Absolute Immunity Case

McGahn Case
Key Excerpts from 2019 District Court Opinion Upholding House Subpoena

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On Nov. 25, 2019, D.C. District Judge Ketanji Brown Jackson upheld the House subpoena directed to former White House counsel Donald McGahn. The district court ruled that senior-level presidential aides are not absolutely immune to Congressional testimonial subpoenas, but can assert claims of privilege. *Committee on the Judiciary, United States House of Representatives v McGahn*, No. 19-2379 (KBJ), 2019 WL 6312011 (D.D.C. Nov. 25, 2019). Here are key excerpts from her 120-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.

Court ruling
[T]he Judiciary Committee's motion for partial summary judgment is GRANTED, and DOJ's cross-motion for summary judgment is DENIED.

Court has jurisdiction under Section 1331 to resolve interbranch subpoena dispute
[Th]is Court agrees with Judge Bates's conclusion that federal courts have subject-matter jurisdiction to resolve legal disputes that arise between the Legislature and the Executive branch concerning the scope of each branch's subpoena-related rights and duties, under section 1331 of Title 28 of the United States Code and the Constitution. *See Miers*, 558 F. Supp. 2d at 64–65. Jurisdiction exists because the Judiciary Committee's claim presents a legal question, and it is "emphatically" the role of the Judiciary to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Separation-of-powers principles
It also plainly advances constitutional separation-of-powers principles, rather than subverts them, when a federal court decides the question of whether a legislative subpoena that a duly authorized committee of the House of Representatives has issued to a senior-level aide of the President is valid and enforceable, or, alternatively, is subject to the President's invocation of absolute testimonial immunity.

House has standing and cause of action to enforce subpoena
Miers was correct to conclude that, given the indisputable Article I power of the House of Representatives to conduct investigations of potential abuses of power and subpoena witnesses to testify at hearings concerning such investigations, the Judiciary Committee has both standing and a cause of action to file an enforcement lawsuit in federal court if the Executive branch blocks a current or former presidential aides' performance of his duty to respond to a legislative subpoena.

Discredited notion of executive power
DOJ's arguments to the contrary are rooted in "the Executive's interest in 'autonomy[,]'" and, therefore, "rest[] upon a discredited notion of executive power and privilege." *Id.* at 103. Indeed, when DOJ insists that Presidents can lawfully prevent their senior-level aides from responding to compelled congressional process and that neither the federal courts nor Congress has the power to do anything about it, DOJ promotes a conception of separation-of-powers principles that gets these constitutional commands exactly backwards. In reality, it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny. *See* The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Thus, when presented with a case or controversy, it is the Judiciary's duty under the Constitution to interpret the law and to declare government overreaches unlawful.

Unassailable Executive branch authority cannot be sustained
[T[he House of Representatives has the constitutionally vested responsibility to conduct investigations of suspected abuses of power within the government, and to act to curb those improprieties, if required. Accordingly, DOJ's conceptual claim to unreviewable absolute testimonial immunity on separation-of-powers grounds—essentially, that the Constitution's scheme countenances unassailable Executive branch authority—is baseless, and as such, cannot be sustained.

Withholding privileged information v. not showing up at all
DOJ has failed to bridge the yawning gap between a presidential aide's right to withhold privileged information in the context of his or her compelled congressional testimony (which no one disputes), and the President's purported power to direct such aides to refuse to show up and be questioned *at all* …. Accordingly, just as with Harriet Miers before him, Donald McGahn "must appear before the Committee to provide testimony, and invoke executive privilege where appropriate."

Immunity to compulsory legal process is rare
[I]t is relatively rare for the law to recognize an "immunity" to compulsory legal process—i.e., the right of the recipient of a valid subpoena to decline to produce any documents or provide any testimony. In effect, such an immunity is enormously powerful, because it operates to nullify the legal obligation to perform that a valid subpoena creates.

Power of House to investigate well established
It is reasonably clear that "legislative subpoenas are older than our country itself[,]" … and the power of committees of the House of Representatives to conduct investigations that involve issuing subpoenas to witnesses for documents and testimony is similarly well established.

