

# DON MCGAHN IS NOT THE MOST CRITICAL WITNESS ON IMPEACHMENT

In the last several days, Jerry Nadler has stated more and more clearly that his committee is conducting an inquiry on whether to file articles of impeachment. Six months after gaining the majority, this feels like a slow walk perhaps intended to time any impeachment vote based on how it will impact the election.

In its press release and complaint seeking to enforce its subpoena against Don McGahn last week, the House Judiciary Committee made an alarming claim: that Don McGahn was the most important witness in its consideration of whether to file for impeachment.

McGahn is the Judiciary Committee's most important fact witness in its consideration of whether to recommend articles of impeachment and its related investigation of misconduct by the President, including acts of obstruction of justice described in the Special Counsel's Report.

That claim suggests that the House Judiciary Committee has a very limited conceptualization of its own inquiry and perhaps an overestimation of how good a witness McGahn will be.

## McGahn's probably not as credible as HJC Dems think

I say the latter for two reasons. First, in the early days of the Russian investigation, McGahn overstepped the role of a White House Counsel. For example, even after his office recognized

they could not talk to Jeff Sessions about the Russian investigation or risk obstruction, McGahn followed Trump's orders to pressure Dana Boente on the investigation.

At the President's urging, McGahn contacted Boente several times on March 21, 2017, to seek Boente's assistance in having Corney or the Department of Justice correct the misperception that the President was under investigation.<sup>326</sup>

Curiously, McGahn and Boente's versions of what happened are among the most divergent in the entire Mueller Report, which might suggest McGahn was less than forthright in testimony that, per footnotes, came in one of his earlier interviews.

Plus, as the Mueller Report acknowledges, the NYT story that triggered one of the key events in the report – where Trump asked McGahn to publicly rebut a claim that he had asked McGahn to fire Mueller, which led him to threaten to resign – was inaccurate in its claim that McGahn had functionally threatened to resign (which was clear in real time).

On January 26, 2018, the President's personal counsel called McGahn's attorney and said that the President wanted McGahn to put out a statement denying that he had been asked to fire the Special Counsel and that he had threatened to quit in protest.<sup>784</sup> McGahn's attorney spoke with McGahn about that request and then called the President's personal counsel to relay that McGahn would not make a statement.<sup>785</sup> McGahn's attorney informed the President's personal counsel that the Times story was accurate in reporting that the President wanted the Special Counsel removed.<sup>786</sup> Accordingly, McGahn's attorney said, although the article was inaccurate in

some other respects, McGahn could not comply with the President's request to dispute the story.<sup>787</sup>

Put McGahn under oath, and Republicans will ask if he was a source for that story, and if he was, why he oversold what he did. At the very least they'll beat him up for letting the "#FakeNews NYT" spread lies.

## **There are far better (tactically and Constitutionally) reasons to impeach**

More troubling still, asserting that McGahn is the most important witness – and stating that he'd be a witness in "criminal obstruction" – you prioritize that cause for impeachment over others, causes that might elicit some Republican support or at the very least mobilize the Democratic base.

To my mind, the best cause for impeachment – in terms of cornering Republicans and mobilizing the Democratic base – pertains to Trump's repurposing of otherwise allocated funding for his Wall. This was an issue about which Republicans themselves had problems. It highlights Trump's impotence to deliver on his campaign promise that Mexico would pay for his wall. It goes to issues of efficacy on national security issues. And it highlights how Trump has abused authority – authority which goes to the core of separation of powers – to facilitate his attacks on Latino immigrants. Plus, depending on when impeachment was triggered, having focused on the power of the purse would provide a tool to rein Trump in if he survived the election.

Democrats should also focus on Trump's abuse of the Vacancy Reform Act in his appointments to lead the Consumer Financial Protection Board, DOJ, DOD, and ODNI. Violating the spirit of

Consumer Financial Protection Board gave Trump a way to gut an entity meant to protect consumers, something that Elizabeth Warren will be able to magnify better than anyone (all the more so if and when the economy starts to turn south). Appointing Big Dick Toilet Salesman Matt Whitaker to fire Jeff Sessions provides a different way to get to the Russian investigation, and may (if BDTs prevented Mueller from naming Trump in the Roger Stone indictment) focus more attention on the resolution of that case (which has the potential of being both a really damaging trial or a pre-trial pardon). The appointment of Patrick Shanahan as Acting Secretary of Defense provides a way to focus on ethics complaints about his tenure, to say nothing about Trump's tolerance for familial abuse. And Trump must be held accountable for whatever predictable problems selecting a loyalist over Sue Gordon as Acting DNI will cause – and some of the predictable problems, which might involve North Korea, Iran, or cybersecurity, could be quite damning.

