Absolute Immunity Case

McGahn Case
Key Excerpts from 2019 District Court Opinion Denying Stay Pending Appeal

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On Nov. 27, 2019, former White House counsel Donald McGahn, through the Department of Justice ("DOJ"), filed motions in both the district court and the D.C. Circuit Court of Appeals requesting a stay of the D.C. district court's ruling that upheld a House subpoena directing Mr. McGahn to testify before Congress. On Dec. 2, 2019, D.C. District Judge Ketanji Brown Jackson denied his request for a stay pending appeal. *Committee on the Judiciary, United States House of Representatives v McGahn*, No. 19-cv-2379 (KBJ) (D.D.C. Dec. 2, 2019). Here are key excerpts from her 17-page opinion, each excerpt of which consists of a direct quotation taken from the text of the opinion, with no changes in punctuation but with footnotes omitted.

Standards to obtain a stay pending appeal
"A stay is an 'intrusion into the ordinary processes of administration and judicial review[.]'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)). The party seeking a stay bears the "burden of showing that exercise of the court's extraordinary injunctive powers is warranted." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). There are four "traditional" factors that govern a request for a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Party must raise serious, substantial, difficult questions on the merits
[A] party seeking a stay pending appeal must "raise[] questions going to the merits so serious, substantial, difficult[,] and doubtful, as to make them a fair ground for litigation

and thus for more deliberative investigation." *Id.* at 844 (internal quotation marks and citation omitted); *see also In re Application of Comm. on Judiciary U.S. House of Representatives for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-gj-48 (BAH), 2019 WL 5608827, at *1 (D.D.C. Oct. 29, 2019). The D.C. Circuit has further explained that a movant's failure to satisfy this stringent standard for demonstrating a likelihood of success on the merits is "an arguably fatal flaw for a stay application."

Irreparable harm must be certain and great

"Irreparable harm must be 'both certain and great[,]' and 'actual and not theoretical.'" *CREW*, 904 F.3d at 1019 (quoting *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)). It is "further require[d] that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Wis. Gas Co.*, 758 F.2d at 674 (citing *Holiday Tours, Inc*., 559 F.2d at 843 n.3). Where there is a low likelihood of success on merits, a movant must show a proportionally greater irreparable injury, *see Cuomo*, 772 F.2d at 974, in order to warrant the "extraordinary remedy" of a stay, *id*. at 978.

Harm to government merges with harm to the public interest

"[T]he harm to the opposing party and weighing the public interest[,] . . . merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Such is the case here; indeed because the party that opposes the stay is a committee of the body of Congress that is comprised of proportionally elected representatives of the People of the United States, it is clear that the public interest lies in avoiding any harm to the Judiciary Committee that might result from a stay of this Court's Order.

Weaker absolute immunity claim and weaker harm than before

Miers was a case of first impression, whereas, now, two federal district court judges have addressed the same legal issues concerning both the authority of the federal courts to entertain a disputed subpoena-enforcement claim brought by the House Judiciary Committee after a former White House Counsel refused to testify before Congress in response to a valid subpoena; and also the President's assertion that senior-level presidential aides have absolute testimonial immunity. And both judges rejected the Executive branch's contentions—a track record that had not developed at the time that the D.C. Circuit considered the stay motion in *Miers*. In addition, the Executive branch's claim of irreparable harm is substantially weaker in the instant case than it was in *Miers*, because unlike Harriet Miers, McGahn has already given sworn testimony to the Special Counsel, which makes it difficult to see why the Executive branch would be harmed if McGahn's testimony proceeds while the appeal is pending.

Likelihood of success, not importance of issues, is test to obtain a stay

[N]either the Supreme Court nor the D.C. Circuit has ever previously held that the significance of the issues presented in a case, standing alone, is enough to warrant a stay pending appeal. To the contrary, it is well established that "[s]imply calling an issue important—primarily because it involves the relationship of the political branches—does not transform the Executive's weak arguments into a likelihood of success or a substantial appellate issue."