Duty to cooperate
The duty of the recipient of a valid legislative subpoena to respond to that authorized call of action for the good of the country is also indisputable. … Indeed, the Supreme Court has specifically stated, in the most direct and eloquent terms, that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation." *Watkins*, 354 U.S. at 187–88.

House subpoenas ordinarily reverentially observed
It should come as no surprise that the rights and duties that attach when a duly authorized committee of Congress issues a subpoena are ordinarily reverentially observed, or that subpoena-backed requests for information to be provided to the House in the context of its Article I investigations have traditionally been respected, consistent with core democratic and constitutional norms.

Accommodation typically resolves conflicts
[W]hen disputes over congressional subpoenas do arise, the conflict is typically resolved through negotiations between House committee representatives and the person or persons to whom the subpoena is directed—a process commonly known as "accommodation"—and, thus, committees of Congress rarely have had to resort to the implementation of enforcement mechanisms.

No kneecap of House investigations
What is missing from the Constitution's framework as the Framers envisioned it is the President's purported power to kneecap House investigations of Executive branch operations by demanding that his senior-level aides breach their legal duty to respond to compelled congressional process.

Adoption of *Meiers* reasoning
This Court finds *Miers*'s analysis compelling (albeit, admittedly, not controlling) and, consistent with stare decisis principles, the Court adopts Judge Bates's precedential reasoning herein, where referenced in the discussion below.

No unchecked executive power
[T]he Court cannot accept DOJ's present reliance on carefully curated rhetoric concerning historical accommodations practices. Nor can it abide DOJ's less-than-subtle suggestion that, under our constitutional scheme, the Legislature and the Judiciary are both hopelessly stymied when it comes to addressing alleged abuses by the Executive branch, such that, ultimately, the President wields virtually unchecked power.

No absolute immunity for senior-level presidential aides
[A]s a matter of law, senior-level current and former presidential aides, including White House Counsels, must appear before Congress if compelled by legislative process to do so. This means that such aides cannot defy a congressional subpoena on the basis of absolute testimonial immunity, even if the President for whom they work (or worked) demands that response.

Subpoena enforcement claim under Section 1331
[I]nsofar as the Judiciary Committee's power to issue subpoenas "derives implicitly from Article I of the Constitution," *Miers*, 558 F. Supp. 2d at 64, which it appears that DOJ does not contest, the subpoena-enforcement claim that the Judiciary Committee has brought to this Court for resolution likewise arises under the Constitution for the purpose of section 1331.

Judicial review is available
[T]he historical record plainly reflects that, since the Revolution, judicial review has been available to ensure that the use of compulsory congressional process and/or the invocation of a privilege with respect to compelled performance is consistent with the law.

Caution against unduly hampering Congress' power to probe
[T]he Supreme Court had previously considered the competing interests of the Executive and the Legislature with respect to subpoenas pertaining to legislative investigations, and had suggested caution with respect to the merits of claims that the Congress had overstepped its bounds, given "the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered."

Dearth of cases
Watkins also seems to explain the dearth of cases during the two-century period in which DOJ says that lawsuits concerning "Congress' access to information held by the Executive Branch . . . did not exist[.]" … DOJ implies that courts must have had the view that their power to adjudicate legal disputes between the branches was unauthorized. … But *Watkins* suggests a different implication: Congress "so sparingly

employed the power to conduct investigations, . . . [that] there [were] few cases *requiring* judicial review of the power." *Watkins*, 354 U.S. at 193 (emphasis added). … [R]ather than shedding light on the accepted scope of the federal courts' authority to resolve inter-branch disputes over compelled congressional process, the absence of recorded federal cases concerning the myriad "clashes between the two political Branches over congressional attempts to obtain testimony" that DOJ's brief identifies (Def.'s Mot. at 34) better supports the far less sensational conclusion that, with respect to legislative subpoena fights, the Executive branch wisely picked its battles.

