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March 2, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

[Via email to: RulesCommittee_Secretary@ao.uscourts.gov]

Re: Proposal to revise Federal Rule of Criminal Procedure 6(e)

Dear Ms. Womeldorf:

On behalf of Public Citizen Litigation Group (PCLG), American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists, I am writing to propose an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure. The proposed amendment would make clear that district courts have authority to order disclosure, in appropriate circumstances, of grand jury materials of historical significance, and it would provide a temporal end point for grand jury secrecy with respect to materials that are stored as archival records at the National Archives.

American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists have been successful petitioners in several cases seeking the release of grand jury records of great historical significance. For example, in 2008 and 2015, they successfully petitioned for release of grand jury records concerning the indictment of Julius and Ethel Rosenberg. *See In re Petition of Nat'l Sec. Archive*, No. 08 Civ. 6599, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008); *In re Petition of Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015). Representing clients including these organizations and individual historians, PCLG has handled several cases on unsealing grand jury records based on historical significance. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011) (ordering release of Richard Nixon's Watergate grand jury testimony); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (ordering release of some of the transcripts of the Alger Hiss grand jury proceedings). The release of grand jury materials through this type of petition has helped to complete the historical record and shed light on the course of judicial proceedings in these historically important cases.

The Advisory Committee on Criminal Rules concluded in 2012 that amending Rule 6(e) was unnecessary because it agreed with the federal courts' consensus that the existing rule did not displace the courts' inherent authority to order disclosure of historically significant grand jury materials. Since that time, however, the former judicial consensus has been disturbed by a D.C.

Circuit decision holding that the existing rules do not permit such disclosure. Revision of Rule 6(e) is therefore now needed to protect the public's interest in access to these important materials.

Introduction

In 2011, then-Attorney General Eric Holder wrote to the Advisory Committee on Criminal Rules to request an amendment to Rule 6(e) to address district courts' authority to order disclosure of certain grand jury material of historical significance. His letter was prompted by a case brought by PCLG on behalf of American Historical Association, American Society for Legal History, Organization of American Historians, and Society of American Archivists, *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), in which the district court granted a petition to unseal the 1975 grand jury testimony of former President Richard Nixon.

At that time, both the Second and Eleventh Circuits had recognized the district courts' inherent authority to release grand jury materials. See *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004) (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398–99 (1959), and *In re Petition to Inspect & Copy Grand Jury Materials (In re Hastings)*, 735 F.2d 1261 (11th Cir. 1984)). And the Tenth Circuit had implicitly held the same. See *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178–79 (10th Cir. 2006) (remanding to district court to decide whether case presented exceptional circumstances, without deciding question of courts' inherent authority).

Although Mr. Holder's letter, sent on behalf of the Department of Justice, disagreed that courts have inherent authority to order disclosure except as specified in Rule 6(e), the letter agreed that disclosure of grand jury records in cases of historical importance was often sensible: "After a suitably long period, in cases of enduring 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." Letter from Attorney General to Advisory Comm. on Crim. Rules, Oct. 18, 2011, at 1, *reprinted in* Advisory Comm. on Crim. Rules, Agenda Book 217 (Apr. 2012), https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.

After considering Mr. Holder's request, a letter sent in response by PCLG, the case law, and other pertinent materials, the Committee declined to revise Rule 6(e) because it found that courts were aptly addressing this situation through exercise of inherent authority. The Committee minutes state: "Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority." Advisory Comm. on Crim. Rules, Minutes 7, *supra* p.9 (emphasis added); see also Agenda Book, *supra*, at 209–71 (documenting Committee's detailed assessment of Rule 6(e)'s text, history, precedent, and policy).

At that time, the D.C. Circuit had indicated that district courts' authority was not circumscribed by Rule 6(e). See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (releasing grand jury material because it became "sufficiently widely known" that it lost "its character as Rule 6(e) material" (internal quotation marks omitted)). More recently, however, it held that district courts lack authority to release grand jury material except as

specifically provided for in Rule 6(e) and, therefore, that they may not release materials of historical interest notwithstanding the passage of time and other circumstances indicating that the public interest in disclosure outweighs the concerns underlying grand jury secrecy. *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019).

Because the D.C. Circuit in *McKeever* created a conflict among the Circuits, the historian who sought records in that case filed a petition for certiorari to the Supreme Court. In opposing the petition, the Solicitor General wrote: “Although the decision below creates a conflict with decisions of other circuits, that conflict can and should be addressed in the first instance by the rules committee, which has the ability to amend Rule 6(e).” Br. for Resp. at 9, *McKeever v. Barr*, No. 19-307 (U.S. 2019).

