[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

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellant is the U.S. Department of Justice. The appellee is the Committee on the Judiciary, U.S. House of Representatives. Ranking Member of the Committee Representative Doug Collins and the Constitutional Accountability Center appeared as amici in the district court, and the Constitutional Accountability Center has appeared as an amicus in this Court as well.

B. Ruling Under Review

The ruling under review is the October 25, 2019 order of the district court (Howell, C.J.), granting the Committee's application for the disclosure of certain grand jury materials under Federal Rule of Criminal Procedure 6(e). JA 76-77. The memorandum opinion (JA 1-75) will be published in the F. Supp. 3d, but has not yet received an official citation. The opinion is available on Westlaw (2019 WL 5485221).

C. Related Cases

This case has not previously been before this Court or any other court. A pro se litigant who was denied leave to intervene in district court, David Andrew Christenson, has filed an appeal of that denial, which is currently pending before this

Court as No. 19-5219. There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Brad Hinshelwood
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Regulation:

Rules:

Legislative Materials:

Other Authorities:

INTRODUCTION

This appeal presents fundamental questions concerning the relationship between congressional impeachment proceedings and the federal grand jury system. Rule 6(e) of the Federal Rules of Criminal Procedure, which "codifies the traditional rule of grand jury secrecy," *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983), prohibits the disclosure of grand jury materials by non-witnesses "[u]nless these rules provide otherwise," Fed. R. Crim. P. 6(e)(2)(B) (Rule). The Rule recognizes only a handful of narrowly tailored exceptions to that rule of secrecy, and that list is exhaustive. None of the Rule's enumerated exceptions authorizes the disclosure of grand-jury information to Congress.

In this case, the Committee on the Judiciary of the U.S. House of Representatives petitioned the district court under Rule 6(e) for access to a host of secret grand-jury materials in and underlying the Mueller Report for potential use in an impeachment proceeding. Because Rule 6(e) makes no provision for congressional access to grand-jury information, the Committee styled its application as a request for disclosure "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(E)(i). The Committee asserted that it had the requisite "particularized need" for this information because the grand-jury materials would allow the Committee "to assess the meaning and implications of the Mueller Report" (JA 132) for potential articles of impeachment against the President. The district court granted the petition in substantial part, declaring that an impeachment proceeding in Congress constitutes

a "judicial proceeding" under Rule 6(e) and that the Committee had a particularized need for all of the requested information because "[i]mpeachment based on anything less than all relevant evidence would compromise the public's faith in the process." JA 65.

The district court's order warrants reversal for two reasons. First, it rests on the textually flawed and constitutionally problematic premise that an impeachment proceeding in Congress is a "judicial proceeding" within the meaning of Rule 6(e). That conclusion disregards the text, structure, and history of Rule 6(e), all of which demonstrate that a "judicial proceeding" under the Rule is a proceeding in a *court*, not in Congress. The district court's contrary view creates substantial separation-of-powers problems. It places district courts in the position of policing Congress's use of grand-jury information in impeachment proceedings. And it invites courts to scrutinize specific legal theories of impeachment, and the materiality of particular evidence under those theories, to assess Congress's "particularized need" for grand-jury information. Contrary to the district court's view, this Court has never squarely decided these questions, and the troubling consequences of the district court's holding strongly counsel in favor of addressing them de novo here for the first time.

Second, having determined to treat an impeachment proceeding in Congress as a "judicial proceeding" under Rule 6(e)(3)(E)(i), the district court failed to apply the well-settled "particularized need" test that governs disclosures under that provision. Indeed, the Committee did not seriously try to satisfy that test, under which a

generalized need for grand-jury materials to "complete the story" or "investigate fully," or simply to double-check that witnesses are not lying, has never been sufficient. Instead, the district court applied an impeachment-specific and toothless version of that standard—so toothless that the court even ordered the disclosure of grand-jury information that the Committee conceded that it did *not* need. The district court's failure to apply the correct legal standard for particularized need by itself is grounds for reversal.

The district court, in short, effectively treated Rule 6(e) as a discovery mechanism for congressional impeachment proceedings. As noted, that understanding of the Rule raises substantial constitutional problems and risks entangling courts in questions that the Constitution commits to Congress alone. Those constitutional concerns do not cast doubt on the jurisdiction of this Court or the justiciability of this case. But they do counsel strongly in favor of rejecting the premise of the Committee's petition and holding that impeachment proceedings are not contemplated by the Rule at all.

STATEMENT OF JURISDICTION

The district court adjudicated the Committee's request for the release of grand jury materials as an exercise of its continuing jurisdiction over, and supervision of, the grand jury, and pursuant to 28 U.S.C. § 1331. The district court entered an opinion and judgment on October 25, 2019. JA 1-75, 76-77. The Department filed a timely

notice of appeal on October 28, 2019. Dkt. No. 47; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether an impeachment proceeding in Congress is a "judicial proceeding" within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

2. Whether the Committee demonstrated a "particularized need" for access to all grand-jury material redacted from the Mueller Report and related grand-jury materials.

3. Whether this case is justiciable.

PERTINENT STATUTES

Rule 6(e) of the Federal Rules of Criminal Procedure is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

This case concerns the rule of grand-jury secrecy. "Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979). This rule of secrecy not only ensures that those under investigation do not flee or attempt to "influence individual grand jurors," but also safeguards the willingness of witnesses to testify "fully and frankly" as well as "voluntarily," and "assure[s] that persons who are accused but exonerated by the

grand jury will not be held up to public ridicule." *Id.* at 219. The Supreme Court has accordingly stressed that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," and "courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury." *Id.* at 218-19.

Federal Rule of Criminal Procedure 6(e) "codifies the traditional rule of grand jury secrecy." *Sells Eng'g*, 463 U.S. at 425. Originally promulgated in 1946, the Rule has been repeatedly amended by the Supreme Court in its rulemaking capacity and by Congress, which established the basic framework of the current Rule by direct enactment in 1977. *See* Act of July 30, 1977, Pub. L. No. 95-78, § 2(a), 91 Stat. 319, 319-20. In its present form, the Rule generally prescribes that all non-witness participants in the grand jury "must not disclose a matter occurring before the grand jury." Rule 6(e)(2)(B). It then provides a detailed list of exceptions to that general rule of secrecy. Many of these exceptions address sharing of grand-jury materials within the Executive Branch without leave of court, such as disclosures to "an attorney for the government for use in performing that attorney's duty," Rule 6(e)(3)(A)(i), or, after amendments in the wake of the September 11, 2001 terrorist attacks, to certain national security officials to address grave national security threats, Rule 6(e)(3)(D).

A final subgroup of exceptions, however, provides that a "court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs"—in five enumerated circumstances. Rule 6(e)(3)(E)(i)-(v). These enumerated

exceptions are the only circumstances in which a district court may authorize the disclosure of grand-jury materials. *McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019), *pet. for cert. filed*, No. 19-307 (U.S. Sept. 5, 2019). The Supreme Court has explained that these exceptions operate as "an affirmative limitation on the availability of court-ordered disclosure of grand jury materials," and reflect Congress's "judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *United States v. Baggot*, 463 U.S. 476, 479-80 (1983).

None of the five enumerated exceptions in Rule 6(e)(3)(E) concerns disclosures to Congress. Four of the five address situations in which a prosecutor or criminal defendant seeks disclosure of grand-jury materials as part of the enforcement of criminal law. *See* Rule 6(e)(3)(E)(ii)-(v). And only one permits a petition for disclosure by an interested third party: Rule 6(e)(3)(E)(i) provides that a court may authorize disclosure "preliminarily to or in connection with a judicial proceeding."

Even within the terms of the "judicial proceeding" exception, the Supreme Court has stressed that secrecy remains the default. Litigants seeking disclosure under Rule 6(e)(3)(E)(i) must demonstrate a "particularized need" for the material in the other judicial proceeding. *Sells Eng'g*, 463 U.S. at 443. Under this standard, "[p]arties seeking grand-jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is

structured to cover only material so needed." *Douglas Oil*, 441 U.S. at 222. The showing of need must be "strong," *Sells Eng'g*, 463 U.S. at 443, and the particularized-need standard is not met "merely by alleging that the materials [a]re relevant to an actual or potential . . . action," *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 568 (1983); *accord United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("relevancy and usefulness" an insufficient basis for disclosure). The point of the particularized-need standard is to ensure that, even where the exception applies, the veil of secrecy is lifted only "discretely and limitedly." *Douglas Oil*, 441 U.S. at 221 (quoting *Procter & Gamble*, 356 U.S. at 683).

