No. 19-1328

In The
Morris Tyler Moot Court of Appeals at Yale

DEPARTMENT OF JUSTICE,
Petitioner,

v.

HOUSE COMMITTEE ON THE JUDICIARY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

In 2017, the U.S. Attorney General appointed a Special Counsel to investigate the Russian government's alleged interference in the 2016 presidential election and the Trump Campaign's alleged collusion in these efforts. In connection with an impeachment inquiry, the House Committee on the Judiciary seeks—and the Department of Justice opposes—the disclosure of grand jury materials related to the Special Counsel's investigation.[1] Matters occurring before the grand jury are traditionally kept secret, but Rule 6(e) of the Federal Rules of Criminal Procedure permits the disclosure of grand jury materials in a narrowly defined set of circumstances, including where grand jury materials are needed "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i).

The question presented is whether a Senate impeachment trial constitutes a "judicial proceeding" for the purposes of Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

[1] The Department of Justice is the Petitioner. The House Committee on the Judiciary is the Respondent.

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1 Joseph Story, Commentaries on the Constitution of the United States (Boston, Little, Brown, & Co. 1873) 16

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James Wilson, *Comparison of the Constitution of the United States, with that of Great Britain*, *in* 1 Collected Works of James Wilson 524 (2007) 16

Michael J. Gerhardt, *Lessons of Impeachment History*, 67 Geo. Wash. L. Rev. 603 (1999) 15-16

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The Federalist No. 65 16

Webster's New International Dictionary of the English Language (2d ed. 1953) 6

OPINIONS BELOW

The decision of the D.C. Circuit is reported at 951 F.3d 589. The district court's opinion is reported at 414 F. Supp. 3d 129.

STATEMENT OF JURISDICTION

The D.C. Circuit entered judgment on March 10, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure states that a "court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . preliminarily to or in connection with a judicial proceeding."

STATEMENT OF THE CASE

A. Factual Background

In May 2017, Deputy Attorney General Rod Rosenstein appointed a Special Counsel, Robert Mueller, to lead an inquiry into the Russian government's alleged interference in the 2016 presidential election and the Trump Campaign's alleged collusion with these efforts. *In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d 129, 138 (2019). The scope of the investigation encompassed actions taken during the election, as well as alleged obstruction of justice by President Trump with respect to the investigation itself. *Id.* at 137-38.

In March 2019, the Special Counsel finished his investigation and submitted his confidential report to the Attorney General. *Id.* The report, known as the Mueller Report, concluded that "[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." *Id.* at 139 (citations omitted). The interference primarily consisted of a pro-Trump social media campaign and a hacking operation targeting Democratic

Party organizations and the Clinton Campaign. *Id.* Although the Special Counsel determined that the "links between the Russian government and the Trump Campaign were 'numerous,'" the "investigation 'did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities.'" *Id.* at 139, 143 (citations omitted).

Attorney General Barr immediately expressed his intent to release as much of the report as possible to Congress. *Id.* at 144. The chairpersons of six House committees "formally request[ed]" the "release [of] the Special Counsel's full report." *Id.* (citations omitted). However, Attorney General Barr maintained that redactions were necessary to preserve grand jury secrecy and protect "sensitive sources and methods." *Id.* at 145. A redacted version of the Mueller Report was made public in April 2019, *id.* at 140, but the House Judiciary Committee was "[n]ot satisfied with the redacted version," *id.* at 145. House committee chairpersons have claimed to need the full report in order to "perform their duties under the Constitution," particularly to conduct an impeachment investigation. *Id.* at 144 (citations omitted).

B. Prior Proceedings

On July 26, 2019, the House Judiciary Committee ("HJC") applied to the D.C. District Court "for an order pursuant to Federal Rule of Criminal Procedure 6(e) authorizing the release" of the redacted portions of the Mueller Report as well as underlying grand jury exhibits and testimony transcripts. *Id.* at 146.

The district court granted the order, deciding that impeachment trials constituted "judicial proceeding[s]" within the meaning of an exception to the grand jury secrecy requirement carved out in Rule 6(e)(3)(E)(i). *Id.* at 149. It determined that it was bound by controlling D.C. Circuit precedent. *Id.* at 159-60. However, it also independently reasoned that this conclusion was

supported by the "broad meaning" imputed to the phrase "judicial proceeding" by other lower courts, *id.* at 150-52, its understanding of impeachment trials as judicial in nature, *id.* at 152-57, and its interpretation of historical practice, *id.* at 157-59.