The Supreme Court denied the petition. In a statement with respect to the denial, Justice Breyer acknowledged that the lower courts are in disagreement, that the DC Circuit’s holding “appears to conflict with the considered views of the Rules Committee,” and that the issue is important. *McKeever v. Barr*, 539 U.S. ___, 2020 WL 283746 (Jan. 21, 2020) (Breyer, J., concurring). He concluded that the issue is one “the Rules Committee both can and should revisit.” *Id.*

Meanwhile, the Eleventh Circuit has sua sponte decided to rehear en banc a case presenting the same issue. *See Pitch v. United States*, 925 F.3d 1224 (11th Cir. 2019). In that case, a panel of the Eleventh Circuit had applied its longstanding circuit precedent, *In re Hastings*, to affirm a district court order releasing grand jury materials relating to the 1946 Moore’s Ford Lynching—considered by some to be the “last mass lynching in American history.” *Pitch v. United States*, 915 F.3d 704, 707, 709–11 (11th Cir. 2019); *see id.* at 709–11. The full court vacated the panel decision and heard oral argument in the fall, but it has not yet issued the en banc decision.

Accordingly, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists now request that the Committee on Rules of Practice and Procedure revisit the issue and propose amending Federal Rule 6 to incorporate the view stated by the Advisory Committee in 2012: that district courts possess the authority to “reasonably resolve[] applications” for release of grand jury material in cases of historical importance. The groups also propose that, in addition to defining the circumstances when exercise of authority to release historical materials is appropriate, the Committee propose a further amendment to Rule 6(e) specifying that its exceptions do not limit the federal courts’ inherent authority to order disclosures in exceptional circumstances.

Background on Rule 6(e)

Federal courts follow the “long-established policy that maintains the secrecy of the grand jury proceedings.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). Grand jury proceedings are conducted secretly to preserve the anonymity of grand jurors, to facilitate uninhibited deliberations, to protect witnesses against tampering, to encourage full disclosure, and to avoid alerting suspects about the investigation and possible cooperating witnesses. *Douglas Oil*

Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979); *Aisenberg*, 358 F.2d at 1346. Nonetheless, grand jury secrecy “is not absolute.” *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). For example, a court may authorize disclosure of a grand jury matter “preliminarily or in connection with a judicial proceeding,” Fed. R. Crim. P. 6(e)(3)(E)(i), or “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury,” *id.* 6(e)(3)(E)(ii).

Although Federal Rule of Criminal Procedure 6(e)(3) sets forth several exceptions to the general rule of secrecy, “the rule is not the true source of the district court’s power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court.” *In re Hastings*, 735 F.2d at 1268. As the Supreme Court has stated, “Rule 6(e) is but declaratory” of the principle that “disclosure [is] committed to the discretion of the trial judge.” *Pittsburgh Plate Glass Co.*, 360 U.S. at 399; *see Douglas Oil Co.*, 441 U.S. at 223 (holding that a court has substantial discretion to determine whether grand jury transcripts should be released).

Accordingly, several courts have long recognized that courts have inherent authority to order release of grand jury material outside Rule 6(e)’s enumerated exceptions, when warranted by special circumstances. *See Aisenberg*, 358 F.3d at 1347 (citing *In re Hastings*, 735 F.2d 1261); *Craig*, 131 F.3d at 102–03; *see also In re Special Feb., 1975 Grand Jury*, 662 F.2d 1232, 1235–36 (7th Cir. 1981) (noting that the “court in rare situations may have some discretion” to permit disclosure outside Rule 6(e)), *aff’d on other grounds sub nom. United States v. Baggot*, 463 U.S. 476 (1983). These cases are consistent with the “history of Rule 6(e),” which “indicate[s] that the exceptions permitting disclosure were not intended to ossify the law, but rather are subject to development by the courts.” *In re Hastings*, 735 F.2d at 1269, *quoted in Aisenberg*, 358 F.3d at 1347 n.30; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (stating that courts should “not lightly assume” that the Federal Rules diminish “the scope of a court’s inherent power”).

As a result of the courts’ leading role, “exceptions to the secrecy rule generally have developed through conformance of Rule 6 to the ‘developments wrought in decisions of the federal courts,’ not *vice versa*.” *Am. Historical Ass’n*, 49 F. Supp. 2d at 286 (quoting *In re Hastings*, 735 F.2d at 1268). For example, in 1977, the Rule was amended to change the definition of “other government personnel” to whom disclosure may be made, following a trend in the courts of allowing disclosure to certain government personnel. *See* Fed. R. Crim. P. 6 advisory committee’s note to 1977 amendment. In 1979, the Rule was amended to add a requirement that grand jury proceedings be recorded, another change in response to a trend among the courts. *See id.*, advisory committee’s note to 1979 amendment. And in 1983, the Advisory Committee explained that Rule 6(e)(3)(C) was being amended to state that grand jury materials may be disclosed to another grand jury, which “even absent a specific provision to that effect, the courts have permitted ... in some circumstances.” *Id.*, advisory committee’s note to 1983 amendments; *see also Am. Historical Ass’n*, 49 F. Supp. 2d at 286 (listing additional examples in which Rule 6 was revised to conform to court practices).

