

[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5331

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Pursuant to this Court's December 18, 2019 Order, the Department of Justice, on behalf of Appellant Donald F. McGahn, II, files this supplemental brief "addressing the effect of the articles of impeachment on the issues in this case, including whether the articles of impeachment render this case moot and whether expedited consideration remains necessary."

1. The articles of impeachment adopted by the House of Representatives do not render this case moot. In its complaint, the Committee alleged that, wholly apart from impeachment proceedings, McGahn's testimony would assist the Committee in "assess[ing] the need for remedial legislation and to conduct oversight." JA17. Whether or not that allegation is correct on the merits, it survives the House's impeachment vote and thus the suit is not moot—which also renders irrelevant whether or not the subpoena was ever validly justified by the House's impeachment power in the first place.

2. Although the suit is not moot, the impeachment vote affects the extent to which expedited consideration remains necessary. The Committee opposed "the Department's request for a stay pending appeal because the delay from such a stay would impair the House's ongoing impeachment inquiry." Dist. Ct. Doc. 51, at 1. In doing so, the Committee stated that "speedy judicial action is needed to avoid hampering the House's impeachment investigation."

Id. at 2. That justification no longer applies. Moreover, the case is already fully briefed, and the Court has scheduled oral argument for January 3. There is no need for any additional expedition of this case. In particular, there is certainly no reason to “affirm the district court’s order without delay, such as by immediately vacating the stay and issuing the Court’s order, with an opinion to follow in due course.” Comm. Br. 53. Nor is there any justification for otherwise expediting the Court’s decision in this case beyond holding oral argument on the already-scheduled date of January 3.

3. The articles of impeachment affect this case in two other ways. *First*, even before the impeachment vote, the Committee had no response to the Department’s point that a court, as a matter of equitable discretion at the very least, should refrain from entangling itself in an interbranch dispute where Congress as a whole has not made a conscious choice to clearly grant the courts subject-matter jurisdiction over the Committee’s suit and the Committee a cause of action to sue at all. *See* Opening Br. 46-47; Reply Br. 24. The reasons for refraining are even more compelling now that what the Committee asserted—whether rightly or wrongly—as the primary justification for its decision to sue no longer exists.

Second, the article of impeachment addressing purported obstruction of Congress relies in part on the judicial proceedings *in this very case*. The House

Judiciary Committee’s impeachment report, for example, cites the district court’s characterization of the Justice Department’s litigating position in this case for the proposition that the President “insists that unfounded doctrines, such as absolute immunity, preclude testimony by many current and former officials who might shed light on any Presidential abuses.” H.R. Rep. No. 116-___, *Impeachment of Donald J. Trump, President of the United States: Report of the Committee on the Judiciary* 165 (2019). Pursuing an interbranch suit in court while simultaneously pursuing impeachment, and then using that litigation as part of the impeachment proceedings, is “far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement.” *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring). But that is exactly what the Committee has done. The effect of that choice is to “embroil[] the federal courts in a power contest nearly at the height of its political tension.” *Id.*

Indeed, if this Court now were to resolve the merits question in this case, it would appear to be weighing in on a contested issue in any impeachment trial. That would be of questionable propriety whether or not such a judicial resolution preceded or post-dated any impeachment trial. *Cf. Nixon v. United States*, 506 U.S. 224, 232, 235-36 (1993). The now very real possibility of this Court appearing to weigh in on an article of impeachment at a time when

political tensions are at their highest levels—before, during, or after a Senate trial regarding the removal of a President—puts in stark relief why this sort of interbranch dispute is not one that has “traditionally thought to be capable of resolution through the judicial process.” *Raines*, 521 U.S. at 819. This Court should decline the Committee’s request that it enter the fray and instead should dismiss this fraught suit between the political branches for lack of jurisdiction.

CONCLUSION

Although the articles of impeachment do not moot this case, they eliminate the need for further expedition beyond holding oral argument on the already-scheduled date of January 3, and they underscore the reasons why this Court should dismiss or deny the Committee’s suit without adjudicating the subpoena’s validity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This supplemental brief complies with this Court's December 18, 2019 order because it contains 822 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/Martin Totaro

MARTIN TOTARO

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically filed the foregoing supplemental brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Martin Totaro

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