B. Factual Background

In May 2017, Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller, III, as Special Counsel to investigate Russian interference in the 2016 presidential election and certain related matters. Deputy Attorney General Order No. 3915-2017 (May 17, 2017).[1] Special Counsel Mueller conducted an extensive investigation. As part of that investigation, a grand jury sitting in the District of Columbia "issued more than 2,800 subpoenas," and "almost 80" witnesses testified before a grand jury. JA 511. In addition to three convictions obtained by the Special Counsel's office, at the conclusion of the Special Counsel's investigation, the office

[1] Available at https://www.justice.gov/opa/press-release/file/967231/download.

transferred eleven ongoing prosecutions to other Department components and referred fourteen matters to other law enforcement entities. JA 692-97.

On March 22, 2019, Special Counsel Mueller submitted his confidential Report to the Attorney General pursuant to 28 C.F.R. § 600.8(c). On April 18, 2019, a version that included the overwhelming majority of the Report was disclosed to the public. The public version of the Report contained limited redactions for four sometimes-overlapping categories of information: grand-jury materials; information that could compromise intelligence or law enforcement activities; information that could harm ongoing criminal matters; and information that would unduly infringe upon the personal privacy and reputational interests of peripheral third parties. JA 447.

On the same day that it provided the redacted Report to the public, the Department of Justice announced that it would "provide the Chairman and Ranking Members of the House and Senate Committees on the Judiciary, the members of the 'Gang of Eight,' and one designated staff person per member" the ability to review the Report unredacted, except for the grand-jury information. JA 450; *see* JA 448 (explaining that the Attorney General does not "have discretion to disclose grand-jury information to Congress").

On April 19, 2019, the Committee served a subpoena demanding the Attorney General's testimony, as well as, *inter alia*, the unredacted Report, all documents referenced in the Report, and all documents created by the Special Counsel's Office.

JA 190-92. In response, the Department explained that "Rule 6(e) contains no exception that would permit the Department to provide grand-jury information to the Committee in connection with its oversight role." JA 221. But the Department noted that it had provided the chairman of the Committee and certain other Congressional leaders "with access to a version of the report that redacts only the grand-jury information . . . [T]his minimally redacted version would permit review of 98.5% of the report, including 99.9% of Volume II, which discusses the investigation of the President's actions." *Id.*

C. Prior Proceedings

On July 26, the Committee filed an application with the district court seeking "all portions of [the Mueller Report] that were redacted pursuant to" Rule 6(e); "any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e)"; and "transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to" four broad categories of information: "(A) President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election; (B) President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts; (C) President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or (D) actions taken by former White

House Counsel Donald F. McGahn II during the campaign, the transition, or McGahn's period of service as White House Counsel." JA 89-90.

The Department opposed. Along with its opposition, the Department submitted an *ex parte*, *in camera* declaration describing the redactions on each of the five pages in Volume II of the Report, and on one page in Appendix C of the Report, that have redactions on the basis of Rule 6(e). *See* JA 726-29 (public version of declaration). The district court did not receive or review any of the material redacted on the basis of Rule 6(e) in Volume I of the Report, nor did it receive or review any of the grand-jury transcripts underlying the redactions.

The district court granted the application in substantial part on October 25, JA 76, and filed an accompanying memorandum opinion. As relevant here, the court first held that an impeachment trial in the Senate qualifies as a "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i). Although it acknowledged that it had previously reached the opposite conclusion, *see* JA 39 n.27, the court rejected the Department's "plain-meaning" reading of the term as reaching "legal proceedings governed by law that take place in a judicial forum before a judge or magistrate," because it believed that the plain meaning was inconsistent with the "broad interpretation given to the term 'judicial proceeding'" and "fails to grapple with the judicial nature of an impeachment trial," JA 25-26. The court expressed the view that "impeachment trials are judicial in nature," JA 26, noting that the Constitution uses terminology borrowed from the judicial setting to describe impeachment proceedings,

JA 27-33. The district court cited historical examples which, in its view, showed that "Congress was afforded access to grand jury material prior to the enactment of Rule 6(e) in 1946," and that "Rule 6(e) was intended to codify this practice." The district court also opined that, in any event, *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), and *McKeever v. Barr*, *supra*, establish that impeachment qualifies as a "judicial proceeding" within the meaning of the Rule. *See* JA 39-40.

The district court further held that the Committee had established a "particularized need" for the materials under Rule 6(e)(3)(E)(i). According to the court, disclosure was necessary because "[i]mpeachment based on anything less than all relevant evidence would compromise the public's faith in the process." JA 65. The court also suggested that accessing the secret grand-jury information underlying certain redactions in the Mueller Report might be relevant to "complete the full story" for the Committee, to "prevent witnesses from misleading the House during its investigative factfinding," or to "reach a final determination about conduct by the President described in the Mueller Report." JA 66-67. The court further concluded that these considerations outweighed any need for continued secrecy because the grand jury's investigation has concluded and the disclosure of "limited" information to the Committee, which has asserted that it will maintain that information confidentially, would be "unlikely to deter potential future grand jury witnesses" from testifying frankly or to cause embarrassment to those investigated but not indicted by the grand jury. JA 71-73. The court discounted concerns about interference with

ongoing criminal matters based on the Committee's representation that it would "negotiate with [the Department] about disclosure of any grand jury information that [the Department] believes could harm ongoing matters." JA 73-74.

Based on these conclusions, the district court ordered disclosure of "[a]ll portions" of the Report "that were redacted pursuant to" Rule 6(e) and "any underlying transcripts or exhibits referenced" in those portions of the Report. JA 76. The court also specified that the Committee could make further requests for grand-jury material after reviewing those materials. JA 77.

The Department appealed and sought a stay pending appeal from the district court and from this Court. Although the district court denied a stay pending appeal, *see* JA 730-36, this Court entered an administrative stay, held argument on the stay motion, and then extended the administrative stay while setting the case for expedited briefing and argument on the merits.

SUMMARY OF ARGUMENT

The district court's disclosure order under Rule 6(e) should be reversed for two reasons. *First*, an impeachment proceeding in the Senate is not a "judicial proceeding" within the meaning of Federal Rule of Criminal Procedure 6(e)(3)(E)(i). By its plain terms, the Rule envisions disclosures made in proceedings occurring before a court, not a legislative body. That conclusion is reinforced by every ordinary tool of statutory construction: the Rule's text, structure, and history uniformly demonstrate that a "judicial proceeding" is a proceeding occurring before judges, not legislators. It

is also reinforced by principles of constitutional avoidance: the Committee's insistence that Rule 6(e) encompasses impeachment proceedings invites federal courts to regulate Congress's use and disclosure of grand-jury information in impeachment trials and entangles federal judges in determining whether the House has demonstrated a need for particular evidence in support of particular legal theories of impeachment. The Court should avoid those problems and construe the term "judicial proceeding" in Rule 6(e) not to include proceedings in Congress.

The district court's contrary ruling rests on a series of unsound premises. To begin, the court's extended discussion of whether impeachment in some abstract sense involves "judicial power" is beside the point. The question in this case is whether a Senate impeachment proceeding is a "judicial proceeding" in the specific sense of Rule 6(e). That is a straightforward question of statutory interpretation, and all of the relevant indicia point in one direction. The district court was also wrong to conclude that this Court's decisions in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), and *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), establish binding precedent about the correct meaning of the term "judicial proceeding" in Rule 6(e). Neither of those cases actually decided the questions in this case. Particularly given the constitutional difficulties raised by the Committee's position, this Court should resolve those questions now.

Second, the district court erred by applying an unrecognizable version of the "particularized need" standard for disclosure of grand-jury materials. It is black-letter

law that disclosure of grand-jury secrets under Rule 6(e)(3)(E)(i) requires significantly more than just a showing of relevancy and usefulness in another judicial proceeding. A party seeking grand-jury information under Rule 6(e) must make a strong showing of need "with particularity so that the secrecy of the proceedings [may] be lifted discretely and limitedly." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 221 (1979) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)).

