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Kaepernick Looks To Up The Ante, Pull Trump Into Grievance

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Law360 (June 12, 2018, 3:55 PM EDT) -- NFL quarterback Colin Kaepernick, who started a wave of player national anthem protests, is expected to try to compel U.S. President Donald Trump to testify in an ongoing labor grievance, a move some experts said strategically looks to turn the president's politicization of the issue to Kaepernick's advantage.

Kaepernick and his attorneys are expected to seek subpoenas, [Yahoo Sports](#) reported Thursday, to compel Trump and Vice President Mike Pence to testify in the ongoing labor dispute in which the former [San Francisco 49ers](#) quarterback alleges [National Football League](#) owners are colluding to keep him out of the league.



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Former San Francisco 49ers quarterback Colin Kaepernick kneels during the national anthem before a 2016 NFL game. (AP)

Trump and Pence have repeatedly attacked the protesting players over the past two seasons and have publicly — and reportedly in private — pressured NFL owners to put a stop to the protests, inserting themselves into the issue and playing to their base.

Now it seems those actions are central to Kaepernick's theory of collusion. But attempting to depose the president and vice president is a bold move that is sure to further stir the pot.

"This is just as much of a legal maneuver as it is sort of a PR move to put pressure



on the owners," said Aaron Swerdlow, a sports and entertainment attorney with [Glaser Weil Fink Howard Avchen & Shapiro LLP](#). "The owners really don't want to have this issue continue to be in the news.

"They don't want to continue to have Trump use the NFL as a flag for political purposes to politicize the issue and politicize the league," he said. "It has already happened [last] week with the Eagles. I don't think the timing of this is coincidental."

Last week, Trump uninvited the [Philadelphia Eagles](#) from the White House less than a day from a scheduled visit to celebrate their Super Bowl win, after it became apparent many of the players would not attend.

[The White House](#) blamed the players for the change, saying they were abandoning their fans. Then, during an event scheduled to replace the Eagles' visit, Trump criticized the protesting players without referring to them directly, saying all Americans should stand for the anthem. Eagles players reportedly did not kneel during the anthem last season but did raise fists at times.

It was the latest in a series of public statements by the president attacking the players and threatening the NFL to end the protests. He notably referred to players as "son[s] of bitch[es]" during a political rally last September.

Pence has also joined in, storming out of an [Indianapolis Colts](#) game last season after players protested during the anthem.

For the owners, attempting to involve Trump and Pence in Kaepernick's grievance may be the last thing they want.

Kaepernick must first convince the NFL system arbitrator handling his grievance that Trump and Pence's testimony is relevant and then convince a federal judge to issue



a subpoena to compel their testimony.

"There are some significant hurdles even if it were an ordinary case with ordinary witnesses," said Jay Holland, employment and civil rights attorney with [Joseph Greenwald & Laake PA](#). "Obviously, this is an extraordinary case with extraordinary witnesses."

But Holland said there is a "good-faith legal basis" for Kaepernick to seek to compel the testimony.

"Just what is in the public domain, it seems pretty clear that the president, along with the vice president, sought to embarrass and politically damage the players who were engaging in and kneeling in protests during the national anthem and at times singling out Colin Kaepernick," Holland said.

"There is certainly an intertwining between what is happening politically ... to put pressure on the NFL as it related to these players and in particular, Colin Kaepernick."

Kaepernick is ostensibly alleging that the owners agreed to keep him out of the league to either punish him for starting the protests or at least put an end to them — or both.

The testimony is not likely the sort of smoking gun evidence that two owners agreed to keep out Kaepernick, experts said, though it certainly could be circumstantial evidence that the owners were acting in concert under the same pressure or direction of the president.

Then again — though experts said it would be unlikely — there is the possibility that it could be discovered that Trump played more of a leading role, forcing and



coordinating a collusive agreement between the owners against Kaepernick.

"In those very rare cases, I allow the party who sought the subpoena to put on testimony and enter exhibits; and in these uncommon instances, I have found facts in favor of that party, to the detriment of a recalcitrant or obstructing party," said University of Illinois College of Law professor Michael H. LeRoy, who has served as a labor arbitrator. "So, that's one distinct possibility here.

"Even then, however, it's not an automatic win for Kaepernick," LeRoy said. "He still needs to have something for the arbitrator to look at. In that vein, I think a better path is for Kaepernick to subpoena the emails, text messages, phone records, flight logs and league meeting records that involve owners."

That could be further useful as the issue of whether the president would even or must comply with a federal court subpoena is another question. The whole effort pushes Kaepernick's case into the spotlight and raises the potential for more evidence in his favor.

"From a business standpoint, it is putting pressure on the NFL," Swerdlow said. "It says, 'Look we are going to fully litigate this matter, and if you continue to treat Kaepernick this way, we are going to pull this additional lever to hyperpoliticize what should be a sports or sports labor issue. Not a national political issue.'"

--Editing by Rebecca Flanagan and Katherine Rautenberg.