

House Panel Subpoena Of Mueller Report Sets Up Legal Fight

By **Michael Macagnone**

Law360, Washington (April 19, 2019, 1:50 PM EDT) -- The House Judiciary Committee chairman issued a subpoena for the unredacted version of special counsel Robert Mueller's report and underlying evidence Friday, setting off both a political showdown and a legal fight.

Chairman Rep. Jerrold Nadler, D-N.Y., who called for the release of the full report after Attorney General William Barr released his redacted version Thursday, issued the subpoena with a May 1 deadline. The redacted version of Mueller's report detailed Russia's efforts to interfere in the 2016 election, President Donald Trump campaign's response to Russian overtures to help, and steps Trump himself took to control or shut down the probe.

Nadler argues that the report identifies several areas of wrongdoing by Trump and his circle and Congress must see the whole thing.

"Even the redacted version of the report outlines serious instances of wrongdoing by President Trump and some of his closest associates," Nadler said in a statement.

Thursday, Barr offered to allow a select group of lawmakers see a less-redacted version but even that one would have grand jury information redacted. Top Democrats rejected that offer Friday in a letter, arguing that Barr's proposal is not acceptable without access to grand jury information.

So far Republicans haven't gone along with Nadler's push for more documents, and a recent D.C. Circuit case could throw some roadblocks before a court battle. Earlier this month, a 2-1 D.C. Circuit panel ruled that a district judge did not have the authority to deviate from the narrow exceptions to grand jury secrecy rules in order to allow a researcher access to grand jury material.

Barr has said that grand jury material formed one portion of the four categories of information redacted from the report. Others included classified material, information about uncharged nonpublic individuals and information that would harm ongoing investigations.



House Judiciary Chairman Jerrold Nadler has issued a subpoena with a May 1 deadline for the unredacted version of the special counsel's report on Russian interference in the 2016 election. (AP)

In the D.C. Circuit case, researcher Stuart McKeever sought access to a 1957 grand jury proceeding for a book about the kidnapping and murder of Columbia University professor and activist Jesús de Galíndez. A D.C. District judge had rejected his claims that the grand jury proceedings should be released and McKeever appealed.

In the majority opinion, D.C. Circuit Judge Douglas Ginsburg wrote in that case that McKeever's argument to open up the grand jury material "would allow the district court to create such new exceptions as it thinks make good public policy" and would "render the detailed list of exceptions merely precatory and impermissibly enable the court to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure."

That decision may not necessarily bar the House Judiciary Committee from getting the documents, according to Crowell & Moring LLP partner Rebecca Ricigliano. She pointed to a footnote in the majority opinion which she said parses a Watergate-era D.C. Circuit case in a key way.

"In a way, I'm not sure that McKeever is going to be the litmus test here," Ricigliano said.

The footnote refers to "ambiguous" nature of the *Haldeman v. Sirica* case, but ultimately reads it to have allowed the transmission of a grand jury report to the House Judiciary Committee under one of the exceptions for disclosure of grand jury material: for the purpose of a judicial proceeding. Reading *Haldeman* that way, the footnote said, "reads the case to cohere, rather than conflict," with precedent on the issue.

Ricigliano said that the *Haldeman* case may end up determining the fate of the House subpoena, if they can convince the court that their subpoena for the Mueller report lines up with the grand jury report in the *Haldeman* case. Still, that kind of legal issue could easily head for the Supreme Court, she said.

"Depending on how long it goes, what the circuit decision finds, it is likely to end up before the court," Ricigliano said. "Whether the court takes it up is another issue."

Nadler and House Democrats have so far tiptoed around a major court showdown over the Mueller report; the panel voted to authorize the subpoena earlier this month but Nadler did not issue it until Friday. Earlier this month, Rep. David Cicilline, D-R.I., a member of the panel, told reporters that committee staff is working to put them on solid legal footing to petition a court for access to the grand jury information, but they hope they don't have to go that far.

"I am open to working with the department to reach a reasonable accommodation for access to these materials, however, I cannot accept any proposal which leaves most of Congress in the dark as they grapple with their duties of legislation, oversight and constitutional accountability," Nadler's statement said.

Ranking member Rep. Doug Collins, R-Ga., called Nadler's subpoena "wildly overbroad" in a statement Friday and maintained that Nadler set the DOJ up with an impossible timeline. He has previously argued that the grand jury redactions in the Mueller report will have to be kept secret unless the House starts impeachment proceedings against Trump.

"The chairman's process flies in the face of normal and proper congressional oversight. I urge Chairman Nadler to narrowly tailor his subpoena and give the department a meaningful chance to respond," Collins said.

The release of Mueller's report Thursday capped a nearly two-year investigation into Russian interference in the 2016 election and allegations Trump interfered with that probe. Over the course of more than 440 pages, Mueller detailed Russia's efforts to interfere in the election and the Trump campaign's outreach for their help, as well as 10 documented instances where Trump sought to curtail, control or end the probe.

A group of news organizations has already filed a Freedom of Information Act lawsuit seeking the redacted information from the report.

--Additional reporting by Ben Kochman. Editing by Sarah Golin and Katherine Rautenberg.

Update: This story has been updated to include additional information about the McKee case.