The Committee did not seriously attempt to meet this standard. It made no showing of particularized need akin to what this Court or other courts have required for disclosure in connection with actual judicial proceedings. It did not, for example, identify a particularized reason to believe that a witness had testified or would testify untruthfully and seek access to grand-jury testimony to impeach the witness or refresh the witness's recollection. *See Douglas Oil*, 441 U.S. at 222 n.12 (describing this as a "typical showing of particularized need"). Instead, the Committee simply asserted that it needed the grand-jury information at issue to further its impeachment investigation. Such a diffuse and generic showing of need would never suffice under Rule 6(e) in any other context.

The district court nevertheless ordered disclosure—including of material the Committee expressly conceded in district court that it did *not* need, despite having requested it. The court reasoned that the possibility that the Committee might be misled by witnesses at some point in its investigation justified disclosure of the grand-jury materials. But courts have uniformly rejected such speculative and generic claims

of need, which any prosecutor or defense attorney could advance in any criminal trial. Likewise, the district court's assertions that the Committee had a particularized need "to investigate fully"; to consider "investigatory routes left unpursued" by the Special Counsel; to obtain "[c]omplete information"; and to "assess[] the need to fill acknowledged evidentiary 'gaps,'" JA 67, 68, 69, are simply observations that the grand-jury material may be relevant to the Committee's inquiry. But few principles of law in this area are more firmly settled than that a "generalized need for information" in aid of an investigation does not establish a particularized need under Rule 6(e). *In re Sealed Case*, 801 F.2d 1379, 1382 (D.C. Cir. 1986) (Scalia, J.).

Finally, the Court has directed the parties to address the Court's jurisdiction and the justiciability of this case. The Committee's application under Rule 6(e), which essentially asked the district court to exercise its unquestioned jurisdiction over the grand jury, is properly justiciable, and this Court has jurisdiction to review and reverse the court's order. The constitutional concerns raised by the Committee's position in this case are substantial, but those concerns relate to the merits, not to the jurisdiction of the courts. The solution is to construe Rule 6(e) to avoid those constitutional concerns by holding that a Senate impeachment trial is not a "judicial proceeding" within the meaning of Rule 6(e) at all.

STANDARD OF REVIEW

The district court's determination that an impeachment proceeding in the Senate qualifies as a "judicial proceeding" under Rule 6(e) is a legal question reviewed de novo. *See United States v. McIlwain*, 931 F.3d 1176, 1181 (D.C. Cir. 2019). The district court's conclusion that the Committee demonstrated a particularized need for the materials at issue is reviewed for abuse of discretion. *In re Sealed Case*, 801 F.2d at 1381. Whether the district court applied the correct standard in reaching that conclusion is a question of law reviewed de novo. *In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998).

ARGUMENT

I. A Senate Impeachment Proceeding Is Not A "Judicial Proceeding" Under Rule 6(e)

The district court held that an impeachment proceeding in the Senate is a "judicial proceeding" for purposes of Rule 6(e). That interpretation is at odds with the plain meaning of the term "judicial proceeding." It disregards the text, structure, and history of Rule 6(e). And it creates substantial separation-of-powers problems: it invites federal courts to impose conditions on Congress's use of grand-jury information in impeachment trials, and it requires courts to scrutinize specific legal theories of impeachment to assess Congress's "particularized need" for certain information.

Neither this Court nor any other court of appeals has squarely decided this question. As we explain below, the district court was mistaken in believing that it was bound either by this Court's denial of mandamus in *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), or by the Court's characterization of that decision in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), to hold that a Senate impeachment trial is a judicial proceeding under the Rule. Those decisions, which together contain a total of two sentences on the issue, need not and should not be understood to establish affirmative circuit precedent for the correct meaning of Rule 6(e). The profound errors in the district court's reasoning below—and the substantial constitutional difficulties raised by the court's approach to Rule 6(e)—strongly counsel in favor of this Court's resolving this important question here for the first time in a de novo appeal.

A. The Text, Structure, and History of Rule 6(e) Demonstrate that a "Judicial Proceeding" Occurs Before a Court, Not Congress

Rule 6(e) is "by any definition . . . a statute," *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981), and the ordinary tools of statutory construction govern its interpretation, *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). All of the traditional tools of statutory construction point to the conclusion that an impeachment trial in the United States Senate is not a "judicial proceeding" within the meaning of Rule 6(e). Judicial proceedings in the

sense of the Rule are proceedings that take place before federal, state, or local courts—not legislative bodies.

To begin, as the district court here previously recognized, the ordinary meaning of the term "judicial proceeding" does not include a proceeding conducted before a legislative body. *See In re Application to Unseal Dockets Related to Independent Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 318 n.4 (D.D.C. 2018) (Howell, C.J.) ("Consideration by the House of Representatives, even in connection with a constitutionally sanctioned impeachment proceeding, falls outside the common understanding of 'a judicial proceeding.'"). Rather, at the time of the exception's enactment in 1946, at the time of its re-enactment by Congress in 1977, and today, that term has been commonly understood to connote proceedings taking place before a court. Judicial Proceeding, *Black's Law Dictionary* at 1033 (3d ed. 1933) ("[a] proceeding in a legally constituted court" and "[a] general term for proceedings relating to, practiced in, or proceeding from, a court of justice"); Judicial Proceeding, *Black's Law Dictionary* (11th ed. 2019) (defining term as "[a]ny court proceeding; any proceeding initiated to procure an order or decree, whether in law or in equity"). And the Supreme Court's usage is the same: in observing that "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive," the Court recognized the essential distinction between impeachment proceedings committed to the legislative branch and judicial proceedings before courts. *Nixon v. United States*, 506 U.S. 224, 235 (1993).

Other textual clues in Rule 6(e) confirm that a proceeding before a House of Congress is not a "judicial proceeding" in the sense of the Rule. In addition to Rule 6(e)(3)(E)(i), two other provisions of Rule 6(e) use the term "judicial proceeding." *See* Rule 6(e)(3)(F), (G). Those rules unambiguously refer to a *court* proceeding. Rule 6(e)(3)(G), for example, provides that "[i]f the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper." *See also* Rule 6(e)(3)(G) advisory committee's note to 1983 amendment (describing what was then codified at subsection 6(e)(3)(E)). The district court did not seriously dispute that the term "judicial proceeding" in those provisions of Rule 6(e) refers exclusively to court proceedings. The court nevertheless discarded this textual evidence, suggesting that "the presumption of consistent usage readily yields to context." JA 25 n.19 (quotation omitted). But the district court did not explain what aspects of the "context" of Rule 6(e) suggest that "judicial proceeding" means something different in Rule 6(e)(3)(E)(i) than it does in Rules 6(e)(3)(F) and (G). The entire Rule is of a piece.

Other aspects of the Rules reinforce the plain meaning of the term "judicial proceeding." The only other instance in which the phrase "judicial proceedings" appears in the Rules of Criminal Procedure indisputably refers to courts. *See* Fed. R. Crim. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or

the broadcasting of judicial proceedings from the courtroom."). This understanding of the phrase is also consistent with the definitions contained in Rule 1. That rule defines a "Court" as "a federal judge performing functions authorized by law," and a "judge" as a "federal judge or a state or local judicial officer." *See* Fed. R. Crim. P. 1(b)(2), (4); *see also* Fed. R. Crim. P. 1(b)(3) (defining "Federal judge").

Finally, the history of Rule 6(e) likewise confirms that the term "judicial proceeding" carries its ordinary meaning. Before the advent of Rule 6(e), district courts authorized the disclosure of secret grand-jury materials only in relatively limited circumstances, all of which related to ordinary court proceedings. The Supreme Court, for example, approved the disclosure of grand-jury testimony to refresh the recollection of witnesses at trial, *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940), and courts of appeals recognized their authority to pierce grand-jury secrecy where there was a basis to set aside an indictment because of misconduct before the grand jury, *see, e.g.*, *Murdick v. United States*, 15 F.2d 965, 968 (8th Cir. 1926). When Rule 6(e) "codifie[d] the traditional rule of grand jury secrecy" in 1946, *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983), it codified those limited exceptions, creating express authorization for district courts to disclose grand-jury matters "preliminarily to or in connection with a judicial proceeding or . . . at the request of a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed. R. Crim. P. 6(e) (1946).

