[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

On Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF FOR APPELLANT

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The Department of Justice, on behalf of the United States, respectfully submits this consolidated supplemental brief in response to the Court's orders of December 13 and December 18, 2019. The December 13 order directs the parties to address "whether Appellee has Article III standing." The December 18 order directs the parties to address "the effect of the articles of impeachment on the issues in this case, including whether the articles of impeachment render this case moot and whether expedited consideration remains necessary. Appellee should also address whether it is still seeking the grand-jury materials at issue in this case in furtherance of its impeachment inquiry."

ARGUMENT

I. Article III Standing

There is no Article III standing problem in this case. That is not because the Committee would have Article III standing to sue the Attorney General over the withholding of grand jury information from the Mueller Report; it would not. Rather, there is no Article III problem in this case because (1) the Committee did not need Article III standing in district court to request that the court exercise its continuing supervisory jurisdiction concerning the grand jury to authorize the release of grand jury records; and (2) because the court ordered the Department of Justice to disclose grand jury records in its lawful custody, the Department may invoke the Article III jurisdiction of this Court on appeal to redress that injury to the United States in its sovereign capacity.

A. For the same reasons that the Committee lacks Article III standing to seek judicial enforcement of its subpoena in *Committee on the Judiciary v. McGahn*, No. 19-5331, the Committee would lack Article III standing to commence a freestanding civil action against the Executive Branch to obtain the grand jury information at issue here. *See McGahn* Opening Br. 14-33; *McGahn* Reply Br. 2-12. The Committee has stated that it needs the grand jury materials it seeks so that the House of Representatives may "consider whether to exercise its full Article I powers, including . . . approval of articles of impeachment." JA 99 (Committee's Rule 6(e) application). That interest is quintessentially institutional in nature. As the Department's briefs in *McGahn* explain, institutional disputes between the political branches over access to information have existed since the beginning of the Republic. *See McGahn* Opening Br. 17-19. But there is no historical tradition of Article III courts adjudicating such disputes, and the Supreme Court has made clear that disputes between the political branches over their institutional prerogatives do not present the type of personal injuries that support Article III standing. *See Raines v. Byrd*, 521 U.S. 811, 825-26 (1997). Accordingly, if the Committee had filed a lawsuit to enforce its April 2019 subpoena to the Attorney General for an unredacted copy of the Mueller Report and related records (*see* JA 190-92), the Department would have moved to dismiss that complaint for the same threshold reasons that require dismissal of the Committee's complaint in *McGahn*, including lack of Article III standing.

B. This case, however, involves a Rule 6(e)(3)(E)(i) application, not a civil complaint. Unlike a civil complaint, a Rule 6(e)(3)(E)(i) application does not involve the commencement of a new "case" or "controversy" in an Article III court. Rather, such an application asks a district court, exercising its ongoing supervisory jurisdiction concerning a federal grand jury convened by that court, to "authorize disclosure" of materials gathered by the grand jury in an investigation conducted under the district court's auspices. *See* Rule 6(e)(3)(E).

Although it functions to a large degree at "arm's length" from the Judicial Branch, *United States v. Williams*, 504 U.S. 36, 47 (1992), a federal grand jury 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). As the Supreme Court has recognized, a district court's limited exercise of supervisory jurisdiction concerning a grand jury, though not adjudicating an "adversarial" case or controversy in the typical sense, is nonetheless a "traditional[]" function of Article III courts. *See Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988); *Levine v. United States*, 362 U.S. 610, 617 (1960) ("The grand jury is an arm of the court and its in camera proceedings constitute a judicial inquiry." (quotation omitted)); *Blair v. United States*, 250 U.S. 273, 280 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States.").

One aspect of a court's supervisory jurisdiction concerning a grand jury is the authority—and responsibility—to control access to the records of a grand jury investigation conducted under the court's auspices. Rule 6(e) codifies and defines that authority and prescribes the procedures for its exercise. A request for access to grand jury records under that Rule has not been understood as equivalent, for Article III purposes, to the commencement of a civil action. Indeed, the proceedings are often conducted on an *ex parte* basis and, under some exceptions in the Rule, do not relate to any pending or anticipated federal criminal or civil proceeding at all. *See, e.g.*, Rule 6(e)(3)(E)(iii) (court-approved disclosures to foreign prosecutors for use in foreign criminal investigations).