Appearing before Congress is not an injury

[I]mportantly, compliance with a valid subpoena that a committee of Congress issues pursuant to Article I investigative powers is itself a legal duty, and therefore not an injury at all (see Mem. Op. at 35); *see also Watkins v. United States*, 354 U.S. 178, 187–88 (1957), and this is especially so where the only requirement of this Court's Order is that McGahn must appear before Congress, see *Miers* Stay Opinion, 575 F. Supp. 2d at 205–06. DOJ's harm contention also seems especially dubious under the particular circumstances of this case, because the Judiciary Committee has asserted that it intends to question McGahn about statements that he made to the Special Counsel's Office, which have already been publicly disseminated as part of the Mueller Report. As this Court's Opinion explained, the Committee is free to subpoena a witness who has already provided testimony, whether to test that witness's credibility or otherwise, and where the Committee calls such a witness, the Executive branch is hard pressed to maintain persuasively that it is irreparably harmed by that witness's repeat performance while the absolute immunity issue is pending on appeal.

Any harm to Executive branch is minimal

DOJ's first two sentences suggest that a stay of this Court's Order pending appeal is warranted because what the Court has done "[f]or only the second time in our history" is to shift "the balance of power between the Legislative and Executive Branches" by ordering that a senior-level presidential advisor must testify before Congress. (Def.'s Mot. at 1 (internal quotation marks and citation omitted).) But when one recalls that "[s]enior presidential advisors frequently appear voluntarily to provide testimony before Congress on sensitive issues[,]" and that requiring McGahn to testify during the pendency of the appeal "will not preclude the Executive from asserting absolute immunity prospectively in the event that the D.C. Circuit reverses this Court's absolute immunity holding and concludes that senior advisors are entitled to such protection[,]" *Miers* Stay Opinion, 575 F. Supp. 2d at 206, the impact of this Court's ruling is far less dramatic than DOJ represents. Thus, this Court agrees with Judge Bates that any harm to the Executive branch's interests from the denial of DOJ's requested stay pending appeal is minimal.

Harm to Congress and public interest is grave

DOJ's argument that the Judiciary Committee will not be meaningfully harmed by a stay of this Court's Order pending appeal seems disingenuous, and therefore, is unpersuasive. … [I]t is indisputable that the Judiciary Committee has consistently sought access to materials and testimony with respect to its investigation of the circumstances that underlie the Mueller Report, and it is *DOJ's appeal* that has created a delay in the execution of Chief Judge Howell's order requiring that unredacted copies of the grand jury materials be turned over to the Committee.

This Court has no doubt that 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. … Interference with a House committee's ability to perform its constitutionally assigned function of gathering relevant and important

> information concerning potential abuses of power in a timely fashion injures both the House and the People whose interests the Congress's power of inquiry is being deployed to protect. … [I]t is clear that the Judiciary Committee's ongoing investigation will be further hampered if the Committee loses its ability to question McGahn altogether (effectively or not) during the current impeachment inquiry.
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> **House committee controls the scope of its inquiry**
> DOJ's insistence that the Judiciary Committee is really most interested in the Ukraine affair, and thus will not be harmed by any delay with respect to key testimony concerning certain circumstances revealed in the Mueller Report, fares no better. For one thing, it is the Judiciary Committee, and not DOJ, that gets to establish the scope of its own Article I investigation, and the Committee has repeatedly represented that it is, in fact, reviewing the Mueller Report as part of the House's impeachment inquiry.
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> **Congress is authorized to subpoena witnesses almost without exception**
> [T]he Judiciary Committee is constitutionally authorized to subpoena witnesses almost without exception, and … is not limited to calling only those persons whose testimony is unknown.
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> **McGahn has key role in impeachment inquiry**
> [T]he Judiciary Committee would almost certainly lose the chance to question McGahn as part of the present impeachment inquiry if a stay order issues, which would unquestionably harm the ongoing investigation that the Judiciary Committee is conducting, and by extension, would also injure the public's interest in thorough and well-informed impeachment proceedings. DOJ does not dispute that McGahn is a key witness to events that the Judiciary Committee seeks to review, or that "Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively" if the Committee is not able to compel timely testimony related to the current impeachment inquiry. *Quinn v. United States*, 349 U.S. 155, 160–61 (1955) (citations omitted). Therefore, any additional delay in McGahn's compliance with the Committee's valid subpoena causes real and certain harm to the Judiciary Committee and to the broader interests of the public. … [T]he fact that the issuance of a stay of McGahn's testimony would impede an investigation that a committee of Congress is undertaking *as part of an impeachment inquiry* is yet another distinction between the instant circumstances and those that existed when the D.C. Circuit stayed the district court order in *Miers*.

In contrast to the district court, the D.C. Circuit Court of Appeals stayed the district court's ruling upholding the House subpoena pending review of the case. The D.C. Circuit, which ordered oral argument on Jan. 3, 2020, has yet to issue an opinion in this matter.