



The Special Counsel's Report: Can Congress Get It?

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UPDATE 4/9/2019: After this Sidebar was originally published, the Attorney General [reported](#) to Congress on March 24, 2019 that the Special Counsel had submitted a report concerning “allegations that members of the presidential campaign of Donald J. Trump, and others associated with it, conspired with the Russian government in its efforts to interfere in the 2016 U.S. presidential election, or sought to obstruct related federal investigations.” In a subsequent [letter](#), the Attorney General indicated that a redacted version of the report could be made available “by mid-April, if not sooner.” The letter identified four categories of information that would be redacted from the report: (1) grand jury material; (2) “material the intelligence community identifies as potentially compromising sensitive sources and methods; (3) material that could affect other ongoing matters, including those that the Special Counsel has referred to other Department offices; and (4) information that would unduly infringe on the personal privacy and reputational interests of peripheral third parties.”

*In addition, on April 5, 2019, a panel of the United States Court of Appeals for the D.C. Circuit [ruled](#) in *McKeever v. Barr* that federal courts lack “inherent authority” to authorize the disclosure of grand jury matters in circumstances not covered by an explicit exception set out in Rule 6(e) of the Federal Rules of Criminal Procedure. Though the facts of *McKeever* are unrelated to the Special Counsel's report, it appears that the appellate court's decision in *McKeever* has, for the time being, closed off one potential avenue for Congress to obtain grand jury material in federal court in the District of Columbia (though the decision could always be reheard en banc or overturned by the Supreme Court).*

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The original post from March 8, 2019 is below.

Recent media [reports](#) suggest that Special Counsel Robert S. Mueller III is close to concluding his investigation of Russian interference in the 2016 election. As discussed in [this](#) separate Sidebar, Department of Justice (DOJ) [regulations](#) require the Special Counsel to deliver a confidential report (Special Counsel report) to Attorney General William Barr at the conclusion of the investigation, and the Attorney General must then notify Congress with “an explanation” for the investigation’s termination. But there appears to be no requirement in statute or regulation obligating the Attorney General to share the full Special Counsel report with Congress, and Mr. Barr has [indicated](#) that legal considerations might require him to withhold some or all of it. In response, some Members of Congress have [suggested](#) that a subpoena may be issued to compel disclosure of the full report.

Should the Attorney General withhold portions of the Special Counsel report and, potentially, resist a congressional subpoena seeking disclosure, the decision would likely stem, at least in part, from two legal limitations that restrict the release of information about federal criminal investigations: (1) [Federal Rule of Criminal Procedure 6\(e\)](#) (Rule 6(e)), which, among other things, prohibits an attorney for the government from disclosing “a matter occurring before the grand jury”; and (2) “executive privilege,” which potentially insulates certain information from disclosure to protect executive branch confidentiality interests. The legal considerations that could impact the Attorney General’s decision to withhold specific information from Congress may vary depending on the particular nature and context of the requested information and any subpoena. However, these two doctrines would appear most likely to inform not only the Attorney General’s decision, but also any potential judicial consideration of the question if an impasse between Congress and the executive branch over the Special Counsel report were eventually to make its way to court. The federal judiciary has generally sought to [avoid](#) adjudicating disputes between the executive and legislative branches when possible, instead encouraging the branches to settle their differences through a process of negotiation and accommodation. However, the House has [previously](#) been successful in using the courts to enforce a congressional subpoena issued to the Attorney General, though the context-specific nature of judicial rulings in this field means that a similar result might not be guaranteed in every case where Congress seeks executive branch records. Nevertheless, while both limits on information sharing are subject to multiple variables and little judicial guidance, in both cases, exceptions exist that may provide Congress with an avenue to obtain at least some protected material.

Federal Rule of Criminal Procedure 6(e)

[Rule 6\(e\)](#) shrouds grand jury proceedings in secrecy by setting out a list of persons, including grand jurors and “attorney[s] for the government,” who “must not disclose a matter occurring before the grand jury” unless the Federal Rules of Criminal Procedure “provide otherwise.” The prohibition is [indefinite](#) (i.e., the veil of secrecy is not lifted 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.