Inconsistent DOJ positions

DOJ stood silent with respect to the jurisdictional question, as President Trump (in his personal capacity) has invoked the authority of the federal courts, on more than one occasion, seeking resolution of a dispute over the enforceability of a legislative subpoena concerning his tax returns. A lawsuit that asserts that a legislative subpoena should be quashed as unlawful is merely the flip side of a lawsuit that argues that a legislative subpoena should be enforced. And it is either DOJ's position that the federal courts have jurisdiction to review such subpoena-enforcement claims or that they do not. By arguing vigorously here that the federal courts have no subject-matter jurisdiction to entertain the Judiciary Committee's subpoena-enforcement action, yet taking no position on the jurisdictional basis for the President's maintenance of lawsuits to prevent Congress from accessing his personal records by legislative subpoena, DOJ implicitly suggests that (much like absolute testimonial immunity) the subject-matter jurisdiction of the federal courts is properly invoked only at the pleasure of the President.

Subpoena enforcement not limited to private citizens

The Supreme Court has never suggested that the Judiciary has the power to perform its constitutionally assigned function only when it speaks to private citizens, or when it is called upon to resolve a legal dispute between a private citizen and one of the branches of government. And DOJ's odd idea that federal courts' indisputable power to adjudicate questions of law evaporates if the requested pronouncement of law happens to occur in the context of a dispute between branches appears nowhere in the annals of established constitutional law.

Branches limit and police each other

[T]here can be no doubt that providing the branches with the power to limit each other's behavior, for the protection of the People, was the original intent of the Framers, as evidenced both by the constitutional scheme they adopted and by the remarks they made to explain the separation-of-powers construct. Indeed, far from DOJ's present suggestion that the separation-of-powers construct means that the political branches must resolve their disputes in the political arena and never head to federal court, Federalist No. 51 proceeds to explain that political checks are not the sole solution, and that the branches themselves must also be vested with the power to police the abuses of the others.

Intersectionality of branches may cause friction

[T]he Framers made clear that the proper functioning of a federal government that is consistent with the preservation of constitutional rights hinges just as much on the

intersectionality of the branches as it does on their separation, and it is the assigned role of the Judiciary to exercise the adjudicatory power prescribed to them under the Constitution's framework to address the disputed legal issues that are spawned from the resulting friction.

Defiance of subpoena produces concrete injury
As far as this Court can tell, no federal judge has ever held that defiance of a valid subpoena does not amount to a concrete and particularized injury in fact; indeed, it appears that no court has ever even *considered* this proposition. And perhaps for good reason: if defiance of duly issued subpoenas does not create Article III standing and does not open the doors of the court for enforcement purposes, it is hard to see how the wheels of our system of civil and criminal justice could keep turning.

Power of inquiry integral part of legislative and impeachment authority
Article I to the House of Representatives assigns the "sole Power of Impeachment", U.S. Const. art. I, § 2, cl. 5, and it also vests Congress as a whole with "[a]ll legislative Powers," U.S. Const. art. I, § 1. Moreover, it grants to Congress the "power of inquiry[,]" *McGrain*, 273 U.S. at 174, which the House and the Senate may delegate to their respective committees and subcommittees, and this power is an "integral part" of the legislative and impeachment authority. *Eastland*, 421 U.S. at 505; *see also Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 499 (1977).

Constitution's blessing
[W]hen a committee of Congress seeks testimony and records by issuing a valid subpoena in the context of a duly authorized investigation, it has the Constitution's blessing, and ultimately, it is acting not in its own interest, but for the benefit of the People of the United States.

Constitutional duty to find the facts
If there is fraud or abuse or waste or corruption in the federal government, it is the constitutional duty of Congress to find the facts and, as necessary, take corrective action. Conducting investigations is the means that Congress uses to carry out that constitutional obligation. Thus, blatant defiance of Congress' centuries-old power to compel the performance of witnesses is not an abstract injury, nor is it a mere banal insult to our democracy. It is an affront to the mechanism for curbing abuses of power that the Framers carefully crafted for our protection, and, thereby, recalcitrant witnesses actually undermine the broader interests of the People of the United States.

