

[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5331

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia
(No. 1:19-cv-2379) (Hon. Ketanji Brown Jackson, District Judge)

**SUPPLEMENTAL BRIEF OF THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES HOUSE OF REPRESENTATIVES**

Annie L. Owens
Joshua A. Geltzer
Seth Wayne

INSTITUTE FOR
CONSTITUTIONAL ADVOCACY
AND PROTECTION

*Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042
ao700@georgetown.edu*

Douglas N. Letter, *General Counsel*
Todd B. Tatelman, *Deputy General Counsel*
Megan Barbero, *Associate General Counsel*
Josephine Morse, *Associate General Counsel*
Adam A. Grogg, *Assistant General Counsel*
William E. Havemann, *Assistant General Counsel*
Jonathan B. Schwartz, *Attorney*

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
*219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov*

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GLOSSARY

Committee	Committee on the Judiciary of the U.S. House of Representatives
DOJ	U.S. Department of Justice
FBI	Federal Bureau of Investigation
JA	Joint Appendix
McGahn	Donald F. McGahn, II

INTRODUCTION

On December 18, 2019, the United States House of Representatives adopted two Articles of Impeachment against President Donald J. Trump for abuse of power and obstruction of Congress. H. Res. 755, 116th Cong. (2019). The House's vote was based on compelling evidence that the President solicited the interference of a foreign government in the 2020 Presidential election and—consistent with his past efforts to undermine investigations into foreign election interference—ordered defiance of lawful Congressional subpoenas. The Committee on the Judiciary of the United States House of Representatives (Committee) submits this supplemental brief in response to the Court's order to address the effect of those Articles of Impeachment on this case. That the House has impeached President Trump has not mooted this case and it has reinforced the Committee's need for this Court's expeditious resolution of this appeal.

This case is not moot first because McGahn was a witness to several of the President's past efforts to undermine investigations into foreign interference in elections, which relate directly to the obstruction of Congress Article of Impeachment. See H. Res. 755, at 7-8; *Staff of the H. Comm. on the Judiciary, 116th Cong., Rep. on the Impeachment of Donald J. Trump, President of the United States* 138-39 (2019) (to be published as H. Rep. No. 116-346) (*Impeachment Report*), <https://perma.cc/3S55-3HLG>. McGahn's testimony would thus inform the House's decision-making about impeachment and presentation of the Articles in a Senate trial. McGahn's testimony

is also relevant to the Committee's ongoing investigations into Presidential misconduct and consideration of whether to recommend additional articles of impeachment. *See Impeachment Report* at 167 n.928.

This case is not moot for an independent reason, on which the Department of Justice (DOJ) agrees. The Committee has explained from the outset of its investigations and throughout this litigation that McGahn's testimony is important to the Committee's consideration of remedial legislation and oversight of the Executive Branch. The Committee is weighing legislative proposals to govern interactions between the White House and DOJ with respect to ongoing civil and criminal matters, and to impose reporting requirements for foreign offers of assistance to political committees. *See* Comm. Br. 9. McGahn's testimony is also necessary for the Committee's oversight of DOJ and the Federal Bureau of Investigation (FBI), including in determining whether those agencies are operating free from improper political interference.

The Committee has needed information from McGahn relevant to these pressing legislative and oversight purposes from the beginning of its investigations, and this need has become more urgent as this Congress's time has elapsed. The Committee's wait for McGahn's testimony should end now.

ARGUMENT

I. THIS CASE IS NOT MOOT

A case becomes moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted). That standard is not met here.

A. The Committee Continues To Need McGahn’s Testimony For Impeachment

1. The first Article of Impeachment, “Abuse of Power,” states that President Trump “solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election.” H. Res. 755, at 2; *see id.* at 2-5. President Trump’s “actions were consistent with [his] previous invitations of foreign interference in United States elections.” *Id.* at 5. As the Committee’s accompanying impeachment report explains, those previous actions included the President “inviting and welcoming Russian interference in the 2016 United States Presidential election.” *Impeachment Report* at 132; *see id.* at 132-34.

