[ORAL ARGUMENT NOT SCHEDULED]

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 a Final Order of the U.S. District Court for the District of Columbia
(No. 1:19-gj-48) (Hon. Beryl Howell, Chief District Judge)

OPPOSITION OF THE COMMITTEE ON THE JUDICIARY TO THE DEPARTMENT OF JUSTICE'S EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF SERVICE

GLOSSARY

Committee	Committee on the Judiciary of the United States House of Representatives
DOJ	United States Department of Justice

INTRODUCTION

The U.S. House of Representatives is conducting an inquiry to determine whether to impeach President Donald J. Trump. As part of that urgent investigation, the Committee on the Judiciary (Committee) has sought access to certain grand-jury materials that will aid the House in determining whether the President committed impeachable offenses, including attempted obstruction of the Special Counsel's investigation of Russian interference in the 2016 Presidential election and solicitation of Ukrainian interference in the 2020 Presidential election. The district court correctly ordered the Department of Justice (DOJ) to disclose the requested materials pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i), which authorizes disclosure "preliminarily to … a judicial proceeding." This Court should deny DOJ's application for a stay of that order pending appeal.

This Court has twice interpreted Rule 6(e) to authorize disclosure of grand-jury materials preliminary to impeachment, and that interpretation—which DOJ itself urged this Court to adopt as recently as last year—controls this case. DOJ's contrary interpretation of Rule 6(e) ignores the constitutional text; raises serious separation-of-powers concerns; and, if accepted, would yield absurd results. Under DOJ's theory, courts could pierce grand-jury secrecy to assist in run-of-the-mill litigation or attorney disciplinary proceedings, but not where the House is deciding whether to impeach the President—a result that every court to consider the issue has rejected and that DOJ once described as "fatuous."

DOJ's other arguments on the merits are similarly flawed. An investigation into whether the President should be impeached is "preliminar[y] to" an impeachment trial itself. And the district court, acting within its "considered discretion," *Douglas Oil Co. of Ca. v. Petrol Stops Nw.*, 441 U.S. 211, 228 (1979), made thorough factual findings that the Committee has established a "particularized need" for the materials it seeks—findings that DOJ offers no reason to disturb.

DOJ, in any event, has identified no irreparable harm that it will suffer absent a stay. Although DOJ implies that its appeal will become moot if the grand-jury materials are disclosed, the Supreme Court has rejected precisely that contention. *See United States v. Sells Eng'g*, 463 U.S. 418, 422 n.6 (1983).

By contrast, delaying disclosure would irreparably harm the Committee and the public by depriving the House of information essential to its ongoing impeachment investigation. "An impeachment investigation involving the President of the United States is a matter of the most critical moment to the Nation," and DOJ itself has recognized a "public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare." Dkt. 55 (Stay Op.) 6-7 (alteration and quotation marks omitted). The public interest would be irreparably harmed if DOJ succeeds in running out the clock on impeachment through obstruction and delay. This Court should deny the stay.

STATEMENT

1. The "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." Mueller Report, Vol. I at 1.[1] The Trump Campaign welcomed Russia's election interference because it "expected it would benefit electorally from information stolen and released through Russian efforts." *Id.*, Vol. I at 1-2. Senior campaign officials engaged directly with agents of the Russian government in the hope of receiving damaging information about then-candidate Clinton, and there is "evidence suggesting that then-candidate Trump may have received advance information about Russia's interference activities." Dkt. 46 (Op.) 6.