The Advisory Committee notes accompanying the Rule accordingly explained that Rule 6(e) "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory committee's note (1944). The only cases cited in those notes as examples of what the Advisory Committee had in mind involved attempts to lift grand-jury secrecy in connection with proceedings occurring before courts. *See id.* (citing *Schmidt v. United States*, 115 F.2d 394 (6th Cir. 1940) (attempt to obtain testimony of grand jurors to support motion to quash indictment); *Atwell v. United States*, 162 F. 97 (4th Cir. 1908) (same); *United States v. American Med. Ass'n*, 26 F. Supp. 429 (D.D.C. 1939) (same)). This historical practice confirms that the term "judicial proceeding" refers to a proceeding occurring before a court.

B. The District Court's Interpretation Creates Substantial Constitutional Difficulties

Shoehorning a Senate impeachment trial into Rule 6(e)(3)(E)(i)'s "judicial proceeding" exception also creates substantial constitutional difficulties that reinforce why that term is not properly read to include a legislative branch proceeding.

A critical feature of Rule 6(e)(3) is that a district court, faced with a petition to use grand-jury records in another judicial proceeding, may grant the petition but impose conditions on the petitioner's use and handling of the grand-jury information. That power is expressly stated in the Rule. *See* Rule 6(e)(3)(E) (district court may authorize disclosure "at a time, in a manner, and subject to any other conditions that

it directs"). In *Douglas Oil Co. v. Petrol Stops Northwest*, for example, the Supreme Court addressed a district court order that had authorized a disclosure of grand-jury materials subject to multiple conditions: that they be available "only to counsel"; that they be used "solely for the purpose of impeaching" or "refreshing the recollection" of witnesses; that counsel must not "further reproduc[e]" the materials; and that counsel must return the materials to the government "upon completion of the purposes authorized" by the district court's order. 441 U.S. 211, 217 (1979). The Supreme Court endorsed that approach, emphasizing that "if disclosure is ordered, the court may include protective limitations on the use of the disclosed material." *Id.* at 223. The authority to impose such conditions—which are enforceable by contempt, *see* Rule 6(e)(7)—is essential for a district court to ensure that grand-jury secrecy is lifted only "discretely and limitedly," *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

A district court is likely powerless, however, to impose such conditions on or enforce them against members of Congress, like the Committee members here. This Court has explained that "the separation of powers, including the Speech or Debate clause, bars [a] court from ordering a congressional committee to return, destroy, or refrain from publishing" information that has come into its possession. *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017); *accord Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416-17 (D.C. Cir. 1995); *Hearst v. Black*, 87 F.2d 68, 71-72 (D.C. Cir. 1936). Accordingly, although this Court

has never decided the question, it is, at a minimum, constitutionally doubtful whether a federal court could impose on the Representatives or Senators involved in an impeachment proceeding any of the "protective limitations on the use of the disclosed material" that the Supreme Court contemplated in *Douglas Oil*. Notably, the Committee here has not represented otherwise, nor is it apparent how any such representation in litigation could bind individual Representatives and Senators.

That one of Rule 6(e)'s express tools for protecting grand-jury secrecy would likely be unconstitutional as applied to impeachment proceedings is, by itself, a compelling reason to doubt that congressional proceedings are "judicial proceeding[s]" under the Rule. *See also infra* pp. 49-50 (explaining that applying the "particularized need" standard to congressional impeachment proceedings improperly invites federal courts to scrutinize particular theories of impeachment and weigh the significance of particular evidence under those theories). Principles of constitutional avoidance thus underscore why this Court should reverse the district court and hold that the term "judicial proceeding" in Rule 6(e)(3)(E)(i) does not extend to impeachment proceedings.

C. The District Court's Contrary Reasoning Is Unpersuasive

The district court gave various reasons for holding that the judicial-proceeding exception extends to impeachment proceedings. None of them withstands scrutiny.

1. To begin, the district court suggested that the term "judicial proceeding" is appropriately given a "broad interpretation," and that this broad interpretation would

cover a Senate impeachment proceeding. JA 25. This assertion is wrong for two reasons.

First, the district court's interpretive presumption is backwards: both the Supreme Court and this Court have emphasized that "exceptions to Rule 6(e) must be narrowly construed." *In re Sealed Case*, 250 F.3d 764, 769 (D.C. Cir. 2001). In *Sells Engineering*, for example, the Supreme Court held that the term "attorney for the government" in Rule 6(e)(3)(A)(i) does not include Civil Division attorneys and is instead limited to "those attorneys who conduct the criminal matters to which the materials pertain." 463 U.S. at 427. The Court emphasized that "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand-jury] secrecy has been authorized." *Id.* at 425.

Second, the district court took the wrong lesson from the cases it cited. The court pointed to decisions involving attorney disciplinary hearings and similar matters to demonstrate the supposed breadth of the term "judicial proceeding." The Supreme Court has never endorsed those cases, declining to opine on "the knotty question of what, if any, sorts of proceedings other than garden-variety civil actions and criminal prosecutions might qualify as judicial proceedings." *Baggot*, 463 U.S. at 479 n.2. But even assuming their continued vitality, those cases have uniformly treated an eventual proceeding before a *court* as a necessary predicate for disclosure under Rule 6(e)(3)(E)(i).

Cases involving attorney disciplinary proceedings illustrate the point. As this Court has explained, "disciplinary proceedings of lawyers, where bar committees act as an arm of the court, are a function which has been assigned to the judiciary from time immemorial," and such a proceeding "is not only preliminary to a judicial proceeding, it is part of a judicial proceeding." *United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980) (per curiam); *see In re J. Ray McDermott & Co.*, 622 F.2d 166, 170 (5th Cir. 1980) (observing that in those cases "the proceedings were designed to culminate in judicial review"). In *Doe v. Rosenberry*, for example, the relevant judicial proceeding occurred "before the Appellate Division" of the New York state courts, and the bar disciplinary investigation at issue was thus "preliminarily to" that proceeding. 255 F.2d 118, 120 (2d Cir. 1958); *accord In re Federal Grand Jury Proceedings*, 760 F.2d 436, 438 (2d Cir. 1985) (emphasizing that the proceeding in *Rosenberry* was "ordered by the Appellate Division . . . and initiated by the Grievance Committee"); *Special Feb. 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 897 (7th Cir. 1973) (authorizing disclosure where "[t]he statutory scheme involved here plainly contemplates judicial review of the [disciplinary] board's findings").

These decisions demonstrate that the term "judicial proceeding" in Rule 6(e) means exactly that: a proceeding *before a court*. The district court's other examples underscore the point. Given that a "proceeding before a grand jury constitutes a judicial inquiry of the most ancient lineage," *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (quotation and citation omitted), it is hardly surprising that this Court has

said that "grand jury investigations themselves" qualify as judicial proceedings (or are "preliminary to" judicial proceedings) under the Rule. JA 23; *see In re Grand Jury*, 490 F.3d 978, 986 (D.C. Cir. 2007) (per curiam). Likewise, this Court's decision in *In re Sealed Motion* involved a unique statutory proceeding before the Special Division of this Court, which the Court concluded qualified as a "judicial proceeding" under the plain language of the Rule. 880 F.2d 1367, 1368-70, 1379-80 (D.C. Cir. 1989) (per curiam).

None of these examples supports the district court's view that the Rule's use of the term "judicial proceeding" is properly construed to include a proceeding constitutionally entrusted to the legislative branch. As the Supreme Court has held, a claim that the Senate violated the constitutional provision granting the Senate "the sole Power to try all Impeachments" is not justiciable. *Nixon*, 506 U.S. at 237-38. But if "impeachment proceedings" were a type of judicial proceeding, then "[j]udicial involvement" and "judicial review" would hardly be "counterintuitive," in the words of *Nixon*, *id.* at 235. Rather, it would be ordinary and appropriate, given that Article III vests "the judicial power of the United States" in the Supreme Court.

