyers to make the trip often.”

The court also emphasized the significance of history, pointing to several cases of both interbranch disputes in general and interbranch information disputes more specifically that have not been resolved by the federal courts. These cases include *Allen v. Wright*, *Racbo v. Common Cause*, *Summers v. Earth Island Institute*, *Raines v. Byrd*, *United States v. Nixon*, *Flast v. Cohen*, and *Youngstown Sheet & Tube Company v. Sawyer*. The majority stressed that the political branches never brought suits claiming injury to official authority or power. The court elaborated that the Supreme Court has only ever resolved interbranch disputes after one branch’s allegedly unconstitutional actions harmed the concrete interests of private actors (citing *INS v. Chadha*, in which case the Court found that Chadha, an immigrant, had standing because if he was successful on the merits his deportation order would have been canceled. The court also noted that while the Supreme Court has adjudicated other separation-of-powers cases, none of them arose out of a “pure interbranch dispute.” Instead, all of the separation-of-powers cases heard by the Court implicated the rights of private actors.

Additionally, the court noted that “Congress expressly excluded federal jurisdiction over suits involving executive branch assertions of ‘governmental privilege’ in 28 U.S.C. § 1365(a), which is the statutory regime for the enforcement of congressional subpoenas. The legislative history of section 1365 specifically notes that the purpose of the law is to “keep disputes between the executive and legislative branches out of the courtroom.”

The Judiciary Committee, in their brief and oral argument, relied on the D.C. Circuit’s precedent to argue that the court had standing. But the court identified that since the Supreme Court’s 1997 decision in *Raines v. Byrd*, which held that members of Congress do not have standing to challenge the constitutionality of federal legislation when the alleged harm sought to be redressed constitutes an institutional injury as opposed to a personal injury, the D.C. Circuit Court of Appeals has “three times considered and three times rejected efforts to assert congressional standing.” The court went on to say that while the D.C. Circuit has not formally overruled their earlier legislative-standing cases, *Raines’s* reasoning casts doubt on their vitality and “compels the conclusion that [federal courts] lack jurisdiction to consider lawsuits between the Legislative and Executive Branches because such lawsuits involve institutional, not personal injury.

Finally, the majority relied on the fact that the political branches have a long tradition of resolving their differences through negotiation and accommodation, and that if the court were to resolve this case, they would be “displac[ing] the long-established process by which the political branches resolve information disputes.” The court asserted that the Constitution provides Congress with several political tools to encourage cooperation from the executive branch, including holding officers in contempt, withholding appropriations, refusing to confirm the President’s nominees, harnessing public opinion, delaying or derailing the President’s legislative agenda, or impeaching recalcitrant officers. In response to the dissent’s concern that the court’s decision will “dramatically undermine” Congress’s capacity to ‘fulfill its constitutional obligations,’ the majority cited “an array of possible resolutions in interbranch disputes,” and warned of the danger in resolving every case with a lawsuit: “When a lawsuit is the end-game of any interbranch dispute, the response to an overbroad subpoena isn’t ‘Let’s talk’ but ‘We’ll see you in court.’” The majority concluded by saying that “if federal courts were to swoop in to rescue Congress whenever its constitutional tools failed, it would not just supplement the political process; it would replace that process with one in which unelected judges become the perpetual overseer of our elected officials.”
Judge Rogers issued a forceful dissent, emphasizing the significance of an impeachment inquiry and the corresponding need for accurate and complete information.

[Impeachment] is not a decision taken lightly and, for that reason, must be made on an informed basis. In the context of impeachment, when the accuracy and thoroughness of the investigation may well determine whether the President remains in office, the House’s need for information is at its zenith.xxxvii

Judge Rogers warned that the majority’s decision would make it nearly impossible for Congress to address corruption and abuses of power, as it will embolden future presidents to issue the same “blanket and unprecedented” order that President Trump issued to executive branch officials to defy congressional subpoenas.xxxix While the President and Congress have traditionally been able to resolve interbranch information disputes, President Trump’s refusal to engage in the informal negotiation process, the same process which the majority encourages, makes clear that the parties in this case, as well as future parties, will be unlikely to reach a mutually acceptable resolution.xl

In her dissent, Judge Rogers also made clear that the majority’s position defies long-standing recognition by the Supreme Court and the D.C. Circuit that “the ability to acquire information is indispensable to Congress’s performance of its constitutional roles.”xli Judge Rogers also identified that under the Supreme Court’s analysis in Raines v. Byrd, the district court’s order enforcing the subpoena should be affirmed. She also argued that the main obstacle to Article III standing in Raines is not present in the instant case since the instant lawsuit was expressly authorized by the full House of Representatives, not individual legislators. This holding was clarified in Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, which characterized Raines as “holding specifically and only that ‘individual members of Congress [lack] Article III standing.’”xlii

The dissent also pointed to two previous D.C. Circuit cases, Senate Select Committee on Presidential Campaign Activities v. Nixonxliii and United States v. AT&T,xliv in which the court entertained congressional subpoena enforcement lawsuits against executive branch officials. In the former case, the D.C. Circuit, sitting en banc, unanimously enforced a Senate Committee subpoena on the President for the production of the Nixon tapes. Both cases stand for the proposition that the Committee would have jurisdiction in the instant case, the dissent argued.

Judge Rogers additionally recognized that when the separation of powers concerns arise in situations such as when Congress files a lawsuit against a former presidential advisor, courts should resolve such disputes only as a “last resort” (quoting Raines).xlv The instant case, Judge Rogers argued, required judicial intervention because alternative remedies were impracticable and if the subpoena were enforced, protections of the president’s interest in executive branch confidentiality would remain unaffected.

Finally, the dissent acknowledged that while the dispute occurred against the backdrop of impeachment, the legal question of whether McGahn must appear in response to a valid subpoena is not a political dispute and does not fit within the Supreme Court’s doctrine for what qualifies as a non-justiciable political question.xlv

**Decision to Hear the Case En Banc**

On March 13, the D.C. Circuit Court of Appeals voted to vacate the three-judge panel’s decision and hold a rehearing en banc on April 28, 2020, in Committee on the Judiciary v. McGahn. If the three-judge panel’s decision stands, it will deal a severe blow to congressional oversight, resulting in the troubling situation in which Congress must negotiate future requests for testimony, but there would be no judicial remedy if the executive branch chose not to negotiate at all. The full court now has the opportunity to reaffirm, clarify, or abrogate the court’s prior congressional subpoena cases and any decision will be pivotal in defining the line between congressional oversight and executive branch immunity.

It is rare for the D.C. Circuit to grant a petition for rehearing en banc.xlvi Rehearings are “not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”xlvii The Committee argued, in its petition, that the decision created a conflict within Circuit and was not in line with a recent Supreme Court decision that narrowed Raines in a way that defeated the standing argument relied on by the panel. The Committee further noted that the panel decision “permits the President to order defiance of the House’s subpoenas on an absolute immunity theory that draws no support from the Constitution and contravenes Supreme Court precedent,” and that the decision “will severely impede Congressional investigations and
oversight.” It appears that both or at least the first of the above conditions have been met, and given the nature of the case there is a high likelihood that this case will end up in the Supreme Court.

The *en banc* hearing will likely focus on the implications for a constitutional separation of powers, and whether the three-judge panel’s decision was in line with prior D.C. Circuit precedent. During the 1970s, the D.C. Circuit decided two significant subpoena enforcement cases, *United States v. AT&T* and *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, neither of which concluded that the legislative parties lacked standing. The United States District Court for the District of Columbia, following the D.C. Circuit’s Precedent, ruled on two recent occasions in *Comm. on Oversight & Gov’t Reform v. Holder* and *Comm. on the Judiciary v. Miers*, that congressional committees do have standing the pursue subpoena enforcement actions against executive officials.

In the three-judge panel decision, however, the court suggested the Supreme Court’s decision in *Raines v. Byrd*, which held that members of Congress do not have standing to challenge the constitutionality of federal legislation when the alleged harm sought to be redressed constitutes an institutional injury as opposed to a personal injury, cast doubt on the D.C. Circuit’s 1970s subpoena enforcement rulings. The full court, when it rehers the case and issues a new opinion, may answer whether *AT&T* and *Nixon* remain good law.

If the D.C. Circuit, *en banc*, decides that Congress cannot vindicate interbranch information disputes in court, Congress’s ability to resolve information access disputes with the executive branch will be severely limited. While Congress can use the political tools mentioned in the three-judge panel’s decision, Judge Rogers, in her dissent in the February 28, 2020, D.C. Circuit opinion, warned that such a decision would embolden future presidents to issue “blanket and unprecedented” orders to executive branch officials to defy congressional subpoenas. Such a ruling would remove any incentive for the executive branch to engage in the negotiation process with Congress, therefore severely impeding congressional oversight.

If the full D.C. circuit adopts the three-judge panel majority’s approach to Article III standing, the court would find that there is little to no role for the judiciary in resolving interbranch informational disputes. Alternatively, the full court could agree with Judge Rogers’ dissent and find that federal courts may adjudicate congressional subpoena enforcement actions against executive branch officials.

The two biggest issues for the Circuit will likely be Article III standing and the separation of powers. The Circuit will likely focus on the issue of Article III standing and the alleged Circuit split between the panel’s decision and the Circuit’s decision in *AT&T*, either finding that they are distinguishable or that the panel wrongly interpreted *AT&T*. The Circuit may comment on the implication of *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n* on *Raines*. Finally, the Circuit will likely address separation of powers concerns regarding the judiciary adjudicating subpoena-enforcement disputes, a point which the panel decision emphasized. Whatever the full circuit decides, its ruling will be sure to have an impact on congressional oversight moving forward.
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What is CAPI?
The Center for the Advancement of Public Integrity is a nonprofit resource center dedicated to improving the capacity of public offices, practitioners, policymakers, and engaged citizens to deter and combat corruption. Established as partnership between the New York City Department of Investigation and Columbia Law School in 2013, CAPI is unique in its city-level focus and emphasis on practical lessons and tools.

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“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.” U.S. Const art. III, § 2.

Id. at 515–16.


Id. at 515–16.


Id. at 515–16.


Id. at 515–16.


Id. at 515–16.


Id. at 515–16.


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McGahn, 951 F.3d at 525.
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Id. at 526.
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Id. at 518.
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Id. at 519.
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Id. at 529.
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Id. at 530.
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Id. at 543 (Rogers, J., dissenting).
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Id. at 542.
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Id. at 544.
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Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)
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United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976)
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Id. at 549 (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997) (Souter, J. concurring)).
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Petition for Rehearing En Banc of the Comm. on the Judiciary of the U.S. House of Representatives at 4, 14, Comm. on
the Judiciary v. McGahn, 951 F.3d 510 (D.C. Cir. 2020) (No. 19-5331), reh’g en banc granted, opinion vacated sub nom.
curiam).
1 United States v. Am. Tel. & Tel. Co., 185 U.S. App. D.C. 254, 567 F.2d 121, 125 (1977); Senate Select Comm. on
2 Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558
3 Raines, 521 U.S. at 813.
3ii McGahn, 951 F.3d at 525.
4 Id. at 542 (D.C. Cir. 2020) (Rogers, J., dissenting).
4 United States v. American Telephone & Telegraph Co. (AT&T I), 551 F.2d 384 (D.C. Cir. 1976) (citing Senate Select
Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc)).