In May 2017, the Acting Attorney General appointed Robert S. Mueller III to serve as Special Counsel to investigate Russian interference in the 2016 election and "whether individuals associated with the Trump Campaign [had] coordinat[ed] with the Russian government" in this interference. Mueller Report, Vol. I at 4. The President recognized that this investigation "would uncover facts about the campaign and the President personally that the President could have understood to be crimes or that would give rise to personal and political concerns." *Id.*, Vol. II at 76; *see also id.*, Vol. II at 78 ("Oh my God.… This is the end of my Presidency."). The report details that the President committed "multiple acts … that were capable of exerting undue influence over" the investigation. *Id.*, Vol. II at 157. These acts included (but are not

[1] Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (Mueller Report) (2019), https://perma.cc/DN3N-9UW8.

limited to): the President's decision to fire the Director of the FBI, *id.*, Vol. II at 76; his "efforts to remove the Special Counsel and to reverse the effect of the Attorney General's recusal" from the matter, *id.*, Vol. II at 157; his "attempted use of official power to limit the scope of the investigation," *id.*; his "direct and indirect contacts with witnesses with the potential to influence their testimony," *id.*; and his efforts to "encourage witnesses not to cooperate with the investigation," *id.*, Vol. II at 7.

The Special Counsel transmitted a confidential version of his final report to the Attorney General in March 2019, and the Attorney General publicly released a redacted version of the report in April. Volume I of the report describes Russia's successful efforts to interfere in the 2016 election on President Trump's behalf and details the "links or coordination between the Russian government and individuals associated with the Trump Campaign." *Id.*, Vol. I at 1.

Volume II of the report describes the results of the Special Counsel's inquiry into whether President Trump obstructed justice in attempting to impede the investigation. Volume II "does not exonerate [the President]"—and, tellingly, the report's authors state 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.*, Vol. II at 182. But Volume II stops short of determining whether the President obstructed justice, in part because accusing a sitting President of a crime would "potentially preempt constitutional processes for addressing presidential misconduct"—*i.e.*, impeachment. *Id.*, Vol. II at 1.

The public report contains numerous redactions, including redactions made under Rule 6(e) to protect the secrecy of grand-jury materials from the Special Counsel's investigation. These Rule 6(e) redactions—more than 240 in Volume I alone—withhold information about contacts between the Trump Campaign and Russian officials or WikiLeaks, and therefore may bear on whether the President committed impeachable offenses by obstructing the Special Counsel's investigation into those activities. One Rule 6(e) redaction, for example, appears to relate to grand-jury evidence indicating that President Trump sought or obtained advance knowledge of WikiLeaks's plans during the campaign, *id.*, Vol. II at 18 & n.27, possibly contradicting written answers he provided to the Special Counsel, *id.*, App. C-18. In addition, certain redacted materials pertain to a Trump Campaign official's contacts with Ukraine, Op. 6, and therefore may be relevant to the House's examination of whether the President committed impeachable offenses by soliciting Ukrainian interference in the 2020 Presidential election.

2. After the Attorney General declined a series of requests from the Committee for the materials, the Committee subpoenaed the Attorney General for an unredacted version of the report and certain underlying materials. The Committee made clear that it sought these materials in part to assess "whether to approve articles of impeachment." Dkt. 1-22 at 3 (quotation marks omitted). Consistent with President Trump's declaration that the Executive Branch is "fighting all the

subpoenas,"[2] however, DOJ refused to comply with the Committee's subpoena. *See, e.g.*, Dkt. 1-20. Departing from its longstanding practice, DOJ declined to join the Committee in seeking disclosure of the Rule 6(e) materials, arguing for the first time that Rule 6(e) does not permit disclosure to a Congressional committee during an impeachment investigation.

The House subsequently passed a resolution authorizing the Committee to initiate litigation seeking the withheld grand-jury materials to assist the Committee's investigation regarding "whether to recommend articles of impeachment with respect to the President." H. Rep. No. 116-108, at 21 (2019); *see* H. Res. 430 (2019). Chairman Nadler then issued protocols to protect the confidentiality of any grand-jury materials disclosed to the Committee. Dkt. 1-25. These protocols limit staff access to grand-jury materials; require storage of such materials in a secure location; and provide that such materials may not publicly be disclosed absent a majority vote by the Committee (though the protocols provide that such materials may be shared with another House Committee). *See id.* DOJ nevertheless continued to defy the subpoena as to the Rule 6(e) materials, and the Committee ultimately filed the present application seeking release of specified withheld materials. *See* Op. 17 (listing categories of materials sought).