2. The district court next reasoned that the Senate's role during impeachment must be a "judicial proceeding" under the Rule because it has a "judicial nature." JA 26. The court observed that the Constitution uses judicial terminology in describing the impeachment power—*e.g.*, "try," "convicted"—and that various Founding-era documents refer to the Senate as (for example) having a "judicial character" as "a

court for the trial of impeachments," *The Federalist* No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

In this respect, the district court simply asked and answered the wrong question. The issue here is not whether the Constitution borrows terms from the judicial sphere to describe impeachment proceedings, or whether a Senate proceeding can be characterized as adjudicative in nature in some general sense. Instead, it is whether such a proceeding is a "judicial proceeding" in the specific sense of Rule 6(e)(3)(E). The adjudicative "nature" of impeachment proceedings has little bearing on that straightforward textual question. Countless federal statutes and rules govern courts, judgments, crimes, convictions, and other aspects of judicial proceedings. No one would assume that such provisions apply of their own force to a Senate impeachment trial, merely because the Senate in some sense acts as a "court" or exercises "judicial" functions. Just as a federal administrative proceeding is not rendered a "judicial proceeding" within the text of the Rule simply because it is adjudicative in nature and presided over by administrative judges, *see, e.g.*, *Bates*, 627 F.2d at 350-51 (holding that an "adjudicatory hearing" of the Federal Maritime Commission is not "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)), the presence of some "judicial" trappings in a Senate impeachment proceeding does not answer the textual question under the Rule.

If anything, the district court's invocation of the constitutional status of impeachment only highlights the enormous differences between a Senate

impeachment proceeding and the sort of judicial proceedings contemplated by the Rule. Impeachment is the ultimate check by the *Legislative* Branch on the Executive and Judicial Branches. The Constitution textually commits the impeachment process to the legislative branch, to be overseen by Representatives and Senators who are politically accountable to the voters in regular elections. *See* U.S. Const. art. I, § 3, cl. 6. As already noted, the Constitution addresses the "judicial Power" elsewhere, *see id.* art. III, § 1, and draws a clear distinction between the political sanction of removal from public office and the penal sanction that comes from conviction in a judicial proceeding post-removal, *see id.* art. I, § 3, cl. 7. Indeed, the Supreme Court has specifically rejected the contention that the use of the term "try" in describing the Senate's power over impeachments, *see id.* art. I, § 3, cl. 6, imposes a requirement "that the proceedings must be in the nature of a judicial trial," *Nixon*, 506 U.S. at 229.

The congressional nature of impeachment is confirmed by the Senators' ultimate authority over a Senate impeachment trial. When the Senate conducts an impeachment proceeding, there is typically no judicial officer involved; the proceedings are overseen by the Vice President or whichever Senator is presiding at that time. And although "[w]hen the President of the United States is tried, the Chief Justice shall preside," U.S. Const. art. I, § 3, cl. 6, the Chief Justice's role is purely administrative, akin to a Parliamentarian. The Senators retain authority over both the procedural rules and substantive standards that govern the proceeding. *See, e.g.*, *Nixon*, 506 U.S. at 237-38; S. Doc. No. 113-1, *Rules of Procedure and Practice in the Senate When*

Sitting on Impeachment Trials (2014). In short, regardless of how much court-like procedure the Senators adopt, the Senate impeachment process is inescapably a congressional one. It is not a "judicial proceeding" under Rule 6(e).

3. The district court also suggested that some "[h]istorical practice" predating the enactment of Rule 6(e) supported the conclusion that "Rule 6(e) does not bar disclosure of grand jury information to Congress." JA 34. But the "practice" the district court posited—which consisted of just three examples, none involving impeachment—in fact undermines that conclusion.

To begin, the district court cited an instance in 1924 when "the Senate launched an investigation of a Senator who had been indicted by a [federal] grand jury" in Montana. JA 35. Far from supporting the district court's holding, however, this historical anecdote refutes it. The court's account of this incident relies on *Cannon's Precedents*. *See* 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives* § 399, at 565 (1935). The report in *Cannon's Precedents* states that a Senate subcommittee "sen[t] a telegram to the presiding judge" in the case "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." *Id.* Omitted from Cannon's report, however, but clear from the Congressional Record, is that the district judge refused some or all of the request, stating that the requested evidence "had been impounded, and he thought he could not go any further." 65 Cong. Rec. 8865 (1924). The committee then decided not to pursue the matter, reasoning that it

could obtain much of what it needed "from other sources." *Id.* The Congressional Record, *Cannon's Precedents*, and the committee's report and minority views (*see* S. Rep. No. 68-537 (1924)) contain no suggestion that the committee ever obtained the "grand jury minutes" that it had requested.

Likewise unavailing is a separate 1924 incident cited by the district court in which "a grand jury report from the Northern District of Illinois implicat[ed] two unnamed members of the House in a matter involving the payment of money." JA 35. The Congressional Record makes clear that the grand jury's report was "a matter of public record" that could be "consulted by anyone," and that the House obtained it "[n]ot through the Department of Justice, and not through the action of a court," but instead through "members of the press." *See* 65 Cong. Rec. 3973 (1924); *see generally* Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury: A Guide to Law & Practice* § 3.4 (Nov. 2019 update) (describing history of grand-jury reports, including the fact that many grand-jury reports were publicly issued in the years before Rule 6(e)). Although the House sought "the names of the two members and the nature of the charges made against them" from the Attorney General, "[t]he Attorney General objected to the request" in light of an ongoing criminal investigation, and the House declined to take any further action. 6 Cannon § 402, at 573-75; *see* H.R. Rep. No. 68-282, at 2 (1924). Again, therefore, it appears that no disclosure of secret grand-jury information was made to Congress at all.

The same appears to be true of a 1902 incident cited by the district court involving a grand-jury report from St. Louis. *See* JA 35 (citing 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* § 1123, at 700 (1907)). From all appearances the grand-jury report at issue was a public document. The committee report on the incident quotes it at length, and there is no suggestion that the report was obtained by application to a court. *See* H.R. Rep. No. 57-1423 (1902), at 12-13.

These examples are thus no different from the ones the district court discarded in a footnote as instances in which "the grand jury information was presumably no longer secret." JA 35 n.25. And they provide no support for the conclusion that there was any established practice of sharing secret grand-jury materials with Congress in the years before the adoption of Rule 6(e), much less a tradition of *court-ordered* disclosures of such material.

The only examples cited by the district court for such disclosures under the judicial proceeding exception post-dated the enactment of the Rule. *See* JA 40 (citing *In re Grand Jury Investigation of U.S. Dist. Judge G. Thomas Porteous, Jr.*, No. 09-mc-04346 (E.D. La. Aug. 6, 2009), *summarily aff'd sub nom. In Re Grand Jury Proceeding*, No. 09-30737 (5th Cir. Nov. 12, 2009); *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072 (S.D. Fla. 1987), *aff'd sub nom. In re Request for Access to Grand Jury Materials Grand Jury No. 81-1*, 833 F.2d 1438 (11th Cir. 1987)). In those cases, as well as in *Haldeman v. Sirica*, *supra*, the Department took the position that such disclosures were authorized by the judicial proceeding exception. The

Department has reconsidered that position, however, just as the Department reconsidered its previous view that federal courts possess inherent authority to disclose grand-jury information outside of the terms of Rule 6(e). *See* Brief in Opposition at 14 n.*, *McKeever v. Barr* (U.S. No. 19-307) (noting the government's change in position). For the reasons outlined above, every tool of statutory construction points to the conclusion that an impeachment trial in the Senate is not a "judicial proceeding" under the Rule.

4. Finally, the district court erroneously believed that this Court's decisions in *Haldeman* and *McKeever v. Barr*, *supra*, collectively establish, as a matter of circuit precedent, that impeachment qualifies as a "judicial proceeding." JA 37-42.

In *Haldeman*, this Court considered mandamus petitions that sought to block the disclosure of a grand-jury report to the House in furtherance of an impeachment inquiry. 501 F.2d at 715. The district court had allowed the disclosure, concluding that the grand jury was authorized to issue such a report and that the disclosure to Congress was authorized both on principles of inherent judicial authority and under the "judicial proceeding" exception to Rule 6(e). The question before this Court was whether the petitioners had shown that the district court's order reflected "the kind of abuse of discretion or disregard of law amounting to judicial usurpation for which the extraordinary writs were conceived." *Id.* at 716. Expressing only "general agreement with [the district court's] handling" of the case, including both Rule 6(e) issues and

"the question of the grand jury's power to report," the Court denied the petitions. *Id.* at 715.

