

[EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 19, 2021]**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF
REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD MCGAHN, II,

Defendant-Appellant.

No. 19-5331

JOINT MOTION TO POSTPONE ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 27, the parties in this case respectfully move to postpone oral argument because the Committee on the Judiciary and the Executive Branch have reached an agreement on an accommodation. The agreement is attached to this motion.

Oral argument in this en banc matter was originally scheduled for February 23, 2021. This Court has twice granted Defendant-Appellant's motions to postpone the argument in order to permit the parties an opportunity to engage in discussions to determine whether

an accommodation might be available with respect to the Committee's request. Oral argument is currently scheduled for May 19, 2021. In postponing the argument to that date, this Court stated that "[t]here will be no further postponements of oral argument in this case absent exceptional circumstances." Apr. 21, 2021 Order.

The Committee on the Judiciary and the Executive Branch have now reached an agreement on an accommodation. Under that agreement, the Executive Branch will permit the Committee to conduct a transcribed interview of former White House Counsel Donald F. McGahn, II, according to parameters set forth in the agreement. Once implemented, the accommodation will resolve this litigation, as set forth in the accommodation agreement.

Accordingly, the parties jointly request that the Court postpone oral argument to allow implementation of the accommodation. As this Court has previously recognized, "[a] compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance." *United States v. AT&TI*, 551 F.2d 384, 390, 394 (D.C. Cir. 1976). Postponing argument will allow time for implementation of the accommodation and will conserve the Court's

resources. The agreement on an accommodation constitutes an “exceptional circumstance” that justifies removing this case from the May 19, 2021 oral argument calendar. Once the accommodation is implemented, there will no longer be a need for resolution in this case of the issues currently presented to the en banc Court.

As noted in the parties’ May 11 Joint Status Report, former President Trump, who is not a party to this case, is not a party to the agreement regarding an accommodation.

If the requested postponement is granted, the parties propose to provide a status update in 30 days, on June 11, 2021.

CONCLUSION

For the foregoing reasons, the parties jointly move for the Court to postpone the May 19, 2021 oral argument.

Respectfully submitted,

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MICHAEL S. RAAB

/s/ Courtney L. Dixon

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MAY 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished automatically by the appellate CM/ECF system.

/s/ Courtney L. Dixon

COURTNEY L. DIXON

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point century font, a proportionally spaced font, and that it complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 390 words, according to the count of Microsoft Word.

/s/ Courtney L. Dixon

COURTNEY L. DIXON

Agreement Concerning Accommodation

Committee on the Judiciary, U.S. House of Representatives v. McGahn No. 19-5331 (D.C. Cir.)

This document describes the terms of an accommodation between the Committee on the Judiciary and the Executive Branch as represented by the Department of Justice. The accommodation is intended to end the litigation in *Committee on the Judiciary, U.S. House of Representatives v. McGahn*, which is now pending before the en banc D.C. Circuit (“McGahn Litigation”).

Format of Interview

- The Committee will conduct a transcribed interview of Mr. McGahn rather than calling Mr. McGahn to testify at a public hearing.
- The following counsel may attend the interview: counsel for the Committee majority, counsel for the Committee minority, private counsel for Mr. McGahn, and counsel from the Department of Justice.
- Members of the public, the press, and Members of Congress who are not on the Judiciary Committee will not be permitted to attend the interview.
- The interview will be conducted as soon as possible, consistent with needed preparation time and the availability of Mr. McGahn and counsel.
- A transcript of the interview will be created and promptly provided to all involved parties. The parties will have a reasonable amount of time, not to exceed seven calendar days, to review the transcript for accuracy before it is released.
- The Committee Chair will ask all Members and Committee staff to maintain the confidentiality of the interview until the transcript is released publicly.

Scope of Interview

- The interview of Mr. McGahn will be limited to the following topics:
 1. Information attributed to Mr. McGahn in the publicly available portions of the Mueller Report and events that the publicly available portions of the Mueller Report indicate involved Mr. McGahn. (Communications between Mr. McGahn and other Executive Branch officials that are not disclosed in the publicly available portions of the Mueller Report are outside of the scope of the interview.)
 2. Whether the Mueller Report accurately reflected Mr. McGahn’s statements to the Special Counsel’s Office, and whether those statements were truthful.

- Mr. McGahn will be free to decline to answer questions outside of the agreed-upon scope of questioning and counsel from the Department of Justice may instruct Mr. McGahn not to answer such questions.
- No assertions of executive privilege will be made with respect to information provided by Mr. McGahn to the Special Counsel and attributed to Mr. McGahn in the publicly available portions of the Mueller Report. But counsel from the Department of Justice otherwise retain the right to assert executive privilege. The Committee retains its rights to challenge any assertion of privilege.

Litigation

- Upon entry into this agreement, the Committee and the Department of Justice will jointly move to postpone the oral argument currently scheduled for May 19, 2021 before the D.C. Circuit en banc in the McGahn Litigation (No. 19-5331), on the ground that the Committee and the Department of Justice have reached an agreement in principle to settle the McGahn Litigation.
- Upon completion of the transcribed interview of Mr. McGahn, the parties will file a motion in the D.C. Circuit. In the motion, the parties will jointly ask the D.C. Circuit to dismiss the appeal in the McGahn Litigation (No. 19-5331) under Fed. R. App. P. 42(b) on the ground that the parties have reached a settlement. The parties will specify that each party will pay its own costs as well as any fees that may be due. In the motion, the Committee will simultaneously ask the D.C. Circuit to vacate the three-judge panel opinion that it agreed to rehear en banc. *See Committee on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020). The Committee will represent in the motion that the Executive Branch believes that the panel opinion was correct but, in the interest of accommodation between the branches, agrees that the Court should vacate the panel opinion.
- If the D.C. Circuit dismisses the appeal, the Committee will promptly move in the U.S. District Court for D.C. to dismiss its complaint in the McGahn Litigation (No. 1:19-cv-02379).
- The Committee and the Executive Branch agree that to the extent it becomes necessary in this and any future proceedings, the parties will support this accommodation as an appropriate resolution of the dispute between the branches, without prejudice to either party's ability to advocate for their positions on any legal issues that may be raised.

For the Committee on the Judiciary,
U.S. House of Representatives:



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Dated: 5/12/2021

For the U.S. Department of Justice:



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Dated: 5-12-2021