

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on Possible Misconduct in Prevention of White House Counsel's Testimony to Congress

Possible Violation of the Law

Did President Trump obstruct justice, or attempt to obstruct justice, in his various requests and orders to former White House counsel Donald McGahn? Is his refusal to permit McGahn to comply with a congressional subpoena legal, and does it interfere with Congress's constitutionally granted power of oversight?

Facts

When Robert Mueller's report summarizing the findings of his nearly two-year investigation was released, some of the most significant legal revelations came from one prominent former Trump advisor: Donald McGahn, who served as White House counsel from 2016 until late 2018. McGahn spent over thirty hours with Mueller's team of special investigators,¹ and his name appeared in Mueller's report over 150 times.² His time with the special counsel shed light on two damning episodes of possible obstruction of justice, which Mueller disclosed in his report.³

The two episodes McGahn bore witness to are linked, and each may constitute an attempted obstruction. First, McGahn told investigators that President Trump ordered him to have the Department of Justice fire Mr. Mueller in June of 2017.⁴ Second, McGahn further explained that in February of 2018, after the *New York Times* reported President Trump's order to fire Mueller, President Trump requested that McGahn create a false paper trail denying this account.⁵ Not only did President Trump want McGahn to deny the *Times* story publicly, but he also asked McGahn to write a letter for his records, falsifying evidence so that there was "something beyond a press statement to demonstrate that the reporting was inaccurate."⁶ Notably, McGahn refused each of the President's requests.⁷ He neither ordered the firing of Mueller, nor denied the episode to Mueller or to the country at large.

After Mueller released his report detailing his findings, the House Judiciary Committee issued a subpoena to McGahn as part of its investigation into President Trump's potential obstruction of justice.⁸ The subpoena sought both McGahn's testimony and documents relating to the investigation.⁹ McGahn's testimony would be critical to the committee, because his insight, more than any other potential witness, would directly address with whether and how President Trump obstructed justice.¹⁰ In fact, the Judiciary Committee asserted that McGahn was the most important witness, other than the president himself.¹¹ And furthermore, requesting congressional testimony from former White House counsel is not unprecedented: President Nixon's former White House counsel, John Dean, provided publicly televised testimony to the Senate in June of 1973.¹²

However, the White House instructed its former counsel not to comply with the congressional subpoena—either by providing testimony or documents.¹³ The White House declared that the documents implicate the executive branch’s confidentiality interest, and therefore claimed executive privilege.¹⁴ McGahn acquiesced to the President’s wishes, and the Judiciary Committee sued McGahn in order to enforce the subpoena.¹⁵ The matter has not been fully resolved by the courts.¹⁶

Possible Misconduct

The battle over McGahn’s testimony and documents is multilayered and involves separate instances of possible misconduct: the original misconduct as uncovered by Mueller, and the possible misconduct in prohibiting McGahn from complying with the congressional subpoena.

A. Potential Obstruction of Justice Witnessed by McGahn

McGahn’s testimony would allow the Judiciary Committee to delve deeper into the two possible episodes where President Trump may have criminally obstructed justice. Federal law criminalizes “obstruction of justice,” defined as an act that “corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.”¹⁷ There are three elements of obstruction: (i) an obstructive act, (ii) linked to an investigation or with a nexus to an official proceeding, and (iii) a corrupt motive.¹⁸ It is also important to note that while McGahn refused to comply with President Trump’s requests in the two episodes in question, this does not exonerate President Trump. An unsuccessful attempt to obstruct justice still qualifies as obstruction.¹⁹

President Trump spoke to McGahn over the phone twice, lamenting that Mueller had a conflict of interest and ordering McGahn to have Mueller fired.²⁰ When McGahn decided to resign rather than follow through with the President’s request, President Trump backed away from his request.²¹ The first and second element of obstruction are met: President Trump’s acts were linked to an investigation, and according to the Mueller report, President Trump knew that this was wrong.²² In fact, Mr. McGahn had told the president to use personal lawyers for conflict complaints, not act with his official powers to remove Mueller as special counsel.²³ The first element, requiring an obstructive act, is also likely met, although there is room for ambiguity. Firing Mueller, as he himself acknowledged, would not have stopped the investigation, and so may not have obstructed it.²⁴ However, removing the special counsel may have impeded the investigation or affected Mueller’s replacement, which could constitute an obstructive act, chilling the special investigation.²⁵

President Trump’s directive to falsify evidence and cover up the fact that he had asked McGahn to fire Mueller is an even stronger case of obstruction of justice. The order was clearly an obstructive act (or attempt for an obstructive act), and it was certainly done with corrupt intent. And like the scenario above, this too was linked to an investigation. However, it is this second

element, the link to an investigation, where President Trump may have a possible defense: his request could be interpreted just as a request to lie to the American public, rather than lie directly to Mueller or the special counsel's team as part of the investigation.²⁶ However, if President Trump's intent was still that Mueller be persuaded by this public denial and account, that interpretation of his actions still qualifies as obstruction.