On its face, the Court's denial of the extraordinary relief of mandamus in *Haldeman* resolves nothing about the correct meaning of Rule 6(e) as a de novo matter. *See McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting) (noting that *Haldeman* "contains no meaningful analysis of Rule 6(e)'s terms"). Although the Court expressed "general agreement" with the district court's handling of multiple contested legal issues, that vague statement is not a square endorsement of the conclusion that an impeachment trial is a judicial proceeding under Rule 6(e), especially given the heightened standard of review that applied in the mandamus context. As this Court later observed in *McKeever*, furthermore, the district court's opinion in *Haldeman* was itself "ambiguous as to its rationale," 920 F.3d at 847 n.3, making it particularly inappropriate to read this Court's per curiam order denying the mandamus petitions as establishing a precedential holding on the scope of the judicial-proceeding exception.

Nor does *McKeever* provide that precedential holding. The issue in *McKeever* was whether district courts have "inherent authority" to disclose grand-jury materials outside the enumerated exceptions in Rule 6(e). Responding to Judge Srinivasan's dissent, the panel in *McKeever* construed the Court's denial of mandamus in *Haldeman* as "fitting within" the judicial proceeding exception, rather than as depending on the possibility of inherent authority. 920 F.3d at 847 n.3. The *McKeever* panel had no

reason to go further and decide whether the denial of mandamus in *Haldeman* reflected a precedential holding that the judicial-proceeding exception actually encompasses impeachment, or whether it merely reflected a conclusion that the exception was not so clearly inapplicable as to warrant the extraordinary relief of mandamus. As the government argued, it was sufficient in *McKeever* merely to recognize that this Court has "treated *Haldeman* as standing only for the proposition that an impeachment proceeding *may* qualify as a 'judicial proceeding' for purposes of Rule 6(e)." Brief for Appellee at 37, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) (No. 17-5149) (emphasis added).

In sum, neither *Haldeman* nor *McKeever* expressly considered, much less squarely decided, whether, as a de novo matter, an impeachment trial in the Senate constitutes a "judicial proceeding" within the scope of Rule 6(e). And neither contains the slightest explanation of *how* impeachment would so qualify. As we have shown, every indication from the Rule's text, structure, and history points the other direction, and serious constitutional concerns further dictate that conclusion. The Court should decide the question here for the first time and hold that a Senate impeachment trial is not a "judicial proceeding" under Rule 6(e)(3)(E)(i).

II. The Committee Failed To Establish A "Particularized Need" For The Grand-Jury Materials At Issue

In any event, the district court also failed to require the Committee to show a "particularized need" for the requested grand-jury information under the settled law

of this Court and the Supreme Court. Although the court purported to find such a "particularized need," it applied a novel and toothless version of that standard—so toothless that the court even required the Department to divulge grand-jury information that the Committee itself belatedly acknowledged it did *not* need. Because the district court failed to apply the correct legal standard and the Committee failed to satisfy that standard, the judgment below should be reversed.

A. The Committee Did Not Even Attempt To Meet The Ordinary "Particularized Need" Test Under Rule 6(e)

The Supreme Court has stressed that a party seeking disclosure under Rule 6(e)(3)(E)(i) must make a "strong showing of a particularized need for grand jury materials." *Sells Eng'g*, 463 U.S. at 443. It is not sufficient simply to show "relevancy and usefulness" in another proceeding. *Procter & Gamble*, 356 U.S. at 682; *accord Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 568 (1983) (particularized need is not established "merely by alleging that the materials were relevant to an actual or potential . . . action"). Rather, parties seeking grand-jury material must establish that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil*, 441 U.S. at 222. "[T]he typical showing of particularized need arises when a litigant seeks to use 'the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like'" because "[s]uch use is necessary to

avoid misleading the trier of fact." *Id.* at 222 n.12 (quoting *Procter & Gamble*, 356 U.S. at 683).

The Committee did not meaningfully attempt to satisfy that standard here, and a faithful application of controlling law would have compelled denial of the Committee's application. The Committee contends that it needs the grand-jury information underlying all of the Rule 6(e) redactions in the Mueller Report to assess possible grounds for impeachment. But only a very small fraction of the Report—less than two percent—is redacted on the basis of Rule 6(e). Moreover, the bulk of those redactions are in Volume I of the Report, which concerns Russian interference in the 2016 election rather than the President's official conduct. The Committee has expressed only an indirect interest in that portion of the Report with respect to its impeachment inquiry. The Committee instead has focused its attention on Volume II of the Report, concerning obstruction of justice. But in that Volume, which is more than 180 pages long, only five pages include any redactions of grand-jury material. *See* JA 664, 669, 678, 682, 683; *see also* JA 727-29. The redactions that do appear in the Report, furthermore, are surgical, which should have enabled the Committee to advance particularized arguments based on specific redactions if it believed it was capable of doing so. *See, e.g.*, JA 678, 683. And the Committee should have been aided in that task by the extensive investigation already undertaken by the Committee and other House committees. *See* JA 66 (documenting that "numerous individuals" have already testified to the House about events described in the Report).

Despite these advantages, the Committee did not attempt to establish a *particularized* need for *specific* information. The Committee did not, for example, identify specific redactions of particular interest and explain why the information contained in them was unlikely to be available to it through other means. *See Douglas Oil*, 441 U.S. at 221 (requiring that a "showing of need for the transcripts be made 'with particularity' so that 'the secrecy of the proceedings [may] be lifted discretely and limitedly'" (quoting *Procter & Gamble*, 356 U.S. at 683)); *Sells Eng'g*, 463 U.S. at 445 (showing "take[s] into account any alternative discovery tools available" to the party seeking disclosure). Nor did the Committee identify particularized reasons to believe that specific redacted information would contradict testimony or evidence the Committee had already received from other sources.

Instead, the Committee asserted that it had an investigative need for *all* of the grand-jury information cited in the Report, on the theory that *some* of it *might* bear on whether the President committed impeachable offenses. To the extent the Committee tried to be more specific, it simply guessed at what the redactions contain and asserted a particularized need to discover if it was correct. The Committee argued vigorously in district court, for example, that it had a compelling need to examine the grand-jury testimony of Don McGahn. But that "need" turned out to be baseless speculation: McGahn did not testify before the grand jury at all. *See* JA 727; *see also* JA 67 n.46 (district court's acknowledgment that this asserted need was unfounded). And the first and only time the district court challenged the Committee

to explain its particularized need for a specific redaction at the hearing, counsel for the Committee conceded that the Committee could "take that one off the table." JA 710-11. The district court failed to follow up and require the Committee to explain its need to see behind any other redactions, but there is no reason to believe that the Committee's response would be any more particularized or persuasive.

B. The District Court Applied The Wrong Legal Standard

The district court nonetheless ordered disclosure of all grand-jury materials redacted from the Report—including the redaction that the Committee had conceded it did not need—along with all portions of grand-jury transcripts corresponding to those redactions. Because the court entered that order without receiving or reviewing *in camera* any of the redactions in Volume I of the Report, which accounts for the vast majority of the redactions at issue, it is clear that the court's finding of "need" did not reflect any actual factual determination about the relationship of the redacted information to the Committee's investigation. Instead, the court justified its order on the theory that "[i]mpeachment based on anything less than all relevant evidence would compromise the public's faith in the process." JA 65.

That is not how the "particularized need" test works. The district court's across-the-board, undifferentiated disclosure order—encompassing numerous grand-jury redactions spanning many disparate topics and events—represents the very antithesis of the particularized-need inquiry under Rule 6(e). The district court was obliged to ensure both that the Committee had made "a strong showing of

particularized need" for the grand-jury information it requested *and* that any disclosure order was carefully tailored to the "material so needed." *Sells Eng'g*, 463 U.S. at 443 (quoting *Douglas Oil*, 441 U.S. at 222). The district court not only failed on both counts, but gave reasons for its ruling that bear virtually no relationship to the way the particularized need standard is ordinarily applied. The court's failure to apply the correct standard was legal error that requires reversal.

1. The district court declared that the Committee had a particularized need for the materials because they would help the Committee "to investigate fully"; to consider "investigatory routes left unpursued" by the Special Counsel; to obtain "[c]omplete information"; and to "fill[], or assess[] the need to fill, acknowledged evidentiary 'gaps.'" JA 67, 68, 69. In other words, the district court believed that these materials were relevant to the Committee's inquiry, and therefore should be disclosed. *See* JA 65 (opining that impeachment proceedings must have available "all relevant evidence"). No case from this Court or the Supreme Court could be cited for these propositions, which verge on a *per se* rule that disclosure under Rule 6(e) is required for all grand-jury materials that may meaningfully bear upon a congressional impeachment proceeding.

To the contrary, the Supreme Court has repeatedly rejected the notion that relevance alone is a sufficient reason for breaching grand-jury secrecy. It has explained that materials sought must be more than "rationally related" to the judicial proceeding for which they are sought, *Sells Eng'g*, 463 U.S. at 445; that a party cannot

obtain materials "merely by alleging that the materials [are] relevant to an actual or potential . . . action," *Abbott & Assocs.*, 460 U.S. at 568; and that "relevancy and usefulness" do not meet the standard, *Procter & Gamble*, 356 U.S. at 682. This Court has likewise stressed that the particularized need inquiry requires more than "a generalized need for information" in aid of a factual investigation. *In re Sealed Case*, 801 F.2d 1379, 1382 (D.C. Cir. 1986) (Scalia, J.).

Other circuits, too, have regularly rejected such generalized assertions of need. *See, e.g.*, *In re Lynde*, 922 F.2d 1448, 1453 (10th Cir. 1991) (rejecting argument that disclosure was necessary because of possible prejudice to the "truth seeking process and preparation of [the plaintiffs'] claims" (ellipsis omitted)); *Matter of Grand Jury Proceedings*, 942 F.2d 1195, 1199 (7th Cir. 1991) ("[A] mere possibility of benefit does not satisfy the required showing of particularized need."); *Lucas v. Turner*, 725 F.2d 1095, 1102, 1106 (7th Cir. 1984) (rejecting arguments that plaintiffs needed grand-jury materials because they "would be significant and perhaps critical to their ability to present the case" or might "provide the names and testimony of certain unknown witnesses" (emphasis omitted)).

The district court's recitation of various events described in the Mueller Report in passages that include grand-jury redactions, JA 65-66, 69, does not substitute for a determination that (1) specific grand-jury materials related to those incidents are (2) actually necessary to the Committee's work and (3) unavailable to the Committee otherwise. The Committee has in its possession a voluminous Report from Special

Counsel Mueller that details the course of his investigation and his findings and conclusions. Over 98% of the Report is available to the Committee's leadership. Contrary to the district court's apparent belief, the scale and detail of the Mueller Report cuts *against* a finding of particularized need, not in favor. If the Committee had a reason to believe that a particular redaction among the remaining 2% holds information indispensable to its investigation, it was incumbent on the Committee to make that showing—and the extraordinary level of detail in the Report itself should have assisted it in doing so. But the Committee did nothing of the kind.

2. The district court's misapplication of the particularized need standard is further illustrated by its discussions of witness testimony. The district court believed that "the grand jury material . . . may be helpful in shedding light on inconsistencies or even falsities in the testimony of witnesses called in the House's impeachment inquiry," to "prevent witnesses from misleading the House during its investigative factfinding," and to help the Committee "insure most effectively against being misled." JA 66-67, 70. But a generalized desire to have grand-jury materials conveniently on hand for the purpose of identifying possible inconsistencies in witness testimony, or to insure against being misled, is plainly not a "particularized need" under Rule 6(e). Every prosecutor or defense attorney could assert the same speculative need. Instead, it is black-letter law that to justify a disclosure order under Rule 6(e), "the moving party must show an actual failure of recollection by the witness

on a particular point or an inconsistency in the witness's account of a particular event." Sara Sun Beale et al., *Grand Jury Law and Practice* § 5:12.

Examples of this basic point are legion. In a Fifth Circuit case, for example, a petitioner sought grand-jury transcripts from the testimony of three witnesses "to impeach them or to refresh their recollections." *In re Grand Jury Testimony*, 832 F.2d 60, 63 (5th Cir. 1987). The court reversed the grant of the petition because the petitioner provided only "naked assertions that transcripts of their grand jury testimony are necessary," without pointing to any "actual inability to recall or inconsistent testimony." *Id.* at 63, 64. The Tenth Circuit has likewise explained in reversing a disclosure order that "a claimed need to impeach, standing alone," is insufficient for disclosure, and that a party must "point[] to actual inability to recall or examples of inconsistent testimony on material issues" before disclosure will be authorized. *In re Special Grand Jury 89-2*, 143 F.3d 565, 571 (10th Cir. 1998) (per curiam). The Ninth Circuit, too, has reversed a district court order for disclosure of grand-jury materials where the district court failed to "specify its basis for finding a compelling need for disclosure as to each witness," and specified that, on remand, the district court "should rely on the parties to determine *which portions* of the transcripts, if any, are necessary for impeaching testimony or refreshing recollection." *United States v. Fischbach & Moore, Inc.*, 776 F.2d 839, 845-46 (9th Cir. 1985). The district court here committed the same error, ordering disclosure on the speculative theory

that grand-jury information "may be helpful" to the Committee in evaluating witness testimony. JA 66.

The district court placed special emphasis on the fact that certain individuals have been convicted of lying either to Congress or to the Special Counsel in connection with events described in the Report. JA 66. But the salience of that fact is unclear. The Committee has not claimed that it has a particularized need for grand-jury information related to Michael Cohen, Michael Flynn, or George Papadopoulos. JA 66. To the contrary, the redaction Committee counsel conceded could be taken "off the table" was related to Flynn. JA 709-11. And the fact that those individuals made false statements does not logically suggest that the Committee has a particularized need for grand-jury information related to *other* witnesses.

In *In re Special Grand Jury 89-2*, for example, a district court ordered the disclosure of the grand-jury testimony of every witness to a grand-jury proceeding on the basis of a showing that one witness had been recalcitrant and nine other witnesses claimed "memory loss," even though only two of those nine "had actually testified before the grand jury." 143 F.3d at 571. The Tenth Circuit reversed, explaining that "[t]he district court erred in generalizing a need for the testimony of all, based on a showing relevant to a small sample." *Id.* Instead, the Tenth Circuit explained, "the district court must conduct a witness-by-witness analysis under the particularized need standard," and even after conducting that analysis must "confine disclosure to portions related to the need." *Id.* at 571, 573.

3. The district court's cursory assessment of the continued need for grand-jury secrecy further illustrates its failure to apply the correct standard. Under *Douglas Oil*, a district court must determine that "the need for disclosure is greater than the need for continued secrecy." 441 U.S. at 222. In ordering the disclosure to the Committee of all grand-jury information redacted from the Mueller Report, the district court acknowledged the need to "safeguard[] future grand juries' ability to obtain 'frank and full testimony.'" JA 72 (quoting *Douglas Oil*, 441 U.S. at 222). But the court gave that concern little weight, reasoning that the disclosure was "limited" and that the Committee had put in place handling protocols for the information. *Id.* The district court gave no consideration to the highly sensitive nature of the grand jury's inquiry, which examined allegations of criminal conduct surrounding a presidential election.

It is precisely in such high-profile matters, in which each twist and turn of the investigation draws vigorous condemnation and praise from different public constituencies, that the risk of undermining the willingness of witnesses "to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony," is at its peak. *Douglas Oil*, 441 U.S. at 219. The same is true of the risk that witnesses "would be less likely to testify fully and frankly, as they would be open to retribution as well as inducements." *Id.*; *see Procter & Gamble*, 356 U.S. at 681-82. It is not difficult to imagine that a witness in a future investigation of alleged presidential misconduct might be deterred from testifying fully or frankly if she believed that her testimony would be readily disclosed to the House for use in

impeachment proceedings. And the potential prejudice to those "individuals investigated but not indicted" in such a high-profile investigation, JA 73, is commensurately greater. None of these risks is obviously lessened by the fact that disclosure would be made as an initial matter only to the Committee, where the material will be reviewed by elected officials engaged in the political task of impeachment and will be subject to the discretion of the Committee to make it public at any time.

4. At bottom, the district court's failure to apply the ordinary particularized need standard appears rooted in its belief that, apparently in contrast to a typical civil or criminal proceeding, impeachment proceedings must have available "all relevant evidence." JA 65. But if the well-settled parameters of the "particularized need" standard under Rule 6(e)(3)(E)(i) seem a poor fit for the House's needs in an impeachment investigation, that is just further evidence that an impeachment proceeding is not properly viewed as a "judicial proceeding" in the sense of that Rule at all. *See supra* pp. 16-32. If the Committee is to shoehorn its investigation within that exception, it must make the same "strong showing of particularized need" that this Court requires of every other litigant, including government litigants. *See Sells Eng'g*, 463 U.S. at 445 (observing that there is no "special dispensation from the *Douglas Oil* standard for government agencies"); *In re Sealed Case*, 801 F.2d at 1381. Indeed, in *Sells Engineering*, the Supreme Court rejected the contention that the particularized need standard "ought not to be applied when government officials seek

access in furtherance of their responsibility to protect the public weal," observing that a rule that made disclosure "permissible if the grand jury materials are relevant" to a public need would make a court's disclosure order "a virtual rubber stamp for the Government's assertion that it desires disclosure." 463 U.S. at 443-44 (quotations omitted). That encapsulates the error of the district court's reasoning here.

