

[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5288

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent-Appellant,

v.

COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES,

Petitioner-Appellee.

On Appeal from the United States District Court for the
District of Columbia (No. 19-gj-00048) (Hon. Beryl A. Howell)

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS
AMICUS CURIAE IN SUPPORT OF THE COMMITTEE ON THE
JUDICIARY, U.S. HOUSE OF REPRESENTATIVES**

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**STATEMENT REGARDING CONSENT TO FILE
AND SEPARATE BRIEFING**

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties has been sent notice of the filing of this brief and have consented to the filing.¹

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. In furtherance of those goals, CAC has studied the history of grand jury materials being disclosed to Congress in aid of Congress's impeachment function. CAC is accordingly well situated to discuss that history and how it informs the issues raised in this case.

¹ Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

I. PARTIES AND AMICI

Except for any *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: December 16, 2019

By: /s/ Brianne J. Gorod
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	1
ARGUMENT	6
I. THERE IS A LONG HISTORY OF GRAND JURY MATERIALS BEING DISCLOSED IN APPROPRIATE CIRCUMSTANCES, AND THE FEDERAL RULES OF CRIMINAL PROCEDURE MAINTAIN THAT LONG-STANDING LEGAL TRADITION.....	6
II. COURTS HAVE ROUTINELY DISCLOSED GRAND JURY MATERIALS TO CONGRESS TO FURTHER ITS IMPEACH- MENT FUNCTION.....	13
III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT OR- DER AUTHORIZING THE RELEASE OF THE GRAND JURY MATERIALS RELATED TO SPECIAL COUNSEL MUELLER’S REPORT THAT THE COMMITTEE HAS REQUESTED.....	22
CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Atwell v. United States</i> , 162 F. 97 (4th Cir. 1908)	2, 9, 10, 12
<i>Blair v. United States</i> , 250 U.S. 273 (1919).....	7
<i>Costello v. United States</i> , 350 U.S. 359 (1956).....	6
<i>Doe v. Rosenberry</i> , 255 F.2d 118 (2d Cir. 1958).....	3, 13
<i>Douglas Oil Co. of Cal. v. Petrol Stops Nw.</i> , 441 U.S. 211 (1979).....	5, 7, 23, 25
<i>Haldeman v. Sirica</i> , 501 F.2d 714 (D.C. Cir. 1974).....	4, 18, 23
<i>In re Cisneros</i> , 426 F.3d 409 (D.C. Cir. 2005).....	21, 25
<i>In re Espy</i> , 259 F.3d 725 (D.C. Cir. 2001).....	21
<i>In re Grand Jury Investigation of Uranium Indus.</i> , No. 78-0173, 1979 WL 1661 (D.D.C. Aug. 16, 1979).....	19
<i>In re Grand Jury Proceedings</i> , 4 F. Supp. 283 (E.D. Pa. 1933).....	2, 8, 10, 11
<i>In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)</i> , 669 F. Supp. 1072 (S.D. Fla. 1987).....	18, 19, 26
<i>In re North</i> , 16 F.3d 1234 (D.C. Cir. 1994).....	21
<i>In re Petition to Inspect & Copy Grand Jury Materials</i> , 735 F.2d 1261 (11th Cir. 1984)	12

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives,</i> 370 F. Supp. 1219 (D.D.C. 1974).....	3, 4, 5, 15, 16, 17, 24, 25, 26
<i>McKeever v. Barr,</i> 920 F.3d 842 (D.C. Cir. 2019).....	4, 18, 23
<i>Metzler v. United States,</i> 64 F.2d 203 (9th Cir. 1933)	2, 10, 11
<i>Pittsburgh Plate Glass Co. v. United States,</i> 360 U.S. 395 (1959).....	12
<i>Schmidt v. United States,</i> 115 F.2d 394 (6th Cir. 1940)	12
<i>Special Feb. 1971 Grand Jury v. Conlisk,</i> 490 F.2d 894 (7th Cir. 1973)	3, 13
<i>United States v. Am. Med. Ass’n,</i> 26 F. Supp. 429 (D.D.C. 1939).....	12
<i>United States v. Calandra,</i> 414 U.S. 338 (1974).....	6
<i>United States v. Farrington,</i> 5 F. 343 (N.D.N.Y. 1881).....	8
<i>United States v. Sells Eng’g, Inc.,</i> 463 U.S. 418 (1983).....	7
<i>United States v. Smith,</i> 27 F. Cas. 1186 (C.C.D.N.Y. 1806).....	9
<i>United States v. Socony-Vacuum Oil Co., Inc.,</i> 310 U.S. 150 (1940).....	2, 11
 <u>Constitutional Provisions, Statutes, and Legislative Materials</u>	
28 U.S.C. § 594(h)(1)(B) (2014).....	20

