



Resolving Subpoena Disputes Between the Branches: Potential Impacts of Restricting the Judicial Role

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An *en banc* panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) is set to consider what could turn out to be one of the circuit's more consequential decisions on congressional power. In *Committee on the Judiciary v. McGahn*, the question before the court is whether the House can invoke the authority of the courts to compel former White House counsel Don McGahn to comply with a House Judiciary Committee subpoena for his testimony. In February, a [three-judge panel](#) of the D.C. Circuit determined that the House could not, holding that because the House lacked standing, the court lacked authority to hear the dispute (the reasoning behind that decision is explored in a [companion Sidebar](#)). The Judiciary Committee quickly filed its petition for rehearing before an *en banc* panel of the D.C. Circuit, which was granted last week. The order granting rehearing also vacated the February three-judge panel decision and set oral arguments in the case for April 28, 2020.

The vacated panel opinion would have considerably restricted, and possibly foreclosed, litigation as an option for resolving congressional information access disputes with the executive branch. Had that decision stood, it would have largely removed one of Congress's primary [methods](#) of enforcing subpoenas issued to executive branch officials. The impact—especially long-term—such a restriction would have on Congress is difficult to discern, but if the *en banc* D.C. Circuit were to agree with the three-judge panel and hold that Congress must rely exclusively on its own powers—rather than the courts'—to enforce its investigative demands, that ruling may affect not only how Congress investigates, but also how it legislates.

Committee on the Judiciary v. McGahn

The *McGahn* case arose from a dispute over Congress's authority to obtain testimony from presidential advisers. The executive branch asserts that McGahn and other close presidential advisers possess "[absolute testimonial immunity](#)" and cannot be compelled to appear before a congressional committee. Presidential administrations have asserted that position since at least 1971, but the U.S. District Court for the District of Columbia rejected that argument in 2008 in *Committee on the Judiciary v. Miers*. In 2019, after President Trump directed McGahn not to comply with a Judiciary Committee subpoena for his

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testimony, the Committee filed a civil lawsuit asking that court to direct McGahn to appear before the Committee.

Endorsing the approach taken in *Miers*, the [district court](#) in *McGahn* concluded that it had authority to resolve the dispute, and rejected the Executive's absolute immunity argument as having "no principled justification" and "no basis in law." On appeal, however, that decision was [reversed](#), with a divided three-judge panel holding—mainly on standing and separation of powers principles—that the courts lack authority to resolve this type of "pure" "interbranch quarrel" over information access. (Although McGahn is now a private citizen, the lead opinion viewed the case as a "pure interbranch dispute" with "no bearing on the 'rights of individuals.'") Instead, the court held, Congress must leverage its own legislative powers (ranging from harnessing public opinion, to legislation and appropriations, to impeachment) to "bring the executive branch to heel." Although refusing to provide the Committee with the requested relief, the appellate court did not endorse the DOJ's assertion of absolute immunity. It instead appeared quite [skeptical](#), with two of the three judges questioning whether McGahn would have prevailed on the merits if the court had the power to resolve the case.

As noted, the panel decision was vacated in an order issued by a majority of judges on the D.C. Circuit who agreed to rehear the case *en banc* (meaning the case is to be heard before all active circuit judges who have not been recused). As such, the *en banc* court is scheduled to reconsider whether Congress can invoke the assistance of the courts to resolve subpoena disputes between the branches.

Enforcing Congressional Subpoenas: A Brief History

Addressing how the *McGahn* case could impact Congress's ability to conduct oversight requires an understanding of how Congress enforces its subpoenas. Subpoena enforcement is not a one-size-fits-all exercise. The process, though at times "[messy](#)," can be tailored to each dispute and is generally shaped by the strength of the Executive's desire to keep information confidential and Congress's willingness to exert its will to compel disclosure. Most frequently, obtaining information from the executive branch involves [negotiation and compromise](#) from *both* sides—as well as the strategic application of political pressure—rather than sheer legal force. It is also historically a fluid process that has evolved together with the balance of power between the branches.

Prior to 1857, both chambers used a process known as [inherent contempt](#) to enforce subpoenas. This involved directing the Sergeant at Arms to arrest witnesses who refused to turn over documents or provide testimony, and then detaining them until they gave Congress what it demanded. Inherent contempt had the benefit of requiring no assistance from either the executive or judicial branches, but the process was time consuming and witnesses could be held only temporarily. So in 1857, Congress enacted the [criminal contempt statute](#) to complement the inherent contempt power with an easier and more efficient process. That statute made non-compliance with a congressional subpoena a federal crime. Under the statute (now 2 U.S.C. §§ [192](#), [194](#)), the House or Senate could simply certify an offending witness to the executive branch for criminal prosecution, whose duty it would be to present the matter to a grand jury. This streamlined criminal process soon overtook the more cumbersome inherent contempt process, and by the 1930s inherent contempt had fallen out of use entirely.

