

THE BROOKINGS INSTITUTION

THE CURRENT: What does DC Circuit ruling mean for House subpoena power?

Wednesday, September 1, 2020

Host: Adrianna Pita, Office of Communications, Brookings

Guest: Scott Anderson, Visiting Fellow, Governance Studies, Brookings; Senior Editor, Lawfare

(MUSIC)

PITA: On Monday, the D.C. Circuit Court of Appeals ruled that the House Judiciary Committee cannot compel former White House counsel Donald McGahn to comply with their congressional subpoena, a decision with potentially wider repercussions for Congress' authority.

With us to explain what's happening with this case and the broader implications is Scott Anderson, a visiting fellow with Governance Studies here at Brookings and a senior editor at Lawfare. Scott, thanks for talking to us today.

ANDERSON: Thanks for having me.

PITA: Before we get into those broader implications, maybe I can ask you to catch our listeners up a little bit on what's been happening with this case. This feels a little like *déjà vu* – didn't the D.C. Circuit already issue a ruling on this? How has this come back around again?

ANDERSON: This is actually the second panel opinion and third overall opinion that the D.C. Circuit of Appeals has issued in this particular matter. There was an earlier panel opinion – meaning an opinion by three judges of the Court of Appeals – by the same three judges involved in the most recent decision, earlier in the spring, which essentially held that the committee could not subpoena, or enforce its subpoena, against Don McGahn on different grounds, on the ground that it did not have the legal standing to do so. The Judiciary Committee appealed that decision to what is called the "en banc" D.C. Circuit Court of Appeals, which is a step between the Court of Appeals panel and the Supreme Court that is optional that plaintiffs can pursue, or parties can pursue, that essentially asks the whole court to review the panel's decision, and if they see fit, to reverse it.

In that case, that is actually what happened earlier this summer, where the en banc D.C. Circuit, in what was ultimately a 7-2 decision, although two Trump appointees sat out of that matter, reversed the earlier panel opinion and said that the Judiciary Committee does in fact have standing to proceed with enforcing the subpoena against Don McGahn. But it declined to reach other defenses that McGahn and supporters of the president and the administration have invoked specifically relating to cause of action, relating to executive privilege, related to an array of other legal issues implicated by this sort of subpoena. And it remanded those – meaning it sent it back down to the panel of three judges to address those issues.

Notably, in dissents to that en banc opinion, two of the three judges on this panel – Judge Griffith, who actually retired from the court the day after this opinion dropped, and Judge Karen Henderson, who joined him both in the initial panel opinion and this later panel opinion – said essentially, we don't think there's a cause of action here, either, so let's just go ahead and resolve these

other issues as well, but the broader court elected not to do so. So in some ways, this most recent decision isn't that surprising; both Judge Griffith and Judge Henderson did exactly what they said they were going to do in their dissents for the en banc opinion and they ruled that, in fact, there's no cause of action, therefore this is a new grounds on which to efforts to support this subpoena fails.

PITA: Maybe you could also explain – there were some recent decisions by the Supreme Court this summer that also pertain to Congress' subpoena authority. I was really struck by the language in one of them, where they quoted an older case saying, the “power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” How does that match with these decisions that are coming out of the D.C. Circuit?

ANDERSON: Well, it's true, the Supreme Court earlier this summer issued two related opinions on similar subpoena situations, although they're slightly different in meaningful ways. In a *Trump v. Mazars* decision which related to a subpoena by members of Congress to a private accountant seeking financial records related to the president, the Supreme Court said essentially that such subpoenas, contrary to what the president and the administration had been arguing, actually are not prohibited by the separation of powers between the presidency and the Congress. Congress can issue and enforce such subpoenas.

But they noted there were a number of separation of powers concerns implicated by those sorts of subpoenas and remanded that particular matter back to the lower appellate court so they could properly examine and weigh those different separation of powers factors in determining whether that subpoena should be or could be enforced.

In a separate matter, *Trump v. Vance*, there was a similar situation where we saw an effort by New York state authorities to get certain records related to Trump's tax returns and other financial records. In that case, similarly, essentially the court said that can move forward – although there were still an array of other legal defenses and legal issues that still had to be worked out that weren't addressed by the Supreme Court – and remanded that back. Both those matters have been ongoing. The *Vance* investigation being led by New York state authorities is still ongoing and supposedly has secured some information and is working its way forward in its investigation and potentially bringing charges or other accusations against the Trump organization and certain others in the president's orbit. The *Mazars* matter is still being litigated in the lower courts. But both those decisions together basically stood for the proposition that it wasn't categorically impossible for congressional committees to enforce subpoenas, at least in those sorts of circumstances: against third parties, in the *Trump v. Mazars* case, or state authorities against third parties, as in the *Vance* case. Neither of them directly address the question in the current *McGahn* matter, which is slightly different, which is an effort to subpoena a former White House counsel that is opposed by the current presidential administration, something that more directly implicates officials acting in their official capacity, questions of executive privilege, and a different bundle of separation of powers issues and legal issues.

