United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 3, 2020 Decided March 10, 2020

No. 19-5288

IN RE: APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS,

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES,
APPELLEE

v.

UNITED STATES DEPARTMENT OF JUSTICE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-gj-00048)

Mark R. Freeman, Attorney, U.S. Department of Justice, argued the cause for appellant. With him on the briefs were *Hashim M. Mooppan*, Deputy Assistant Attorney General, and *Michael S. Raab* and *Brad Hinshelwood*, Attorneys.

Douglas N. Letter, General Counsel, U.S. House of Representatives, argued the cause for appellee. With him on

the brief were *Todd B. Tatelman*, Deputy General Counsel, *Megan Barbero* and *Josephine Morse*, Associate General Counsel, *Adam A. Grogg* and *William E. Havemann*, Assistant General Counsel, *Jonathan B. Schwartz*, Attorney, *Annie L. Owens*, *Mary B. McCord*, and *Daniel B. Rice*.

Elizabeth B. Wydra, *Brianne J. Gorod*, and *Ashwin P. Phatak* were on the brief for *amicus curiae* Constitutional Accountability Center in support of the Committee on the Judiciary, U.S. House of Representatives.

Before: ROGERS, GRIFFITH, and RAO, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

Concurring opinion by *Circuit Judge* GRIFFITH.

Dissenting opinion by *Circuit Judge* RAO.

ROGERS, *Circuit Judge*:

> Article I of the United States Constitution provides that the House of Representatives "shall have the sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5. Further, the Senate "shall have the sole Power to try all Impeachments." *Id.* § 3, cl. 6.

The Committee on the Judiciary of the U.S. House of Representatives seeks to obtain the redacted grand jury materials referenced in the Special Counsel's Report in connection with its impeachment investigation of President Donald J. Trump. The district court authorized the disclosure of these grand jury materials pursuant to the "judicial proceeding" exception in Federal Rule of Criminal Procedure

6(e)(3)(E)(i). For the following reasons, because that exception encompasses impeachment proceedings and the Committee has established a "particularized need" for the grand jury materials, the Order of the district court is affirmed.

I.

In May 2017, Deputy U.S. Attorney General Rod Rosenstein appointed Robert S. Mueller, III, as Special Counsel to investigate Russian interference in the 2016 presidential election, including any links or coordination between the Russian government and individuals associated with President Trump's election campaign. As part of this investigation, a grand jury sitting in the District of Columbia "issued more than 2,800 subpoenas" and almost 80 witnesses testified before the grand jury. Special Counsel Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election, Vol. I at 13 (March 2019) ("The Mueller Report"). In addition, the Special Counsel's Office interviewed "approximately 500 witnesses" under oath, *id.*, including members of the Administration.

On March 22, 2019, the Special Counsel submitted his confidential two-volume report to the Attorney General pursuant to 28 C.F.R. § 600.8(c). Volume I summarizes Russian interference in the 2016 presidential election and describes the "numerous links between the Russian government and the Trump Campaign." Vol. I at 1–3. Nevertheless, the Special Counsel concluded that "the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." *Id.* at 2. Volume II outlines the Special Counsel's examination of whether the President obstructed justice in connection with the Russia-related investigations. The Special Counsel declined to

exonerate the President. Citing to an opinion issued by the Office of Legal Counsel, the Special Counsel stated that indicting or criminally prosecuting a sitting President would violate the separation of powers. Notably, for purposes of the Committee's need for the redacted grand jury materials, the Special Counsel stated that a federal indictment would "potentially preempt constitutional processes for addressing presidential misconduct." Vol. II at 1 (citing U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6).

The Attorney General released a public version of the Mueller Report in April 2019, with redactions for grand jury materials, and other information that he determined could compromise ongoing intelligence or law enforcement activities, harm ongoing criminal matters, or unduly infringe upon the personal privacy interests of peripheral third parties. Letter from Attorney General Barr to Senate Judiciary Chairman Graham and Ranking Member Feinstein, and House Judiciary Chairman Nadler and Ranking Member Collins (Apr. 18, 2019). The Assistant Attorney General wrote the Committee that certain members of Congress, including the Chairman and Ranking Members of the House Judiciary Committee, could review an unredacted version of the Report, except for redactions relating to grand jury information, which the Attorney General claimed he was prohibited from disclosing to Congress by law citing Rule 6(e). Letter from Assistant Attorney General Boyd to Senate Judiciary Chairman Graham and House Judiciary Chairman Nadler (Apr. 18, 2019).

In October 2019, the House of Representatives passed House Resolution 660, which directed six committees, including the House Judiciary Committee and the House Intelligence Committee, to continue their ongoing impeachment investigations. H. Res. 660, 116th Cong. (2019).

On December 18, 2019, the full House adopted two Articles of Impeachment against President Trump. H. Res. 755, 116th Cong. (2019). The first Article of Impeachment, "Abuse of Power," alleges that President Trump "solicited the interference of a foreign government, Ukraine, in the [upcoming] 2020 United States Presidential election." *Id*. at 1. The second Article, "Obstruction of Congress," alleges that President Trump "directed the unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives." *Id.* at 2.

The House Judiciary Committee's Report on the Impeachment of President Trump asserts that the conduct described by these Articles is consistent with the President's "inviting and welcoming Russian interference in the 2016 United States Presidential election," H. Rep. No. 116-346, at 127 (2019), and the President's "endeavor to impede the Special Counsel's investigation into Russian interference . . . as well as [his] sustained efforts to obstruct the Special Counsel after learning that he was under investigation for obstruction of justice," *id.* at 159–60. The Committee Report also makes clear that although two Articles of Impeachment have been approved, the Committee's impeachment investigation related to the Mueller Report is ongoing. *Id.* at 159 n.928; *see also* Appellee's Supp. Br. 17 (Dec. 23, 2019); Oral Arg. Tr. at 59–60 (Jan. 3, 2020).

On July 26, 2019, the House Judiciary Committee filed an application for an order authorizing the release of certain grand jury materials related to the Mueller Report pursuant to Rule 6(e)(3)(E)(i). The Committee requested three categories of grand jury materials: (1) all portions of the Mueller Report that were redacted pursuant to Rule 6(e); (2) any portions of grand jury transcripts or exhibits referenced in those redactions; and (3) any underlying grand jury testimony and exhibits that relate

directly to certain individuals and events described in the Mueller Report. The Committee proposed a "focused and staged disclosure" of the first two categories of material, to be followed as necessary by disclosure of the third category. *In re App. of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials* ("*App. for Mueller Report Grand Jury Materials*"), 2019 WL 5485221, at *33 (D.D.C. Oct. 25, 2019) (internal quotation marks and citation omitted). The Department of Justice, which is the custodian of the grand jury records, *see* Rule 6(e)(1), opposed the application and submitted an *ex parte* declaration disclosing the contents of the Rule 6(e) redactions in Volume II and Appendix C of the Mueller Report for the district court to review *in camera*. The record indicates that the district court reviewed this declaration but that the district court did not receive or review any of the grand jury materials redacted in Volume I of the Report, nor any of the grand jury transcripts or exhibits referenced in these redactions.

On October 25, 2019, the district court granted the Committee's application. The district court concluded that a Senate impeachment trial is a "judicial proceeding" under Rule 6(e). *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *11. The court noted 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." *Id.* at *14; *see also id.* at *14–19. The court further explained that, in any event, it was bound by circuit precedent to conclude that an impeachment trial is a "judicial proceeding," citing *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (*en banc*) and *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019). *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *19. The district court also found that the Committee established a "particularized need" because the Committee's

compelling need for the requested material to "investigate fully" and "to reach a final determination about conduct by the President described in the Mueller Report," *id.* at *35, outweighs any remaining grand jury secrecy interests, *id.* at *37–38, and the requested disclosure was tailored to this need, *id.* at *38.

The district court therefore authorized the disclosure of the first two categories of requested grand jury information: all portions of the Mueller Report redacted pursuant to Rule 6(e) and any portions of grand jury transcripts or exhibits referenced in those redactions. *Id*. The court ordered the Department to provide these materials to the Committee by October 30, 2019. *Id.* The court also stated that the Committee could file additional requests articulating its particularized need for the third category of grand jury materials requested in its initial application. *Id.*

The Department appealed and sought a stay pending appeal from the district court and from this court. The district court denied a stay pending appeal. This court entered an administrative stay on October 29, 2019, held oral argument on the stay motion on November 18, 2019, and then extended the administrative stay setting the case for expedited briefing and oral argument on the merits on January 3, 2020.

II.

The Committee asks this court to interpret and apply Rule 6(e) — which is "a familiar judicial exercise." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Rule 6(e) codifies the "long-established policy" of maintaining grand jury secrecy. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Rule 6(e)(2)(B) provides that "a matter occurring before the grand jury" must not be disclosed by grand

jurors, interpreters, court reporters, government attorneys, or other persons specifically listed in the Rule. Although Rule 6(e) "makes quite clear that disclosure of matters occurring before the grand jury is the exception and not the rule," the Rule "sets forth in precise terms to whom, under what circumstances and on what conditions grand jury information may be disclosed." *McKeever*, 920 F.3d at 844 (quoting *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 868 (D.C. Cir. 1981)), *cert. denied*, 2020 WL 283746 (Jan. 21, 2020). Rule 6(e)(3)(E) provides a list of "exceptions" to grand jury secrecy, including five circumstances in which a "court may authorize disclosure . . . of a grand-jury matter." As relevant here, Rule 6(e)(3)(E)(i) permits a court to authorize disclosure "preliminarily to or in connection with a judicial proceeding," where the person seeking disclosure has shown a "particularized need" for the requested grand jury materials, *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983).

The grand jury functions to a large degree at "arm's length" from the judicial branch, *United States v. Williams*, 504 U.S. 36, 47 (1992), but it operates under the auspices of the district court in which it is convened, *see* Rule 6(a); 28 U.S.C. § 1861 *et seq.*, and "depend[s] on the judiciary in its role as an investigative body," *United States v. Seals*, 130 F.3d 451, 457 (D.C. Cir. 1997). The district court has supervisory jurisdiction over the grand jury. *Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988). Although the district court's authority over the grand jury is limited, *Williams*, 504 U.S. at 47–50, courts may exercise control over the grand jury in several significant respects, including the power to summon and empanel the grand jury and the power to discharge the grand jury, Rule 6(a), (g). Courts also may control access to the records of a grand jury investigation conducted under the court's auspices. As noted, Rule 6(e) codifies and defines that authority and

prescribes the procedures for its exercise. The Committee's Rule 6(e)(3)(E)(i) application asks the district court to exercise its continuing supervisory jurisdiction concerning the grand jury to authorize and order the release of grand jury records.

Numerous courts have recognized that grand jury records are court records. *Carlson v. United States*, 837 F.3d 753, 758–59 (7th Cir. 2016); *Standley v. Dep't of Justice*, 835 F.2d 216, 218 (9th Cir. 1987); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981); *United States v. Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979). "The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators . . . . Instead those documents are records of the court." *Procter & Gamble Co.*, 356 U.S. at 684–85 (Whittaker, J., concurring). But even where doubt is expressed whether grand jury records are judicial records, Rule 6(e)(3)(E) vests courts with control over the disclosure of these records and courts exercise this control "by ordering 'an attorney for the government' who holds the records to disclose the materials," *McKeever*, 920 F.3d at 848 and *id.* (quoting Rule 6(e)(1)).

Although the grand jury "has not been textually assigned . . . to any of the branches," *Williams,* 504 U.S. at 47, it "remains an appendage of the court," *Seals*, 130 F.3d at 457 (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled on other grounds by Harris v. United States,* 382 U.S. 162 (1965)). Grand jury records do not become Executive Branch documents simply because they are housed with the Department of Justice. For instance, in the Freedom of Information Act context, where "documents remain within the control of the court and the grand jury," those documents are not "agency records" and are not subject to FOIA's disclosure requirements that otherwise apply to agency documents even if they are in the possession of the Department

of Justice. *Tigar & Buffone v. Dep't of Justice*, 590 F. Supp. 1012, 1014–15 (D.D.C. 1984). As the Ninth Circuit has explained, "were court documents deemed 'agency records' for purposes of the FOIA when held by the [Department], the Act would encroach upon the authority of the courts to control the dissemination of its documents to the public." *Warth v. Dep't of Justice*, 595 F.2d 521, 523 (9th Cir. 1979). This court has applied similar reasoning to congressional documents transmitted from Congress to the Executive. *Am. Civil Liberties Union v. CIA*, 823 F.3d 655, 667–68 (D.C. Cir. 2016).

In short, it is the district court, not the Executive or the Department, that controls access to the grand jury materials at issue here. The Department has objected to disclosure of the redacted grand jury materials, but the Department has no interest in objecting to the release of these materials outside of the general purposes and policies of grand jury secrecy, which as discussed, do not outweigh the Committee's compelling need for disclosure. Even if the Department had not objected to disclosure, the district court would still need to authorize disclosure pursuant to Rule 6(e)'s "judicial proceeding" exception. *See, e.g.*, *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives* ("*In re 1972 Grand Jury Report*"), 370 F. Supp. 1219, 1227 (D.D.C. 1974). Requests for grand jury materials pursuant to Rule 6(e)(3)(E)(i) necessarily require resolution by the courts.

III.

On the merits, the Department maintains that the district court erred in concluding that *Haldeman* and *McKeever* establish binding precedent on the correct meaning of the term "judicial proceeding" in Rule 6(e). Appellant's Br. 13. Reviewing *de novo* the district court's interpretation of Rule

6(e), *see United States v. McIlwain*, 931 F.3d 1176, 1181 (D.C. Cir. 2019), these precedents establish that a Senate impeachment trial qualifies as a "judicial proceeding" under the Rule.

In *In re 1972 Grand Jury Report*, Chief Judge Sirica ordered the disclosure of the grand jury report and accompanying materials to be delivered to the House Judiciary Committee, which was then engaged in an impeachment investigation of President Richard M. Nixon. 370 F. Supp. at 1230–31. This court denied mandamus relief in *Haldeman*, holding that Chief Judge Sirica had not abused his discretion in ordering the release of these materials. 501 F.2d at 715–16. Significantly, this court expressed "general agreement with his handling of these matters," observing that Chief Judge Sirica "dealt at length" with the contention that Rule 6(e) limits the disclosure of grand jury materials "to circumstances incidental to judicial proceedings and that impeachment does not fall into that category." *Id.* at 715. Judge MacKinnon's partial concurrence concluded that the disclosure fit within the Rule 6(e) exception for judicial proceedings. *Id.* at 717.

Even assuming that the court's opinion in *Haldeman* was "ambiguous" as to whether the disclosure of grand jury materials to Congress was permitted under the "judicial proceeding" exception or the court's inherent authority, *see McKeever*, 920 F.3d at 847 n.3, this court's decision in *McKeever* clarified that district courts lack inherent authority outside of the exceptions listed in Rule 6(e) to order disclosure of grand jury material, *id.* at 844, and understood *Haldeman* to conclude that impeachment "fit[] within the Rule 6 exception for 'judicial proceedings,'" *id.* at 847 n.3 (quoting *Haldeman*, 501 F.2d at 717 (MacKinnon, J., concurring in part and dissenting in part)). The Department now maintains that this interpretation of *Haldeman* is not "precedential," Appellant's

Br. 33–34, but the court's interpretation of *Haldeman* was essential to this court's reasoning in *McKeever*. The dissenting opinion in *McKeever* rested principally on the view *Haldeman* held "that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions." *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting). In reaching the contrary conclusion, the majority in *McKeever* necessarily interpreted *Haldeman* to involve an application of Rule 6(e)'s "judicial proceeding" exception rather than an exercise of inherent authority.

Neither in *Haldeman* nor *McKeever* did this court explain in detail why impeachment qualifies as a judicial proceeding, although the *en banc* court in *Haldeman* embraced Chief Judge Sirica's analysis, 501 F.2d at 715, and the term "judicial proceeding" in Rule 6(e) "has been given a broad interpretation by the courts," *In re Sealed Motion*, 880 F.2d 1367, 1379–80 (D.C. Cir. 1989) (collecting cases). The district court's interpretation in the instant case is further supported by traditional tools of statutory construction.

The constitutional text confirms that a Senate impeachment trial is a judicial proceeding. Article I provides that "[t]he Senate shall have the sole Power to try all Impeachments" and further states that when the President "is tried, the Chief Justice shall preside." U.S. CONST. art. I, § 3, cl. 6. The Framers of the Constitution also understood impeachment to involve the exercise of judicial power. For instance, Alexander Hamilton referred to the Senate's "judicial character as a court for the trial of impeachments." THE FEDERALIST NO. 65, at 396 (Clinton Rossiter ed., 1961). The district court here properly concluded that "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." *App. for*

Mueller Report Grand Jury Materials, 2019 WL 5485221, at *14; *see id.* at *14–18.

The Department objects that the term "judicial proceeding" in Rule 6(e) is limited to judicial court proceedings because the ordinary meaning of the term "judicial proceeding" does not include a proceeding conducted before a legislative body and the two other provisions of Rule 6(e) that use the term "judicial proceeding," Rule 6(e)(3)(F), (G), unambiguously refer to a court proceeding. Appellant's Br. 18–19. These arguments are foreclosed by our precedent and are unpersuasive in any event. The term "judicial proceeding" has long and repeatedly been interpreted broadly, and courts have authorized the disclosure of grand jury materials "in an array of judicial and quasi-judicial contexts" outside of Article III court proceedings — such as administrative proceedings before the United States Tax Court, *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *12–13 (collecting cases). So understood, the term "judicial proceeding" encompasses a Senate impeachment trial over which the Chief Justice of the Supreme Court presides and the Senators constitute the jury. That Rule 6(e)'s other references may contemplate a judicial court proceeding is of little significance because "the presumption of consistent usage 'readily yields' to context," *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014) (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

Additionally, the historical practice supports interpreting Rule 6(e) to encompass impeachment. Rule 6(e) was adopted in 1946 to "codif[y] the traditional rule of grand jury secrecy" that was applied at common law. *Sells Eng'g*, 463 U.S. at 425. As summarized by the district court, Congress has repeatedly obtained grand jury material to investigate allegations of election fraud or misconduct by Members of Congress. *App.*

for Mueller Report Grand Jury Materials, 2019 WL 5485221, at *18–19. The Department dismisses this practice because no example involved impeachment proceedings. Appellant's Br. 29–32. But these examples evince a common-law tradition, starting as early as 1811, of providing grand jury materials to Congress to assist with congressional investigations. *See In re 1972 Grand Jury Report*, 370 F. Supp. at 1230. And historical practice reflects at least one example of a court-ordered disclosure of grand jury materials to the Committee — prior to the Rule's enactment — for use in its impeachment investigation of two federal judges. *Conduct of Albert W. Johnson and Albert L. Watson, U.S. District Judges, Middle District of Pennsylvania: Hearing before Subcomm. of the H. Comm. on the Judiciary*, 79th Cong., at 63 (1945).

Since Rule 6(e) was enacted, federal courts have authorized the disclosure of grand jury materials to the House for use in impeachment investigations involving two presidents and three federal judges. *See generally In re 1972 Grand Jury Report*, 370 F. Supp. 1219 (President Nixon); Order, *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (*per curiam*) (President Clinton); *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami* ("*Hastings*"), 833 F.2d 1438 (11th Cir. 1987) (Judge Alcee Hastings); Order, *Nixon v. United States*, Civ. No. H88-0052(G) (S.D. Miss. 1988) (Judge Walter Nixon), referenced in H.R. Rep. No. 101-36, at 15 (1989); and Order, *In re Grand Jury Investigation of U.S. District Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG (E.D. La. Aug. 6, 2009). It is only the President's categorical resistance and the Department's objection that are unprecedented. Oral. Arg. Tr. at 11–12; *McGahn*, No. 19-5331, Oral Arg. Tr. at 21 (Jan. 3, 2020). In interpreting the Rule, this established practice deserves "significant weight." *Cf. NLRB v. Noel Canning*, 573 U.S. 513, 524–26 (2014) (emphasis omitted).

The Department worries that reading Rule 6(e) to encompass impeachment proceedings would create separation-of-powers problems. It maintains that the particularized need standard for all applicants under Rule 6(e)(3)(E) is "in considerable tension with the House's sole power of impeachment," Appellant's Br. 49, and would invite courts to "pass[] judgment on the legal sufficiency of a particular impeachment theory," *id.* at 50. Courts, however, regularly apply the particularized need standard to mitigate such concerns in the impeachment context because the district court need only decide if the requested grand jury materials are relevant to the impeachment investigation and authorize disclosure of such materials without commenting on the propriety of that investigation. *See, e.g.*, *Hastings*, 833 F.2d at 1446.

In any event, the Department's contrary interpretation of Rule 6(e) would raise as many separation-of-powers problems as it might solve. The Department implies its interpretation of the Rule strengthens the House by insulating its "sole power of impeachment" from judicial interference. But it ignores that courts have historically provided grand jury records to the House pursuant to Rule 6(e) and that its interpretation of the Rule would deprive the House of its ability to access such records in future impeachment investigations. Where the Department is legally barred from handing over grand jury materials without court authorization, judicial restraint does not empower Congress; it impedes it.

IV.

The Committee has established a particularized need for the redacted grand jury materials it seeks. The party requesting the grand jury information must show (1) the material "is needed to avoid a possible injustice in another judicial

proceeding," (2) "the need for disclosure is greater than the need for continued secrecy," and (3) the "request is structured to cover only material so needed." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). The Supreme Court characterizes "[t]he *Douglas Oil* 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." *Sells Eng'g*, 463 U.S. at 445. The Supreme Court has "repeatedly stressed that wide discretion must be afforded to district court judges in evaluating whether disclosure is appropriate." *United States v. John Doe, Inc. I*, 481 U.S. 102, 116 (1987). The district court's determination "is subject to reversal only if that discretion has been abused." *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986).

The district court did not abuse its discretion. Special Counsel Mueller prepared his Report with the expectation that Congress would review it. *See* Vol. II at 1. The district court released only those materials that the Special Counsel found sufficiently relevant to discuss or cite in his Report. Moreover, the Department has already released information in the Report that was redacted to avoid harm to peripheral third parties and to ongoing investigations, thereby reducing the need for continued secrecy. Finally, the Committee's particularized need for the grand jury materials remains unchanged. The Committee has repeatedly stated that if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment. Appellee's Supp. Br. 17 (Dec. 23, 2019); Oral Arg. Tr. at 59–60 (Jan. 3, 2020).

A.

The district court concluded that the Committee needed the redacted grand jury materials to "investigate fully," to "evaluate the bases for the conclusions reached by the Special

Counsel," and to "reach a final determination" about "whether the President committed an impeachable offense" a question "that the Special Counsel simply left unanswered." *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *35. The district court noted several features of the impeachment investigation that made the Committee's need especially compelling. First, because several individuals were convicted of making false statements either to Congress or in connection with the Special Counsel's investigation, the court found that the grand jury material at issue "may be helpful in shedding light on inconsistencies or even falsities in the testimony of witnesses called in the House's impeachment inquiry." *Id.* at *34. Second, the district court found that other sources of information — "such as the public version of the Mueller Report, the other categories of material redacted from the Mueller Report, congressional testimony and FBI Form 302 interview reports" — "cannot substitute for the requested grand jury materials." *Id.* at *36. Third, of striking significance, it was undisputed that "the White House has flatly stated that the Administration will not cooperate with congressional requests for information." *Id.* (citing Letter from Pat A. Cipollone, White House Counsel, to Representative Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019)).

On appeal, the Department contends that a "generalized need" for grand jury materials "to 'complete the story' or 'investigate fully,' or simply to double-check that witnesses are not lying, has never been sufficient." Appellant's Br. 3. The Department asserts that the district court's analysis amounts to no more than an observation that the grand jury materials may be relevant to the Committee's inquiry, *id.* at 15, and that the district court should have conducted a redaction-by-redaction review to determine if the Committee actually needed the material, Oral Arg. Tr. at 26 (Jan. 3, 2020). Not only does this ignore the district court's detailed consideration of the

evidentiary obstacles confronting the Special Counsel's investigation, *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *37, the showing of particularized need required in the impeachment context is different. The *Douglas Oil* standard is "highly flexible" and "adaptable to different circumstances," *Sells Engineering*, 463 U.S. at 445, and courts have required a line-by-line or witness-by-witness determination only in cases where grand jury materials are needed in a future trial to impeach or refresh the recollection of a specific witness. *See, e.g.*, *In re Special Grand Jury 89-2*, 143 F.3d 565, 568, 571 (10th Cir. 1998); *United States v. Fischbach & Moore, Inc.*, 776 F.2d 839, 845–46 (9th Cir. 1985).

In the impeachment context, both this court sitting *en banc* in *Haldeman* and the Eleventh Circuit in *Hastings* concluded that when Congress seeks access to grand jury materials to assist in an impeachment investigation, district courts hand off all relevant materials to Congress without micromanaging the evidence. For example, in *In re 1972 Grand Jury Report*, Chief Judge Sirica ordered that the "Grand Jury Report and Recommendation" and accompanying grand jury materials be delivered to the Committee for use in an impeachment investigation involving the President. 370 F. Supp. at 1230–31. The Chief Judge reasoned that "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on *all the pertinent information*." *Id.* at 1230 (emphasis added). In making this determination, Chief Judge Sirica "carefully examined the contents of the Grand Jury Report" and stated that he was "satisfied that there can be no question regarding their materiality to the House Judiciary Committee's investigation," without parsing through the materials to determine which specific witnesses or lines of testimony were relevant to the Committee's investigation. *Id.* at 1221. This court, in turn,

expressed its "general agreement with his handling of these matters." *Haldeman*, 501 F.2d at 715. Similarly, in *Hastings*, the Eleventh Circuit authorized the disclosure of all grand jury materials to the Committee to assist in its impeachment investigation of Judge Hastings because "without full access to the grand jury materials, the public may not have confidence that the Congress considered *all relevant evidence*." 833 F.2d at 1445 (emphasis added).

Applying the particularized need standard in this way in the impeachment context avoids the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry. The Constitution grants to the House of Representatives the "sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5. In an impeachment, the House serves as both the grand jury and prosecutor; it appoints managers to prosecute in the Senate the Articles of Impeachment that were approved by the House of Representatives. *See* H. Res. 798, 116th Cong. (2020) (appointing managers for the impeachment trial of President Donald J. Trump). The courts cannot tell the House how to conduct its impeachment investigation or what lines of inquiry to pursue, or how to prosecute its case before the Senate, *cf. Old Chief v. United States*, 519 U.S. 172, 186 (1997), much less dictate how the Senate conducts an impeachment trial, *Walter Nixon v. United States*, 506 U.S. 224, 230–33 (1993).

B.

Here, the context makes readily apparent that the need for disclosure is not only greater than the need for continued secrecy but that the district court findings confirmed the particularity of the need. The need for grand jury secrecy is reduced after the grand jury has concluded its work, but courts still "must consider . . . the possible effect upon the functioning of future grand juries" such as the need to encourage "frank and

full testimony," *Douglas Oil*, 441 U.S. at 222, and the risk that "persons who are accused but exonerated by the grand jury" will face "public ridicule," *id*. at 219. The district court concluded upon reviewing in detail the findings in the Mueller Report that any remaining secrecy interests in the redacted grand jury materials were readily outweighed by the Committee's compelling need for the materials in order to determine whether, or to what extent, links existed between the Russian government's efforts to interfere in the 2016 United States presidential election proceedings and individuals associated with President Trump's election campaign. *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *37–38.

Although the need for continued secrecy remains, the district court reasonably concluded that this need is reduced by the Committee's adoption of special protocols to restrict access to the grand jury materials in order to maintain their secrecy. *Id.* at *37; *see* Memorandum from Chairman Nadler to Members of the Committee on the Judiciary re Procedures for Handling Grand Jury Information (July 26, 2019). The Department objects that the Committee has the discretion to make the grand jury material public at any time. Appellant's Br. 45. But the district court, relying on Chief Judge Sirica's analysis, followed a tradition of satisfaction with these protocols. *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *37. As Chief Judge Sirica explained, such protocols "insure against unnecessary and inappropriate disclosure," dismissing concerns about leaks as "speculation." *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230. Here, too, the Department offers "no basis on which to assume that the Committee's use of the [material] will be injudicious." *Id*. In fact, history supports the conclusion that such protocols are not an empty gesture. As the district court noted, "Congress has *still* not publicly disclosed the entirety of the Watergate grand

jury report that Chief Judge Sirica ordered be given to [the Committee] forty-five years ago, in 1974." *In re App. of Comm. on Judiciary U.S. House of Representatives for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-48, 2019 WL 5608827, at *3 (D.D.C. Oct. 29, 2019) (denying stay pending appeal).

Additionally, the risk of "public ridicule" decreases where, as here, there is already "widespread public knowledge about the details of the Special Counsel's investigation, which paralleled that of the grand jury's, and about the charging and declination decisions outlined in the Mueller Report." *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *37. *Cf. In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006); *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994). The Report was made available to the public and the Special Counsel testified about it in congressional hearings. *See, e.g.*, *Former Special Counsel Robert S. Mueller, III on the Investigation into Russian Interference in the 2016 Presidential Election: Hearing Before the H. Perm. Select Comm. on Intelligence*, 116th Cong. 49 (July 24, 2019). Moreover, the Department recently introduced the grand jury testimony of senior Trump advisor, Steven Bannon, at Roger Stone's criminal trial, *United States v. Stone*, No. 19-cr-00018 (D.D.C. Nov. 8, 2019), publicly disclosing grand jury materials concerning a player who was interviewed in connection with the Special Counsel's investigation but not indicted.

It is true that "courts have been reluctant to lift unnecessarily the veil of secrecy." *Douglas Oil*, 441 U.S. at 219. In the impeachment context, courts need to be especially careful in balancing the House's needs against various ongoing secrecy interests inasmuch as courts lack authority to restrict the House's use of the materials or withdraw them if improvidently issued or disseminated. In *Senate Permanent*

Subcomm. on Investigations v. Ferrer, 856 F.3d 1080 (D.C. Cir. 2017), this court suggested that the Speech or Debate Clause bars "ordering a congressional committee to return, destroy, or refrain from publishing" information already in its possession. *Id.* at 1086. But a compelling need for the material and the public interest may necessitate disclosure. *See Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 n.15 (1983). Special Counsel Mueller spoke directly to Congress in his Report, *see* Vol. II at 1, and stopped short of making any "ultimate conclusions about the President's conduct," *id.* at 8. The Department has failed to show in these circumstances that the district court abused its discretion in agreeing that the Committee had a compelling need to be able to reach a final determination about the President's conduct described in the Mueller Report. Along with the "public's interest in a diligent and thorough [impeachment] investigation," these considerations tip the balance toward disclosure. *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *38; *see In re 1972 Grand Jury Report*, 370 F. Supp. at 1227. "Public confidence in a procedure as political and public as impeachment is an important consideration justifying disclosure." *Hastings*, 833 F.2d at 1445.

C.

Furthermore, the Committee's request was tailored to its need. *Douglas Oil*, 441 U.S. at 222. The Committee requested three categories of grand jury materials: (1) all portions of the Mueller Report that were redacted pursuant to Rule 6(e); (2) any portions of grand jury transcripts or exhibits referenced in those redactions; and (3) any underlying grand jury testimony and exhibits that relate directly to certain individuals and events described in the Mueller Report. Additionally, the Committee proposed a staged disclosure, starting with the first two categories of materials. *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *33. The district court

reasonably granted this request given the Committee's compelling need to be able to make a final determination about the President's conduct described in the Mueller Report, *id*. at *33, 35, 38, and stated that the Committee could file further requests articulating its need for the grand jury materials in the third category, *id.* at *33.

The Department's objections to this limited and structured disclosure are unpersuasive. First, the Department maintains that the disclosure includes a redaction in Volume II that the Committee conceded it did not need. Appellant's Br. 38; District Ct. Hearing Tr. at 37–38 (Oct. 8, 2019). The Committee made this concession without knowing what was underlying the redactions. The district court later reviewed *in camera* the grand jury material in Volume II, before authorizing the release of all grand jury material redacted from and referenced in both volumes of the Mueller Report. As to the Committee's need for the material, the court found that "[t]he grand jury material relied on in Volume II is indispensable to interpreting the Special Counsel's evaluation of this evidence and to assessing the implications of any 'difficult issues' for [the Committee's] inquiry into obstruction of justice." *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *35. Given the nature of the two volumes, the Department offered no persuasive reasons to conclude that the Committee's need for the redacted materials in Volume I was less compelling than the need demonstrated for Volume II. The court's determination, of course, is properly "infused with substantial discretion." *Douglas Oil*, 441 U.S. at 223.

Second, the Department maintains that the district court could not have evaluated whether the requested material was limited to material relevant to the Committee's need without conducting an *in camera* review of Volume I. Appellant's Br.