The second Article, “Obstruction of Congress,” states that President Trump “directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives.” H. Res. 755, at 6. President Trump’s obstruction was “consistent with [the President’s] previous efforts to undermine United States Government investigations into foreign interference in United States

elections,” *id.* at 7-8, and is part of a “broader pattern of misconduct,” *Impeachment Report* at 167. That pattern includes the President’s “endeavor to impede the Special Counsel’s investigation into Russian interference with the 2016 United States Presidential election, as well as [his] sustained efforts to obstruct the Special Counsel after learning that he was under investigation for obstruction of justice.” *Id.* at 167-68.

As the Committee explained in its impeachment report, it had no choice but to recommend these two Articles once it “received compelling evidence of [the President’s] misconduct.” *Id.* at 163. Given that “the President [has] abuse[d] power by asking and pressuring foreign powers to corrupt the upcoming election,” *id.* at 164, waiting any longer to impeach on this evidence would have been “an abdication of duty,” *id.* at 163.

At a press conference following the House vote to adopt the Articles of Impeachment, Speaker Nancy Pelosi outlined the next stage of the House’s decision-making, which depends in part on the procedures the Senate adopts for an impeachment trial. *See* Press Release, Speaker of the House, Transcript of Speaker Pelosi, Committee Chairs Press Availability Following Passage of Articles of Impeachment (Dec. 18, 2019), <https://perma.cc/F6CZ-CTKP>. Speaker Pelosi expressed her hope that “resolution” of the procedures to be used in the Senate will take place “soon.” *Id.*

2. McGahn's testimony is vital to the House's ongoing impeachment proceedings in several respects. McGahn's testimony would inform the House's decision-making regarding the presentation of the Articles and evidence to the Senate. As the Committee's impeachment report explains, relevant information from McGahn's testimony "would be utilized, among other purposes, in a Senate trial on these articles of impeachment." *Impeachment Report* at 167 n.928. In addition, the Committee "has continued and will continue those investigations consistent with its own prior statements respecting their importance and purposes." *Id.*

The second Article on obstruction of Congress states that President Trump "[d]irect[ed] the White House to defy a lawful subpoena by withholding the production of documents sought therein by the Committees"; "[d]irect[ed] other Executive Branch agencies and offices to defy lawful subpoenas"; and "[d]irect[ed] current and former Executive Branch officials not to cooperate with the Committees." H. Res. 755, at 7. "These actions were consistent with President Trump's previous efforts to undermine United States Government investigations into foreign interference in United States elections." *Id.* at 7-8.

McGahn witnessed the most significant of those previous efforts firsthand—he was White House Counsel when the President took multiple actions to obstruct the Special Counsel's investigation of Russia's interference in the 2016 Presidential election. These actions included firing FBI Director James Comey as well as directing McGahn to fire the Special Counsel and then lie about it. *See* Comm. Br. at 6 & n.3;

Impeachment Report at 168. McGahn thus witnessed “previous efforts [by the President] to undermine” investigations that relate directly to the second Article of Impeachment. H. Res. 755, at 7-8. As the Committee has explained, “[a]lthough the Second Article of Impeachment focuses on President Trump’s categorical and indiscriminate obstruction of the House impeachment inquiry, the consistency of this obstruction with his broader pattern of misconduct is relevant and striking.”

Impeachment Report at 168. This pattern includes the fact that the President “sought to curtail the Special Counsel’s investigation in a manner exempting his own prior conduct” and “instructed the White House Counsel to create a false record and make false public statements.” *Id.*

The Committee thus continues to have an urgent need for McGahn’s testimony to further support the misconduct described in the second Article. For example, if McGahn confirms to the Committee that the President ordered him to fire Special Counsel Mueller—an event that President Trump has publicly disputed—and then tried to cover it up, that testimony would constitute powerful evidence of the pattern of obstructive behavior described in the second Article. *See id.* at 167 (“There, President Trump used the powers of his office to obstruct and seek to fire the Special Counsel; here, President Trump used the powers of his office to obstruct and embargo the House impeachment inquiry.”). The Committee—and the House—thus have a continued interest in ensuring that the Senate has before it any relevant

information from McGahn's testimony in deciding whether to remove President Trump from office.