So, *Mazars* and *Vance* I think certainly weigh heavily in the background of *McGahn*. There are certain arguments that the administration, the president, have advanced that are very broad declarations about what the separation of powers prohibits and prevents from happening. And I think after *Vance* and *Mazars*, it's hard to take those arguments as seriously as winners before the Supreme Court, particularly because *Mazars* was a 7-2 decision, meaning that a number of conservatives and actually justices appointed by President Trump ultimately said, yeah, the subpoena could be enforced if

it took into account the separation of powers issues. So, it docks out some of those more categorical defenses, but at the same time, it sets up its own series of barriers, meaning these boxes you have to check to properly take account of separation of powers concerns. And so that doesn't completely mean that all of these subpoenas are going to be able to be fast-tracked in any sort of way towards enforcement. Instead, there's going to be a long careful examination of the various legal issues it raises. That probably means that any litigation to enforce them is likely to be fairly drawn out and involve multiple phases of litigation.

PITA: Gotcha. I guess probably the thing that makes me the most curious is that, for years, Congress has been - under the control of either party - has been issuing subpoenas to presidential administrations that really didn't want to comply with those subpoenas. This isn't a new thing to the Trump administration. So how is it that the scope of Congress' powers to not only issue subpoenas, but to enforce them has never been or has not apparently been spelled out enough before now? How are there still disputes about the scope and scale of those powers?

ANDERSON: Well, in a lot of ways this actually is a new situation. Traditionally in the past, when Congress has wanted or demanded documents and information from the executive branch, we've seen the two branches come together in what's called an accommodation process. That makes it sound a little friendlier than it is; often it is quite contentious. There's a lot of politics behind it. There's a lot of threats of legal action often hanging in the background. But very rarely have we seen a case where it actually comes to litigation. We saw a handful of cases around the Watergate matter, but all of them were quite differently situated. So, it's hard to see them providing a direct precedent in all of these, although, again, I think they weigh in favor of the conclusion that, yes in fact the subpoenas can be enforced in certain circumstances. But ultimately, in almost all those cases what ended up happening was that the executive branch capitulated on certain demands by Congress, but not others. And Congress accepted that as an adequate remedy, as an adequate production of information, even if somewhat begrudgingly on the logic that, well, we really don't have that other mechanisms of forcing the executive branch to comply – although we can get to that in a second, that may or may not be true. A lot of people say it isn't – and on the logic that we've gotten a good chunk of information, this kind of checks our core boxes and they can still continue to criticize the administration for stonewalling or whatever they would like.

That accommodation process is something that both the majority and the minority in both panel opinions and in the en banc D.C. Circuit Court value really highly. They say this is the way Congress and the executive branch should be resolving this. But their difference is in the views of what sort of incentives are best likely to drive that accommodation process. Judge Griffith and Judge Henderson, who were in the panel majorities, but lost in the en banc court, they essentially say if there's any possibility of judicial enforcement, then that is just where these parties are going to go and they're going to litigate this out and litigate this out and litigate this out, and then they're never actually going to have any incentive to reach an accommodation. The majority of judges on the D.C. Circuit say the opposite. They essentially say, look if you take out the threat of eventually being able to enforce a subpoena, albeit after a long and somewhat onerous legal process, then similarly there's no incentive to compromise, because the executive branch knows it will always win unless Congress can take some of these other extreme remedies it might have available to it, but doesn't really use that often, and it's hard for it to use – which, again, we can get to in a second. And so therefore, by allowing for the possibility of enforcing the subpoena, but kind of slow-rolling the process, recognizing that it raises

these constitutional issues and therefore approaching it very carefully, which in practice means the litigation takes a while and it's onerous to undertake, they're providing incentives for both parties to reach some sort of compromise or accommodation. And then if that never ends up happening, there is ultimately a remedy-at-law available in the enforcement of subpoena at the end of that long process.

A part of this is, these other remedies that Congress has available to it, which is worth touching on really briefly. Judge Griffith in his original panel opinion that was vacated by the en banc court, and briefly in this new one, although it's less directly relevant here, he essentially says, look, Congress has these other steps that can take to enforce the subpoena and it should do these first. If it really wants this information, it should vote to cut off funding to a priority of President Trump's. Or it should pursue something called inherent contempt, which is an authority that Congress really hasn't used in a meaningful way in almost a century, where they used to have congressional officials go out and physically arrest people who refuse to comply with subpoenas. And he suggests, essentially, Congress should take these sorts of extreme steps to enforce it subpoenas, and that's how they should remedy it. The threat of that is how they should remedy it and drive accommodation, not through the judicial process.