TABLE OF AUTHORITIES – cont’d

	Page(s)
Fed. R. Crim. P. 6(e)(2).....	11
Fed. R. Crim. P. 6(e)(3)(E)(i).....	3, 12
Fed. R. Crim. P. 6(e) 1944 advisory committee’s note 1.....	3, 12, 16
H.R. Rep. No. 111-427 (2010).....	20
H.R. Res. 660, 116th Cong. (2019).....	4, 23
U.S. Const. amend. V.....	7

Books, Articles, and Other Authorities

Richard M. Calkins, <i>Grand Jury Secrecy</i> , 63 Mich. L. Rev. 455 (1965).....	7
6 <i>Cannon’s Precedents of the House of Representatives</i> (1921).....	15
Court Order, <i>In Re: Grand Jury Proceeding</i> , No. 09-30737 (5th Cir. Nov. 12, 2009).....	20
Michael A. Foster, Cong. Research Serv., R45456, <i>Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight</i> (2019).....	8
2 <i>Hinds’ Precedents of the House of Representatives</i> (1907).....	15
3 <i>Hinds’ Precedents of the House of Representatives</i> (1907).....	3, 13, 14
Mark Kadish, <i>Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process</i> , 24 Fla. St. U. L. Rev. 1 (1996).....	7, 8, 9
Special Counsel Robert S. Mueller, III, U.S. Dep’t of Justice, <i>Re- port on the Investigation into Russian Interference in the 2016 Presidential Election</i> (Mar. 2019).....	1, 5, 23, 24
Order, <i>In Re: Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.</i> , No. 2:09-mc-04346-CVSG (E.D. La. Aug. 6, 2009) (Dkt. No. 10).....	20

TABLE OF AUTHORITIES – cont’d

	Page(s)
<i>A Sitting President’s Amenability to Indictment and Criminal Prosecution</i> , 24 Op. O.L.C. 222 (2000)	24
John Somers, <i>The Security of English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England</i> (London, Benjamin Alsop 1682)	7

INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation’s charter guarantees. CAC thus has a strong interest in the grand jury as an institution and the circumstances under which grand jury materials may be disclosed.

INTRODUCTION

In March, Special Counsel Robert Mueller issued a detailed report of his investigation into Russia’s interference in the 2016 election, as well as President Trump’s many efforts to obstruct that investigation. *See* Special Counsel Robert S. Mueller, III, U.S. Dep’t of Justice, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (Mar. 2019) (“Mueller Report”). However, the version of the report that was released publicly—including to Members of Congress—was significantly redacted. Specifically, several key portions of the report that referenced grand jury proceedings or materials were omitted pursuant to Federal Rule of Criminal Procedure 6(e), which governs when and to whom grand jury materials may be disclosed. The House Judiciary Committee—seeking to exercise “due diligence” in its impeachment investigation by “gathering and assessing all relevant

evidence” related to the Mueller Report’s findings, J.A. 2—filed an application with the district court requesting that it release to the Committee those portions of the report redacted as grand jury materials, as well as any underlying grand jury transcripts or exhibits that are referenced in the redacted portions of the report or that are related to actions of the President that the Committee is investigating, *see id.* at 123. The district court granted that request, and the Department of Justice appealed. This Court should affirm.

Although “[g]rand jury testimony is ordinarily confidential,” the Supreme Court has long made clear that “after the grand jury’s functions are ended, disclosure is wholly proper where the ends of justice require it.” *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 233-34 (1940); *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933) (“the rule of secrecy has long since been relaxed by permitting disclosure whenever the interest of justice requires,” and that determination “rests largely within the discretion of the court whose grand jury is concerned”). Thus, courts have long permitted the release of grand jury materials under certain circumstances. *See, e.g., Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933); *Atwell v. United States*, 162 F. 97 (4th Cir. 1908).

Against that background, when grand jury secrecy was codified in the Federal Rules of Criminal Procedure in 1946, those Rules incorporated the long-standing view that courts should have discretion to disclose grand jury materials under certain

circumstances. Indeed, the Advisory Committee that promulgated those rules explained that Rule 6(e) was intended to “continue[] 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) 1944 advisory committee’s note 1. To that end, the Rule explicitly permits a court to authorize disclosure of grand jury materials in certain circumstances, including “preliminarily to or in connection with a judicial proceeding,” Fed. R. Crim. P. 6(e)(3)(E)(i), and courts have disclosed grand jury materials pursuant to that Rule in a variety of circumstances, *see, e.g., Special Feb. 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 896-98 (7th Cir. 1973) (disclosure to police department investigating corruption); *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958) (disclosure to bar association investigating one of its members).

Most pertinent here, both before and after the passage of the Federal Rules, Congress has received grand jury materials to further its impeachment and investigative functions. For example, as early as 1811, a grand jury in the Mississippi Territory forwarded to the House of Representatives its presentment specifying charges against federal territorial judge Harry Toulmin, which set in motion a House inquiry regarding whether to initiate formal impeachment proceedings. 3 *Hinds’ Precedents of the House of Representatives* § 2488, at 984-85 (1907); *see In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1230 & n.47 (D.D.C.

