U.S. Department of Justice

Criminal Division

21-CR-J

Office of Policy and Legislation *Washington, D.C. 20530*

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

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation
Criminal Division, U.S. Department of Justice

RE: Proposed Amendment to Rule 6(e) of the Federal Rules of Criminal Procedure Authorizing the Release of Historical Grand Jury Material

DATE: September 13, 2021

This is a follow-up to our recent Subcommittee call.

As explained in our August 16, 2021 letter, the Department has continued to reexamine its position on the pending proposals to amend Rule 6(e) of the Federal Rules of Criminal Procedure to authorize the release of historical grand jury material. This memorandum lays out the Department's current position on the proposals under consideration by the Subcommittee.

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As you know, in 2011, Attorney General Eric Holder proposed an amendment to Rule 6(e) that would have "permit[ted] the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Crim. Rules (Oct. 18, 2011). We continue to support such an amendment to Rule 6(e). We believe a well-crafted amendment will preserve the tradition and critical role of grand jury secrecy – and the primacy 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 and interest to the public outweighs any remaining need for continued secrecy.

The 2011 proposal would have authorized release of grand jury material of great historical significance after 30 years if certain specified conditions are met. Those conditions

included: that the grand jury material is of exceptional historical importance; that no living person would be materially prejudiced by disclosure (or that any prejudice could be avoided through redaction or other reasonable steps); and that disclosure would not impede any pending government investigation or prosecution. *Id*. The proposal 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 court petition. *Id*.

This general framework – that is, permitting courts to authorize the release of grand jury material of great historical significance after a period of years – is also reflected in the proposals the Subcommittee has been considering. We continue to believe that this general approach is the right one.

We also recognize, as the Subcommittee discussions to date and the various submitted proposals have shown, that determining what constitutes an adequate time is not clear cut or a matter of scientific precision. Various benchmarks point in different directions. For example, Title 44 U.S.C. § 2108 allows the Archivist of the United States to request the disclosure of grand jury records to the National Archives after the records have been in existence for thirty years. *See also, Schmerler v. FBI*, 696 F. Supp. 717, 721, 722, *reh. denied*, 700 F. Supp. 73 (D.D.C. 1988), *rev'd on other grounds, Schmerler v. F.B.I.*, 900 F.2d 333, 334 (D.C. Cir. 1990), *abrogated by U.S. Dep't of Just. v. Landano*, 508 U.S. 165, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993) (interests in secrecy of FBI investigation greatly diminished under Freedom of Information Act, 5 U.S.C. § 552, after passage of 50 years). In *Wilkinson v. FBI*, 633 F. Supp. 336, 345 (C.D. Cal. 1986), the court held that 20- to 40-year-old documents can be disclosed under the Freedom of Information Act due to diminished privacy interest of those mentioned in such documents. Under Executive Order No. 13,526, 75 Fed. Reg. 705 (2010), certain classified records of historical value are automatically declassified, subject to specified exceptions, when they are more than 25 years old and determined to have permanent historical value. Federal district courts in the Second Circuit that have accepted an historical interest exception have released documents in cases where the proceedings were 50 to 60 years in the past. *See In re Am. Hist. Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (permitting the release approximately 50-year-old records related to Alger Hiss); *In re Nat'l Sec. Archive*, No. 08 Civ. 6599 AKH, 2008 WL 8985358 (S.D.N.Y Aug. 26, 2008) (authorizing the release of nearly 60-year-old grand jury transcripts and minutes related to the Julius and Ethel Rosenberg, Abraham Brothman, and Miriam Moskowitz grand jury proceedings).

After considering these and other benchmarks, we believe that Rule 6 should allow consideration of petitions for release of grand jury information of exceptional or significant historical importance after 25 years following the end of the relevant grand jury. We believe this timeframe is appropriate if the rule limits release of grand jury material to cases where the district court finds that no living person would be materially prejudiced by disclosure (or that any prejudice could be avoided through redaction or other reasonable steps) and that disclosure would not impede any pending government investigation or prosecution. Further, we think release should only be authorized when the reviewing court finds that the public interest in disclosing the grand jury matter outweighs the public interest in retaining secrecy.

We also believe there should be a temporal end point for grand jury secrecy for materials that become part of the permanent records of the National Archives. Although most categories of historically significant federal records, including classified records, eventually become part of the public historical record of our country, Rule 6(e) recognizes no point at which the blanket of grand jury secrecy is lifted. The public policies that justify grand jury secrecy are, of course, "manifold" and "compelling." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). But as Attorney General Holder indicated in his letter to the Committee in 2011, they do not forever trump all competing considerations. After a suitably long period, in cases of exceptional or significant historical importance, the need for continued secrecy is eventually outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government.

The Department believes that after 70 years, the interests supporting grand jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have normally faded. That is generally true for government records that are highly protected against routine disclosure. For example, most classified records in the custody of the Archivist that have not previously been declassified become automatically declassified. We think Rule 6 should provide that after 70 years, grand jury records would become available to the public in the same manner as other archival records in NARA's collections, typically by requesting access to the records at the appropriate NARA research facility or by filing a FOIA request. *See generally*, 36 C.F.R. Part 1256, Subpart B.

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These are a summary of the Department's views. These proposals may benefit from some procedural safeguards. 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