

[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

REPLY BRIEF FOR APPELLANT

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SUMMARY OF ARGUMENT

The Committee's response brief is striking for what it does not say. Our opening brief explained that the district court's order gives the term "judicial proceeding" a different meaning in Rule 6(e)(3)(E)(i) than the same phrase carries in other provisions of Rule 6(e) itself, in other Federal Rules of Criminal Procedure, or in ordinary usage. In response, the Committee offers virtually no textual defense of its interpretation of the Rule. Nor does it cite any other statute or federal rule in which a generic reference to judicial proceedings, convictions, or trials is naturally understood to encompass congressional impeachment proceedings. It does not dispute that the cases it relies on—which merely state that the term "judicial proceeding" in Rule 6(e) has a broad meaning—uniformly involve disclosure in or preliminary to a proceeding *in a court*. And the Committee continues to rely on the historical evidence cited by the district court, without disputing our showing that that evidence does not withstand scrutiny.

Most strikingly, the Committee does not grapple with the constitutional difficulties created by its interpretation of the Rule. As we have explained, the Committee's reading would likely render a portion of the Rule's text unconstitutional as applied to Congress. And it would trench on functions constitutionally committed to the Senate by requiring federal courts, in weighing the Committee's showing of "particularized need," to sit as evidentiary gatekeepers for Senate impeachment proceedings. Indeed, the Committee now invites (at 37, 39) this Court to usurp the

Senate's role by holding that the House of Representatives has a particularized need for grand-jury evidence from the Special Counsel's Report in order to convict the President, in a Senate trial, on articles of impeachment that allege high crimes and misdemeanors arising from a *different* controversy that *post-dates* the Report. Especially given the constitutional problems created by the Committee's construction, and the Committee's failure to overcome our showing that this Court's precedent has never squarely resolved the question in a *de novo* appeal, the Court should take this opportunity to hold that a Senate impeachment proceeding is not a "judicial proceeding" in the sense of Rule 6(e).

In any event, as the Committee's brief tacitly recognizes, the posture of this case has fundamentally changed. The House's adoption of articles of impeachment related to the Ukraine controversy, and not the events described in the Report, renders the district court's "particularized need" analysis obsolete. As we have explained, the district court applied a formless, broad-brush standard for assessing the Committee's need, one that effectively permitted the Committee to use Rule 6(e) as a discovery mechanism for impeachment. That approach cannot be reconciled with the relevant decisions of this Court or the Supreme Court, and the Committee's attempts to defend that standard on appeal are unpersuasive. But all of this has now been overtaken by events: the district court's disclosure order cannot be affirmed on the basis of findings the court never made regarding events it was never asked to consider.

ARGUMENT

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

A. 1. Although it acknowledges that this case requires this Court to “interpret and apply Rule 6(e),” Br. 52, the Committee barely addresses the text of that Rule. It does not seriously deny that the ordinary meaning of the phrase “judicial proceeding” is a proceeding in front of a *court*, not a legislative body. It does not address the one other instance in which the term “judicial proceedings” appears in the Rules of Criminal Procedure: in Rule 53’s prohibition on “the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.” And the Committee has nothing to say about the basic definitions provided in Rule 1, all of which confirm that the Rules contemplate proceedings before a court—not Congress.

Instead, the Committee “[b]egin[s]” its analysis of “tool[s] of statutory interpretation” not with the text of Rule 6(e), but with an extended discussion of “constitutional text” and “the contemporaneous understanding of the Constitution’s text by those who wrote it.” Br. 21-23. But even if everything the Committee said on that score were correct, it would demonstrate nothing about the meaning of the Rule’s text or about Congress’s understanding when that text was promulgated in 1946 and reenacted in 1977. To the contrary, as our opening brief explained (at 27), countless federal statutes and rules refer to courts, judgments, convictions, and the like. The

Committee rightly does not suggest that such provisions would apply of their own force to a Senate impeachment trial. Yet the Committee indulges exactly that unexplained assumption as to Rule 6(e).

