U.S. Department of Justice

Criminal Division

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TO: Judge Michael J. Garcia, Chair
Subcommittee on Rule 6(e)
Advisory Committee on the Criminal Rules

FROM: Jonathan J. Wroblewski, Director
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RE: Proposed Amendment to Rule 6(e) Authorizing: (1) the Release of Historically Important Grand Jury Material, and (2) Grand Jury Non-Disclosure Orders

DATE: July 10, 2020

I. Introduction

This is a follow-up to our Subcommittee call of June 30th. We very much appreciate the deliberative course you have set for the Subcommittee, and we look forward to the consideration of the important issues before us. As you requested, this memorandum lays out our current thoughts on these issues.

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As I mentioned on our call, for at least the last several Administrations, the Department of Justice has taken the position – in litigation and in policy debates – that Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of grand jury material unless there is specific authorization for disclosure set out in the Rules. The Department has argued that Rule 6(e) displaces the common law and includes all of the exceptions to grand jury secrecy, and that district courts lack inherent authority to release grand jury material beyond the listed exceptions.

In opposition to a petition for certiorari in *McKeever v. Barr*, the Solicitor General last year argued that "Rule 6(e)'s prohibition on disclosure '[u]nless these rules provide otherwise,' Fed. R. Crim. P. 6(e)(2)(B), makes clear that the circumstances listed in [the Rule] are the only circumstances in which a district court may order disclosure." Brief for Respondent at 10, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020) (No. 19-

307). The Department recognized that the *McKeever* decision created a circuit split among the federal courts of appeals. *Compare In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766-767 (7th Cir. 2016) with *McKeever*, 920 F.3d at 842*; Pitch v. United States*, 953 F.3d 1226 (11th Cir, 2020) (en banc); *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009). Nonetheless, the Solicitor General argued that the petition should be denied "because the question whether and under what circumstances historically significant grand jury materials should be disclosed can be resolved through the rulemaking process, as overseen by this Court under the Rules Enabling Act, 28 U.S.C. 2072." Brief for Respondent at 19, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307). The Solicitor General went on to state that "[r]ulemaking would be a better forum than judicial review to address the policy judgments involved in deciding whether and when grand jury secrecy should expire, including for historically significant records." *Id.* at 20.

In its filing in the Supreme Court, the Solicitor General noted that in 2011, Attorney General Holder proposed amendments to Rule 6(e) that would have "permit[ted] the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." *Id.* at 3. *See also*, Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Crim. Rules (Oct. 18, 2011). The Attorney General explained in the proposal that, although grand jury records of historical significance are catalogued and preserved at the National Archives, no legal mechanism exists for allowing public access to those records. As you know, the Department's 2011 proposal would have authorized release of historically important grand jury material after 30 years, in certain circumstances. *Id*. It would also have granted blanket authority to the Archivist of the United States to release grand jury material 75 years after the relevant case files associated with the grand jury were closed, even without a petition. *Id*.

This past December, the Supreme Court denied the petition for certiorari in *McKeever*. In a statement issued along with the denial, Justice Breyer wrote –

> Whether district courts retain authority to release grand jury material outside of those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.

Statement of Justice Breyer respecting the denial of certiorari, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307).

Following the denial of certiorari, the Advisory Committee received two formal amendment suggestions that Rule 6(e)'s provisions on grand jury secrecy be changed to authorize release of certain grand jury material, including historically important grand jury material. Consistent with the Solicitor General's filing before the Court, we supported the Committee's decision to fully consider such a possible amendment.

II. The Department of Justice Continues to Support a Limited Exception to Grand Jury Secrecy for Historically Important Grand Jury Material

We continue to support an amendment to Rule 6(e) that would preserve the tradition of grand jury secrecy and the exclusivity of the Federal Rules of Criminal Procedure while allowing the release of grand jury records in cases where significant time has elapsed and where the historical value of the records and the interests of the public for their release outweigh any remaining need for continued secrecy.

Rule 6(e) mandates that enumerated categories of individuals maintain grand jury secrecy "unless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). All but two of Rule 6(e)(3)'s exceptions to grand jury secrecy apply to disclosures to a government official. *See* Fed. R. Crim. P. 6(e)(3)(A)-(E). The non-governmental disclosure provisions state:

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

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

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before a grand jury; . . .

Fed. R. Crim. P. 6(e)(3)(E).

Neither of these provisions – nor any other provision of current law – authorizes a petitioner to access historically significant grand jury information. Nor do the rules provide any authorization for release of grand jury material by the National Archives no matter how much time has passed.

Despite the clear text of Rule 6(e), courts nonetheless have looked beyond the exceptions enumerated in Rule 6(e) and have exercised what they have found to be their "inherent authority" to release grand jury material. These courts have found that "special circumstances" justify disclosure of certain historically significant grand jury materials, even when none of Rule 6(e)'s specific exceptions is satisfied. For example, and as we discussed on our call, in *In re Petition of Craig*, 131 F.3d at 99, the Second Circuit found that historical significance can justify disclosure, while affirming non-disclosure on the particular facts.

That courts have no authority to release grand jury materials outside the specific authorization provided by Rule 6(e) is consistent with the Advisory Committee notes accompanying the rules, which state that "Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that general rule." Fed.R.Civ.P. 6(e), advisory committee notes, 2002 Amendments; *see also*, 1 Wright & Miller, Federal Practice and Procedure Section 106 ("reliance on the inherent powers doctrine is suspect"). But while there is no delineated exception for historically significant grand jury material, we recognize – as have the decisions of the courts that have authorized disclosure of historical grand jury records – that the need for secrecy diminishes with the lengthy passage of time and that an amendment to Rule

6(e) authorizing release of historically significant grand jury material is appropriate in certain limited circumstances.

Of course, not all grand jury material is of historical value, and not all is subject to preservation as permanent archival records. Records of "permanent historical value," as that term is defined in title 44 of the United States Code, are determined through records schedules developed jointly by the Department of Justice and the National Archives and approved by the Archivist of the United States. These records are transferred to the National Archives after a period of time – usually a decade or more – when that material may yet be needed for business purposes by the Department. Under current law, Freedom of Information Act requests for the grand jury records directed to the Archives are denied as contrary to Rule 6(e). *See* 5 U.S.C. §552(b)(3).

We believe an amendment to Rule 6(e) would be appropriate to authorize the release of grand jury records of "exceptional historical significance" in certain circumstances after 50 years. As you know, in 2011 the Department proposed possible disclosure after 30 years. Upon further review, we now think 30 years is too short. The 30-year benchmark in the 2011 proposal was based on 44 U.S.C. § 2108(a), which allows the Archivist to disclose certain agency records that have been in existence for more than 30 years notwithstanding certain permissive, statutory restrictions. But this provision has never been interpreted to overcome grand jury secrecy, and we think there are retention standards more akin to what often is in grand jury material and that are the better benchmark here. For example, investigative records of the House of Representatives which contain information involving personal data relating to a specific living person are closed for 50 years. *See*, House Rule VII. https://www.archives.gov/legislative/research/house-rule-vii.html. Similarly, Senate Resolution 474 from the 96th Congress provides that "investigative files relating to individuals and containing personal data, personnel records, and records of executive nominations" cannot be accessed for 50 years. *See*, https://www.archives.gov/legislative/research/senate-resolution-474.html. A 50-year time period would also correspond to the automatic declassification period for certain classified material under Executive Order No. 13,526, § 3.3(b), (c) (2010).

We also no longer believe that Rule 6(e) materials should ever be presumptively available to the public. Presumptive release raised concern with the Committee in 2012 as too dramatic a departure from the traditional rule of grand jury secrecy. We believe now that providing a presumption of release, even after 75 years, would undermine many of the purposes of grand jury secrecy and would have a detrimental effect on grand jury proceedings. Grand jury secrecy should be preserved except in the most extraordinary cases of historical value. We believe that a third-party movant seeking release of grand jury material should always be required to make some showing of need, even in the case of old, historically significant records. There is no strong justification for an automatic disclosure provision; if materials are of historic import, individuals will have every incentive to request them, and providing for automatic disclosure of records no one has seen fit to request is unnecessary.

As to the specific material that would be authorized for release, because there is no simple formula for determining what constitutes "exceptional historical significance" and whether the historical interest outweighs the interest of secrecy, the analysis we suggest be

required – and codified – must inevitably be contextual rather than based upon a rigid formula. Thus, such an amendment should permit a fact-sensitive judicial analysis. Courts could weigh any number of factors, including the age of the materials, the privacy interests at stake, why disclosure is being sought, the specific information being requested, and more. *See*, *In re Petition of Craig*, 131 F.3d at 106.

As we stated in 2011, by articulating broad guidelines for instructing lower courts on the exercise of discretion on this matter, yet at the same time limiting this discretion to the confines of an explicit exception to Rule 6(e), the Committee can maintain the integrity of the Criminal Rules, recognize the important role of the rulemaking process, and preserve the tradition of grand jury secrecy. An explicit historical significance would do all of this, while allowing for enough judicial discretion and flexibility to make an appropriate assessment of historical significance and the need for disclosure.

Such an amendment would recognize the legitimate interest of historians and others interested in gaining access to records. Although the determination of what qualifies as worthy of disclosure under the historical significance exception is inevitably contextual, there are several critical elements that we believe the Committee should address, including the length of time that must necessarily pass after the grand jury testimony is taken before disclosure is permissible. Similarly, we think disclosure should only be permitted when no living person – witness, accused or otherwise (including living descendants) – would be materially prejudiced by disclosure (or in the alternative that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct), disclosure would not impede any pending government investigation or prosecution, and no other reason exists why the public interest requires continued secrecy.

III. Non-Disclosure Orders

In addition to an amendment to Rule 6(e) authorizing disclosure of historically significant grand jury material in certain circumstances, we believe the rule should simultaneously be amended to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances.

Occasionally, Department prosecutors seek orders temporarily blocking disclosure when subpoenaing business or other records as part of a grand jury investigation, mostly to protect ongoing investigations. These orders have traditionally been issued pursuant to the court's authority over the grand jury or pursuant to the All Writs Act, and the courts of appeals have upheld their use. *See, e.g.*, *In re Grand Jury Proceedings,* 417 F.3d 18, 26 (1st Cir. 2005); *In re Subpoena To Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1563-64 (11th Cir. 1989); *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 (8th Cir.), *cert. dismissed* 479 U.S. 1013 (1986).

In response to the *McKeever* decision, however, some district courts are now stepping back from issuing delayed disclosure orders, pointing out that Rule 6(e) does not explicitly permit such an order, and the courts lack the authority to issue one. *See, e.g.*, *In re Application of USA for an Order Pursuant to 28 U.S.C. § 1651(A) Precluding Notice of a Grand Jury*

Subpoena, Case No. 19-wr-10 (BAH), August 6, 2019. We therefore suggest that an additional amendment to Rule 6 – along with the proposal related to historically important grand jury material – be made that would authorize such delayed disclosure orders after consideration of relevant factors. The need for delayed disclosure orders to protect ongoing investigations has been recognized by Congress and the courts. Congress has authorized delayed disclosure orders in certain circumstances in other contexts, like the Stored Communications Act and the Right to Financial Privacy Act, and the proposal we recommend mirrors those congressional authorizations and the weighing of interests required by them.

IV. Inherent Authority

As I mentioned on our conference call, the Department believes that any amendment to Rule 6 should also contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive. A few days after our call, however, the Supreme Court granted review in *Department of Justice v. House Committee on the Judiciary*, 19-1328 (July 2, 2020), which also involves Rule 6(e) and the scope of disclosure permitted by it. It is possible that the issue of whether or not courts retain authority to release grand jury material beyond the list of exceptions to grand jury secrecy contained in the Rule could be addressed by the Court. As a result, we think the Subcommittee should defer consideration of whether or not to include in any Rule 6 amendment a provision on whether the rule contains the full catalogue of exceptions to grand jury secrecy – or whether courts retain authority to release grand jury material beyond the exception in the rule – until after the Court renders a decision, mostly likely in early 2021.

V. Proposal the Department Could Possibly Support

To assist in the consideration of all of these issues, we set out below the text of an amendment that embodies the elements we suggest. We hope it will be helpful in the Subcommittee's consideration.

a. Definition of "archival grand-jury records" through the addition of a new Rule 6(j), following the existing definition of "Indian Tribe" in Rule 6(i).

(j) "Archival Grand-jury Records Defined. For purposes of this Rule, "archival grand-jury records" means records from grand-jury proceedings, including recordings, transcripts, and exhibits, where those files have been determined to have permanent historical or other value warranting their continued preservation under Title 44, United States Code.

b. Addition to Rule 6(e)(3)(E) to permit district courts to grant petitions for the release of archival grand-jury records that have exceptional historical importance after 50 years in appropriate cases.

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

. . .

(vi) on the petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record by a preponderance of the evidence that:

(a) the petition seeks archival grand-jury records;

(b) the records have exceptional historical importance;

(c) at least 50 years have passed since the relevant case files associated with the grand-jury records have been closed;

(d) no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;

(e) disclosure would not impede any pending government investigation or prosecution; and

(f) no other reason exists why the public interest requires continued secrecy.

An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28.

c. Addition to Rule 6(e)(2) to provide an obligation of secrecy for those persons or entities receiving a court order precluding them from disclosing the existence of a subpoena, warrant or court order issued in relation to grand jury proceedings.

(2) *Secrecy.*

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

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

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

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

(viii) a person or entity who receives a court order under Rule 6(e)(8) precluding the person or entity from notifying any person of the existence of a grand jury subpoena and related matters occurring before the grand jury.

d. Creation of a new Rule 6(e)(8), specifying the circumstances under which a district court can enter a non-disclosure order and how long such an order should remain in place.

(8) Non-Disclosure Order. The government may apply for a court order delaying disclosure of a grand-jury matter for a period not to exceed ninety days:

(i) if the court determines that there is reason to believe that notification of the existence of the matter may have an adverse result described in paragraph (ii) of this subsection;

(ii) An adverse result for the purposes of paragraph (i) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(iii) Extensions of the delay of notification of up to ninety days each may be granted by the court upon application of the government.

VI. Conclusion

We hope this memorandum and the proposed amendment text are helpful. We look forward to our discussions and the consideration of these issues over the coming months.

cc: Judge Raymond Kethledge
Professor Sara Sun Beale
Professor Nancy King