The D.C. Circuit affirmed the district court's order. *In re Comm. on the Judiciary, U.S. House of Representatives*, 951 F.3d 589 (D.C. Cir. 2020). Like the district court, it decided that it was bound by circuit "precedents establish[ing] that a Senate impeachment trial qualifies as a 'judicial proceeding' under [Rule 6(e)]." *Id.* at 595-96. The D.C. Circuit also separately concluded that this interpretation was "supported by traditional tools of statutory construction," as well as the nature of impeachment trials, historical practice, and separation-of-powers concerns. *Id.* at 596-97.

SUMMARY OF THE ARGUMENT

Rule 6(e) of the Federal Rules of Criminal Procedure ("Federal Rules") enshrines the principle that grand jury proceedings must remain secret in order to preserve the integrity of criminal investigations. The Rule grants exceptions in an extremely limited set of circumstances, including where grand jury materials are needed "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). Impeachment trials do not constitute "judicial proceeding[s]." This construction of Rule 6(e)(3)(E)(i) is compelled by straightforward principles of statutory interpretation and the fundamental nature of impeachment proceedings. Moreover, no material historical practice countervails this interpretation.

First, this case presents a classic question of textual interpretation. The plain meaning of the term "judicial proceeding" in Rule 6(e)(3)(E)(i), based on dictionary definitions and usage in relevant contexts at the time the Rule was adopted, refers to proceedings conducted in judicial-branch courts. In fact, the canon of consistent usage permits only this narrow interpretation, in

light of the term's unambiguous meaning elsewhere in the Federal Rules. An interpretation that excludes impeachment proceedings is also consistent with the weight of authority in the lower courts, which generally interpret Rule 6(e)(3)(E)(i) as requiring that "judicial proceeding[s]" have an identifiable connection to the judicial branch. Moreover, prohibiting the disclosure of grand jury materials for use in impeachment proceedings is fully consistent with the purpose of Rule 6(e), particularly encouraging candid grand jury witness testimony. Finally, constitutional-avoidance principles caution this Court to interpret Rule 6(e)(3)(E)(i) as excluding impeachment proceedings, in order to avoid confronting serious separation-of-powers questions.

Second, impeachment trials are not judicial in nature. Although the question presented is fundamentally one of textual interpretation, the character of impeachment proceedings confirms that they do not fall within the meaning of the judicial-proceedings exception. The selective historical analyses employed by the courts below gloss over the very real diversity of opinions as to the nature of impeachment trials that existed at the time of the founding. Significantly, impeachment proceedings were widely viewed as distinctly "political." And this Court has dispelled any uncertainty by ruling that impeachment trials do not confer judicial authority and need not be conducted in the same manner as judicial trials.

Finally, historical practice offers no basis for disclosing grand jury materials in the context of impeachment proceedings. No tradition of disclosing grand jury materials to the House for the purposes of an impeachment inquiry existed prior to the adoption of the Federal Rules. The few courts that have since determined that impeachment trials fall within the meaning of "judicial proceeding[s]" under Rule 6(e)(3)(E)(i) have done so based on cursory legal analyses.

ARGUMENT

I. Traditional methods of statutory interpretation demonstrate that impeachment trials are not "judicial proceeding[s]" under Rule 6(e)(3)(E)(i).

Whether an impeachment trial constitutes a "judicial proceeding" for the purposes of Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure is, at bottom, a question of textual interpretation. The phrase in question—"preliminary to or in connection with a judicial proceeding"—has remained unaltered since the Federal Rules were adopted in 1946. *See* Federal Rules of Criminal Procedure for the District Courts of the United States 9 (1946) [hereinafter 1946 Rules]. Although this Court has not previously defined the scope of that term, it once described the issue of "what, if any, sorts of proceedings other than garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings" as a "knotty question." *United States v. Baggot*, 463 U.S. 476, 479 n.2 (1983). However, traditional tools of statutory interpretation are adequate to "untangle" it. The plain meaning of the phrase, structure of the Federal Rules, and weight of authority in the lower courts all indicate that the term should be interpreted to require, at a minimum, an identifiable connection to a judicial-branch court.[2] Moreover, the policy of grand jury secrecy and constitutional-avoidance principles caution against interpreting the term "judicial proceeding" to include impeachment proceedings.

