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Expert Analysis

Mueller Report: A Path to Full Disclosure

By **William F. Johnson**

A special prosecutor's investigation has resulted in the indictment of persons close to the President of the United States. The special prosecutor has prepared a report based on the investigation, and a debate has sparked over whether Congress can obtain the full, unredacted version. These events may seem familiar, but not because they have occurred in full public view over the last several years—these events also took place in 1974 and led a House committee to vote on pursuing the impeachment of President Nixon. At that time, the House went to court in pursuit of the full report of Special Prosecutor Leon Jaworski, and a court found that the report—later termed the "roadmap" that helped shape the Nixon impeachment investigation—should be released to Congress. The court authorized release of the report even though it contained grand jury material otherwise protected from disclosure by Federal Rule of Criminal Procedure 6(e). Fed. R. Crim. P. 6(e)(2)(B) ("Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the ground jury: … (vi) an attorney for the government …").

The Watergate process bears some similarity to today's events. However, thus far the biggest difference is that the report of Special Prosecutor Robert Mueller, today's equivalent of the Nixon-era's Jaworski Report, has not yet been released to Congress in unredacted form. And although the Jaworski Report was released to Congress after litigation, the Jaworski Report was not released to the public until October 2018, almost four and a half decades after it had been delivered to Congress (and after Project Democracy and Lawfare sued for its release). Heather Timmons, *Why Congress has a right to the full Mueller report*, Quartz (April 3, 2019).

Although Attorney General William Barr has the final say within the United States Department of Justice on the release of the Mueller Report, AG Barr does not control the ultimate release of the report, which likely will be determined by legal process involving Congress and the federal courts. Barr wrote a March 29 letter to judiciary committee chairmen Rep. Jerrold Nadler (D-N.Y.) and Sen. Lindsey Graham (R-S.C.) describing four categories of material he redacted in the version made available to Congress: (1) material subject to Rule 6(e) that cannot be made public; (2) classified information that implicates the sources and methods of the intelligence community; (3) information that is sensitive based on other ongoing law enforcement matters; and (4) information that would "unduly infringe" on the "personal privacy and reputational interests of peripheral third parties." There is no permanent legal bar to providing Congress with the latter three categories of evidence, so disclosure of the full Mueller Report turns on resolution of the issues involving category one: grand jury material governed by Rule 6(e).

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Options for Full Disclosure

At this juncture, Congress has several options in its pursuit of obtaining the full report and making it public—they range from suits, to subpoenas, to new

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legislation. The first, and perhaps most likely, of these options requires Congress to go to court and clarify court decisions governing the release of grand jury material protected by Rule 6(e), and the second involves a conflict of interest between Congress and the executive branch regarding contempt of Congress. The third option outlined below would require Congress to test the depths of its own inherent contempt power, and therefore is more theoretical than practical. All of these options require Congress to grapple with the provisions of Rule 6(e) governing the release of grand jury material.

The release of the Mueller Report by DOJ is controlled by Rule 6(e) and laws that govern the sharing of investigative material. Some legal experts familiar with the 1999 Special Counsel Regulations maintain that the Regulations provide the Attorney General with discretion regarding the release of Special Counsel reports, and in any event, were not intended to authorize the Attorney General to withhold reports from Congress. For example, former Solicitor General Neal Katyal, who drafted the regulations, said that "[t]he regulations set a floor, not a ceiling, on the amount of transparency." Neal Kumar Katyal, *I wrote the special counsel rules. The attorney general can—and should—release the Mueller report*, Wash. Post (March 22, 2019). The Special Counsel Regulation states that "The Attorney General may determine that public release of these reports would be in the public interest, *to the extent that release would comply with applicable legal restrictions*." 28 CFR §600.9 (2002) (emphasis added). Thus, although AG Barr has discretion, release of the Mueller Report to the public must still comply with federal law, which would require redaction of grand jury material to comply with Rule 6(e), or meeting one of the Rule's exceptions authorizing disclosure.

Option 1: Court Order. Perhaps the most successful path for Congress is to go directly to the district judge who empaneled the Mueller grand jury and seek an order compelling AG Barr to release the unredacted report. However, the outcome of that potential option depends on the application of relevant case law. A recent decision by the United States Court of Appeals for the D.C. Circuit—the court that would decide disputes involving the Mueller Report—concluded that Federal Rule of Criminal Procedure 6(e)(3)(E) prescribes five exhaustive circumstances under which a district court may release grand jury material. See *McKeever v. Barr*, 920 F.3d 842, 844-45 (D.C. Cir. 2019). According to the two judges in the majority in *McKeever v. Barr*, district courts have no additional inherent authority to disclose grand jury material outside of those specific provisions of Rule 6(e). The *McKeever* case was unrelated to the Mueller Report itself.

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However, decades ago, in *Haldeman v. Sirica*, the D.C. Circuit affirmed a district court decision to disclose grand jury material within the Jaworski Report to the House Judiciary Committee, which was considering impeachment of President Richard Nixon. See *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974). The *McKeever* court concluded that its ruling was consistent with the precedent in *Haldeman* because, in its view, the disclosure in *Haldeman* was made pursuant to one of the five exhaustive Rule 6 exceptions—Rule 6(e)(3)(E)(i)—that permits district court judges to release grand jury materials "preliminarily to or in connection with a judicial proceeding." According to the *McKeever* court, the "judicial proceeding" in *Haldeman* was the impeachment investigation of President Nixon. Therefore, if the U.S. House of Representatives initiated an impeachment investigation of President Trump, it might constitute a "judicial proceeding" that would provide the basis for Congress to seek, consistent with both *Haldeman* and *McKeever*, grand jury material under an expressly enumerated Rule 6 exception, even if the court lacks inherent authority to release such material beyond such exceptions.