I think that, while they don't say quite explicitly, the majority of judges on the D.C. Circuit say it's not a good idea to force Congress to resort to those extreme remedies. A) It's very hard to get the votes necessary to pursue those sorts of steps. B) It has lots of negative externalities, in terms of, cutting off funding has lots of policy consequences, things that might be difficult for Congress to undertake that are painful and they may have good reason not to want to undertake, even if it is effective incentive for the presidency. And in the end, it just beckons much more chaos, than is really necessary to arrive at a resolution to these conclusions when the judicial process, as Mazars kind of seemed to confirm, can ultimately weigh in on these subpoenas, even if it does go through a very careful process. So, there's essentially this discrepancy between these two different views of bargaining and the role that these other remedies play in how these branches should be interacting around this set of issues.

PITA: Got it. So, given these discrepancies, given this debate over the availability of other remedies to Congress, whether those are in fact too impractical to be used, I guess the big question about this case is that, is this as some analysis has it, a fundamental undercutting of one of Congress's main checks and balances against the executive branch or is this a narrower decision that has some of these other tailored remedies?

ANDERSON: I think the best way to view this most recent panel decision is simply as a stepping-stone to whatever the ultimate conclusion is. Again, this a panel opinion as we knew was going to happen from the dissents in the en banc opinion, reached a very narrow conclusion, which is that Congress could actually authorize individual committees in the house to enforce subpoenas. In fact, Congress has actually taken that step already for Senate committees in certain cases, in regards to certain subpoenas, although not those relating to questions of executive privilege, notably something Judge Griffith really harps on. Essentially, they say, well, Congress could authorize this but they haven't done that here. There's no law that allows this committee to enforce it subpoena. Judge Rogers – who is in the minority of the panel in the dissent as she was in the prior panel opinion, and she actually wrote the en banc court's opinion, so she may be a better weathervane of kind of how the broader court looks at these issues – she says, no, you don't need this sort of explicit statutory authorization. Like a person can, these committees can pursue remedies. It's inherent and implied in their Article One of the

Constitution authority to investigate as kind of an attachment to their legislative authority, and therefore, we don't need this express statutory authorization. She also points to declaratory judgments – a particular statute relating to a particular type of remedy – as providing such authorization, at least for that sort of remedy.

The long and short of it is that this panel opinion is very unlikely to be the last word on this topic. It's almost certain that like the last panel opinion this panel opinion will be appealed to the en banc court. It seems very likely the en banc court will take it. And in my view, it seems very likely that they will reverse the panel opinion once again and come up with a different solution as to why the statutory authorization is not at least categorically required. We don't know for sure. And this may be a muddier decision. There'll be maybe more disagreement among the court on this particular matter, because it is a different question, and you can see arguments on both sides as to the extent to which statutory authorization is or is not required for this sort of thing. But it does sort of run in tension with the prior panel opinion which had seven judges on board with it on the en banc court. And therefore, it seems likely to control the day in this ultimate issue. So, in other words, I think it's very likely that we're going to see this panel opinion vacated. And we're going to see the subpoena continue to move forward. But there are still other legal defenses that need to be resolved by the lower courts before it can actually be enforced.

And the truth is that the process for litigating this out is almost certain to drag past the election. And then the question becomes what happens, depending on who's elected president? If President Trump is elected, then we may actually see this litigation process resolved and this court will have to deal with these different issues and ultimately enforce a subpoena. And I suspect with the election past, they be more willing to do so at a quicker pace. If former Vice President Biden wins, becomes the new president, then a lot of these legal defenses the current president, President Trump and his administration, are invoking go away, or at least become waivable by President Biden. And so, a lot of these difficult constitutional issues the court is wrestling with may no longer be an issue, and it becomes much easier to resolve these sorts of subpoenas without implicating those constitutional law questions.

It's worth noting, I would say, that the one actor in all this that I really haven't mentioned yet in terms of moving forward, is the Supreme Court. And it's not clear exactly whether the court will have the opportunity to weigh in on this matter. Certainly, it's a possibility. Either party can appeal these issues to the Supreme Court directly from the panel opinion. They don't have to go to the en banc court of the D.C. Circuit. And the Supreme Court may weigh in. But its jurisdiction is discretionary. It has to grant what's called certiorari, meaning it chooses whether to take up this case. They would need four justices to say, yep, I want to take up this decision and weigh in on this particular matter. And, I suspect that the people litigating this are looking at the Mazars decision, which again came down 7-2, and are seeing the justices as, A) potentially not wanting to disrupt the lower courts' handling of these issues, and potentially not really wanting to stick their nose into the middle of it, certainly prematurely. And so we haven't seen an effort to bring this to the Supreme Court yet. Maybe that will change at this next round, but I suspect not. Instead, I think we're going to see the D.C. Circuit continue to wrestle with it between the en banc and the panel, and we'll see that move forward.

One last note worth noting is Judge Griffith, one of the voices on that panel and the author of the two panel opinions that, the first of which was vacated, the second of which just came down, has

now retired from the court. So, there will be a new judge on that panel and that may change the dynamics as well.

PITA: All right, Scott. Thanks very much for talking to us today and explaining this.

ANDERSON: Thank you so much for having me.