1974) (“*June 5, 1972 Grand Jury*”) (citing this early example of disclosure of grand jury materials). And following the passage of the Federal Rules, courts have disclosed grand jury materials to Congress for use in impeachment investigations. Most prominently, the D.C. District Court permitted the transfer of a grand jury report concerning allegedly illegal conduct by President Richard Nixon to the House Judiciary Committee in 1974. *June 5, 1972 Grand Jury*, 370 F. Supp. 1219. Sitting en banc, this Court approved of that decision, *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc), and a panel of this Court recently clarified that, in its view, that report was released under “the Rule 6 exception for ‘judicial proceedings,’” *McKeever v. Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019).

In short, this Court has twice acknowledged that courts may disclose grand jury materials to Congress under Rule 6(e) to further Congress’s impeachment function, and the House Judiciary Committee’s request for the grand jury materials associated with Special Counsel Mueller’s report plainly furthers that function. The House is currently engaged in an impeachment inquiry. *See* H.R. Res. 660, 116th Cong., at 1 (2019) (Committee’s “ongoing investigation[.]” is “part of the existing House of Representatives inquiry” into impeachment). And the House’s request satisfies the criteria the Supreme Court has recognized that “[p]arties seeking grand jury transcripts under Rule 6(e) must” satisfy: “the material they seek is needed to avoid a possible injustice in another judicial proceeding, . . . the need for disclosure

is greater than the need for continued secrecy, and . . . their request is structured to cover only material so needed.” *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979).

First, failing to disclose these materials would result in injustice: although the Special Counsel concluded that the President engaged in serious misconduct, he did not indict him on the theory that Congress—not the Department of Justice—is the institution that must hold the President accountable. *See* 2 Mueller Report at 1 & n.2 (pointing to “constitutional processes for addressing presidential misconduct”). Congress should not now be prevented from viewing information relevant to its impeachment deliberations because that evidence was also presented to a grand jury. Second, the need for disclosure is obviously greater than the need for continued secrecy. “It would be difficult to conceive of a more compelling need . . . for an unswervingly fair inquiry based on all the pertinent information” than an impeachment inquiry into the President. *June 5, 1972 Grand Jury*, 370 F. Supp. at 1230. And the need for secrecy is lessened where the Committee seeks disclosure to only a limited number of authorized individuals in Congress, not the broader public. *See Douglas Oil Co.*, 441 U.S. at 223 (“as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification”). Third, the request covers only material the Committee needs: “information that the Special Counsel deemed sufficiently significant to be

included or referenced in the Report itself; any grand jury materials that bear directly on or provide context regarding the President’s state of mind; and grand jury materials that describe actions taken by the central witness to the Committee’s investigation, Don McGahn.” J.A. 138. In short, the Committee’s request is both narrowly tailored and critical to its ability to investigate the President and make an informed decision regarding whether to impeach him. This Court should affirm the district court’s order.

ARGUMENT

I. THERE IS A LONG HISTORY OF GRAND JURY MATERIALS BEING DISCLOSED IN APPROPRIATE CIRCUMSTANCES, AND THE FEDERAL RULES OF CRIMINAL PROCEDURE MAINTAIN THAT LONG-STANDING LEGAL TRADITION.

The grand jury is a centuries-old institution, and while there is a long tradition of maintaining the secrecy of grand jury deliberations, grand jury secrecy has never been absolute. Throughout the development of the federal grand jury in American law, grand jury materials have regularly been made public where courts concluded that the interests of justice required it. And the Federal Rules of Criminal Procedure, which today govern grand jury proceedings, codified that tradition.

“[A]n English institution,” the grand jury was “brought to this country by the early colonists and incorporated in the Constitution by the Founders.” *Costello v. United States*, 350 U.S. 359, 362 (1956); see *United States v. Calandra*, 414 U.S. 338, 342 (1974) (“The institution of the grand jury is deeply rooted in Anglo-

American history.”); *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 423 (1983) (“The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution.”). Specifically, the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. Const. amend. V. In other words, under the Fifth Amendment, the government may not indict an individual for a federal felony except with the consent of a grand jury. *Blair v. United States*, 250 U.S. 273, 280 (1919) (“By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime . . .”).

Even before the grand jury was enshrined in the Constitution, “grand jury proceedings [were] closed to the public, and records of such proceedings [were] kept from the public eye.” *Douglas Oil Co.*, 441 U.S. at 218 n.9 (citing Richard M. Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 457 (1965)). Legal scholars in England, like John Somers, explained that “grand jurors were sworn not to disclose the subjects of the inquiry, the witnesses, or any of the evidence,” and were also prohibited from revealing “their own personal knowledge, the knowledge of their fellow jurors, their investigative plans, or their deliberations.” 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, 14-15 (1996) (citing John Somers, *The Security of*

English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England 43 (London, Benjamin Alsop 1682)).