In light of this history, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists agree with the Advisory Committee's view, as stated in 2012, that Rule 6(e) as currently written should pose no obstacle to the courts' exercise of inherent authority to order unsealing of records in appropriate circumstances not listed in the Rule. *See* Advisory Comm. on Crim. Rules, Minutes, *supra*, at 7 (agreeing that courts have inherent authority to unseal grand jury records in appropriate circumstances). Properly understood, Rule 6 does not limit, but rather reflects, the courts' authority.

Rule 6(e)(2), entitled "Secrecy," states at subdivision (A): "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Subdivision B in turn provides that specified "persons must not disclose a matter occurring before the grand jury"—including grand jurors, interpreters, court reporters, government attorneys, and certain other government personnel. Thus, the Rule does not impose a blanket nondisclosure requirement, as it does not require secrecy by witnesses, their family members, or judges, for example. *See* Rule 6, advisory committee's note to 1944 Rule ("The rule does not impose any obligation of secrecy on witnesses."). Critically, Rule 6(e)(2) does not prohibit a *court* from disclosing grand jury matters.

Immediately following subdivision (2), entitled "Secrecy," is subdivision (3), entitled "Exceptions." Although this subdivision does not address exceptional circumstances such as significant historical interest, exceptions do not exist in a vacuum; they must be exceptions *to* something. In Rule 6(e), subdivision (3) states exceptions to the subdivision (2) secrecy requirement. But a person requesting that the court release historically significant grand jury materials is not seeking an exception to subdivision (2) because, again, subdivision (2) does not impose a secrecy requirement on *courts*.

In short, Rule 6(e) does not impose a secrecy requirement on courts, and exercise of a district court's inherent authority would not undermine any of the purposes of Rule 6(e). Nonetheless, given the D.C. Circuit's contrary decision in *McKeever*, to avoid additional litigation over the issue, and to facilitate efforts by historians, archivists, and journalists to uncover and preserve important historical records, an amendment to Rule 6(e) that expressly acknowledges the district courts' authority to release records in cases of historical importance is warranted. Doing so would also follow the rulemakers' historical practice of revising Rule 6 to conform to the decisions of the federal courts. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 286. Additionally, the rule should expressly acknowledge that the stated exceptions do not deprive the courts of inherent authority they otherwise possess to authorize release of grand jury materials in other exceptional circumstances.

Rationale for amendments to Rule 6(e)

1. Cases of historical significance

a. Important interests served by disclosure

As discussed above, several courts have exercised their inherent authority to grant petitions to unseal grand jury records in cases of particular historical interest. Although the cases are relatively few in number, they go back decades and illustrate the importance of the courts' ability to order disclosure of historical records.

For example, in 1987, historian Gary May successfully sought the release of the minutes of grand jury proceedings pertaining to William Remington, a prominent public official who was indicted for perjury in 1950 by the second of the two grand juries involved in the Alger Hiss investigation based on testimony from former Soviet spy Elizabeth Bentley, who accused Remington of being a Communist spy. *See In re Petition of May*, No. 11-189 (S.D.N.Y. Jan. 27, 1987, as amended Apr. 17, 1987). The court noted "the alleged abuses of [this] grand jury which have been the subject of published decisions" gave the public a "strong interest" in "understanding of the administration of justice" in this case of "undisputed historical interest." *May*, slip op. at 4 (citing *United States v. Remington*, 208 F.2d 567 (2d Cir. 1953); *United States v. Remington*, 191 F.2d 246 (2d Cir. 1951)).

In 1990, in *In re Petition of O'Brien*, No. 3-90-X-35 (M.D. Tenn. 1990), a court ordered the disclosure of grand jury records from the investigation of the 1946 race riot in Columbia, Tennessee. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 293 (citing *O'Brien*). And in 2009, in *In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009), retired law professor William Tabac petitioned for the release of the grand jury testimony of four witnesses pertaining to the 1963 jury tampering indictment of Jimmy Hoffa. Finding the testimony to be "of great historical importance," the court held that the petitioner had satisfied his burden of demonstrating special circumstances and that the balance of factors weighed in favor of releasing the testimony of a witness who was deceased, and ordered release of that witness's grand jury testimony (while denying release of the testimony of three witnesses who might still be alive). *Id.* at *2.

