[ORAL ARGUMENT NOT SCHEDULED]

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	Case No. 19-5288

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN OPPOSITION TO THE DEPARTMENT OF JUSTICE'S MOTION FOR A STAY PENDING APPEAL

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

In accordance with 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]

In accordance with 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 and history. 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 furtherance 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.

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INTEREST OF *AMICUS CURIAE*[2]

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 and history. 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 report on his investigation into Russia's interference in the 2016 election, as well as President Trump's 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). However, key portions of that report were redacted pursuant to Federal Rule of Criminal Procedure 6(e), which governs when and to whom grand jury materials may be disclosed, because they referenced grand jury proceedings or materials.

The House Judiciary Committee filed an application with the district court

[2] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief.

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. The district court granted that request, and the Department of Justice now seeks a stay of that order. This Court should deny that request because the Department is unlikely to succeed on the merits of its appeal.

Although "[g]rand jury testimony is ordinarily confidential," *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 233-34 (1940), courts have long permitted the release of grand jury materials under certain circumstances, including to Congress for use in impeachment investigations. *Amicus* submits this brief to provide the Court with information regarding that long history. As the House's application makes clear, disclosure of the requested materials fits easily within this tradition and is authorized by Rule 6(e). The Department's motion for a stay should be denied.

ARGUMENT

THERE IS A LONG TRADITION OF COURTS DISCLOSING GRAND JURY MATERIALS TO CONGRESS TO FURTHER CONGRESS'S IMPEACHMENT FUNCTION, AND THE COMMITTEE'S REQUEST EASILY FALLS WITHIN THAT TRADITION.

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 (1907); *see id.* § 2342, at 714 (noting, in 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 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, it is significant for present purposes that the House 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 in 1946. *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 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 In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974) ("*June 5, 1972 Grand Jury*"). 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, *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. 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 rationales underlying grand jury secrecy, the 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 "[t]he Committee ha[d] taken elaborate precautions to insure against unnecessary and inappropriate disclosure of these materials." *Id.*

This Court, sitting en banc, affirmed that 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 v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974).

And earlier this year, this Court again recognized the propriety of releasing 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 v. Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019) (citing *Haldeman*, 501 F.2d at 717).[3] 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 to the House Judiciary Committee of the record of a grand jury that indicted Judge Alcee Hastings to further the Committee's impeachment investigation of the judge for soliciting 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 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

[3] 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 on the *McKeever* panel agreed that Congress may receive grand jury material where doing so would assist an impeachment inquiry.

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.*, 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 cases applying the now-lapsed independent counsel statute, district courts in this Circuit 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 materials. *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, this Court gave special solicitude to Congress in light of its need for such materials. In *In re Cisneros*, this Court ordered that a report generated by an independent counsel concerning a former Secretary of Housing and Urban Development be mostly released to the public, but it ordered that Section V of the report 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 this 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.[4]

* * *

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

[4] 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* Dkt. No. 1, at 20-21 & nn. 31-32.

impeachment function. The Committee's request here fits easily within that long-standing tradition.

CONCLUSION

For the foregoing reasons, the Department of Justice's motion for a stay pending appeal should be denied.

Respectfully submitted,

Dated: November 1, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 29(a)(5) because it contains 2,587 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 1st day of November, 2019.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 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: November 1, 2019

/s/ Brianne J. Gorod
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