

No. 19-1328

In the Supreme Court of the United States

DEPARTMENT OF JUSTICE, PETITIONER

v.

HOUSE COMMITTEE ON THE JUDICIARY

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**PETITIONER'S SUGGESTION OF MOOTNESS AND
MOTION TO VACATE THE JUDGMENT
OF THE COURT OF APPEALS**

EDWIN S. KNEEDLER
*Deputy Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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Pursuant to this Court's Rule 21.2(b), petitioner the Department of Justice respectfully moves that the Court vacate the judgment of the court of appeals in this case and remand with instructions to vacate the district court's order.

1. This case involves an application filed by the House of Representatives Committee on the Judiciary of the 116th Congress for access to grand jury materials compiled in the course of a Special Counsel investigation.¹ The Committee sought those materials in furtherance of an impeachment investigation the Committee was conducting of then-President Trump. Although grand jury materials are ordinarily secret, the district

¹ See Robert S. Mueller, U.S. Dep't of Justice, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, <https://www.justice.gov/archives/sco/file/1373816/download>.

court held that Federal Rule of Criminal Procedure 6(e)(3)(E)(i), which permits disclosure of such materials “preliminarily to or in connection with a judicial proceeding,” authorized the requested disclosure. See Pet. App. 82a-179a. The court reasoned that a Senate impeachment trial is a “judicial proceeding” within the meaning of that Rule, and that use of the materials as part of the Committee’s investigation of whether to recommend articles of impeachment for consideration by the House of Representatives would therefore be “preliminarily to or in connection with a judicial proceeding.” Fed. R. Crim. P. 6(e)(3)(E)(i); see Pet. App. 110a-144a. The court further concluded that the Committee’s investigation concerning the possible impeachment of President Trump was sufficiently advanced to be preliminary to a possible Senate impeachment trial. Pet. App. 144a-163a. The court accordingly granted the Committee’s application and ordered the Department of Justice to provide the Committee with access to the grand jury materials at issue. *Id.* at 178a-179a. The court of appeals affirmed. *Id.* at 1a-81a.

This Court granted a stay of the court of appeals’ mandate—suspending the Department’s authority and obligation to disclose the secret grand jury materials to the Committee—and subsequently granted a writ of certiorari to address whether a Senate impeachment trial is a “judicial proceeding” within the meaning of Rule 6(e). This Court set the case for argument on December 2, 2020.

2. On November 17, 2020, the Committee moved the Court to remove the case from the argument calendar on the ground that, following the convening of a new Congress in the first week of January 2021 and the inauguration of a new President on January 20, 2021, “the

newly constituted Committee will have to determine whether it wishes to continue pursuing the application for the grand-jury materials that gave rise to this case.” Mot. to Recalendar Arg. 2. This Court granted that motion on November 20, 2020.

3. Since that time, President Trump’s term in office has expired, and the newly constituted Committee in the 117th Congress has taken no steps to formally assert a request for the grand jury materials at issue in this case for use in a duly authorized investigation concerning the possible impeachment of now-former President Trump. Thus, although the House of Representatives of the 116th Congress passed resolutions authorizing the Committee to petition for access to the grand jury materials “pursuant to Federal Rule of Criminal Procedure 6(e), including Rule 6(e)(3)(E),” H.R. Res. 430, 116th Cong., 1st Sess. 1-2 (2019), and to carry out “investigations * * * into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach,” H.R. Res. 660, 116th Cong., 1st Sess. 1 (2019), the House of Representatives of the 117th Congress has passed no comparable authorizations.²

Because both President Trump’s term in office and the 116th Congress have expired, and because the

² While the Committee constituted during the 116th Congress had issued a subpoena to then-Attorney General William P. Barr seeking the grand jury materials at issue, see C.A. App. 190-192, the newly constituted Committee has not issued any such subpoena in the 117th Congress. Even if it had, because the current Committee has not been authorized to receive grand jury materials or conduct an impeachment investigation, any such subpoena could not furnish a basis for access to grand jury materials in the present circumstances even if the courts below correctly construed Rule 6(e)(3)(E)(i) to authorize the providing of grand jury materials to the Committee for use in a duly authorized and active impeachment investigation.

newly constituted Judiciary Committee has not formally asserted any basis for access to the grand jury materials at issue for use in a duly authorized investigation concerning the possible impeachment of former President Trump, there is no longer a live controversy over whether Rule 6(e) permitted the district court to authorize and direct the Department of Justice to provide the grand jury materials to the Committee for use in the impeachment investigation it was then conducting.

4. This Court's ordinary practice in the face of such intervening developments while a case is pending a decision on the merits is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Where mootness arises before this Court has completed its review, vacatur ensures that no party is "prejudiced by a [lower-court] decision which in the statutory scheme was only preliminary," and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41.

No persuasive reason exists to depart from that ordinary practice here. The legal consequences that would result from simply dismissing the writ of certiorari in this case without vacating the judgment below are evident. If this Court were to allow the district court's order to take effect, the Department of Justice would be compelled to provide the Committee with access to secret grand jury materials, even though the basis on which the Committee applied for access to the materials, and on which the courts below ordered that the materials be provided to the Committee, has ceased to exist. Moreover, the court of appeals' decision—in holding that Rule 6(e)(3)(E)(i) authorized disclosure to the Committee and that the standard of particularized need

under Rule 6(e) had been satisfied—could have important “legal consequences” for future disputes if it were allowed to remain in place without further consideration and resolution of the relevant issues by this Court. *Munsingwear*, 340 U.S. at 41. Given this Court’s determination that the court of appeals’ decision warranted plenary review, and the significant superseding developments that have occurred since this Court made that determination, the court of appeals’ judgment and the district court’s order should now be vacated.

If an application for access to grand jury materials for use in an impeachment investigation should arise and be pressed again at some future time, there will be an occasion then for the parties to consider and articulate their positions on the relevant issues, and for the courts to decide those issues, in the context of a live and concrete dispute. The sound course now, however, is for the Court simply to restore the status quo ante.

* * * * *

The judgment of the court of appeals should be vacated and the case should be remanded with instructions to vacate the district court’s order authorizing and directing the Department of Justice to provide the grand jury materials to the House of Representatives Committee on the Judiciary.

Respectfully submitted.

EDWIN S. KNEEDLER
*Deputy Solicitor General**

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* The Acting Solicitor General is recused in this case.