38. The district court reviewed the grand jury material redacted from Volume II of the Mueller Report but not from Volume I. As a result, the Department notes that the district court only examined five of the over 240 redactions in the Mueller Report. Reply Br. 23–24. Here, it was unnecessary for the district court to conduct an *in camera* review of the Volume I redactions. The Committee's request for the grand jury materials in the Mueller Report is directly linked to its need to evaluate the conclusions reached and not reached by the Special Counsel. In the Special Counsel Mueller's own estimation, his Report "contains . . . that information necessary to account for the Special Counsel's prosecution and declination decisions and to describe the investigation's main factual results." Vol. I at 13. The Committee states that it needs the unredacted material to review these findings and make its own independent determination about the President's conduct. The district court had no reason to question the Committee's representation because the Mueller Report itself made clear why the grand jury materials in Volume I were necessary for the Committee to review and evaluate in exercise of its constitutional duty. Courts must take care not to second-guess the manner in which the House plans to proceed with its impeachment investigation or interfere with the House's sole power of impeachment. *Cf. Walter Nixon*, 506 U.S. at 230–31.

Of course, courts must not simply rubber stamp congressional requests for grand jury materials. In cases where the connection between the grand jury materials and the Committee's impeachment investigation is not obvious, further inquiry by the district court may be needed. For instance, Committee counsel could be permitted to review the unredacted grand jury materials *in camera* to enable a more detailed explanation of the relevance of particular witnesses, portions of transcripts, or records. *See* Oral Arg. Tr. 62–64 (Nov. 18, 2019). Or the district court, in the exercise of its

discretion, might decide it should review the unredacted materials *in camera*, as occurred here at the Department's suggestion, with respect to Volume II of the Mueller Report. *See* Redacted Decl. of Bradley Weinsheimer ¶¶ 5–10 (Sept. 13, 2019).

But here, where the Special Counsel stopped short of making any "ultimate conclusions about the President's conduct," Mueller Report, Vol. II at 8, in part to avoid preempting the House's sole power of impeachment, *see id.* at 1, the Committee has established that it cannot "fairly and diligently" make a final determination about the conduct described in both volumes of the Mueller Report "without the grand jury material referenced" therein. *App. for Mueller Report Grand Jury Materials*, 2019 WL 5485221, at *35. In affirming the disclosure of "the entire grand jury record" to the Committee, the Eleventh Circuit similarly observed: "The recommendation of the judicial branch concerning impeachment of Judge Hastings was based on access to the whole grand jury record, and that same access should not be denied Congress." *Hastings*, 833 F.2d at 1445. Given the Committee's tailored request in the instant case, this court has no occasion to decide whether granting a request for "all" of the redacted grand jury materials would have been an abuse of discretion; that question remains for another day. Here, for reasons explained, the district court did not abuse its discretion by ordering the disclosure of all portions of the Mueller Report redacted pursuant to Rule 6(e) and any grand jury transcripts or exhibits referenced in those redactions without scrutinizing the Committee's need as to each redaction.

Accordingly, because a Senate impeachment trial qualifies as a "judicial proceeding" pursuant to Rule 6(e) and the Committee has established a particularized need for the requested portions of grand jury materials, the district court's

Order is affirmed. The distinction that our dissenting colleague reads into the district court's Order between authorizing and ordering release is not raised by either party and rests on a flawed premise. *See* Dissenting Op. at 1–3 (Rao, J.). Our colleague assumes that the House of Representatives is seeking compulsory judicial action against the Executive Branch. Because the Department of Justice is simply the custodian of the grand jury materials at issue however, the instant case is unlike inter-branch disputes where Congress issued subpoenas and directed Executive Branch officials to testify and produce their relevant documents. *See generally Comm. on the Judiciary v. McGahn*, 2019 WL 6312011 (D.D.C. Nov. 25, 2019); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

GRIFFITH, *Circuit Judge*, concurring: I join the opinion for the court, but I write separately to address the dissent's argument that the district court lacked jurisdiction to compel disclosure of grand jury materials under *Committee on the Judiciary v. McGahn*, No. 19-5331 (D.C. Cir. Feb. 28, 2020). Unlike *McGahn*, this case does not involve a suit between the political branches over executive-branch documents or testimony. Instead, it involves an application for access to records of the grand jury, whose disclosure the district court has traditionally controlled.

As the dissent acknowledges, grand jury records do not belong to the Executive Branch. *See* Dissent at 28; *see also* Majority at 9-10; *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 & n.10 (2d Cir. 1981). Regardless of whether grand jury materials are "judicial records," *see* Dissent at 27-28, they do not become executive records simply because the Department of Justice stores them in file cabinets after the grand jury completes its investigation. The Department holds these records subject to the ongoing supervision of the district court. Accordingly, Rule 6(e) bars the Department from disclosing these records to Congress without court approval. *See* FED. R. CRIM. P. 6(e)(2)(B)(vi); *see also* J.A. 448 (letter from the Attorney General stating that he "d[id] not believe that [he] ha[d] discretion to disclose grand-jury information to Congress"). Federal courts, including courts in our own circuit, have approved the disclosure of grand jury materials to the House of Representatives in seven prior impeachment proceedings. *See* Majority at 13-14. Congressional applications for access to grand jury materials have thus traditionally been thought capable of (and indeed to require) judicial resolution. *Cf. Raines v. Byrd*, 521 U.S. 811, 819 (1997).

The dissent insists that "possession" is the "dispositive factor" in our jurisdictional analysis: When the court holds the grand jury materials, it may hand them over; when it does not, it may not compel the Department to do so. Dissent at 20-23.

This argument elevates form over substance. I do not take the dissent to dispute that the district court could have ordered the Department to deliver the grand jury materials for *in camera* review. Indeed, to assess particularized need, "[d]istrict courts are often required to conduct an *in camera* review of grand jury material requested under [Rule 6(e)'s judicial-proceeding exception]." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1074 (D.C. Cir. 1998). Had the court done so, it would have taken possession of the requested materials and could have provided them directly to the Committee, instead of ordering the Department to hand them over. *See Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc) (approving such a direct transfer); Dissent at 20-23 (recognizing that courts have provided grand jury materials to Congress when they possessed them). If the district court may do that, why can't it cut itself out as the intermediary?

I understand the dissent's concern that ordering the Executive Branch to provide grand jury records to Congress could make us a tool of the House in the exercise of its "sole power of impeachment." Dissent at 34-39. The Judiciary's proper place in an impeachment fight is typically on the sidelines. *See Nixon v. United States*, 506 U.S. 224, 228-36 (1993). But, as gatekeepers of grand jury information, we cannot sit this one out. The House isn't seeking our help in eliciting executive-branch testimony or documents. Instead, it's seeking access to grand jury records whose disclosure the district court, by both tradition and law, controls.

In an effort to bring this dispute under *McGahn*, the dissent creates a novel distinction between authorization and compulsion on which its analysis turns. But that distinction is difficult to square with our precedent and the district court's longstanding supervisory power over the grand jury. Our circuit has never distinguished between authorization and

compulsion under Rule 6(e). To the contrary, we've said that "[w]hen the court *authorizes* . . . disclosure [of grand jury records], it does so by *ordering* an attorney for the government who holds the records to disclose the materials." *McKeever v. Barr*, 920 F.3d 842, 848 (D.C. Cir. 2019) (emphases added) (internal quotation marks omitted); *see also In re Grand Jury*, 490 F.3d 978, 986 (D.C. Cir. 2007) ("The federal courts have the authority under Rule 6(e)(3)(E)(i) to *order* disclosure to grand jury witnesses of their own transcripts." (emphasis added)). The text of Rule 6(e) also suggests that courts may order the Department to transfer certain grand jury materials to another entity. Rule 6(e)(1) provides that "[u]nless the court orders otherwise, an attorney for the government will retain control of . . . any transcript [of the grand jury]." As the Department explained at oral argument, "it just doesn't seem like a plausible reading of Rule 6(e) that the District Court could authorize [disclosure] but that the Department of Justice would then say well, we don't want to turn over [the] information." Oral Arg. Tr. 7:20-23.

All that aside, the dissent's distinction between authorization and compulsion strikes me as untenable on its own terms. In the dissent's view, although "[a]uthorization of disclosure is part of the district court's supervisory power" over the grand jury, compulsion is not. Dissent at 1-2. The dissent explains this distinction by arguing that the court's "supervisory power is strictly limited to actions taken . . . in aid of the grand jury" and that compelling disclosure aids third parties rather than the grand jury. *Id.* at 2. But merely authorizing disclosure *also* aids third parties rather than the grand jury. The dissent therefore cannot explain why the district court has power to permit disclosure in the first place. Taken to its logical conclusion, the dissent's theory would seem to require outright dismissal of this case—a result that the

dissent agrees is contrary to history and precedent. *See id.* at 3-5; *see also* Majority at 10-14.

More broadly, I'm skeptical of the claim that the district court's supervisory authority *never* extends to aiding third parties. As the dissent concedes, the district court may issue compulsory process in the form of contempt orders and grand jury subpoenas. Dissent at 16-17. But when the court holds someone in contempt for breaching the grand jury's secrecy, it often aids not only the grand jury but also a third party whose private papers or statements have been unveiled. Moreover, the district court's local rules allow the court "on its own motion" to "ma[ke] public" grand jury materials "upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." D.D.C. LOCAL CRIM. R. 6.1; *see also In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). Under this rule, the district court could presumably compel the Department to make such materials available to the public. All this suggests that compulsory process—even for the benefit of third parties—falls within the district court's traditional supervisory power.

Finally, although I agree with the dissent that we have an independent obligation to assure ourselves of our jurisdiction, we need not chase jurisdictional phantoms. The relationship between the grand jury and Article III courts is, to put it mildly, "very under-theorized," Oral Arg. Tr. 5:21 (counsel for the Department); *see also id.* 62:24-63:17 (counsel for the Committee), and neither party has advanced the dissent's novel theory of that relationship. Given the district court's traditional supervisory power over the grand jury and the fact that grand jury records do not belong to the Executive Branch, I am satisfied that the court had jurisdiction to compel disclosure.

RAO, *Circuit Judge*, dissenting: The district court in this case took two distinct actions: first, it authorized disclosure of grand jury materials to the House Committee on the Judiciary, and second, it ordered the Department of Justice to release those materials to the Committee. The majority affirms both orders and treats them essentially as a single action pursuant to the district court's supervisory power over grand juries, and therefore outside the boundaries of Article III. Yet there are important distinctions between these two actions. While I agree that the court may authorize release under Federal Rule of Criminal Procedure 6(e), a judicial order compelling action by the executive branch has always been treated as an exercise of the Article III power.

The majority dismisses the Article III inquiry because grand jury records are different and outside the traditional constitutional boundaries. It is true that the grand jury exists separate from the three departments of the federal government and that in aiding the grand jury the courts may exercise limited non-Article III powers. Yet the ancient institution of the grand jury does not eviscerate the constitutional limits *between* the coordinate branches of the federal government. While the courts and the executive branch each have a distinct relationship to the grand jury and Rule 6(e) gives both branches shared responsibility for maintaining grand jury secrecy, the grand jury context does not change the powers of the judiciary in relation to the executive branch or to Congress. Thus, a court may compel action by the executive branch to release grand jury records only when a proper litigant meets the requirements of Article III.

As an initial matter, I agree with the majority that at the time of its order, the district court did not abuse its discretion in authorizing disclosure of the grand jury materials. An impeachment investigation is "preliminar[y] to or in connection with a judicial proceeding." FED. R. CRIM. P. 6(e)(3)(E)(i). Authorization of disclosure is part of the district

court's supervisory power and does not require Article III jurisdiction. Yet in the months following the Committee's initial petition, the House passed two articles of impeachment and the Senate conducted an impeachment trial and voted to acquit President Donald J. Trump. In light of these circumstances, I would remand to the district court to consider in the first instance whether the Committee can continue to demonstrate that its inquiry is preliminary to an impeachment proceeding and that it has a "particularized need" for disclosure of the grand jury records.

Separate from authorization, ordering DOJ to turn over the grand jury documents is an exercise of the Article III judicial power for which the Committee must have standing. The majority and the concurrence fail to identify a single case in which a court has compelled disclosure of grand jury materials to a party without standing. Waving the banner of grand jury tradition is not enough to overcome the fundamental principle of separation of powers that a court may order action by the executive branch only at the behest of a party with standing. The constitutional requirements of Article III standing do not disappear when a party seeks grand jury materials. The district court's non-Article III supervisory power is strictly limited to actions taken by courts in aid of the grand jury. Nothing in Rule 6(e) nor the district court's supervisory power changes the constitutional limits on the court's authority with respect to third parties who are not part of the grand jury process. Therefore, the Committee must have standing to obtain a judicial order compelling the Department to produce grand jury materials.

The Committee, however, lacks standing in this case. Under Article III, as confirmed by *Raines v. Byrd*, 521 U.S. 811 (1997), and our recent decision in *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 2020 WL

1125837 (D.C. Cir. Feb. 28, 2020), the Committee has no standing to enforce directly its subpoena to DOJ for grand jury materials.[1] The reasoning of *McGahn* means that the Committee also lacks standing to seek a compulsory order in a Rule 6(e) proceeding—such relief presents an interbranch dispute not traditionally cognizable by the judiciary. Although *McGahn* leaves open the possibility that a statute may create legislative standing, Rule 6(e) does not do so here. The Rule merely permits courts to authorize disclosure. It vests no right in third parties to obtain such authorization, much less a right to compulsory process to receive grand jury materials. Rule 6(e) thus provides no basis for the informational injury claimed by the Committee and cannot provide the prerequisites to the exercise of the Article III judicial power. Because the Committee lacks standing, I would vacate the district court's order compelling DOJ to disclose the grand jury materials. I respectfully dissent.

I.

The primary question addressed by the majority concerns whether the district court could authorize disclosure to the Committee. On this point, I agree with the majority that the Committee's petition could fit within Rule 6(e)'s "judicial proceeding" exception because it sought the grand jury materials preliminary to a possible Senate impeachment trial,

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[1] The House Judiciary Committee's subpoena to Attorney General William P. Barr, dated April 18, 2019, seeks "[t]he complete and unredacted version" of Special Counsel Robert S. Mueller III's *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* ("Mueller Report"), "[a]ll documents referenced in the Report," and "[a]ll documents obtained and investigative materials created by the Special Counsel's Office." *See* J.A. 190–97.

which has always been understood as an exercise of judicial power. The Constitution vests the Senate with the "sole Power to try all Impeachments." U.S. CONST. art. I, § 3, cl. 6. The Framers understood this clause to vest in the Senate a "distinct" non-legislative power to act in a "judicial character as a court for the trial of impeachments." The Federalist No. 65, at 337 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see also Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792) ("[N]o judicial power of any kind appears to be vested [in Congress], but the important one relative to impeachments."); *Trump v. Mazars USA, LLP*, 940 F.3d 710, 755 (D.C. Cir. 2019) (Rao, J., dissenting) ("[T]he Constitution confers upon the House and Senate limited judicial powers over impeachable officials."), *cert. granted*, 140 S. Ct. 660 (2019).

The Supreme Court has consistently recognized the Senate as a court of impeachment parallel to the federal courts. For example, in *Mississippi v. Johnson*, the Court noted that it was without authority to restrain the Senate in the conduct of an impeachment trial because the Senate was sitting "as a court of impeachment" and "this court [cannot] arrest proceedings in that court." 71 U.S. 475, 500–01 (1866); *see also Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880) ("The Senate also exercises the judicial power of trying impeachments."). Similarly, we have stated that doctrines ordering the relations between "state or coordinate federal court[s]" apply to the Senate when it "sits as the constitutionally-designated court of impeachment." *Hastings v. United States Senate*, 887 F.2d 332, 1989 WL 122685, at *1 (D.C. Cir. Oct. 18, 1989) (unpublished). The text of the Impeachment Trial Clause and its consistent interpretation confirm that when sitting for an impeachment trial, the Senate is a court and the trial a "judicial proceeding."

At the time of its decision, the district court did not abuse its discretion in concluding that the Committee had shown a "particularized need" for the grand jury materials. As the majority notes, the particularized need inquiry is a "highly flexible one" that is "adaptable to different circumstances." Maj. Op. 16 (quoting *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 445 (1983)). Impeachment is one such circumstance to which the standards for particularized need must be uniquely adapted. *Cf. In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1444 (11th Cir. 1987) ("*Hastings*") ("[A]pplying the requirements of rule 6(e) in this context, we hold, taking into account the doctrine of separation of powers, that a merely generalized assertion of secrecy in grand jury materials must yield to a demonstrated, specific need for evidence in a pending impeachment investigation.").

Although I agree that the authorization of disclosure was within the district court's discretion at the time it issued its decision, the district court's analysis was highly fact-bound. Rule 6(e)'s "preliminarily to or in connection with a judicial proceeding" exception to grand jury secrecy required the district court to find that the "primary purpose" of the Committee's inquiry was impeachment. *See United States v. Baggot*, 463 U.S. 476, 480 (1983). In analyzing that issue, the district court considered various actions and statements by legislators and legislative committees and concluded that the purpose of the Committee's investigation and its request for the grand jury materials was to "determine whether to recommend articles of impeachment." *See In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, 414 F. Supp. 3d 129, 149 (D.D.C. 2019).

Much has happened since the district court authorized disclosure in October. The House Judiciary Committee conducted an impeachment investigation, subpoenaed materials, and heard from witnesses. The House voted in favor of two articles of impeachment against President Trump. The Senate then conducted an impeachment trial in which it considered the House's evidence, determined that no further evidence was needed, and entered a judgment of acquittal.

In light of these developments, remand is necessary for the district court to address whether authorization is still warranted. A similar analysis of the Committee's application today requires ascertaining whether such investigations are ongoing and, if so, whether their "primary purpose" is to obtain the grand jury materials for impeachment. The Committee's request must fit within one of the Rule 6(e) exceptions and the only exception claimed by the Committee is that impeachment is a "judicial proceeding." Legislative oversight, for example, would not fit within this exception. If impeachment is no longer the primary purpose of the Committee's application, the court could not authorize disclosure because the grand jury records would not be sought "preliminarily to or in connection with" an impeachment trial or inquiry. FED. R. CRIM. P. 6(e)(3)(E)(i).

Similarly, remand is necessary for the district court to consider whether the Committee continues to have a particularized need for the requested grand jury materials, or whether the intervening developments have abrogated or lessened the Committee's need for these records. Once again, this requires a fact-intensive inquiry. *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986) ("[A] district court [considering a Rule 6(e) application] must 'weigh carefully the competing interests in light of the relevant circumstances and standards.'" (quoting *Sells Eng'g*, 463 U.S. at 443)). In order to assess the Committee's ongoing need for these materials,

additional factual information is needed regarding the status of the Committee's investigations. The majority relies on assertions made in briefs filed by the Committee before the impeachment trial. Maj. Op. 16–18. This generalized interest standing alone does not speak to the fact-bound inquiry regarding the ongoing purpose and need for the materials. Remand is thus necessary for the district court to weigh the public interest in disclosure against the need to preserve grand jury secrecy in these changed circumstances. *See In re Sealed Case*, 801 F.2d at 1381. Because authorization of disclosure rests with the sound discretion of the district court, we should not exercise such discretion in the first instance.

* * *

A reasonable observer might wonder why we are deciding this case at this time. After all, the Committee sought these materials preliminary to an impeachment proceeding and the Senate impeachment trial has concluded. Why is this controversy not moot? The majority simply turns a blind eye to these very public events and the parties have not submitted any additional briefs; however, a few observations are worth noting. Mootness is a constitutional doctrine following from the Article III requirement that courts decide only live cases and controversies. *See Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013). Mootness, however, does not impact the district court's authorization of disclosure because authorization is a discretionary action under Rule 6(e)—it is part of the non-Article III supervisory power of the court over the grand jury. With that said, while mootness per se does not apply, the changed circumstances require remand for the reasons already stated. As to the order compelling DOJ to release the records, Article III limitations apply, as explained below. Yet because I conclude that the Committee lacks standing for compulsory process, mootness is irrelevant: The

district court lacked jurisdiction at the outset to compel DOJ to release the grand jury materials.

II.

The constitutional problem presented by this case pertains not to authorization of disclosure, but to the separate question of whether the district court had jurisdiction to compel DOJ to release the grand jury materials to the Committee. In the months leading up to the House's formal initiation of an impeachment inquiry, the Judiciary Committee issued a subpoena to the Department of Justice for the grand jury materials relating to Special Counsel Robert S. Mueller III's investigation. U.S. Dep't of Justice, Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017); *see also* J.A. 190–97 (House Judiciary Committee Subpoena to Attorney General William P. Barr (Apr. 18, 2019)). When the Department refused to comply and cited Rule 6(e) as an impediment to any release, the Committee sought authorization from the district court for the release of the materials. Notably, in its petition to the district court, the Committee sought only authorization of disclosure; it did not ask the court to compel DOJ to release the documents. J.A. 139–40. The district court authorized disclosure, but then went beyond the relief requested by the Committee and ordered the Department to turn over the materials. The Committee seeks to defend that order on appeal.

The Committee's Rule 6(e) application thus replaced legislative process (the Committee's subpoena) with judicial process (the district court's order compelling the Department to turn over the grand jury materials to the House). We have already held that the Committee lacks standing to use the courts to enforce its subpoenas against the executive branch. *See*

McGahn, 2020 WL 1125837, at *16. Both the Department and the Committee maintain, however, that Rule 6(e) fundamentally changes the analysis in this case. They assert that the district court's order was an exercise of the supervisory power over the grand jury, such that the traditional Article III requirements of justiciability do not apply. That position, however, reads too much into Rule 6(e) and the district court's traditional supervisory authority.

The crux of my analysis turns on fundamental principles of separation of powers. First, the mere fact that this case involves a request for grand jury materials does not alter the basic constitutional requirement that a court order directing the executive branch to produce documents to a third party is an exercise of the Article III power. Here, DOJ has possession of the grand jury records under the terms of Rule 6(e)(1).[2] If DOJ declines to disclose the documents, a court may not grant a judicial order to disclose unless the Committee has standing. Second, nothing in Rule 6(e) changes this basic requirement and permits the district court to order disclosure of grand jury materials to a third party that fails to meet the requirements of standing. Finally, although district courts exercise some supervisory authority to aid the grand jury with its core functions, such authority traditionally has not extended to

[2] Both the Committee and DOJ characterize the requested documents as grand jury materials or papers. *See, e.g.*, DOJ Br. 1; Comm. Br. 1. It might fairly be questioned, however, whether the Mueller Report is in fact a grand jury document, as it was prepared by Robert Mueller in his role as the Special Counsel, serving within the Department of Justice. Thus, the Report might be considered executive branch papers, to which additional protections might attach. DOJ has not raised this argument, however, so I consider all the papers as being encompassed within the umbrella request for grand jury materials.

ordering the executive branch to release grand jury materials to third parties in general, nor to Congress in particular.

The majority's entire jurisdictional argument rests on the fact that the question "[was] not raised by either party." Maj. Op. 26; *see also* Concurring Op. 4 ("[N]either party has advanced the dissent's novel theory of that relationship."). Yet DOJ in fact distinguishes between authorizing and ordering disclosure when it asserts that ordering disclosure is an exercise of Article III power, but authorization of disclosure is not. *See* DOJ Supp. Br. 3–6. In any event, we have an independent obligation to ensure jurisdiction before exercising the judicial power. Here, the district court's order to DOJ for disclosure of the grand jury materials required an exercise of Article III power, because nothing in the grand jury context alters the court's power in relation to the executive branch. Suspending the standing requirements of Article III in this context would constitute an exception to justiciability not supported by the Constitution, Rule 6(e), or the general supervisory power over grand juries.

A.

The Committee and the Department argue that the district court's order does not implicate Article III because it was entered pursuant to the court's supervisory power over grand juries. It is true as a general matter that the supervisory power does not implicate "the essential attributes of the judicial power." *United States v. Seals*, 130 F.3d 451, 457 (D.C. Cir. 1997) (citation and quotation marks omitted). But the supervisory power "is a circumscribed one," *id.*, that cannot be extended by federal courts in a manner that transgresses constitutional or statutory limits, *see Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–55 (1988) ("[E]ven a sensible and efficient use of the supervisory power … is invalid if it

conflicts with constitutional or statutory provisions." (quotation marks omitted)). In *United States v. Williams*, the Court distinguished the limited supervisory power over the grand jury from the Article III power, and held that district courts cannot invoke the supervisory authority to take major actions "on their own initiative," or to "alter[] the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." 504 U.S. 36, 50 (1992).

The district court's supervisory power cannot override constitutional requirements with respect to parties outside the grand jury process.[3] A judicial order compelling a party to take an action, be it a mandatory injunction, writ of mandamus, or other similar form of compulsory relief has always been understood as an exercise of the Article III judicial power. *See, e.g.*, *Georgia v. Stanton*, 73 U.S. 50, 75–76 (1867) ("[I]n order to entitle the party to the [injunctive] remedy, a case must be presented appropriate for the exercise of judicial power."). A court may therefore issue compulsory orders only at the behest of a party with Article III standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized.").

The judicial power is particularly implicated when a court issues a compulsory order to the executive branch. *See Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 618 (1838) ("[T]he

[3] As discussed in greater depth below, the courts have a limited ability to issue compulsory process to aid and protect grand jury investigations as part of their traditional supervisory capacity. This limited non-Article III power has never extended to issuing compulsory orders for the benefit of third parties, such as the Committee, who are external to the grand jury process. *See infra* 13–19.

authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act, required by a law of the United States, is within the scope of the judicial powers of the United States."). A court may direct the executive branch only when exercising its Article III powers. As the Court held in *Schlesinger v. Reservists Committee to Stop the War*, a plaintiff must present more than "generalized grievances" to "seek to have the Judicial Branch compel the Executive Branch to act in conformity" with constitutional provisions. 418 U.S. 208, 217 (1974). The Court emphasized the interrelation of standing and separation of powers and explained that ruling on constitutional issues "in the abstract" would "open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id.* at 222.

The courts may interfere with the actions of a co-equal branch only when deciding a justiciable case or controversy. Consistent with these basic principles, during the course of these impeachment investigations, House Committees have not disputed that standing is required to enforce legislative subpoenas directed to the executive branch. Indeed, standing has been the key issue in recent congressional attempts to seek judicial enforcement of congressional subpoenas.[4]

B.

Despite these fundamental constitutional requirements, the Committee maintains it is "counterintuitive" to consider the requirements of Article III in the context of an application for grand jury materials because the district court may authorize

[4] *See McGahn*, 2020 WL 1125837; *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020); *Maloney v. Murphy*, No. 18-5305 (D.C. Cir. filed Aug. 14, 2019); *U.S. House of Reps. v. Mnuchin, et. al.*, No. 19-5176 (D.C. Cir. filed June 14, 2019).

disclosure under Rule 6(e) and the court's supervisory power over the grand jury exists separate and apart from Article III. Comm. Supp. Br. 8–9. Intuitions aside, nothing in the text or structure of Rule 6(e) permits district courts to *order* disclosure of grand jury materials when a party does not otherwise have standing for such relief. Nor does the district court's residual supervisory authority extend to issuing compulsory process to the executive branch on behalf of third parties, rather than on behalf of the grand jury. While courts exercise some limited non-Article III powers when supervising the grand jury, the grand jury context does not allow the courts to suspend Article III when compelling action by the executive branch.

1.

Rule 6(e) does not alter the separation of powers by permitting a court to order disclosure by the executive branch absent standing by a third party. The Federal Rules of Criminal Procedure have the force and effect of law, and as the Court has explained, we interpret Rule 6(e) the same way we would a statute: by looking first to "the Rule's plain language." *United States v. John Doe, Inc. I*, 481 U.S. 102, 109 (1987); *see also United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013). As in all cases of statutory interpretation, we must "accept [Rule 6(e)] as meaning what it says." *John Doe, Inc.*, 481 U.S. at 109 (quotation marks omitted). Under the plain text of Rule 6(e), a supervising court "may authorize disclosure" of grand jury materials under limited circumstances. FED. R. CRIM. P. 6(e)(3)(E).

Rule 6(e) codifies and reinforces the requirements of grand jury secrecy, subject only to certain enumerated exceptions. We have recently explained that the list of exceptions is exclusive and that the district court has no "inherent authority" to order disclosure outside of the circumstances provided for in

the Rule. *See McKeever v. Barr*, 920 F.3d 842, 846 (D.C. Cir. 2019), *cert. denied*, No. 19-307, 2020 WL 283746 (Jan. 21, 2020). Very few third parties will fit within these circumscribed exemptions, which do not include, for example, any provisions for Congress, members of the public, historians, or the media. As we have explained, "[t]he rule makes quite clear that disclosure of matters occurring before the grand jury is the exception and not the rule." *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 868 (D.C. Cir. 1981); *see also United States v. Rutherford*, 509 F.3d 791, 795 (6th Cir. 2007) (explaining that Rule 6(e)(2)(B) is a powerful "prohibitory rule that prevents the government from disclosing grand jury matters except in limited circumstances"). The Supreme Court has explained the Rule "ensure[s] the integrity of the grand jury's functions" by "placing strict controls on disclosure." *Williams*, 504 U.S. at 46 & n.6. The text of the Rule's "judicial proceeding" exception, which specifies a precise "*kind* of need that must be shown" to justify disclosure, "reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *Baggot*, 463 U.S. at 480.

The text and structure of Rule 6(e) demonstrate that it does not create any distinct authority for compulsory process against the executive branch. The fact that the court "may authorize disclosure" suggests that the court cannot release the materials itself. It may only authorize others to do so, presumably the government attorneys who by default "retain control" of the grand jury materials. FED. R. CRIM. P. 6(e)(1). The plain meaning of "authorize" is to "give official permission for" or to "approve" or "sanction," not to compel or require. *Authorize*, Oxford English Dictionary (3d ed. 2014); *see also Authorize*, Webster's New International Dictionary of the English Language (2d ed. 1941) ("To give authoritative permission to

or for; to empower; warrant."). Notably, the Rule does not confer any right to disclosure, but rather leaves disclosure to the discretion of the district court. *See infra* 31–34. Thus, under Rule 6(e), authorizing disclosure does not include compulsion, but rather refers to lifting grand jury secrecy so that the executive branch attorney may disclose the materials.

Moreover, the Rule confers substantial authority on the government attorneys, not only in serving as custodian over grand jury materials, but in many instances allowing government attorneys to disclose without court permission. *See* FED. R. CRIM. P. 6(e)(3)(A), (C), (D). Even for those disclosures that must be authorized by the court, three of the five circumstances require the request for disclosure to be made by the government. FED. R. CRIM. P. 6(e)(3)(E)(iii)–(v). When a person petitions for disclosure of a grand jury matter, notice must be given to an attorney for the government. FED. R. CRIM. P. 6(e)(3)(F).

The government attorneys and the district court together play a gatekeeping and supervisory role over grand jury materials. Both the prosecutor and the district court have an institutional relationship to the grand jury; yet the Rule does not change other constitutional arrangements between the courts and the Executive. Nothing in Rule 6(e) suggests that the court may compel government attorneys to disclose grand jury materials to third parties who do not meet Article III requirements. To the contrary, Rule 6(e) establishes a balance, requiring the agreement of both the courts and the government lawyers for disclosure in most instances.

The majority's position, however, entrusts grand jury secrecy exclusively to the courts—allowing the district court not only to authorize, but to compel release. Maj. Op. 26. By contrast, DOJ's position that impeachment does not fit within

the "judicial proceeding" exception would leave grand jury secrecy solely to the Executive in this political context. The grand jury, however, is not an appendage of any one branch. Rule 6(e) should not be read to upend longstanding principles of separation of powers, nor to create supremacy of either the courts or the executive branch over the grand jury. *See United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir. 1977) ("[G]iven the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their 'supervisory power' could readily prove subversive of the doctrine of separation of powers.").

2.

Rule 6(e) codifies some aspects of grand jury practice and secrecy but does not cover every aspect of the district court's supervisory power. Thus, whether a district court's non-Article III power extends to issuing a compulsory order to the executive branch for the benefit of third parties must also be considered against the historical background of the supervisory power. Even though our circuit does not recognize any "inherent" power in the district court over grand jury disclosure, *see McKeever*, 920 F.3d at 849, some supervisory powers exist alongside Rule 6(e). For example, because a grand jury does not have the power to compel witness testimony, it may rely on the supervising court to issue and enforce compulsory process to aid the grand jury's investigative function. *Seals*, 130 F.3d at 457. Additionally, a court has the power to protect the integrity of grand jury proceedings by issuing contempt sanctions to attorneys who violate grand jury secrecy. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059,

1070 (D.C. Cir. 1998). Even though such exercises of power by the district court go beyond the strictly administrative, they are closely connected to aiding the grand jury in the exercise of its core functions. Compulsory process ordered on behalf of and at the request of the grand jury is not an exercise of the Article III power, but instead part of the court's supervisory function over the grand jury. Judicial assistance in these limited circumstances requires no jurisdiction or standing by the grand jury—because the authority for such process inheres in the limited relationship between the grand jury and judiciary.