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[2] *Remarks by President Trump Before Marine One Departure*, White House (Apr. 24, 2019), https://perma.cc/W7VZ-FZ3T (referring to Congressional subpoenas).

While the Committee's application was pending, Speaker Pelosi in September 2019 announced that the House was "moving forward with an official impeachment inquiry" and directed the Committee to "proceed with [its] investigations under that umbrella of [an] impeachment inquiry."[3] Subsequently, on October 31, 2019, the House approved a resolution confirming that the Committee's "ongoing investigation[]" is "part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House … to exercise its Constitutional power to impeach Donald John Trump." H. Res. 660, at 1 (2019).

3. The district court granted the Committee's application, ruling that Rule 6(e) authorizes the release of the materials. The court first rejected DOJ's argument that Rule 6(e)'s reference to "judicial proceedings" does not encompass impeachment trials. The court explained 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." Op. 26. The court further explained that "binding D.C. Circuit precedent forecloses any conclusion other than that an impeachment trial is a 'judicial proceeding.'" Op. 37 (capitalization altered). The court added that DOJ "has changed its longstanding position regarding whether impeachment trials are 'judicial proceedings,'" but reasoned that

[3] *Pelosi Remarks* (Sept. 24, 2019), https://perma.cc/6EQM-34PT.

"consideration of whether DOJ's new position is estopped is unnecessary" given that the position is meritless. Op. 42-43 n.30.

The district court next rejected DOJ's argument that the Committee's investigation is not "preliminar[y] to" an impeachment trial. The court explained that the "primary purpose" of the Committee's investigation "is to determine whether to recommend articles of impeachment," and that the investigation is therefore preliminary to a potential Senate impeachment trial within the meaning of Rule 6(e). Op. 44.

Finally, the district court found that the Committee possesses the requisite "particularized need" for the withheld information. After reviewing a sealed declaration from DOJ outlining the contents of the withheld Rule 6(e) material, *see* Dkt. 44-1, the court explained that, because many of the redactions pertain to the Trump Campaign's contacts with Russia and the President's motivation to obstruct the Special Counsel's investigation, the Committee "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." Op. 67. The court therefore ordered a "'focused'" disclosure, Op. 64, of two, limited categories of information—the "portions of the Mueller Report that were redacted pursuant to Rule 6(e) and any underlying transcripts or exhibits referenced" therein, Op. 74-75.

The district court in a separate order declined to issue a stay pending appeal. Applying the traditional stay factors, the court found that DOJ was "especially

unlikely to succeed" on the merits given "[t]he serious infirmities in [its] arguments." Stay Op. 4. Next, the court rejected DOJ's claim that disclosure would cause irreparable harm. The court noted that the Committee has adopted "special protocols for handling grand-jury material and keeping that information confidential," and rejected DOJ's unfounded assumption that the Committee will violate those protocols. Stay Op. 5. Finally, the court concluded that granting the stay would harm the Committee and undermine the public interest because "[a]n impeachment investigation involving the President of the United States is a matter of the most critical moment to the Nation." Stay Op. 7 (quotation marks omitted).

ARGUMENT

A stay should be denied for the reasons explained in the district court's thorough and well-reasoned opinions. "A stay pending appeal is always an extraordinary remedy" and is never granted as a matter of right. *Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. and Station Emps. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966) (per curiam). In seeking a stay, DOJ bears the burden of (1) making "a strong showing that [it] is likely to succeed on the merits," (2) establishing that it "will be irreparably injured absent a stay," and (3) showing that a stay would not substantially injure the Committee or undermine the public interest. *Chafin v. Chafin*, 568 U.S. 165, 179 (2013) (quotation marks omitted). DOJ cannot satisfy this standard and the Court should deny a stay.

I. DOJ'S ARGUMENTS FAIL ON THE MERITS.

Rule 6(e)(3)(E)(i) provides for disclosure of grand-jury materials "preliminarily to … a judicial proceeding." This provision authorizes the disclosure of the withheld materials to the Committee for its impeachment investigation. *First*, this Court's precedent confirms that a Senate impeachment trial constitutes a "judicial proceeding"; *second*, an impeachment inquiry in the House is "preliminar[y] to" a Senate trial; and *third*, the district court did not abuse its discretion in finding that the Committee demonstrated a "particularized need" for the requested materials.