The Grand Jury Clause in the U.S. Constitution incorporated this tradition, making “grand jury secrecy an implicit part of American criminal jurisprudence.” *Id.* at 16. Importantly, however, the general rule of grand jury secrecy was “not unyielding.” Michael A. Foster, Cong. Research Serv., R45456, *Federal Grand Jury Secrecy: Legal Principles and Implications for Congressional Oversight* 5 (2019). Instead, the rule of secrecy was “relaxed [to] permit[] disclosure whenever the interest of justice requires,” and the decision whether to disclose grand jury materials was left “largely within the discretion of the court whose grand jury is concerned.” *In re Grand Jury Proceedings*, 4 F. Supp. at 284; see *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881) (“[i]t is only practicable” for courts to exercise “a salutary supervision over the proceedings of a grand jury” by “removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights”).

Most exceptions to grand jury secrecy developed in response to criminal defendants’ arguments that the grand jury had heard improper evidence or that some other type of misconduct had infected the grand jury proceedings. Foster, *supra*, at 5. For instance, in *United States v. Smith*, decided only a few years after the Bill of Rights was ratified, a New York district court held that a defendant could challenge

an indictment on the theory that illegal evidence was introduced to a grand jury. 27 F. Cas. 1186 (C.C.D.N.Y. 1806). The prosecution argued that a grand jury was meant to be “independent, and irresponsible; judging for themselves as to the grounds on which they will prefer an accusation, and that no one has a right to investigate or to know what evidence they have had before them.” *Id.* at 1188. Defense counsel responded that “no unlawful act done in the grand jury, is such a secret as jurors are bound by their oaths to keep.” *Id.* at 1189. The court agreed with the defense, holding that although the grand jury itself is bound to “keep[] its deliberations secret,” the court is entitled to determine whether it has acted “according to the rules of law.” *Id.* at 1188. The court therefore “implicitly accept[ed] the defense argument” that secrecy was in part intended to “protect[] the individual accused and, consequently, could be lifted where secrecy defeated that purpose.” Kadish, *supra*, at 17.

Later cases reached a similar conclusion. In *Atwell v. United States*, the Fourth Circuit held that the policy of grand jury secrecy alone did not shield a grand juror from being questioned about the evidence he considered while serving (though the court prevented the juror from testifying for other reasons). 162 F. at 98, 101, 103. The court acknowledged that secrecy was important “during the sittings and deliberations of the grand jury” because otherwise the grand jury’s role “to make a preliminary and ex parte investigation . . . could easily be impeded by persons

fearing indictment.” *Id.* at 100. Moreover, although the court suggested there should be “indefinite secrecy as to the discussions and vote of the individual members of the jury,” it held that the “evidence adduced before the grand jury” could sometimes be made public “after such jury has made its presentment and indictment, publication thereof has been made, the grand jury finally discharged, and the defendant is in custody.” *Id.* At that point, the court held that secrecy must be maintained “[t]o the full extent necessary to fulfill the ends of justice, *and no further.*” *Id.* (emphasis added).

And in *Metzler v. United States*, the Ninth Circuit held that “[a]fter the [grand jury’s] indictment has been found and made public and the defendants apprehended, the policy of the law does not require the same secrecy as before.” 64 F.2d at 206. To the contrary, “[w]here the ends of justice can be furthered thereby and when the reasons for secrecy no longer exist, the policy of the law requires that the veil of secrecy be raised.” *Id.* Thus, the court permitted an assistant U.S. attorney to read into evidence his shorthand notes of grand jury proceedings in which certain defendants had confessed. *Id.*

Finally, in *In re Grand Jury Proceedings*, a district court allowed the presentation of grand jury material from an investigation regarding an alleged conspiracy to violate the National Prohibition Act in a civil case regarding the revocation of a liquor license. 4 F. Supp. at 284. The court noted that the secrecy rules were

“designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself.” *Id.* at 284-85. However, “[t]he fact that the grand jury has adjourned and been discharged has often been considered as one reason for abandoning secrecy as to its deliberations.” *Id.* at 285. In all, the court explained that the decision to release grand jury material “yields to the general consideration whether the ends of justice will be furthered by the disclosure.” *Id.* On that basis, the court allowed the grand jury material to be introduced in the civil case.

Building on this precedent, the Supreme Court recognized nearly a century ago that grand jury materials need not always remain secret. Although “[g]rand jury testimony is ordinarily confidential,” the Court reasoned, “after the grand jury’s functions are ended, disclosure is wholly proper where the ends of justice require it.” *Socony-Vacuum Oil Co.*, 310 U.S. at 233, 234 (citing *Metzler*, 64 F.2d 203).