Congress may still be able to argue in court that disclosure is permitted under the "judicial proceeding" exception to Rule 6(e)(3)(E)(i) even before an impeachment investigation has formally commenced, and could look to the investigation of President William J. Clinton for precedent. In September 1998, before the House initiated an impeachment inquiry, independent counsel Ken Starr sought and received a federal court order to provide his report—and the grand jury material within it—to Congress. The order authorized release under the "judicial proceeding" exception even though the judicial proceeding had not yet begun when the report was turned over to Congress. See *In re Indep. Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314 (D.D.C. 2018). Notably, the Starr Report was also released to the public. Olivia B. Waxman, *Everyone Got to Read the Starr Report on Bill Clinton. Here's Why the Mueller Report May Not Get the Same Treatment*, Time (March 25, 2019).

Alternatively, Congress could seek to overturn the overarching holding of *McKeever* and obtain a ruling that district

courts do have inherent authority to order disclosure of grand jury material beyond the five enumerated exceptions of Rule 6(e)(3)(E), thereby sidestepping the debate over whether an impeachment investigation, pending or contemplated, would satisfy the "preliminarily to or in connection with a judicial proceeding" exception of Rule 6(e)(3)(E)(i) and the holding of *Haldeman*.

If Congress opts not to go with its first option to seek a court order specifically compelling disclosure of the Mueller Report, it does have other options, but those options also require compliance with Rule 6(e).

Option 2: Contempt. Another option would involve Congress seeking to hold AG Barr in contempt for failure to comply with Congress' subpoena demanding production of the full Mueller Report. The House has already passed a civil contempt resolution against AG Barr and other administration officials for failing to comply with congressional subpoenas, by a vote of 229 to 191. Philip Ewing, *House Votes to Let Its Leaders Pursue Contempt Lawsuits in Trump Inquiries*, NPR (June 11, 2019, 4:28 PM). However, the vote came after House Judiciary Committee Chair Jerrold Nadler had announced that his committee would not pursue a criminal contempt citation. Congress could attempt to seek criminal contempt charges for AG Barr's failure to comply with the subpoena. But this option presents an obvious conflict in that Congress would be dependent upon the executive branch to bring contempt charges against its own employees, including the DOJ's top official. Therefore, this option is unlikely.

If Congress does not want to rely on the executive branch for contempt enforcement, it could take a different tack by tapping into its own inherent contempt power, and seek directly to hold AG Barr in contempt. This power, which Congress hasn't used since the 1930s, allows for the prosecution of noncompliant individuals before the House or Senate. See Todd Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, Cong. Res. Serv. 2 (March 27, 2019); see also Todd Garvey, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, Cong. Res. Serv. (May 12, 2017). Rep. Gerry Connolly (D-VA), a member of the House Oversight Committee, told reporters in May that Congress has "the power to detain and incarcerate…" and while "we don't use it…doesn't mean we can't, and I'm all for reviving it." Ella Nilsen, *What the House's planned contempt vote against Barr actually means, explained*, Vox (June 10, 2019). The likelihood that Congress would be willing to take such a drastic step is low. Even if Congress selected this path to obtain the Mueller Report, the portions of the report containing grand jury material would still be protected from public disclosure under Rule 6(e) as explained above.

Option 3: Legislation. Congress' third option is to pass legislation that would directly authorize public disclosure of the Mueller Report. Congress has already taken steps in this direction: on March 14, 2019, the House passed a non-binding resolution (by a vote of 420 to 0) demanding public release of the Report. Nicholas Fandos, *House Votes, 420-to-0, to Demand Public Release of Mueller Report*, N.Y. Times (March 14, 2019). However, it is extremely unlikely that Congress will pass legislation that actually requires the Report to be made public. Any such bill would also have to pass in the Republican-controlled Senate and be signed by President Trump, or pass by overriding his veto.

Even if those hurdles are overcome, Rule 6(e) would still prevent disclosure of grand jury material within the report, unless Congress took the unlikely action of amending Rule 6(e) itself. The overriding purpose of that rule—to protect the innocence and privacy of the subjects of federal grand jury investigations unless those investigations result in public criminal charges—has not changed. Congress has previously considered legislation that would have expressly permitted a court to authorize disclosure of grand jury material to congressional committees on a showing of substantial need, but it has ultimately declined to alter the rule. See Michael A. Foster, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight*, Cong. Res. Serv. 35 (Jan. 10, 2019).

Conclusion

Congress has thus far been frustrated by the Department of Justice's position on release of a full, unredacted Mueller Report. As noted above, all paths to such disclosure require compliance with, or amendment of, Federal Rule of Criminal Procedure 6(e). Faced with the options described above, it appears the best path for Congress is to either: (1) challenge the holding of *McKeever* that courts have inherent authority to release grand jury material in circumstances beyond the five enumerated exceptions in Rule 6(e)(3)(E)(i); or (2) argue that, within the Rule's enumerated exceptions, *Haldeman v. Sirica* permits disclosure of the Mueller Report because it is "preliminarily to or in connection with" a House committee's "judicial proceeding," either because an impeachment investigation is pending, or similar to the handling of the Starr Report, because one is contemplated or imminent.

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