By contrast, third parties who seek grand jury information stand outside of the historic relationship between the grand jury and the court. As discussed below, there is no longstanding tradition of courts ordering disclosure of grand jury materials to third parties. *See infra* 33–35. When third parties seek the disclosure of such presumptively secret information, they cannot rely on the court's supervisory authority because such authority extends only to aiding the grand jury. For instance, we have drawn a sharp distinction between grand jury witnesses, who are part of the grand jury process, and third parties, who are not. *See In re Grand Jury*, 490 F.3d 978, 988 (D.C. Cir. 2007) ("Preventing a *third party* from reviewing a witness's grand jury testimony is essential to guarantee secrecy to witnesses; preventing *the witness* from reviewing the witness's own testimony is entirely unnecessary to guarantee secrecy to witnesses."); *United States v. Moussaoui*, 483 F.3d 220, 237 (4th Cir. 2007) ("We are certainly unaware of any long unquestioned power of federal district courts to order the Government to disclose non-public materials given to the defense in a criminal trial to third-party civil plaintiffs involved in litigation in another jurisdiction." (internal citation and quotation marks omitted)). Even the prosecutor, who may issue subpoenas on behalf of the grand jury, must ground his authority in the "grand jury investigation, not the prosecutor's

own inquiry" because "[f]ederal prosecutors have no authority to issue grand jury subpoenas independent of the grand jury." *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349–50 (D.C. Cir. 2005).

Only the grand jury and those who are part of the grand jury process—not a third party—may petition a court for compulsory process pursuant to the court's limited supervisory power.[5] The supervisory power of the district court exists to serve the functions of the grand jury, but the district court cannot use that power to evade the requirements of Article III or to expand judicial authority over the executive branch.[6] *See Chanen*, 549 F.2d at 1313 n.5 (admonishing against adopting a view of "judicial supervisory powers [over the grand jury] so broad in scope as to risk serious impairment of the constitutionally-based independence of the Executive, *i. e.*, the prosecutor, when acting within his own sphere").

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[5] The concurring opinion suggests this argument somehow prevents authorization of disclosure, Concurring Op. 3; however, Rule 6(e) specifically allows district courts to authorize disclosure by government attorneys. *See supra* Part I. By contrast, neither the Rule nor the traditional supervisory power suggest the court may compel disclosure by the executive branch, and the concurrence offers not a single case or example to support the principle that district courts may compel disclosure to a party that lacks standing.

[6] Furthermore, the available evidence suggests that the scope of the supervisory power prior to the adoption of Rule 6(e) was similarly limited. Courts allowed grand jury secrecy to be breached only in very limited circumstances, and there is no evidence of a tradition of third parties resorting to the courts to compel disclosure. *See generally* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 16–22 (1996).

C.

This is not the first time Congress has sought grand jury information in connection with an impeachment proceeding. The handful of historical examples demonstrate that Congress has received grand jury materials; however, courts have not compelled disclosure of materials from the executive branch. Since the enactment of Rule 6(e), courts analyzing congressional requests for grand jury materials have been careful to authorize rather than compel disclosure and have recognized the separation of powers concerns present in such cases.

For example, the Eleventh Circuit upheld an order authorizing disclosure to the House Judiciary Committee pursuant to the judicial proceeding exception during the impeachment of Judge Alcee Hastings. *See generally Hastings*, 833 F.2d 1438. Authorization was all that was necessary because DOJ "stated that it ha[d] 'no objection' to this disclosure to the Committee." *Id.* at 1441–42. Similarly, in 2007, the House Judiciary Committee petitioned for disclosure of grand jury materials relevant to its impeachment inquiry into the conduct of Judge Thomas Porteous. *See In re Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 09-mc-04346 (E.D. La. Aug. 6, 2009). The district court held that the Committee demonstrated a particularized need and authorized the Department to disclose the materials. *Id.* at *6. DOJ did not oppose the request, *id.* at *2, so no compulsory process was necessary.

Other courts have recognized that Congress should rely on legislative process to secure grand jury papers, even after authorization of disclosure. In *In re Grand Jury Investigation of Ven-Fuel*, a House Subcommittee Chairman moved for disclosure under Rule 6(e). 441 F. Supp. 1299 (M.D. Fla.

1977). Only after concluding the Chairman had standing,[7] the court determined that it would enforce the authorization of disclosure, but nonetheless "request[ed] that the Subcommittee issue *its own subpoena duces tecum* to the United States Attorney for the specific documents desired." *Id.* at 1307 (emphasis added) (internal citation omitted). The court stressed that the House should utilize the legislative process to enforce its legislative demand for documents from the executive branch. *Id.* at 1307–08. Respect for the political process counseled in favor of withdrawing the judiciary from such clashes to allow the political branches to rely upon their own processes to resolve disputes over grand jury materials.

Courts also considered congressional requests for grand jury records in impeachment proceedings prior to the adoption of Rule 6(e). Rule 6(e) gives possession of grand jury materials to government attorneys, but before Rule 6(e) possession of grand jury materials was not uniform—sometimes the records would be held by the district court and sometimes by the prosecutor. In the few recorded instances of congressional attempts to obtain grand jury materials prior to Rule 6(e), possession appears to have been the dispositive factor.[8] For

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[7] The district court relied on *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976), to support its determination regarding congressional standing. As we recognized in *McGahn*, *AT&T*'s standing holding is no longer tenable after *Raines*. *See* 2020 WL 1125837, at *11–12.

[8] The concurring opinion suggests, incorrectly, that the linchpin of my position is possession. Concurring Op. 1–2. Yet while the happenstance of physical possession appears to have been a critical factor prior to Rule 6(e)'s adoption, Rule 6(e)(1) now establishes the Executive as the designated custodian of grand jury materials. *See supra* 15–16. A court's power to utilize *in camera* review in connection with a Rule 6(e) application does not alter DOJ's duty to

example, during a 1945 impeachment inquiry into two judges, the House Judiciary Committee requested grand jury materials. The supervising district court directed its deputy clerk to testify before the Committee regarding the materials. *See, e.g.*, *Conduct of Albert W. Johnson and Albert L. Watson, U.S. Dist. Judges, Middle District of Pennsylvania: Hearing Before Subcomm. of the H. Comm. on the Judiciary*, 79th Cong. 62–65 (1946). While the majority classifies this as an example of "court-ordered disclosure," Maj. Op. 14, it fails to note that the direction was not to another branch, but simply to the court's deputy clerk. Because the district court possessed the grand jury records, disclosure did not require an exercise of Article III power, but merely an exercise of discretion to release papers within the court's control. By contrast, in a 1924 inquiry into two congressmen, the House failed to obtain grand jury materials that were in the possession of the Attorney General. 6 Cannon's Precedents of the House of Representatives of the United States § 402 ("Cannon's"); *see also* H.R. Rep. No. 68-282 (1924) (grand jury investigation of John W. Langley and Frederick N. Zihlman). The House does not appear to have considered petitioning the supervising court for an order compelling the Attorney General to turn over the materials.

Both before and after Rule 6(e), the federal courts have not utilized their limited supervisory authority to compel the

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maintain grand jury documents. Neither of the cases cited by the concurrence supports the claim that the mere availability of *in camera* review can be used as a backdoor for a court to compel disclosure over the objection of the Executive to a party that lacks standing. To the contrary, both cases involved voluntary compliance by the Executive. *See In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1221 (D.D.C. 1974), *aff'd*, *Haldeman v. Sirica*, 501 F.2d714 (D.C. Cir. 1974); *In re Sealed Case No. 98-3077*, 151 F.3d at 1068.

production of grand jury materials to Congress. The historical precedents cited by the Constitutional Accountability Center in its amicus brief are not to the contrary. Not one of the cited examples involved a court issuing an order to compel disclosure of grand jury materials to Congress. Rather, these precedents all involved, at most, only authorization to release grand jury materials.[9] Thus, whenever Congress has received

[9] The 1811 Toulmin precedent cited by CAC and the majority did not involve compulsory process, judicial involvement of any sort, or even secret grand jury materials. *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives § 2488 ("Hinds'"). The other historical instances CAC cites similarly did not involve compulsory judicial process. *See* 2 Hinds' § 1123; H.R. Rep. No. 57-1423 (1902) (contested election in which the House received a grand jury report without evidence of judicial involvement); 6 Cannon's § 74 (1921 contested election in which grand jury materials were made available to the Senate with no evidence of judicial involvement); *id.* § 399 (1924 Senate conduct inquiry in which a district judge disclosed "some of the[] names" of grand jury witnesses known to the judge but does not appear to have produced "minutes of the grand jury proceeding" or the "documentary evidence which had gone before the grand jury" in response to a subpoena); *Haldeman*, 501 F.2d at 715 ("We think it of significance that the President of the United States, who is described by all parties as the focus of the report and who presumably would have the greatest interest in its disposition, has interposed no objection to the District Court's action" in disclosing a grand jury report the district judge possessed); *Hastings*, 833 F.2d at 1441–42 ("[T]he Department of Justice has stated that it has 'no objection' to this disclosure to the Committee."); *In re Cisneros*, 426 F.3d 409, 412 (D.C. Cir. 2005) (noting the Independent Counsel is "not under the aegis of either the court or a grand jury" and granting his petition to disclose materials to Congress); *In re Grand Jury Investigation of Judge Porteous*, No. 09-mc-04346, at *6–7 ("[T]he Department of Justice is authorized to disclose to authorized personnel of the House of Representatives" grand jury materials related to the Porteous

grand jury materials in the past, it was with the cooperation of the entity that possessed the materials—either the supervising court, if the materials were within its custody, or the executive branch, which turned over the materials without being ordered by a court to do so.[10] The foregoing examples demonstrate that although courts have sometimes *authorized* disclosure to third parties pursuant to their supervisory authority or under the judicial proceeding exception of Rule 6(e), courts have not *compelled* disclosure to third parties over the objection of the executive branch.

* * *

Even in the grand jury context, we are obliged to ensure that a dispute is within our Article III authority. Nothing in Rule 6(e), the traditional supervisory power, or historical practice changes the relationship between the coordinate branches or the general rule that a court exercises the Article III judicial power when it issues compulsory process to the executive branch.

III.

Because a compulsory order to the executive branch in aid of Congress is an essential attribute of the Article III judicial power, the Committee must establish standing in order to

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investigation and "Department of Justice personnel may discuss" with the Committee "matters occurring before the grand jury.").

[10] The historical practice also casts doubt on DOJ's position that an impeachment cannot be a judicial proceeding. DOJ has previously consented to the release of materials for impeachment proceedings and specifically agreed that a "Senate impeachment trial qualifies as a 'judicial proceeding,' and that a House impeachment inquiry is 'preliminary to' the Senate trial." *Hastings*, 833 F.2d at 1440–41.

obtain judicial relief. This Part explains why the Committee lacks standing to seek compulsory process against the executive branch for the grand jury materials. First, in light of *Raines* and our court's recent decision in *McGahn*, the Committee would not have standing to seek judicial enforcement of its subpoena to DOJ. Because this case similarly presents a purely interbranch conflict, the Committee has no standing to seek a judicial order compelling DOJ to produce the same papers in the context of a Rule 6(e) proceeding. Second, although *McGahn* leaves open the possibility that legislative standing could be created by statute, Rule 6(e) creates no informational right to grand jury materials and the denial of such materials is not a judicially cognizable injury. Therefore, irrespective of whether a statute could establish congressional standing, Rule 6(e) does not. Finally, allowing standing in this context would run against historical practice and the limited role of the federal judiciary in our system of separated powers. *Raines*, 521 U.S. at 819 (standing requires the dispute to be "traditionally thought to be capable of resolution through the judicial process" (quotation marks omitted)).

A.

"[T]he law of [Article] III standing is built on a single basic idea—the idea of separation of powers." *Raines*, 521 U.S. at 820 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). The Article III judicial power extends only to cases and controversies, disputes that present concrete and particularized injuries to the rights of individuals. A rigorous standing analysis restricts courts to disputes traditionally within the judicial power. "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from

acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The Court often decides interbranch conflicts, but only when such conflicts implicate the rights of private parties. *See Raines*, 521 U.S. at 820. Conflicts between the executive branch and Congress are generally settled in the political back and forth, because each branch has the constitutional motives and means to defend its own powers and "resist encroachments of the others." The Federalist No. 51, at 268–69 (James Madison).

When Congress brings suit against the executive branch, we must be especially careful to ensure that the suit is properly within our jurisdiction. As we recently explained, "we lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the [Federal] Government.' Without such a harm, any dispute remains an intramural disagreement about the 'operations of government' that we lack power to resolve." *McGahn*, 2020 WL 1125837, at *3 (quoting *Raines*, 521 U.S. at 834 (Souter, J., concurring in the judgment)). In *McGahn*, we held that the Committee lacks standing to "invoke the jurisdiction of the federal courts to enforce its subpoena" for the testimony of former Counsel to the President Donald McGahn. *Id.* at *7. *McGahn* made clear that generalized disputes between Congress and the Executive are not justiciable because standing in interbranch disputes is at odds with the constitutional separation of powers, the nature of the judicial power, and historical practice. *Id.*[11]

[11] As *McGahn* recognized, "we may adjudicate cases concerning congressional subpoenas that implicate the rights of private parties." 2020 WL 1125837, at *16 (citing *Mazars*, 940 F.3d at 723). In *Trump v. Mazars*, the House Oversight Committee's subpoena was directed to the President's private accounting firm. Although the subpoena raised separation of powers concerns and was intertwined with the

The framework in *McGahn* governs the standing inquiry in the case before us. To begin with, the Committee would not have standing to enforce its April subpoena for the grand jury materials—a legislative subpoena against the executive branch must be enforced through legislative process. The fact that the Committee here seeks to use the courts to compel production of the same materials under the aegis of Rule 6(e) does not alter the standing analysis. The Committee asserts that its "continued lack of access to the material is a quintessential informational injury sufficient to confer standing." Comm. Supp. Br. 5. The nature of the interbranch dispute and the relevant constitutional bar in this case is indistinguishable from *McGahn*: In both cases the Committee seeks to invoke the compulsory powers of the federal judiciary in an informational dispute with the executive branch; however, the Committee's alleged "informational injury" is insufficient to confer standing because federal courts lack constitutional power to issue an

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"official actions of the Chief Executive," *Mazars*, 940 F.3d at 752 (Rao, J., dissenting), it nonetheless involved private parties. When determining standing, we focus on the identity of the parties rather than the issues they seek to adjudicate. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Unlike *Mazars*, this case presents a purely interbranch dispute between the House and the Executive, over which this court lacks jurisdiction. Moreover, this case arises in relation to a formal impeachment inquiry and trial, which raises concerns regarding justiciability. *See Raines*, 521 U.S. at 829 (no standing for suits that are "contrary to historical experience"); *(Walter) Nixon*, 506 U.S. 224, 234 (1993) ("[T]he Judiciary … were not chosen to have any role in impeachments."). These concerns were not present in *Mazars*. *See* 940 F.3d at 779 n.20 (Rao, J., dissenting) ("[T]he Committee has not relied on the impeachment power for this subpoena …. Congress, the Executive, and the courts have maintained that requests under the legislative and impeachment powers may be treated differently.").

injunction in a dispute between Congress and the Executive when no individual rights are at stake. *See McGahn*, 2020 WL 1125837, at *3 ("[T]he Committee's dispute with the Executive Branch is unfit for judicial resolution because it has no bearing on the 'rights of individuals.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803))).

The majority insists that this case "is unlike other inter-branch disputes" and distinguishable from *McGahn* because the grand jury is an "appendage of the court" and the Department of Justice is "simply the custodian of the grand jury materials." Maj. Op. 9, 26. The majority further maintains that "it is the district court, not the Executive or the Department, that controls access to … grand jury materials." *Id.* at 10. These sweeping claims cannot be squared with Rule 6(e), our cases, and the history of the grand jury.

The text and structure of Rule 6 make clear that the district court and the executive branch share responsibility for maintaining grand jury secrecy and for overseeing appropriate disclosures. As discussed above, government attorneys have authority to disclose in some circumstances without court approval; in other circumstances, the government attorney must approve the disclosure. *See, e.g.*, FED. R. CRIM P. 6(e)(3)(A)–(D), (E)(iii)–(v). In *McKeever*, we explained that the district court cannot release grand jury records on its own initiative because "Rule 6 assumes the records are in the custody of the Government, not that of the court" and the district court may authorize disclosure by an "attorney for the government." 920 F.3d at 848 (citing FED. R. CRIM. P. 6(e)(1)). The majority's contrary position relies in part on the reasoning of other circuits that have concluded grand jury records are "court records" over which the district court can exercise "inherent authority" because the grand jury is part of the judicial process. Maj. Op. 9 (citing cases). Yet we have recently

stated it is "not at all clear" that grand jury records are "judicial records" and noted that this court has rejected that conclusion in other contexts. *McKeever*, 920 F.3d at 848. Grand jury documents, like the grand jury itself, belong neither to the executive branch nor to the courts.

Contrary to the majority's classification of the grand jury as part of the judiciary, the Supreme Court has explained that the grand jury's "institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length." *Williams*, 504 U.S. at 47. The Court has also recognized the important relationship between the prosecutor and the grand jury. *See, e.g.*, *Sells Eng'g*, 463 U.S. at 430 ("[A] modern grand jury would be much less effective without the assistance of the prosecutor's office…. [The grand jury] depends largely on the prosecutor's office to secure the evidence or witnesses it requires."). Government attorneys have strong institutional reasons for protecting grand jury secrecy in relation to ongoing and future prosecutions.

Thus, although the grand jury relies on both court and prosecutor for the exercise of its functions, it is an "appendage" of neither. The grand jury exists apart from all three branches. *See Williams*, 504 U.S. at 47 ("[The grand jury] has not been textually assigned, therefore, to any of the branches described in the first three Articles. It 'is a constitutional fixture in its own right.'" (quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973))); *Chanen*, 549 F.2d at 1312 ("[T]he functions of the grand jury are intimately related to the functions of court and prosecutor …. But … the grand jury is not and should not be captive to any of the three branches." (internal citations omitted)). A district court may supervise the grand jury, but such supervision does not change the division of power between the court and the political branches.

Because this case is fundamentally an interbranch dispute, the House may seek judicial process against the executive branch only if it can demonstrate Article III standing. The Committee's claim must fit within the increasingly narrow exceptions for congressional standing. Here, the Committee asserts no individual harm to a lawmaker's personal interests. *Cf. Powell v. McCormack*, 395 U.S. 486 (1969) (finding a justiciable case or controversy for elected Member of Congress to sue for wrongful exclusion from Congress, which deprived him of salary and seat). The Committee here is "an institutional plaintiff" representing the House of Representatives. Comm. Supp. Br. 11 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015)); *see also* H.R. Res. 430, 116th Cong. (2019) (authorizing House Judiciary Committee "to petition for disclosure of" the grand jury materials at issue "pursuant to Federal Rule of Criminal Procedure 6(e)"). Although the Court has suggested some limited standing for state legislatures raising institutional interests, *McGahn* forecloses institutional standing for Congress in suits against the executive branch. *See* 2020 WL 1125837, at *3–8. *McGahn*, however, leaves open the question of whether a "statute authorizing a suit like the Committee's would be constitutional." *Id.* at *15. It is doubtful whether this question in fact remains open after *Raines*, where the Court noted "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." 521 U.S. at 820 n.3. Nonetheless, this remains the only possible path for the Committee's standing in this case. Assuming a statute might be able to create standing in an interbranch dispute, I analyze whether Rule 6(e) creates a legally cognizable injury sufficient to sustain the Committee's standing.

B.

Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Yet as the Court recently explained, a plaintiff must *always* demonstrate that it has suffered a sufficiently "concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Thus, the mere fact that "a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right," "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement." *Id.* We have since elaborated on the Court's holding in *Spokeo*, explaining that "[f]or a statutory violation to constitute an injury in fact, then, the statute must protect the plaintiff's concrete interest—*i.e.*, afford the putative plaintiff a right to be free of a harm capable of satisfying Article III." *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064 (D.C. Cir. 2019).

The Committee maintains that it has standing because Rule 6(e) "authorizes court-ordered disclosures" when grand jury material is sought preliminary to a judicial proceeding, and the House is therefore "entitled to the material under the Rule." Comm. Supp. Br. 5. Contrary to the House's assertions, however, Rule 6(e) does not create an entitlement to invoke the courts' aid in compelling production of grand jury information. *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959) (Rule 6(e) does not confer upon an applicant "a 'right' to the delivery to it of the witness' grand jury testimony"); *see also In re Fed. Grand Jury Proceedings*, 760 F.2d 436, 439 (2d Cir. 1985) (explaining that there "is no 'absolute right' to … grand jury testimony" under the judicial proceeding exception). Rather, Rule 6(e) starts from the premise that "disclosure of matters occurring before the grand

jury is the exception and not the rule," and then proceeds to "set[] forth in precise terms to whom, under what circumstances and on what conditions grand jury information *may* be disclosed." *McKeever*, 920 F.3d at 844 (emphasis added) (citation and quotation marks omitted).

The decision to authorize the release of grand jury materials in connection with a judicial proceeding is thus committed to the sound discretion of the supervising court, which "may" authorize disclosure "at a time, in a manner, and subject to any other conditions that it directs." FED. R. CRIM. P. 6(e)(3)(E). Even then, disclosure is appropriate only if the court first concludes that "the party seeking material covered by the exception ha[s] made a sufficiently strong showing of need to warrant disclosure." *McKeever*, 920 F.3d at 846.

Rule 6(e) is thus unlike other statutes and regulations that *require* the disclosure of certain categories of information, such as the Freedom of Information Act. *See* 5 U.S.C. § 552 (providing that agencies "shall make available" to the public various categories of records and information); *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 617–18 (D.C. Cir. 2006) (noting that under FOIA "[t]he requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive"). The Committee's attempt to analogize Rule 6(e) to such statutes is misguided. Each of the cases cited by the Committee to support its theory of informational injury-in-fact involved claims that a plaintiff was denied access to information in violation of an express statutory or regulatory mandate to disclose the information at issue. For example, the Federal Election Campaign Act of 1971 required that political committees make certain information public, and so an alleged failure to disclose such information would constitute a judicially cognizable injury. *See FEC v. Akins*, 524 U.S. 11, 21 (1998). Similarly, the Federal Advisory

Committee Act, 5 U.S.C. App. 2 § 10, requires release of information pertaining to certain committees advising the executive branch. The Court held that a deprivation of such information constituted an injury sufficient to confer standing. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989). Because these statutes created affirmative disclosure obligations, a plaintiff could establish an Article III injury by alleging a refusal to provide the required information.[12]

By contrast, Rule 6(e)(3) creates no such injury because it does not afford *any* concrete right. Rather, the Rule is purely permissive, providing that the district court "may authorize disclosure" of grand jury materials. The existence of an enumerated exception to grand jury secrecy under Rule 6(e)(3) is only the starting point. After determining an exception applies, a supervising court must determine, in its discretion, whether disclosure of the grand jury materials may be warranted under the circumstances and whether the applicant has demonstrated a "particularized need" for the materials. *See, e.g.*, *Sells Eng'g*, 463 U.S. at 442–43. Even this permissive standard refers only to authorization of disclosure, not to disclosure itself. Moreover, the Court has never held that Rule 6(e)(3) creates a private right of action for a third party to obtain injunctive relief. *See Pittsburgh Plate Glass*, 360 U.S. at 399. Although Rule 6(e)(3) allows the court to remove the

[12] The Committee's attempt to analogize Rule 6(e) to statutes like FOIA fails for an additional reason. Although Rule 6(e) "ha[s] the force of law," Comm. Supp. Br. 6–7 (quoting *Deaver v. Seymour*, 822 F.2d 66, 70 n.9 (D.C. Cir. 1987)), under the Rules Enabling Act, a federal rule of criminal procedure cannot vest any substantive right to information. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."); *see also Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) ("[I]t is axiomatic" that rules promulgated pursuant to the Rules Enabling Act "do not create or withdraw federal jurisdiction.").

shield of grand jury secrecy through authorization, a third party must look elsewhere for a right of action to compel disclosure. *See Rutherford*, 509 F.3d at 793 ("[Rule] 6(e)(3)(E)(i), pertaining to the disclosure of grand jury documents, cannot be used to mandate such release.").

It is instructive that we have held other parts of Rule 6(e) can be enforced by third parties through a private right of action. For example, a third party has a "very limited" private right of action to enforce Rule 6(e)(2)'s secrecy requirement by seeking "injunctive relief or civil contempt of court through the district court supervising the grand jury." *In re Sealed Case No. 98-3077*, 151 F.3d at 1070 (quotation marks omitted). Rule 6(e)(2) uses the mandatory language "must not disclose," which courts have interpreted as vesting a private right that may be judicially redressable. Rule 6(e)(3), unlike Rule 6(e)(2), does not provide a legal entitlement to compel production of grand jury materials.[13] Thus, a third party such as the Committee that seeks a court order to compel production must demonstrate an independent legal right to such materials[14]

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[13] Other statutes demonstrate that Congress knows how to vest district courts with the power to compel production of grand jury materials. For example, the Jencks Act provides that the government may be ordered to produce grand jury witness statements. 18 U.S.C. § 3500(b). The Act also provides remedies if the government fails to comply with a court's disclosure order. 18 U.S.C. § 3500(d).

[14] Legal rights to grand jury materials have been found in different contexts. *See, e.g.*, *Gibson v. United States*, 403 F.2d 166 (D.C. Cir. 1968) (criminal defendant asserting constitutional rights, such as the need to obtain potentially exculpatory evidence in a pending criminal trial); *Dennis v. United States*, 384 U.S. 855, 869–70 (1966) (criminal discovery); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557 (1983) (Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b)); *United States v. Procter & Gamble*, 356 U.S. 677 (1958) (civil plaintiff's discovery rights). Our sister circuits have prevented

or possess a judicial device for compelling the materials, such as a subpoena. *See Rutherford*, 509 F.3d. at 795 ("[Rule 6(e)] does not authorize third parties to obtain grand jury materials from the government against the government's objections without a proper device for compelling the documents, such as a subpoena duces tecum.").

In sum, Rule 6(e) fails to create a legally cognizable informational right, the denial of which might constitute an injury sufficient to support congressional standing. I therefore need not opine on the broader question left open by *McGahn* regarding whether a statute can confer such standing in the first place.

C.

In addition to conflicting with *McGahn* and the text of Rule 6(e)(3), the Committee's "attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Raines*, 521 U.S. at 829. This type of interbranch dispute is not one "traditionally thought to be capable of resolution through the judicial process." *Allen*, 468 U.S. at 752 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). The fact that Congress seeks grand jury materials does not erase the constitutional boundaries between the judiciary and Congress with respect to impeachment, nor does it displace the separate

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parties from using Rule 6(e)(3) to compel disclosure absent a legal right. For example, in *Moussaoui*, the Fourth Circuit rejected an attempt to use Rule 6(e) to "compel the Government to disclose non-public documents to crime victims involved in a civil action in a different jurisdiction." 483 F.3d at 230; *see also California v. B.F. Goodrich Co.*, 619 F.2d 798, 801 (9th Cir. 1980) (after authorizing disclosure, adding that "[t]he Attorney General need not disclose the materials if he objects to their disclosure").

legislative processes that Congress has for obtaining information.

The Committee initially sought authorization of disclosure for the Mueller grand jury materials preliminary to an impeachment proceeding. Yet impeachment is a separate process that occurs in the House and the Senate, without the interference or involvement of the courts. Parallel to the ordinary criminal process, the Constitution vests the power of impeachment and power to try all impeachments solely in the House and Senate respectively. U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 6. The Constitution carefully separates the criminal process in the courts from the impeachment process in Congress. *See* U.S. CONST. art. I, § 3, cl. 7 ("[T]he Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); The Federalist No. 65, at 340 (Alexander Hamilton). As the Supreme Court has explained, "the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments." *(Walter) Nixon*, 506 U.S. at 234.

The text and structure of the Constitution's provisions regarding the impeachment power confirm the separation of the courts from this process. The "risks from overlapping powers reach their apogee in a presidential impeachment trial." *(Walter) Nixon v. United States*, 938 F.2d 239, 242–43 (D.C. Cir. 1991), *aff'd*, 506 U.S. 224. Thus, courts should not interfere with the exercise of the impeachment powers, and the House does not have a positive constitutional right to assistance from the other branches in the exercise of its sole power of impeachment. *See (Walter) Nixon*, 506 U.S. at 231 (interpreting the word "sole" to exclude any judicial "assistance or interference" in an impeachment proceeding (citation omitted)). The House must look to its own powers or

those of the court of impeachments, the Senate, for compulsory aid in an impeachment investigation.

History confirms that both Congress and the courts have maintained the separation between impeachment and the judicial process. In the only three previous presidential impeachment investigations, as well as other impeachments, the House has never resorted to the courts to compel materials from the executive branch. As in *Raines*, "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." 521 U.S. at 826; *see also McGahn*, 2020 WL 1125837, at *6 ("Neither interbranch disputes (in general) nor interbranch information disputes (in particular) have traditionally been resolved by federal courts.").

During the impeachment investigation of President Nixon, the House Judiciary Committee recognized that seeking judicial assistance would likely weaken the authority of the House as well as exceed the judicial power of the courts. In its impeachment report, the Committee held that "it would be inappropriate to seek the aid of the courts to enforce its subpoenas against the President" because it would undermine "the constitutional provision vesting the power of impeachment solely in the House of Representatives." H.R. Rep. No. 93-1305, at 210 (1974) (noting also the "express denial by the Framers of the Constitution of any role for the courts in the impeachment process"). The Committee was concerned that judicial involvement would undermine its powers because "the court would necessarily have to determine whether the subpoenaed material was reasonably relevant to the inquiry." *Id.* at 212. The Committee also raised concerns that the courts would not have "adequate means" to enforce a congressional subpoena because the only viable remedy for the

President's noncompliance would be impeachment, which "would ultimately be adjudicated in the Senate." *Id.* The House agreed and, in line with this position, did not seek court orders to obtain grand jury materials. Instead, it received most Watergate grand jury materials by order of the President and on the petition of the Watergate grand jury, without objection from the executive branch. *See* Letter from Peter W. Rodino, Jr., Chairman, House Judiciary Committee, to John J. Sirica, U.S. District Judge (Mar. 8, 1974); *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. at 1221.

Similarly, during the impeachment of President Clinton, the House Judiciary Committee never resorted to the courts to compel production from the executive branch and instead relied on the addition of an article of impeachment alleging insufficient responses from the President to numerous interrogatories issued by the Committee. *See generally* H.R. Rep. No. 105-830 (1998). Moreover, neither the Judiciary Committee in the impeachment inquiry nor the Senate Whitewater Committee resorted to the courts to receive grand jury materials. *See* S. Rep. No. 104-191, at 9 (1995) ("[G]rand jury secrecy restrictions forbid the Committee's participation in discussions over subpoenas to the White House."). To the extent the Judiciary Committee received grand jury materials, it was not through a Rule 6(e)(3) application filed by the Committee. Rather, a member of the executive branch, the Independent Counsel, disclosed the materials to Congress pursuant to the Ethics in Government Act, 28 U.S.C. § 595(c), after receiving Rule 6(e) authorization from the Special Division of this court. *See* H.R. Rep. No. 105-795, at 32 (1998).

The impeachment of Andrew Johnson also conforms to this understanding. The "tedious job of taking testimony and

searching through documents" was conducted solely by the House, with no mention of judicial involvement. Michael Les Benedict, "The Impeachment of President Andrew Johnson, 1867–68" *in* Congress Investigates at 263–64; *cf*. *Mississippi*, 71 U.S. at 501 (noting it would be a "strange spectacle" for the Court to attempt to "restrain by injunction the Senate of the United States from sitting as a court of impeachment").

These historical precedents further reinforce the availability and effectiveness of legislative process to enforce informational requests. "Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers." *McGahn*, 2020 WL 1125837, at *5. The ultimate form of accountability for the President is an article of impeachment. Impeachment is a power the House must exercise pursuant to its own processes and standards, and self-help is always available.

Moreover, when sitting as a court of impeachment, the Senate may issue the same compulsory process and orders as any other court. It may issue warrants, summons, and subpoenas, and even arrest and hold individuals who fail to comply. Indeed, the Senate Rules provide that the Senate, not the courts, makes determinations regarding relevancy and compulsory process. *See* S. Res. 479, 99th Cong. (1986), *reprinted in* Senate Manual § 176, 113th Cong. (2014).[15]

[15] During the impeachment trial of President Clinton, Chief Justice Rehnquist noted that a deposition could be taken only under the Senate's authority because "a deposition is an adjunct to a court proceeding, and it is only from the court that the authority to compel attendance of witnesses and administer oaths is derived." Letter from

Although the Committee now seeks to reassign the Senate's authority to the judiciary, this court has observed that the Article III courts must apply the same principles of comity and abstention to the Senate sitting as "the constitutionally-designated court of impeachment" as it would to any other "coordinate federal court." *Hastings*, 887 F.2d 332, 1989 WL 122685, at *1; *see also id.* ("[W]e have not found any case in which the judiciary has issued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch."). We should decline to issue compulsory process in an impeachment trial committed to the "sole" discretion of the Senate.