Subpoena enforcement continued to evolve as the branches brought their own institutional interests to bear. The conflict between Congress and the Presidency over President Nixon's White House tapes led Congress to pursue a third subpoena enforcement option: [civil enforcement](#) through the courts. After President Nixon—citing executive privilege—refused to comply with Senate Watergate Committee subpoenas for recordings of his Oval Office conversations, the Committee determined that it would be "[unseemly](#)" to attempt enforcement directly against the President through either criminal or inherent contempt. Instead, after enacting a statute explicitly granting the D.C. District Court jurisdiction over the matter, the Senate Watergate Committee went to [federal court](#), asking the judiciary to issue an order

directing the President to provide the Committee with the subpoenaed tapes. The [D.C. Circuit](#) heard that claim, but ultimately ruled that the Committee had not overcome the President's privilege.

Perhaps hesitant after that loss, Congress did not ask the courts to enforce a subpoena against an executive branch official for another thirty years. That eventual return to the courts was at least partly attributable to another intervening development. In 1984, the executive branch [asserted](#) that it would not prosecute executive branch officials for criminal contempt of Congress when executive privilege formed the basis for non-compliance with a congressional subpoena. The executive branch has [reiterated](#) that position—which is based on its understanding of the separation of powers and prosecutorial discretion—numerous times. The DOJ has also subsequently declined to prosecute executive branch officials in scenarios that have [not involved claims of executive privilege](#), but where the DOJ has otherwise concluded that a prosecution would not be proper. Because of this asserted discretion, criminal contempt of Congress has been rendered nearly ineffective as an enforcement tool in information access disputes against the executive branch. Since 2008, the House has cited at least [six](#) current or former executive branch officials for violations of the criminal contempt statute. The executive branch, however, has not taken action on any of those referrals.

In light of the Executive's unwillingness to move forward with criminal contempt citations and Congress's continued disinclination to use its inherent contempt powers to enforce subpoenas against executive officials, the House turned back to the federal courts to enforce subpoenas. In [2008](#) and [2012](#), House committees filed subpoena enforcement suits to force the executive branch to turn over information or provide testimony. In each case the district court determined it had authority to hear the claim, and in each case the House won on the merits. However, appeals in both cases took significant time and were ultimately settled before any precedential appellate decision on the merits was reached.

The House has increasingly used civil subpoena enforcement during the 116th Congress, perhaps due to an increase in the frequency and severity of information access disputes with the executive branch. The House has filed three subpoena enforcement cases against current or former executive branch officials this Congress, with *McGahn* having been the first to receive a judicial decision.

With this history in mind, the effect of removing civil enforcement from the investigations toolbox comes into focus. If the D.C. Circuit *en banc* panel were to reach a decision in *McGahn* similar to that reached by the three-judge panel, the result would be that of Congress's direct tools to compel compliance with subpoenas, *none* would appear to be practicable to use against executive branch officials. Inherent contempt appears to be a relic of the past that Congress has not been willing to revive (perhaps because of the [potential risks associated](#) with the exercise of that power, including the possibility of a [stand-off](#) between the Sergeant at Arms attempting to arrest an executive branch official and executive branch law enforcement charged with protecting that official). Criminal contempt appears to be of limited utility as executive branch policy makes criminal prosecutions against executive branch officials unlikely. And finally, a decision in *McGahn* that mirrors the panel decision would largely foreclose civil enforcement lawsuits.

The Possibility of Subpoena Enforcement Without the Courts

Although any opinion in *McGahn* would bind only courts within the D.C. Circuit, it is particularly consequential because Congress, the White House, and most federal agency headquarters are located within the circuit, and for that reason, it is where congressional subpoena enforcement lawsuits against executive branch officials have generally been brought. Still, there could be specific scenarios in which a chamber of Congress may be able to file subpoena enforcement lawsuits in other courts that are not bound by any D.C. Circuit opinion—for example if a federal official lives or works outside of the District of Columbia. That limited option notwithstanding, the *en banc* decision in *McGahn* will likely govern the vast majority of subpoena enforcement lawsuits.