Even when the Committee finally “[c]onsider[s] ... the text of Rule 6(e),” it avoids the text itself, focusing instead on a case observing that “[t]he term judicial proceeding has been given a broad interpretation.” Br. 25 (quotation omitted). But this Court has also emphasized that “exceptions to Rule 6(e) must be narrowly construed.” *In re Sealed Case*, 250 F.3d 764, 769 (D.C. Cir. 2001). So, too, has the Supreme Court, which has consistently given narrow readings to provisions providing for disclosure of grand-jury information. *See United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 (1983); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 572-73 (1983). The Committee does not address these points.

Nor, in any event, do the cases on which the Committee relies support construing the term “judicial proceeding” to include “Congressional impeachment.” As our opening brief explained (at 24-26), the unifying theme of cases applying the judicial-proceeding exception is that a “judicial proceeding” takes place before a court. The Committee nowhere disputes that basic proposition, and the cases it relies on only reinforce it. For example, as the Committee emphasizes, this Court observed in *In re Sealed Motion*, 880 F.2d 1367 (D.C. Cir. 1989) (per curiam), that the term “judicial proceeding has been given a broad interpretation.” But the Court made that observation in explaining why the unusual proceedings conducted by the Special

Division of this Court under the Ethics in Government Act qualified as a “judicial proceeding” under the Rule. *Id.* at 1379-80, 1380 n.15. The fact that this Court concluded that *a proceeding before this Court* constituted a “judicial proceeding” under Rule 6(e) hardly supports the Committee’s claim that a proceeding in the Senate does as well. Likewise, *In re North*, 16 F.3d 1234 (D.C. Cir. 1994) (*per curiam*), concluded that this Court’s receipt and publication of an independent counsel report was a judicial proceeding because the Court’s “act ... is a judicial one” in resolving “a genuine case or controversy between the movants and the Independent Counsel” entrusted to the Court by statute. *Id.* at 1244.

The Committee’s treatment of the term “judicial proceeding” in other subsections of Rule 6(e)—Rules 6(e)(3)(F) and (G)—is even more puzzling. The Committee acknowledges that these “references to ‘judicial proceedings’ appear to contemplate litigation,” but asserts that the “context” of the Rule illustrates the term is not “confine[d]” to that meaning where it appears in Rule 6(e)(3)(E)(i). Br. 25. The Committee does not explain why the term would have its ordinary meaning in two subsections of the Rule, yet carry a different, unnatural meaning in the immediately preceding subsection of the same Rule. Indeed, the three provisions must be referring to the same types of judicial proceedings: Rules 6(e)(3)(F) and (G) specify the procedures to be followed in adjudicating a petition for disclosure under Rule 6(e)(3)(E)(i). Under ordinary principles of statutory interpretation, such closely

related provisions are “given the same meaning.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

The Committee next attempts to show that the “structure of Rule 6(e)” supports its broad reading. Br. 25. The Committee contends that because other Rule 6(e) exceptions permit disclosure “where government officials seek the material for use in connection with their official duties,” the judicial-proceeding exception “should be understood to allow for disclosure to the Committee for use in impeachment.” Br. 25. In fact, the Rule’s exceptions point to the opposite conclusion. The other “officials” mentioned in Rule 6(e) are uniformly—and exclusively—prosecutors and others whose official duties involve criminal law enforcement, or their designees in defined circumstances. *See* Rule 6(e)(3)(A), (D), (E)(iii)-(v). That the Rule contains a comprehensive list of permissible disclosures to executive officials with law enforcement responsibilities—without any mention of Congress or legislative officials—is compelling evidence that Rule 6(e) does not envision disclosures for use in congressional proceedings.

Indeed, even the Committee’s inapposite reliance on the Constitution and Founding-era documents to construe the meaning of Rule 6(e) continues to ignore the most relevant constitutional text, history, and precedent. The Committee makes no effort, for example, to reconcile its assertion that a Senate impeachment trial is a “judicial proceeding” with the unambiguous language of Article III, which vests “[t]he judicial Power of the United States”—all of it—in the Supreme Court and such

inferior courts as established by Congress. U.S. Const. art. III, § 1, cl. 1 (emphasis added). Impeachment is instead a Legislative Branch tool to check the Executive and Judicial Branches—indeed, one in which “[j]udicial involvement” has been described as “counterintuitive.” *Nixon v. United States*, 506 U.S. 224, 235 (1993).

Even more fundamentally, the Committee has no answer to the objection that its reading of Rule 6(e) would likely render a key feature of that Rule unconstitutional in application. *See* DOJ Br. 21-23. As we explained, the plain text of the Rule contemplates that district courts may impose—and enforce through contempt—conditions on an applicant’s use and handling of grand-jury information. *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”). Yet as the Committee tacitly acknowledges (Br. 28), that provision of the Rule likely could not constitutionally be applied to regulate Congress’s use of grand-jury information in an impeachment proceeding. *See, e.g., Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017). That one of Rule 6(e)’s express tools for protecting grand-jury secrecy would likely be unconstitutional as to Congress is, by itself, a compelling reason to doubt that congressional proceedings are “judicial proceeding[s]” under the Rule.¹

¹ The Committee’s suggestion (Br. 26) that the Department somehow forfeited the right to point out the constitutional problems created by the district court’s interpretation of Rule 6(e) is meritless. The Department has contended from the outset of this case that the term “judicial proceeding” is not properly construed to encompass impeachment proceedings, and the Committee has asserted that the

Likewise, the Committee does not address our showing (Br. 48-50) that Rule 6(e)’s “particularized need” standard would require courts to assess the proper contours of the impeachment trial—such as whether the grand-jury materials at issue have any relevance to the articles of impeachment now adopted by the House—and thus potentially trench on functions constitutionally committed to the Senate. And contrary to the Committee’s repeated suggestion (Br. 27, 52), the point is *not* that Congress is constitutionally disabled from authorizing disclosure of secret grand-jury materials for impeachment proceedings, but rather that it has not done so in Rule 6(e), and almost certainly would do so only in a different manner that avoided the constitutional problems created by the Committee’s attempt to shoehorn impeachment proceedings into Rule 6(e)’s “judicial proceeding” exception.

2. The Committee continues to insist that its atextual interpretation has support in historical practice preceding the enactment of Rule 6(e). *See* Br. 23-24. But the Committee and its amicus have failed to identify a single instance before Rule 6(e)’s enactment in which secret grand-jury materials were disclosed to Congress, much less in connection with an impeachment proceeding. The Committee notably declines to address the historical evidence marshalled in our opening brief (at 29-31) demonstrating that the examples cited by the district court do not withstand scrutiny,

Constitution compels its reading. The fact that the Committee’s reading instead *creates* constitutional problems underscores the need for this Court to address and reject it, especially given constitutional-avoidance principles.

and the Committee does not attempt to resuscitate these examples to support its cause.² Instead, the Committee relies on an example that the district court itself discarded as involving grand-jury material that was “no longer secret.” JA 35 n.25.

These are not mere “quibbles.” Br. 23. The Committee’s claim—accepted by the district court—is that there was a longstanding “historical practice of disclosing grand-jury material to Congress” in the context of impeachment, *id.*, and that when Rule 6(e) “codifie[d] the traditional rule of grand jury secrecy,” *Sells Eng’g*, 463 U.S. at 425, it necessarily incorporated that practice into the judicial-proceeding exception. The Committee’s failure to identify a single example of such a disclosure before the Rule’s adoption is fatal to that argument: the historical evidence cited demonstrates that Congress accessed grand-jury materials, if at all, when those materials were public (or available from other sources), with no aid from the courts.

The Committee finally resorts to the claim that reading the term “judicial proceeding” to mean what that phrase naturally connotes—and what it concededly means elsewhere in Rule 6(e) and the Federal Rules—would produce “absurd results” (Br. 26) and “raise[] constitutional concerns” (Br. 28). But there is nothing absurd or constitutionally problematic about the conclusion that a Federal Rule of Criminal Procedure speaks to court proceedings, not congressional ones. As we have

² Although the Committee references (Br. 24) the arguments of amicus Constitutional Accountability Center, that amicus brief merely repeats the examples relied on by the district court, without engaging with any of the flaws in those examples laid out in our opening brief.

explained, Congress could enact a targeted exception to Rule 6(e) for impeachment investigations—one that would presumably account for the constitutionally unique nature of such proceedings—but it has not done so. To conclude that the Committee must abide in litigation by the choices Congress has made in legislation is not to disregard the separation of powers, but to honor it.

B. The Committee contends 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), resolve the question presented here and hold that impeachment is a “judicial proceeding” under the Rule. As we have explained (at 32-34), however, neither case considered that question *de novo*, much less decided it. This is the first case to present that question for plenary review in this Court.

The Committee dismisses *Haldeman*’s mandamus posture and lack of reasoning by pointing out that “[o]ther cases that definitively resolve legal issues in a mandamus posture are ... treated as precedent.” Br. 19. While that statement is undoubtedly true at times—a grant of mandamus, for example, establishes that certain legal premises are “clear and indisputable”—it begs the question here. The question is whether *Haldeman* “definitively resolve[d]” the meaning of Rule 6(e) by stating, without elaboration, that it was denying a petition for an extraordinary writ because the Court was in “general agreement” with the district court’s handling of a host of issues in that case. 501 F.2d at 715. That conclusion, which likely reflected nothing more than a judgment that the district court’s order did not involve “the kind of abuse

of discretion or disregard of law amounting to judicial usurpation for which the extraordinary writs were conceived,” *id.* at 716, can hardly be characterized as a holding about the text of Rule 6(e).

The same is true of *McKeever*, which addressed the separate question of whether district courts have “inherent authority” to disclose grand-jury materials in circumstances not enumerated in Rule 6(e). The Committee contends that if *Haldeman* had “been decided on inherent authority grounds rather than Rule 6(e) grounds,” the *McKeever* panel would have been bound by it. Br. 19. But *Haldeman*’s denial of mandamus was no more binding on that issue than it is on this Court in assessing the meaning of Rule 6(e). That the *McKeever* majority viewed *Haldeman* as “fitting within” the judicial-proceeding exception likewise does not advance the Committee’s position. That statement simply meant that *Haldeman* was *not* based on inherent authority; it says nothing about whether the denial of mandamus in *Haldeman* has any freestanding precedential effect—much less whether, as a *de novo* matter, it is correct to treat impeachment as a “judicial proceeding” within the meaning of the Rule. It was not necessary to decide any of that in *McKeever*, and this Court has never answered that question.

The Committee’s theory of judicial estoppel (Br. 20) likewise fails. In *McKeever*, the Department observed that “this Court has subsequently 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). That tentative language is entirely consistent with the Department’s argument here that *Haldeman* merely denied mandamus relief without announcing a precedential holding on the merits.

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

A. The House’s adoption of articles of impeachment renders the district court’s “particularized need” finding obsolete

The posture of this case has fundamentally changed since the filing of the Committee’s response brief. On December 15, the Committee reported two articles of impeachment to the full House. On December 18, the House approved both articles. *See* H.R. Res. 755, 116th Cong. (2019). Neither article of impeachment alleges high crimes or misdemeanors stemming from the events described in the Special Counsel’s Report.

As we explain in our supplemental brief, the House’s adoption of articles of impeachment renders the district court’s “particularized need” finding obsolete. The Committee’s petition seeks grand-jury materials in furtherance of impeachment proceedings based on events described in the Report. JA 99. The district court’s order rested on that premise: the court concluded that the Committee had a “particularized need” for grand-jury information in and underlying the Report because the Committee needed “to reach a final determination about conduct by the President described in the Mueller Report.” JA 67.

That justification has plainly been overtaken by events. The articles of impeachment referred by the Committee and approved by the full House do not refer to the Report or to any of the events featured in the district court's discussion. To the contrary, the approved articles expressly recite that the House's "impeachment inquiry focused on President Trump's corrupt solicitation of the Government of Ukraine to interfere in the 2020 United States Presidential election," H.R. Res. 755 at 6, not the events investigated by the Special Counsel. The alleged high crimes and misdemeanors all post-date the completion of the Report.

Accordingly, there is no longer any basis for the "particularized need" that the Committee has asserted throughout this case for access to grand-jury materials. The Committee's brief is notably vague on that score. The Committee offers generic assertions that it "has continued and will continue [its impeachment] investigations," Br. 29; *accord* Br. 13, and that it continues to need the materials "to inform" its "ongoing impeachment investigation," Br. 37. But now that the full House has already voted to impeach on different grounds, that contention strains credulity.

The Committee instead attempts to backfill, arguing for the first time on appeal that certain grand-jury material in the Report is "needed to inform" or "evaluate" the background "circumstances" of events surrounding the Ukraine matters that are the subject of the articles of impeachment. Br. 37, 39. But the district court did not make, and for obvious reasons could not have made, any judgment that disclosure of the materials at issue here is "needed to avoid a possible injustice" in a Senate

impeachment trial on the articles of impeachment the House has actually adopted. *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). The district court's disclosure order cannot be affirmed on the basis of findings the court never made regarding events it was never asked to consider. For this reason alone, the disclosure order should be reversed.

B. In any event, the Committee failed to establish a particularized need for the grand-jury materials at issue.

As our opening brief explained (at 34-46), the district court's "particularized need" determination was also unsustainable on its own terms. In defending that determination on appeal, the Committee asks this Court to apply a formless and apparently impeachment-specific standard of particularized need that has no basis in the decisions of this Court or the Supreme Court.

1. Under settled law, 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. The district court was therefore required to determine, on a redaction-by-redaction basis, whether the Committee had identified a particularized need for the grand-jury information to "avoid a possible injustice" in a Senate impeachment trial. It was not sufficient for the Committee "merely [to] alleg[e] that the materials [are] relevant to an actual or potential ... action." *Abbott & Assocs.*, 460 U.S. at 568.

The Committee rejects that view, yet it is unable to articulate what in its view the “particularized need” standard requires the Committee to demonstrate beyond the fact of potential relevance to an impeachment inquiry. It was unable to articulate a standard at the oral argument on the stay motion in this Court. Tr. of Oral Arg. at 48:12-54:22. Its response brief provides no greater clarity. The Committee denies that it is asking the Court to “apply a unique particularized-need test in cases involving impeachment,” Br. 42, yet it repeatedly invokes “the extraordinary importance of impeachment” as the essential factor, Br. 41; *see* Br. 33-34. And the Committee repeatedly declares that disclosure of all grand-jury material is appropriate to enable the Committee to conduct a “complete” inquiry or access all “pertinent” and “relevant” information. *See* Br. 33-34, 37, 42-43.

These contentions effectively acknowledge that the district court applied a “particularized need” standard that would not suffice in any other context. The Committee does not explain how a simple showing of investigative relevance—indeed, an *assertion* of relevance by the Committee that the “Court should not lightly second-guess,” Br. 42—is consistent with the cases of the Supreme Court and this Court applying the particularized need standard. The Committee stresses the Supreme Court’s observations that the particularized need test is “highly flexible” and “adaptable,” *Sells Eng’g*, 463 U.S. at 445; “that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification”; and that the “public interest” is a relevant

consideration. *Douglas Oil*, 441 U.S. at 223. But the Supreme Court made those statements while at the same time emphasizing that a mere showing of “relevancy and usefulness” is insufficient. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *see generally* DOJ Br. 39-40.

Indeed, the Supreme Court in *Sells Engineering* rejected precisely the argument pressed by the Committee, recognizing that disclosure on the mere assertion that materials are “relevant to matters within the duties of attorneys for the government” would be “a virtual rubber stamp for the Government’s assertion that it desires disclosure.” 463 U.S. at 444. Instead, it explained, there is no “special dispensation” from the particularized need standard for government litigants, and that the standard applies even “when government officials seek access in furtherance of their responsibility to protect the public weal.” *Id.* at 443, 445 (quotation omitted). Even States, possessed of their own sovereign law-enforcement prerogatives, are not permitted to access federal grand-jury materials on a mere showing of investigative relevance. *See Abbott & Assocs.*, 460 U.S. at 565-73.

The Committee does not address this point head-on. It obliquely suggests that its quasi-prosecutorial needs should exempt the Committee from the ordinary particularized need standard, relying on *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987). *See* Br. 30, 34, 35, 47. But *John Doe* does not establish any such principle. The Court there concluded that attorneys from DOJ’s Antitrust Division who were already in possession of grand-jury materials from a criminal investigation could

obtain an order authorizing them to disclose those materials to other DOJ attorneys for “expert consultation” about whether to bring a civil action. 481 U.S. at 104-06. In approving that internal consultative use, the Court stressed the analysis would be different if the government sought “disclosure for use in an actual adversarial proceeding,” or if the material were sought for “unlimited use.” *Id.* at 114, 115. And it repeatedly emphasized that it was affirming the order on the understanding that it would not result in any public disclosure of the materials, noting that the disclosure “would not directly result in any witness’ testimony being used against him or her in a civil proceeding,” that there was no indication “that any complaint filed would necessarily disclose grand jury information” to the public, and that “the Antitrust Division attorneys may have planned on eventually seeking a second court order that would allow them to disclose the material in a civil suit.” *Id.* at 114, 117 n.11.

The Committee’s request lacks the features critical to the analysis in *John Doe*. First, the Committee’s avowed purpose in seeking these materials is to use them “in a Senate trial on the[] articles of impeachment” the House recently passed. Br. 29 (quoting H.R. Rep. No. 116-346, at 167 n.928 (2019)). The Committee has thus already declared that it intends to make at least some of this material publicly available “in an actual adversarial proceeding,” without any apparent plan to “seek[] a second court order that would allow [it] to disclose the material. *John Doe*, 481 U.S. at 115, 117 n.11. Second, the disclosure here is sought for the Committee’s “unlimited use.” *Id.* at 114. Unlike Department of Justice attorneys—who are subject to Rule 6(e), face

contempt for violating the terms of a disclosure order, and may see otherwise valid civil actions derailed by misuse of grand-jury material—the Committee forthrightly acknowledges that a court cannot control the Committee’s “substantial power over grand-jury material once a court orders the material disclosed” to it, Br. 27, including its ability to make the materials public by majority vote, Br. 9, or to use them for any purpose the Committee sees fit. Indeed, as already noted, a district court likely could not constitutionally exercise its express power under Rule 6(e) to place conditions on a congressional committee’s use of information in its possession.

The Committee’s view of the standard thus reduces to a simple premise: because of the special nature of impeachment, the Committee should be exempt from showing anything more than that records may be “pertinent” or “relevant,” or that it has determined (in a manner a court should not “second-guess”) that it needs the information for “an informed determination.” Br. 42. That is precisely the sort of “special dispensation” from the particularized need standard that the Supreme Court has rejected. *Sells Eng’g*, 463 U.S. at 445.

2. The Committee does not seriously contest that the district court applied a simple relevance standard—indeed, that is the standard the Committee now appears to endorse. The Committee’s discussion of its need for the materials at issue, Br. 37-43, likewise never attempts to show more than potential relevance. Two of its five “specific needs for the withheld material,” Br. 37, state that the Committee needs all “pertinent” or “relevant” information, Br. 42. Its first purported need recites a list of

events described in the Report and asserts it has a “strong interest” in grand-jury materials related to those events. Br. 38. But the district court found nothing more than that these materials were relevant to “complete the full story” for the Committee. JA 66. Even the Committee’s extended discussion of its alleged need for one particular piece of information—a redaction in a footnote, Br. 38-39—adds up to nothing more than an assertion that the redaction may include information relevant to the subject matter of the Committee’s inquiry (or rather, the Committee’s inquiry before the House approved articles of impeachment).

The Committee’s resistance to any ordinary application of the particularized need standard is highlighted by its insistence that it needs grand-jury materials in order “to prevent witnesses from misleading” the Committee. Br. 41 (quoting JA 67). Every prosecutor or defense attorney could make a similar claim. Unsurprisingly, the Committee cites no case recognizing a preemptive interest in deterring untruthful testimony to be sufficient to establish a particularized need. It is literally hornbook law that “a bare assertion that the materials will be useful for that purpose” is insufficient to show particularized need. Sara Sun Beale et al., *Grand Jury Law & Practice* § 5:12.

Even now, the Committee does not attempt to articulate an interest in grand-jury testimony (if any) from the testifying witnesses that the district court identified. Instead, the Committee generally asserts that it “questioned individuals who may have previously testified before the grand jury,” and has an interest in determining whether

those witnesses—if they appeared before the grand jury at all—“may have also lied.”

Br. 41. But courts have rejected that premise, too. *See In re Special Grand Jury 89-2*, 143 F.3d 565, 571 (10th Cir. 1998) (per curiam) (holding that a district court abused its discretion in “generalizing a need for the testimony of all, based on a showing relevant to a small sample”).

The Committee wrongly asserts that *Dennis v. United States*, 384 U.S. 855 (1966), permits this inference. Br. 48. *Dennis* involved the testimony of four witnesses who were known to have testified at both the trial and before the grand jury. The Court identified five “circumstances” demonstrating that the defendant had a particularized need for the grand-jury testimony of the specific witnesses at issue, including (as the fifth circumstance) that one witness had previously given inconsistent testimony. 384 U.S. at 872-83. These factors collectively constituted a showing that it was “likely that the witnesses’ testimony at trial was inconsistent with their prior grand jury testimony.” *Douglas Oil*, 441 U.S. at 221. The district court did not attempt such an analysis here, and the Committee did not ask it to do so.

The Committee also attempts to argue that it need not have shown any inconsistency with a witness’s prior statements because the Committee “does not seek the redactions with a view to buttressing or discrediting a particular witness’s trial testimony, but rather to obtain information critical to its investigation.” Br. 47. The district court, however, cited the Committee’s application and the oral argument transcript in concluding “that the grand jury material would be used to impeach or

corroborate witnesses,” and recited the Supreme Court’s statement that such use is the “typical showing of particularized need.” JA 65-66 (quotations omitted) (citing JA 135 and Dkt. No. 38 at 40:5-41:17).

The Committee’s confusion on this point is an understandable consequence of its resistance to a particularized analysis. Such an analysis, when properly conducted, results in “specific findings on the Petitioners’ need for disclosure of the grand jury testimony of *each* of the ... witnesses,” which then serve as the basis for appellate review. *United States v. Fischbach & Moore*, 776 F.2d 839, 845 (9th Cir. 1985); *accord In re Special Grand Jury 89-2*, 143 F.3d at 571 (requiring “witness-by-witness analysis”). Nothing comparable occurred here.

3. The Committee’s attempt to defend the district court’s order as “narrowly tailored” (Br. 46) is likewise meritless. As the Supreme Court has repeatedly explained, any disclosure of grand-jury materials should be “structured to cover only material” for which real need can be shown. *Douglas Oil*, 441 U.S. at 222. This requirement is inextricably bound up with the requirement that a petitioner make a showing of need “with particularity,” because that showing ensures “that the secrecy of the proceedings [may] be lifted discretely and limitedly.” *Id.* at 221 (quotation omitted). Even a disclosure made “to avoid misleading the trier of fact” should be “limited strictly to those portions of a particular witness’ testimony that bear upon some aspect of his direct testimony at trial.” *Id.* at 222 n.12.

The Committee expresses surprise that this basic principle would require it to show “a specific need for every word of withheld material,” Br. 36, but that is simply another way of saying that the Committee must only receive information for which it actually has a particularized need. And that is exactly how the courts of appeals have applied the standard, focusing on “whether particularized need has been shown for *each item* to be released.” *Lucas v. Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984) (emphasis added); *see, e.g., In re Special Grand Jury 89-2*, 143 F.3d at 572. The Committee’s observation that these cases involve wholesale disclosure of transcripts (Br. 48) misses the point entirely: a disclosure order is necessarily overbroad when it discloses material for which a petitioner has not shown the requisite need.

The district court’s order manifestly disregards that principle. The court ordered disclosure of the grand-jury information underlying hundreds of redactions (including one the Committee has conceded it does not need, Br. 49) spanning both volumes of the Report, along with the relevant portions of the “underlying transcripts.” JA 76. By contrast, even assuming that the Committee could show a particularized need for every redaction on every page of the Report it cites among the “examples” of need it offers in its appellate brief, Br. 38-41, that would cover only twenty-seven redactions.³ That leaves over 210 redactions for which the Committee

³ *See* JA 612-16 (twenty-six redactions); JA 669 (one redaction).

has not even attempted to show need “with particularity”—all of which are required to be disclosed under the district court’s order.

The Committee also objects that holding it to ordinary standards would require that it “know what the withheld material says before the [Committee] can obtain it.” Br. 36; *accord* Br. 49. That is not what the standard requires. It *does* require, however, that the party seeking grand-jury information explain with particularity why it needs the specific information at issue. It is true that an applicant must make that showing *ex ante*, based on other information available to it. In that respect, however, a party seeking grand-jury information is similarly situated to any party seeking to establish a right to access privileged information. The issue is typically resolved by having the petitioner actually identify specific needs, after which the district court conducts an *in camera* review of the requested material “to determine what material, if any, is responsive to the need asserted by the requesting party.” *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1074 (D.C. Cir. 1998) (per curiam). As this Court has explained, “this *in camera* review ‘is necessary due to the paramount concern of all courts for the sanctity and secrecy of grand jury proceedings.’” *Id.* (quoting *Lucas*, 725 F.2d at 1109); *accord In re Special Grand Jury 89-2*, 143 F.3d at 572; *In re Grand Jury Testimony*, 832 F.2d 60, 64 (5th Cir. 1987); *United States v. Sobotka*, 623 F.2d 764, 768 (2d Cir. 1980). Such an inquiry likewise permits the district court to make actual, particularized findings about need and relevance, unlike the blanket assertion of need made by the district court and the Committee here. Br. 35; JA 70. Other litigants willing to follow this

procedure meet the standard in appropriate circumstances. *See, e.g., In re Special Grand Jury 89-2*, 143 F.3d at 571 & n.7, 572 & n.10. And the Committee was in a far better position than most parties in this respect: most petitioners do not have the benefit of a voluminous and largely unredacted Report covering the events of interest.

The district court, however, examined only five of the over 240 redactions *in camera*. And the court inquired into the Committee's particularized need for only one of those redactions—a redaction the Committee immediately conceded it did not need. JA 710-11. The Committee's assertion that the district court's "inquiry into individual redactions shows that [it] engaged in an appropriately particularized analysis" (Br. 50) is simply contrary to fact.

4. Finally, the Committee, like the district court, is too quick to dismiss the compelling reasons to protect grand-jury secrecy in these circumstances. As the Supreme Court has long recognized, grand-jury secrecy is protected in significant part to protect "the functioning of future grand juries" by ensuring that witnesses will be willing to provide "frank and full testimony." *Douglas Oil*, 441 U.S. at 222. The "[f]ear of future retribution or social stigma" is particularly acute in matters as high-profile and sensitive as this one, as is the possibility that witnesses may be offered "inducements" in exchange for particular testimony. *Id.* at 219, 222.

To recognize that reality and to properly account for it is not "to shield [the President] from scrutiny," Br. 35, but to respect the policies animating grand-jury secrecy and to apply the "particularized need" test as instructed by the Supreme

Court. In dismissing as “fanciful” the suggestion that witnesses might be less willing to testify truthfully in a high-profile criminal investigation of the President if they were aware “that Congress might seek portions of their testimony in deciding whether to impeach,” Br. 45-46, the Committee does not acknowledge or address the concerns about retribution or inducements, to say nothing of concerns about the willingness of witnesses to testify “knowing that those against whom they testify would be aware of that testimony.” *Douglas Oil*, 441 U.S. at 219. And the rarity of such high-profile proceedings (Br. 45) is relevant precisely because it illustrates the unique degree to which those pressures will be present.

The Committee is likewise too dismissive of the need to protect third parties investigated but not indicted from opprobrium. Br. 44. The Committee appears to believe that this need has evaporated because some individuals “have been convicted.” *Id.* But that says nothing about the interests of unindicted individuals, or even of the interests of indicted individuals with respect to accusations that the grand jury decided not to credit. The district court did not review the grand-jury material it ordered disclosed to determine whether and to what extent this interest was implicated.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed.⁴

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⁴ The Committee has requested (Br. 54) that this Court “immediately vacat[e] the stay” and affirm by “order with an opinion to follow.” As our supplemental brief explains, the House’s adoption of articles of impeachment obviates any need for expedition. If the Court were nonetheless to agree with the Committee, it should at least leave the stay in place for a reasonable period to allow the Solicitor General to seek appropriate relief from the Supreme Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,492 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

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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.

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