

[EN BANC ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2021]

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,

Appellee,

v.

DONALD F. MCGAHN, II,

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)

**OPPOSITION OF THE COMMITTEE ON THE JUDICIARY OF THE
U.S. HOUSE OF REPRESENTATIVES TO MOTION TO POSTPONE
ORAL ARGUMENT**

Appellee the Committee on the Judiciary of the U.S. House of Representatives respectfully opposes the request by the Department of Justice (DOJ) to postpone the oral argument in this case. The Committee urges that the oral argument take place as scheduled on February 23, 2021.

1. In March 2019, the Committee began investigating the events detailed in Special Counsel Robert Mueller's report, including President Trump's interference with DOJ and FBI law enforcement investigations. *See* Comm. Panel Br. 4-9. Appellant Donald McGahn was a key witness to several of the most serious instances of President Trump's misconduct documented in the Mueller Report, and, with

President Trump's approval, McGahn voluntarily sat for hours of interviews with the Special Counsel about his interactions with the President. The Committee therefore issued a subpoena for McGahn's testimony in April 2019. McGahn refused to testify, claiming at the direction of President Trump that he was absolutely immune from compelled Congressional testimony. Despite repeated efforts at an accommodation, the parties reached an impasse, and the Committee filed suit to enforce its subpoena in August 2019.

In November 2019, District Court Judge Ketanji Brown Jackson ordered McGahn to comply with the subpoena, rejecting DOJ's threshold arguments and concluding that McGahn is not absolutely immune from testifying before Congress. After issuing an administrative stay, a divided panel of this Court reversed the district court, holding that the Committee lacked standing to enforce the subpoena to McGahn. *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510, 531 (D.C. Cir. 2020). This Court then granted rehearing en banc, vacated the panel's judgment, and affirmed the district court's conclusion that the Committee has standing. *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760-61 (D.C. Cir. 2020) (en banc). On remand from the en banc Court, a divided panel of this Court again reversed the district court, this time holding that the Committee lacked a cause of action to enforce its subpoena. *See Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020). This Court once again granted rehearing en banc and vacated the panel's judgment.

At the start of the 117th Congress, the Committee reissued its subpoena to McGahn, explaining that McGahn's testimony remains essential to the Committee's investigation and its consideration of remedial legislation.

2. Given this history and the already lengthy delays that have prevented the Committee from obtaining McGahn's testimony, further delay in this case would be inappropriate. The Committee first sought McGahn's testimony nearly two years ago. Despite receiving a prompt district court decision from Judge Jackson rejecting each of DOJ's arguments, the Committee remains thwarted in the exercise of its constitutional "power of inquiry," which is "an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975) (because subpoena litigation "halt[s] the functions of a coordinate branch," "courts of appeals have a duty to see that the litigation is swiftly resolved").

3. DOJ seeks to postpone the argument after a change in Presidential Administrations to explore the possibility of resolving this case without further litigation. We appreciate the Biden Administration's efforts to settle this case, and we have actively participated in those efforts. But we do not believe that postponing the argument will improve the prospect of a settlement or serve the interests of judicial efficiency or fairness to the parties. *See* D.C. Circuit Rule 34(g) (the Court will postpone oral argument only "upon a motion evidencing extraordinary cause for a continuance").

Because the Biden Administration must coordinate with McGahn, the recipient of the subpoena and an official from the prior Administration, settlement discussions promise to be complex. It should be expected that the Biden Administration will also consult with former-President Trump regarding the possibility of a settlement. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977); *cf.* Executive Order 13489 (Jan. 21, 2009). Given what this Court has called President Trump’s “apparently unprecedented categorical direction” preventing his advisors from cooperating with the Committee’s investigation, *McGahn*, 968 F.3d at 777, that consultation will further complicate the discussions, and it seems likely that no global agreement will be reached. Without such an agreement, the full Court will ultimately have to rule on this case and issue a decision.

Postponing the argument would therefore likely result in a lengthy delay, only for global settlement discussions to prove unsuccessful, in which event this Court would need to schedule another en banc oral argument. Because this Court schedules en banc sittings rarely, the delay to the Committee from postponing the argument could be substantial, and could prevent the Committee from securing McGahn’s testimony for much of the 117th Congress, just as it was prevented from securing that testimony for almost the entire duration of the 116th Congress.

It would therefore be considerably more efficient for the Court to proceed with the en banc oral argument as scheduled, after which the Committee and DOJ could continue to engage in accommodation discussions as appropriate. Because oral

argument can illuminate the relative strengths and weaknesses of the parties' positions, proceeding with the oral argument could, as is often true, provide added momentum for further productive discussions among the parties.

4. Should the Court nevertheless decide to postpone the en banc oral argument, the Committee respectfully requests that the Court reschedule the argument as soon as practicable, preferably no more than one month from February 23, the date on which the argument is currently scheduled. Promptly rescheduling the argument will minimize any delay to the Committee and provide a backstop to guide the parties in their efforts to determine how this case should proceed.

Respectfully submitted,

/s/ Douglas N. Letter

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CERTIFICATE OF COMPLIANCE

1. This response complies with Federal Rule of App. P. 27(d)(2) because it contains 965 words.

2. This response complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
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CERTIFICATE OF SERVICE

I certify that on February 17, 2021, I filed the foregoing response 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