* * *

Congress has historically relied upon its own constitutional powers to enforce subpoenas and informational requests against the executive branch. *See McGahn*, 2020 WL 1125837, at *7 ("Principles and practice thus agree: The Committee may not invoke the jurisdiction of the federal courts to enforce its subpoena."). "[P]olitical struggle and compromise" is the Constitution's chosen method to resolve interbranch disputes. *Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1984) (Bork, J., dissenting). With respect to grand jury records in the possession of the executive branch, no less than other disputes, the Committee must demonstrate Article III standing. Here, the Committee can point to no statutory entitlement to this information and the judicial relief it seeks is contrary to historical practice and the separation of powers. Accordingly, the Committee lacks standing to request a court order compelling DOJ to disclose the grand jury materials.

William Rehnquist, Chief Justice of the United States, to Tom Harkin, United States Senator (Jan. 25, 1999).

IV.

Fundamental principles of separation of powers and the relation of the grand jury to the three branches necessarily lead to the conclusion that the Committee cannot fight this interbranch dispute through the courts. Although it is well established that a court exercises the Article III judicial power when issuing a compulsory order to the executive branch, the fact that the Committee here seeks grand jury materials has obscured the ordinary justiciability requirements. When pursuing an impeachment investigation, the Committee may petition for authorization of disclosure under the "judicial proceeding" exception in Rule 6(e)(3). Nothing in the Rule, however, allows the district court to compel the executive branch to disclose grand jury materials to a party that lacks standing. The district court's supervisory power over the grand jury cannot expand judicial authority over the executive branch.

The majority refuses to consider the first and most fundamental question presented in every case—namely whether we have the power to decide it. Although the majority and concurrence refer in the abstract to the supervisory power, they cite not a single case in which a court has ordered the executive branch to release grand jury materials to a party without standing. Our duty to ensure that we have jurisdiction cannot be brushed aside by the expedient agreement of the executive branch and the House to support the Committee's standing. "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Steel Co.*, 523 U.S. at 94 (quotation marks omitted). Acquiescence by the political branches cannot erase constitutional boundaries. *See, e.g.*, *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*,

561 U.S. 477, 497 (2010) ("[T]he separation of powers does not depend on … whether 'the encroached-upon branch approves the encroachment.'" (quoting *New York v. United States*, 505 U.S. 144, 182 (1992))); *Clinton v. New York*, 524 U.S. 417, 447 (1998) (support from both political branches for the Line Item Veto Act could not override the "finely wrought procedure commanded by the Constitution" (quotation marks omitted)); *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.").

In a similar vein, the courts should not defer to the political branches with respect to protecting the integrity of the Article III judicial power. Inevitably, there will be times when institutional interests lead Congress or the Executive to seek out the courts to resolve messy political matters. In this case, the House repeatedly asserted that it should be treated as would "every other litigant" seeking grand jury materials under Rule 6(e). Comm. Br. 51–52; *see also* Comm. Supp. Br. 12. The House chose to press its standing in the third branch, rather than rely on the full and awesome powers of the first.[16] Similarly, the Department of Justice here only selectively invokes Article

[16] By contrast, during the Nixon impeachment, the House Judiciary Committee resisted resort to the courts to enforce impeachment related process because judicial involvement in impeachment matters would be inappropriate, and moreover, would weaken Congress as an institution. *See* H.R. Rep. No. 93-1305, at 210–12 (1974); *see also* Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 893 (1975) ("[P]ossibly the Committee was reluctant to surrender a jot of its paramountcy in conducting an impeachment investigation; and it did have an ultimate sanction—to add an article for contempt of the House by refusal to comply with its subpoena. Presidential infringements on the prerogatives of the House are impeachable.").

III to press for its institutional self-interest. *See* DOJ Supp. Br. 3–6. The Constitution gives the Executive and Congress the constitutional means and motives to pursue the interests of their respective departments. In purely interbranch disputes, however, those constitutional means do not include judicial review.

Moreover, the grand jury context does not alter the justiciability requirements of Article III. The role of the courts in our system of separated powers is to preserve *individual* rather than *institutional* rights. *See Marbury*, 5 U.S. (1 Cranch) at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); *McGahn*, 2020 WL 1125837, at *3 ("[T]he Committee's dispute with the Executive Branch is unfit for judicial resolution because it has no bearing on the 'rights of individuals.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 170)); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983). The Article III judicial power does not include the "amorphous general supervision of the operations of government." *Raines*, 521 U.S. at 829 (citation and quotation marks omitted). Our Article III courts are confined to the less flashy but nonetheless vital "species of contest which is termed a lawsuit." *Barnes*, 759 F.2d at 52 (Bork, J., dissenting) (quoting 1 A. De Tocqueville, Democracy in America 106–07 (T. Bradley ed. 1945)); *cf. Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) ("These limitations [on standing] preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature. This concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party.").

In our constitutional democracy, most decisions are left to the people and their representatives. The courts play an essential role in saying what the law is, but they are not all-purpose umpires, available to referee any dispute between the other branches. Unless presented with a proper case or controversy, the courts do not advise or review the acts of the coordinate branches or the disputes that may arise between them. As discussed above, these separation of powers concerns are at their height in the impeachment context. The courts should have no part of assisting or interfering with impeachment proceedings. *See (Walter) Nixon*, 506 U.S. at 233–34. Institutional disputes between the executive branch and Congress often pertain to political arrangements and are fought under political standards, wholly outside the purview of the courts.

Furthermore, maintaining careful control over jurisdictional boundaries is one of the primary mechanisms of self-defense for the judiciary, because it avoids entangling unelected judges in the political sparring of the day. *See McGahn*, 2020 WL 1125837, at *4 ("Interbranch disputes are deeply political and often quite partisan…. By restricting the role of the judiciary, Article III preserves the 'public confidence' in the federal courts." (quoting *Valley Forge Christian Coll.*, 454 U.S. at 474)). The political branches seek judicial resolution of their interbranch dispute today, yet may tomorrow find the courts an inconvenient interference. If courts enter the business of resolving interbranch disputes, the branch losing the judicial contest has every incentive to discredit the motive and means employed by the judiciary—charges against which the judiciary has few protections when it has decided a case outside the boundaries of the judicial power. Moreover, a judicial decision in these disputes may allow the political branches to escape accountability for making their case to the American people and instead deflect responsibility to the

courts. That was not the system designed by our Framers. If the court picks sides in a political dispute, we not only compromise the boundaries of our own power, but also weaken the political accountability of the other branches.

Any doubt regarding the unsuitability of the courts for this interbranch dispute should be put to rest in the circumstances of this case. The Senate trial of President Trump concluded more than a month before publication of this opinion. Even when acting on an expedited basis, courts cannot move with the alacrity and speed of the political process. And indeed, that process has moved on without our decisions. The flurry of supplemental filings recounting the litigating positions of the President and the House in the impeachment trial, and arguing that such positions should affect our decisionmaking, demonstrates the practical impediments to judicial resolution of these issues.[17] In addition to the constitutional limits of the judicial power, the very structure of the judiciary reinforces that impeachments and related interbranch information disputes are not the business of the courts.

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[17] *See, e.g.*, Letter from Douglas N. Letter, General Counsel, U.S. House of Representatives, to Mark Langer, Clerk of the Court, U.S. Court of Appeals for the D.C. Circuit (Jan. 23, 2020) ("[O]ne of President Trump's defenses in the impeachment is that the House should have gone to court to obtain the information he withheld."); Letter from Mark R. Freeman, Department of Justice, to Mark Langer, Clerk of the Court, U.S. Court of Appeals for the D.C. Circuit (Jan. 28, 2020) ("The extensive, ongoing debate in the Senate over what evidence the Senate should or should not consider in the trial underscores the oddity of the Committee's view.").

* * *

The grand jury context does not eliminate the limits on the judicial power essential to the Constitution's separation of powers. Because I conclude that the House lacks standing to seek compulsory process against the executive branch in this context, I would vacate the part of the district court's order directing DOJ to disclose the grand jury materials. On the question of authorization, in light of changed circumstances, I would remand to the district court to evaluate in the first instance whether the Committee can demonstrate that it continues to have a "particularized need" for these grand jury materials "preliminarily to" impeachment proceedings. For the foregoing reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS	Grand Jury Action No. 19-48 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION GRANTING THE APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

Table of Contents

In March 2019, Special Counsel Robert S. Mueller III ended his 22-month investigation and issued a two-volume report summarizing his investigative findings and declining either to exonerate the President from having committed a crime or to decide that he did. *See generally* Special Counsel Robert S. Mueller, III, U.S. Dep't of Justice, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* ("Mueller Report") (Mar. 2019), ECF Nos. 20-8, 20-9. The Special Counsel explained that bringing federal criminal charges against the President would "potentially preempt constitutional processes for addressing presidential misconduct." *Id*. at II-1. With this statement, the Special Counsel signaled his view that Congress, as the federal branch of government tasked with presidential impeachment duty under the U.S. Constitution, was the appropriate body to resume where the Special Counsel left off.

The Speaker of the House of Representatives has announced an official impeachment inquiry, and the House Judiciary Committee ("HJC"), in exercising Congress's "sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5, is reviewing the evidence set out in the Mueller Report. As part of this due diligence, HJC is gathering and assessing all relevant evidence, but one critical subset of information is currently off limits to HJC: information in and underlying the Mueller Report that was presented to a grand jury and withheld from Congress by the Attorney General.

The Department of Justice ("DOJ") claims that existing law bars disclosure to the Congress of grand jury information. *See* DOJ's Resp. to App. of HJC for an Order Authorizing Release of Certain Grand Jury Materials ("DOJ Resp."), ECF No. 20. DOJ is wrong. In carrying out the weighty constitutional duty of determining whether impeachment of the President is warranted, Congress need not redo the nearly two years of effort spent on the Special Counsel's investigation, nor risk being misled by witnesses, who may have provided information

to the grand jury and the Special Counsel that varies from what they tell HJC. As explained in more detail below, HJC's application for an order authorizing the release to HJC of certain grand jury materials related to the Special Counsel investigation is granted. *See* HJC's App. for an Order Authorizing the Release of Certain Grand Jury Materials ("HJC App."), ECF No. 1.

I. BACKGROUND

What follows begins with a brief review of the initiation of the Special Counsel's investigation, the key findings in the Mueller Report and the grand jury secrecy redactions embedded therein, as well as the significant gaps in the Special Counsel's investigation that contributed to the Special Counsel assessment that "[t]he evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgement." Mueller Report at II-8.[1] Next reviewed is Congress's response to the release of the public redacted version of the Mueller Report and ensuing—and ultimately unsuccessful—negotiations with DOJ to obtain the full Report and related investigative materials, leading HJC to file the instant application, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

A. The Special Counsel's Investigation

On May 17, 2017, then-Deputy Attorney General ("DAG") Rod J. Rosenstein appointed Robert S. Mueller III to serve as Special Counsel for DOJ "to investigate Russian interference with the 2016 presidential election and related matters." U.S. Dep't of Justice, Office of the Deputy Attorney General, Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters ("Appointment

[1] As noted, the Mueller Report is in two volumes, with each volume re-starting the page numbering. Thus, citations to this report use a nomenclature indicating the page number in either Volume I or Volume II.

Order") (May 17, 2017) (capitalization altered).[2] Prior to the Special Counsel's appointment, the Federal Bureau of Investigation ("FBI") had already initiated "an investigation into whether individuals associated with the Trump Campaign [had] coordinat[ed] with the Russian government" to interfere in the 2016 presidential election. Mueller Report at I-1. The order authorizing the Special Counsel's appointment thus had the effect of transferring the ongoing FBI investigation to his office. *See* Appointment Order ¶ b (authorizing the Special Counsel "to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before [Congress] on March 20, 2017"). The Special Counsel was also granted "jurisdiction to investigate matters that arose directly from the FBI's Russia investigation, including whether the President had obstructed justice in connection with Russia-related investigations" and "potentially obstructive acts related to the Special Counsel's investigation itself." Mueller Report at II-1. Pursuant to this grant of authority—and upon receiving evidence "relating to potential issues of obstruction of justice involving the President"—the Special Counsel "determined that there was a sufficient factual and legal basis to further investigate . . . the President." *Id.* at II-12.

In compliance with the DOJ regulations authorizing his appointment, upon completion of his investigation the Special Counsel issued a confidential report to the Attorney General "explaining the prosecution or declination decisions [he] reached." *Id*. at I-1 (quoting 28 C.F.R § 600.8(c)). That Report laid out the Special Counsel's findings in two volumes, totaling 448 pages. Both HJC and DOJ point to the contents of the Report as highly relevant to resolving the

[2] Then-Attorney General Jeff Sessions had recused himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States," Press Release, U.S. Dep't of Justice, Attorney General Sessions Statement of Recusal (Mar. 2, 2017), making the Deputy Attorney General the "Acting Attorney General, by operation of law" as to such matters, *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 621 (D.D.C. 2018), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019).

current legal dispute. Indeed, DOJ submitted the public redacted version of the Mueller Report as exhibits to support its arguments. *See* DOJ's Resp., Exs. 8 (Volume I), 9 (Volume II), ECF Nos. 20-8, 20-9. Therefore, a recounting of some of the key events chronicled in and conclusions (or lack thereof) reached by the Special Counsel in the Mueller Report is in order.

Volume I of the Mueller Report "describe[s] the factual results of the Special Counsel's investigation of Russia's interference in the 2016 presidential election." Mueller Report at I-2. The Special Counsel concluded that "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion," "principally through two operations." *Id*. at I-1. "First, a Russian entity carried out a social media campaign that favored presidential candidate Donald J. Trump and disparaged presidential candidate Hillary Clinton. Second, a Russian intelligence service conducted computer-intrusion operations against entities, employees, and volunteers working on the Clinton Campaign and then released stolen documents." *Id.* Russia hacked and stole "hundreds of thousands of documents," *id.* at I-4, from the Democratic National Committee, the Democratic Campaign Committee, and the Clinton Campaign, and then disseminated those documents through fictitious online personas and through the website WikiLeaks in order to influence the outcome of the 2016 presidential election. *Id.* at I-4, 38, 41, 48, 58.

Volume I of the Mueller Report also details evidence of "links between the Russian government and individuals associated with the Trump [2016 Presidential] Campaign." *Id.* at I-2–3. According to the Special Counsel, "the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts," and the links between the Russian government and the Trump Campaign were "numerous." *Id.* at I-1–2. For instance, a meeting occurred on June 9, 2016 at Trump Tower in New York City, between a Russian

lawyer and senior Trump Campaign officials Donald Trump Jr., Jared Kushner, and then-campaign manager Paul Manafort, triggered by information provided to those campaign officials that the Russian lawyer would deliver "official documents and information that would incriminate Hillary [Clinton]." *Id.* at I-6 (internal quotation marks omitted). Additionally, the Mueller Report documents connections between Ukraine and Manafort, who had previously "work[ed] for a pro-Russian regime in Ukraine." *Id.* at I-129. Among other things, the Special Counsel determined that "during the campaign" Manafort—through "Rick Gates, his deputy on the Campaign"—"periodically sent" internal Trump Campaign "polling data" to Konstantin Kilimnik, Manafort's long-time business associate in Ukraine with alleged ties to Russian intelligence, with the expectation that Kilimnik would "share that information with others in Ukraine." *Id.* The Mueller Report further recounts evidence suggesting that then-candidate Trump may have received advance information about Russia's interference activities, stating:

> Manafort, for his part, told the Office that, shortly after WikiLeaks's July 22 release, Manafort also spoke with candidate Trump **[redacted]**. Manafort also **[redacted]** wanted to be kept apprised of any developments with WikiLeaks and separately told Gates to keep in touch **[redacted]** about future WikiLeaks releases.
>
> According to Gates, by the late summer of 2016, the Trump campaign was planning a press strategy, a communications campaign, and messaging based on the possible release of Clinton emails by WikiLeaks. **[Redacted]** while Trump and Gates were driving to LaGuardia Airport. **[Redacted]**, shortly after the call candidate Trump told Gates that more releases of damaging information would be coming.

Id. at I-53–54 (footnotes omitted) (redactions in original, with citation in referenced footnote 206 redacted due to grand jury secrecy).

The public version of Volume I contains over 240 redactions on the basis of grand jury secrecy.[3] These redactions occur in parts of the Mueller Report that include discussion of the Trump Tower Meeting, then-candidate Trump's discussion with associates about releases of hacked documents, and Manafort's contacts with Kilimnik. *See id.* at I-54 & n.206, 111–12, 117, 120, 136–37, 140, 143.

Volume II of the Mueller Report summarizes the "obstruction investigation," which "focused on a series of actions by the President that related to the Russian-interference investigations, including the President's conduct towards the law enforcement officials overseeing the investigations and the witnesses to relevant events." *Id.* at II-3 (capitalization altered). The Special Counsel determined that "the President of the United States took a variety of actions towards the ongoing [Russia-related investigations] . . . that raised questions about whether he had obstructed justice." *Id.* at II-1. For example, in the summer of 2017 after news reports about the Trump Tower Meeting, President Trump "directed aides not to publicly disclose the emails setting up the June 9 meeting" and "edited a press statement for Trump Jr.," eliminating the portion "that acknowledged that the meeting was with 'an individual who [Trump Jr.] was told might have information helpful to the campaign,'" even while President Trump's personal attorney "repeatedly denied the President had played any role" in Trump Jr.'s statement. *Id.* at II-5 (alteration in original).

In another instance involving potential witness tampering, the Mueller Report examined the events leading to former Trump Organization executive and attorney Michael Cohen

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[3] Redactions in the Mueller Report were not applied by the Special Counsel's Office but "by Department of Justice attorneys working closely together with attorneys from the Special Counsel's Office, as well as with the intelligence community, and prosecutors who are handling ongoing cases." William P. Barr, Attorney General, Department of Justice, Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election (Apr. 18, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian.

providing false testimony to Congress, in 2017, about a deal to build a Trump Tower in Moscow, Russia. *Id.* at II-6. While Cohen was preparing to give that false testimony the President's personal counsel told Cohen, according to Cohen, that "Cohen should 'stay on message' and not contradict the President." *Id.* Then, in April 2018, after Cohen became the subject of a criminal investigation and the FBI had searched Cohen's home and office, the President stated publicly "that Cohen would not 'flip'" and "contacted [Cohen] directly to tell him to 'stay strong,'" at the same time that President Trump's personal counsel "discussed pardons" with Cohen. *Id.*

As DOJ points out, DOJ Resp. at 32 n.19, the public version of Volume II contains some, but far fewer, redactions on the basis of grand jury secrecy than does the public version of Volume I.[4] Again, the Mueller Report recounts an incident when then-candidate Trump spoke to associates indicating that he may have had advance knowledge of damaging leaks of documents illegally obtained through hacks by the Russians, stating "shortly after WikiLeaks's July 22, 2016 release of hacked documents, [Manafort] spoke to Trump **[redacted]**; Manafort recalled that Trump responded that Manafort should **[redacted]** keep Trump updated. Deputy campaign

[4] The reason for the fewer grand jury–related redactions in Volume II addressing "questions about whether [the President] had obstructed justice," Mueller Report at II-1, becomes clear upon analysis. The introduction to this part of the Mueller Report provides assurances that "we conducted a thorough factual investigation in order to preserve the evidence when memories were fresh and documentary materials were available." *Id*. at II-2. As the Mueller Report highlights, "a President does not have immunity after he leaves office," and, quoting DOJ policy, the Report further observes that "an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment." *Id*. at II-1 & n.4 (quoting *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 255 (2000) [hereinafter *OLC Op.*]). Yet, some individuals whose actions figure prominently in incidents described in Volume II were never compelled to testify under oath before the grand jury to preserve their testimony. For example, several witnesses, who simply declined to speak to the Special Counsel, as is their right, were not pursued with the tools available to prosecutors to gather material evidence in a criminal investigation. Certain consequences flow from these prosecutorial choices—other than the obvious fact that the grand jury was given no opportunity to consider this evidence—namely: the testimony of these individuals is not formally preserved but also any statements or documentary evidence that was obtained from these individuals is not protected by grand jury secrecy. *See In re Application of the Committee on the Judiciary*, No. 19-gj-48, 2019 WL 5268929, at *1 (Oct. 17, 2019) (ordering DOJ to unseal improperly redacted portion of declaration pertaining to "identities of individuals who did not testify before the grand jury"); DOJ's' Notice of Compliance with Ord. of Oct. 17, 2019 ("DOJ Notice"), Ex. 10, Decl. of Associate Deputy Attorney General ("ADAG") Bradley Weinsheimer ¶ 4 ("Revised ADAG Decl."), ECF No. 44-1 (revealing that "Don McGahn did not testify before the grand jury" and "Donald Trump, Jr. also did not testify before the grand jury").

manager Rick Gates said that . . . Manafort instructed Gates **[redacted]** status updates on upcoming releases. Around the same time, Gates was with Trump on a trip to an airport **[redacted]**, and shortly after the call ended, Trump told Gates that more releases of damaging information would be coming." *Id.* at II-18 (footnotes omitted) (redactions in original, with citation in footnote 27 redacted due to grand jury secrecy). In addition, a discussion related to the Trump Tower Meeting contains two grand jury redactions: "On July 12, 2017, the Special Counsel's Office **[redacted]** Trump Jr. **[redacted]** related to the June 9 meeting and those who attended the June 9 meeting." *Id.* at II-105 (redactions in original).

The Mueller Report acknowledges investigative "gaps" that were sufficiently significant that the Special Counsel could not "rule out the possibility that the unavailable information would shed additional light on (or cast in a new light) the events described in the report." *Id*. at I-10. Six "identified gaps" were that: (1) "[s]ome individuals invoked their Fifth Amendment right against compelled self-incrimination and were not, in the Office's judgment, appropriate candidates for grants of immunity"; (2) "[s]ome of the information obtained . . . was presumptively covered by legal privilege and was screened from investigators"; (3) "other witnesses and information—such as information known to attorneys or individuals claiming to be members of the media"—were not pursued "in light of internal Department of Justice policies"; (4) "practical limits" prevented the gathering of information and questioning of witnesses abroad; (5) "[e]ven when individuals testified or agreed to be interviewed, they sometimes provided information that was false or incomplete"; and (6) "some of the individuals we interviewed or whose conduct we investigated—including some associated with the Trump Campaign—deleted relevant communications or communicated during the relevant period using applications that feature encryption or that do not provide for long-term retention of data or

communications records." *Id.* Consequently, the Mueller Report cautions that "[a] statement that the investigation did not establish particular facts does not mean there was no evidence of those facts." *Id.* at I-2.

The Report acknowledges that these gaps adversely affected the investigation and, in some instances, precluded the Special Counsel from reaching any conclusion about whether criminal conduct occurred. For example, evidence related to the President's knowledge about his personal attorney's involvement in the preparation of Cohen's false testimony to Congress was not pursued. The Mueller Report states that "[t]he President's personal counsel declined to provide us with his account of his conversations with Cohen," and "we did not seek to obtain the contents of any . . . communications" between President Trump and his attorney during that time period. *Id.* at II-154. "The absence of evidence about the President and his counsel's conversations about the drafting of Cohen's statement precludes us from assessing what, if any, role the President played." *Id.* In another example, the Special Counsel examined the circumstances of a meeting held, during the transition, on January 11, 2017, on the Seychelles Islands between Kirill Dmitriev, the chief executive officer of Russia's sovereign wealth fund, and Erik Prince, a businessman with close ties to Trump Campaign associates, including senior Trump advisor Steve Bannon. *See id*. at I-7, 148. Prince said he discussed the meeting with Bannon in January 2017, but Bannon denied this, and "[t]he conflicting accounts . . . could not be independently clarified . . . because neither [Prince nor Bannon] was able to produce any of the [text] messages they exchanged in the time period surrounding the Seychelles meeting." *Id.* at I-156. "Prince's phone contained no text messages prior to March 2017" and "Bannon's devices similarly contained no messages in the relevant time period," and neither Prince nor

Bannon could account for the absent messages. *Id.*; *see also id.* at I-153–55 (extensive grand jury redactions).[5]

Some areas of the report describing such gaps contain redactions of grand jury material. For example, in describing the Trump Tower Meeting, the Mueller Report states: "The Office spoke to every participant [at the Trump Tower Meeting] except [Natalia] Veselnitskaya and Trump, Jr., the latter of whom declined to be voluntarily interviewed by the Office," with the remainder of the sentence redacted for grand jury secrecy. *Id.* at I-117. The Special Counsel declined to pursue charges related to this meeting in part because "the Office did not obtain admissible evidence likely to meet the government's burden to prove beyond a reasonable doubt that these individuals acted 'willfully.'" *Id.* at I-186.[6]

The Mueller Report also reveals the Special Counsel's unsuccessful effort to speak directly with the President: "We also sought a voluntary interview with the President. After more than a year of discussion, the President declined to be interviewed," which statement is followed by two lines redacted for references to grand jury material. *Id*. at II-13. Although "the President did agree to answer written questions on certain Russia-related topics, and he provided us with answers," the President refused "to provide written answers to questions on obstruction topics or questions on events during the transition." *Id*. The Special Counsel acknowledged "that we had the authority and legal justification to issue a grand jury subpoena to obtain the

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[5] Both Prince and Bannon testified before congressional committees. *See Testimony of Erik Prince Before the H. Permanent Select Comm. on Intelligence*, 115th Cong. (Nov. 30, 2017), https://docs.house.gov/meetings/IG/IG00/20171130/106661/HHRG-115-IG00-Transcript-20171130.pdf; H. PERMANENT SELECT COMM. ON INTELLIGENCE, 115TH CONG., SCOPE OF INVESTIGATION, MINORITY VIEWS at 11 (MARCH 26, 2018), https://perma.cc/D9HE-AFUH (reporting on Steve Bannon's testimony).

[6] Another example involves a July 2016 trip to Moscow by Carter Page, then a Trump Campaign official, who gave a speech in Moscow and represented in emails to other Campaign officials that he also spoke with Russian government officials. Mueller Report at I-96, I-98, I-101. Yet, "[t]he Office was unable to obtain additional evidence or testimony about who Page may have met or communicated with in Moscow; thus, Page's activities in Russia . . . were not fully explained." *Id.* at I-101. This same paragraph reporting this gap in the evidence contains redacted references to grand jury material. *See id*.

President's testimony," but "chose not to do so." *Id.*; *see also* Mueller Report App'x C (describing efforts to interview the President in greater detail). When the Special Counsel testified before Congress on July 24, 2019, he acknowledged that the President's written responses to questions posed by the Special Counsel's Office were "generally" not only "inadequate and incomplete," but also "showed that he wasn't always being truthful." HJC App., Ex. W, *Former Special Counsel Robert S. Mueller, III on the Investigation into Russian Interference in the 2016 Presidential Election: Hearing before the H. Permanent Select Comm. on Intelligence*, 116th Cong. 83 (July 24, 2019), ECF No. 1-24.

The Special Counsel's investigation "did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." Mueller Report at I-2. Nor did the Special Counsel "make a traditional prosecutorial judgment" or otherwise "draw ultimate conclusions about the President's conduct." *Id*. at II-8. At the same time, the Special Counsel stated that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state." *Id.* at II-2. "[W]hile this report does not conclude that the President committed a crime, it also does not exonerate him." *Id.; see also id.* at II-8, II-182 (reiterating that Report "does not exonerate" President). "Given the role of the Special Counsel as an attorney in the Department of Justice and the framework of the Special Counsel regulations," the Special Counsel "accepted" the DOJ Office of Legal Counsel's ("OLC") legal conclusion that "'the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions' in violation of 'the constitutional separation of powers.'" *Id.* at II-1 (citation omitted) (quoting *OLC Op.* at

222, 260). This OLC legal conclusion has never been adopted, sanctioned, or in any way approved by a court.

At the same time, impeachment factored into this analysis, as the Special Counsel also concluded "that Congress may apply the obstruction laws to the President's corrupt exercise of the powers of office [which] accords with our constitutional system of checks and balances and the principle that no person is above the law." *Id*. at II-8.

B. Release of the Mueller Report

On March 22, 2019, Attorney General ("AG") William Barr, as required by 28 C.F.R. § 600.9(a)(3), notified the Chairmen and Ranking Members of the United States House and Senate Judiciary Committees, via a one-page letter, that the Special Counsel had completed his investigation. DOJ Resp., Ex. 1, Letter from William P. Barr, Attorney Gen., Dep't of Justice, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, et al. (Mar. 22, 2019), ECF No. 20-1. AG Barr stated that he "intend[ed] to consult with Deputy Attorney General Rosenstein and Special Counsel Mueller to determine what other information from the report [could] be released to Congress and the public consistent with the law," and that he "remain[ed] committed to as much transparency as possible." *Id.* Two days later, on March 24, 2019, AG Barr sent a second, four-page letter to the Chairmen and Ranking Members of the United States House and Senate Judiciary Committees, advising them "of the principal conclusions reached by Special Counsel Robert S. Mueller III," and reiterating his "intent . . . to release as much of the Special Counsel's report as [possible] consistent with applicable law," noting that he first needed to identify information "subject to Federal Rule of Criminal Procedure 6(e)," as well as "information that could impact other ongoing matters." DOJ Resp., Ex. 2, Letter from William P. Barr, Attorney

Gen., Dep't of Justice, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, et al. 1, 4 (Mar. 24, 2019), ECF No. 20-2.[7]

The next day, March 25, 2019, the chairpersons of six House committees ("House Committee Chairpersons")—including HJC Chairman Jerrold Nadler—responded to AG Barr in a three-page letter. *See* HJC App., Ex. C, Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, et al., to William P. Barr, Attorney Gen., Dep't of Justice (Mar. 25, 2019), ECF No. 1-4. Highlighting that each of their committees was "engaged in oversight activities that go directly to the President's conduct, his attempts to interfere with federal and congressional investigations, his relationships and communications with the Russian government and other foreign powers, and/or other alleged instances of misconduct," the House Committee Chairpersons "formally request[ed]" that AG Barr "release the Special Counsel's full report to Congress" and "begin transmitting the underlying evidence and materials to the relevant committees." *Id.* at 1. This information, they explained, was necessary "to perform their duties under the Constitution," such as their duty to "make an independent assessment of the evidence regarding obstruction of justice." *Id.* at 1, 2.[8]

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[7] In his summary of the Mueller Report's "principal conclusions," AG Barr stated that "[t]he Special Counsel's investigation did not find that the Trump campaign or anyone associated with it conspired or coordinated with Russia in its efforts to influence the 2016 U.S. presidential election," Letter from William P. Barr to Lindsey Graham, et al., *supra*, at 2 (Mar. 24, 2019), and that "[t]he Special Counsel . . . did not draw a conclusion—one way or the other—as to" whether the "actions by the President . . . that the Special Counsel investigated" "constituted obstruction," *id.* at 3. AG Barr determined that "[t]he Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions" left it to him as the Attorney General "to determine whether the conduct described in the report constitutes a crime," and he "concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense." *Id.*

[8] On February 22, 2019—before the Mueller Report was submitted to AG Barr but when media reporting suggested that the Special Counsel investigation was nearing its end—the House Committee Chairpersons had submitted a similar request to AG Barr, noting that "because the Department has taken the position that a sitting President is immune from indictment and prosecution, Congress could be the only institution currently situated to act on evidence of the President's misconduct." HJC App., Ex. B, Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, et al., to William P. Barr, Attorney Gen., Dep't of Justice 2 (Feb. 22, 2019), ECF No. 1-3 (footnote omitted).

Four days later, on March 29, 2019, AG Barr responded to both the House Committee Chairpersons' letter and a letter sent by Senate Judiciary Committee ("SJC") Chairman Lindsey Graham. *See* DOJ Resp., Ex. 3, Letter from William P. Barr, Attorney Gen., Dep't of Justice, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, and Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Mar. 29, 2019), ECF No. 20-3. AG Barr reaffirmed that he was preparing the Report for release, again noting that redactions would be required to protect material that was subject to grand jury secrecy under Rule 6(e) and that could compromise sensitive sources and methods, as well as to protect information that could pose harm to other ongoing matters or was related to the privacy and reputations of third parties. *Id.* at 1.