A. The plain meaning of the term "judicial proceeding" connotes a connection to a judicial-branch court.

"When a term goes undefined," this Court "give[s] the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Dictionary definitions are often informative for this purpose. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 390 (2013)

[2] The term "judicial-branch court" is used to denote courts created under Article III of the Constitution and equivalent state courts.

(Sotomayor, J., dissenting) ("[A] definition widely reflected in dictionaries generally governs over other possible meanings."). Around the time the Federal Rules were adopted, a leading dictionary defined "judicial," in relevant part, as something "[o]f or pertaining or appropriate to the administration of justice, or courts of justice, or a judge hereof, or the proceedings therein; as, *judicial* power; *judicial* proceedings;—distinguished in general from *legislative*, *executive*, *administrative*, *ministerial*." Webster's New International Dictionary of the English Language (2d ed. 1953). A definition of the term "judicial proceedings" can easily be derived: proceedings in courts of justice, as explicitly distinguished from proceedings connected to the other branches of government.

This definition is consistent with the way the term was employed in judicial decisions around the time the Federal Rules were drafted and approved. A series of this Court's rulings from the 1920s and 1930s provide ample evidence that the phrase "judicial proceeding" expressly referred to judicial-branch court proceedings. In a particularly informative case, the Court implied that the term "judicial proceeding" is equivalent to the term "suit," which refers specifically to "a proceeding in court." *See Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 349 (1927). Moreover, this Court repeatedly distinguished proceedings that had the accoutrements of a court proceeding but took place outside of the judicial branch from true "judicial proceedings." *See, e.g.*, *Morgan v. United States*, 298 U.S. 468, 480 (1936) (describing a proceeding that "requir[ed] the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings" only as having "a quality resembling that of a judicial proceeding"); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 81 (1936) (describing "decisions of administrative tribunals . . . made after hearing evidence and argument under the sanctions and the safeguards attending

judicial proceedings" as "quasi judicial" and contrasting them with traditional "judicial proceedings"); *City Bank Farmers' Tr. Co. v. Schnader*, 291 U.S. 24, 30 (1934) (explaining that, when an administrative action is "tried as an ordinary action" in an appellate court, it is "render[ed] . . . judicial").

Even some of the lower courts that have adopted the broadest constructions of Rule 6(e)(3)(E)(i) have conceded that their interpretations are inconsistent with the Rule's plain meaning. For example, when the D.C. District Court permitted the release of grand jury materials for internal police disciplinary proceedings, it explained that "[i]f a literal interpretation of [Rule] 6(e) were given . . . the Court [would have] no authority to grant the petition." *In re Bullock*, 103 F. Supp. 639, 641 (D.D.C. 1952). Likewise, when the same court permitted disclosure to HJC in connection with a prior impeachment investigation, it noted as a "difficulty in [the] application of Rule 6(e)" the fact that the "language regarding 'judicial proceedings' can imply limitations on disclosure much more extensive than" what the court believed the drafters intended. *See In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1229 (D.D.C. 1974). However, ignoring plain meaning in such a manner contravenes this Court's established approach to textual interpretation. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (explaining that plain meaning "must ordinarily be regarded as conclusive").

Finally, this Court has specifically cautioned 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, Inc.*, 463 U.S. 418, 425 (1983). Thus,

the phrase "judicial proceeding" should be interpreted to exclude impeachment trials, consistent with its plain meaning.

B. The consistent-usage canon requires a narrow definition of "judicial proceeding."

This Court "ordinarily assumes 'that identical words used in different parts of the same act are intended to have the same meaning.'" *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 319 (2014) (citations omitted). A definition of the phrase "judicial proceeding" so broad as to encompass impeachment trials would not make sense in the context of the Federal Rules as a whole.

The term "judicial proceeding" appeared in one additional provision of the Federal Rules of Criminal Procedure when they were first adopted. *See* 1946 Rules, *supra*. Rule 53, as originally written, prohibited the "taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room." *Id.* at 79. The repeated references to a "court room" unambiguously suggest that the drafters employed the term "judicial proceedings" to refer to activity in judicial-branch courts.