Substantial harm caused by defiance of subpoena
DOJ's hand-waving over the Judiciary Committee's purported failure to establish a "cognizable" injury for standing purposes (Def.'s Mot. at 36–40) masks the substantial harm that results from an Executive branch official's defiance of a congressional subpoena. But it is hard to imagine a more significant wound than such alleged interference with Congress' ability to detect and deter abuses of power within the Executive branch for the protection of the People of the United States.

Irrelevant that information available elsewhere
[I]t is irrelevant that the Committee already has access to many, if not all, of McGahn's sworn statements on this issue … nor does it matter that the Committee might be able to find out what it seeks to get from McGahn in some other fashion (see, e.g., Def.'s Mot. at 79–80). This is because, as a committee of Congress, the Judiciary Committee has the "broad power" under Article I of the Constitution to conduct its investigations however it sees fit, so long as it does not impinge upon the constitutional rights of those it undertakes to question. *Watkins*, 354 U.S. at 198–99. And, here, the Committee avers that, among other things, it wants McGahn to appear in person to testify about the events in question so that the Committee can evaluate his credibility.

Article I cause of action
Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry.

Subpoena enforcement intrinsic to Congress' authority to investigate
[T]he Supreme Court's analysis of the Legislature's Article I investigative power confirms that a committee of Congress's right to enforce its subpoenas is intrinsic to its constitutional authority to conduct investigations in the first place.

No last resort requirement
[T]he fact that the Judiciary Committee has "several political arrows in its quiver to counter perceived threats to its sphere of power[,]" *Mnuchin*, 379 F. Supp. 3d at 22—including, apparently, the manipulation of its appropriations power … and, therefore, "this lawsuit is not a last resort for the House[,]" *Mnuchin*, 379 F. Supp. 3d at 22, is irrelevant. The elements that courts must consider to determine whether a plaintiff has Article III standing are well established (see supra n.19), and they do not include a "last resort" requirement.

Appropriations power isn't sufficient to enforce subpoena
DOJ's suggestion that a thwarted House committee must eschew the courts and, instead, must rely on its "power to withhold appropriations" in order "to get the information that it needs" (Hr'g Tr. at 65:18–20) is nearly a practical nullity, because an appropriations sanction for non-compliance with a legislative subpoena cannot be implemented swiftly enough to preserve the utility of a defiant witness's testimony, and it also cannot be achieved without the cooperation of the entire Congress as well as the President whom the Judiciary Committee is investigating and whose allegedly unlawful directive to his senior-level aides is the impetus for the Committee's legal claims.

Novel exercises of Executive power
[W]e are at a point in history in which the Executive branch appears to be categorically rejecting once-accepted and standard applications of Legislative and Judicial branch authority; therefore, federal courts are being called upon to evaluate novel exercises of Executive power that allegedly threaten the prerogatives of the other branches of government in unique ways. … This reality plainly limits the lessons that can properly

be drawn from history. … In this Court's view, the fact that federal courts throughout history have not had occasion to address the kinds of perceived threats to constitutional and procedural norms that are being brought to federal courts' attention regularly in the present day actually says more about the unprecedented nature of the challenged actions and legal positions of the Executive branch than it does about the nature of the Judiciary Committee's claim or harm.

Presidential aide must appear

[I]f a duly authorized committee of Congress issues a valid legislative subpoena to a current or former senior-level presidential aide, the law requires the aide to appear as directed, and assert executive privilege as appropriate.

Executive cannot be the judge of its own privilege

OLC serves as legal counsel to the Executive branch, and "the Executive cannot be the judge of its own privilege[.]" *Miers*, 558 F. Supp. 2d at 106. Consequently, its statement of the law is "entitled to only as much weight as the force of [its] reasoning will support."

Testimony is not punishment

As the Supreme Court has suggested on numerous occasions, Congress brings in witnesses not as punishment, but to provide the Legislature with the information that it needs to perform its critical legislative and oversight functions. *Watkins*, 354 U.S. at 187; *McGrain*, 273 U.S. at 175. Thus, the idea that having to testify truthfully about the inner workings of government is a threat that would actually be sufficient to prevent key public servants from competently performing as assistants to the President seems anomalous.