In 1946, the Federal Rules of Criminal Procedure were enacted, including several provisions governing grand jury procedures. Notably, Rule 6(e) codified grand jury secrecy principles that had, up until that time, been a part of the common law enforced by courts, prohibiting grand jurors, government attorneys, and others from disclosing a matter occurring before the grand jury and any materials associated with that matter. *See* Fed. R. Crim. P. 6(e)(2). Like the practice of courts before the Rules’ enactment, however, the Rules do not foreclose all disclosure of grand jury

materials. Instead, as the Advisory Committee Notes explain, Rule 6(e) was intended to “continue[] 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) 1944 advisory committee’s note 1 (emphasis added). The Notes then cite three cases, all of which stand for the proposition that district courts have discretion to release grand jury materials publicly where appropriate. *Id.*; see *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940); *United States v. Am. Med. Ass’n*, 26 F. Supp. 429, 430 (D.D.C. 1939); *Atwell*, 162 F. at 99-101. As the Supreme Court explained following the Rules’ enactment, “the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge,” and “Rule 6(e) is but declaratory” of “the same principle.” *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). To that end, Rule 6(e) explicitly enumerates several exceptions to the secrecy requirement, including, most importantly for this case, permitting a court to authorize disclosure “preliminarily to or in connection with a judicial proceeding.” Fed. R. Crim. P. 6(e)(3)(E)(i).

In the years since the Rule was adopted, courts have routinely permitted the disclosure of grand jury materials in a variety of circumstances where the interests of justice required it. See, e.g., *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1263 (11th Cir. 1984) (permitting grand jury materials

regarding a federal judge's indictment to be transferred to the Investigating Committee of the Judicial Council of the Eleventh Circuit as part of its investigation into whether it would recommend impeachment); *Special Feb. 1971 Grand Jury*, 490 F.2d at 895 (permitting grand jury transcripts pertinent to alleged criminal conspiracy and corruption among police officers to be released to a Chicago Police Department's board of inquiry); *Doe*, 255 F.2d at 119-20 (permitting grand jury testimony regarding an attorney's alleged corruption and criminal activity to be released to Grievance Committee of the New York City Bar Association).

* * *

In short, there is a long history of grand jury materials being disclosed notwithstanding the general tradition of grand jury secrecy, and the Federal Rules of Criminal Procedure maintained that practice. As the next Section describes, courts have been especially willing to permit disclosure of grand jury materials to Congress to further Congress's impeachment function.

II. COURTS HAVE ROUTINELY DISCLOSED GRAND JURY MATERIALS TO CONGRESS TO FURTHER ITS IMPEACHMENT FUNCTION.

The House has sometimes been described as “a grand jury . . . to the nation,” with “the duty . . . to examine into the conduct of public officers.” 3 *Hinds' Precedents of the House of Representatives* § 1729, at 85-86 (describing 1818 House resolution that formed a committee to investigate whether federal clerks and other

officers “have conducted themselves improperly in their official duties”); *see id.* § 2342, at 714 (noting, in the debates over the impeachment inquiry of Justice Samuel Chase in 1804, that “[t]he analogy between the function of the House in this matter [impeachment] and that of a grand jury was correct and forcible”); *id.* § 2505, at 1009 (Rep. Henry L. Dawes noting in the impeachment inquiry of Judge Mark W. Delahay that “[t]he Senate is a perpetual court of impeachment, and in presenting these articles we act only as a grand jury”). Because the House effectively acts as a grand jury when investigating public officers and deciding whether to impeach them, it has a special need for grand jury materials pertaining to those public officers’ misdeeds. Indeed, there is a long tradition of both bodies of Congress receiving grand jury materials, both before and after the passage of the Federal Rules of Criminal Procedure.

As early as 1811, a county grand jury in the Mississippi Territory forwarded to the House of Representatives its presentment specifying charges against federal territorial judge Harry Toulmin for consideration in a possible impeachment action. *Id.* § 2488, at 984-85. Indeed, the House “inquiry as to Judge Toulmin was *set in motion* by action of a grand jury forwarded by a Territorial legislature.” *Id.* at 984 (emphasis added). While the House eventually “declined to order a formal investigation,” *id.* at 985, what is significant for these purposes is that it received the grand

jury materials, and so far as *amicus* is aware, that disclosure was not controversial at the time.