If anything, the Committee's unique status heightens its burden to show a strong and particularized need for specific grand-jury materials before disclosure can be authorized. *Cf. Sells Eng'g*, 463 U.S. at 445 (recognizing that a court may weigh "relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case"). As already discussed, the Committee is not subject to the same judicial controls over its use of grand-jury materials that apply to other applicants for such materials; the court is likely powerless to enforce conditions imposed pursuant to Rule 6(e). *See Ferrer*, 856 F.3d at 1086. The Committee's unique constitutional status underscores, at a minimum, the importance of ensuring that any disclosure of grand-jury materials to the Committee is "discrete[] and limited[]" and "structured to cover only material" for which real need can be shown. *Douglas Oil*, 441 U.S. at 221-22 (quoting *Procter & Gamble*, 356 U.S. at 682).

III. This Case Is Justiciable, And This Court Has Jurisdiction To Review And Reverse The District Court's Misapplication Of Rule 6(e)

The Court has directed the parties to address the Court's jurisdiction and the justiciability of this case. For the reasons discussed below, this case is properly

justiciable, and this Court has jurisdiction to review and correct the district court's erroneous interpretation of Rule 6(e). The constitutional concerns raised by the Committee's position in this case are substantial, but those concerns relate to the merits, not to the jurisdiction of the Court. The solution is to construe Rule 6(e) to avoid those constitutional concerns and hold that a Senate impeachment trial is not a "judicial proceeding" within the meaning of Rule 6(e) at all.

A. The Committee brought this petition pursuant to D.D.C. Local Criminal Rule 57.6, entitled "Applications for Relief in a Criminal Case by Persons Not Parties." That rule permits a "news organization or other interested person" who seeks, *inter alia*, "relief relating to a criminal investigative or grand jury matter," to file an application for relief in district court. Such petitions are not unusual, and because they involve requests for relief ancillary to criminal or grand-jury matters already properly before the court, they do not generally raise justiciability problems. Indeed, although the district court typically dockets and handles such petitions as miscellaneous civil matters arising under 28 U.S.C. § 1331, a petition under Rule 6(e) in effect asks the district court to exercise its supervisory authority in a preexisting criminal matter, as the caption of the local rule itself reflects. This Court, in turn, has appellate jurisdiction under 28 U.S.C. § 1291 to review the district court's final disposition of that petition.

The questions presented on the face of the Committee's petition are likewise justiciable. Adjudicating a petition under generally applicable provisions of Rule 6(e)

does not necessarily require a federal court to exercise review over any aspect of the impeachment power textually committed to Congress. *Cf. Nixon*, 506 U.S. at 228. Although a Senate impeachment trial itself must function "independently and without assistance or interference," *id.* at 231, it does not follow that federal courts lose jurisdiction over all matters connected to impeachment investigations. There is no doubt that a federal court could preside, for example, over a federal criminal prosecution of a witness for perjury in an impeachment hearing.

Nor does the Committee's Rule 6(e) petition, filed in connection with a grand-jury matter already properly before the district court, necessarily present the sort of fundamental separation-of-powers questions that are raised when a congressional committee files a freestanding lawsuit to enforce a legislative subpoena against an executive official invoking executive privileges. *Cf. Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (subpoena enforcement action was "of potentially great significance for the balance of power between the Legislative and Executive Branches"). For these reasons, the Department has not contended that the district court lacked jurisdiction.

B. The Committee's contention that an impeachment proceeding in Congress is a "judicial proceeding" under Rule 6(e)(3)(E)(i) does, however, raise substantial separation-of-powers questions on the merits. As discussed, the district court's supervisory power over Congress is in no way comparable to its authority over other applicants for grand-jury materials. Unlike any other "judicial proceeding" under the

Rule, no court can review whether the Senate's impeachment proceeding violates the impeachment powers textually committed to it by the Constitution. *See Nixon*, 506 U.S. at 237-38. And, notwithstanding the plain text and ordinary operation of Rule 6(e), a district court is likely unable to constrain a congressional committee's use of grand-jury materials once they come into Congress's possession. *See Ferrer*, 856 F.3d at 1086.

Moreover, the "particularized need" test that applies to all applicants for disclosure under Rule 6(e)(3)(E) is in considerable tension with the House's sole power of impeachment. The Supreme Court has explained that the inquiry required by the particularized need analysis "cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought." *Baggot*, 463 U.S. at 480 n.4. Thus, the Supreme Court has instructed that district courts facing requests for disclosure must carefully scrutinize the relationship between the legal claims in the "judicial proceeding" at issue and the grand-jury materials sought. In *Douglas Oil*, for example, the Court explained that the district court, in assessing particularized need, was required to assess the "contours of the conspiracy respondents sought to prove in their civil actions" in order to weigh the claimed need for the grand-jury information. 441 U.S. at 229.

That inquiry poses no difficulties for a "garden-variety civil action[] or criminal prosecution[]." *Baggot*, 463 U.S. at 479 n.2. But by insisting that a Senate impeachment trial qualifies as a "judicial proceeding" under Rule 6(e), the Committee

invites federal courts to tread on perilous ground. A court presumably needs to examine the "contours" of the particular theories of impeachment being considered by the Committee, and then make a determination about the degree of materiality of the grand-jury material—granting access to what the House truly needs, but withholding material that is only useful as "general discovery." *Douglas Oil*, 441 U.S. at 229. It is unclear on what proper basis a district court could make that assessment in the context of a proceeding exclusively committed under the Constitution to the legislative branch. To be sure, a court could try to avoid passing judgment on the legal sufficiency of a particular impeachment theory, or appearing to second-guess the House's own assessment of materiality. But the constitutional hazards are plain.

These constitutional concerns underscore why, if Congress actually had intended to allow disclosure of grand-jury materials in connection with impeachment proceedings, it is exceedingly unlikely that Congress would have silently left that question to resolution under the facially inapposite "judicial proceeding" exception rather than expressly address such *sui generis* disclosures in a separate statute or Rule exception. Both the judicial assessment of Congress's need for grand-jury materials and the propriety of judicial controls over Congress's use of such information raise difficult problems that the existing Rule and case law do not address. Rather than strain to fit impeachment proceedings into the existing text of the Rule, the Court should give Rule 6(e)(3)(E)(i) its plain meaning, consistent with its structure and

history, and leave it to Congress to determine whether and how the Rule should be amended to address the unique circumstances of impeachment.[2]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed. If the Court affirms, we respectfully request that the Court leave the

[2] This conclusion is entirely consistent with *Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees*, 9 Op. O.L.C. 86 (1985). That opinion addressed a proposed amendment to Rule 6(e) that would have allowed congressional committees in all cases to petition a court for disclosure of grand jury materials on a showing of "substantial need." *Id.* at 86. Explaining that "the Executive Branch must be able to control congressional access to law enforcement documents to prevent legislative pressures from impermissibly influencing its prosecutorial decisions," the opinion concluded that an amendment permitting broad disclosures to Congress in any criminal matter would trench on that function. *Id.* at 87. The opinion did not assess whether Congress could amend Rule 6(e) in aid of its own constitutionally-assigned impeachment powers. *Cf. Abbott & Assocs.*, 460 U.S. at 572 (noting that Congress "has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants").

administrative stay in effect for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,885 words. 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 2, 2019, I electronically filed the foregoing 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.

/s/ Brad Hinshelwood
Brad Hinshelwood

ADDENDUM

TABLE OF CONTENTS

Fed. R. Crim. P. 6(e):

(e) RECORDING AND DISCLOSING THE PROCEEDINGS.

(1) *Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) *Exceptions.*

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the

government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

• actual or potential attack or other grave hostile acts of a foreign power or its agent;

• sabotage or international terrorism by a foreign power or its agent; or

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) 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;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the

material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment.* The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt.* A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.