The House Committee Chairpersons objected to AG Barr's proposed redactions. *See* HJC App., Ex. D, Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, et al., to William P. Barr, Attorney Gen, Dep't of Justice (Apr. 1, 2019), ECF No. 1-5. They observed that "[t]he allegations at the center of Special Counsel Mueller's investigation strike at the core of our democracy," such that "Congress urgently needs his full, unredacted report and its underlying evidence in order to fulfill its constitutional role." *Id.* at 2; *see also id.* App'x at 1 (stating that Congress has an "independent duty to investigate misconduct by the President"). As to grand jury material, the House Committee Chairpersons proposed that DOJ "seek leave from the district court to produce those materials to Congress—as it has done in analogous situations in the past," *id.* at 2, explaining that the material was needed because "[HJC] is engaged in an ongoing investigation of whether the President has undermined the rule of law, including by compromising the integrity of the Justice Department," *id*. App'x at 2.

On April 18, 2019, AG Barr released the Mueller Report in redacted form to the Congress and the public. *See* DOJ Resp., Ex. 4, Letter from William P. Barr, Attorney Gen.,

Dep't of Justice, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, et al. (Apr. 18, 2019), ECF No. 20-4. AG Barr also promised to "make available" to SJC Chairman Graham, HJC Ranking Member Dianne Feinstein, HJC Chairman Nadler, and HJC Ranking Member Collins "a version of the report with all redactions removed except those relating to grand-jury information." *Id.* at 4.

Not satisfied with the redacted version of the Mueller Report, the next day HJC served a subpoena on AG Barr requiring the production of three classes of documents: (1) "[t]he complete and unredacted version of the [Mueller Report]," including attachments; (2) "[a]ll documents referenced in the Report"; and (3) "[a]ll documents obtained and investigative materials created by the Special Counsel's office." HJC App., Ex. G, Subpoena by Authority of the H. of Representatives to William P. Barr, Attorney Gen., Dep't of Justice 3 (Apr. 19, 2019), ECF No. 1-8.

DOJ has granted HJC access to "the entirety of Volume II, with only grand jury redactions" and did "the same with regard to Volume I" for "the Chairman and Ranking Member from [HJC]." DOJ Resp. at 6 n.2. DOJ has not, however, allowed HJC to review the portions of the Mueller Report redacted pursuant to Rule 6(e). *See, e.g.*, HJC App., Ex. K, Letter from Stephen E. Boyd, Assistant Attorney Gen., Dep't of Justice, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary 4 (May 1, 2019), ECF No. 1-12 (stating that "Rule 6(e) contains no exception that would permit the Department to provide grand-jury information to the Committee in connection with its oversight role").

C. The Instant Proceeding

On July 26, 2019, HJC submitted the instant application for an order pursuant to Federal Rule of Criminal Procedure 6(e) authorizing the release to HJC of certain grand jury materials

related to the Special Counsel's investigation. HJC App. HJC requests the release to it of three categories of material:

> 1. all portions of [the Mueller Report] that were redacted pursuant to Federal Rule of Criminal Procedure 6(e);
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> 2. any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and
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> 3. transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to (A) President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election; (B) President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts; (C) President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or (D) actions taken by former White House Counsel Donald F. McGahn II during the campaign, the transition, or McGahn's period of service as White House Counsel."

Id. at 1–2.

After entry of a scheduling order in accord with the dates proposed by the parties, *see* Min. Ord. (July 31, 2019), DOJ filed its response to HJC's application on September 13, 2019, maintaining that Rule 6(e) prohibits disclosure of the requested material to HJC, *see* DOJ Resp., and HJC filed its reply on September 30, 2019, *see* HJC's Reply in Support of its App. for an Order Authorizing the Release of Certain Grand Jury Materials ("HJC Reply"), ECF No. 33.[9] Following a hearing on October 8, 2019, the parties provided supplemental submissions to

[9] On August 30, 2019, the Constitutional Accountability Center submitted an amicus brief in support of HJC's application, *see* Br. of Constitutional Accountability Ctr. as *Amicus Curiae* in Support of HJC, ECF No. 16-1, and, on October 3, 2019, Representative Doug Collins, HJC's Ranking Member, submitted an amicus brief urging denial of HJC's application, *see* Mem. Amicus Curiae of Ranking Member Doug Collins in Support of Denial ("Collins Mem."), ECF No. 35.

address additional issues not covered by the initial briefing. *See* Min. Ord. (October 8, 2019).[10] This matter is now ripe for resolution.

II. LEGAL STANDARD

Under Rule 6(e) of the Federal Rules of Criminal Procedure, disclosure of "a matter occurring before the grand jury" is generally prohibited. FED. R. CRIM. P. 6(e)(2)(B). While witnesses are expressly exempted from any "obligation of secrecy," *id*. 6(e)(2)(A), the Rule provides a list of seven categories of persons privy to grand jury proceedings who must keep secret "[i]nformation . . . presented to the grand jury," *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 1002 (D.C. Cir. 1999) (per curiam), including grand jurors, interpreters, court reporters, operators of recording devices, persons who transcribe recorded testimony, attorneys for the government, and certain other persons to whom authorized disclosure is made, FED. R. CRIM. P. 6(e)(2)(B)(i)–(vii).[11]

Rule 6(e) also sets out exceptions to grand jury secrecy, some of which allow disclosure without any judicial involvement and others of which require either judicial notice or a court order. *See* FED. R. CRIM. P. 6(e)(3)(A)–(E).[12] The D.C. Circuit recently held, in *McKeever v.*

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[10] As part of this supplemental briefing, DOJ was directed to provide its reasoning for redacting from public view, as grand jury material, portions of a declaration submitted by DOJ in support of its position that HJC's application should be denied. *See* Min. Order (Oct. 8, 2019). This Court determined that the declaration had been improperly redacted and ordered DOJ to correct its error. *In re Application of the Committee on the Judiciary*, 2019 WL 5268929. DOJ complied with that order on October 20, 2019. *See* DOJ Notice.

[11] The definition of "a matter occurring before the grand jury" can also encompass information "that would 'tend to reveal some secret aspect of the grand jury's investigation, including" the "strategy" or future "direction of the investigation,'" *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 73 (D.C. Cir. 2018) (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)), but the D.C. Circuit has "cautioned . . . about 'the problematic nature of applying so broad a definition,'" *see In re Sealed Case No. 99-3091*, 192 F.3d at 1001 (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1071 n.12 (D.C. Cir. 1998) (per curiam)).

[12] For instance, under Rules 6(e)(3)(A)(ii) and 6(e)(3)(D), the government may disclose grand jury material in certain circumstances without a court order but must provide notice of disclosure to the court that impaneled the grand jury. *See* FED. R. CRIM. P. 6(e)(3)(B), (D)(ii). In March 2016, this Court instituted a system for docketing such notices received in this District, and since that time the government has submitted 783 notice letters. *See In re Grand Jury Disclosures*, 16-gj-1 (D.D.C. 2016) (184 notices); *In re Grand Jury Disclosures*, 17-gj-1 (D.D.C. 2017) (83 notices); *In re Grand Jury Disclosures*, 18-gj-1 (D.D.C. 2018) (244 notices); *In re Grand Jury Disclosures*, 19-gj-1 (D.D.C. 2019) (272 notices). This number undercounts the actual number of disclosures, given that a single notice often advises that grand jury information has been shared with multiple persons and entities. Among these

Barr, 920 F.3d 842 (D.C. Cir. 2019), *reh'g denied*, Order, No. 17-5149 (D.C. Cir. July 22, 2019), *docketing petition for cert.*, No. 19-307 (U.S. Sept. 5, 2019), that the "text of the Rule" prevents disclosure of a "'matter appearing [sic] before the grand jury'" "'unless these rules provide otherwise.'" *Id.* at 848 (quoting incorrectly FED. R. CRIM. P. 6(e)(2)(B)).[13] In the D.C. Circuit's binding view, "deviations from the detailed list of exceptions in Rule 6(e) are not permitted," *id.* at 846, and thus a "district court has no authority outside Rule 6(e) to disclose grand jury matter," *id*. at 850.[14]

III. DISCUSSION

HJC is "not requesting the entire grand jury record" of the Special Counsel's investigation. HJC Reply at 24.[15] Instead, HJC seeks only disclosure of the grand jury

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notices were sixteen instances when grand jury information was revealed to foreign governments. DOJ has represented that "[n]o grand jury information collected from the Mueller investigation and protected from disclosure was shared with any foreign government pursuant to Rule 6(e)(3)(D)." DOJ's Supplemental Submission in Resp. to Min. Ord. of Oct. 8, 2019 ("DOJ Second Supp.") at 2, ECF No. 40.

[13] The D.C. Circuit's narrow textual reading of Rule 6(e) is based on the subsection in the Rule that secrecy is required "[u]nless *these rules* provide otherwise." FED. R. CRIM. P. 6(e)(2)(B) (emphasis added). Yet, this subsection is difficult to reconcile with other statutory authorities that either require or permit disclosure of grand jury matter in civil forfeiture, financial regulatory, special–grand jury, and criminal defense contexts. *See, e.g.,* 18 U.S.C. § 3322(a) (allowing disclosure of grand jury information to "an attorney for the government . . . for use in connection with any civil forfeiture provision of federal law"); *id.* §§ 3322(a), (b)(1)(A) (authorizing disclosure of grand jury information to "an attorney for the government for use in enforcing section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989" and to federal and state financial institution regulatory agencies "for use in relation to any matter within the jurisdiction of such regulatory agency" when the relevant grand jury was investigating "a banking law violation"); *id.* §§ 3333(a), (b) (permitting special grand juries to provide reports that the impaneling court may make public); *id.* §§ 3500(b), (e)(3) (requiring disclosure to criminal defendant of certain grand jury testimony of trial witnesses).

[14] The D.C. Circuit in *McKeever* rejected the view articulated by this Court and several Circuit Courts of Appeals that courts have inherent authority to disclose grand jury material. *See, e.g.*, *In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 324 (D.D.C. 2018) (Howell, C.J.), *appeal docketed*, No. 18-5142 (D.C. Cir. May 17, 2018); *In re Petition of Kutler*, 800 F. Supp. 2d 42, 47 (D.D.C. 2011) (Lamberth, C.J.); *see also Carlson v. United States*, 837 F.3d 753, 766–67 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *Pitch v. United States*, 915 F.3d 704, 707 (11th Cir. 2019), *rehearing en banc ordered and opinion vacated*, 925 F.3d 1224 (11th Cir. 2019). HJC acknowledges this, conceding that "*McKeever* currently forecloses the Committee from prevailing before this Court on [an inherent-authority] argument," but nonetheless raises inherent authority as a basis for disclosure to "preserve[] its argument" "[i]n the event *McKeever* is subject to further review." HJC App. at 40.

[15] The entire grand jury record would be extensive since the Special Counsel's investigation involved the execution of "nearly 500 search-and-seizure warrants," issuance of "more than 230 orders for communications records under 18 U.S.C. § 2703(d)," "almost 50 orders authorizing use of pen registers," "13 requests to foreign governments pursuant to Mutual Legal Assistance Treaties," and "more than 2,800 subpoenas under the auspices of

information referenced in or underlying the Mueller Report as well as grand jury information collected by the Special Counsel relating to four categories of information pursuant to Rule 6(e)'s exception for disclosure "preliminarily to or in connection with a judicial proceeding." HJC App. at 26 (internal quotation marks omitted) (quoting FED. R. CRIM. P. 6(e)(3)(E)(i)). Disclosure of grand jury information is proper under this exception when three requirements are satisfied. The person seeking disclosure must first identify a relevant "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i); then, second, establish that the requested disclosure is "preliminarily to" or "in connection with" that proceeding; and, finally, show a "particularized need" for the requested grand jury materials. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 443 (1983) ("Rule 6(e)(3)([E])(i) simply authorizes a court to order disclosure 'preliminarily to or in connection with a judicial proceeding.' . . . We have consistently construed the Rule, however, to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted."); *United States v. Baggot*, 463 U.S. 476, 480 (1983) (explaining that the "preliminarily to or in connection with a judicial proceeding" and the "particularized need" requirements "are independent prerequisites to ([E])(i) disclosure" (internal quotation marks omitted)).

As discussed more fully below, HJC has identified the requisite "judicial proceeding" to be a possible Senate impeachment trial, which is an exercise of judicial power the Constitution assigned to the Senate. *See* U.S. CONST. art. I, § 3, cl. 6. HJC has demonstrated that its current investigation is "preliminarily to" a Senate impeachment trial, as measured—per binding Supreme Court and D.C. Circuit precedent—by the "primary purpose" of HJC's requested disclosure to determine whether to recommend articles of impeachment against the President.

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a grand jury sitting in the District of Columbia," and interviews of "approximately 500 witnesses," "almost 80" of whom "testified before a grand jury." Mueller Report at I-13.

This purpose has only been confirmed by developments occurring since HJC initially submitted its application. Finally, HJC has further shown a "particularized need" for the requested grand jury materials that outweighs any interest in continued secrecy. *See Douglas Oil Co. of Ca. v. Petrol Stops Nw.*, 441 U.S. 211, 222–23 (1979). The need for continued secrecy is reduced, given that the Special Counsel's grand jury investigation has ended, and is easily outweighed by HJC's compelling need for the grand jury material referenced and cited in the Mueller Report to conduct a fulsome inquiry, based on all relevant facts, into potentially impeachable conduct by the President.

The three requirements for disclosure under Rule 6(e)(3)(E)(i) are addressed *seriatim*.

A. Rule 6(e)'s "Judicial Proceeding" Requirement is Satisfied Because an Impeachment Trial is Such a Proceeding

HJC posits that an impeachment trial before the Senate is a "judicial proceeding," and that Rule 6(e)'s "judicial proceeding" requirement is thus satisfied. HJC App. at 28.[16] DOJ, for its part, rejects the proposition that any congressional proceeding may qualify as a "judicial proceeding." DOJ Resp. at 13 ("The plain meaning of 'judicial proceeding' does not include congressional proceedings.") (capitalization altered). This dispute thus presents the threshold issue of whether an impeachment trial in the Senate is a "judicial proceeding" under Rule 6(e). Consideration of this issue requires an understanding of (1) what the drafters of Rule 6(e) meant

[16] An impeachment inquiry in the House may itself constitute a judicial proceeding. *See, e.g.*, *Marshall v. Gordon*, 243 U.S. 521, 547 (1917) (characterizing instances when a "committee contemplat[es] impeachment" as times that congressional power is "transformed into judicial authority"); *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 191 (1880) (explaining that the House "exercises the judicial power . . . of preferring articles of impeachment"); *Trump v. Mazars USA*, *LLP*, No. 19-5142, 2019 WL 5089748, at *27 (D.C. Cir. Oct. 11, 2019) (Rao, J., dissenting) (explaining that the House's "power to investigate pursuant to impeachment . . . has always been understood as a limited judicial power"). HJC's primary contention, however, is not that a House impeachment inquiry is a judicial proceeding, but that HJC's current inquiry satisfies Rule 6(e) because that inquiry is "'preliminar[y] to' an impeachment trial." HJC App. at 29 (alteration in original). As explained *infra* in Part III.B., HJC's "preliminarily to" argument succeeds, and, consequently, whether a House impeachment inquiry constitutes a "judicial proceeding" within the meaning of Rule 6(e) need not be addressed.

by "judicial proceeding," and (2) the precise nature of an impeachment trial. Both considerations are informed by history and, contrary to DOJ's position, point to the same conclusion: an impeachment trial is, in fact, a "judicial proceeding" under Rule 6(e), as binding D.C. Circuit precedent correctly dictates.

1. The Term "Judicial Proceeding" in Rule 6(e) Has a Broad Meaning

In the Rule 6(e) context, "[t]he term judicial proceeding has been given a broad interpretation by the courts." *In re Sealed Motion*, 880 F.2d 1367, 1379 (D.C. Cir. 1989) (per curiam). The D.C. Circuit has indicated that "judicial proceeding" might "include[] every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasi judicial powers." *Id.* at 1380 (quoting *Jones v. City of Greensboro*, 277 S.E.2d 562, 571 (N.C. 1981), *overruled in part on other grounds by Fowler v. Valencourt*, 435 S.E.2d 530 (N.C. 1993)); *see also In re North*, 16 F.3d 1234, 1244 (D.C. Cir. 1994) (quoting *In re Sealed Motion*, 880 F.2d at 1380)); *Haldeman v. Sirica*, 501 F.2d 714, 717 (D.C. Cir. 1974) (en banc) (MacKinnon, J, concurring in part and dissenting in part) (describing Rule 6(e) judicial proceeding as one "in which due process of law will be available"); *In re Grand Jury Investigation of Uranium Indus.* (*In re Uranium Grand Jury*), No. 78-mc-0173, 1979 WL 1661, at *6 (D.D.C. Aug. 21, 1979) (Bryant, C.J.) (noting that the "judicial proceeding" exception authorizes disclosure of grand jury materials to a "wide variety of official bodies").[17]

[17] DOJ relies on the definition first articulated by Judge Learned Hand in *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958). *See* DOJ Resp. at 14–15. That definition provides: "[T]he term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime." *Doe*, 255 F.2d at 120. DOJ's reliance on this definition is puzzling since courts—including the D.C. Circuit—have consistently recognized that Judge Hand gave "judicial proceeding" "a broad interpretation," *In re Sealed Motion*, 880 F.2d at 1379, and judges of this Court have already twice recognized that Judge Hand's definition encompasses an impeachment trial, *see In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1228–30 (D.D.C. 1974) (citing *Doe*); *In re Uranium Grand Jury*, 1979 WL 1661, at *5–7 (citing *Doe*) (explaining that a Senate impeachment trial "presided over by the Chief Justice of the United States" is "very much a judicial proceeding," *id.* at *7).

In keeping with the term's "broad meaning," disclosure of grand jury materials has been judicially authorized under the "judicial proceeding" exception in an array of judicial and quasi-judicial contexts. Courts, for instance, have determined that attorney disciplinary proceedings are "judicial proceedings" because such a proceeding is "designed in the public interest to preserve the good name and uprightness of the bar, made up, as it is, of attorneys who are public officers." *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958); *see also, e.g.*, *In re J. Ray McDermott & Co.*, 622 F.2d 166, 170 (5th Cir. 1980). Similarly, courts have permitted disclosure in connection with internal police disciplinary proceedings under the "judicial proceeding" exception. *See, e.g.*, *In re Bullock*, 103 F. Supp. 639, 641, 643 (D.D.C. 1952). The D.C. Circuit's decisions are in accord. The Circuit has held that the following proceedings are eligible for disclosure under Rule 6(e): (1) "disciplinary proceedings of lawyers" conducted by "bar committees," *United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980) (per curiam), (2) grand jury investigations themselves, *In re Grand Jury*, 490 F.3d 978, 986 (D.C. Cir. 2007) (per curiam), and (3) proceedings pursuant to the now-expired Independent Counsel Act, 28 U.S.C. § 591 *et seq.* (1987), to determine what portions of an independent counsel report are appropriate for release, *see, e.g.*, *In re Sealed Motion*, 880 F.2d at 1380. Additionally, the D.C. Circuit has even indicated that parole hearings might qualify. *See In re Sealed Motion*, 880 F.2d at 1380 n.16 (citing *United States v. Shillitani*, 345 F.2d 290, 293 (2d Cir. 1965), *vacated on other grounds*, 384 U.S. 364 (1966)).

As these examples illustrate, the term "judicial proceeding" in Rule 6(e) does not refer exclusively to proceedings overseen by courts exercising the "judicial Power of the United States" referred to in Article III of the Constitution. U.S. CONST. art. III, § 1. Plainly, proceedings in state courts are "judicial proceedings" eligible for disclosure of grand jury

information. *See, e.g., United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 947 & n.9 (4th Cir. 1980) (noting that the court "may authorize disclosure under the circumstances detailed in Rule 6(e)(3); in fact it has done so in many cases in support of proceedings in both federal and state judicial, and even in state administrative, proceedings") (citing *Doe*, 255 F.2d 118; *In re Disclosure of Testimony, Etc.*, 580 F.2d 281 (8th Cir. 1978) (authorizing disclosure of federal grand jury material to municipality investigating judicial misconduct); *In re 1979 Grand Jury Proceedings*, 479 F. Supp. 93 (E.D.N.Y. 1979) (authorizing disclosure of federal grand jury material regarding obstruction by municipal employees to municipality)); *In re Petition for Disclosure of Evidence Before Oct., 1959 Grand Jury*, 184 F. Supp. 38, 41 (E.D. Va. 1960) (citing *Doe*, 255 F.2d 118) ("We cannot agree with the United States that this phrase refers only to a Federal proceeding.").

Moreover, at the federal level, "the judicial power of the United States is not limited to the judicial power defined under Article III." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 889 (1991) (citing *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). The United States Tax Court, for example, "is not a part of the Article III Judicial Branch," and "its judges do not exercise the 'judicial Power of the United States' under Article III," *Kuretski v. Comm'r of Internal Revenue*, 755 F.3d 929, 940 (D.C. Cir. 2014). Nevertheless, the Tax Court "exercises a portion of the judicial power of the United States," *Freytag*, 501 U.S. at 891, and that judicial power has, in turn, been deemed sufficient to make Tax Court proceedings "judicial proceedings" under Rule 6(e), *see In re Grand Jury Subpoenas Duces Tecum*, 904 F.2d 466, 468 (8th Cir. 1990) ("[T]he tax court redetermination hearing satisfies the judicial proceeding requirement."); *Patton v. Comm'r of Internal Revenue*, 799 F.2d 166, 172 (5th Cir. 1986) ("Clearly a tax court petition for redetermination is a 'judicial proceeding' within the meaning of

Rule 6(e)(3)([E])(i).”); *United States v. Anderson*, No. 05-cr-0066, 2008 WL 1744705, at *2 (D.D.C. Apr. 16, 2008) (ordering that grand jury materials be shared pursuant to Rule 6(e)(e)(E)(i) in connection with a “law suit . . . pending before the United States Tax Court”); *see also, e.g.*, *In re Grand Jury Proceedings*, 62 F.3d 1175, 1180 (9th Cir. 1995) (indicating that disclosure in connection with tax court litigation would be permissible under Rule 6(e) “upon an adequate showing” of need).[18] Accordingly, while judicial power of some kind may be necessary to make a proceeding “judicial” under Rule 6(e), the exercise of *Article III* judicial power is not required.

Notwithstanding the weight of these precedents, DOJ maintains that an impeachment trial cannot be a “judicial proceeding” under Rule 6(e) because the plain and ordinary meaning of the term refers to “legal proceedings governed by law that take place in a judicial forum before a judge or a magistrate.” DOJ Resp. at 2; *see also id.* at 13 (“By its plain terms, the phrase ‘judicial proceeding’ means a matter that transpires in court before a neutral judge according to generalized legal rules.”).[19] This plain-meaning argument ignores the broad interpretation given to the term “judicial proceeding” as used in Rule 6(e), s*ee, e.g., In re Sealed Motion*, 880 F.2d at

[18] Even the Supreme Court, in *Baggot*, recognized that Tax Court proceedings are “judicial proceedings” under Rule 6(e). Although purporting not to address “the knotty question of what, if any, sorts of proceedings other than garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings under ([E])(i),” 463 U.S. at 479 n.2, the Court advised that the Seventh Circuit “correctly held” that “the IRS may seek ([E])(i) disclosure” when a “taxpayer ha[s] clearly expressed its intention to seek redetermination of [a claimed tax] deficiency in the Tax Court” and “the Government’s primary purpose is . . . to defend the Tax Court litigation,” *id.* at 483.

[19] DOJ also cites to the use of “judicial proceeding” in two other subsections of Rule 6(e)—(e)(3)(F) and (e)(3)(G)—as generally referring to court proceedings, DOJ Resp. at 17, but this argument relies on one of the least probative statutory-interpretation presumptions. Although “[o]ne ordinarily assumes ‘that identical words used in different parts of the same act are intended to have the same meaning,’” “the presumption of consistent usage ‘readily yields’ to context, and a statutory term . . . ‘may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.’” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 319–20 (2014) (internal quotation marks omitted) (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). Moreover, as HJC explains, subsection (e)(3)(F) may in fact cover a Senate impeachment trial, and as to subsection (e)(3)(G), significant textual differences distinguish this subsection from (e)(3)(E)(i). *See* HJC Reply at 12–13. In any event, historical practice and binding precedent guide the proper construction of Rule 6(e)(3)(E)(i), no matter the use of the term “judicial proceeding” in other parts of the criminal procedure rules.

1379, and fails to grapple with the judicial nature of an impeachment trial, *see infra* Part III.A.2. In any event, applying DOJ's plain-meaning construction and imposing a requirement that a "judge" preside to qualify as a "judicial proceeding" would not remove an impeachment trial from Rule 6(e)'s ambit since the Chief Justice of the Supreme Court presides over any Senate impeachment trial of the President. U.S. CONST. art. I, § 3, cl. 6.[20] DOJ dismisses the Chief Justice's role in impeachment trials as "purely administrative, akin to a Parliamentarian," whose decisions can be overridden by a vote of the Senate. DOJ Resp. at 16. Even if true up to a point, the fact remains that the Senate may grant the Chief Justice as significant a role as it sees fit.

In sum, "judicial proceeding," as used in Rule 6(e), is a term with a broad meaning that includes far more than just the prototypical judicial proceeding before an Article III judge.

2. An Impeachment Trial is Judicial in Nature

DOJ flatly states that no congressional proceeding can constitute a Rule 6(e) "judicial proceeding" because "[t]he Constitution carefully separates congressional impeachment proceedings from criminal judicial proceedings." DOJ Resp. at 15. This stance, in service of the obvious goal of blocking Congress from accessing grand jury material for any purpose, overlooks that an impeachment trial is an exercise of judicial power provided outside Article III and delegated to Congress in Article I.[21] Contrary to DOJ's position—and as historical practice, the Federalist Papers, the text of the Constitution, and Supreme Court precedent all make clear—impeachment trials are judicial in nature and constitute judicial proceedings.

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[20] DOJ observes that impeachment trials of officials other than the President are presided over by "the Vice President or whichever Senator is presiding at that time," rather than by the Chief Justice. DOJ Resp. at 16. This constitutional quirk is irrelevant here since the instant petition concerns the possible impeachment of the President.

[21] Although Representative Collins, like DOJ, supports denial of HJC's application, he "agrees with [HJC] that an impeachment inquiry . . . fall[s] under Federal Rule of Criminal Procedure 6(e)'s judicial proceeding exception because" an impeachment inquiry is "preliminary to a trial in the U.S. Senate." Collins Mem. at 1.

"The institution of impeachment is essentially a growth deep rooted in the ashes of the past." Wrisley Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684, 685 (1913). It was "born of the parliamentary usage of England," *id.*, where "the barons reserved to Parliament the right of finally reviewing the judgments' [sic] of all the other courts of judicature." *Id.* "[T]he assembled parliament . . . represent[ed] in that respect the judicial authority of the king," and "[w]hile this body enacted laws, it also rendered judgments in matters of private right." *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 183 (1880); *see also* Brown, *supra*, at 685. (explaining that "the Parliament [was] the high court of the realm in fact as well as in name"). "Upon the separation of the Lords and Commons into two separate bodies . . . called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords." *Kilbourn*, 103 U.S. (13 Otto) at 183–84. "To the Commons," however, "was left the power of impeachment, and, perhaps, others of a judicial character." *Id.* at 184. "And during the memorable epoch preluding the dawn of American independence," the English practice of impeachment, "though seldom put into application, was still in the flower of its usefulness." Brown, *supra*, at 687.

During the drafting of the Constitution, this English history informed how the Framers approached impeachment, and examination of pertinent Federalist Papers confirms that they viewed the impeachment power as judicial. *See* THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that impeachment in the United States was "borrowed" from the "model" "[i]n Great Britain"). Alexander Hamilton's writings in Federalist Nos. 65 and 66 are illustrative. The preceding Federalist Nos. 62, 63, and 64 had discussed most of the powers that the new Constitution granted to the Senate. *See* THE FEDERALIST NOS. 62–63

(probably James Madison), NO. 64 (John Jay). The only "remaining powers" to be discussed were those "comprised in [the Senate's] participation with the executive in the appointment to offices, and in [the Senate's] judicial character," and Hamilton accordingly used Federalist Nos. 65 and 66 to "conclude" the discussion of the Senate "with a view of the judicial character of the Senate" "as a court for the trial of impeachments." THE FEDERALIST NO. 65, *supra*, at 396 (Alexander Hamilton).

As Hamilton's thinking on the subject of impeachment demonstrates, his choice of the words "judicial" and "court for the trial of impeachments" was purposeful. *See Nixon v. United States*, 938 F.2d 239, 260 (D.C. Cir. 1991) (Randolph, J., concurring) ("The inference that the framers intended impeachment trials to be roughly akin to criminal trials is reinforced by seemingly unrefuted statements made by Alexander Hamilton during the ratification debates."), *aff'd*, 506 U.S. 224 (1993).[22] For instance, Hamilton described the appointment of officers—which is an executive function—and impeachment, as powers given to the Senate "in a distinct capacity" from all of the Senate's other powers. THE FEDERALIST NO. 65, *supra*, at 396. By citing those two powers in particular and separating them from all others bestowed on the Senate, he thus conveyed that those powers were, unlike those that came before, *not* legislative. Additionally, when Hamilton considered potential alternative "tribunal[s]," *id.* at 398, that might be granted the power of trying impeachments, he considered the primary alternatives to be

[22] Indeed, Hamilton's discussion of the Senate's impeachment power in Federalist Nos. 65 and 66, uses such judicial terms repeatedly and consistently. Hamilton referred to the "court," the "court of impeachments," and the "court for the trial of impeachments" a total of *seventeen* times. THE FEDERALIST NOS. 65–66, *supra*, at 396–407 (Alexander Hamilton). Moreover, when referring to impeachment, Hamilton also used the following additional terms associated with the judicial nature of the proceeding: "jurisdiction" once; "offense(s)" or "offender" five times; "prosecution" or "prosecutors" three times; "accused," "accusers," "accusation," or "accusing" nine times; "case(s)" five times; "decision," "decide," or "deciding" eight times; "innocence" or "innocent" three times; "guilt" or "guilty" five times; "inquest," "inquisitors," or "inquiry" four times; "tribunal" twice; "judges" or "judging" ten times; "sentence" or "sentenced," including "sentence of the law," five times; "party" once; "punishment" or "punish" seven times; "conviction" once; "trial" or "try" four times, not counting instances of "courts for the trial of impeachments"; "verdict(s)" twice; "liable" once; and "charges" once. *Id.*

assignment of the power directly to the Supreme Court alone, *id.*, or assignment to the "Supreme Court with the Senate," *id.* at 399*,* underscoring the judicial nature of the impeachment-trial power.

Most importantly, when Hamilton addressed the objection that making the Senate the "court of impeachments" "confound[ed] legislative and judiciary authorities in the same body," he *accepted* the premise that granting the Senate the power to try impeachments produced an "intermixture" of "legislative and judiciary authorities." THE FEDERALIST NO. 66, *supra*, at 401; *see also* THE FEDERALIST NO. 81, *supra*, at 482 (Alexander Hamilton) (noting that there are "men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers"). Such "partial intermixture," he argued, is "not only proper but necessary to the mutual defense of the several members of the government against each other." THE FEDERALIST NO. 66, *supra*, at 401–02. He pointed out that many states at the time combined legislative and judicial functions: the New York constitution made the New York Senate, "together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal," *id.* at 402; in New Jersey, "the final judiciary authority [was] in a branch of the legislature," *id.* at 402 n.*; and "[i]n New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature [was] the court for the trial of impeachments," *id.* These Federalist Papers leave no doubt that the power to try impeachments was, in Hamilton's view, inherently judicial. *See Nixon*, 938 F.2d at 261 (Randolph, J., concurring) ("From all of [Hamilton's] statements, it can be reasonably inferred that the framers intended that the Senate would approach its duty of trying impeachments with the solemnity and impartiality befitting judicial action . . . .").

Hamilton was not the only Founder who conceived of the impeachment power as inherently judicial. Notably, James Madison shared Hamilton's view. In Federalist No. 38, Madison, like Hamilton, noted that a principle objection to the Constitution was "the trial of impeachments by the Senate, . . . when this power so evidently belonged to the judiciary department." THE FEDERALIST NO. 38, *supra*, at 236 (James Madison). Then, in Federalist No. 47, Madison defended this mixing of powers. In the British system, Madison pointed out, "the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other" because, *inter alia*, "[o]ne branch of the legislative department . . . is the sole depositary of judicial power in cases of impeachment." THE FEDERALIST NO. 47, *supra*, at 302 (James Madison) (spelling irregularity in original). Such mixing, he pointed out, occurred in the states as well, such as in New Hampshire, where "[t]he Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments," and in Massachusetts, where "the Senate, which is a part of the legislature, is a court of impeachment," notwithstanding a declaration in the state's constitution "'that the legislative department shall never exercise the . . . judicial powers.'" *Id.* at 304–05 (citing also to the "court for the trial of impeachments" in New York "consist[ing] of one branch of the legislature and the principal members of the judiciary department," *id.* at 305, and to the "court of impeachments" in Delaware, "form[ed]" by "one branch of the [legislative department]," *id.* at 306)).