A. Rule 6(e)'s reference to "judicial proceedings" encompasses impeachment trials. This Court held as much in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), where it rejected the argument "that impeachment does not fall into that category." *Id.* at 715. The district court in that case had concluded that Rule 6(e)'s "judicial proceedings" exception encompasses impeachment, and this Court "agree[d]" with that holding and deemed it not "necess[ary] to expand [the district court's] discussion" of its reasoning. *Id.*

If there were any doubt about the proper interpretation of *Haldeman*, this Court resolved it earlier this year in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019). *McKeever* presented the question whether district courts possess inherent authority outside of the exceptions listed in Rule 6(e) to order disclosure of grand-jury material. This Court held that district courts lack such inherent authority, distinguishing *Haldeman* on the ground that the disclosure in that case was ordered pursuant to Rule 6(e)'s

exception for judicial proceedings. *See id.* at 847 n.3. Responding to the dissent's contrary argument, *McKeever* explained that *Haldeman* is best understood to hold that impeachment "fit[s] within the Rule 6 exception for 'judicial proceedings.'" *Id.*

DOJ's attempts to distinguish *Haldeman* and *McKeever* "are simply unpersuasive." Op. 41. The fact that *Haldeman* arose on mandamus makes no difference because the portion of *Haldeman* addressing Rule 6(e)'s judicial proceedings exception did not mention the mandamus standard and instead resolved the question on the merits. And, contrary to DOJ's suggestion (Mot. 15), *McKeever*'s interpretation of *Haldeman* was central to *McKeever*'s holding. Had *Haldeman* been decided on inherent authority grounds rather than Rule 6(e) grounds, "the *McKeever* panel would have had no choice but to apply that precedent faithfully." Op. 42.

DOJ is in any event foreclosed from taking a contrary position because, as the district court found, it "changed its longstanding position regarding whether impeachment trials are 'judicial proceedings.'" Op. 42-43 n.30. In its brief to this Court in *McKeever*, DOJ maintained that this Court has "treated *Haldeman* as standing … for the proposition that an impeachment proceeding may qualify as a 'judicial proceeding' for purposes of Rule 6(e)."[4] That representation cannot be reconciled with DOJ's new position that this Court has not decided whether Rule 6(e) encompasses impeachment proceedings. *See* Mot. 9, 14-15. Having persuaded the

[4] Br. for Appellee at 37, *McKeever*, 920 F.3d 842 (No. 17-5149), 2018 WL 2684575.

D.C. Circuit to accept its interpretation of the relevant precedent in *McKeever*, DOJ may not now, "simply because [its] interests have changed, assume a contrary position." *Temple Univ. Hosp. v. NLRB*, 929 F.3d 729, 733 (D.C. Cir. 2019) (quotation marks omitted).

Even if DOJ's argument regarding the scope of "judicial proceedings" were not foreclosed, it would fail on its merits. The constitutional text makes clear that impeachment trials are judicial proceedings. Article I provides that "[t]he Senate shall have the sole Power to *try* all Impeachments"; states that when the President is tried, "the Chief Justice shall *preside*"; describes a "*Judgment* in Cases of Impeachment"; and refers to "the *Party convicted*." U.S. Const. Art. I, § 3, cls. 6-7 (emphases added). Article III similarly describes an impeachment trial as a type of "*Trial* of all Crimes." *Id.*, Art. III, § 2, cl. 3 (emphasis added). While DOJ urges the Court to disregard the constitutional text (Mot. 12-13), the terms in the Constitution—"trial," "convict," "judgment," "case," "crime"—contemplate a judicial proceeding.