Consistent with that understanding, courts generally have not required applicants for grand jury records under Rule 6(e)(3)(E) to demonstrate that they have Article III standing to sue. Of course, many applicants for court-ordered disclosure of grand jury records under Rule 6(e) would undoubtedly possess Article III standing if it were required. For example, Rule 6(e)(3)(E)(ii) provides that a court may authorize disclosure of grand jury records "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." A criminal defendant invoking that Rule would almost invariably have Article III standing to appeal if the district court denied the application. But neither this Court nor district courts in this circuit have required a showing of Article III standing in the first instance for a party to request that the

court exercise the supervisory power codified in Rule 6(e) to authorize the disclosure of grand jury records. For that reason, the Department did not move to dismiss the Committee's application in district court here for lack of standing.

C. Article III standing is required for a party to invoke the jurisdiction of this Court, *see, e.g., Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (Article III standing required at every stage of the appellate process), including on appeal from a district court's disposition of a Rule 6(e) application. *Cf. In re Grand Jury*, 490 F.3d 978, 980-82 (D.C. Cir. 2007) (per curiam) (concluding that the denial of a petition under Rule 6(e)(3)(E)(i) constitutes a "final decision" subject to appeal under 28 U.S.C. § 1291).

That requirement is satisfied here, however, because the district court granted the Committee's application in substantial part and directed the Department to disclose grand jury records. The United States has Article III standing to appeal the district court's order requiring the Department to disclose grand jury materials in its possession, both as the complaining party in any criminal proceedings for which the grand jury materials were generated and as the lawful custodian of the grand jury materials. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-19 (1989) (even where Article III standing is not required in proceedings below, a party ordered by a lower tribunal to engage in conduct has Article III standing to seek relief from a federal court). There is no question, for example, that the United States would have Article III standing to seek relief from the federal courts if a state court purported to order a federal agency to disclose records within its custody to a private party. The Article III

analysis is no different merely because the federal agency here has been ordered to disclose such records by a federal court at the request of a congressional committee. *Cf. Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (holding that "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is vested in the Executive Branch). This Court therefore has jurisdiction to consider this case on the merits.

Given the procedural posture of this case, there is no reason for the Court to address the difficult questions that would have arisen if the district court had denied the Committee's application and the Committee had sought to appeal. In such circumstances, the Court would need to address whether the Committee has a judicially cognizable interest in the information it seeks sufficient for Article III purposes, and relatedly, whether such an interest can properly be asserted in litigation against the Executive Branch. Those questions are not presented here because the Committee was not required to possess Article III standing in district court simply to request that the court exercise its authority under Rule 6(e), and because the United States has Article III standing to appeal the district court's subsequent order requiring the Department to disclose grand jury records within its lawful custody.

II. Effect of the Articles of Impeachment

On December 15, 2019, the Committee reported two articles of impeachment to the full House. On December 18, 2019, the House of Representatives approved both articles. *See* H.R. Res. 755, 116th Cong. (2019). One article addresses the

President's conduct with respect to Ukraine, *id.* at 2-5, while the other addresses Congress's inquiry into that conduct, *id.* at 5-9.

The House's adoption of these articles of impeachment fundamentally alters this case. The Committee originally sought access to the grand jury materials in and underlying the Mueller Report so that the House of Representatives could "consider whether to exercise its full Article I powers, including . . . approval of articles of impeachment." JA 99 (Committee's Rule 6(e) application). Indeed, because the Committee's only colorable hook to obtain the grand jury records under Rule 6(e) was its contention that it was engaged in proceedings "preliminary to" the asserted "judicial proceeding" of a Senate impeachment trial, its legal theory depended on the premise that there was a nexus between the Mueller Report and impeachment. The district court, in turn, accepted that premise and predicated its finding of "particularized need" on the Committee's assertion that it needed to review grand jury materials from the Special Counsel's investigation in order "to reach a final determination about conduct by the President described in the Mueller Report" for purposes of its impeachment inquiry. JA 67.

Neither article of impeachment adopted by the House, however, alleges high crimes or misdemeanors stemming from the events described in the Mueller Report. To the contrary, the second article, in alleging obstruction of the impeachment inquiry, expressly recites that the House's "impeachment inquiry focused on President Trump's corrupt solicitation of the Government of Ukraine to interfere in the 2020

United States Presidential election," H.R. Res. 755 at 6, as opposed to the events investigated by the Special Counsel. And the accompanying report issued by the Committee alleges a scheme of improper presidential conduct "[b]eginning in the Spring of 2019," H.R. Rep. No. 116-346, at 86 (2019)—that is, *after* the Special Counsel prepared his report, which was delivered to the Attorney General in March 2019. Accordingly, nothing appears to remain of the Committee's alleged need for the grand-jury materials in the Mueller Report.

