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Legal Sidebar

Grand Jury Secrecy and Impeachment: Implications of D.C. Circuit Ruling on the Special Counsel's Report

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Following the conclusion of Special Counsel Robert S. Mueller III's investigation of Russian interference in the 2016 election and related matters, the Attorney General released a public version of the Special Counsel's report concerning the investigation, with redactions. Many of the redactions related to matters occurring before the grand jury that had been convened in the investigation, as Rule 6(e) of the Federal Rules of Criminal Procedure (Rule 6(e)) provides for the secrecy of grand jury proceedings unless an exception applies. Certain Members of Congress were offered the opportunity to review a less redacted version of the report, but the Attorney General has maintained that Rule 6(e) prohibited the disclosure of grand jury information even to Congress.

In July 2019, the House Judiciary Committee filed an application in federal district court for an order authorizing the Department of Justice (DOJ) to release, among other things, the portions of the Special Counsel's report that were redacted pursuant to Rule 6(e). The Committee argued that it needed the redacted portions of the report to determine whether to recommend articles of impeachment against the President, and that authorizing DOJ to release of the grand jury material was thus permissible pursuant to a Rule 6(e) exception for disclosures "preliminarily to or in connection with a judicial proceeding." The district court granted the Committee's request, and, on March 10, 2020, a panel of the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed that decision in a 2-1 ruling. The appellate court ruling, should it stand, appears to establish a favorable framework for Congress to obtain grand jury materials in the course of future impeachment investigations. This Sidebar accordingly provides an overview of Rule 6(e) governing grand jury secrecy and the "judicial proceeding" exception, addresses the appellate court decision regarding the Special Counsel's report, and briefly discusses some possible implications of the decision.

Federal Rule of Criminal Procedure 6(e)

To protect the innocent, encourage full disclosure by witnesses, and prevent those under scrutiny from fleeing, among other things, Rule 6(e) establishes the secrecy of grand jury proceedings by setting out a list of persons, including grand jurors and "attorney[s] for the government," who "must not disclose a

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matter occurring before the grand jury" unless the Federal Rules of Criminal Procedure "provide otherwise." The prohibition is indefinite (i.e., the secrecy interest is not eliminated merely because a grand jury has completed its investigation and either issued an indictment or declined to do so). However, Rule 6(e) also contains a series of exceptions to the general rule of grand jury secrecy that permit disclosure of grand jury matters under certain circumstances. Many of the exceptions require a court order before any disclosure of a grand jury matter may occur.

One exception in particular permits a court to "authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . preliminarily to or in connection with a judicial proceeding." A person seeking grand jury materials pursuant to this exception may file a "petition to disclose" in the district where the grand jury convened. The Rule does not define the term "judicial proceeding," but some courts have viewed the exception as extending beyond actual court proceedings to include certain administrative or "quasi-judicial" proceedings (for example, attorney disciplinary proceedings). Additionally, several federal courts have authorized disclosure of grand jury materials to Congress in the impeachment context, though these orders generally have not contained significant analysis of how an impeachment trial fits within the "judicial proceeding" exception. Regardless, assuming a particular proceeding constitutes a "judicial proceeding" for purposes of the Rule, disclosure must still be "preliminarily to or in connection with" that proceeding. The Supreme Court has said that the relevant inquiry in this respect is the purpose and use for which the information is being requested: "If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure . . . is not permitted."

A person or entity seeking court-authorized disclosure based on the "judicial proceeding" exception must also establish a "particularized need" for the materials at issue, which requires a showing that the materials are "needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." The Supreme Court has characterized this "particularized need" standard as a "highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others."