The Framers understood impeachment to involve the exercise of judicial power. James Madison described the Senate as the "depositary of *judicial power* in cases of impeachment." *The Federalist No. 47* (James Madison) (emphasis added). Alexander Hamilton similarly referred to "the *judicial character* [of the Senate] as a court for the trial of impeachments." *The Federalist No. 65* (Alexander Hamilton) (emphases added). When Hamilton addressed the argument that authorizing the Senate to conduct impeachment trials "confounds legislative and judiciary authorities in the

same body," he did not dispute that this arrangement produces an "intermixture" of "legislative and judiciary authorities," but instead explained that vesting the Senate with judicial power is "not only proper but necessary to the mutual defense of the several members of the government against each other." *The Federalist No. 66* (Alexander Hamilton). The Supreme Court has similarly recognized that "[t]he Senate … exercises the *judicial power* of trying impeachments." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880) (emphasis added).

It should go without saying that a *trial* at which the Chief Justice *presides* and during which the Senate exercises *judicial power* to *convict* the accused and render a *judgment* qualifies as a "judicial proceeding" as that term is used in Rule 6(e). That conclusion is particularly apparent given that the term "judicial proceeding" in Rule 6(e) "has been given a broad interpretation," and may include "every proceeding of a judicial nature before a court or official clothed with judicial or quasi judicial power." *In re Sealed Motion*, 880 F.2d 1367, 1379-80 (D.C. Cir. 1989) (per curiam) (quotation marks omitted). While DOJ contends (Mot. 6) that the district court rejected the "plain meaning" of the Rule, the court in fact analyzed the text of both the Constitution and the Rule in determining that impeachment trials are judicial proceedings. Op. 30-33. And the court properly interpreted the Rule's text in light of historical practice, *see* Op. 34, noting that in the decades predating Rule 6(e)'s enactment, courts frequently disclosed grand-jury materials for use in Congressional investigations, and that Rule 6(e) was enacted to "codif[y]" that preexisting practice.

Sells Eng'g, 463 U.S. at 425; *see also* Br. of Const. Account. Ctr. as *Amicus Curiae* at 3-4 (describing this history).

DOJ's contrary interpretation would yield untenable results. Interpreting Rule 6(e) to authorize the Executive to withhold materials the House needs to carry out its impeachment responsibilities would raise substantial constitutional concerns. *See Senate Select Comm. v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) ("The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source."). And, as Judge Sirica noted during Watergate, it would be "incredible" if grand-jury material were "available to disbarment committees and police disciplinary investigations" but "unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation." *In re Report & Rec. of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1230 (D.D.C. 1974). DOJ agreed, positing that a contrary interpretation of Rule 6(e)—the one it now endorses—would be "fatuous."[5]

B. The Committee's request for disclosure is "preliminar[y]" to an impeachment trial within the meaning of Rule 6(e) because the "primary purpose" of disclosure is "to assist in preparation or conduct of" that proceeding. *United States v. Baggot*, 463 U.S. 476, 479-80 (1983). The requirement is met here because "the primary purpose of the investigation for which the grand-jury disclosure is sought is

[5] Mem. for the United States (DOJ *Haldeman* Br.) at 20, *Haldeman*, 501 F.2d 714 (No. 74-1364), *available at* https://perma.cc/9TDD-JV9T.

to determine whether to recommend articles of impeachment against President Trump." Op. 57-58.

DOJ principally claims (Mot. 16) that the Committee's investigation cannot be preliminary to impeachment because the Committee "lacks the authority to precipitate or initiate an impeachment proceeding in the Senate." But the Supreme Court has *declined* to hold that "the Government … may never obtain disclosure of grand jury materials any time the initiative for litigating lies elsewhere." *Baggot*, 463 U.S. at 482-83. It is quite common for different entities to be responsible for an investigation and the subsequent initiation of a judicial proceeding, and DOJ identifies no support for the suggestion that such a division of labor prevents investigators from obtaining the grand-jury information they require.