Because the Attorney General is an “attorney for the government” within the [meaning](#) of the Federal Rules of Criminal Procedure, he is bound by Rule 6(e)’s obligation not to disclose grand jury “matter[s].” That term, however, is not defined in Rule 6(e) and has been the subject of sometimes unclear and contradictory judicial constructions. Generally, courts have viewed “matter[s] occurring before the grand jury” as [encompassing](#) any information that “would tend to reveal some secret aspect of the grand jury’s investigation,” such as “the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.” Under this broad umbrella, particular categories of information clearly constitute grand jury “matter[s],” while other

categories may hinge on the specific factual context in which a request is made and the use to which a grand jury is put in the investigation at issue. For [example](#), actual transcripts of proceedings and witness testimony, as well as written “summaries” or “discussions” of the proceedings, are grand jury matters. So [too](#) are the details of a grand jury’s composition and focus. But [general statements](#) about prosecutors’ deliberations, independent of the grand jury, may not constitute grand jury matters, nor may notes or other memorializations of witness interviews conducted before a grand jury subpoena is issued.

The amount of grand jury content in the Special Counsel’s report to the Attorney General will likely depend on the form the report takes and the specific factual circumstances under which particular information was gathered. Assuming some or all of the report contains grand jury material, however, the question remains whether sharing that material with Congress would constitute a prohibited disclosure under Rule 6(e). On this question, courts have reached conflicting conclusions. Relying on an expansive conception of Congress’ investigative authority, [two courts](#) have held that Congress has a “constitutionally independent legal right” to obtain documents in furtherance of “legitimate legislative activity” even if the documents disclose matters occurring before a grand jury. Yet [other courts](#) have criticized these decisions, sharply disagreeing with the conclusion that the rule of grand jury secrecy does not apply when Congress is the contemplated recipient of information.

Regardless of the conflict in the case law, DOJ has [taken the position](#) that it may release grand jury material to Congress only if disclosure is permitted under Rule 6(e). Thus, to the extent the Special Counsel’s report to the Attorney General contains grand jury material, it seems likely that the Attorney General would act as if constrained by Rule 6(e) even in the face of a congressional subpoena.

Still, the disclosure prohibition in Rule 6(e) is subject to several codified and judicially crafted [exceptions](#) that sometimes permit disclosure of grand jury information (usually only with prior judicial authorization). In the context of the Special Counsel investigation into possible Russian interference in the 2016 election, one potentially relevant exception to Rule 6(e) [permits](#) an attorney for the government to disclose any grand jury matter involving threats of attack or intelligence gathering by foreign powers to “any appropriate federal . . . government official.” Although an “appropriate” government official could arguably include a Member of Congress, disclosure under this exception would be [limited](#): only grand jury information concerning the specified subject matter would be available, at the discretion of the attorney for the government. It is thus unclear whether this exception would motivate the Attorney General to provide Congress with information in the Special Counsel report that would otherwise be withheld.

Two other [exceptions](#) to the rule of grand jury secrecy would permit Congress independently to petition a court for access to grand jury material in the Special Counsel report: (1) the exception allowing a court to authorize disclosure of grand jury matters “preliminarily to or in connection with a judicial proceeding,” and (2) the exception, recognized by a few courts, allowing a court to authorize disclosure of grand jury matters in special or exceptional circumstances. [Some courts](#) have applied one or both of these exceptions in the context of congressional requests for grand jury materials (a case currently before the D.C. Circuit could [limit](#) the applicability of the exception for special or exceptional circumstances). As such, even if Rule 6(e) restricts what the Attorney General may share from the Special Counsel report, Congress might, depending on the circumstances, have additional tools at its disposal to seek protected material in court.

Finally, Rule 6(e) does [not](#) automatically bar independent disclosure of all information that happens to have “reached the grand jury chambers.” And because Rule 6(e) generally does not apply to disclosures by grand jury [witnesses](#), Congress may be able to obtain much of the information in the Special Counsel report through the more time-consuming process of subpoenaing underlying documents and witness testimony.

For more information on grand jury secrecy and the exceptions that could apply to Congress, see this [report](#).

Executive Privilege

The Attorney General [may](#) also cite executive privilege as grounds for withholding aspects of the Special Counsel report from Congress. [Executive privilege](#) is an implied—rather than textually explicit—constitutional doctrine that has been given definition more by the historical practice of the political branches than by judicial pronouncements. Under a [memorandum](#) issued during President Reagan’s administration that appears to remain in effect, the final determination of whether the privilege is asserted is left to the President’s judgment. Thus, an assertion of executive privilege over the Special Counsel report would [likely](#) come from the President personally or with his explicit authorization.