The *en banc* court could resolve *McGahn* in a number of different ways. It could, for example, avoid the separation of powers issues—based on McGahn’s current status as a private citizen rather than an executive branch official—by disagreeing with the earlier opinion’s characterization of the case as a “pure interbranch dispute.” That would likely result in the court then simply addressing whether McGahn can be made to appear. But if the court views the case as a dispute between the branches, and concludes both that the House has standing and that the courts can hear interbranch subpoena enforcement cases, it would be the first appellate level decision to so hold. Such an opinion would likely go a long way to solidify a chamber of Congress’s ability to use the courts as a means of resolving informational access disputes with the executive branch.

But the *en banc* court could also reach a holding similar to the three-judge panel. Given that possibility, it is important to consider what losing the courts as an option for subpoena enforcement would mean for Congress. The remainder of this Sidebar considers possible congressional responses to a potential new landscape in which the D.C. Circuit determines that the courts lack authority to adjudicate investigative disputes between the branches. In such a scenario, Congress—as it has in the past—may be compelled to adjust its approach.

Statutory Authorization for Subpoena Enforcement Lawsuits

If Congress wished to retain the courts as an enforcement option, it could attempt to enact a statute that clearly authorizes the federal judiciary to hear House and Senate lawsuits to enforce subpoenas against executive branch officials. (An existing [statute](#) authorizes Senate subpoena enforcement lawsuits, but does not apply to suits against executive branch officials asserting a “governmental privilege”; whether this statute complements or circumscribes the Senate’s ability to enforce subpoenas against executive branch officials through other means is briefly discussed [in a CRS Report](#).)

The lead opinion in the February *McGahn* opinion suggested that a statute specifically authorizing judicial enforcement of congressional subpoenas “[might](#)” cause the court to reassess the House’s standing. Such a statute, the court reasoned, “could mitigate the separation-of-powers considerations that counsel against adjudicating interbranch disputes” by “reflect[ing] Congress’s (and perhaps the President’s) view that judicial resolution of interbranch disputes is” appropriate. The [dissenting](#) judge, however, contended that because the lead opinion rooted its decision in constitutional separation of powers and standing principles, its invitation contradicts the well-established principle that Congress cannot “overrule a constitutional holding of [a] court” through enactment of a statute. As such, the effectiveness of such a statute remains uncertain. (The lead opinion specifically [declined](#) to assess whether a current statute authorizing Senate subpoena enforcement was permissible either generally or in application to executive branch officials.)

Leveraging Legislative Powers to Encourage Compliance

Congress could also take another recommendation from the lead [opinion](#) in the February *McGahn* decision and—rather than “dragging judges into the fray”—exercise its own legislative powers to enforce congressional demands for information from the Executive. Congress, the court noted, has a variety of “political tools” to encourage the executive branch to comply with informational requests, and using (or threatening to use) those powers has always been part of each chamber’s approach to compelling reluctant executive branch witnesses to disclose information. Congress’s [toolbox](#) in this respect is indeed “[ample](#).” Most powerful among these tools are Congress’s legislative and appropriations powers which can be wielded to either directly compel executive branch disclosures or to indirectly incentivize compliance with congressional requests.

But these tools are also “[imperfect](#).” As the [dissenting](#) judge in the February *McGahn* decision noted, Congress generally may only exercise its legislative powers through the “finely wrought and exhaustively

considered[] procedure” set forth in Article I, Section 7 of the Constitution, which requires that legislation pass both houses of Congress and be presented to the President before it is given legal effect. In the current environment, in which control of the House and Senate is split between the two major political parties, agreement among the two chambers has often been elusive. Moreover, even if the House and Senate did agree on a legislative response to executive branch failures to comply with investigative subpoenas, any measure, especially a freestanding one, would likely be opposed by the President and fall victim to a veto. Thus, Congress’s most powerful tools could be limited to situations in which both the House and Senate are substantially unified, such that Congress as a whole could [override](#) a possible veto. Nevertheless, to the extent consensus is possible, a D.C. Circuit decision eliminating the civil enforcement option could act as a catalyst for a potentially more prompt and effective approach to subpoena enforcement by incentivizing the use of legislative powers to support committee investigations.

Absent that unity, however, each chamber of Congress would be left only with those enforcement tools that it can wield on its own. As noted above, the two primary single-chamber subpoena enforcement tools would be severely limited if the D.C. Circuit were to rule against the House in a manner similar to the three-judge panel, as citing officials with criminal contempt of Congress has not proven successful in compelling executive compliance with a chamber’s information requests and judicial enforcement of congressional subpoenas by a chamber against executive officials would be greatly circumscribed.