B. Refusal to Permit McGahn to Comply with Congressional Subpoena

The refusal to permit McGahn from testifying to Congress, thereby impeding Congress's oversight power, may not rise to the level of legal misconduct. The courts have struggled with the issue of whether President Trump can bar his advisors from complying with congressional subpoenas.²⁷ The issue places two of each branch's cherished powers and privileges against each other: Congress's oversight powers, and the President's executive privilege, which he is asserting to prevent McGahn's testimony.²⁸ A district court judge rejected the claim of blanket immunity for presidential advisors, and found that the advisor must comply with the subpoena and invoke executive privilege in person, for each question to which it applies.²⁹ However, just last month the Court of Appeals for the D.C. Circuit dismissed the case on the grounds that there was no statute by which Congress could seek a remedy.³⁰ Still, the case is not yet settled: House Speaker Nancy Pelosi announced plans to seek review of the decision by the full D.C. Circuit.³¹ In her statement, Speaker Pelosi condemned the decision, noting that "this wrong-headed Court of Appeals panel ruling threatens to strike a grave blow to one of the most fundamental Constitutional roles of the Congress: to conduct oversight on behalf of the American people, including by issuing our lawful and legitimate subpoenas."³²

Regardless of what happens next in the appeals process, it is unlikely that the refusal to permit McGahn to testify is itself illegal or presidential misconduct, given the conflicting views of which has priority—executive privilege or congressional oversight. The Supreme Court has also never resolved whether Congress has the power to sue the president.³³

Conclusion

There is a persuasive case that President Trump's obstructed justice with his requests that McGahn fire Mueller, and then deny that request. However, if McGahn is shielded from testifying under the blanket of executive privilege, it is unlikely that there will be criminal charges of obstruction against the president. The case will hinge on the House of Representative's appeal of the D.C. Circuit's panel ruling, and there is also the possibility that Congress could pass a law to enforce its subpoenas.³⁴

¹ Katherine Faulders, et al., *White House instructs former counsel Don McGahn not to comply with congressional subpoena*, ABC NEWS (May 7, 2019, 8:10 PM), <https://abcnews.go.com/Politics/white-house-instruct-counsel-comply-congressional-subpoena/story?id=62873987>.

² Josh Dawsey et al., *White House plans to fight House subpoena of former counsel Donald McGahn for testimony on Mueller report*, WASHINGTON POST (Apr. 23, 2019, 5:18 PM), https://www.washingtonpost.com/politics/white-house-plans-to-fight-house-subpoena-of-former-counsel-donald-mcgahn-for-testimony-on-mueller-report/2019/04/23/2d48732a-65f1-11e9-83df-04f4d124151f_story.html.

³ Nicholas Fandos and Charlie Savage, *Pondering Impeachment, House Sues Don McGahn, Ex-White House Counsel, for Testimony*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/politics/don-mcgahn-subpoena.html?searchResultPosition=3>.

⁴ Michael S. Schmidt, *As McGahn Emerges as Chief Witness in the Mueller Report, Trump and Allies Ramp Up Attacks*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/us/politics/mcgahn-trump-attacks.html?searchResultPosition=4>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Tucker Higgins, *House Judiciary Committee issues subpoena to former White House counsel Don McGahn*, CNBC LLC, (Apr. 22 2019, 5:58 PM), <https://www.cnn.com/2019/04/22/house-judiciary-committee-issues-subpoena-to-former-white-house-counsel-don-mcgahn.html>.

⁹ *Id.*

¹⁰ David A. Graham, *Don McGahn's Testimony Would Be the Main Event*, THE ATLANTIC (May 20, 2019), https://www.theatlantic.com/ideas/archive/2019/05/white-house-blocks-mcgahn-testifying-congress/589873/?gclid=CjwKCAjw-5v7BRAMeIwAJ3DpuCjGPU80_Svd3KOV845xloTFPbGLvFBtadzrs4Mh1w93V3aqFawEWBoChZ8QAvD_BwE.

¹¹ Fandos, *supra* note iii.

¹² Dawsey, *supra* note ii.

¹³ Faulders, *supra* note i.

¹⁴ *Id.*

¹⁵ Fandos, *supra* note iii.

¹⁶ Spencer S. Hsu and Ann E. Marimow, *Court dismisses House lawsuit seeking to enforce a subpoena of former White House counsel Donald McGahn*, WASH. POST (Aug. 31, 2020 at 2:26 PM), <https://www.washingtonpost.com/local/legal-issues/court-dismisses-house-lawsuit-seeking-to-enforce-a-subpoena-of-former-white-house-counsel-donald-mcgahn/2020/08/31/c693ad3e-ebaf-11ea-ab4e-581edb849379story.html>.

¹⁷ 18 U.S.C. § 1503.

¹⁸ Charlie Savage, *Did Trump Obstruct Justice? Mueller Didn't Say, but Left a Trail to the Answer*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/us/politics/trump-mueller-obstruction.html?searchResultPosition=5>.

¹⁹ Daniel Hemel, *Mueller's biggest bombshell? Trump told the White House counsel to lie.*, WASH. POST (Apr. 19, 2019, 2:25 PM), <https://www.washingtonpost.com/outlook/2019/04/19/muellers-biggest-bombshell-trump-told-white-house-counsel-lie/>.

²⁰ Savage, *supra* note xviii.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Hemel, *supra* note xix.

²⁷ Adam Liptak, *In McGahn Case, an Epic Constitutional Showdown*, N.Y. TIMES (Jan. 13, 2020) <https://www.nytimes.com/2020/01/13/us/politics/mcgahn-trump-congress-lawsuit.html?searchResultPosition=9>.

²⁸ Rachel Bade, et al., *White House invokes executive privilege to bar former counsel from turning over documents to Congress*, WASH. POST (May 7, 2019, 9:14 PM), https://www.washingtonpost.com/powerpost/white-house-invokes-executive-privilege-to-bar-former-counsel-from-turning-over-documents-to-congress/2019/05/07/bf106bc6-70de-11e9-8be0-ca575670e91c_story.html.

²⁹ Hsu, *supra* note xvi.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Liptak, *supra* note xxvii.

³⁴ Hsu, *supra* note xvi.