Uses of the term "judicial proceeding" added by later amendments cannot reasonably be interpreted to include impeachment trials, either. For instance, Rule 6(e)(3)(F)(ii) requires that "[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," and generally "the court must afford a reasonable opportunity to appear and be heard to . . . the parties to the judicial proceeding." It is unnatural to describe a House committee as a "party" in an impeachment proceeding. Likewise, Rule 6(e)(3)(G) 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." Here, reading "judicial proceeding" to include impeachment proceedings yields an impossible meaning. Congress is not a "district," nor can it "transfer" cases to a district court.

The court below dismissed this argument on the grounds that "the presumption of consistent usage 'readily yields' to context." *In re Comm. on the Judiciary*, 951 F.3d at 596 (citations omitted). However, this Court has explained that the presumption yields when "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (citations omitted). The exception to the consistent-usage canon certainly does not apply to uses of the term within Rule 6(e)(3). On the contrary, the advisory notes accompanying the 2002 amendments explain that "the Committee considered whether to amend the language relating to 'parties to the judicial proceeding' [in Rule 6(e)(3)(F)(ii)] and determined that . . . it is understood that the parties referred to are the parties in the same judicial proceeding identified in Rule 6(e)(3)(E)(i)." Fed. R. Crim. P. 6(e) advisory committee's note to 2002 amendments. Nothing in the text suggests that the term means something different in subsection (G) as opposed to subsections (E) and (F). Therefore, the consistent-usage canon largely forecloses the possibility that the term "judicial proceeding" in Rule 6(e)(3)(E)(i) could encompass impeachment proceedings.

C. Defining "judicial proceeding" to exclude impeachment trials accords with the weight of authority in the lower courts.

Although some lower courts have permitted the disclosure of grand jury materials under Rule 6(e)(3)(E)(i) for use in proceedings outside of judicial-branch courts, they have generally recognized that the defining feature of a "judicial proceeding" is a connection to the judicial

branch. For example, the D.C. District Court explained that courts' "apparent willingness to apply freely the 'judicial proceeding' definition masks a consistency," namely "the ultimate involvement of the judiciary in resolving a controversy in which the grand jury materials were needed." *In re Grand Jury Investigation of Uranium Indus.*, 1979 WL 1661, *6 (D.D.C. Aug. 16, 1979). The Fifth Circuit articulates the distinction well, explaining that the "judicial proceeding[s]" requirement is met "where: the proceedings were designed to culminate in judicial review; the statute authorizing the proceedings envisioned that initial findings subsequently would be presented to a court; or resort to judicial review was clearly contemplated." *In re J. Ray McDermott & Co., Inc.*, 622 F.2d 166, 170 (5th Cir. 1980).

A brief review of cases substantiates the theory. For instance, multiple courts have explained that disciplinary actions against lawyers fall within the meaning of a "judicial proceeding" because "bar committees act as an arm of the court," *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980), and "this function has been assigned to the judiciary from time immemorial," *In re J. Ray McDermott*, 622 F.2d at 170. Likewise, courts have determined that police board and tax court hearings qualify because these proceedings are subject to judicial review. *See In re Grand Jury Subpoenas Duces Tecum*, 904 F.2d 466, 468 (8th Cir. 1990) (tax court); *Special Feb. 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 897 (7th Cir. 1973) (police boards). By contrast, courts have denied disclosure because proceedings lack a connection to the judiciary. *See, e.g.*, *Bradley v. Fairfax*, 634 F.2d 1126, 1129 (8th Cir. 1980) (declining to disclose grand jury materials for a parole revocation hearing because that "procedure is [only] subject to collateral attack in the courts"). Although a few courts have permitted disclosure in the context of impeachment, these cases are not sufficient in number or depth of analysis to overwhelm the broader trend identified. *See infra* Section III.B.

The judicial branch plays no role in impeachment proceedings, and Senate conviction is not subject to judicial review. *Nixon v. United States*, 506 U.S. 224, 235 (1993). Although the Chief Justice presides over presidential impeachment trials, his role is merely administrative. *See* U.S. Const. art. I, § 3, cl. 6. As a result, interpreting Rule 6(e)(3)(E)(i) to exclude impeachment proceedings is consistent with the weight of authority in the lower courts.

D. Permitting the disclosure of grand jury materials for the purposes of an impeachment investigation would contravene the policy of grand jury secrecy.

Among the reasons this Court has identified for maintaining the secrecy of grand jury proceedings is "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958) (citations omitted). Including impeachment proceedings among the few exceptions to the secrecy requirement would be inconsistent with that policy.

"Fear of future retribution or social stigma may," as this Court has recognized, "act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). If this concern is "heightened where the witness is an employee of a company under investigation," *id.*, how much greater is the risk in the context of an investigation involving a public official, particularly a president? "Persons called upon to testify"—likely political operatives—"will consider the likelihood that their testimony may one day be disclosed to outside parties"—political power brokers in Congress. *Id.* Even the district court seemed to recognize that witnesses might be more reticent when testifying before members of Congress. *See In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d at 137 (expressing concern that

witnesses "have provided information to the grand jury . . . that varies from what they [would] tell" HJC).

While the release of grand jury materials in connection with impeachment proceedings may be conducive to Congress' present efforts, it would almost certainly chill witnesses' willingness to cooperate with future grand jury investigations connected to impeachable officials. Far from ensuring that HJC has access to candid testimony, lifting the protections of grand jury secrecy would impair criminal investigations by incentivizing witnesses to similarly hold back before the grand jury. This consequence strongly militates against permitting disclosure. *See Douglas Oil*, 441 U.S. at 222 ("[I]n considering the effects of disclosure on grand jury proceedings, the courts must consider . . . the possible effect upon the functioning of future grand juries.").

E. Constitutional-avoidance principles favor an interpretation of Rule 6(e)(3)(E)(i) that forbids disclosing grand jury materials for impeachment purposes.

Our government is characterized by separate and defined powers. Interpreting Rule 6(e)(3)(E)(i) to allow disclosure of grand jury materials in the context of impeachment proceedings would give rise to two serious separation-of-powers concerns.

First, the disclosure of grand jury materials under Rule 6(e) "require[s] a strong showing of particularized need." *Sells Eng'g*, 463 U.S. at 443. Allowing a district court to determine whether HJC has a "particularized need" for the materials it seeks infringes on the House's "sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. The D.C. Circuit dismissed this concern, reasoning that a 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." *In re Comm. on the Judiciary*, 951 F.3d at 597. However, determining the relevance of such

materials still requires a court to make a substantive judgment. The decision to withhold a particular piece of requested evidence as irrelevant to an impeachment investigation would infringe on the House's sole power of impeachment—not necessarily by precluding access to information (which the House could generally collect independently) but by infringing on the House's discretion within its constitutionally designated sphere. Conversely, if the district court releases any materials HJC requests without question, a congressional committee would effectively enjoy a blank check to bypass grand jury secrecy protections. Neither possibility is acceptable.

Second, Rule 6(e)(3)(E) empowers the district court to "authorize disclosure . . . subject to any other conditions that it directs." As this Court explained, the provision permits a district court to "include protective limitations on the use of the disclosed material." *Douglas Oil*, 441 U.S. at 223. The limitations a district court imposes on HJC in connection with its use of grand jury material could also infringe upon the House's impeachment power or its constitutional authority to "determine the Rules of its Proceedings." *See* U.S. Const. art. I, § 5, cl. 2.

By contrast, excluding impeachment trials from the definition of "judicial proceeding[s]" in Rule 6(e)(3)(E)(i) does not create a separation-of-powers problem, because it does not "deprive the House of its ability to access" the information it needs to fulfill its constitutional duty. *See In re Comm. on the Judiciary*, 951 F.3d at 597. The House is fully empowered to subpoena witnesses and compel testimony. *See Quinn v. United States*, 349 U.S. 155, 160-61 (1955); *see also Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 767-68 (D.C. Cir. 2020) (addressing the context of impeachment). Thus, a court failing to disclose grand jury materials to HJC does not prevent the Committee from obtaining the same information through its own powers. Importantly, disclosure would not solve any problems

related to witnesses' increased reticence when testifying before a congressional committee, but rather would export the same problem to the grand jury's investigation. *See supra* Section I.D. Finally, while HJC may not wish to "*redo* the . . . effort spent on the Special Counsel's investigation," *In re Comm. on the Judiciary*, 951 F.3d at 137 (emphasis added), efficiency is not a controlling constitutional principle, *see Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency.").

In sum, constitutional-avoidance principles favor an interpretation of "judicial proceeding[s]" that excludes impeachment proceedings and sidesteps the separation-of-powers problems a broader interpretation would inevitably raise. *See Clark v. Martinez*, 543 U.S. 371, 379 (2005).

II. Impeachment trials are not judicial in nature.

The meaning of the phrase "judicial proceeding" in Rule 6(e)(3)(E)(i) is fundamentally a question of textual interpretation, but the fact that impeachment trials are not inherently judicial in nature confirms that they do not fall within the exception specified. While there was no clear consensus among the Founders as to the character of impeachment trials, reliable sources suggest that many understood the proceeding to be inherently political, not judicial. That conclusion is reinforced by this Court's precedent.

A. The character of impeachment trials, though disputed, was widely understood to be political during the founding era.

Although the precise nature of impeachment was disputed, impeachment trials were widely considered to be "political" proceedings at the time of the founding, a view difficult to square with a conception of impeachment as judicial in character. The Constitution assigns the role of trying impeachments to the legislative—not the judicial—branch. It also limits Congress'

power to punish an official convicted under the impeachment power while nonetheless providing that the official may "be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. art. I, § 3, cl. 7. Thus, the Framers clearly differentiated impeachment from traditional judicial proceedings in the Constitution's text.

The first impeachment trial, conducted in 1798, offers the best evidence of the lack of consensus concerning the proper classification of impeachment proceedings, as well as the popularity of the view that impeachment is political in nature. *See* Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 Md. L. Rev. 438 (1993). One senator suggested that impeachment trials must be conducted by jury, reasoning that the Sixth Amendment, which requires jury trials in criminal cases, overrode the provision of the original Constitution excepting impeachment trials from the jury requirement. *Id.* at 445-47. His motion was resoundingly defeated. *Id.* at 454. Not only did the opponents deny that impeachment trials constituted criminal trials, but some also denied that they were judicial proceedings at all. For example, Senator Ross explained that "trial by impeachment [is] an extraordinary proceeding, not according to the ordinary course of law." *Federal Legislature, Senate*, Aurora General Advertiser, Feb. 28, 1798, at 2. Instead, he described impeachment as "a kind of ostracism, without banishment." *Id*. Senator Stockton highlighted the fact that impeachment was "not ranged in the constitution with the provisions which concern the judiciary but under the legislative head." *Id.* Senator Paine likewise understood impeachment trials to be political proceedings. Melton, *supra*, at 451.

Other Founders and early American jurists also explicitly maintained that impeachment trials were not judicial proceedings. For instance, James Wilson—Constitutional Convention delegate and Justice on the first Supreme Court—"strongly endorsed the basic idea that one of

the fundamental features of the federal impeachment process is its separateness and distinctiveness from judicial proceedings." Michael J. Gerhardt, *Lessons of Impeachment History*, 67 Geo. Wash. L. Rev. 603, 609 (1999); *see, e.g.*, James Wilson, *Comparison of the Constitution of the United States, with that of Great Britain*, *in* 1 Collected Works of James Wilson 524, 536 (2007) ("Impeachments . . . come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects."). Justice Joseph Story similarly believed that "an impeachment is a proceeding purely of a political nature." 1 Joseph Story, Commentaries on the Constitution of the United States § 803 (Boston, Little, Brown, & Co. 1873); *see also id.* § 812 (explaining that impeachments involve punishments that "are peculiarly fit for a political tribunal to administer").

Even descriptions of impeachment in the *Federalist Papers* are nuanced and, at times, contradictory—displaying a complexity largely glossed over by the lower courts. True, Alexander Hamilton referred to the Senate's "judicial character as a court for the trial of impeachments." The Federalist No. 65 (Alexander Hamilton). However, he also explained how the "nature of the [impeachment] proceeding" differed from that of ordinary trials. *Id.* For example, "[t]he subjects of [an impeachment trial's] jurisdiction," he wrote, "are of a nature which may with peculiar propriety be denominated POLITICAL." *Id.* The description of impeachment as "political" is inconsistent with an understanding of the proceeding as "judicial." Moreover, James Madison, also writing as "Publius," implied that impeachment constituted an exercise of "judicial power" but not a "judiciary act." *See* The Federalist No. 47 (James Madison) ("The entire legislature can perform no *judiciary act*, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is

possessed of the *judicial power* in the last resort." (emphasis added)). Thus, the *Federalist Papers*' position as to whether impeachment trials are judicial in nature is far from plain. And from a broader perspective, these writings merely formed part of a widespread and inconclusive debate over the nature of impeachment trials during the founding era.

B. This Court's precedent confirms that impeachment trials are not judicial in nature.

This Court's precedent confirms that impeachment trials are not judicial in character. In one illustrative case, Walter Nixon, an impeached district court judge, challenged a Senate rule which "allows a committee of Senators to hear evidence," asserting that the rule violates the Constitution by "prohibit[ing] the whole Senate from taking part in the evidentiary hearings." *Nixon*, 506 U.S. at 226, 228. This Court determined that the case was nonjusticiable, *id.* at 226, for reasons that bear on the present controversy.

Judge Nixon "argue[d] that the word 'try'" in the Impeachment Clause "imposes by implication an additional requirement on the Senate in that the proceedings must be in the nature of a judicial trial." *Id.* at 229; *see* U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). This Court explicitly rejected that proposition:

> The word "try," both in 1787 and later, has considerably broader meanings than those to which petitioner would limit it. . . . Based on the variety of definitions . . . we cannot say that the Framers used the word "try" as an implied limitation on the method by which the Senate might proceed in trying impeachments.

Nixon, 506 U.S. at 229-30 (citations omitted). Even Justice White, who concurred only in judgment, concluded that "the term 'try' . . . meant that the Senate should conduct its proceedings in a manner *somewhat resembling* a judicial proceeding." *Id.* at 248 (White, J., concurring in judgment) (emphasis added). Ultimately, the Court's rejection of the proposition that Senate impeachment trials "must be in the nature of a judicial trial," *id.* at 229, constituted a

key basis for its conclusion that "the use of the word 'try' in . . . the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions," *id.* at 230. That holding strongly suggests that impeachment trials are not inherently judicial in character.

A second case supports this conclusion, although the district court cited it for the opposite proposition. *See In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d at 156. In *Marshall v. Gordon*, 243 U.S. 521 (1917), this Court, on separation-of-powers grounds, held that the House could not punish a nonmember for contempt if he did not interfere with the body's ability to legislate. The House had suggested that it could do so when "its committee [was] contemplating impeachment proceedings." *Id.* at 547. The Court dismissed that argument as "wholly without merit." *Id.* It explained that "the suggestion could not be accepted without the conclusion that . . . the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority." *Id.* The fact that the power would be subject to such constitutional constraints, the Court expounded, "would frustrate and destroy the very purpose [for] which the proposition [was] advanced." *Id.* Thus, this Court did not hold that an impeachment proceeding grants the House "judicial authority." On the contrary, it implied that a committee "contemplating impeachment" was not exercising such power.

The other two cases cited by the district court as "confirm[ing] . . . that the Senate's power to try impeachments is judicial" discuss that power only in dicta. *See In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d at 156. One case considered whether the judicial branch can undertake nonjudicial functions, and the impeachment power was simply mentioned in a letter— quoted at length in a footnote—written by a Justice and a district court judge. *Case*

of Hayburn, 2 U.S. 408, 410 (1792). The other case contemplated whether the House of Representatives could punish a nonmember for contempt outside of the impeachment context. *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). Because the discussions of the impeachment power were not necessary to the ultimate ruling in either case, they do not carry precedential weight. *Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001). Thus, this Court's precedent unreservedly militates against classifying the Senate's "sole Power to try all Impeachments" as a judicial power.

III. Historical practice offers no basis for disclosing grand jury materials in the context of impeachment.

Neither pre-enactment history nor post-enactment practice constitutes a basis for disclosing grand jury materials in the context of impeachment. No relevant examples of such disclosures exist before the adoption of the Federal Rules, while post-enactment examples are sparse and not supported by well-reasoned judgments.

A. Rule 6(e) did not codify a historical practice respecting impeachment.

There is no evidence that Rule 6(e) codified a historical practice of disclosing grand jury materials in the context of impeachment inquiries. True, this Court has "afforded significant weight to historical practice" when the practice in question was "venerable and unchallenged." *NLRB v. Noel Canning*, 573 U.S. 513, 574 n.1 (2014) (Scalia, J., concurring in judgment). However, only "one example of a court-ordered disclosure of grand jury materials" in connection with an impeachment proceeding and "prior to the Rule's enactment" has come to light. *See In re Comm. on the Judiciary*, 951 F.3d at 597. One example hardly constitutes a "venerable and unchallenged" tradition.

Moreover, the timing of the order in question contravenes its relevance. The order was dated June 12, 1945. *See Conduct of Albert W. Johnson and Albert L. Watson, U.S. District Judges, Middle District of Pennsylvania: Hearing before Subcomm. of the H. Comm. on the Judiciary*, 79th Cong., at 63 (1945). The Federal Rules of Criminal Procedure were submitted to Congress on January 3, 1945. George H. Dession, *The New Federal Rules of Criminal Procedure*, 55 Yale L.J. 694, 696 (1946). They took effect on March 21, 1946. *See* 1946 Rules, *supra*, at i. Thus, the example cited exists in a temporal no man's land: it occurred too soon to have influenced the drafting of the Rules but too late to have been shaped *by* the Rules. At least on this basis, it is simply impossible to argue that the Rules codified a historical practice with respect to impeachment proceedings.

The courts below sought to analogize impeachment proceedings to congressional proceedings related to "allegations of election fraud or misconduct by Members of Congress." *In re Comm. on the Judiciary*, 951 F.3d at 596. Again, a few examples do not constitute "venerable and unchallenged" practice. Moreover, they do not bear on the specific question of whether an impeachment trial constitutes a judicial proceeding, and this Court should approach the analogy with skepticism. Although the Advisory Committee Notes indicate that the drafters intended to "continue[] . . . traditional practice," Fed. R. Crim. P. 6(e) advisory committee's note (1944 adoption), it is highly unlikely that they contemplated practices surrounding congressional investigations—much less their application to impeachments. Thus, any attempts to impute such intent should be unpersuasive. In any event, the text itself must govern, even if the authors "did not precisely envision" the consequences that resulted from the language they drafted. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982).

B. The few cases allowing the disclosure of grand jury materials under Rule 6(e) in the context of impeachment should not influence this Court.

The cases permitting the disclosure of grand jury materials under Rule 6(e) in the context of impeachment are few in number and generally involved only cursory legal analyses. In fact, only five examples have been brought to light. *See In re Comm. on the Judiciary*, 951 F.3d at 597. Among these, only one court appears to have expressly justified its decision with reference to Rule 6(e)(3)(E)(i), and still the precise legal basis of its conclusion was long disputed.[3]

The D.C. District Court, based on a substantive but vaguely worded legal analysis, concluded that grand jury materials should be released in connection with an impeachment inquiry. *See In re Report & Recommendation of June 5*, 370 F. Supp. 1219. The D.C. Circuit declined to issue a writ of mandamus prohibiting that disclosure. *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (en banc). However, it merely expressed "general agreement" with the district court's reasoning. *Id.* As recently as 2019, confusion remained as to whether the district court (and, thus, the D.C. Circuit) had held that an impeachment trial qualified as a "judicial proceeding" or that it constituted a separate exception, in addition to those enumerated in Rule 6(e)(3)(E). *See McKeever v. Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019). In a case unrelated to impeachment, the D.C. Circuit decided to "read *Haldeman* . . . as fitting within the Rule 6 exception for 'judicial proceedings.'" *Id.* But it did so over the strenuous dissent of Judge Srinivasan, who insisted that *Haldeman* rested on the district court's purported "discretion to release grand jury materials outside the Rule 6(e) exceptions." *Id.* at 854 (Srinivasan, J., dissenting).

[3] One of the five orders cited by the district court has not been digitized. The physical record is currently unavailable for scanning due to coronavirus-related facilities closures. *See* Order, *Nixon v. United States*, No. H88-0052(G) (S.D. Miss. 1988).

The other instances in which the application of Rule 6(e)(3)(E)(i) to impeachment proceedings has been considered are even less informative. In an Eleventh Circuit case, "the parties agree[d], that . . . a Senate impeachment trial qualifies as a 'judicial proceeding,'" so the court never actually considered the "interpretation of [the Rule 6(e)] language." *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1440-41 (11th Cir. 1987). Both the Special Division of the D.C. Circuit and the Eastern District of Louisiana issued their relevant orders without even contemplating whether impeachment trials constituted "judicial proceeding[s]." *See* Order, *In re Madison Guar. Sav. & Loan Ass'n*, No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (per curiam); Order, *In re Grand Jury Investigation of U.S. District Judge G. Thomas Porteous, Jr.*, No. 2:09-mc-04346-CVSG (E.D. La. Aug. 6, 2009). These cases are not sufficient in quantity or quality of analysis to impact this Court's decision on such a consequential matter.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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