Other available [one-house tools](#) like censure, committee hearings, resolutions of inquiry, or harnessing public opinion generally can only be used to influence, rather than compel, executive branch action. And while each chamber has additional, unique tools to pressure the executive branch, the effectiveness of these tools may depend on a number of factors. The House, for example, could potentially threaten to impeach an executive officer who fails to comply with a House subpoena, but this tool may be of limited utility if the Senate is unlikely to convict and remove the official from office for a failure to cooperate with a congressional investigation. And while the Senate may threaten to withhold its advice and consent to treaties or appointments to important government offices until certain subpoenas are complied with, the effectiveness of this threat may depend on how the executive branch weighs the importance of Senate approval of a treaty or appointment against its interest in maintaining the confidentiality of the information it is withholding from the legislature.

Besides these tools, what would be left for a chamber of Congress that seeks to pressure the Executive to comply with an information request? There appear to be two primary options. *First*, a chamber may attempt to attach legislative language combating executive branch withholding of information to “must pass” legislation likely to be approved by the other chamber and either signed by the President or passed with a veto-proof majority. For example, a chamber could add a rider to an important appropriations bill that limits funds to a specific executive branch agency until it complies with an outstanding committee subpoena. *Second*, the House or Senate could simply withhold its consent to legislation—particularly appropriations bills or measures that align with the executive branch’s legislative priorities—until the Executive complies with certain subpoenas. Although a chamber of Congress cannot, on its own, [enact](#) affirmative restrictions or prohibitions on the executive branch, it can prevent the enactment of legislation that the executive branch desires.

If the House or Senate withholds its consent to legislation as a tool to enforce subpoenas, then the unavailability of the courts to enforce subpoenas may not only impact how Congress investigates, but also how it legislates. Indeed, with only limited practical mechanisms to force compliance with its subpoenas at each chamber’s disposal, it is possible that one impact of the courts refusing to hear congressional subpoena enforcement lawsuits may be an increase in the frequency of disagreements between the House and Senate on legislative matters. Withholding consent to legislative measures a chamber may otherwise have approved in order to support investigative inquiries may be a powerful tool of leverage for encouraging executive branch compliance with committee subpoenas. But doing so may also make House and Senate agreement on consequential legislation more difficult to achieve if each chamber regularly

makes its support contingent upon executive compliance with its information demands. As the Judiciary Committee asserted in its petition for rehearing *en banc*, use of political tools to enforce subpoenas could “invite further constitutional brinkmanship and are poor substitutes for judicial subpoena enforcement.”

Giving New Life to Inherent Contempt

One or both houses of Congress could also choose to reinvigorate the [inherent contempt power](#). This would likely be done through alterations to each chamber’s rules, and thus would not require any agreement or participation from the other chamber or the President. When *McGahn* initially was heard before the three-judge circuit panel, the [dissent](#) cast some doubt on the practicality of this option, but that was “so long as a more peaceable judicial alternative remains available.” It is important to note that only two executive branch officials have been detained using inherent contempt, neither of which involved claims of executive privilege. And the executive branch, as the dissent noted, [contends](#) that inherent contempt cannot be used to arrest and detain an executive official asserting a claim of executive privilege. Nevertheless, the House or Senate could, for example, attempt to use the inherent contempt power to levy fines on non-compliant witnesses rather than to detain them. This option, and others, are discussed in greater detail in a [CRS report](#).

Conclusion

Congress’s approach to enforcing its subpoenas has evolved as the House and Senate have adapted to changing circumstances in order to maintain effective ways of forcing the executive branch to comply with congressional demands for information. Depending on how the D.C. Circuit rules, the *McGahn* case could represent either another significant turning point in this long history or confirm Congress’s authority to enlist the aid of the courts in adjudicating subpoena disputes between the branches. If the latter, Congress would retain what has become an important tool for responding to executive branch non-compliance with congressional subpoenas. If the former, Congress could respond by reasserting its own powers in a way that ultimately develops into an effective approach to enforcing committee subpoenas. But if the courts remove themselves from these interbranch disputes, and Congress does not adjust to the changing landscape, it is possible that Congress’s ability to enforce its investigative powers could deteriorate until subpoenas to the executive branch are reduced to formalized requests for information rather than enforceable demands.

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