There are many similar examples prior to the adoption of the Federal Rules. *See, e.g., 2 id.* § 1123, at 700 (describing congressional investigation of election fraud in St. Louis in 1902 in which a committee received “a report of a grand jury which sat in St. Louis” that described “a conspiracy entered into by leading officials of sitting Member’s party”); *6 Cannon’s Precedents of the House of Representatives* § 74, at 99 (1921) (noting, in Senate inquiry into contested election, that a grand jury had conducted a thorough investigation “[a]nd everything before the grand jury which was deemed at all relevant was introduced at Grand Rapids, and the entire testimony at Grand Rapids was available to [the Senate] committee which, on the part of the Senate, examined into this matter”); *id.* § 399, at 565 (noting, in 1924 Senate inquiry into Senator Burton Wheeler, that a committee chairman sent “a telegram to the presiding judge of the court in Montana 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 received that information).

This practice persisted following the enactment of the Federal Rules. Most prominently, a district court in 1974 permitted the House Judiciary Committee to receive a grand jury report concerning allegedly illegal conduct by President Nixon. *See June 5, 1972 Grand Jury*, 370 F. Supp. 1219. In that case, the grand jury “heard

evidence that it regard[ed] as having a material bearing on matters within the primary jurisdiction of the Committee in its current inquiry [into the President],” and lodged with the court a sealed report that it wished to be transmitted to the Committee. *Id.* at 1221. After concluding that the grand jury had the power to issue a report, independent of a prosecutor’s decision to indict, *id.* at 1226, the court considered the propriety of disclosure. The court noted that “[w]here, as here, a report is clearly within the bounds of propriety, . . . [a court] should presumptively favor disclosure to those for whom the matter is a proper concern and whose need is not disputed.” *Id.* at 1227. The court observed that “[t]he Report’s subject [President Nixon] is referred to in his public capacity, and, on balance with the public interest, any prejudice to his legal rights caused by disclosure to the Committee would be minimal.” *Id.* Indeed, “the President would not be left without a forum in which to adjudicate any charges against him that might employ Report materials.” *Id.* And while the court also noted that President Nixon himself “[did] not object to release,” *id.*, its decision made clear that his acquiescence was only one of many factors that made disclosure appropriate.

The court also rejected the idea that Rule 6(e) prohibited disclosure of the report to the Judiciary Committee. Citing the Advisory Committee Notes for the proposition that the Rule “continues the traditional practice of secrecy . . . , except when the court permits a disclosure,” Fed. R. Crim. P. 6(e) 1944 advisory

committee’s note 1, the court reasoned that “Rule 6(e)[,] which was not intended to create new law, remains subject to the law or traditional policies that gave it birth,” *June 5, 1972 Grand Jury*, 370 F. Supp. at 1229. None of those policies, in the court’s view, “dictate[d] that in this situation disclosure to the Judiciary Committee be withheld.” *Id.* Indeed, examining the reasons that the Supreme Court had previously articulated as justifying grand jury secrecy, this Court noted that the grand jury’s work was complete, so “[t]here is no need to protect against flight on anyone’s part, to prevent tampering with or restraints on witnesses or jurors, to protect grand jury deliberations, [or] to safeguard unaccused or innocent persons with secrecy.” *Id.*

Moreover, the court noted that it was

deal[ing] in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It 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. Believing that these considerations might even justify public disclosure, the court concluded that at the very least they provided “ample basis for disclosure to a body that in this setting acts simply as another grand jury”—the House of Representatives. *Id.* This was especially so given that the Committee had “taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials.” *Id.* In short, the court concluded that Congress should be able to see this grand jury material.

Importantly, this Court, sitting en banc, affirmed the district court’s decision and stated that it was “in general agreement with” the district court’s handling of the “question of the grand jury’s power to report.” *Haldeman*, 501 F.2d at 715. And earlier this year, this Court again recognized the propriety of the release of the Nixon grand jury materials to the House Judiciary Committee, clarifying that, in its view, those materials were released under “the Rule 6 exception for ‘judicial proceedings.’” *McKeever*, 920 F.3d at 847 n.3 (citing *Haldeman*, 501 F.2d at 717).¹ In short, this Court has twice acknowledged that courts may disclose grand jury materials to Congress to further Congress’s impeachment function.

Other courts have agreed. For instance, in 1987, a federal court in Miami permitted the disclosure of the record of a grand jury that indicted Judge Alcee Hastings to the House Judiciary Committee to further its impeachment investigation into whether Hastings solicited a bribe to influence a judicial decision. *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1073 (S.D. Fla. 1987) (“*Miami Grand Jury*”). Specifically applying the Rule 6(e) judicial-proceedings exception, the court held that “[t]here can be little doubt that an impeachment

¹ While the dissenting judge in *McKeever* disagreed with the majority’s analysis of the *Haldeman* decision, arguing that the *Haldeman* court approved the release of those grand jury documents pursuant to its inherent authority to oversee the grand jury, not pursuant to any enumerated exception in Rule 6, see *McKeever*, 920 F.3d at 854-55 (Srinivasan, J., dissenting), the important point for present purposes is that all three judges in *McKeever* agreed that Congress may receive grand jury material where doing so would assist an impeachment inquiry.