Another impeachment cause that would invoke some of the same issues as the Russian investigation, but in a way that would be more awkward for the President, is Trump's abuse of security clearances, starting with, but not limited to, Kushner's (this is an issue where the Oversight Committee has done great work). An inquiry into why Trump gave Kushner clearance would provide a way to get to Kushner's awkward role in foreign policy, particularly the possibility that he shared US classified information with Gulf oligarchs. If Kushner is found to have shared intelligence allowing Mohammed bin Salman to target Al-Waleed bin Talal or Jamal Khashoggi, it will invoke a slew of issues that will put Republicans in an awkward position (and have the salutary effect of focusing attention on Trump's refusal to keep the Saudis honest).

Democrats would be idiots if they didn't make an issue of Trump's self-dealing, including but not limited to emoluments. It's likely Republicans would defend the President on this point, but if

they do, it can form the basis for legislation to more clearly prohibit such self-dealing going forward if Democrats do well in 2020. In addition, it goes to an issue that was absolutely key to Trump's supporters, #DrainTheSwamp, but on which he has been (predictably) an utter failure.

Finally, Democrats should include Trump's refusal to respond to violations of the Presidential Records Act in any impeachment inquiry. It is true that most Administrations have had problems adhering to PRA going back to Poppy Bush (Obama is to a large extent an exception, but Hillary's avoidance of the Federal Records Act undermines that good record). But when pressed, most prior Administrations have been forced to admit the details of their failures to fulfill the law. Here, Trump has simply refused to respond to all questions about PRA violations. Some of these violations involve key players in the Russian investigation: Jared, KT McFarland, and Bannon. But these same people were involved in other scandals, such as the willingness to sacrifice US standards on nuclear security so that a bunch of Republicans can make \$1 million per reactor (again, this would incorporate great work done by OGR).

This is a non-exclusive list. The point is, however, that HJC should frame their impeachment inquiry broadly, partly because some of Trump's high crimes and misdemeanors have pissed off Republicans in the past, and partly because a failed impeachment trial can still frame Republican obstruction in a way that voters will care about.

Obviously, I think Trump's conduct during the Russian investigation is important, and it's all packaged up with a bow. But it's not even just obstruction. Trump lied under oath in his written responses to Mueller. And Trump cheated to win an election. So even while pursuing impeachment on Russia, it needs to be more broadly conceived than the issues that Don

McGahn can address.

## **Other witnesses have more to offer than Don McGahn**

So even in the emphasis on the Russia investigation, I think there is at least one better witness: Jay Sekulow. Sekulow has done a number of things that don't qualify for attorney client privilege, such as his conversations directly with Michael Cohen to write a false statement hiding the President's ties to Russia. That goes directly to Trump's sworn lies.

Then there's John Kelly. He was at DHS for the beginning of Trump's abusive immigration policies. He knows details of Trump's security clearance abuses (and might actually give a damn about them). He should know details of the PRA violations (and if not, should be accountable for why not). And he knows details of Kushner's privatized foreign policy (and probably tried to control it). Kelly was a minor witness for Robert Mueller, but should be a key witness to any impeachment inquiry.

Finally, there's the role of the Office of Legal Counsel and its head Steve Engel in all this. Some of OLC's opinions enabling Trump's abusive acts have been every bit as dodgy as John Yoo's ones. It is the place of DOJ's oversight committee to review the circumstances of those shitty opinions. While the government would likely fight this testimony particularly aggressively based on deliberative and attorney-client privileges, both John Yoo and Steven Bradbury have testified before, Yoo on an issue (torture) pertaining to abuse. Engel would still be able to testify about patterns of communication and the degree to which Trump dictated outcomes.

I'll grant you, there are good reasons why McGahn may be a good tactical witness. I suspect that, by the time he testified, McGahn might be

prepared to Bigfoot his testimony, not least in an attempt to cleanse himself of the Trump taint. So at that level, he may be a willing, damning witness.

So calling McGahn the most important witness might just be a legal tactic, a means to tie HJC's obstruction inquiry with witnesses who have been blocked from testifying. And the White House Counsel position (to say nothing of the former White House Counsel position) is one for which there is precedent (under Clinton and Bush) for coerced testimony.

But I hope to hell HJC doesn't really believe he's the most important witness.