DOJ also disputes (Mot. 16-17) that the "primary purpose" of the Committee's investigation is impeachment, but it does so only by ignoring the overwhelming evidence that the district court surveyed—including a Committee report explaining that the investigation is directed to impeachment; a House resolution authorizing the present action for purposes of advancing the impeachment investigation; Chairman Nadler's memorandum and hearing statements regarding impeachment; and Speaker Pelosi's September 2019 statement that the House is "moving forward with an official impeachment inquiry." Op. 57; *see* Op. 56-58. The fact that the investigation has other secondary purposes does not mean that impeachment is not the primary purpose of the disclosure the Committee seeks. And DOJ's suggestion (Mot. 16) that

the House must authorize the impeachment investigation has always been incorrect, and is untenable now that the House has approved a resolution confirming that the Committee's investigation is "part of the existing House of Representatives inquiry into whether sufficient grounds exist" to "impeach Donald John Trump." H. Res. 660, at 1-2 (2019).

C. The district court's finding that the Committee has demonstrated the requisite particularized need for the grand-jury materials was well within the court's "considered discretion." *Douglas Oil*, 441 U.S. at 228. The court considered the specific "[f]eatures of the House's investigation" and found that these features make the Committee's "need for the grand jury materials … especially particularized and compelling." Op. 65. The court specifically referenced the Committee's need for information about

> the [June 2016] 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 [D]emocratic political organizations and the Clinton Campaign.

Op. 65. The court found that "Rule 6(e) material was redacted from the descriptions of each of these events in the Mueller Report," that "access to this redacted information is necessary to complete the full story for [the Committee]," and that the Committee "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." Op. 65-67.

DOJ has provided no basis to second-guess the district court's findings regarding the need for the withheld material. The court's thorough opinion belies DOJ's claim (Mot. 17) that the Committee has not "advance[d] particularized arguments based on specific redactions," or (Mot. 20) that the court announced what is tantamount to "a *per se* rule that disclosure is required in any impeachment proceeding." And contrary to DOJ's suggestion (Mot. 19), during oral argument before the district court the Committee repeatedly articulated its specific need for the materials it seeks. *See, e.g.*, Dkt. 38 at 8-9; *see also, e.g.*, Dkt. 1 at 34-35; Dkt. 33 at 20-22.

DOJ also errs in claiming (Mot. 18) that the Committee's need for disclosure extends only to the redacted materials in Volume II of the Mueller Report. To the contrary, to assess the President's conduct while in office, the Committee must gain a full understanding of contacts between the Trump Campaign and agents for the Russian government, as well as then-candidate Trump's knowledge of those contacts, as documented in Volume I of the report. Those are the events that the President may have been motivated to cover up, as documented in Volume II.

Finally, while DOJ suggests (Mot. 19) that the Committee may have other means of obtaining the necessary information, the district court rejected that argument as "smack[ing] of farce." Op. 70. In fact, "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." Op. 70. DOJ correctly

points out (Mot. 19) that the Committee has "interview[ed]" certain "witnesses of interest," but those interviews are no substitute for the withheld grand-jury materials, which "may be helpful in shedding light on inconsistencies or even falsities in [the witnesses'] testimony." Op. 66 (noting multiple convictions obtained by the Special Counsel's office against witnesses who lied to Congress and the FBI).

II. DOJ WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY.

DOJ also cannot satisfy its burden of establishing irreparable harm, which provides an independent basis for denying a stay.

DOJ claims (Mot. 21) that it is harmed because the denial of a stay would "entirely destroy [its] right to secure meaningful review," and goes so far as to imply that its appeal would become moot absent a stay. But the Supreme Court rejected that argument in *Sells Engineering*. In that case, the district court had ordered certain grand-jury materials disclosed to government attorneys, and the court of appeals had refused to grant a stay, which meant that the attorneys had "enjoyed access to the grand jury materials for more than two years." 463 U.S. at 422 n.6. The Supreme Court nevertheless concluded that the case was not moot, reasoning that the improper disclosure did not impose an all-or-nothing injury and that a decision reversing the disclosure could still confer meaningful relief. *Id.*