McGahn's testimony also remains central to the Committee's ongoing inquiry into the President's obstructive conduct. If McGahn's testimony produces new evidence supporting the conclusion that President Trump committed impeachable offenses that are not covered by the Articles approved by the House, the Committee will proceed accordingly—including, if necessary, by considering whether to recommend new articles of impeachment. The Committee's interest in obtaining McGahn's testimony pursuant to its ongoing impeachment investigations plainly suffices to preserve a live case or controversy.

Even if that were not true, the capable-of-repetition-yet-evading-review doctrine would prevent the President from evading this Court's review of his absolute immunity claim covering McGahn by running out the clock on impeachment. The President's claim of absolute immunity during the impeachment inquiry that culminated in the two current Articles of Impeachment was "in its duration too short to be fully litigated prior to its cessation or expiration." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) (quotation marks omitted). In addition, "there is a reasonable expectation" that the Committee will "be subjected to the same action again." *Id.* (quotation marks and alteration omitted). When the Committee subpoenas another Presidential aide—whether as part of its ongoing investigations or in future investigations—it is likely again to confront DOJ's theory

that Presidential advisors are absolutely immune from compelled Congressional testimony. The Court should address and reject that theory now.

B. The Committee Continues To Need McGahn's Testimony For Legislation And Oversight

This case is not moot for an additional reason: The Committee seeks McGahn's testimony for pressing legislative and oversight purposes. *See* Comm. Br. 4-9, 15-17 (collecting Committee materials describing legislative and oversight aims). McGahn has never disputed the validity of these purposes. *See* JA855-56 (describing Committee's investigation and noting that the "material facts that underlie this lawsuit are not in dispute"). And McGahn agrees that the case is not moot for this reason. McGahn Supp. Br. 1.

Consistent with its assigned role as the authorizing committee for DOJ and the FBI, *see* House Rule X.1(l), X.2(a), (b)(1)(B), the Committee is conducting necessary oversight of both agencies arising out of the events uncovered by the Special Counsel's investigation. Among other things, the Committee seeks McGahn's testimony about the Special Counsel's findings on the President's interference with these agencies and the law enforcement matters under their supervision. *See, e.g.*, JA73-77, JA529-34, JA542; H. Rep. No. 116-105, at 13 (2019); *see also, e.g.*, Mueller Report, Vol. II at 77-78, 80-90 (President Trump's directions to McGahn to fire Special Counsel Mueller).

The Committee is also weighing a range of legislative responses, including “whether the conduct uncovered may warrant amending or creating new federal authorities . . . relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes.” JA530 (quoting H. Rep. No. 116-105, at 13). To this end, the 116th Congress is already considering various legislative proposals to which the testimony of McGahn—who prior to becoming White House Counsel was counsel to the Trump Campaign—is relevant, including legislation that would: impose reporting and transparency requirements on communications between the White House and DOJ relating to ongoing civil and criminal matters (H.R. 3380); place limitations on the removal of special counsels (H.R. 197); and amend the campaign finance laws to require political committees to report within 24 hours to the Federal Election Commission and the FBI offers of prohibited campaign assistance from foreign nationals (H.R. 2424).