The Supreme Court’s only robust discussions of the privilege occurred in two cases in the 1970s involving President Nixon’s communications and records. In [United States v. Nixon](#), a case concerning a grand jury subpoena for Oval Office recordings of conversations between the President and his advisors, the Court recognized the constitutional dimensions of executive privilege for the first time, holding that the need to protect the confidentiality of presidential communications relating to the “discharge of a President’s powers” is “constitutionally based” and “inextricably rooted in the separation of powers.” But the Court also established that the protection for presidential communications is a qualified one, holding that “absent a need to protect military, diplomatic, or sensitive national security secrets,” President Nixon’s “generalized interest” in the confidentiality of his communications was overcome by the judiciary’s “demonstrated, specific need” for evidence in a pending trial. The High Court reaffirmed the scope and qualified nature of executive privilege three years later in [Nixon v Administrator of General Services](#), at least as the privilege relates to presidential communications and records. That case involved a claim of executive privilege by then-former President Nixon in response to new legislation that sought to preserve presidential records by subjecting them to screening and cataloguing by executive branch archivists. The Court held that Nixon’s claim of “Presidential privilege clearly must yield to the important congressional purposes of preserving the materials....”

Because executive privilege is not governed by bright-line rules and there have been few judicial decisions examining the scope of the privilege, the executive and legislative branches have sometimes taken divergent views of the privilege’s scope. While Congress has generally interpreted executive privilege [narrowly](#), limiting its application to the types of confidential presidential communications referenced by the Supreme Court, the executive branch has historically viewed the privilege more broadly, providing protections to several categories of documents and communications that may implicate executive branch confidentiality interests. Under the [executive branch’s interpretation](#), the privilege covers not only communications involving the President or his close advisors, but also deliberative communications within executive branch agencies; military, diplomatic, and national security information; and information from law enforcement files such as evidence gathered in an investigation and communications related to investigative and prosecutorial decision making. Some of these different components could conceivably be implicated by the contents of the Special Counsel report. For example, parts of the report would likely include information from both open and closed law enforcement files. Given the subject matter of the Special Counsel’s investigation, it seems possible the report may include information relevant to national security concerns or involving presidential communications.

Executive Privilege and Congressional Subpoenas

The Supreme Court has not addressed executive privilege in any substantial way since the *Nixon* cases, and has never addressed the application of executive privilege in the context of a congressional investigation. The most significant judicial analysis of executive privilege in the context of a congressional investigation is the D.C. Circuit’s decision in [Senate Select Committee on Presidential Campaign Activities v. Nixon](#). *Senate Select Committee* involved an attempt by a congressional committee to obtain Nixon’s oval office recordings as part of the Committee’s investigation into the 1972

Presidential election. Although ultimately siding with the President, the D.C. Circuit made clear that a President's assertion of the privilege could be overcome by a "strong showing of need by another institution of government...." The court elaborated that Congress, in the exercise of its investigative powers, may overcome the President's presumptive privilege when it can show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's function."

The Select Committee sought to make the required showing by arguing it had a "critical" need for the tapes to carry out two separate and distinct functions. First, pursuant to its *oversight function*, the Committee argued that access to the tapes was necessary to "oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view." Second, pursuant to its *legislative function*, the Committee argued that "resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is necessary' and 'could help engender the public support needed for basic reforms in our electoral system.'"

The circuit court [concluded](#) that the Committee had failed to make the requisite showing of need. That determination, however, appears to have been based on a pair of unique facts: first, copies of the tapes had been provided to the House Judiciary Committee under that Committee's impeachment investigation; and second, the President had publicly released partial transcripts of the tapes. As for the oversight function, the appellate court held that because the Judiciary Committee had obtained the tapes, any further investigative need by the Select Committee was "merely cumulative." With regard to the Select Committee's legislative functions, the court held that the particular content of the conversations was not essential to future legislation, as any "specific legislative decisions" the Committee faced could "responsibly be made" based upon the released transcripts.

Application of Executive Privilege Principles to the Special Counsel Report

The strength of any assertion of executive privilege in the face of a congressional subpoena may depend on (1) the appropriate scope of the privilege—especially for open and closed law enforcement files—and (2) the significance of the legislative interest set forth by the congressional committee.

With regard to the first issue, the Special Counsel report could contain information relating to various species of executive privilege, but perhaps the most apparent claim would be one asserted to protect confidential information associated with investigative and prosecutorial decision making in both closed and [open](#) aspects of the Special Counsel investigation. Yet, federal courts have not addressed whether there is a constitutionally based law enforcement component to executive privilege that applies during a congressional investigation and whether (if it does exist) such a privilege can justify non-compliance with a congressional subpoena. The only such dispute to reach the courts was *United States v. House of Representatives*, arising from a criminal contempt of Congress citation against an executive official who claimed executive privilege as the basis for refusing to comply with a House committee subpoena for law enforcement material. That case was dismissed without significant discussion of the executive privilege claim or Congress' authority to obtain the subpoenaed information after the court determined that judicial intervention in such inter-branch disputes "should be delayed until all possibilities for settlement have been exhausted."