trial by the Senate is a ‘judicial proceeding’ in every significant sense and that a House investigation preliminary to impeachment is within the scope of the Rule.” *Id.* at 1075-76; *see id.* at 1076 (noting that Article III, section 3 provides that “[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury,” and that Article I uses the terms “cases of impeachment,” “try,” “convicted,” and “judgment” in reference to impeachment). According to the court, “[t]he fact that senators rather than Article III judges decide the case does not make it any less judicial; it merely points to a jurisdictional choice made by the framers for political and historical reasons.” *Id.*; *see In re Grand Jury Investigation of Uranium Indus.*, No. 78-0173, 1979 WL 1661, at *7 (D.D.C. Aug. 16, 1979) (noting that a House impeachment investigation “certainly was preliminarily to or in connection with a contemplated trial presided over by the Chief Justice of the United States—very much a judicial proceeding”). Having concluded that Rule 6(e) permitted disclosure to the House as part of an impeachment inquiry, the court also declined to place any limitations on the House’s access to the materials, reasoning that “[i]t is within the province of the House Committee to review all of the information, including the grand jury record,” and that the “request of the Chairman of the Committee on the Judiciary satisfies the standard of particularized need for disclosure of the record.” *Miami Grand Jury*, 669 F. Supp. at 1077-78.

Similarly, a Louisiana district court approved the release of grand jury materials to the House Judiciary Committee for use in its impeachment investigation of Judge G. Thomas Porteous, Jr. *See* H.R. Rep. No. 111-427, at 8-10 (2010). The court reasoned that the Committee had “an interest in conducting a full and fair impeachment inquiry,” and for that reason “[d]isclosure of the requested documents [was] warranted.” Order at 3, *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) (Dkt. No. 10). Moreover, the court concluded that the request was “not overly broad” because “[a]ny testimony or materials obtained by the grand jury or grand juries in question that pertain to Judge Porteous are certainly relevant to the scope of the Judiciary Committee’s inquiry.” *Id.* at 6. The Fifth Circuit summarily affirmed that Order. Court Order, *In Re: Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009).

Finally, in a set of cases applying the now-lapsed independent counsel statute, district courts in this Circuit have permitted the disclosure of grand jury materials to the public, sometimes reserving sensitive materials for only Congress. Under that statute, an independent counsel, prior to his or her termination, was required to submit a report to the Special Division of the court “setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.” 28 U.S.C. § 594(h)(1)(B) (2014). In multiple decisions, this Court

approved the public release of those reports, despite the fact that they contained grand jury matters. *See, e.g., In re Espy*, 259 F.3d 725, 728-30 (D.C. Cir. 2001); *In re North*, 16 F.3d 1234, 1242-45 (D.C. Cir. 1994).

Notably, in one case, the Court gave special solicitude to Congress in light of its need for such materials. In *In re Cisneros*, this Court held that most of a report generated by an independent counsel concerning a former Secretary of Housing and Urban Development should be released to the public, but it held that Section V of the report should be released to congressional leadership alone. 426 F.3d 409, 410-11 (D.C. Cir. 2005). That section dealt with “investigations of alleged obstructions of justice and tax-related matters,” *id.* at 412, which “did not result in indictments, certainly fostered no trials, and concerned individuals whose identities [had] not been generally disclosed to the public,” only the grand jury, *id.* at 413. While the Court concluded that Section V should not be disclosed to the public, it acknowledged that the report was “obviously a matter within the responsibility and concern of the Congress” and therefore ordered that Section V be transmitted “to appropriate officials of the Congress for such distribution to other Members as they deem necessary in the pursuit of congressional duties.” *Id.* at 415.²

² As the Committee noted in its Application in the district court, in almost all of these cases, the Department of Justice advocated in favor of releasing grand jury materials to Congress to aid congressional impeachment and other investigations. *See* J.A. 118-19 & nn.31-32.

* * *

In short, there is a long history, beginning early in the Republic and continuing to modern times, of Congress receiving grand jury materials in furtherance of its impeachment function. As the next Section explains, the Committee’s request for grand jury materials in this case fits well within that long-standing tradition.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT ORDER AUTHORIZING THE RELEASE OF THE GRAND JURY MATERIALS RELATED TO SPECIAL COUNSEL MUELLER’S REPORT THAT THE COMMITTEE HAS REQUESTED.

In this case, the House Judiciary Committee has requested the portions of Special Counsel Mueller’s report that the Department of Justice redacted pursuant to Rule 6(e), as well as any underlying grand jury transcripts or exhibits referenced in the portions of the report that were redacted and related to certain actions of the President that the Committee is investigating. *See* J.A. 123. That request falls well within the historical tradition of Congress receiving grand jury materials pursuant to its impeachment function, and this Court should affirm the district court’s order granting the Committee’s request.