Hamilton and Madison's view is confirmed by the text of the Constitution. By making the Senate the "court of impeachments," *id.* at 306; THE FEDERALIST NO. 65, *supra*, at 398 (Alexander Hamilton), the Framers tasked the Senate with a judicial assignment. Article I uses judicial terms to refer to impeachment trials in three separate instances in the sixth clause of its third section, stating that the Senate is granted "the sole Power to *try* all Impeachments"; "[w]hen

the President of the United States is *tried*, the Chief Justice shall preside"; "[a]nd no person shall be *convicted* without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6 (emphases added). The next clause continues the theme: "*Judgment* in *Cases* of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office . . . : but the Party *convicted* shall nevertheless be liable and subject to [criminal prosecution]." *Id.* cl. 7 (emphases added). Article II, meanwhile, prevents the President's power to pardon from extending to "*Cases* of Impeachment," *id.* art. II, § 2, cl. 1 (emphasis added), and allows for removal of the President "on Impeachment for, and *Conviction* of, Treason, Bribery, or other high *Crimes* and *Misdemeanors*." *Id.* § 4 (emphases added). Finally, even Article III—despite being the article devoted to the "judicial" branch—reveals that when it comes to impeachment, the Senate takes on a judicial character, for Article III requires that "[t]he *Trial* of all *Crimes*, except in *Cases* of Impeachment, shall be by Jury." *Id.* art. III, § 2, cl. 3 (emphases added).

These words employed in the Constitution to describe the Senate's role—"trial," "convict," "judgment," "case," "crime," and "misdemeanor"—are inherently judicial. Any layperson asked whether a constitutionally prescribed "trial" of a "case" in order to reach a "judgment" as to whether a person should be "convicted" of a "crime" or "misdemeanor," is judicial in character, would invariably answer yes—and rightly so. *Cf. Mazars*, 2019 WL 5089748, at *32 (Rao, J., dissenting) ("Article I makes clear that in this [impeachment] role, the Senate acts as a court trying impeachable offenses and renders judgment . . . ."); *id*. at *50 ("Senate trials of impeachment are an exercise of judicial power . . . .").

Black's Law Dictionary confirms this intuition. "Trial" means "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding." *Trial*,

BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter BLACK'S]. "Convict" means "[t]o prove or officially announce (a criminal defendant) to be guilty of a crime after proceedings in a law court; specif., to find (a person) guilty of a criminal offense upon a criminal trial, a plea of guilty, or a plea of nolo contendere (no contest)." *Convict*, BLACK'S. "Judgment" can mean either "mental faculty" or "[a] court's final determination of the rights and obligations of the parties in a case" (or, in English law, "[a]n opinion delivered by a member of the appellate committee of the House of Lords; a Law Lord's judicial opinion"), *Judgment*, BLACK'S—and in the context of other words like "trial" and "convict," the *noscitur a sociis* canon counsels against adopting the first definition, *see Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality) (explaining that *noscitur a sociis* means that "a word is known by the company it keeps"). "Case" means, as relevant here, "[a] civil or criminal proceeding, action, suit, or controversy at law or in equity" or "[a]n instance, occurrence, or situation"—again, *noscitur a sociis* pushes strongly in favor of relying on the first definition here. Finally, "crime" means "[a]n act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding," *Crime*, BLACK'S, and "misdemeanor" means "[a] crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement (usu. for a brief term) in a place other than prison (such as a county jail)." *Misdemeanor*, BLACK'S.[23] As these dictionary definitions demonstrate, at every turn the Constitution uses words that mark the judicial nature of the Senate's power to try impeachments.

Not surprisingly, therefore, the Supreme Court has confirmed, on at least three separate occasions, that the Senate's power to try impeachments is judicial. First, in *Hayburn's Case*, 2

[23] The variation "high crime" similarly means "[a] crime that is very serious, though not necessarily a felony," *Crime*, BLACK'S, and "high misdemeanor" historically meant in English law "[a] crime that ranked just below treason in seriousness," *Misdemeanor*, BLACK'S.

U.S. (2 Dall.) 408 (1792), the Court quoted a letter from "[t]he circuit court for the district of North Carolina (consisting of Iredell, Justice, and Sitgreaves, District Judge)" observing that "no judicial power of any kind appears to be vested [in the legislature], but the important one relative to impeachments." *Id.* at 410 n.* (capitalization altered). Second, in *Kilbourn*, the Court explained that "[t]he Senate . . . exercises the judicial power of trying impeachments." 103 U.S. (13 Otto) at 191. Third, in *Marshall v. Gordon*, 243 U.S. 521 (1917), the Court noted that congressional contempt power can be "transformed into judicial authority" when a "committee contemplat[es] impeachment." *Id.* at 547.

As the foregoing demonstrates, impeachment trials are judicial in nature, notwithstanding the Founders' decision to make the Senate the "court of impeachments." As Chief Justice Rehnquist stated, in considering a Senator's objection to House Managers' "referring to the Senate sitting as triers in a trial of the impeachment of the President of the United States," 145 Cong. Rec. S279 (statement of Sen. Harkin), "the objection . . . is well taken, that the Senate is not simply a jury; it is a court in this case," *id.* (statement of Chief Justice Rehnquist). "Therefore," Chief Justice Rehnquist continued, "counsel should refrain from referring to the Senators as jurors." *Id.* The views of the Senators participating in the last impeachment trial of a sitting President confirm their understanding of their judicial role. *See id.* at S1584 (statement of Sen. Leahy) (noting that when "Senate is the court," "Senators are not merely serving as petit jurors" but "have a greater role and a greater responsibility in this trial"); *id.* at S1599 (statement of Sen. Stevens) (noting that "an impeachment trial is no ordinary proceeding" and that Senators "sit as judge and jury—rulers on law and triers of fact"); *id.* at S1602 (statement of Sen. Lieberman) (noting that impeachment "is unique in that it is a hybrid of the legislative and the judicial, the political and the legal" (quoting *Senate Rules and Precedents Applicable to*

Impeachment Trials: Executive Session Hearing Before the S. Comm. on Rules and Administration, 93rd Cong. 193 (1974) (statement of Sen. Mansfield)); *id.* at S1618 (statement of Sen. Crapo) ("As each Senator took the oath to provide impartial justice, . . . [n]o longer was the Senate a legislative body, it was a court of impeachment. A unique court, to be sure, not identical to traditional civil and criminal courts, but a court nonetheless.").

This further supports the conclusion that an impeachment trial constitutes "a judicial proceeding" under Rule 6(e)(3)(E)(i).[24]

3. Historical Practice Before Enactment of Rule 6(e) Informs Interpretation of that Rule

Historical practice confirms that, contrary to DOJ's position, Rule 6(e) does not bar disclosure of grand jury information to Congress. Indeed, grand jury investigations have prompted and informed congressional investigations, and Rule 6(e) was meant to codify this practice.

Several examples illustrate that Congress was afforded access to grand jury material prior to the enactment of Rule 6(e) in 1946. In 1902, a House committee investigated allegations of election fraud in St. Louis, Missouri, based on "a report of a grand jury which sat in St. Louis"

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[24] This analysis disposes of DOJ's argument that an impeachment trial is not judicial in nature because impeachment proceedings "are political." DOJ Resp. at 16. While the House "has substantial discretion to define and pursue charges of impeachment," *Mazars*, 2019 WL 5089748, at *28 (Rao, J., dissenting), the Constitution nevertheless "limits the scope of impeachable offenses," *id.* at *50 (citing U.S. CONST. art. II, § 4); *see id.* at *32 ("[I]mpeachment addresses a public official's wrongdoing—treason, bribery, and high crimes or misdemeanors—while problems of general maladministration are left to the political process."); *see also* 3 Lewis Deschler, *Deschler's Precedents of the House of Representatives* Ch. 14 App'x [hereinafter Deschler] ("The impeachment of President Andrew Johnson . . . rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress."). Thus Hamilton, for instance, viewed an impeachment trial's character as judicial even while he viewed impeachment offenses as "of a nature which may with peculiar propriety be denominated POLITICAL." THE FEDERALIST NO. 65 (emphasis in original). Further, while Members of the U.S. Senate are politically accountable, this accountability merely ensures that Senators properly exercise their judicial power to try impeachments. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 110 (1996) ("[M]embers of Congress seeking reelection have a political incentive to avoid any abuse of the impeachment power. . . . [T]he cumbersome nature of the impeachment process makes it difficult for a faction guided by base personal or partisan motives to impeach and remove someone from office.").

that a city police board in the district apparently had assisted with the election fraud. 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* Ch. 40 § 1123 [hereinafter Hinds].[25] Twenty years later, in 1924, the Senate launched an investigation of a Senator who had been indicted by a grand jury. 6 Cannon Ch. 188 § 399. Seeking to ensure that the congressional investigation had access to all information relevant to the allegations, the chairman of the investigating committee "sen[t] a telegram to the presiding judge . . . asking for the minutes of the grand jury proceedings, the names of the witnesses, and the documentary evidence which had gone before the grand jury," and subsequently received what he requested. *Id.* (indicating that "reply to the telegram" helped the committee compile its list of witnesses, and that "[n]o evidence [was] left out of the [Senate committee] hearings").

Again, in 1924, in response to a grand jury report from the Northern District of Illinois implicating two unnamed Members of the House in a matter involving the payment of money, the House directed the Attorney General to submit to it "the names of the two [Members] and the nature of the charges made against them." *Id.* § 402. The Attorney General objected to the request, but only insofar as the request would lead to "two tribunals attempting to act upon the same facts and to hear the same witnesses at the same time," which would "result in confusion and embarrassment and . . . defeat the ends of justice." *Id.* Accordingly, the Attorney General

[25] Even earlier, in 1811, the House received a "copy of a presentment against [territorial judge] Harry Toulmin, . . . made by the grand jury of Baldwin County, specifying charges against the said judge, which" "set in motion" a House "inquiry" "looking to the impeachment" of Judge Toulmin. 3 Hinds Ch. 79 § 2488. Also, in 1921 a Senate committee confronted another allegation of election fraud, and because the committee's investigation post-dated a grand jury inquiry, the Senate committee had access to "everything before the grand jury which was deemed at all relevant," because the material had been introduced at trial to HJC. 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives* Ch. 159 § 74 [hereinafter Cannon]. In these instances, the grand jury information was presumably no longer secret, but Chief Judge Sirica nevertheless deemed the 1811 Judge Toulmin "precedent" to be "persuasive" when he ordered disclosure of the Watergate grand jury report. *See In re Report & Recommendation of June 6, 1972 Grand Jury* (*In re 1972 Grand Jury Report*), 370 F. Supp. 1219, 1230 (D.D.C. 1974) (Sirica, C.J.) ("If indeed [Rule 6(e)] merely codifies existing practice, there is convincing precedent to demonstrate that common-law practice permits the disclosure here contemplated.").

assured the House that if, "acting within its constitutional power (under Article I) to punish its Members for disorderly behavior or to expel such Member, [the House] request[ed] that all the evidence now in the possession of anyone connected with the Department of Justice . . . be turned over to [it]," he would "direct all such evidence, statements, and information obtainable to be immediately turned over to [the House] or to such committee as may be designated by the House." *Id.*

In 1946, Rule 6(e) was enacted to codify current practice and not "to create new law." *In re 1972 Grand Jury Report*, 370 F. Supp. at 1229. As the Advisory Committee Notes explain, Rule 6(e) "continues the traditional practice of secrecy on the part of members of the grand jury, *except* when the court permits a disclosure." FED. R. CRIM. P. 6(e) advisory committee's note 1 (1944 adoption) (emphasis added); *see also, e.g.*, *Sells Eng'g, Inc.*, 463 U.S. at 425 (noting that Rule 6(e) "codifie[d] the traditional rule of grand jury secrecy"); *Haldeman*, 501 F.2d at 716 (MacKinnon, J, concurring in part and dissenting in part) (observing that Rule 6(e) "is a codification of long-standing decisions that hold to the 'indispensable secrecy of grand jury proceedings . . . except where there is a compelling necessity'") (omission in original) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958))).[26] The practice, albeit fairly rare, of sharing grand jury information with Congress at the time of Rule 6(e)'s enactment lends support to the conclusion that this rule, particularly the "judicial proceedings" exception, is correctly construed to include impeachment trials.

This conclusion is bolstered by the fact that these historical examples share a common thread: allegations of election fraud and punishment of Members of Congress. In these

[26] "In the absence of a clear legislative mandate, the Advisory Committee Notes [to the Federal Rules of Criminal Procedure] provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002).

situations, as with cases of impeachment, Congress is acting more in a judicial rather than a legislative capacity. As the Supreme Court explained in *Kilbourn*, when the House "punish[es] its own members and determin[es] their election," the House "partake[s]" in some "degree" of the "character" of a "court." 103 U.S. (13 Otto) at 189; *see also id.* at 190 ("Each House is by the Constitution made the *judge* of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in *trying* a contested election, for refusing to testify, that he would if the *case* were pending before a *court of judicature*." (emphases added)). Further, the Supreme Court has stated that the Senate has "certain powers, which are not legislative, but judicial, in character," and that "[a]mong these is the power to judge of the elections, returns, and qualifications of its own members." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (citing U.S. CONST. art. I, § 5, cl. 1).

4. Binding D.C. Circuit Precedent Forecloses Any Conclusion Other Than That an Impeachment Trial is a "Judicial Proceeding"

The D.C. Circuit has already expressly concluded at least twice—in *Haldeman v. Sirica* and *McKeever v. Barr*—that an impeachment trial is a "judicial proceeding" under Rule 6(e), and these decisions bind this Court. *See also In re Sealed Motion*, 880 F.2d at 1380 n.16 (quoting approvingly a District of Kansas decision noting that *Haldeman* decided "disclosure of grand jury material to [a] House Committee considering impeachment" was made preliminarily to or in connection with a judicial proceeding (quoting *United States v. Tager*, 506 F. Supp. 707, 719 (D. Kan. 1979)).

Forty-five years ago, Chief Judge John Joseph Sirica ordered that the Watergate grand jury's report on the President's conduct ("Watergate Roadmap") be sent to HJC, which was then

engaged in an impeachment-related investigation of President Richard Nixon. *See In re 1972 Grand Jury Report*, 370 F. Supp. 1219. In ordering that disclosure, Chief Judge Sirica confronted the same issue currently pending in this case: Is an impeachment trial a "judicial proceeding" within the meaning of Rule 6(e)? *See id.* at 1227. Chief Judge Sirica answered, emphatically, yes. "[I]t should not be forgotten," he explained, "that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States." *Id.* at 1230. "Certainly Rule 6(e) [could not] be said to mandate" the withholding of such a report from HJC. *Id.*

In *Haldeman v. Sirica*, the D.C. Circuit, sitting en banc, reviewed Chief Judge Sirica's decision. Two defendants facing charges arising from the same grand jury investigation filed petitions for writs of prohibition or mandamus, asserting that the release of the grand jury's Watergate Roadmap to HJC would adversely affect their right to a fair trial. *Haldeman*, 501 F.2d at 714–15. Notably, by contrast to its position in the instant case, DOJ filed a memorandum before the D.C. Circuit supporting Chief Judge Sirica's decision to release the grand jury report to HJC. *Id.* at 714.

The D.C. Circuit agreed with Chief Judge Sirica, DOJ, and the grand jury, and thus allowed the disclosure of grand jury materials to HJC to occur. In so doing, the Circuit rejected the petitioners' argument that "the discretion ordinarily reposed in a trial court to make such disclosure of grand jury proceedings as he deems in the public interest is, by the terms of Rule 6(e) of the Federal Rules of Criminal Procedure, limited to circumstances incidental to judicial proceedings and that impeachment does not fall into that category." *Id.* at 715. The Circuit determined that Rule 6(e) presented no obstacle to the disclosure that Chief Judge Sirica had ordered: "Judge Sirica has dealt at length with this contention . . . in his filed opinion. We are in

general agreement with his handling of these matters, and we feel no necessity to expand his discussion." *Id.*

One judge—Judge MacKinnon—wrote separately in *Haldeman,* agreeing that Rule 6(e)'s judicial proceeding exception authorized the disclosure. *See id.* at 717 (MacKinnon, J., concurring in part and dissenting in part). In fact, he pointed out that "[a]t oral argument the prosecutor represented that this disclosure of the grand jury material to the House Judiciary Committee and eventually possibly to the House and Senate is being made 'preliminarily to (and) in connection with a judicial proceeding,' and explained that his "concurrence in the release of the grand jury material ha[d] taken this representation into consideration." *Id.* (quoting FED. R. CRIM. P. 6(e)). For Judge MacKinnon, the problem with Chief Judge Sirica's decision was that it had not gone far *enough* in disclosing grand jury material to HJC. *See id.* at 716 ("I would . . . permit the House Judiciary Committee . . . to have access not only to the limited testimony accompanying the report and index but to the entire grand jury proceedings under supervision of the court . . . .").

Haldeman has stood the test of time. Earlier this year, in fact, the D.C. Circuit turned back to *Haldeman* in *McKeever*. The primary issue in *McKeever* was whether courts possess inherent authority to disclose grand jury materials, and the Circuit answered that question in the negative. 920 F.3d at 850. The *McKeever* dissent, though, argued that the majority's decision conflicted with *Haldeman*. On the dissent's reading, Chief Judge Sirica's decision had been an exercise of inherent authority, and *Haldeman*, in turn, "affirmed [Chief Judge Sirica's] understanding that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions." *Id.* at 855 (Srinivasan, J., dissenting).[27] In response, the *McKeever*

[27] DOJ relies on a footnote from a prior decision of this Court, *see* DOJ Resp. at 14–15 (quoting *In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton*, 308 F.

majority acknowledged "ambigu[ity]" in *Haldeman*'s reasoning, but the majority opted to "read[] the case to cohere, rather than conflict, with the Supreme Court and D.C. Circuit precedents" that formed the basis for the *McKeever* holding. *Id.* at 847 n.3 (majority opinion). Accordingly, the Circuit "read *Haldeman* as did Judge MacKinnon in his separate opinion concurring in part, as fitting within the Rule 6 exception for 'judicial proceedings.'" *Id.*

Together, *Haldeman* and *McKeever* hold that an impeachment trial is a "judicial proceeding" under Rule 6(e), and these decisions bind this Court. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ginsburg, Ruth B., J., concurring) (explaining that D.C. Circuit law is binding "unless and until overturned by the court en banc or by Higher Authority"), *vacated in part on reh'g on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc). These decisions alone require ruling in HJC's favor on the threshold requirement that an impeachment trial is a "judicial proceeding" within the meaning of Rule 6(e). Indeed, in addition to Chief Judge Sirica and the *Haldeman* Court, *every* other court to have considered releasing grand jury material to Congress in connection with an impeachment investigation has authorized such disclosure. *See* Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG (E.D. La. Aug. 6, 2009), *summarily aff'd sub nom. In Re Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009); *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072 (S.D. Fla. 1987), *aff'd sub nom. In re Request for Access to Grand Jury Materials* (*Hastings*), 833 F.2d 1438 (11th Cir. 1987).[28]

Supp. 3d at 318 n.4), for a plain reading of the term "judicial proceeding" as precluding application to a congressional proceeding, but the cited decision read *Haldeman,* like Judge Srinivasan, as "allow[ing] for district court disclosures beyond Rule 6(e)'s exceptions," *Mckeever*, 920 F.3d at 853 (Srinivasan, J., dissenting). The *Mckeever* panel majority read *Haldeman* differently to include impeachment proceedings within the "judicial proceeding" exception, and that reading now controls.

[28] DOJ describes as "telling[]" that "rulemakers did not include the possibility that a congressional proceeding could constitute a judicial proceeding, even though" the 1983 amendments to Rule 6(e)(3)(E)(i) "post-dated

DOJ strains to distinguish *Haldeman* and *McKeever* with arguments that are simply unpersuasive. As to *Haldeman*, DOJ focuses on the procedural posture, claiming that "[t]he only issue decided in that case was whether the petitioners had shown that the district court's order was a 'clear abuse of discretion or usurpation of judicial power' from which the petitioners had a clear and indisputable right to relief," and thus "it is unsurprising that the D.C Circuit was able to deny the petition without engaging in any 'meaningful analysis of Rule 6(e)'s terms.'" DOJ Resp. at 3 (first quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1952); then quoting *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting)); *see* Hr'g Tr. at 87:24–88:1 ("That page-and-a-half decision talked about the standard of review being the extraordinary writ of mandamus seven times in the opinion . . . ."). DOJ misreads *Haldeman.* When discussing Rule 6(e), the mandamus standard is not mentioned, although this standard comes up repeatedly in *other* parts of the opinion. Instead, after explaining that Chief Judge Sirica had "dealt at length" with whether an impeachment trial is a judicial proceeding, the *Haldeman* Court expressed "general agreement with his handling of these matters." 501 F.2d at 715. This "agreement" was so strong, in fact, that the *Haldeman* majority felt "no necessity to expand [Chief Judge Sirica's] discussion," *id.*, "thereby subscrib[ing] to Chief Judge Sirica's rationale for his disclosure order," *McKeever*, 920 F.3d at 854 (Srinivasan, J., dissenting) (describing *Haldeman* as having "ratified" Chief Judge Sirica's decision).[29] Notably, despite the affirming

Haldeman." DOJ Resp. at 18 n.12. If any inference can be gleaned from leaving the judicial proceeding exception unchanged, however, the correct inference is that Congress "adopted the earlier judicial construction of th[e] phrase," *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019), namely: that disclosure of grand jury material to Congress for an impeachment investigation was already authorized by this exception.

[29] DOJ characterizes the *Haldeman* majority's "general agreement" with Chief Judge Sirica's reasoning as indicating merely that the majority believed any error in Chief Judge Sirica's analysis did not merit reversal in light of the deferential standard of review, DOJ Resp. at 21 (internal quotation marks omitted) (quoting *Haldeman*, 501 F.2d at 715), but appellate courts are not coy about acknowledging when decisions turn on standards of review, *see, e.g.*, *Pallet Cos. v. NLRB*, 634 Fed. App'x 800, 801 (D.C. Cir. 2015) (per curiam) ("Particularly in light of our deferential standard of review, we have no basis to disturb that credibility judgment."); Judgment, *Giron v. McFadden*, 442 Fed. App'x 574, 575 (D.C. Cir. 2011) ("Particularly in light of the deferential standard of review,

language in *Haldeman*, DOJ has gone so far as to say here that Rule 6(e) did not in fact authorize the disclosure of the grand jury's Watergate Roadmap, which Chief Judge Sirica ordered disclosed to HJC during the impeachment investigation of President Nixon. *See* Hearing Tr. at 89:21–90:2.

DOJ also discounts *McKeever*'s analysis of *Haldeman* as mere dicta, contending that *McKeever* "did not rule on the meaning of the term 'judicial proceeding,'" because "it was undisputed that the historical grand jury information at issue fell entirely outside Rule 6(e)." DOJ Resp. at 2. Again, DOJ is wrong. *McKeever*'s interpretation of *Haldeman* was "'reasoning essential' to the Court's holding." *Apprendi v. New Jersey*, 530 U.S. 466, 488 n.14 (2000) (quoting *id.* at 536 (O'Connor, J., dissenting)). *Haldeman* after all, was an en banc decision. If *Haldeman* had been decided on inherent authority grounds, the *McKeever* panel would have had no choice but to apply that precedent faithfully. The *McKeever* panel recognized as much; indeed, this argument was the sole subject of the dissent. *See* 920 F.3d at 847 n.3 ("[O]ur dissenting colleague cite[s] *Haldeman* . . . as stepping outside the strict bounds of Rule 6(e)."); *id.* at 853–55 (Srinivasan, J., dissenting). Thus, when the *McKeever* majority "read *Haldeman* as did Judge MacKinnon in his separate opinion concurring in part, as fitting within the Rule 6 exception for 'judicial proceedings," *id.* at 847 n.3 (majority opinion), the majority made that interpretation the binding law in this Circuit.[30]

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we hold that the District Court did not abuse its discretion . . . ."), rather than straightforward approval of the decision below. The *Haldeman* Court did the latter.

[30] When queried about reconciling DOJ's current position with its historical support of providing grand jury materials to Congress for use in impeachment inquiries, DOJ responded that its position has "evolved." Hr'g Tr. at 85:24. No matter how glibly presented, however, an "evolved" legal position may be estopped. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (alteration in original) (internal quotation mark omitted) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). This rule also applies when a party, including a governmental entity, makes "a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Id.* at 749 (internal quotation mark omitted), *see also id.* at 755–56 (applying estoppel to a state government). Here, DOJ has changed

Most troubling, DOJ's proposed reading of "judicial proceeding" raises constitutional concerns. DOJ policy is that a sitting President cannot be indicted, *OLC Op.*, which policy prompted the Special Counsel to abstain from "mak[ing] a traditional prosecutorial judgment" or otherwise "draw[ing] ultimate conclusions about the President's conduct." Mueller Report at II-8. This leaves the House as the only federal body that can act on allegations of presidential misconduct. Yet, under DOJ's reading of Rule 6(e), the Executive Branch would be empowered to wall off any evidence of presidential misconduct from the House by placing that evidence before a grand jury. Rule 6(e) must not be read to impede the House from exercising its "sole Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5; *cf. Trump v. Comm. on Oversight and Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76, 95 (D.D.C. 2019) ("It is simply not fathomable that a Constitution that grants Congress the power to remove a President for reasons including criminal behavior would deny Congress the power to investigate him for unlawful conduct . . . ."), *aff'd sub nom. Trump v. Mazars USA, LLP*, No. 19-5142, 2019 WL 5089748 (D.C. Cir. 2019).

* * *

its longstanding position regarding whether impeachment trials are "judicial proceedings" and whether *Haldeman* so held. In *Haldeman* itself, the special prosecutor argued for disclosure of the grand jury materials and "represented that this disclosure of the grand jury material to the House Judiciary Committee and eventually possibly to the House and Senate [was] being made 'preliminarily to (and) in connection with a judicial proceeding.'" *Haldeman*, 501 F.2d at 717 (MacKinnon, J. concurring in part and dissenting in part) (quoting FED. R. CRIM. P. 6(e)). Similarly, when grand jury material was released to HJC during the impeachments of Judges Hastings and Porteous, DOJ raised no objections. *See Hastings*, 833 F.2d at 1441–42 ("[T]he Department of Justice has stated that it has 'no objection' to this disclosure to the Committee."); Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG, at 2 ("DOJ does not oppose the request."). Most importantly, in *McKeever* itself DOJ successfully argued—*just last year*—that the D.C. Circuit has "treated *Haldeman* as standing only for the proposition that an impeachment proceeding may qualify as a 'judicial proceeding' for purposes of Rule 6(e)," *see* Brief for Appellee at 37, *McKeever*, 920 F.3d 842 (No. 17-1549), and the D.C. Circuit agreed, *see McKeever*, 920 F.3d at 847 n.3. DOJ's position has had a speedy evolution indeed. Nevertheless, since DOJ's reading of *Haldeman* and *McKeever* fails on the merits, further consideration of whether DOJ's new position is estopped is unnecessary.

As the foregoing analysis shows, a Senate impeachment trial is a "judicial proceeding" within the meaning of Rule 6(e). *Quod erat demonstrandum*.

B. HJC's Consideration of Articles of Impeachment is "Preliminarily To" an Impeachment Trial

Rule 6(e)(3)(E)(i)'s authorization of disclosure "preliminarily to or in connection with a judicial proceeding" is "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Baggot*, 463 U.S. at 480. Thus, "[i]f the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under ([E])(i) is not permitted." *Id*. For HJC's current impeachment-related proceedings to qualify as "preliminarily to . . . a judicial proceeding" and disclosure to be permissible, HJC must be engaged in an investigation that is "related fairly directly to" an "anticipated" impeachment trial. *Id.* As explained in more detail below, the "primary purpose," *id.*, of HJC's investigation is to determine whether to recommend articles of impeachment and HJC therefore satisfies this prerequisite for disclosure.

1. Governing Legal Principles Demonstrate That House Proceedings Can be "Preliminarily To" a Senate Impeachment Trial

The Supreme Court has addressed the issue of how to apply Rule 6(e)'s "preliminarily to" requirement only once, in *Baggot*. There, the Court addressed two situations—one that met the "preliminarily to" requirement, and one that did not. First, the Supreme Court considered an Internal Revenue Service ("IRS") "audit of civil tax liability," the purpose of which was "not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." *Id.* This failed the "preliminarily to" test because, even "[a]ssuming *arguendo* that this audit will inevitably disclose a deficiency," "[t]he IRS's decision is largely self-executing, in the sense that it has independent legal force of its own, without requiring prior validation or enforcement by a court." *Id.* at 481. By contrast, the Court discussed a second situation where

"the IRS had closed its audit and issued a notice of deficiency, and the taxpayer had clearly expressed its intention to seek redetermination of the deficiency in the Tax Court." *Id.* at 483. In that second situation, the Supreme Court explained the Seventh Circuit "correctly held . . . that the IRS may seek [Rule 6(e)(3)(E)(i)] disclosure" because "[i]n such a case, the Government's primary purpose is plainly to use the materials sought to defend the Tax Court litigation, rather than to conduct the administrative inquiry that preceded it." *Id.* (citing *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079 (7th Cir. 1982)).

Between these two situations, a myriad of alternative circumstances is possible. The Supreme Court abstained, however, in footnote 6, from defining precisely "the level of likelihood of litigation that must exist before an administrative action is preliminary to litigation." *Id.* at 482 n.6. In so doing, the Court acknowledged, in practical terms, how investigations evolve to reach the point of contemplating litigation, stating:

> [a]s a general matter, many an investigation, begun to determine *whether* there has been a violation of law, reaches a tentative affirmative conclusion on that question; at that point, the focus of the investigation commonly shifts to ascertaining the scope and details of the violation and building a case in support of any necessary enforcement action.

Id. (emphasis in original). Given these practical realities, the Court declined to specify "how firm the agency's decision to litigate must be before its investigation can be characterized as 'preliminar[y] to a judicial proceeding,'" *id*. (alteration in original), noting that in the case before it, the Court was confronted with a "clear" case of the "IRS's proposed use" being to "assess[] taxes rather than to prepare for or to conduct litigation," *id*. at 483.

The D.C. Circuit similarly has had limited opportunity to consider application of the "preliminarily to" requirement in Rule 6(e). Post-*Baggot*, the D.C. Circuit has made clear that "a party requesting grand jury material must demonstrate that his 'primary purpose' for acquiring

the material is preliminary to or in connection with a judicial proceeding." *In re Sealed Motion*, 880 F.2d at 1379 n.15.[31] As suggested by *Baggot*'s footnote 6, the D.C. Circuit has further indicated that an investigation can be "preliminarily to" a judicial proceeding even though no litigation is actually pending but may only be "possible." *In re Grand Jury*, 490 F.3d at 986 (holding that grand jury investigation satisfies the "preliminarily to" test as "preliminary to a possible criminal trial").

DOJ actually makes little effort to dispute that *if* an impeachment trial is a judicial proceeding, the House's consideration of articles of impeachment is "preliminary to" that proceeding at least in some circumstances. DOJ Resp. at 26, n.15; *see id*. at 24–30. DOJ is wise not to waste much energy on that argument. To the extent the House's role in the impeachment context is to investigate misconduct by the President and ascertain whether that conduct amounts to an impeachable offense warranting removal from office, the House performs a function somewhat akin to a grand jury. *See In re 1972 Grand Jury Report*, 370 F. Supp. at 1230 (stating that House "acts simply as [a] grand jury."); 3 Hinds Ch. 72 § 2343 ("The analogy between the function of the House in this matter [referring to 1804 impeachment of Justice Samuel Chase] and that of a grand jury was correct and forcible."); *id.* Ch. 54 § 1729 (explaining in the context of an 1818 "inquiry into the conduct of clerks in the Executive Departments" "that the House was in the relation of a grand jury, to the nation, and that it was the duty of the House to examine into the conduct of public officers"); *id.* Ch. 79 § 2505 (explaining in 1873 during the impeachment of Judge Delahay that "[t]he Senate is a perpetual court of impeachment, and in

[31] At least two other circuits have reached the same conclusion. *See Patton v. C.I.R.*, 799 F.2d 166, 172 (5th Cir. 1986) ("In *Baggot*, the Supreme Court observed that Rule [6(e)(3)(E)(i)] 'contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated,' as measured by the 'primary purpose of the disclosure.'" (quoting *Baggot*, 463 U.S. at 480)); *In re Barker*, 741 F.2d 250, 254 (9th Cir. 1984) ("Under *Baggot*, the proper inquiry is whether the primary purpose of the disclosure is to assist in the preparation or conduct of judicial proceedings.").

presenting these articles we act only as a grand jury"); *Mazars*, 2019 WL 5089748, at *32 (Rao, J., dissenting) ("In the context of an impeachment inquiry, the House serves as a kind of grand jury, investigating public officials for misconduct."); *cf. Jefferson's Manual of Parliamentary Procedure* § 615a ("*Jefferson's Manual*") ("[The English House of Commons] have been generally and more justly considered, as is before stated, as the grand jury.").[32]

Accordingly, just as a grand jury investigation is "preliminary to a possible criminal trial," *In re Grand Jury*, 490 F.3d at 986, a House impeachment inquiry occurs preliminarily to a possible Senate impeachment trial.