Application for Grand Jury Materials in the Special Counsel's Report

In its application seeking (among other things) authorization for disclosure of the grand jury information in the Special Counsel's report, the House Judiciary Committee argued that it needed the information as part of its investigation "to determine whether the Committee should recommend articles of impeachment against the President" based on the facts contained in the report. (The President was subsequently impeached based on distinct allegations.) According to the Committee, a Senate impeachment trial is a "judicial proceeding" within the meaning of Rule 6(e), and a Committee investigation to determine whether to recommend articles of impeachment "is 'preliminar[y] to' the impeachment trial" for purposes of the Rule. The Committee also asserted that it had a "particularized need" for the materials, as (1) the materials were "necessary for the Committee to assess the meaning and implications" of the Special Counsel's report, including with respect to particular circumstances that could bear on impeachable offenses; (2) the need for the information far outweighed the need for continued secrecy given prior public disclosures and that a "high degree of 'continued secrecy' could in fact be maintained" through confidentiality protocols adopted by the Committee; and (3) the Committee had tailored its request to cover only "critical" materials, i.e., "information that the Special Counsel deemed sufficiently significant to be included or referenced in the Report itself," among other things.

DOJ opposed the Committee's application, however, asserting that "judicial proceedings" are "legal proceedings governed by law that take place in a judicial forum before a judge or magistrate," and thus Senate removal proceedings do not fit within the meaning of the term. Additionally, even assuming a Senate impeachment trial could be considered a judicial proceeding, DOJ argued that the Committee's

investigation at that point was "too far removed' and "laden with contingencies" to be considered "preliminar[y] to" the proceeding. Finally, DOJ maintained that the Committee did not carry its burden of demonstrating a "particularized need" for the grand jury materials. According to DOJ, Committee leadership already had access to 99.9% of the relevant material from the Special Counsel's report, and the Committee's explanation for why it needed the remaining 0.1% was speculative.

In an opinion issued October 25, 2019, the district court agreed with the Committee that its investigation was "preliminar[y] to" the "judicial proceeding" of a Senate impeachment trial and that the Committee had shown a particularized need for the grand jury information in the Special Counsel's report. The court accordingly ordered DOJ to provide the Committee promptly with all portions of the Special Counsel's report that were redacted pursuant to Rule 6(e), among other things.

DOJ then appealed to the D.C. Circuit, largely reiterating the arguments it had made in the district court and asserting that the House of Representatives' approval of two articles of impeachment in the interim "fundamentally alter[ed]" the case, as the distinct issues underlying those articles had become "the sole focus of the Committee's impeachment inquiry" such that there was "no further need, let alone a particularized need," for grand jury information from the Special Counsel's report. DOJ also claimed that allowing the district court's decision to stand would create "substantial constitutional difficulties" because of Rule 6(e)'s recognition that a court may authorize disclosure with conditions. In DOJ's view, this provision "would likely be unconstitutional as applied to impeachment proceedings," because the Constitution's separation of powers preclude the judiciary from enforcing such conditions against Members of Congress. DOJ thus argued that the difficulty in applying part of Rule 6(e) in the context of impeachment was "a compelling reason to doubt that congressional proceedings are 'judicial proceeding[s]' under the Rule." In response, the Committee maintained on appeal that the requested materials were still needed, because they would bear on issues "in the rapidly unfolding impeachment proceedings" and remained "central to the Committee's ongoing inquiry into the President's conduct." The Committee additionally averred that it would actually create constitutional problems to *deny* the Committee access to the grand jury materials, as that outcome would effectively "authorize the Executive Branch to withhold material that the House needs to carry out its impeachment function."

In a 2-1 decision, a panel of the D.C. Circuit affirmed the district court's order on March 10, 2020. The majority opinion recognized that Supreme Court and circuit precedent, including a 1974 *en banc* decision addressing the disclosure of grand jury materials to the House Judiciary Committee in connection with its impeachment investigation of President Nixon, established that a Senate impeachment trial is a "judicial proceeding" under the Rule to which a Committee investigation may be preliminary. The majority also viewed the text of the Constitution, history, and past practice as all supporting the same conclusion. And it rejected DOJ's argument that authorizing disclosure would raise separation-of-powers concerns, noting that judicial refusal to grant congressional access to grand jury materials in an impeachment investigation when DOJ itself is barred from releasing them without court authorization would "not empower Congress" but would rather "impede[]" it. Finally, the majority affirmed that the House Judiciary Committee had shown a "particularized need" for the grand jury materials in the Special Counsel's report, emphasizing the "highly flexible" nature of the inquiry. The majority concluded the Committee's need "remain[ed] unchanged" despite the approved articles of impeachment because the Committee had "repeatedly stated that if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." Rejecting the view that the redacted grand jury information required line-by-line examination, the majority acknowledged a "compelling need to be able to reach a final determination about the President's conduct described in the" report overall and observed that it could not "tell the House how to conduct its impeachment investigation or what lines of inquiry to pursue." The majority also recognized that the request was sufficiently tailored to its need and that in light of the public interest in a thorough investigation and special protocols the Committee adopted to restrict access to the grand jury materials, the need for continued secrecy was outweighed by the need for disclosure.

One judge on the panel dissented. Notably, the dissenting judge largely agreed with the majority on the central issues in the case. However, the judge dissented on grounds that were not raised or disputed by the parties: in the dissenting judge's view, while the district court could rightfully "authorize" DOJ to disclose the grand jury materials pursuant to Rule 6(e), it lacked the power to *order* DOJ to do so. Specifically, the dissent looked to the text of Rule 6(e), which speaks of a court "authoriz[ing] disclosure," and determined that the text permits a court to exercise its traditional supervisory authority over grand juries by removing the impediment that would otherwise bar DOJ (which typically acts as the custodian of grand jury records under the Rules) from disclosing grand jury materials. However, from the dissent's perspective, Rule 6(e) does not authorize the judiciary to *compel* the executive branch to turn over such materials, as such an action would constitute a core exercise of judicial power requiring the party seeking the materials (in this case, the Committee) to demonstrate standing—i.e., a concrete injury and certain other prerequisites—under Article III of the Constitution. And this, in the dissent's view, the Committee could not do, because a different panel of the D.C. Circuit recently held in *Committee on the Judiciary of the U.S. House of Representatives v. McGahn* that the House Judiciary Committee lacked standing to use the courts to enforce a subpoena against the executive branch. (The D.C. Circuit has since vacated the judgment in *McGahn* in the course of granting review by the full court.)

In response, the majority noted that "[n]umerous courts have recognized that grand jury records are court records" and "do not become Executive Branch documents simply because they are housed with" DOJ. Thus, according to the majority, "it is the district court, not the Executive or the [DOJ], that controls access to the grand jury materials at issue," and a district court merely "exercise[s] its continuing supervisory jurisdiction concerning the grand jury" in using that control to "order[] 'an attorney for the government' who holds the records to disclose the materials" pursuant to a Rule 6(e) exception. A separate concurrence—written by the author of the *McGahn* opinion—additionally accused the dissent of "chas[ing] jurisdictional phantoms," recognizing that although "the relationship between the grand jury and Article III courts is, to put it mildly, 'very under-theorized,'" the case before the court did "not involve a suit between the political branches over executive-branch documents or testimony" but simply "an application for access to records of the grand jury, whose disclosure the district court has traditionally controlled."

Implications

The D.C. Circuit's recent decision appears to support fairly broad congressional access to grand jury information in the impeachment context. The majority opinion held, in a far less equivocal fashion than prior cases, that an impeachment inquiry is "preliminar[y] to" a "judicial proceeding" such that grand jury materials may be disclosed to Congress. The court also seemed to take a flexible and deferential approach to Congress's assertion of a "particularized need" for the materials in that context.

As such, should the decision stand, it would appear to constitute a favorable precedent for Congress to obtain grand jury materials (at least in the District of Columbia) in the course of future impeachment investigations, even where DOJ objects and judicial compulsion is required. However, DOJ could request that the panel or full court rehear the case, and eventual Supreme Court review is also a possibility, meaning that multiple avenues still exist for the decision potentially to be overturned. Regardless of the ultimate outcome with respect to the grand jury information in the Special Counsel's report, Congress is free to amend Rule 6(e) to permit or restrict disclosure in circumstances not currently addressed by the Rule, as it has done in the past.

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