As described above, this Court has made clear that a court may disclose grand jury material to a congressional committee to further an impeachment investigation under Rule 6(e). In *Haldeman*, the en banc Court held that it was in “general agreement” with a district court’s decision to release a grand jury report to the House Judiciary Committee for use in the Committee’s investigation about whether to

impeach President Nixon. 501 F.2d at 715. And in *McKeever*, this Court made explicit that, in its view, disclosure to the House for use in an impeachment investigation “fit[s] within the Rule 6 exception for ‘judicial proceedings.’” 920 F.3d at 847 n.3.

Disclosure is permissible here because the House is actively considering the impeachment of President Trump. *See* H.R. Res. 660, 116th Cong., at 1 (Committee’s “ongoing investigation[]” is “part of the existing House of Representatives inquiry” into impeachment). Moreover, the Committee has made the showing the Supreme Court has stated is required when “[p]arties seek[] grand jury transcripts under Rule 6(e)”: “the material they seek is needed to avoid a possible injustice in another judicial proceeding,” “the need for disclosure is greater than the need for continued secrecy,” and “their request is structured to cover only material so needed.” *Douglas Oil Co.*, 441 U.S. at 222.

First, failure to disclose the material the Committee is requesting would necessarily cause injustice. The Special Counsel concluded that the President engaged in serious misconduct, and yet his report made clear that the Department of Justice would not indict the President based on long-standing Department policy prohibiting the indictment of a sitting President. *See* 2 Mueller Report at 1 (“Given the role of the Special Counsel as an attorney in the Department of Justice and the framework of the Special Counsel regulations, . . . this Office accepted [the Office of Legal

Counsel’s] legal conclusion [that a sitting President cannot be indicted] for the purpose of exercising prosecutorial jurisdiction.”); *see also A Sitting President’s Amenable to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000). Rather, Mueller pointed to “constitutional processes for addressing presidential misconduct”—referring, of course, to impeachment. 2 Mueller Report at 1 & n.2. It would be a miscarriage of justice if Congress were prevented from viewing information plainly relevant to the “constitutional processes for addressing presidential misconduct” simply because that evidence was also presented to a grand jury.

Second, the need for disclosure is obviously greater than the need for continued secrecy. The Committee is carrying out one of its gravest duties: considering the impeachment of a President. As the district court explained when considering the disclosure of grand jury information regarding President Nixon, “it should not be forgotten that we deal in a matter of the most critical moment to the Nation, an impeachment investigation involving the President of the United States. It would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all pertinent information.” *June 5, 1972 Grand Jury*, 370 F. Supp. at 1230. And the Committee needs this information: “the requested grand jury information is necessary for the Committee to assess the meaning and implications of the Mueller Report, including with regard to the Trump Campaign’s contacts with agents for the Russian government, President Trump’s

knowledge of those contacts, and the President’s state of mind when he took various steps to undermine Special Counsel Mueller’s investigation.” J.A. 132-33; *see id.* at 133-35 (explaining how the redacted passages involve key moments in President Trump’s campaign and administration that are critical to the Committee’s inquiry).

On the flip side, the need for secrecy is lessened where the Committee seeks disclosure only to a limited number of authorized individuals. *See id.* at 122-23. As the Committee itself has explained, it “will seek [the Select Intelligence Committee’s] assistance in reviewing grand jury materials and other evidence . . . [g]iven [that Committee’s] ability to handle the most sensitive classified information.” *Id.* at 123. Where the Committee has “taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials,” *June 5, 1972 Grand Jury*, 370 F. Supp. at 1230, the considerations in favor of secrecy are far less persuasive. *See Douglas Oil Co.*, 441 U.S. at 223 (“as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification”); *cf. In re Cisneros*, 426 F.3d at 415 (permitting the disclosure of certain more sensitive information to only Congress, not the broader public). Moreover, the fact that the grand jury has completed its work means that “[t]here is no need to protect against flight on anyone’s part, to prevent tampering with or restraints on witnesses or jurors, to protect grand jury deliberations, [or]

to safeguard unaccused or innocent persons with secrecy.” *June 5, 1972 Grand Jury*, 370 F. Supp. at 1229.

Finally, the request covers only material the Committee needs: “information that the Special Counsel deemed sufficiently significant to be included or referenced in the Report itself; any grand jury materials that bear directly on or provide context regarding the President’s state of mind; and grand jury materials that describe actions taken by the central witness to the Committee’s investigation, Don McGahn.” J.A. 138. This request is eminently reasonable, especially given the gravity of the subject matter that the Committee is investigating. *Cf. Miami Grand Jury*, 669 F. Supp. at 1077 (“It is within the province of the House Committee to review *all* of the information.” (emphasis added)). For all those reasons, this Court should affirm the district court’s order granting the Committee’s request.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contain 6,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 16th day of December, 2019.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: December 16, 2019

/s/ Brianne J. Gorod
Brianne J. Gorod