2. HJC's Primary Purpose is to Determine Whether to Recommend Articles of Impeachment

HJC's investigation is in fact "preliminarily to" an impeachment trial because its primary purpose is to determine whether to recommend articles of impeachment. Before detailing how the record of House and HJC impeachment activities verifies this primary purpose, DOJ's and Representative Collins' proposed criteria for meeting the "preliminarily to" test are considered and, due to their critical shortcomings, rejected.

***a. DOJ's Proposed "Preliminarily To" Test is Contrary to* Baggot**

Despite the clarity with which the Supreme Court "decline[d]," *Baggot*, 463 U.S. at 482 n.6, to draw the line when an investigation becomes "preliminarily to . . . a judicial proceeding," DOJ relies heavily on *Baggot* to contend that HJC's inquiry fails to cross that line. *See* DOJ Resp. at 24–25. In this vein, DOJ construes *Baggot* as requiring HJC to show that its

[32] The grand jury analogy is not perfect. *See* 145 Cong. Rec. S1586 (1999) (statement of Sen. Leahy) (noting that the analogy between the House and a grand jury is "loose" (quoting *Background and History of Impeachment: Hearing Before the Subcomm. On the Constitution of the HJC*, 105th Cong., XX S. Doc. 106-3 at 228 (statement of Laurence H. Tribe) (1998)). When the House decides whether to impeach, it functions as more than a "mere 'accuser.'" *Id.* "The House's constitutional responsibility for charging the President should not be misinterpreted to justify applying only a grand jury's 'probable cause' standard of proof." *Id.* at S1587. Rather, "House Members who vote to impeach should also be convinced th[e] President has so abused the public trust and so threatens the public that he should be removed." *Id.*

investigation "must lead to referral of articles of impeachment to the floor of the House," *id.* at 25, and further that "referral of articles of impeachment 'must' lead to a Senate trial," *id.* Short of those dual showings of action in the House and in the Senate, DOJ posits that HJC's investigation amounts only to "[a] nonlitigative function," *id*. at 27 (quoting *Baggot*, 463 U.S. at 483), with only a "tenuous" connection to an impeachment trial, *id.* at 25, which is "entirely hypothetical rather than 'likely to emerge,'" *id*. at 29 (quoting *Baggot*, 463 U.S. at 480)).

The line-drawing suggested by DOJ—requiring dual showings of the House's intention to pass articles of impeachment plus a guaranteed Senate impeachment trial—ignores first the Supreme Court's expressed appreciation that, even in the midst of an investigation, the focus can shift to "building a case" and then qualify as preliminarily to "any necessary enforcement action." *Baggo*t, 463 U.S. at 482 n.6. Nor is DOJ's requirement of a guarantee of a Senate impeachment trial grounded in *Baggot*. *Baggot* made clear that the requisite judicial proceeding need not be subject to initiation by the party seeking disclosure or pending at the time of the requested grand jury disclosure; the proceeding need only be "anticipated," *id*. at 480, or "possible," *In re Grand Jury*, 490 F.3d at 986; *see Baggot*, 463 U.S. at 482–83 ("We also do not hold that . . . a private party who anticipates a suit . . . may never obtain ([E])(i) disclosure of grand jury materials any time the initiative for litigating lies elsewhere. Nor do we hold that such a party must always await the actual commencement of litigation before obtaining disclosure."). Thus, DOJ's proposed criteria to demonstrate a "primary purpose" for an impeachment inquiry are rejected.

DOJ also reasons that HJC's proceedings *here* are not "preliminarily to" impeachment because "the Committee's actions thus far . . . at most amount to an exploratory inquiry where

impeachment is one of many possible outcomes." DOJ Resp. at 24.[33] Even if DOJ were correct that only some congressional committee investigations are "preliminarily to" an impeachment trial, *see In re Uranium Grand Jury*, 1979 WL 1661, at *7 (determining that Rule 6(e) is not satisfied where a House committee "makes a somewhat vague assertion that one of the reasons it needs to examine the transcripts is that it might result in its recommendation to the House Judiciary Committee that impeachment proceedings be initiated"), DOJ is wrong in this instance, as detailed *infra* in Part III.B.2.C.

b. No House "Impeachment Inquiry" Resolution is Required

Relatedly, Representative Collins asserts that HJC's investigation cannot be "preliminarily to" an impeachment trial until the full House passes a resolution authorizing a "formal impeachment proceeding." Collins Mem. at 1. DOJ equivocates on this proposed bright line test to meet the "preliminarily to" requirement, Hr'g Tr. at 69:10–11, but seems to indicate that the House must go at least that far, *see* DOJ Resp. at 28. Like all bright-line rules, this "House resolution" test is appealing in terms of being easy to apply. Yet, the reasoning supporting this proposed test is fatally flawed. The precedential support cited for the "House resolution" test is cherry-picked and incomplete, and more significantly, this test has no textual support in the U.S. Constitution, the governing rules of the House, or Rule 6(e), as interpreted in binding decisions.

[33] Some of DOJ's arguments regarding whether HJC meets the "preliminarily to" test have been mooted due to developments in the possible impeachment of President Trump since the pending application was filed. DOJ, for instance, initially argued that statements by the Speaker and the House Majority Leader showed that "the House Democratic caucus was 'not even close' to an 'impeachment inquiry.'" DOJ Resp. at 27 (quoting *Rep. Nancy Pelosi (D-CA) Continues Resisting Impeachment Inquiry*, CNN (June 11, 2019), http://transcripts.cnn.com/TRANSCRIPTS/1906/11/cnr.04html). That may have been true in June, but not now, after the Speaker herself announced in September that the full House is "moving forward with an official impeachment inquiry." *Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), https://perma.cc/6EQM-34PT [hereinafter Pelosi Tr.].

Turning first to the arguments that stem from precedent, DOJ and Representative Collins state that the "impeachments of Presidents Clinton and Andrew Johnson were investigated in multiple phases with each phase authorized by the House's adoption of resolutions." DOJ Resp. at 28; *see also* Collins Mem. at 9–12 (stating that for presidential impeachments, including the likely impeachment of President Nixon had he not resigned, "the full House voted to authorize impeachment proceedings"). Even were this statement accurate, which it is not, the manner in which the House has chosen to conduct impeachment inquiries encompasses more than past Presidents and no sound legal or constitutional reason has been presented to distinguish the House's exercise of impeachment authority for a President from the exercise of such authority more generally.[34]

Indisputably, the House has initiated impeachment inquiries of federal judges without a House resolution "authorizing" the inquiry. *See, e.g.*, H.R. Rep. No. 101-36, at 13–16 (1988) (describing proceedings with respect to Judge Walter Nixon leading up to HJC's recommendation of articles of impeachment, with no mention of an authorizing resolution); H. R. Res. 320, 100th Cong. (as passed by the House Dec. 2, 1987) (authorizing taking of affidavits and depositions during the impeachment investigation of Judge Hastings, without any formal House resolution for an "impeachment inquiry"); H.R. Rep. No. 99-688, at 3–7 (1986) (describing proceedings with respect to Judge Harry Claiborne leading up to HJC's

[34] DOJ and Representative Collins offer only one argument for distinguishing presidential and judicial impeachments: that the House "has delegated initial investigatory authority for impeachment to the U.S. Judicial Conference through the passage of the Judicial Conduct and Disability Act of 1980." Collins Mem. at 10 n.12 (citing 28 U.S.C. § 355(b)); *see also* Hr'g Tr. at 83:21–84:23 (DOJ) (raising similar argument). Yet, during the investigations of Judge Porteous and Judge Hastings, HJC did not rely on the Judicial Conference to furnish relevant grand jury material but instead petitioned for and received relevant grand jury material directly from the courts supervising the grand jury investigations of the judges at issue. *See Hastings*, 833 F.2d 1438; Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG. Moreover, the impeachment investigation of Justice Douglas, which went forward without a House Resolution, occurred in 1970, before the Judicial Conduct and Disability Act of 1980 was adopted. *See Final Report on Associate Justice William O. Douglas, Special Subcomm. on H.R. Res. 920 of the House Comm. on the Judiciary*, 91st Cong. (1970).

recommendation of articles of impeachment, with no mention of an authorizing resolution); 3 Deschler Ch. 14 § 5 ("In the case of Justice Douglas, the Committee on the Judiciary authorized a special subcommittee to investigate the charges, without the adoption by the House of a resolution specifically authorizing an investigation."). Furthermore, federal judges have been *impeached* by the House without a House resolution "authorizing" an inquiry. *See* H.R. Res. 87, 101st Cong. (1989) (impeaching Judge Nixon); H.R. Res. 499 100th Cong. (1988) (impeaching Judge Hastings); H.R. Res. 461, 99th Cong. (1986) (impeaching Judge Claiborne). In the course of an impeachment proceeding against a federal judge, the House has also obtained grand jury material to assist in an impeachment inquiry that was not "authorized" by a specific House impeachment resolution. *See Hastings*, 833 F.2d at 1439 (releasing Hastings grand jury information to HJC).

Even in cases of presidential impeachment, a House resolution has never, in fact, been required to begin an impeachment inquiry. In the case of President Johnson, a resolution "authoriz[ing]" HJC "to inquire into the official conduct of Andrew Johnson" was passed *after* HJC "was already considering the subject." 3 Hinds Ch. 75 § 2400. In the case of President Nixon, HJC started its investigation well before the House passed a resolution authorizing an impeachment inquiry. *See* 3 Deschler Ch. 14, § 15 (Parliamentarian's Note) (noting that even before "the adoption of" the Nixon impeachment-inquiry resolution, "House Resolution 803," HJC "had been conducting an investigation into the charges of impeachment against President Nixon," such as by "hir[ing] special counsel for the impeachment inquiry").[35] In the case of President Clinton, the D.C. Circuit authorized the disclosure of grand jury materials to Congress

[35] DOJ and Representative Collins both agree that the events leading up to President Nixon's resignation are relevant historical precedent for the purpose of the current inquiry, even though President Nixon left office before he could be impeached. *See* Hr'g Tr. at 71:13–19 (DOJ); Collins Mem. at 9–10.

on July 7, 1998, *see* HJC App., Ex. Q, Order, *In re Madison Guaranty Savings & Loan Assoc.*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam), ECF No. 1-18, even though no impeachment resolution had yet been adopted and was not adopted by the House until four months later, *see* H. R. Res. 525, 105th Cong. (1998) (authorizing, on October 8, 1998, HJC to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach" President Clinton).[36]

While close scrutiny of the historical record undercuts that justification for the "House resolution" test proposed by Representative Collins, the more significant flaw with this proposal is as follows: while this test may address political legitimacy concerns, which are best resolved in the political arena, no governing law requires this test—not the Constitution, not House Rules, and not Rule 6(e), and so imposing this test would be an impermissible intrusion on the House's constitutional authority both to "determine the rules of its proceedings" under the Rulemaking Clause, U.S. CONST., Art. I, § 5, cl. 2, and to exercise "the sole power of Impeachment" under the Impeachment Clause, *id.* § 2, cl. 5. This Court "ha[s] no authority to impose," by judicial order, a particular structure on House proceedings. *Mazars*, 2019 WL 5089748, at *24. In *Mazars*, for example, the D.C. Circuit rejected the position that enforcement of a House Oversight and Reform Committee subpoena of a third-party's records related to President Trump and his business associates was inappropriate until the "full House" granted the Committee "express authority to subpoena the President for his personal financial records." *Id.* at *24 (internal quotation marks omitted). Citing the Constitution's Rulemaking Clause, the D.C.

[36] DOJ dismisses the example of the House's impeachment of President Clinton, contending that the then-operative Independent Counsel Act provided independent authorization for disclosure of grand jury material to Congress. DOJ Resp. at 22–23. Putting aside whether DOJ correctly reads the now-lapsed independent counsel statute, this contention only confirms that full House impeachment resolutions have not been a necessary predicate for HJC to commence an impeachment investigation and obtain access to grand jury material to assist in that investigation.

Circuit explained that "unless and until Congress adopts a rule that offends the Constitution, the courts get no vote in how each chamber chooses to run its internal affairs." *Id*.; *see also Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019) (noting that "'*making* the Rules . . . [is] a power that the Rulemaking Clause reserves to each House alone'" (quoting *United States v. Rostenkowski*, 59 F.3d 1291, 1306–07 (D.C. Cir. 1995)). This Court likewise lacks authority to require the House to pass a resolution tasking a committee with conducting an impeachment inquiry.

Representative Collins shifts gears with an alternative challenge to HJC's petition, contending that, even if no House rule prohibits HJC from beginning an impeachment investigation without a House resolution, the House has not "delegate[d] such authority to the Committee," and HJC has no powers except those expressly granted to it. Collins Mem. at 6. Pressing this point, he argues that the House has thus far delegated only "legislative and oversight authority to the Committee," not "impeachment authority," *id*. at 5, and, further, that the Speaker of the House may not "unilaterally delegate to the Committee the House's impeachment power," *id*. at 13–14. These contentions are, at worst, red herrings and, at best, incorrect.

At the outset, the distinction drawn by Representative Collins between Congress's "legislative and oversight authority" and Congress's "impeachment authority," is not so rigid as he makes out. Nothing "in the Constitution or case law . . . compels Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process." *Mazars*, 2019 WL 5089748, at *18.[37] In any event, the House has

[37] The distinction between Congress' legislative and impeachment authority, even if otherwise sound, has questionable relevance to the Rule 6(e) analysis. The "preliminarily to" requirement depends on the "primary purpose" disclosure would serve, not the source of authority Congress acts under.

sufficiently delegated to HJC the authority to conduct an impeachment inquiry in at least two ways. *Jefferson's Manual*—which under House Rule XXI "'govern[s] the House in all cases to which [it is] applicable and in which [it is] not inconsistent with the Rules and orders of the House'"—provides that impeachment can be "set[] . . . in motion" by "a resolution introduced by a Member and referred to a committee" as well as "facts developed and reported by an investigating committee of the House." *Jefferson's Manual* § 603.[38] Additionally, the full House has authorized, in Resolution 430, HJC to bring this suit and simultaneously granted HJC "*any* and *all* necessary authority under Article I of the Constitution." H.R. Res. 430, 116th Cong. (as passed by House June 11, 2019) (emphases added).[39]

As to Representative Collins' last point regarding the Speaker's statement, HJC never claims that the Speaker possesses the power to authorize an impeachment inquiry solely by saying so. Rather, HJC points to the Speaker's statement as evidence of the primary purpose of HJC's investigation. The Speaker's statement is, in fact, highly probative evidence on that score.[40] Even DOJ does not dispute that statements made by the House Speaker may be

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[38] *Jefferson's Manual* is one of the "fundamental source material[s] for parliamentary procedure used in the House of Representatives." Thomas J. Wickham, *Constitution, Jefferson's Manual, and Rules of the House Representatives of the United States One Hundred Fifteenth Congress* at v (2017).

[39] Challenge to a specific committee action on grounds that HJC's authority was in doubt would be unreviewable. "[U]nless and until Congress adopts a rule that offends the Constitution," judicial review of House rules is inappropriate. *Mazars*, 2019 WL 5089748, at *24. Here, neither DOJ nor Representative Collins complains that HJC's actions or authorizing House rules suffer from a "constitutional infirmity." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983). That distinguishes this case from *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), which Representative Collins heavily relies on; there the House resolution at issue raised "serious and difficult" constitutional issues. *Id.* at 275; *see also Mazars*, 2019 WL 5089748, at *24 (similarly distinguishing *Tobin*).

[40] Citing Speaker Pelosi's September 2019 statement, Representative Collins also argues that HJC's investigation is not "preliminarily to" a Senate impeachment trial because the "impeachment inquiry" announced by the Speaker will "be handled by three other committees and focus 'narrowly on the Ukraine matter'" rather than on allegations in the Mueller Report. Collins Mem. at 14 (quoting Rachael Blade and Mike DeBonis, *Democrats Count on Schiff to Deliver Focused Impeachment Inquiry of Trump*, WASH. POST (Sept. 29, 2019), https://www.washingtonpost.com/politics/pelosi-turns-to-schiff-to-lead-house-democrats-impeachment-inquiry-of-trump/2019/09/28/ed6c4608-e149-11e9-8dc8-498eabc129a0_story.html). This argument is misguided, first, because Speaker Pelosi made clear that "six [c]ommittees"—including HJC—would "proceed with their investigations under that umbrella of impeachment inquiry," Pelosi Tr., and thus HJC plainly remains engaged. Second, the current focus on President Trump's interactions with the foreign leader of Ukraine is pertinent, not to the "preliminarily to"

probative in evaluating the "primary purpose" of HJC inquiries, as DOJ too has relied on the Speaker's statements in its arguments about satisfaction of the "preliminarily to" requirement. *See* DOJ Resp. at 3, 26–27.

c. The Record of House and HJC Impeachment Activities Here Meets the "Preliminarily To" Test

Having dispatched DOJ's and Representative Collins' unsupported criteria for meeting the "preliminarily to" test, examination of the record before the Court is essential to assess whether HJC has satisfied the actual inquiry: *Baggot*'s "primary purpose" test. As HJC explains, the purpose of HJC's investigation and the requested disclosure is "to determine whether to recommend articles of impeachment," HJC App. at 3, and the record evidence supports that claim. Determining whether to recommend articles of impeachment may not have been the primary purpose of HJC's investigation initially, but that is of no moment. "Congress's decision whether, and if so how," to act "will necessarily depend on what information it discovers in the course of an investigation, and its preferred path forward may shift as members educate themselves on the relevant facts and circumstances." *Mazars*, 2019 WL 5089748, at *13. While HJC is "pursuing a legitimate legislative objective [it] may . . . choose to move from legislative investigation to impeachment," *id.* at *18, and that is precisely what occurred here, as a review of the record evidence in chronological order demonstrates.

The beginnings of HJC's current investigation trace to January 3, 2019, when a resolution calling for President Trump's impeachment was introduced, *see* H.R. Res. 13, 116th Cong. (2019), and, in keeping with standard practice, then referred to HJC for consideration, 165 Cong. Rec. H201, H211 (daily ed. Jan. 3, 2019) (referring H.R. Res. 13 to HJC). This resolution

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requirement, but to the issue of whether HJC has shown a "particularized need" for the redacted grand jury materials in the Mueller Report. As to the "preliminarily to" requirement, the Ukrainian developments simply underscore that the investigations currently proceeding in the House may lead to a Senate impeachment trial.

remains under review before HJC. *See* All Actions H.Res.13 — 116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/house-resolution/13/all-actions.

HJC turned to the subject of impeachment in earnest after the release of the Mueller Report. On June 6, 2019, HJC issued a report that accompanied a resolution recommending that AG Barr be held in contempt of Congress for failing to comply with a subpoena for production of the unredacted Mueller Report and underlying materials. *See* H.R. Rep. No. 116-105 (2019) ("Contempt Report"). That Contempt Report explained that among the "purposes" of HJC's "investigation into the alleged obstruction of justice, public corruption, and other abuses of power by President Donald Trump" was to "consider[] whether any of the conduct described in the Special Counsel's Report warrants the Committee in taking any further steps under Congress' Article I powers," "includ[ing] whether to approve articles of impeachment with respect to the President." *Id.* at 13.

Significantly, on June 11, 2019, the full House voted to ensure HJC possessed the authority needed to continue this investigation. The House approved, by a vote of 229 to 191, a resolution allowing HJC "to petition for disclosure of information" related to the Mueller Report—*i.e.*, to bring the instant action. H.R. Res. 430, 116th Cong. (2019). House Resolution 430 expressly authorized HJC to bring a petition pursuant to Rule 6(e)'s "'preliminarily to . . . a judicial proceeding'" exception, *id.* (omission in original) (quoting FED. R. CRIM. P. 6(e)(3)(E)(i)), and, as noted above, granted HJC, in connection with that authorization, "*any* and *all* necessary authority under Article I of the Constitution," *id.* (emphases added).

By July, HJC's investigation had become focused on the impeachment power, as expressed in a July 11, 2019 memorandum issued by HJC Chairman Nadler explaining that HJC is "determin[ing] whether the Committee should recommend articles of impeachment against the

President or any other Article I remedies, and if so, in what form." HJC App., Ex. A, Jerrold Nadler, Chairman, H. Comm. on the Judiciary, *Memorandum Re: Hearing on "Lessons from the Mueller Report, Part III: 'Constitutional Processes for Addressing Presidential Misconduct*'" at 3 (July 11, 2019), ECF No. 1-2. At a hearing held the next day, Chairman Nadler further stated that HJC's "responsibility" was "to determine whether to recommend articles of impeachment against the President," noting that "articles of impeachment are under consideration as part of the Committee's investigation." HJC App., Ex. T, *Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct": Hearing Before the H. Comm. on the Judiciary* at 4 (July 12, 2019), ECF No. 1-21 (capitalization altered). On September 12, 2019, HJC adopted a resolution confirming that the purpose of its investigation is "to determine whether to recommend articles of impeachment with respect to President Donald J. Trump." DOJ Resp., Ex. 11, Comm. on the Judiciary, Resolution for Investigative Procedures at 4 (Sept. 12, 2019), ECF No. 20-11.

Finally, on September 24, 2019, House Speaker Nancy Pelosi announced that the full House is "moving forward with an official impeachment inquiry." Pelosi Tr. "For the past several months," Speaker Pelosi explained, the House had been "investigating in our Committees and litigating in the courts so the House can gather all of the relevant facts and consider whether to exercise its full Article I powers, including a constitutional power of the utmost gravity, approval of articles of impeachment." *Id.* Thus, Speaker Pelosi "direct[ed]" the "six Committees"—including HJC—to "proceed with their investigations under that umbrella of impeachment inquiry" going forward. *Id.*

These indicia of HJC's purpose sufficiently demonstrate that the primary purpose of the investigation for which the grand jury disclosure is sought is to determine whether to recommend

articles of impeachment against President Trump. *Cf. Mazars*, 2019 WL 5089748, at *10–11 (looking to statements a committee chairman made in a memorandum to his colleagues to assess the purpose of a congressional investigation); *see Jefferson's Manual* § 603 at 319 (stating that "[i]n the House various events have been credited with setting an impeachment in motion," such as "charges made on the floor on the responsibility of a Member or Delegate," "a resolution introduced by a Member and referred to a committee," "charges transmitted . . . from a grand jury," and "facts developed and reported by an investigating committee of the House"); 3 Deschler Ch. 14 § 5 ("In the majority of cases, impeachment proceedings in the House have been initiated either by introducing resolutions of impeachment by placing them in the hopper, or by offering charges on the floor of the House under a question of constitutional privilege. Where such resolutions have directly impeached federal civil officers, they have been conferred by the Speaker to the Committee on the Judiciary, which has jurisdiction over federal judges and presidential succession . . . ."); Charles W. Johnson et al., *House Practice: A Guide to the Rules, Precedents, and Practice of the House*, Ch. 27 § 6, at 602 (2017) (confirming same).

Formulating a firm line on when, in the impeachment context, activities within the House meet the "preliminarily to" requirement to qualify for disclosure of grand jury material need not be drawn here, since this case is clear. Collectively, the record shows an evolving and deliberate investigation by HJC that has become focused on determining whether to impeach the President and thus has crossed the "preliminarily to" threshold.

3. Requiring More Than the Current Showing by HJC, as DOJ Demands, Would Improperly Intrude on Article I Powers Granted to House of Representatives

DOJ urges this Court to second-guess a co-equal branch of government and find that the steps taken by the House fall short of showing a primary purpose of undertaking an impeachment inquiry that would meet the "preliminarily to" requirement in Rule 6(e)(3)(E)(i). In so doing,

DOJ again invites an impermissible intrusion on the House's constitutional authority under the Rulemaking and Impeachment Clauses. These Article I grants of exclusive authority require a degree of deference to the House's position that the House and HJC are currently engaged in an investigation with the primary purpose of assessing whether to adopt articles of impeachment. *See Vander Jagt,* 699 F.2d at 1173 (concluding that the Rulemaking Clause "means that neither we nor the Executive Branch may tell Congress what rules it must adopt"); *Mazars*, 2019 WL 5089748, at *24 ("[U]nless and until Congress adopts a rule that offends the Constitution, the courts get no vote in how each chamber chooses to run its internal affairs."); *Nixon v. United States*, 506 U.S. 224, 238 (1993) (concluding that judicial review of Senate impeachment trial procedures would be inconsistent with the text and structure of the Constitution).

At the same time, HJC has argued that complete and absolute deference is due to the House and HJC not only in structuring but also in articulating the purpose of the current inquiry. Hearing Tr. at 25:23–26:4; *see also* HJC App. at 30–31. HJC's position goes too far, at least as to judicial review of HJC's "primary purpose." Rule 6(e), and the Supreme Court's cases interpreting it, grant this Court authority, and indeed a responsibility, to verify that HJC seeks disclosure of the grand jury material for use in an inquiry whose core aim is assessing possible articles of impeachment. The preceding review of the factual record and finding about HJC's "primary purpose" fulfill that responsibility of judicial review without intruding on the House's ability to write its own rules or to exercise its power of impeachment. *See Morgan v. United States*, 801 F.2d 445, 449 (D.C. Cir. 1986) (Scalia, J.) (noting that "no absolute prohibition of judicial review" of House Rules exists).[41]

[41] Although neither the Supreme Court nor the D.C. Circuit has considered the justiciability of, or the degree of deference due in, cases implicating the House's "sole power of Impeachment," U.S. CONST., Art. I, § 2, cl. 5, verifying that the factual record supports HJC's assertion about its "primary purpose" does not require direct judicial review of any actions by the House taken pursuant to the impeachment power.

Additionally, DOJ's position that no disclosure of grand jury information to a House impeachment inquiry is permitted under Rule 6(e), *see* DOJ Resp. at 13–19, would completely bar access to relevant grand jury materials. Such a blanket bar would have concrete repercussions on limiting the House's access to investigative materials and thereby impermissibly impede the House's ability to exercise its constitutional power of impeachment. The House, through the committees tasked with conducting an impeachment investigation, must develop a factual record supporting at least a good-faith basis for believing that the President has engaged in conduct meeting the constitutional requirement of a "high crime" or "misdemeanor" before voting in favor of articles of impeachment targeting such conduct. *Cf. Kaley v. United States*, 571 U.S. 320, 328 (2014) (noting that to issue an indictment, a grand jury must find probable cause to believe a defendant committed the charged offense); Dep't of Justice, *Justice Manual* § 9-27.220 (explaining that before commencing or recommending federal prosecution against an individual, a federal prosecutor must "believe[] that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction"). Indeed, even a lawyer in a civil proceeding must "certif[y] that to the best of the [lawyer's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the "factual contentions" presented to the court "have evidentiary support." FED. R. CIV. P. 11(b).

Blocking access to evidence collected by a grand jury relevant to an impeachment inquiry, as DOJ urges, undermines the House's ability to carry out its constitutional responsibility with due diligence. On the other hand, interpreting Rule 6(e) in a manner compatible with this constitutional responsibility avoids this conundrum, and ensures HJC has

access to the pertinent information *before* making an impeachment recommendation to the full House.

4. DOJ's Remaining Objections are Unpersuasive

DOJ's remaining arguments are easily dispatched. DOJ asserts that "the full House in the current Congress has already voted overwhelmingly *against* impeachment," DOJ Resp. at 25 (emphasis added), because House Resolution 498, which called for an impeachment inquiry based on "President Trump's racist comments," H.R. Res. 498, 116th Cong. (2019), was "defeated 332-95," DOJ Resp. at 25. Yet, the fact that House Resolution 498 was tabled, *see* All Actions, H.Res.498 — 116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/house-resolution/498/all-actions?actionsSearchResultViewType=compact, has little relevance here since that resolution has nothing to do with the concerns of the current impeachment inquiry, which is focused on the President's possible criminal conduct described in the Mueller Report and in connection with Ukraine.

Next, DOJ claims that HJC's "primary purpose" is to decide among different possible actions to "pursue in response to the Mueller Report," such as "various legislative proposals, Constitutional amendments, and a Congressional referral to the Department of Justice for prosecution or civil enforcement." DOJ Resp. at 26. DOJ is correct that deciding whether to recommend articles of impeachment may not always have been—and still may not be—the only purpose of HJC's current investigation, but that is to be expected. "As the Supreme Court has explained, '[t]he very nature of the investigative function—like any research—is that it takes the searchers up some "blind alleys" and into nonproductive enterprises.'" *Mazars*, 2019 WL 5089748, at *21 (alteration in original) (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 (1975)). Here, HJC began, appropriately, with a broad inquiry, but focused on impeachment as the investigation progressed. This new focus does not necessitate that HJC

forgo its other aims. *See Mazars*, 2019 WL 5089748, at *18. HJC's investigation to determine whether to impeach President Nixon, for example, contributed not only to President Nixon's resignation, but also to significant legislative reforms. *See, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 611 (D.C. Cir. 1997) (Internal Revenue Code provision restricting public release of individual tax returns); *United States v. Rose*, 28 F.3d 181, 183 (D.C. Cir. 1994) (Ethics in Government Act of 1978).

Finally, DOJ cautions that if introduction of articles of impeachment by a single Member of Congress were sufficient to render an HJC investigation "preliminarily to" an impeachment trial, grand jury information would become "politicized." Hr'g Tr. at 70:6; *see also* DOJ Resp. at 28. That hypothetical situation is far removed from this case, where HJC is months into its investigation and both the Speaker of the House and HJC have confirmed that the current investigation's purpose is to determine whether to recommend articles of impeachment against President Trump. Besides, this "slippery slope" may be less precipitous than DOJ suggests, for a congressional committee seeking to obtain grand jury information based solely on a single Member's introduction of articles of impeachment would have an uphill battle demonstrating a "particularized need" for the materials.

* * *

In sum, HJC has presented sufficient evidence that its investigation has the primary purpose of determining whether to recommend articles impeachment and thus has satisfied Rule 6(e)'s "preliminarily to . . . a judicial proceeding" requirement.

C. HJC Has a "Particularized Need" for the Requested Materials

Finally, to meet the last "independent prerequisite[] to ([E])(i) disclosure," HJC needs to "show particularized need for access to" the requested grand jury materials, *Baggot*, 463 U.S. at

480; *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986). As stated earlier, those materials fall into three categories. First, HCJ asks for "all portions of the Mueller Report that were redacted pursuant to Rule 6(e)." HJC App. at 25. Second, HJC wants the material underlying those redactions—that is, the portions of the grand jury "transcripts or exhibits" cited in the Report. *Id.* Third, HJC requests "transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to" President Trump's knowledge of several topics as well as to actions taken by former White House counsel Donald F. McGahn II during his service to first-candidate and then-President Trump. *Id.*[42]

The "particularized need" standard requires a showing that (1) the requested materials are "needed to avoid a possible injustice in another judicial proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only material so needed." *In re Sealed Case*, 801 F.2d at 1381 (internal quotation marks omitted); *see also Baggot*, 463 U.S. at 480 n.4 (citing *Douglas Oil*, 441 U.S. at 222). The balancing aspect of the test means that "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury [material] will have a lesser burden." *Douglas Oil*, 441 U.S. at 223.

Ultimately, determinations of "particularized need" are committed to the "considered discretion of the district court." *Douglas Oil*, 441 U.S. at 228; *see also In re Sealed Case*, 801 F.2d at 1381 (recognizing the "substantial discretion of the district court"). That discretion "to

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[42] To repeat, the topics in the third category of requested grand jury materials are: (A) "President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election;" (B) his "knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts;" (C) his "knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign;" and (D) "actions taken by McGahn during the campaign, the transition, or McGahn's period of service as White House Counsel." HJC App. at 25. Material is related directly to President Trump's knowledge, HJC says, if it reflects "what witnesses saw or heard President Trump do." Hr'g Tr. at 7:5–7:6.

determine the proper response to requests for disclosure," *Douglas Oil*, 441 U.S. at 228, extends to structuring the "time," "manner," and "other conditions" of any release of material, FED. R. CRIM. P. 6(e)(3)(E); *see also Douglas Oil*, 441 U.S. at 223 (acknowledging the possibility of "protective limitations" on the release of the material). HJC has proposed that the Court use this authority to "direct a focused and staged disclosure," starting with categories one and two of the requested grand jury information and, following HJC's review of that material, moving to category three. HJC Reply at 25; *see also* Hr'g Tr. at 35:1–35:11.