Even so, a series of [DOJ legal opinions](#) has developed the executive branch's position that executive privilege provides protections to confidential law enforcement information. Generally these claims have related to *open* law enforcement files. For example, the Office of Legal Counsel has stated that "the policy of the Executive Branch throughout our Nation's history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances." The executive branch has identified various constitutional justifications for this policy of nondisclosure that generally relate either to the impairment of the Executive's ability to "[take care that the](#)

Laws be faithfully executed” that would result from congressional interference in executive branch law enforcement decisions or prejudicial effect on potential targets of executive branch enforcement actions.

At times, however, the executive branch has extended its interpretation of the ostensible law enforcement component of executive privilege to include protections for *closed law enforcement files*. The DOJ has acknowledged that once an investigation ends, many justifications for nondisclosure “lose some of their force,” but maintains that nondisclosure may still be necessary to protect the *executive branch’s* “long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process.”

Despite the executive policy of nondisclosure, there is historical precedent for congressional committees obtaining both closed and open law enforcement files. Generally this access has been under a negotiated settlement or information-access agreement in which the committee has agreed to certain confidentiality protections. For example, a 1982 Senate select committee *investigation* into undercover law enforcement practices DOJ used during its ABSCAM operation obtained documents and testimony relating to the closed investigation, including internal prosecutorial memoranda. Similarly, a House committee obtained a variety of documents relating to open law enforcement files during a 1998 *inquiry* into DOJ’s ongoing investigation into allegations of campaign finance violations during the 1996 election.

Even if aspects of the Special Counsel report are viewed as covered by executive privilege—perhaps because the report includes material relating to presidential communications, national security matters, or law enforcement files—the *Nixon* and *Senate Select Committee* cases counsel that the privilege may not establish an absolute bar to Congress obtaining the protected information. Instead, analysis of whether Congress could compel disclosure would involve balancing the President’s interest in confidentiality with Congress’ need for the information. Thus the content of the report and the reason a congressional committee is seeking the report would be essential to judicial consideration of the privilege question.

With respect to the President’s interest, it would appear from *Nixon* that the President’s interest is perhaps at its *apex* when asserting the privilege “to protect military, diplomatic, or sensitive national security secrets.” The President’s interest would presumably be reduced if based solely upon an interest in protecting law enforcement materials, especially those connected with closed aspects of the investigation.

With respect to the congressional committee’s interest, the standard for overcoming the President’s assertion of executive privilege may vary based on the species of executive privilege asserted. But in *Senate Select Committee* the D.C. Circuit made clear that the focus was on both the “nature and appropriateness” of the function for which the committee required the information, and whether the material was “necessary,” or “demonstrably critical” to the “fulfillment” of that function. Thus, a committee seeking the Special Counsel’s report would be in a stronger position if it can articulate a significant legislative or oversight purpose for seeking the report. Those purposes would likely vary depending on the committee that has issued the subpoena.

Takeaways for Congress

It appears that a congressional committee seeking to obtain the Special Counsel’s full report to the Attorney General, should the Attorney General withhold some or all of it, may face obstacles related to executive privilege and the rule of grand jury secrecy contained in Federal Rule of Criminal Procedure 6(e).

First, assuming the Special Counsel report discusses “matter[s] occurring before the grand jury,” the Attorney General generally may not disclose that information unless a Rule 6(e) exception applies. And although case law on the subject is sparse and conflicting, it seems likely that the Attorney General would take the position (in conformity with DOJ) that Rule 6(e)’s prohibition extends even to disclosure to Congress. As such, should a congressional committee wish to obtain grand jury materials in the Special Counsel report, it may have to seek court authorization for disclosure pursuant to an exception to Rule

6(e). In the past, Congress has had some success obtaining grand jury materials by means of court orders pursuant to Rule 6(e) exceptions, but authority is limited.

Whereas Rule 6(e) protects only applicable grand jury materials, executive privilege could apply to a broader range of information within the Special Counsel report. However, the scope of the privilege is unsettled, especially with respect to law enforcement information. Moreover, even if information is protected, executive privilege is generally qualified, and can be surmounted if Congress can show an overriding need for the information.

Additionally, Congress may seek information stemming from the Special Counsel investigation through sources other than the Special Counsel report. For example, Congress could seek the Special Counsel's testimony directly (though he would likely be constrained by the same Rule 6(e) and executive privilege considerations discussed in this Sidebar), or Congress could opt to seek documents or testimony from grand jury witnesses themselves.