No zero-sum game

DOJ's implicit suggestion that compelled congressional process is a 'zero-sum' game in which the President's interest in confidentiality invariably outweighs the Legislature's interest in gathering truthful information, such that current and former senior-level presidential aides should be always and forever immune from answering probing questions, is manifestly inconsistent with a governmental scheme that can only function properly if its institutions work together. *See* The Federalist No. 51 (James Madison).

No post-*Miers* parade of horribles

Surely if Congress was inclined to utilize its subpoena power to harass the Executive branch unjustifiably, then *Miers*'s own holding would have given it sufficient impetus to do so. Yet, even DOJ must acknowledge that no such parade of horribles has happened.

No Executive power of inquiry over Congress

[I]t maintains, that "the public spectacle of haling [current and] former advisors to a sitting President before a committee of Congress . . . promote[s] the perception of Executive subservience to the Legislature" (Def.'s Mot. At 70), which, in its view of what the Constitution permits, is improper, because "[a] committee of Congress could not, consistent with the separation of powers, hale the President before it to compel him to testify under oath, any more than the President may compel congressmen to appear before him" (Def.'s Mot. at 63). … [W]hile the branches might well be conceived of as

co-equals (in the sense that one cannot unlawfully subvert the prerogatives of another), that does not mean that all three branches must be deemed to have the same powers. To the contrary, the President cannot hale members of Congress into the White House for questioning precisely because the power of inquiry resides with the Legislature, and also because the Constitution itself expressly prevents the Executive branch from becoming inquisitors by inflicting its own subpoena power on members of Congress for political reasons.

Presidents are not kings

Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings. … This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control.

Aides, not President, decide whether to testify

[I]n this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States. Moreover, as citizens of the United States, current and former senior-level presidential aides have constitutional rights, including the right to free speech, and they retain these rights even after they have transitioned back into private life. … To be sure, there may well be circumstances in which certain aides of the President possess confidential, classified, or privileged information that cannot be divulged in the national interest and that such aides may be bound by statute or executive order to protect. But, in this Court's view, the withholding of such information from the public square in the national interest and at the behest of the President is a duty that the aide herself possesses. … DOJ's present assertion that the absolute testimonial immunity that senior-level presidential aides possess is, ultimately, owned by the President, and can be invoked by the President to overcome the aides' own will to testify, is a proposition that cannot be squared with core constitutional values, and for this reason alone, it cannot be sustained.

Absolute immunity does not exist

[I]t is clear to this Court … that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist. Indeed, absolute testimonial immunity for senior-level White House aides appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions, and through accommodations that have permitted its proponents to avoid having the proposition tested in the crucible of litigation. … [I]t does not matter whether such immunity would theoretically be available to only a handful of presidential aides due to the sensitivity of their positions, or to the entire Executive branch. Nor does it make any difference whether the aides in question are privy to national security matters, or work solely on domestic issues. … [A]ny such immunity most certainly stops short of covering individuals who only purport to be cloaked with this authority because, at some point in the past, they once were in the President's employ.

Defiance of subpoena injures Congress and national interest
[W]hen the issue in dispute is whether a government official has the duty to respond to a subpoena that a duly authorized committee of the House of Representatives has issued pursuant to its Article I authority, the official's defiance unquestionably inflicts a cognizable injury on Congress, and thereby, substantially harms the national interest as well.

No absolute immunity no matter how many times it has been asserted
Executive branch officials are not absolutely immune from compulsory congressional process—no matter how many times the Executive branch has asserted as much over the years—even if the President expressly directs such officials' non-compliance.

Court order to comply with subpoena preserves venerated constitutional principles
[W]hen a duly authorized committee of Congress issues a valid subpoena to a current or former Executive branch official, and thereafter, a federal court determines that the subpoenaed official does, as a matter of law, have a duty to respond notwithstanding any contrary order of the President, the venerated constitutional principles that animate the structure of our government and undergird our most vital democratic institutions are preserved.