Congressional Access to Grand Jury Information

Mueller Grand Jury Case
Key Excerpts from 2019 District Court Opinion
Ordering Production of Grand Jury Materials

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On Oct. 25, 2019, D.C. District Chief Judge Howell granted the House application to obtain grand jury material related to the Mueller Report and ordered the Department of Justice ("DOJ") to produce them. *In re Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials,* No. 19-gj-48 (BAH), 2019 WL 5485221 (D.D.C. Oct. 25, 2019). Here are excerpts from her 75-page opinion, each excerpt of which consists of a direct quotation taken from the text of her opinion, with no changes in punctuation but with footnotes omitted.

On impeachment inquiry

The Speaker of the House of Representatives has announced an official impeachment inquiry, and the House Judiciary Committee ("HJC"), in exercising Congress's "sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5, is reviewing the evidence set out in the Mueller Report. As part of this due diligence, HJC is gathering and assessing all relevant evidence, but one critical subset of information is currently off limits to HJC: information in and underlying the Mueller Report that was presented to a grand jury and withheld from Congress by the Attorney General.

Congress Can Get Information

The Department of Justice ("DOJ") claims that existing law bars disclosure to the Congress of grand jury information. See DOJ's Resp. to App. of HJC for an Order Authorizing Release of Certain Grand Jury Materials ("DOJ Resp."), ECF No. 20. DOJ is wrong. In carrying out the weighty constitutional duty of determining whether impeachment of the President is warranted, Congress need not redo the nearly two years of effort spent on the Special Counsel's investigation, nor risk being misled by witnesses, who may have provided information to the grand jury and the Special Counsel that varies from what they tell HJC. As explained in more detail below, HJC's application for an

order authorizing the release to HJC of certain grand jury materials related to the Special Counsel investigation is granted.

Mueller Report conclusions

The Special Counsel's investigation "did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." Mueller Report at I-2. Nor did the Special Counsel "make a traditional prosecutorial judgment" or otherwise "draw ultimate conclusions about the President's conduct." Id. at II-8. At the same time, the Special Counsel stated that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state." Id. at II-2. "[W]hile this report does not conclude that the President committed a crime, it also does not exonerate him."

Indictment of sitting president

[T]he Special Counsel "accepted" the DOJ Office of Legal Counsel's ("OLC") legal conclusion that "'the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions' in violation of 'the constitutional separation of powers.'" Id. at II-1 (citation omitted) (quoting OLC Op. at 222, 260). This OLC legal conclusion has never been adopted, sanctioned, or in any way approved by a court.

Grand jury material withheld

DOJ has granted HJC access to "the entirety of Volume II, with only grand jury redactions" and did "the same with regard to Volume I" for "the Chairman and Ranking Member from [HJC]." DOJ Resp. at 6 n.2. DOJ has not, however, allowed HJC to review the portions of the Mueller Report redacted pursuant to Rule 6(e).

3-part test

Disclosure of grand jury information is proper under this exception when three requirements are satisfied. The person seeking disclosure must first identify a relevant "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i); then, second, establish that the requested disclosure is "preliminarily to" or "in connection with" that proceeding; and, finally, show a "particularized need" for the requested grand jury materials.

House has met test

HJC has identified the requisite "judicial proceeding" to be a possible Senate impeachment trial, which is an exercise of judicial power the Constitution assigned to the Senate. See U.S. CONST. art. I, § 3, cl. 6. HJC has demonstrated that its current investigation is "preliminarily to" a Senate impeachment trial, as measured—per binding Supreme Court and D.C. Circuit precedent—by the "primary purpose" of HJC's requested disclosure to determine whether to recommend articles of impeachment against the President. This purpose has only been confirmed by developments occurring since HJC initially submitted its application. Finally, HJC has further shown a "particularized

need" for the requested grand jury materials that outweighs any interest in continued secrecy.

Impeachment is a judicial proceeding

"[J]udicial proceeding," as used in Rule 6(e), is a term with a broad meaning that includes far more than just the prototypical judicial proceeding before an Article III judge.

DOJ flatly states that no congressional proceeding can constitute a Rule 6(e) "judicial proceeding" because "[t]he Constitution carefully separates congressional impeachment proceedings from criminal judicial proceedings." DOJ Resp. at 15. This stance, in service of the obvious goal of blocking Congress from accessing grand jury material for any purpose, overlooks that an impeachment trial is an exercise of judicial power provided outside Article III and delegated to Congress in Article I. Contrary to DOJ's position—and as historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent all make clear—impeachment trials are judicial in nature and constitute judicial proceedings. … The D.C. Circuit has already expressly concluded at least twice—in *Haldeman v. Sirica* and *McKeever v. Barr*—that an impeachment trial is a "judicial proceeding" under Rule 6(e), and these decisions bind this Court.

Walling off evidence in a grand jury

Most troubling, DOJ's proposed reading of "judicial proceeding" raises constitutional concerns. DOJ policy is that a sitting President cannot be indicted, OLC Op., which policy prompted the Special Counsel to abstain from "mak[ing] a traditional prosecutorial judgment" or otherwise "draw[ing] ultimate conclusions about the President's conduct." Mueller Report at II-8. This leaves the House as the only federal body that can act on allegations of presidential misconduct. Yet, under DOJ's reading of Rule 6(e), the Executive Branch would be empowered to wall off any evidence of presidential misconduct from the House by placing that evidence before a grand jury. Rule 6(e) must not be read to impede the House from exercising its "sole Power of Impeachment."

House impeachment role is akin to grand jury

To the extent the House's role in the impeachment context is to investigate misconduct by the President and ascertain whether that conduct amounts to an impeachable offense warranting removal from office, the House performs a function somewhat akin to a grand jury.

No House vote needed for impeachment inquiry

Representative Collins asserts that HJC's investigation cannot be "preliminary to" an impeachment trial until the full House passes a resolution authorizing a "formal impeachment proceeding." … The precedential support cited for the "House resolution" test is cherry-picked and incomplete, and more significantly, this test has no textual support in the U.S. Constitution, the governing rules of the House, or Rule 6(e), as interpreted in binding decisions.

Even in cases of presidential impeachment, a House resolution has never, in fact, been required to begin an impeachment inquiry. In the case of President Johnson, a resolution "authoriz[ing]" HJC "to inquire into the official conduct of Andrew Johnson" was passed after HJC "was already considering the subject." 3 Hinds Ch. 75 § 2400. In the case of President Nixon, HJC started its investigation well before the House passed a resolution authorizing an impeachment inquiry. See 3 Deschler Ch. 14, § 15 (Parliamentarian's Note) (noting that even before "the adoption of" the Nixon impeachment-inquiry resolution, "House Resolution 803," HJC "had been conducting an investigation into the charges of impeachment against President Nixon," such as by "hir[ing] special counsel for the impeachment inquiry"). In the case of President Clinton, the D.C. Circuit authorized the disclosure of grand jury materials to Congress on July 7, 1998, see HJC App., Ex. Q, Order, *In re Madison Guaranty Savings & Loan Assoc*., Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam), ECF No. 1-18, even though no impeachment resolution had yet been adopted and was not adopted by the House until four months later, see H. R. Res. 525, 105th Cong. (1998) (authorizing, on October 8, 1998, HJC to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach" President Clinton).

This Court "ha[s] no authority to impose," by judicial order, a particular structure on House proceedings. *Mazars*, 2019 WL 5089748, at *24.

House meets primary purpose test

As HJC explains, the purpose of HJC's investigation and the requested disclosure is "to determine whether to recommend articles of impeachment," HJC App. at 3, and the record evidence supports that claim. Determining whether to recommend articles of impeachment may not have been the primary purpose of HJC's investigation initially, but that is of no moment. "Congress's decision whether, and if so how," to act "will necessarily depend on what information it discovers in the course of an investigation, and its preferred path forward may shift as members educate themselves on the relevant facts and circumstances." *Mazars*, 2019 WL 5089748, at *13. While HJC is "pursuing a legitimate legislative objective [it] may . . . choose to move from legislative investigation to impeachment," id. at *18, and that is precisely what occurred here, as a review of the record evidence in chronological order demonstrates. … Collectively, the record shows an evolving and deliberate investigation by HJC that has become focused on determining whether to impeach the President and thus has crossed the "preliminarily to" threshold.

Ensuring House has access to pertinent information

Blocking access to evidence collected by a grand jury relevant to an impeachment inquiry, as DOJ urges, undermines the House's ability to carry out its constitutional responsibility with due diligence. On the other hand, interpreting Rule 6(e) in a manner compatible with this constitutional responsibility avoids this conundrum, and ensures HJC has access to the pertinent information before making an impeachment recommendation to the full House.

Committee can have both impeachment and legislative aims
DOJ is correct that deciding whether to recommend articles of impeachment may not always have been—and still may not be—the only purpose of HJC's current investigation, but that is to be expected. "As the Supreme Court has explained, '[t]he very nature of the investigative function—like any research—is that it takes the searchers up some "blind alleys" and into nonproductive enterprises.'" *Mazars* …. Here, HJC began, appropriately, with a broad inquiry, but focused on impeachment as the investigation progressed. This new focus does not necessitate that HJC forgo its other aims. See *Mazars*, 2019 WL 5089748, at *18. HJC's investigation to determine whether to impeach President Nixon, for example, contributed not only to President Nixon's resignation, but also to significant legislative reforms.

Particularized need test
The "particularized need" standard requires a showing that (1) the requested materials are "needed to avoid a possible injustice in another judicial proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only material so needed."

HJC showing of need
HJC asserts that it needs the material to conduct a fair impeachment investigation based on all relevant facts. See HJC App. at 34. In authorizing disclosure of grand jury material for use in impeachment investigations of judges and of a President, courts have found this "interest in conducting a full and fair impeachment inquiry" to be sufficiently particularized. … Impeachment based on anything less than all relevant evidence would compromise the public's faith in the process. … Further, as already discussed, denying HJC evidence relevant to an impeachment inquiry could pose constitutional problems. See supra Parts III.B.3; *see also Hastings*, 833 F.2d at 1445 (concluding that denying the House the full record available, including the grand jury material, for use in impeachment would "clearly violate separation of powers principles"). … HJC needs the requested material not only to investigate fully but also to reach a final determination about conduct by the President described in the Mueller Report. … HJC cannot fairly and diligently carry out this responsibility without the grand jury material referenced and cited in the Mueller Report. … Similarly, disclosure is necessary to assist HJC in filling, or assessing the need to fill, acknowledged evidentiary "gaps" in the Special Counsel's investigation.

DOJ position smacks of "farce"
DOJ claims that "[a] finding of 'particularized need' is especially inappropriate" because HJC "has not yet exhausted its available discovery tools"—namely, waiting for DOJ to fulfill its promised production of FBI interview reports and using congressional subpoenas. … In particular, DOJ cites an agreement reached with HJC this summer for DOJ to provide to HJC the thirty-three FBI-302 reports cited in Volume II of the Report, contending that this agreement must preclude a finding of "particularized need." See DOJ Resp. at 32. These arguments smack of farce. The reality is that DOJ and the White House have been openly stonewalling the House's efforts to get information by subpoena and by agreement, and the White House has flatly stated that the Administration will not cooperate with congressional requests for information. See Letter from Pat A. Cipollone,

> Counsel to the President, to Representative Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019) at 2.
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> Regarding DOJ's production of FBI-302s, "the bottom line," as HJC put it, is that some 302s have so far been produced by DOJ but not "the ones of most interest." … Congress's need to access grand jury material relevant to potential impeachable conduct by a President is heightened when the Executive Branch willfully obstructs channels for accessing other relevant evidence.
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> **Minimal need for continued grand jury secrecy**
> The need for continued secrecy is minimal and thus easily outweighed by HJC's compelling need for the material. Tipping the scale even further toward disclosure is the public's interest in a diligent and thorough investigation into, and in a final determination about, potentially impeachable conduct by the President described in the Mueller Report.
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> **Order to produce**
> DOJ is ordered to provide promptly, by October 30, 2019, to HJC all portions of the Mueller Report that were redacted pursuant to Rule 6(e) and any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e). HJC is permitted to file further requests articulating its particularized need for additional grand jury information requested in the initial application.

The Department of Justice appealed the district court decision to the D.C. Circuit Court of Appeals.