

Federal appeals court rules Congress cannot enforce White House subpoena

By John Burton
4 March 2020

Last Friday, a federal appellate panel reversed by a 2-1 vote a lower court order directing former White House Counsel Donald McGahn to appear before the House Judiciary Committee to answer questions concerning President Donald Trump's allegedly illegal obstruction of congressional investigations.

Although Trump's impeachment inquiry ended with a party-line acquittal in the Senate, the House of Representatives is asserting a continuing need to compel McGahn to testify about alleged abuses of power on the part of the president.

The subpoena was issued based on statements that McGahn made to Special Counsel Robert Mueller concerning Trump's efforts to thwart the special counsel's investigation into supposed Russian meddling in the 2016 presidential election.

The split decision by the United States Court of Appeals for the District of Columbia Circuit, which reviews cases arising in the courts of the nation's capital, was expected to resolve Trump's assertion that presidential advisors have absolute immunity from congressional questioning, a sweeping claim that flies in the face of numerous Watergate-era rulings striking down similar assertions of privilege by then-President Richard Nixon.

The overruling of Nixon's claim to absolute immunity resulted in the release of tape recordings that documented White House misconduct and cover-up, ultimately leading to Nixon's resignation, under the threat of impeachment, on August 8, 1974.

Upholding the McGahn subpoena and ordering his appearance before Congress while the impeachment hearings were ongoing, District Judge Kentanji Brown Jackson, an Obama appointee, wrote that "No one is above the law," emphasizing that "the primary takeaway from the past 250 years of recorded

American history is that Presidents are not kings."

The ruling by the DC Circuit Appeals Court panel majority goes a long way in investing the US president with king-like powers. Writing for the majority, Judge Thomas B. Griffin, a one-time Republican political operator appointed to the DC Circuit by President George W. Bush, wrote that "the Constitution forbids federal courts from resolving this kind of interbranch information dispute."

According to Griffith, the House of Representatives and the president are "locked in a bitter political showdown that raises a contentious constitutional issue." He continued: "The committee claims an absolute right to McGahn's testimony, and the President claims an absolute right to refuse it. We cannot decide this case without declaring the actions of one or the other unconstitutional, and," quoting a case decided in favor of former Vice President Dick Cheney, "'occasions for constitutional confrontation... should be avoided whenever possible.'"

Thus, federal courts can play no role whatsoever when the executive branch stonewalls Congress. As explained by Griffith, "If we order McGahn to testify, what happens next? McGahn, compelled to appear, asserts executive privilege in response to the Committee's questions. The Committee finds those assertions baseless. In that case, the Committee assures us, it would come right back to court to make McGahn talk. The 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."

Griffith wrote as though deciding such disputes was not part of a judge's job description.

More than two centuries of federal jurisprudence, starting with the seminal Supreme Court case of *Marbury v. Madison* in 1803, establish that the federal

judiciary exists to determine important constitutional disputes, including those that inevitably arise between the legislative and executive branches. Friday's decision, however, both disables congressional power to obtain documents and testimony from the White House and repudiates judicial responsibility to determine constitutional questions. As such, the DC Circuit's ruling marks yet another step toward the unchecked "unitary executive" so coveted by Trump and others seeking more authoritarian forms of rule.

Circuit Judge Karen LeCraft Henderson, an appointee of President George H.W. Bush, agreed with Griffith that lower federal courts do not have jurisdiction to enforce congressional subpoenas directed to the White House. Her separate concurrence, however, described Trump's assertion of absolute immunity as resting on "somewhat shaky legal ground," a meaningless concession given the removal of that constitutional question from the scope of judicial review.

The dissent by Clinton appointee Judith W. Rogers echoed the lower court's ruling, writing, "The power to impeach and remove the President from office distinguished the President from a king... The Founders well knew the destructive power of unchecked and uncheckable authority in the hands of a single person."

House Speaker Nancy Pelosi announced that the House of Representatives will petition for en banc review of the ruling by the entire DC Circuit. The next step after that would be a petition for review by the United States Supreme Court.

The DC Circuit ruling, if it stands, is expected to affect a number of other congressional inquiries, including ongoing House efforts to obtain Trump's tax returns.

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