

[Click to print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: <https://www.law.com/nationallawjournal/2020/01/03/doj-tells-unelected-and-unaccountable-judges-to-stay-out-of-fight-for-mcgahn-testimony/>

DOJ Tells 'Unelected and Unaccountable' Judges to Stay Out of Fight for McGahn Testimony

Justice Department lawyer Hashim Mooppan said the court should avoid “refereeing” a fight for evidence sought as part of the impeachment proceedings.

By Jacqueline Thomsen | January 03, 2020



Former White House counsel Donald McGahn. Photo by Diego M. Radzinski/ALM.

A Justice Department attorney told a three-judge panel for the U.S. Court of Appeals for the D.C. Circuit that, if they find the House Judiciary Committee can sue to compel testimony from former White House counsel Donald McGahn, it could undermine public trust in the federal courts.

Justice Department lawyer Hashim Mooppan told the court Friday that, if it rules on the McGahn testimony case, it will insert the judiciary into an inherently political dispute.

Referring to judges as “unelected and unaccountable,” Mooppan told the panel that they “can be assured that the opinion this court issues will be waved on the floor of the Senate” as evidence either for or against the removal of President Donald Trump from office.

Judge Judith Rogers repeatedly pushed back against those claims, noting that can happen with any opinion issued by a court.

But Mooppan said the court should avoid “refereeing” this fight for evidence sought as part of the impeachment proceedings.

The arguments were held just weeks after the House impeached Trump for abuse of power and obstruction of Congress. Those charges were the result of a monthslong investigation into Trump’s efforts to push Ukraine to investigate his political opponent, former Vice President Joe Biden, while withholding military aid from the country.

The House Judiciary Committee last year filed two lawsuits for evidence it said it needed in determining whether to impeach Trump: McGahn’s testimony and grand jury materials redacted from former special counsel Robert Mueller’s investigation. However, matters related to that evidence were not directly and explicitly referenced in the Ukraine-focused articles of impeachment.

House attorney Megan Barbero argued the House clearly has standing, saying the lawmakers' legal team does "fundamentally disagree" with DOJ's interpretation of past U.S. Supreme Court rulings on legislators' right to go to court.

"Even if there are political issues the courts will gladly avoid, it is the duty of the court in a case that is otherwise justiciable ... to say what the law is," Barbero said. "That is what we are asking the court to do."

However, Judge Thomas Griffith, who previously served as Senate legal counsel, questioned why the House couldn't use other political tools instead of going to court.

"Cut the appropriations, get the Senate to stop confirming judges," Griffith said. "You're not without remedy here."

Rogers, the only Democratic-appointed judge on the panel, questioned that logic, saying the Senate would also have to sign off on any legislation passed by the House.

"It's nice to write a law review article about. You have two branches at loggerheads here," Rogers told Mooppan.

Griffith also pressed Barbero about how McGahn's testimony could be relevant to the current impeachment. He noted McGahn, who is now at Jones Day, was "long gone" before the Ukraine actions took place.

Barbero said that, in the article passed for obstruction of Congress, it references a pattern of obstructive behavior by Trump that McGahn could testify to. And she read a passage from a House supplemental briefing filed last week about how lawmakers have not ruled out further articles being drafted against Trump, if sparked by newly revealed evidence.

Friday's McGahn arguments are part of a double feature at the D.C. Circuit, with another three-judge panel slated to hear from attorneys in the appeal of the Mueller grand jury (<https://www.law.com/nationallawjournal/2020/01/02/mcgahn-and->

mueller-meet-the-attorneys-and-judges-starring-in-the-dc-circuit-arguments/) materials case.

Almost immediately after the House voted last month, largely along party lines, to impeach the president, each panel of judges asked the House and the Justice Department to say how impeachment impacted the cases. And the panel in the Mueller grand jury materials case also asked whether the House has standing to sue for the information.

The House said both sets of materials could be used for the impeachment trial in the Senate, and potentially for additional articles of impeachment against Trump, if they revealed further offenses.

House attorneys said the DOJ hasn't previously disputed lawmakers' right to get the materials, and that "the current status of the impeachment proceedings underscores the continuing controversy regarding the withheld grand-jury material, and increases the need for this Court to rule expeditiously."

But the DOJ indicated in its own filings that it believed the courts should stay out of any impeachment disputes, contrasting with the repeated assertions by House Republicans that their Democratic counterparts had to go to court to try and obtain evidence and witnesses before an impeachment vote.

The D.C. Circuit arguments are the culmination of months of court battles in the impeachment-related fights, which have, so far, largely gone in the House's favor.

U.S. Chief District Judge Beryl Howell said in an opinion last year that the House should be able to view the unredacted grand jury information gathered as part of the Mueller investigation, ruling that the impeachment inquiry was a judicial proceeding, one of the few times that grand jury materials can be shared.

And shortly after, U.S. District Judge Ketanji Brown Jackson found that McGahn could be compelled to testify as part of the impeachment inquiry, writing that the DOJ's claim that the former White House counsel has "absolute immunity" from testifying "is a proposition that cannot be squared with core constitutional values, and for this reason alone, it cannot be sustained."

Read more:**Meet the Big Law Litigators the US House Turned To in 2019**

(<https://www.law.com/nationallawjournal/2019/12/28/meet-the-big-law-litigators-the-u-s-house-turned-to-in-2019/>)

McGahn's Testimony Is 'Urgent,' House Argues, as DOJ Tells Court to Stand Down (<https://www.law.com/nationallawjournal/2019/12/23/mcgahns-testimony-is-urgent-house-argues-as-doj-tells-court-to-stand-down/>)

White House Counsel Isn't 'Personal Lawyer' to President, McGahn Asserts (<https://www.law.com/nationallawjournal/2019/12/12/white-house-counsel-isnt-personal-lawyer-to-president-mcgahn-asserts/>)

Trump's 2019 Court Tab: All the Major Losses, and a Few Big Wins

(<https://www.law.com/nationallawjournal/2019/12/27/trumps-2019-court-tab-all-the-major-losses-and-a-few-big-wins/>)

Copyright 2020. ALM Media Properties, LLC. All rights reserved.