

POLITICS

'Food fight' or congressional oversight? Appeals court weighs whether to enforce subpoenas issued in impeachment inquiry

[Bart Jansen](#) and [Kevin Johnson](#) USA TODAY

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WASHINGTON – House lawyers told a federal appeals court Friday that President Donald Trump faces the prospect of new articles of impeachment as they asked judges to give them access to secret testimony gathered during the Russia investigation and to force former White House counsel Donald McGahn to testify before Congress.

The Justice Department, which appealed rulings by two district courts, vehemently argued against both efforts. But their challenges were met with deep skepticism from some members of the two judicial panels.

“Has there ever been an instance of such a broad scale of defiance of Congress?” Judge Thomas Griffith asked Justice Department lawyer Hashim Mooppan, referring to the Trump administration's refusal to cooperate with the House impeachment inquiry. “Has that ever happened?”

Mooppan acknowledged there may be no precedent, yet he pressed to block McGahn's testimony by arguing the courts have no authority to intervene in a largely political dispute.

The blunt exchange was part of a morning-long clash in back-to-back hearings in which House lawyers said the impeachment inquiry against Trump remains open. New charges could be brought, they said, if McGahn testifies and if the House reviews grand jury testimony behind the conclusions of special counsel Robert Mueller's investigation into Russia's interference in the 2016 election.

Last month, the House approved two articles of impeachment against the president. One article accuses Trump of abusing his power by withholding military aid in order to pressure Ukraine to announce investigations into a political rival. The other accuses him of obstructing Congress by stonewalling most of its subpoenas for documents and testimony.

Megan Barbero, House associate general counsel, told the panel in the McGahn case that his testimony could bolster the obstruction charge, which deals with Trump's alleged efforts to have Ukraine interfere in the 2020 election. And it could lead to additional articles of impeachment regarding Russian interference in the 2016 election, she said.

“It is the pattern of misconduct that would be relevant,” Barbero said.

Asked later whether the grand jury information gathered during the Russia inquiry could prompt new impeachment charges, House general counsel Douglas Letter said, “That is on the table; there is no doubt.”

Mueller’s report described multiple instances in which Trump sought to thwart the investigation, which included ordering McGahn to remove Mueller. The special counsel did not make a decision on bringing criminal charges against Trump, largely because Justice Department policy says a sitting president cannot be charged with a crime.

The House Judiciary Committee subpoenaed McGahn in April, but he refused to appear.

The battle over his testimony could redefine relations between the executive and legislative branches of government, with the Trump administration arguing Congress cannot force any Trump aide to testify.

Judges spent most of the 80-minute hearing in the McGahn case questioning whether they should decide the matter at all.

Mooppan, the deputy assistant attorney general at the Justice Department, argued the court should avoid the “political food fight” between the other two branches and let them resolve the dispute over McGahn’s testimony.

But Barbero said the judges must enforce the House's subpoena in order to guard against the Trump administration's unprecedented defiance of Congress' oversight.

Judge Karen Henderson pointedly asked the Justice Department lawyer whether the administration believes the House could never ask the courts to enforce a subpoena against the executive branch.

“That is our position, your honor,” Mooppan said.

Judge Judith Rogers said judges were wrestling with whether and how to mediate in a period of noncooperation between the branches of government, when “either they have to duke it out or nothing happens.”

“That’s what we’re struggling with here,” Rogers said.

Other potential witnesses in the impeachment inquiry, such as acting White House Chief of Staff Mick Mulvaney and former national security adviser John Bolton, have said they wanted clarification from the courts about whether they could be forced to testify.

Since the beginning of the impeachment inquiry, however, McGahn has been a central figure because of his proximity to the president.

U.S. District Judge Ketanji Brown Jackson sided with the Judiciary Committee when it sued to enforce the McGahn subpoena. She rejected the White House's claims of absolute immunity, writing that the president "does not have the power" to prevent his aides from responding to congressional subpoenas.

"Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings," Jackson wrote.

The Justice Department appealed her ruling, urging the appeals court to dismiss the lawsuit for having no standing in federal court. The department argued there was no urgency to making a decision because a quick decision could influence the pending Senate trial.

Barbero argued that the Trump administration has directed aides and executive branch agencies to defy House subpoenas for documents and testimony. If the court doesn't step in, she said, that could hurt the legislative branch’s ability to provide a check on the administration's power.

The Trump administration has argued that top officials such as McGahn enjoy “absolute immunity” from being compelled to testify, which is necessary for them to offer confidential advice to the president.

Barbero said “absolute immunity” was “unfounded in the law.”

If the court were to force McGahn to testify, he could still refuse to answer specific questions by claiming executive privilege, which also aims to protect confidential advice to the president. But that could lead to more lawsuits.

“This court should not be refereeing who is right or wrong about whether the president is acting totally unusually or Congress is acting totally unusually,” Mooppan said. “That is exactly why this court should stay out of that.”

But Barbero said defiance of subpoenas could thwart all congressional investigations, including those that could lead to legislation to prevent foreign contributions from influencing elections.

“There is also a diminution of power of our branch of government,” she said.

Mooppan argued that the House has no authority to enforce its subpoena and should have relied on the Justice Department for that. He said the court shouldn’t decide the case because Congress has other remedies when facing a defiant administration, such as withholding spending for presidential priorities, refusing to confirm nominees or pursuing impeachment.

“It’s not that there aren’t any remedies – it’s that they are political,” Mooppan said.