There are particularly good reasons here to conclude that any harm to DOJ from disclosing the materials could be repaired. The district court ordered a "'focused'" disclosure of only a narrow class of materials, Op. 64, and the Committee

has adopted protocols providing that, absent a further vote, any grand-jury material it receives will remain confidential. While DOJ appears to assume that the Committee will authorize reckless public disclosures, "[t]he courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978). Indeed, DOJ has already disclosed to the Committee certain non-Rule 6(e) materials that were redacted in the public version of the Mueller Report, and DOJ does not assert that these disclosures have resulted in any harm. The district court thus correctly rejected DOJ's claim to irreparable harm, finding that disclosure to the Committee "does not equate to public disclosure" and that any disclosure "that is found to be erroneous[] can be clawed back." Stay Op. 5. DOJ has identified no basis to second-guess those factual findings.

DOJ's allegations of harm are notable for what they omit. DOJ does not contend that disclosure would threaten the traditional values served by grand-jury secrecy—such as preventing flight by the targets of criminal investigations and protecting active witnesses. *See Douglas Oil*, 441 U.S. at 218-19. Nor, apart from unsubstantiated references (Mot. 3, 20) to ongoing investigations or prosecutions, does DOJ make any effort to tie the withheld materials to any pending matters. *Cf.* Dkt. 40-1 ¶ 3. And DOJ does not allege that targeted disclosures made in the extraordinary context of a Presidential impeachment inquiry would deter future witnesses from testifying candidly before grand juries in less high-profile matters.

DOJ's cursory arguments do not come close to establishing the requisite irreparable harm.

III. Staying Disclosure Would Injure the Committee and Undermine the Public Interest.

A. A stay pending appeal would impair the House's urgent efforts to determine whether the President committed impeachable offenses, including by attempting to obstruct the investigation of Russian interference in the 2016 election and by soliciting Ukrainian interference in the 2020 election. Because DOJ's obstructionism interferes with the "sole Power of Impeachment" that the Constitution vests in the House, *see* U.S. Const. Art. I, § 3, cl. 6, a stay would risk subjecting the House to significant constitutional harm. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

B. A stay would also undermine the public interest. DOJ's own Office of Legal Counsel has recognized "the 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 WL 33711291, at *27 (2000) (emphasis added). Delaying disclosure of information vital to the House impeachment inquiry would harm that interest in prompt action.

A stay would harm the public interest if it delayed impeachment proceedings only temporarily, but a serious risk exists that delay could be used to thwart entirely the Committee's ability to conduct an impeachment inquiry based on all of the relevant evidence. The "House, unlike the Senate, is not a continuing body." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 512 (1975). The current House ends in fourteen months. More than six months have passed since the Committee subpoenaed the material it seeks, and DOJ continues to defy the subpoena even though the district court deemed DOJ's grounds for doing so to be meritless. Every passing day represents a continued infringement of the Committee's entitlement to receive the information sought by the subpoena and to evaluate its relevance to a time-sensitive impeachment process. The Committee and the public will suffer irreparable harm if DOJ is permitted to run out the clock on impeachment.

Finally, "[i]mpeachment based on anything less than all relevant evidence would compromise the public's faith in the process." Op. 65. The decision whether to impeach a sitting President is among the House's most significant and solemn responsibilities, and it is vital that this decision be based on a comprehensive understanding of the relevant facts. Under previous administrations, DOJ recognized this public interest. It previously cooperated with efforts to disclose grand-jury material relevant to impeachment, and recognized that the "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." DOJ *Haldeman* Br. at

19. This Court should heed that representation and reject DOJ's efforts at further delay.

Respectfully submitted,

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November 1, 2019

[*] Attorneys for the Office of General Counsel for the U.S. House of Representatives and "any counsel specially retained by the Office of General Counsel" are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States … without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

CERTIFICATE OF COMPLIANCE

This response satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 5,120 words. This response complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word Professional Plus 2016 in Garamond, 14-point font, a proportionally-spaced typeface.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on November 1, 2019, I filed the foregoing response of the Committee on the Judiciary of the U.S. House of Representatives via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter