[ORAL ARGUMENT HELD JANUARY 3, 2020]

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	No. 19-5288

MOTION TO STAY MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Under Federal Rule of Appellate Procedure 41(d)(1), respondent U.S. Department of Justice respectfully requests that this Court stay the issuance of its mandate pending final disposition of the government's forthcoming petition for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2)(ii). The mandate is presently set to issue on May 1, 2020. The Department further requests that, if the motion is denied, the Court stay issuance of the mandate for a reasonable period to permit the Department to seek a stay from the Supreme Court. We have consulted petitioner Committee on the Judiciary, which opposes this request and intends to file a response.

In this case, the Court concluded that a presidential impeachment proceeding in the Senate qualifies as a "judicial proceeding" for purposes of Federal Rule of Criminal Procedure 6(e)(3)(E)(i). That holding raises a "substantial question" warranting Supreme Court review. Fed. R. App. P. 41(d)(1). The plain meaning of the term "judicial proceeding" encompasses proceedings before a court—not a

legislative body carrying out the inescapably political task of impeachment. The use of that term elsewhere in Rule 6(e) and the Federal Rules of Criminal Procedure in general confirm this straightforward understanding of the term. And reading the term to go beyond its plain meaning raises significant separation of powers concerns by rendering key portions of Rule 6(e) inoperative or unconstitutional in application, and permitting Congress to seek, on an assertion of relevance, grand jury materials without meeting the standards ordinarily required of other litigants, with concomitant potential for harassment of the Executive Branch.

There is also "good cause" for the requested stay. Fed. R. App. P. 41(d)(1). Unless the mandate is stayed, this Court's decision will upset the status quo by requiring the Department to turn over the grand jury materials at issue, irreversibly breaching the secrecy of those materials, and raising serious questions about whether they could ever be retrieved from Congress once in Congress's possession. *See Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1086 (D.C. Cir. 2017) ("[T]he 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). Nor is there any harm to the Committee from a stay: any impeachment inquiry appears to be dormant, and since the Court's opinion in this case, the Committee has neither inquired about the materials nor sought to terminate the Court's administrative stay.

STATEMENT

1. In July 2019, the House Committee on the Judiciary filed a petition in district court seeking grand jury materials from Special Counsel Robert S. Mueller, III's investigation into Russian interference in the 2016 presidential election. The district court granted the application in substantial part over the Department's opposition. The court held that a Senate impeachment proceeding qualifies as a "judicial proceeding" for purposes of Rule 6(e)(3)(E)(i), which authorizes the release of grand jury materials "preliminarily to or in connection with a judicial proceeding." The court also held that the Committee had shown a "particularized need" for the materials because the materials were relevant to an impeachment inquiry.

2. The Department appealed and sought a stay pending appeal. This Court issued an administrative stay, Order of October 29, 2019, and later instructed that the stay would remain in place "pending further order of the court," Order of Nov. 11, 2019.

A panel of this Court affirmed after briefing and argument on the merits. The panel rejected the argument that a Senate impeachment trial is not a "judicial proceeding" under Rule 6(e)(3)(E)(i). It first concluded that the question was settled by this Court's prior 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), *cert. denied*, 140 S. Ct. 597 (2020). Op. 11-12. Acknowledging, however, that neither decision "explain[ed] in detail why impeachment qualifies as a judicial proceeding," the panel stated that "[t]he

constitutional text confirms that a Senate impeachment trial is a judicial proceeding" and that the term "judicial proceeding" in Rule 6(e) "has long and repeatedly been interpreted broadly." Op. 12-13. The panel also stated that "historical practice" supported its conclusion, citing past examples as evidence of "a common-law tradition . . . of providing grand jury materials to Congress to assist with congressional investigations," as well as an "established practice" of such disclosures under Rule 6(e). Op. 13-14.

The panel discounted the separation of powers concerns that might arise from "invit[ing] courts to pass judgment on the legal sufficiency of a particular impeachment theory" because courts could "apply the particularized need standard to mitigate such concerns in the impeachment context because the district court need only decide if the requested grand jury materials are relevant to the impeachment investigation . . . without commenting on the propriety of that investigation." Op. 15; *accord* Op. 18. This low threshold for disclosure, the panel concluded, "avoids the potentially problematic second-guessing of Congress's need for evidence that is relevant to its impeachment inquiry." Op. 19.

The panel also held that the other factors traditionally favoring grand jury secrecy were not significantly implicated, given the public attention already focused on the Special Counsel's Report and the Committee's adoption of handling protocols that would limit access to the information. Op. 19-22. Finally, the panel rejected the argument that the disclosure ordered by the district court was overbroad in including

numerous redactions never reviewed by the district court in camera, including one redaction the Committee conceded it did not need. Op. 23-24.

Judge Rao dissented. She agreed with the majority that "an impeachment investigation is 'preliminarily to or in connection with a judicial proceeding,'" and that "the standards for particularized need must be uniquely adapted" for impeachment inquiries, Diss. 1, 5, but would have "remand[ed] to the district court to consider in the first instance whether the Committee can continue to demonstrate that its inquiry is preliminary to an impeachment proceeding and that it has a 'particularized need' for the grand jury records" given the Senate's acquittal of the President on impeachment articles during the pendency of the appeal, Diss. 2. Judge Rao's dissent primarily focused on the question of whether the Committee had Article III standing to seek an order compelling the Department to disclose the materials. Diss. 8-45.

In a brief concurrence, Judge Griffith noted that "this case does not involve a dispute between the political branches over executive-branch documents or testimony," and observed that courts have on several past occasions "approved the disclosure of grand jury materials to the House," demonstrating that such requests have "traditionally been thought capable of (and indeed to require) judicial resolution." Concur. 1.

3. This Court's opinion and judgment issued on March 10, 2020, and absent a stay, the mandate would issue on May 1. *See* Fed. R. App. P. 41(b). Although it is unclear, an order issuing the mandate and divesting this Court of jurisdiction would at

least arguably constitute a "further order" dissolving the administrative stay that was entered by this Court on October 29, 2019, and currently remains in effect.

ARGUMENT

To obtain a stay of the mandate "pending the filing of a petition for a writ of certiorari in the Supreme Court," a movant "must show that the [certiorari] petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). This requires a party to demonstrate a reasonable probability of succeeding on the merits and injury absent a stay. *See, e.g.*, *United States v. Warner*, 507 F.3d 508, 510-11 (7th Cir. 2007) (Wood, J., in chambers); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *California v. American Stores Co.*, 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers).

This standard is easily met here. This case raises substantial legal issues of the type appropriate for Supreme Court review, including separation of powers concerns that affect all three branches of government in the exercise of one of Congress's most significant powers. In addition, without a stay of the mandate, the Department will be forced to turn over the disputed grand jury materials. The secrecy of those materials, once lost, cannot be regained, and there are grave doubts that any court would have the authority to claw back those materials once disclosed.

1. The Department's forthcoming petition for certiorari will present a "substantial question" for the Supreme Court's review on which the Department has at least a reasonable probability of success. Fed. R. App. P. 41(d)(1). Whether and

under what circumstances Congress may resort to the courts to seek grand jury materials generated in a criminal investigation in aid of an impeachment inquiry is plainly a question of great significance to all three branches of government, as well as to the functioning of the grand jury system in high-profile, politically-charged matters.

The text and structure of Rule 6(e), as well as ordinary principles of statutory interpretation, make clear that the Rule contemplates proceedings before a *court*, not a legislative body. The panel did not dispute that the ordinary meaning of the term "judicial proceeding" encompasses only such proceedings. Nor did it dispute that where the term appears elsewhere in Rule 6(e)—in Rules 6(e)(3)(F) and (G)—it is confined to proceedings before a court. The panel instead stated that the term carried a different meaning in Rule 6(e)(3)(E)(i) because "context" dictated a different meaning, notwithstanding the presumption of consistent usage. Op. 13. But the panel opinion does not specify what other "context" could be meant; after all, Rules 6(e)(3)(F) and (G) prescribe the procedures to be used in adjudicating a petition under Rule 6(e)(3)(E)(i). It is precisely in those circumstances that the presumption of consistent usage is at its strongest. In addition, the only other use of the term in the Rules of Criminal Procedure—in Rule 53—also unambiguously refers to proceedings before courts (not Congress). To the extent the panel's reference to "context" acknowledges that treating an impeachment trial as a "judicial proceeding" is illogical in the context of Rules 6(e)(3)(F) and (G), that simply underscores that Rule 6(e)(3)(E)(i) does not treat impeachment as a "judicial proceeding" in the first place.

The panel also expressed the view that a Senate impeachment trial is a "judicial proceeding" in a constitutional sense. *See* Op. 12-13. But even assuming that impeachment is "judicial" in some constitutional sense—though even that is dubious, *see Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 908 (1991) (Scalia, J., concurring in part)—that is ultimately beside the point. The question here is the sense in which *Rule 6(e)* uses the term "judicial proceeding." The panel pointed to nothing in the ordinary meaning of that term or the text and structure of the Rule that supports reading it to reach impeachment proceedings. Instead, the panel asserted that Rule 6(e)(3)(E)(i) must be read "broadly." Op. 13. But the Supreme Court has reached the opposite conclusion, emphasizing 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." *United States v. Sells Eng'g*, 463 U.S. 418, 425 (1983); *see In re Sealed Case*, 250 F.3d 764, 769 (D.C. Cir. 2001) ("[E]xceptions to Rule 6(e) must be narrowly construed"). Indeed, the Supreme Court has never endorsed the (largely pre-*Sells*) line of cases reading Rule 6(e) "broadly," instead reserving the "knotty question" whether Rule 6(e)(3)(E)(i) encompasses anything more than "garden-variety civil actions or criminal prosecutions." *United States v. Baggot*, 463 U.S. 476, 479 n.2 (1983).

The panel also suggested that historical practice supported its conclusion. Op. 13-14. Although Rule 6(e) "codifie[d] the traditional rule of grand jury secrecy," *Sells Eng'g*, 463 U.S. at 425, there is no apparent pre-Rule tradition of court-ordered

disclosures of grand jury material in connection with impeachment proceedings. Indeed, the majority identified just one arguable pre-Rule example of a disclosure of secret grand jury material, otherwise relying on Congress's use of *public* materials "to investigate allegations of election fraud or misconduct by members of Congress." Op. 13-14; *but see* Diss. 21, 22 n.9. And post-Rule practice, Op. 14, cannot change the plain meaning of the text.

The panel's interpretation of Rule 6(e)(3)(E)(i) also creates, rather than avoids, significant separation of powers issues, further demonstrating the existence of a "substantial question" for Supreme Court review. 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 v. United States*, 506 U.S. 224, 237-38 (1993). In addition, although Rule 6(e)(3)(E) generally permits a district court to guard against the unnecessary disclosure of grand jury materials by authorizing disclosures "at a time, in a manner, and subject to any other conditions that it directs," that important prophylaxis is unavailable in disclosures to Congress, because "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); *see* Op. 21. The panel's reading would thus render an important portion of Rule 6(e) unconstitutional in application.

Moreover, the "particularized need" test that applies to all applicants for disclosure under Rule 6(e)(3)(E) is in considerable tension with the Senate sole power to try impeachments. 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 Co. v. Petrol Stops Northwest*, 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, withholding material that is useful only as "general discovery." 441 U.S. 211, 229 (1979).

The panel recognized the potential for "problematic second-guessing of Congress's need for evidence" in applying this standard. Op. 19. But it concluded that this could be resolved by treating impeachment inquiries as "different" from all other requests for grand jury materials. Op. 18. Although the Supreme Court has said that mere relevance is not a sufficient ground for disclosure of grand jury material to States, *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 568 (1983), or even within the Executive Branch, *Sells Eng'g*, 463 U.S. at 445, the panel concluded that turning over

"all relevant materials" in response to a congressional request would resolve any constitutional concerns. Op. 18.

This approach to the particularized need standard has never been endorsed by the Supreme Court. Yet even this departure from the usual standard for disclosure does not avoid the problem; the panel acknowledged that "courts must not rubber stamp congressional requests for grand jury materials," and might in some circumstances be required to conduct "further inquiry" to determine if the grand jury materials were in fact relevant to the Committee's inquiry. Op. 24; *see* Op. 15 (court must "decide if the requested grand jury materials are relevant to the impeachment investigation").

Thus, even under the panel's approach, courts would be placed in the difficult position of determining whether grand jury material was "relevant" to a particular line of inquiry or theory of impeachment—a decision that would necessarily require assessing the "contours" of the Committee's theory. *Douglas Oil*, 441 U.S. at 229. It is unclear on what basis a district court could make that assessment in the context of a proceeding exclusively committed under the Constitution to the legislative branch. *See* Diss. 34-39 (discussing historical "separation between impeachment and the judicial process," including in determinations of relevance); Diss. 44 (observing that disputes between the parties over "the litigating positions of the President and the House in the impeachment trial . . . demonstrate[] the practical impediments to judicial resolution of these issues"). And the potential for abuse is clear: a House

opposed to a future President could seek grand jury materials from investigations of individuals with only tenuous connections to the President, all under the aegis of conducting an impeachment investigation, with no meaningful restraint.

Even aside from the unnecessary separation of powers concerns created by departing from the plain meaning of Rule 6(e)(3)(E)(i), the issue is important to the functioning of the grand jury system. As the Supreme Court has explained, grand jury secrecy exists 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" or concern that "those against whom [witnesses] testify would be aware of their testimony" is particularly acute in high-profile and politically-charged matters, as is the possibility that witnesses may be offered "inducements" in exchange for particular testimony. *Id.* at 219, 222. The panel suggested that these concerns were reduced because the Committee has promised to "restrict access to the grand jury materials." Op. 20. Of course, the Committee still retains discretion "to make the grand jury material public at any time," *id.*, and represented here that it sought to make public use of the material in the course of presenting its case to the Senate on the articles of impeachment. Witnesses in future proceedings very likely will be affected by the knowledge that their testimony will be disclosed to members of Congress for use—including public use—in inevitably political impeachment proceedings. And that is particularly true where

disclosure would occur on a Committee majority's assertion that the material is relevant to an impeachment inquiry and nothing more.

2. There is also "good cause" for the requested stay. Fed. R. App. P. 41(d)(1). As the Supreme Court has explained, once grand jury material has been disclosed, a court "cannot restore the secrecy that has already been lost." *Sells Eng'g*, 463 U.S. at 422 n.6. Those concerns are particularly acute in this context; as the panel observed, "courts lack authority to restrict the House's use of the materials or withdraw them if improvidently issued or disseminated." Op. 21; *see Ferrer*, 856 F.3d at 1086. A stay of the mandate is therefore warranted to preserve the current administrative stay of the district court's order and prevent the irremediable breach of grand jury secrecy that would occur in the absence of a stay.

In addition, the Committee would not be prejudiced by a stay, and the public interest favors allowing an orderly resolution of the important questions presented here. Although the Committee previously stated that it needed the materials for use in a Senate trial, the articles of impeachment the Committee previously referred have already been disposed of by the Senate. *See* H. Res. 755, 116th Cong. (2019); 166 Cong. Rec. S937-38 (daily ed. Feb. 5, 2020). In addition, although the Committee has represented that its impeachment inquiry is ongoing, no hearings are scheduled on its public calendar, and there is no indication that time is of the essence. *See* "Committee Activity," Committee on the Judiciary, https://judiciary.house.gov/calendar/. The Committee has not requested the materials in the time since the panel's opinion in

this case, nor has it moved to dissolve the administrative stay. Allowing the Supreme Court time to consider whether to take up the important questions presented far outweighs any delay to the Committee's inquiry, which appears to be dormant in any event.

3. In the event this Court denies a stay of the mandate, the Department respectfully requests that the Court stay the mandate for a reasonable time to permit the Solicitor General to apply for a stay from the Supreme Court.

4. We have consulted counsel for the Committee, and they have indicated that the Committee opposes this request and will file a response.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 3,361 words. This motion complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface.

/s/ *Brad Hinshelwood*
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Brad Hinshelwood*
Brad Hinshelwood