Adopting that proposal, to which DOJ has not objected, the Court finds that HJC has demonstrated a "particularized need" for the material in the first and second categories. DOJ must promptly produce to HJC the grand jury material redacted from and cited in the Mueller Report. HJC may file further requests articulating its "particularized need" for any grand jury material in category three.

1. Disclosure is Necessary to Avoid Possible Injustice

HJC asserts that it needs the material to conduct a fair impeachment investigation based on all relevant facts. *See* HJC App. at 34. In authorizing disclosure of grand jury material for use in impeachment investigations of judges and of a President, courts have found this "interest in conducting a full and fair impeachment inquiry" to be sufficiently particularized. *Hastings*, 833 F.2d at 1442; Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG, at 3; *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230 (applying the predecessor to the "particularized need" standard). Chief Judge Sirica, in releasing the Watergate Roadmap to HJC, remarked that "[i]t would be difficult to conceive of a

more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information." *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230.[43]

Impeachment based on anything less than all relevant evidence would compromise the public's faith in the process. *See Hastings*, 833 F.2d at 1445 ("Public confidence in a procedure as political and public as impeachment is an important consideration justifying disclosure."). Further, as already discussed, denying HJC evidence relevant to an impeachment inquiry could pose constitutional problems. *See supra* Parts III.B.3; *see also Hastings*, 833 F.2d at 1445 (concluding that denying the House the full record available, including the grand jury material, for use in impeachment would "clearly violate separation of powers principles"). These principles may, on their own, justify disclosure. *See Hastings*, 833 F.2d at 1442; Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG, at 3; *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230. Features of the House's investigation and of the Mueller Report make HJC's need for the grand jury materials referenced and cited in the Report especially particularized and compelling.

First, several "portions of the Mueller Report" are of particular interest to HJC, including the Trump Tower Meeting, Carter Page's trip to Moscow, Paul Manafort's sharing of internal polling data with a Russian business associate, and the Seychelles meeting, as well as information about what candidate Trump knew in advance about Wikileaks' dissemination in July 2016 of stolen emails from democratic political organizations and the Clinton Campaign.

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[43] At the time, DOJ similarly recognized that "[t]he 'need' for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived." HJC App., Ex. P, Mem. for the U.S. on behalf of the Grand Jury, *In re 1972 Grand Jury Report*, 370 F. Supp. 1219 (Mar. 5, 1974), ECF No. 1-17. DOJ now attempts to distinguish *In re 1972 Grand Jury Report* on the ground that the grand jury itself initiated the request to disclose the Watergate Roadmap to Congress, DOJ Resp. at 35, but Rule 6(e) does not give different treatment to disclosures by grand jurors, *see* FED. R. CRIM. P. 6(e)(2)(B)(i), and so, unsurprisingly, the grand jury's involvement featured not at all in the relevant portions of Chief Judge Sirica's analysis, *see In re 1972 Grand Jury Report*, 370 F. Supp. at 1229–31.

See HJC App. at 35–36. Rule 6(e) material was redacted from the descriptions of each of these events in the Mueller Report and access to this redacted information is necessary to complete the full story for HJC. In some instances, without access to the redacted material, HJC cannot understand what the Special Counsel already found about key events. For example, what appears to be a citation to grand jury material supports the investigative finding that then-candidate Trump asked Manafort for continued updates about WikiLeaks's plans to release hacked documents. *See* Mueller Report at II-18 n.27.

Second, numerous individuals have already testified before or given interviews with HJC or other House committees about the events noted above that are central to the impeachment inquiry and also described in the Mueller Report.[44] These witnesses include Donald Trump, Jr., Carter Page, Erik Prince, Steve Bannon, and Corey Lewandowski.[45] Of concern is that another witness who spoke to both the Special Counsel and to Congress, Michael Cohen, has already been convicted of making false statements to Congress, Mueller Report at I-195–96, and two other individuals have been convicted of making false statements to the FBI in connection with the Special Counsel's investigation, *see id.* at I-192 (Papadopoulos); *id.* at I-194 (Flynn). The record thus suggests that the grand jury material referenced or cited in the Mueller Report may be helpful in shedding light on inconsistencies or even falsities in the testimony of witnesses called in the House's impeachment inquiry. *See* HJC App. at 37 (seeking the materials "to

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[44] In particular, the activities of the House Permanent Select Committee on Intelligence ("HPSCI") are relevant here because HJC's protocols for handling the grand jury information, discussed *infra*, state that the information will be shared with Members of HPSCI. *See* HJC App., Ex. X, Jerrold Nadler, Chairman, HJC, [HJC] Procedures for Handling Grand Jury Information ("GJ Handling Protocols") ¶ 11, ECF No. 1-25. With HJC, HPSCI is one of the six committees conducting the impeachment inquiry. *See* Pelosi Tr.

[45] *See* DOJ Resp. at 34 & n.23 (noting testimony by Trump Jr., Page, Bannon, and Prince and citing Minority Views, HPSCI Report, https://intelligence.house.gov/uploadedfiles/20180411_-_final_-_hpsci_minority_views_on_majority_report.pdf); Thursday: House Judiciary to Consider Procedures Regarding Whether to Recommend Impeachment, COMM. ON THE JUDICIARY (Sept. 9, 2019), https://judiciary.house.gov/news/press-releases/thursday-house-judiciary-consider-procedures-regarding-whether-recommend (Lewandowski).

refresh or challenge th[e] testimony" of witnesses before Congress and "to corroborate [witness] veracity"); *see also* Hr'g Tr. at 40:5–41:17 (HJC) (confirming that the grand jury material would be used to impeach or corroborate witnesses).[46] Disclosure is thus necessary here to prevent witnesses from misleading the House during its investigative factfinding. *See supra* Part III.B.3 (discussing the House's factfinding role). As DOJ acknowledges, disclosure of grand jury information "when necessary to avoid misleading a trier of fact" is a paradigmatic showing of "particularized need." DOJ Resp. at 18–19 (recognizing that requests under the "judicial proceedings exception typically arose" in this situation and quoting *Douglas Oil*); *Douglas Oil*, 441 U.S. at 222 n.12 ("The typical showing of particularized need arises when a litigant seeks to use 'the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.'" (quoting *Procter & Gamble Co.*, 356 U.S. at 683)).

Third, HJC needs the requested material not only to investigate fully but also to reach a final determination about conduct by the President described in the Mueller Report. *See* HJC App. at 34 (requesting the material "to assess the meaning and implications of the Mueller Report").[47] Given that the Special Counsel stopped short of a "traditional prosecutorial judgment" or any "ultimate conclusions about the President's conduct," Mueller Report at II-8, in part to avoid "preempt[ing] constitutional processes for addressing presidential misconduct," *id.* at II-1; *see also id.* at 2 ("[W]hile this report does not conclude that the President committed a crime, it also does not exonerate him."), "the House alone can hold the President accountable for the conduct described," HJC Reply at 19. HJC cannot fairly and diligently carry out this responsibility without the grand jury material referenced and cited in the Mueller Report. Put

[46] In identifying this need, HJC's application focused on the example of Don McGahn, *see* HJC App. at 37, but DOJ has now confirmed that McGahn did not testify before the grand jury, *see* Revised ADAG Decl. ¶ 4.

[47] As HJC confirmed at the hearing, the recent revelations related to Ukraine have not displaced HJC's focus on investigating the conduct described in the Mueller Report. See Hr'g Tr. at 30:25–32:22.

another way, HJC requires the grand jury material to evaluate the bases for the conclusions reached by the Special Counsel.

Critically, for example, the Mueller Report states: "The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred." Mueller Report at II-2. The grand jury material relied on in Volume II is indispensable to interpreting the Special Counsel's evaluation of this evidence and to assessing the implications of any "difficult issues" for HJC's inquiry into obstruction of justice. The same is true of the material redacted from Appendix C, which details the Special Counsel's unsuccessful efforts to interview the President directly, the Special Counsel's choice not to issue a grand jury subpoena for the President's testimony, and related information redacted for grand jury secrecy. *See* Mueller Report App'x C-1–C-2.

Complete information about the evidence the Special Counsel gathered, from whom, and in what setting is indispensable to HJC. The recent revelation that two individuals who figured prominently in events examined in the Mueller Report—Don McGahn and Donald Trump, Jr. — were not compelled to testify before the grand jury illustrates this point. *See* Revised ADAG Decl. ¶ 4. The choice not to compel their testimony may indicate, for example, that the Special Counsel intended to leave aggressive investigation of certain potential criminal conduct, such as obstruction of justice by the President, to Congress. That intention should inform HJC's investigation of those same issues. The grand jury material redacted from and cited in the Report may provide other significant insights into the Special Counsel's use of, or decisions not to use, the grand jury. Those insights may be essential to HJC's decisions about witnesses who should be questioned and about investigatory routes left unpursued by the Special Counsel that should be pursued by HJC prior to a final determination about impeachment.

Similarly, disclosure is necessary to assist HJC in filling, or assessing the need to fill, acknowledged evidentiary "gaps" in the Special Counsel's investigation. *See supra* Part I.A. The Report detailed or alluded to investigative choices by the Special Counsel about immunity, about privilege, about pursuit of hard-to-get evidence, and other matters. As described earlier, these choices had an impact on the quantity and quality of evidence gathered about events of interest to HJC, including the Trump Tower Meeting, Carter Page's trip to Moscow, Erik Prince's Seychelles meeting, and potential tampering of Michael Cohen's testimony to Congress. *See supra* Part I.A. The Special Counsel helpfully documented those impacts, identifying critical factual disputes his investigation left unresolved and pointing to potential criminal violations that went uncharged due at least in part to gaps in evidence. *See supra* Part I.A. HJC thus needs the grand jury material redacted from and cited in the Report to pursue evidence that the Special Counsel did not gather and to resolve questions—including the ultimate question whether the President committed an impeachable offense—that the Special Counsel simply left unanswered.

In a last gasp effort to deny HJC access to the requested grand jury information, DOJ argues that HJC cannot show "particularized need" because other sources, such as the public version of the Mueller Report, the other categories of material redacted from the Mueller Report, congressional testimony, and FBI Form 302 interview reports ("FBI-302s"), can supply the requisite information. *See* DOJ Resp. at 31–34. As the preceding discussion makes abundantly clear, this argument gets the basic relationship between HJC's and the Special Counsel's investigations backwards: the overlap between these investigations enhances, rather than detracts from, HJC's showing of "particularized need." *Cf. In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1302 (4th Cir. 1986) (explaining that "particularized need' standard

requires more than relatedness but that "[o]bviously, the materials must be 'rationally related' for otherwise there would be no reason at all to disclose").

Furthermore, the sources DOJ identifies cannot substitute for the requested grand jury materials. To insure most effectively against being misled, HJC must have access to all essential pieces of testimony by witnesses, including testimony given under oath to the grand jury. Additionally, for purposes of assessing and following up on the Mueller Report's conclusions, the full Report is needed: the grand jury material may offer unique insights, insights not contained in the rest of the Report, congressional testimony, or FBI-302 reports.

Finally, DOJ claims that "[a] finding of 'particularized need' is especially inappropriate" because HJC "has not yet exhausted its available discovery tools"—namely, waiting for DOJ to fulfill its promised production of FBI interview reports and using congressional subpoenas. DOJ Resp. at 32–33 (citing *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991)). In particular, DOJ cites an agreement reached with HJC this summer for DOJ to provide to HJC the thirty-three FBI-302 reports cited in Volume II of the Report, contending that this agreement must preclude a finding of "particularized need." *See* DOJ Resp. at 32. These arguments smack of farce. The reality is that DOJ and the White House have been openly stonewalling the House's efforts to get information by subpoena and by agreement, and the White House has flatly stated that the Administration will not cooperate with congressional requests for information. *See* Letter from Pat A. Cipollone, Counsel to the President, to Representative Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019) at 2.

Regarding DOJ's production of FBI-302s, "the bottom line," as HJC put it, is that some 302s have so far been produced by DOJ but not "the ones of most interest." HJC Resp. to DOJ

Second Supp. at 4, ECF No. 41.[48] Although DOJ at first "anticipate[d] making the remaining FBI-302s available," DOJ First Supp. at 3, DOJ now says it "may need to amend the . . . agreement" because of a letter the White House sent to congressional leadership on October 8, *see* DOJ Second Supp., Second Decl. of ADAG Bradley Weinsheimer ("Second ADAG Decl.") ¶ 6, stating that "President Trump and his Administration reject [the House's] baseless, unconstitutional efforts to overturn the democratic process" and "cannot participate in [the House's] partisan and unconstitutional inquiry," Letter from Pat A. Cipollone, Counsel to the President, to Representative Nancy Pelosi, Speaker of the House, et al. (Oct. 8, 2019) at 2. The letter's announced refusal to cooperate extends to congressional subpoenas, which the President himself had already vowed to "fight[]." *Remarks by President Trump Before Marine One Departure*, WHITE HOUSE (Apr. 24, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-39/ ("Well, we're fighting all the subpoenas.").

The White House's stated policy of non-cooperation with the impeachment inquiry weighs heavily in favor of disclosure. Congress's need to access grand jury material relevant to potential impeachable conduct by a President is heightened when the Executive Branch willfully obstructs channels for accessing other relevant evidence.

2. The Need for Disclosure Outweighs the Need for Continued Secrecy

Any "considerations justifying" continued grand jury "secrecy bec[a]me less relevant" once the Special Counsel's investigation, and attendant grand jury work, concluded. *Douglas Oil*, 441 U.S. at 223. Once a grand jury has ended, interests in preventing flight by those who might be indicted and in protecting sitting jurors and witnesses disappear, or lessen considerably.

[48] DOJ has produced redacted FBI-302s for only seventeen of the thirty-three individuals promised. DOJ's Supplemental Submission Regarding Accommodation Process ("DOJ First Supp.") at 3, ECF No. 37.

See id. at 222 (recognizing that "the interests in grand jury secrecy" are "reduced" once "the grand jury has ended its activities"); *Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990) (identifying these as the considerations that no longer apply "[w]hen an investigation ends"); *In re 1972 Grand Jury Report*, 370 F. Supp. at 1229; 1 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 106 (4th ed. 2019).

Once a grand jury has ended, the primary purpose of secrecy is safeguarding future grand juries' ability to obtain "frank and full testimony." *Douglas Oil*, 441 U.S. at 222. Any risk of damage to this interest is slim here, for two reasons. First, as DOJ itself emphasizes in arguing that HJC cannot establish a need for the material, categories one and two of HJC's request are relatively "limited." DOJ Resp. at 6; *see also id.* at 31 (calling the redactions "minimal"); Revised ADAG Decl. ¶ 3. Disclosure of "limited" information, including excerpts of grand jury transcripts, to HJC is unlikely to deter potential future grand jury witnesses. Second, disclosure is to the House, not to the public, and "less risk of . . . leakage or improper use" of grand jury material is present when disclosure is made to "government movants." *Sells Eng'g*, *Inc.*, 463 U.S. at 445; *Hastings*, 833 F.2d at 1441 (considering factors "peculiar to the [HJC] as a government movant"). Here, HJC guarantees that "a high degree of 'continued secrecy' could in fact be maintained" under already-adopted Grand Jury Handling Procedures calling for storage of the material in a secure location and restriction of access to Members of HJC and HPSCI. *See* HJC App. at 38 (citing GJ Handling Protocols); *see also In re 1972 Grand Jury Report*, 370 F. Supp. at 1230 (observing that the relevant standard "might well justify even a public disclosure" but that there is "certainly ample basis for disclosure to a body" that "has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials"). DOJ discounts these procedures as "entirely illusory" because they can be altered "on a simple

majority vote" by HJC, DOJ Resp. at 36, but offers "no basis on which to assume that the Committee's use of the [material] will be injudicious or that it will disregard" or change these procedures, *In re 1972 Grand Jury Report*, 370 F. Supp. at 1230. Such an assumption would be inappropriate. *See supra* Part II.B.3 (discussing deference due to Congress in this matter).

Certainly, a continued interest in protecting from "public ridicule" individuals investigated but not indicted by the grand jury persists even when a grand jury has ended. *Douglas Oil*, 441 U.S. at 219; *see also* Wright & Miller, *supra*, § 106. The risk of public reputational harm to such individuals is slim to none here, however, where disclosure is to HJC under special handling protocols. Further, any remaining interest in secrecy is diminished by widespread public knowledge about the details of the Special Counsel's investigation, which paralleled that of the grand jury's, and about the charging and declination decisions outlined in the Mueller Report. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (recognizing that "when information is sufficiently widely known" it has no "character [of] Rule 6(e) material" (quoting *In re North*, 16 F.3d at 1245)).

DOJ argues that ongoing criminal matters referred by the Special Counsel's Office for investigation or prosecution are the chief reason for continued secrecy. *See* DOJ Resp. at 36–37 (citing, *inter alia*, Mueller Report App'x D ("Special Counsel's Office Transferred, Referred, and Completed Cases")). That DOJ has already disclosed to certain Members of the House the material redacted from the Mueller Report to prevent harm to ongoing matters, *see* DOJ Resp. at 8; *see also* Hr'g Tr. at 4:4–4:11, undercuts this claim that continued secrecy of the grand jury material is required to protect any ongoing investigations or cases. HJC has nevertheless made clear that it has "no interest whatsoever in undermining any ongoing criminal proceedings" and has expressed willingness to negotiate with DOJ about disclosure of any grand jury information

that DOJ believes could harm ongoing matters. Hr'g Tr. at 45:2–45:11. The Court expects that any such negotiations between the parties would be limited to the six redactions for grand jury information in Volume I of the Report that DOJ has already identified as presenting potential harm to ongoing matters. *See* Second ADAG Decl. ¶ 3.

* * *

The need for continued secrecy is minimal and thus easily outweighed by HJC's compelling need for the material. Tipping the scale even further toward disclosure is the public's interest in a diligent and thorough investigation into, and in a final determination about, potentially impeachable conduct by the President described in the Mueller Report. *See In re 1972 Grand Jury Report*, 370 F. Supp. at 1230; *see Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 n.15 (1983) ("[T]he district court may weigh the public interest, if any, served by disclosure to a governmental body.").

3. Scope of Disclosure Authorized

HJC has shown that it needs the grand jury material referenced and cited in the Mueller Report to avoid a possible injustice in the impeachment inquiry, that this need for disclosure is greater than the need for continued secrecy, and that the "request is structured to cover only material so needed." *Douglas Oil*, 441 U.S. at 222.[49] DOJ is ordered to disclose that material to HJC promptly, by October 30, 2019. HJC may file further requests with the Court articulating its particularized need for disclosure of any additional material requested in its initial application.

IV. CONCLUSION

For the foregoing reasons, HJC's application is granted. Consequently, DOJ is ordered to provide promptly, by October 30, 2019, to HJC all portions of the Mueller Report that were

[49] DOJ concedes that the requests for the material referenced or cited in the report are properly structured. *See* DOJ Resp. at 37–38 (challenging only the structure of HJC's request for material in category three).

redacted pursuant to Rule 6(e) and any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e). HJC is permitted to file further requests articulating its particularized need for additional grand jury information requested in the initial application.

An appropriate Order accompanies this Memorandum Opinion.

Date: October 25, 2019

BERYL A. HOWELL
Chief District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS	Grand Jury No. 19-48 (BAH) Chief Judge Beryl A. Howell

ORDER GRANTING THE APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES

Upon consideration of the Application of the Committee on the Judiciary ("HJC"), U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials, ECF No. 1.; the memoranda and declarations, with exhibits, in support and opposition thereto, including the memoranda of *amici curiae* Constitutional Accountability Center and U.S. House Representative Doug Collins, HJC's Ranking Member; the arguments presented at the Hearing on October 8, 2019, *see* Hr'g Tr., ECF No. 38, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion Granting the Application of the Committee on the Judiciary, U.S. House of Representatives, it is hereby:

ORDERED that HJC's Application is **GRANTED**; and it is further

ORDERED that, by October 30, 2019, DOJ must disclose to HJC: (1) All portions of Special Counsel Robert S. Mueller III's *Report on the Investigation Into Russian Interference In The 2016 Presidential Election* ("Mueller Report") that were redacted pursuant to Federal Rule of Criminal Procedure 6(e); and (2) any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and it is further

ORDERED that, following review and assessment of the disclosed grand jury material set out in (1) and (2) above, HJC may submit further requests articulating particularized need for disclosure of additional grand jury material requested in the Application.

SO ORDERED.

DATE: October 25, 2019

This is a final and appealable order.

BERYL A. HOWELL
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re APPLICATION OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING THE RELEASE OF CERTAIN GRAND JURY MATERIALS	Grand Jury Action No. 19-48 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

The Department of Justice ("DOJ") seeks to stay this Court's order, issued on October 25, 2019, requiring DOJ to disclose, by October 30, 2019, to the House Judiciary Committee ("HJC") the grand jury material redacted, pursuant to Federal Rule of Criminal Procedure 6(e), from the public version of Special Counsel Robert S. Mueller III's *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* ("Mueller Report"), as well as any underlying transcripts or exhibits referenced in those redactions. DOJ's Mot. to Stay Disclosure Order Pending Appeal ("Mot. Stay"), ECF No. 48.[1] For the reasons set out below, the motion for a stay is denied.

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,

[1] DOJ filed the pending motion for a stay on October 28, 2019. After entry of a minute order directing HJC to respond, *see* Min. Order (Oct. 28, 2019), HJC filed its Opposition to DOJ's Motion for a Stay Pending Appeal, ECF No. 50, on October 29, 2019, which was supplemented with HJC's response to an order to show cause from this Court, HJC's Resp. to Order to Show Cause, ECF No. 52.

that such a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant," *id.* (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). 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," *Cuomo*, 772 F.2d at 974; *see also Nken*, 556 U.S. at 434 (listing essentially same four factors); *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987) (same).

The Supreme Court has indicated that "[t]he first two factors of the traditional standard are the most critical," *Nken*, 556 U.S. at 434, and has elaborated, as to the first factor, that "[i]t is not enough that the chance of success on the merits be 'better than negligible,'" *id.* (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). Rather, "[m]ore than a mere 'possibility' of relief is required." *Id*. (alteration in original) (internal quotation marks omitted). The D.C. Circuit has further emphasized the importance of the first factor, stating that "show[ing] little prospect of success" on appeal is "an arguably fatal flaw for a stay application." *Citizens for Responsibility & Ethics in Washington v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam); *see also Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) ("read[ing] *Winter* [*v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)] at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement'" (quoting *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J. concurring))).

As to the requisite irreparable injury showing, "simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434–35 (citation omitted) (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). Rather, "[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)). Indeed, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wis. Gas*, 758 F.2d at 674 (emphasis in original).

Set against these standards, analysis of the four requisite factors mandates denial of the stay.

DOJ is not likely to succeed on the merits on appeal. 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," *id.* Here, DOJ argues, first, that there is a "substantial question as to whether an impeachment trial constitutes a 'judicial proceeding' within the meaning of Rule 6(e)," Mot. Stay at 4, because "[i]mpeachment and removal proceedings in the legislature are not 'judicial proceedings' within the ordinary meaning of that language," *id.* at 2; and, second, that HJC failed to establish "particularized need" for the requested materials because (a) HJC failed to articulate a "*specific* reason the information is needed," *id.* at 5 (emphasis in original), and (b) "the amount of information [already] released in connection with the Mueller Report" minimizes HJC's need for the materials, *id.* at 6.[2]

[2] Notably, DOJ has not argued that it is likely to prevail on any argument related to whether HJC's current investigation is occurring "preliminarily to" an impeachment trial. FED. R. CRIM. P. 6(e)(3)(E)(i).

The serious infirmities in DOJ's arguments have already been addressed at length. *See In re Application of Committee on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-gj-48 (BAH), 2019 WL 5485221, at *11–23 (D.D.C. Oct. 25, 2019) (judicial proceeding); *id.* at *32–38 (particularized need). Regarding the first argument, DOJ continues to ignore that the D.C. Circuit has already given "judicial proceeding," as used in Rule 6(e), a "broad interpretation," *In re Sealed Motion*, 880 F.2d 1367, 1379 (D.C. Cir. 1989) (per curiam); that *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), and *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *reh'g denied*, Order, No. 17-5149 (D.C. Cir. July 22, 2019), *docketing petition for cert.*, No. 19-307 (U.S. Sept. 5, 2019), are binding D.C. Circuit precedent that 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.

Regarding the "particularized need" arguments that DOJ asserts present colorable appealable issues, DOJ is especially unlikely to succeed given that determinations of "particularized need" are committed to the "considered discretion of the district court." *Douglas Oil Co. of Ca. v. Petrol Stops Nw.*, 441 U.S. 211, 228 (1979). Moreover, courts have consistently recognized that the "interest in conducting a full and fair impeachment inquiry" is a sufficiently particularized need. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1442 (11th Cir. 1987); *see also* Order, *In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG, at 3 (E.D. La. Aug. 6, 2009), *summarily aff'd sub nom. In re Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009); *In re Report & Recommendation of June 6, 1972 Grand Jury* (*In re 1972 Grand Jury Report*), 370 F. Supp. 1219, 1230 (D.D.C. 1974) (Sirica, C.J.). 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.

As to the second critical factor, irreparable harm to the moving party, DOJ must, at a minimum, show an especially high degree of irreparable harm considering DOJ's failure to establish a likelihood of success on appeal. *See Cuomo*, 772 F.2d at 784 ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay must be granted with either a high probability of success and some injury, or vice versa."). DOJ alleges irreparable harm without a stay because "once the grand jury information is released to the HJC . . . , information cannot ever be clawed back," and DOJ claims that this harm "is particularly acute here, where there is no guarantee the HJC will keep this sensitive information secret." Mot. Stay at 3. This assertion is predicated on the apparent view that, despite the HJC's special protocols for handling grand jury material and keeping that information confidential, those protocols cannot be trusted. To the contrary, given those protocols, a disclosure of grand jury material made under the October 25 Order that is found to be erroneous, can be clawed back. To the extent that underlying DOJ's concern is a lack of trust in those protocols, history shows that HJC has been and can be trusted. *See In re 1972 Grand Jury Report*, 370 F. Supp. at 1230 ("[HJC] has taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these [grand jury] materials. . . . We have no basis on which to assume that [HJC]'s use of the Report will be injudicious . . . ."). Indeed, Congress has *still* not publicly disclosed the entirety of the Watergate grand jury report that Chief Judge Sirica ordered be given to HJC forty-five years ago, in 1974. *See In re Petition for Order Directing Release of the "Road Map" Transmitted by the Watergate Grand Jury to the House Judiciary Committee in 1974*, No. 1:18-mc-00125-BAH (D.D.C. dismissed without prejudice Apr. 16, 2019). This only demonstrates

that disclosure to HJC does not equate to public disclosure. Finally, the mere chance that HJC may opt to make some of the grand information public at some point is not sufficient to establish a "certain" injury. *Cuomo*, 772 F.2d at 976 (quoting *Wis. Gas*, 758 F.2d at 674).

Nor will allowing HJC itself to review the grand jury materials cause irreparable harm. HJC did not "request[] the entire grand jury record" of the Special Counsel's investigation, HJC's Reply in Support of its App. for an Order Authorizing the Release of Certain Grand Jury Materials at 24, ECF No. 33, and this Court—accepting HJC's proposal that the case proceed with "focused and staged disclosure," *id.* at 25—ordered the release to HJC of only two, limited categories of information: the "'portions of the Mueller Report that were redacted pursuant to Rule 6(e),'" and "the material underlying those redactions—that is, the portions of the grand jury 'transcripts or exhibits' cited in the Report," *In re Application of the Committee on the Judiciary*, 2019 WL 5485221, at *32 (quoting HJC's App. for an Order Authorizing the Release of Certain Grand Jury Materials at 25, ECF No. 1). HJC's access to this limited material on a confidential basis in the circumstances of this matter will not harm the interests that grand jury secrecy is meant to protect, *see id.* at *37–38, and this concern would certainly be insufficient to justify a stay here, given that DOJ has not established a likelihood of success on appeal.[3]

The third factor, whether HJC will be harmed if the requested stay is ordered, and the final factor, the public interest, also weigh against granting DOJ's motion. "[A]n impeachment

[3] This conclusion is not altered by the fact that Chief Judge Sirica, in ordering disclosure of the Watergate grand jury's report on President Richard Nixon's conduct, stayed his decision "because of the irreversible nature of disclosure." *In re 1972 Grand Jury Report*, 370 F. Supp. at 1231. Chief Judge Sirica's decision pre-dates D.C. Circuit caselaw that has explained the substantial—perhaps dispositive—weight that must be given to the first factor, likelihood of success on appeal. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington*, 904 F.3d at 1019; *see also United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 422 n.6 (1983) (recognizing, nine years after disclosure of the Watergate grand jury's report, that disclosure of grand jury material does not moot an appeal). Moreover, Chief Judge Sirica ordered a stay of just two days, and did so merely "to allow [the] defendants an opportunity to pursue their remedies." *In re 1972 Grand Jury Report*, 370 F. Supp. at 1231. This Court went beyond what Chief Judge Sirica did and granted DOJ *five days* to pursue an appeal before having to disclose any grand jury materials.

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.[4]

The Court finds that all four factors—including both critical factors—favor allowing disclosure to occur while this case is considered on appeal. Accordingly, it is hereby

ORDERED that DOJ's Mot. Stay, ECF No. 48, is **DENIED**.

SO ORDERED.

Date: October 29, 2019

BERYL A. HOWELL
Chief Judge

[4] DOJ claims that HJC does not need the disclosure to occur imminently because "[t]he Speaker [of the House] has announced that the House impeachment inquiry will focus narrowly on the whistleblower complaint and issues surrounding Ukraine" and thus "now . . . the House Intelligence Committee . . . is the lead committee heading the congressional investigation." Mot. Stay at 6. The Speaker has, however, in fact "direct[ed]" the "*six* Committees" who have been "investigating" the President's conduct—which *includes* HJC—to "proceed with their investigations under th[e] umbrella of impeachment inquiry." *Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), https://perma.cc/6EQM-34PT (emphasis added). Thus, HJC plainly remains engaged.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5288 **September Term, 2019**

1:19-gj-00048-BAH

Filed On: October 29, 2019

In re: Application of the Committee on the Judiciary, U.S. House Of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials,

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Committee on the Judiciary and United States House of Representatives,

Appellees

v.

United States Department of Justice,

Appellant

BEFORE: Millett, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of the emergency motion for stay pending appeal and for an immediate administrative stay, it is

ORDERED that the district court's October 25, 2019 order be administratively stayed pending further order of the court. The purpose of this administrative stay is to give the court sufficient opportunity to consider the emergency motion for stay pending appeal and should not be construed in any way as a ruling on the merits of that motion. See D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018). It is

FURTHER ORDERED, on the court's own motion, that appellees file a response to the motion by 4:00 p.m. on Friday, November 1, 2019, and that appellant file any reply by 4:00 p.m. on Tuesday, November 5, 2019. The parties are directed to hand-deliver the paper copies of their submissions to the court by the time and date due.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5288 **September Term, 2019**

1:19-gj-00048-BAH

Filed On: November 18, 2019

In re: Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials,

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Committee on the Judiciary, United States House of Representatives,

Appellee

v.

United States Department of Justice,

Appellant

BEFORE: Rogers, Griffith, and Rao, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that the parties brief the merits of this appeal pursuant to the following briefing schedule:

Brief of Appellant	December 2, 2019
Appendix	December 2, 2019
Brief of Appellee	December 16, 2019
Reply Brief of Appellant	December 23, 2019

The parties are directed to file their briefs and appendix and hand deliver the paper copies to the Clerk's office by 4:00 p.m. on the date due. While not otherwise limited, the parties are directed to address in their briefs the court's jurisdiction and the justiciability of this case. It is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5288 **September Term, 2019**

FURTHER ORDERED that oral argument be scheduled before this panel at 9:30 a.m. on Friday, January 3, 2020. It is

FURTHER ORDERED that the administrative stay entered on October 29, 2019, remain in place pending further order of the court.

All issues and arguments must be raised by appellant in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 41 (2018); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5288 **September Term, 2019**

1:19-gj-00048-BAH

Filed On: May 1, 2020

In re: Application of the Committee on the Judiciary, U.S. House of Representatives, for an Order Authorizing the Release of Certain Grand Jury Materials,

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Committee on the Judiciary, United States House of Representatives,

Appellee

v.

United States Department of Justice,

Appellant

BEFORE: Rogers, Griffith, and Rao, Circuit Judges

O R D E R

Upon consideration of the motion of the Department of Justice to stay mandate pending petition for writ of certiorari, which includes a request to stay issuance of the mandate for a reasonable period to permit the Department to seek a stay from the Supreme Court, and the opposition thereto, it is

ORDERED that the motion to stay mandate pending petition for writ of certiorari be denied. The Clerk is directed to withhold issuance of the mandate until May 11, 2020, to permit the Department a reasonable time to seek a stay from the Supreme Court.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk