

**From:** Beryl Howell  
**Sent:** Sunday, January 3, 2021 8:49 AM  
**To:** John Bates  
**Cc:** Royce Lamberth  
**Subject:** Consideration of Changes to Fed. R. Crim. P. 6(e)

Thank you for the good news that the Criminal Rules Committee is taking up the issue invited by Justice Breyer's statement concurring in the denial of certiorari in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), which rejected the view that courts have inherent authority to disclose grand jury material outside the enumerated exceptions set out in Fed. R. Crim. P. 6(e). *See McKeever v. Barr*, 140 S. Ct. 597, 597-98 (2020)(Breyer, J.)("Whether district courts retain authority to release grand jury material outside 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."). We understand that some proposed amendments to Rule 6(e) have already been submitted to the Committee, including a proposed exception allowing release of otherwise secret grand jury material of historical importance, a version of which proposal the Department of Justice previously (and unsuccessfully) urged the Committee to consider. *See* Letter from Eric Holder, Attorney General, to Reena Raggi, Chair of Advisory Committee on the Criminal Rules (Oct. 18, 2011) (encouraging Committee to amend Rule 6(e)(3) to permit district courts to release historically significant grand jury records so that "the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e).").

At the risk of adding to the Committee's workload, Royce Lamberth and I would like to raise another issue we believe deserves consideration and clarification post-*McKeever*, at least in this Circuit: the authority of the court to release judicial decisions issued in grand jury matters, since these decisions, even in redacted form, arguably reveal "matters occurring before the grand jury," Fed. R. Crim. P. 6(e), given the broad scope of that phrase. *See Bartko v. United States DOJ*, 898 F.3d 51, 73 (D.C. Cir. 2018)(describing scope of Rule 6(e) as covering "information that would 'tend to reveal some secret aspect of the grand jury's investigation, including the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, or the deliberations or questions of jurors.'" (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)); *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 1001 (D.C. Cir. 1999)("this court's definition of 'matters occurring before the grand jury' ... encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'"(quoting *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir.)). Judicial decisions in grand jury matters may arise in historically significant matters, e.g., Watergate investigation of former President Nixon; Whitewater and related investigations of former President Clinton, but not always.

The practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury. *See*,

*e.g., In re Sealed Case*, 932 F.3d 915, 940 (D.C. Cir. 2019)(releasing publicly redacted version of decision affirming district court's contempt orders against two Chinese Banks for failing to comply fully with grand jury subpoenas for records that might clarify how North Korea finances its nuclear weapons program). This practice is critically important to avoid building a body of "secret law" in the grand jury context. *See Leopold v. United States*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) ("The common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch. At bottom, it reflects the antipathy of a democratic country to the notion of 'secret law,' inaccessible to those who are governed by that law.") (internal citations and quotations omitted); *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)(construing FOIA exemption to require "disclosure of all opinions and interpretations which embody the agency's effective law and policy," as consistent with "a strong congressional aversion to secret [agency] law," and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law.") (internal citations and quotations omitted; brackets in original); *Elec. Frontier Found. v. United States DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (discussing policy of applying FOIA exemptions "to avoid the development of "secret law" by federal agencies).

Nevertheless, to the extent that judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in *McKeever* rejected those bases. *McKeever*, 920 F.3d at 844 (holding district court has no "inherent authority to disclose what we assume are historically significant grand jury matters"); *id.* at 845 (holding district court has no authority to disclose grand jury matters outside exceptions in Rule 6(e)(3)). While no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice and the Committee's clarification of the issue would be helpful.

Thank you so much for your offer to pass our concerns along to the Criminal Rules Committee.

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