The Committee now asserts, without elaboration, that the materials at issue "could be used during the subsequent Senate proceedings." Committee Br. 13. Whether or not that assertion is correct on the merits, it is enough to prevent this case from being moot as a strict Article III matter.[1] As a practical matter, however, the Committee's Rule 6(e) application plainly has been overtaken by events.

At a minimum, the district court's "particularized need" rationale is now obsolete. That rationale rested exclusively on the Committee's need, in conducting an inquiry "preliminary to" a Senate impeachment trial, to "reach a final determination about conduct by the President described in the Mueller Report." JA 67. As our

[1] If the Court nevertheless were to conclude that this case has become moot because of the House's voluntary decision to proceed with the adoption of articles impeachment without awaiting a ruling from this Court, the United States would be entitled to vacatur of the district court's order under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

reply brief explains (at 14-25), that rationale was never legally sufficient. It is now no longer even apposite.

The district court did not consider, let alone decide, whether the Committee had shown a particularized need for the grand jury material at issue in connection with matters relating to Ukraine and the 2020 presidential election. Indeed, the district court recognized at the time it issued its decision that the Ukraine controversy was already becoming the focus of the House's interest, and it acknowledged in its opinion that this growing focus was "pertinent . . . to the issue of whether [the Committee] has shown a 'particularized need' for the redacted grand jury materials." JA 54 n.40. The district court ultimately rejected the Department's challenge to the Committee's application on that ground, however, declaring that "the recent revelations related to Ukraine have not displaced [the Committee]'s focus on investigating the conduct described in the Mueller Report." JA 67 n.47.

As the final articles of impeachment adopted by the House make clear, that is no longer true: the Ukraine controversy, and allegations of obstruction of the House's impeachment inquiry concerning that controversy, became the sole focus of the Committee's impeachment inquiry, and that is the basis on which the House of Representatives ultimately voted to impeach the President. The Committee therefore has no further need, let alone a particularized need, for grand jury materials from the Mueller Report. In fact, it is far from the clear that the Committee—an organ of the House of Representatives—will have any further role in the impeachment process at

all. The Committee has referred articles of impeachment to the House; the House has approved those articles; once the articles are transmitted to the Senate, the next steps are for the Senate to determine. The Committee has no need for materials to "inform[]" its "consideration" (Br. 39) of articles of impeachment that are no longer before it.

In no event, however, would the Committee's insistence (Br. 13) that it could still potentially use the information in a Senate trial provide a proper basis for sustaining the district court's order. As the Committee itself has stressed in its briefs in this Court (*see, e.g.*, Br. 31), the discretion to allow disclosure of grand jury materials under Rule 6(e)(3)(E) belongs in the first instance to the district court. Even if a Senate impeachment trial qualified as a "judicial proceeding" under Rule 6(e), it would be the district court's responsibility in the first instance to decide whether the Committee could articulate any particularized need for grand-jury information in the Mueller Report in light of (1) the specific articles of impeachment approved by the House, and (2) whatever rules the Senate may adopt for the conduct of the trial on those articles. The district court's disclosure order cannot properly be affirmed on the basis of findings the court never made regarding alleged needs it was never asked to consider.

For the same reason, further expedited consideration by this Court is unnecessary. There is certainly no reason to "issue an immediate order vacating the stay and affirming the decision below, with opinion to follow." Committee Br. 2.

That said, expedited briefing is now complete and the Department stands ready to present oral argument in this matter on January 3, 2020, as scheduled. In the Department's view, the most straightforward basis for resolving this case is for the Court to hold that a Senate impeachment trial is not a "judicial proceeding" under Rule 6(e) and to reverse the district court on that ground. That approach would obviate the constitutional difficulties posed by the Committee's interpretation of Rule 6(e), *see* Opening Br. 21-23, 48-51; provide clarity to Congress and the Department on this recurring question; and avoid the need to determine the effect of the articles of impeachment on the Committee's request. But if the Court prefers, it could simply vacate the district court's order and remand with instructions for the court to assess whether, given the articles of impeachment approved by the House, the Committee can articulate any ongoing particularized need for grand jury information in and underlying the Mueller Report.

CONCLUSION

Although the articles of impeachment do not render this case moot, they obviate the need for further expedition beyond holding oral argument on January 3 as scheduled. They also render the district court's "particularized need" rationale obsolete and make clear that, at a minimum, vacatur of the district court's order is required.

Respectfully submitted,

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December 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and with the Court's orders of December 13 and 18, 2019, because it contains 2,829 words, of which fewer than 3,000 words address the respective subjects of each of the Court's supplemental briefing orders. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2019, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. In addition, I caused printed copies of the foregoing brief to be delivered to the Court in accordance with the Court's supplemental briefing orders.

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