That the Committee’s investigation into Presidential misconduct serves multiple Article I functions of the House simultaneously is unremarkable. *See Trump v. Mazars USA, LLP*, 940 F.3d 710, 724, 737-39 (D.C. Cir. 2019), *cert. granted*, 2019 WL 6797734 (U.S. Dec. 13, 2019) (No. 19-715). The Committee’s investigatory power “is broad,” *id.* at 722; it “encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes,” and “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste,” *Watkins v. United States*, 354 U.S. 178, 187 (1957). In response to Watergate—a close

historical analogue—Congress likewise amended and enacted multiple laws that addressed the conduct of Executive Branch officials and sought to reform errant agency processes. *See, e.g., Mazars*, 940 F.3d at 714-15 (Ethics in Government Act of 1978); *Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997) (Internal Revenue Code provision restricting release of tax returns).

II. EXPEDITED CONSIDERATION REMAINS NECESSARY

The House’s vote on the Articles of Impeachment against President Trump underscores the Committee’s urgent need for expedited consideration of this appeal. As discussed above, McGahn’s testimony is critical both to a Senate trial and to the Committee’s ongoing impeachment investigations to determine whether additional Presidential misconduct warrants further action by the Committee. The public has a significant interest “in immediately removing a sitting President whose continuation in office poses a threat to the Nation’s welfare.” *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 258, 2000 WL 33711291, at *27 (2000).

The Committee’s need for McGahn’s testimony is also acute given the urgent nature of the oversight and legislative reforms the Committee is pursuing. In its oversight role, the Committee is investigating whether law enforcement matters at DOJ and the FBI are vulnerable to improper political interference. And the Committee is considering legislative reforms that would prevent such interference, preserve election security, protect campaign finance systems, and address other

important issues. *See* Comm. Br. 4-9; *see also* JA530. Yet Congress “cannot legislate wisely or effectively in the absence of information.” *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). With each day that passes, the Committee is further deprived of information that could assist it in crafting responsible laws to protect ongoing criminal investigations and safeguard the integrity of America’s elections in 2020.

The House, moreover, “unlike the Senate, is not a continuing body.” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 512 (1975). The House’s current term ends on January 3, 2021. U.S. Const., Amend. XX. Here, “the loss of time to consider and act upon the material disclosed pursuant to the[] subpoena[], which will expire at the end of the 116th Congress,” is “irreparable,” particularly where the Committee “need[s] the remaining time to analyze the material, hold hearings, and draft bills for possible enactment.” *Trump v. Deutsche Bank AG*, 943 F.3d 627, 674 (2d Cir. 2019), *cert. granted*, 2019 WL 6797733 (U.S. Dec. 13, 2019) (No. 19-760).

More than eight months—one-third of the House’s two-year term—have passed since the Committee subpoenaed McGahn’s testimony. JA73. During that time, McGahn has continually defied his “unremitting obligation” to comply, “to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.” *Watkins*, 354 U.S. at 187-89. As the district court correctly concluded, “further delay of the Judiciary Committee’s enforcement of its valid subpoena causes grave harm to both the Committee’s investigation and the interests of the public more broadly.” JA984.

The Committee continues to suffer harm with each additional day that it is denied access to McGahn's testimony. The Committee has already waited eight months. The Committee should not be required to wait any longer.

CONCLUSION

The Court should promptly affirm the district court's order entering judgment in favor of the Committee.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter

General Counsel

Todd B. Tatelman

Deputy General Counsel

Megan Barbero

Associate General Counsel

Josephine Morse

Associate General Counsel

Adam A. Grogg

Assistant General Counsel

William E. Havemann

Assistant General Counsel

Jonathan B. Schwartz

Attorney

Annie L. Owens
Joshua A. Geltzer
Seth Wayne

INSTITUTE FOR
CONSTITUTIONAL ADVOCACY
AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042
ao700@georgetown.edu

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

*Counsel for the Committee on the Judiciary
of the U.S. House of Representatives*

December 23, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies the instructions in this Court's supplemental briefing order because it contains 2,560 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter

Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on December 23, 2019, I filed the foregoing supplemental brief of the Committee on the Judiciary of the United States House of Representatives via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter

Douglas N. Letter