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By Patrick Martin
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Judge denies “absolute immunity” of White House aides

In a sweepingly worded decision, a federal judge in Washington DC ruled Monday that there was no legal or constitutional basis for the Trump administration’s claim that top White House aides have “absolute immunity” from being compelled to testify before Congress.

The case arose from a subpoena issued by the House of Representatives for the testimony of former White House counsel Donald F. McGahn, one of the witnesses most frequently cited in the Mueller report into allegations of collusion by the 2016 Trump campaign with Russia and Trump’s actions in response to the charges.

Several of the charges of obstruction of justice that Mueller suggested could be brought against Trump in a congressional impeachment involve his instructions to McGahn, both to arrange the firing of Mueller himself and to lie about those efforts when questioned by the press.

After the House issued the subpoena last May, the White House instructed McGahn to refuse to appear in response to it. Justice Department attorneys subsequently argued, both in court filings and in a hearing October 31 before Judge Jackson, that close Trump aides had “absolute immunity” from being called to testify before Congress.

Jackson flatly rejected such claims, noting that they had been made repeatedly by both Democratic and Republican administrations over the past 50 years, since Watergate, but had never been litigated beyond the level of the federal district court for Washington DC.

Both the executive and the legislative branches had sought to avoid an appeals court or Supreme Court decision that would represent a binding precedent one way or the other.

“To make the point as plain as possible,” she wrote, “with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist.” She called the concept “a fiction that has been fastidiously maintained over time through the force of sheer repetition in (Office of Legal Counsel) opinions, and through accommodations that have permitted its proponents to avoid having the proposition tested in the crucible of litigation.”

The judge wrote that the White House “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.”

“However busy or essential a presidential aide might be, and whatever their proximity to sensitive domestic and national-security projects, the President does not have the power to excuse him or her from taking an action that the law requires,” Judge Jackson added. In language that made headlines in the national press, she concluded, “Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings.”

The decision has no immediate effect either on whether McGahn will testify himself, or on the broader question of whether other White House officials will testify in the course of impeachment proceedings before the House. The Justice Department announced that it would appeal Jackson’s decision, a process that could lead to an appeals court ruling in 2020, but might not reach the Supreme Court until after the 2020 presidential election.

But the judge’s ruling could have an impact on the willingness of other witnesses to defy White House instructions not to appear, as numerous State Department and National Security Council officials have already done.

Even if McGahn does eventually appear before a House committee, there is no guarantee that he will actually respond to questions. Jackson’s opinion allowed that McGahn might well legitimately assert either executive privilege or lawyer-client privilege in relation to a particular line of questioning. But she ruled that he had to show up and make such claims on a question by question basis, rather than refuse to appear before Congress at all.

Jackson noted a decision 11 years ago at the district court level, issued by Judge John Bates in relation to the Bush administration's claim to testimonial immunity for former White House counsel Harriet Miers, which centered on the same issues raised by the Trump White House. Bates similarly rejected the sweeping claims of immunity, and Congress and the Bush White House worked out a compromise.

The Obama administration argued in 2014, in an internal legal opinion, that the Bates ruling was incorrect, taking the same position as Bush and Trump. But such executive branch opinions were not binding on the courts, said Jackson, herself an Obama appointee. The court ruling on McGahn intersects with the conclusion of public hearings by the impeachment inquiry run by the House Intelligence Committee. Committee Chairman Adam Schiff (D-Calif) said Monday that his staff would be preparing a report on Trump's conduct in relation to delaying military aid to Ukraine in order to force Ukraine to publicly open an investigation into the activities of Hunter Biden, son of former Vice President Joe Biden, a candidate for the Democratic presidential nomination to challenge Trump next year.

The report would be transmitted to the House Judiciary Committee sometime next week, Schiff said, setting the stage for the next step in the impeachment process, the drafting of actual articles of impeachment. In a letter to House members, Schiff claimed that the closed-door and public hearings had provided "overwhelming, unchallenged, and damning" evidence of abuse of office.

Meanwhile, more evidence continues to emerge of the reactionary character of the Democrats' impeachment drive, which is not aimed at punishing Trump's real crimes, like his persecution of immigrants and refugees or his encouragement of white supremacist and neo-Nazi tendencies, but rather at imposing the demands of the national-security establishment in relation to US policy towards Russia and Ukraine.

According to the testimony of Laura Cooper, a Pentagon official who appeared last Wednesday, the Department of Defense was receiving anxious calls from the representatives of arms manufacturers who were supplying military equipment to Ukraine at the behest of the Pentagon, including Javelin anti-tank missiles.

These officials were concerned that the profits of their companies from supplying weapons for the "hot war" in eastern Ukraine were threatened by Trump's decision to delay the military aid in order to pressure Ukraine President Volodymyr Zelensky to make good on a promise to investigate the Bidens and perform other political favors for Trump.