

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**TO:** Hon. John D. Bates, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Raymond M. Kethledge, Chair  
Advisory Committee on Criminal Rules

**RE:** Report of the Advisory Committee on Criminal Rules

**DATE:** December 4, 2020

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## **I. Introduction**

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The draft minutes from the meeting are attached to this report. There are no action items. The Committee's report presenting a draft emergency rule is included as an attachment to the joint report at Tab 2 of the agenda book. What remains for this report are the following information items:

- The Committee's plan to hold a virtual miniconference on several proposals to amend Rule 6 to allow for disclosure of materials of historical importance and to authorize delayed disclosure of grand jury subpoenas under certain circumstances;
- The Committee's decision not to move forward with a suggestion to authorize videoconferencing without the parties' consent in non-emergency circumstances;
- The Committee's decision not to move forward with a suggestion to adopt short deadlines for enforcing and challenging subpoenas and appealing from rulings; and

- The Committee’s decision not to move forward with a suggestion to amend Criminal Rule 59(b)(1) or Civil Rule 72(b) to eliminate a difference in phrasing.

## II. Rule 6 (The Grand Jury)

The Committee has received three formal suggestions that it consider amending Rule 6(e)’s provisions on grand jury secrecy.

The first two proposals—described in more detail in our June report—are from (1) Public Citizen Litigation Group and five associations of historians and archivists, and (2) the Reporters Committee for Freedom of the Press and 30 additional media organizations. These proposals seek an exception in Rule 6 to grand jury secrecy to allow disclosure of materials of historical importance or public interest, as well as a statement that nothing in Rule 6 limits whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances.

The Committee subsequently received a suggestion (20-CR-H) from the Department of Justice to authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

A subcommittee is reviewing the proposals, and it plans to hold a virtual miniconference in the spring to gather a wide range of perspectives. We intend to invite participants with first-hand experience, including not only historians, archivists, and journalists who wish to have access to grand jury materials, but also persons who can speak to the interests of victims, witnesses, and prosecutors in cases in which grand jury materials have been sought. The subcommittee will also invite participants who can speak to the Department of Justice’s proposal that courts be given the authority to order that notification of subpoenas be delayed. These participants might include, for example, technology companies that favor providing immediate notice to their customers.

As noted, two of the proposals seek amendments that would address the courts’ inherent authority to disclose grand jury materials. The Committee is closely following a case in the Supreme Court that presents the question whether the exceptions in Rule 6 are exclusive. The respondent in *Department of Justice v. House Judiciary Committee*, No. 19-1328 (*cert. granted*, July 2, 2020), has relied on the courts’ inherent authority as an alternative ground for upholding the decision below. Following the election, on November 20, 2020, the Court granted the respondent’s motion to remove the case from the Court’s December argument calendar.<sup>1</sup>

## III. Items Removed from the Committee’s Agenda

The Committee decided not to move forward with a suggestion (20-CR-G) to authorize videoconferencing during certain procedures without the parties’ consent in non-emergency circumstances. In recent years the Committee has received several similar proposals to expand the

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<sup>1</sup> The motion noted that after a new Congress is convened and Joseph Biden inaugurated as president, the newly constituted House Judiciary Committee will have to determine whether it wishes to continue pursuing the application for the grand jury materials that gave rise to this case.

use of videoconferencing. Each time the Committee has reaffirmed the importance of in-person proceedings, even in cases in which the parties consent to virtual proceedings. Accordingly, there was no interest in further consideration of this issue at the present time.

The Committee decided not to move forward with a suggestion (19-CR-E) that it tighten the procedures for enforcing or challenging congressional subpoenas by imposing very short deadlines for replies, arguments, and decisions. Rules establishing deadlines for judicial action have been generally disfavored. And in this case it was unclear whether the suggestion (which was also addressed to the Civil and Appellate Rules Committees) fell within the jurisdiction of the Criminal Rules Committee. No member supported further consideration.

Finally, the Committee removed from its agenda a suggestion (20-CR-F) addressed to both the Civil and Criminal Rules Committees drawing attention to a difference in the wording of the provisions requiring magistrate judges to mail or serve copies of their reports and recommendations. Because the suggestion stated that the phrasing of the Criminal Rule was preferable, there was no need for further consideration by the Criminal Rules Committee.