



Congressional Access to Grand Jury Information

Mueller Grand Jury Case Key Excerpts from 2019 District Court Opinion Denying Stay

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On Oct. 28, 2019, DOJ asked the district court for a stay pending appeal of its order to produce Mueller grand jury materials to Congress. On Oct. 29, 2019, the district court denied the stay. *In re Application of Comm. on Judiciary U.S. House of Representatives for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-gj-48 (BAH), 2019 WL 5608827 (D.D.C. Oct. 29, 2019). Here are excerpts from the district court's 7-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.

Stay pending appeal is extraordinary remedy

The law is well settled that a stay of a final judicial order pending appeal is an “extraordinary remedy.” *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985) (per curiam). The Supreme Court has explained that “[a] stay is an ‘intrusion into the ordinary processes of administration and judicial review,’” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)), and, further, that such a stay “is not a matter of right, even if irreparable injury might otherwise result to the appellant[.]”

Test to obtain stay pending appeal

The party requesting a stay bears the burden of showing that the circumstances of a particular case justify an exercise of judicial discretion upon consideration of four “traditional,” *id.* at 434, and “stringent requirements,” *Van Hollen v. FEC*, Nos. 12-5117 & 12-5118, 2012 WL 1758569, at *1 (D.C. Cir. May 14, 2012) (per curiam): “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Court grants the stay; and (4) the public interest in granting the stay[.]”

Irreparable injury must be certain and great

“[A] party moving for a stay is required to demonstrate that the injury claimed is ‘both certain and great.’” *Cuomo*, 772 F.2d at 976 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)).

Likelihood of success on the merits

The legal standard for likelihood of success to obtain a stay of an order is not “a 50% plus probability,” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), but is rather a finding that “the [movant] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation[.]”

DOJ not likely to succeed on merits

The serious infirmities in DOJ’s arguments have already been addressed at length. ... DOJ continues to ignore that the D.C. Circuit has already given “judicial proceeding,” as used in Rule 6(e), a “broad interpretation,” ... binding D.C. Circuit precedent [has] rejected DOJ’s position; and that historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent all make clear that impeachment trials are judicial in nature and constitute judicial proceedings. ... DOJ is especially unlikely to succeed given that determinations of “particularized need” are committed to the “considered discretion of the district court.” ... Moreover, courts have consistently recognized that the “interest in conducting a full and fair impeachment inquiry” is a sufficiently particularized need. ... DOJ’s minimal chance of success on appeal, by itself, is likely “fatal” to its motion, *Citizens for Responsibility & Ethics in Washington*, 904 F.3d at 1019, but DOJ fares no better on the other factors.

Impeachment inquiry requires immediate access to grand jury material

“[A]n impeachment investigation involving the President of the United States” is “a matter of the most critical moment to the Nation.” *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230. As DOJ has acknowledged, “the Framers themselves specifically determined” by providing for an impeachment process that there is a “public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation’s welfare.” *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 258 (2000). Both HJC itself and the public, therefore, have an interest in HJC gaining immediate access to this grand jury material.