In response to petitions from American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists, courts have also unsealed records concerning the grand jury proceedings leading to the indictments of Alger Hiss and of Julius and Ethel Rosenberg in light of the historical impact of those cases. *See Am. Historical Ass'n*, 49 F. Supp. 2d at 287–88 (granting unsealing of portions of transcripts from Alger Hiss grand jury proceedings related to four specific issues of historical importance); *Nat'l Sec. Archive*, 2008 WL 8985358 (granting unsealing of transcripts of all witnesses in the Rosenberg grand jury proceeding who were deceased, had consented to the release of the transcripts, or were presumed to be indifferent or incapacitated based on their failure to object); *Nat'l Sec. Archive*, 104 F. Supp. 3d at 629 (granting petition to unseal transcripts of two witnesses in the Rosenberg grand jury proceeding who had died since 2008).

In 2011, a district court in the District of Columbia granted the petition of four of these organizations and historian Stanley Kutler to unseal the historically important transcript of the deposition of Richard Nixon taken in 1975 in connection with proceedings of the third Watergate grand jury. *See Kutler*, 800 F. Supp. 2d at 50. Had this petition been filed today, public access to this valuable historical material would have been barred by the D.C. Circuit's subsequent decision in *McKeever*.

Importantly, court orders unsealing historically significant grand jury records not only have advanced general understanding of our nation's history, but also have provided important insight into the functioning of the judicial process in important cases. For example, the records from the Rosenberg 1950 grand jury that were unsealed in 2015 showed that Ethel Rosenberg's brother David Greenglass, himself part of the spying conspiracy, had testified that Ethel was not involved: "[H]onestly, this is a fact: I never spoke to my sister about this at all." *See Nat'l Sec. Archive, New Rosenberg Grand Jury Testimony Released*, July 14, 2015, <https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/>. At trial, however, he testified that Ethel had typed handwritten notes for delivery to the Soviets and operated a microfilm camera hidden in a console table. *Id.* (noting that Greenglass later admitted that he had lied on the stand to protect his wife). The released grand jury testimony thus suggests that prosecutors presented trial testimony concerning Ethel Rosenberg's role that they knew or had reason to know contradicted earlier sworn testimony by the same witness. *Id.* (stating "that the documents provided answers to three key questions: Were the Rosenbergs guilty of spying? Yes. Was their trial fair? Probably not. Did they deserve the death penalty? No."). The international news coverage of revelations from the records speaks to their significant historical importance. *See, e.g.,* Robert MacPherson, *Grand jury testimony brings up questions on Ethel Rosenberg guilt*, *The China Post*, July 17, 2015, available at <https://nsarchive2.gwu.edu/news/20150714-Rosenberg-spy-case-Greenglass-testimony/The%20China%20Post.pdf>; Sam Roberts, *Secret Grand Jury Testimony from Ethel Rosenberg's Brother Is Released*, *N.Y. Times*, July 15, 2015, <https://www.nytimes.com/2015/07/16/nyregion/david-greenglass-grand-jury-testimony-ethel-rosenberg.html>; Mahita Gajanan, *'Atom spy' Ethel Rosenberg's conviction in new doubt after testimony released*, *The Guardian*, July 15, 2015, <https://www.theguardian.com/us-news/2015/jul/15/ethel-rosenberg-conviction-testimony-released-atom-spy>.

Grand jury records unsealed in other cases have made similarly important contributions to the historical record. The unsealed transcripts of the Alger Hiss grand juries show that, unknown to Hiss and his defense counsel, testimony of Whittaker Chambers, the key witness against Hiss, was contradicted by two grand jury witnesses. *See The Alger Hiss Story*, <https://algerhiss.com/history/new-evidence-surfaces-1990s/the-grand-jury-minutes/>. Conversely, redacted grand jury transcripts concerning the 1963 indictment of Jimmy Hoffa released by the court in *In re Tabac* suggest that concerns about prosecutorial misconduct in that proceeding are unfounded. *See Edecio Martinez, What Jimmy Hoffa Knew: Did Powerful Teamsters Boss Plot to Ambush the FBI?*, *CBS News*, July 27, 2009, <https://www.cbsnews.com/news/what-jimmy-hoffa-knew-did-powerful-teamsters-boss-plot-to-ambush-fbi/>.

As these examples show, courts' ability to exercise inherent authority to unseal grand jury records, although sparingly exercised, is a vital tool for completing the public historical record of significant events, including the record of the functioning of the judicial process, in historically significant cases.

b. Considerations for evaluating requests to disclose

To set forth a test for assessing requests for disclosure of grand jury material in cases of historical importance, the “special circumstances” test articulated in *Craig* and applied by district courts in several subsequent cases provides an appropriate starting point. *Craig* sets forth a fact-intensive inquiry in which the court, weighing nine factors, balances the historical importance of the grand jury records against the need to maintain secrecy: (1) the identity of the parties seeking disclosure, (2) whether the government or the defendant in the grand jury proceeding opposes disclosure, (3) why the disclosure is sought, (4) what specific information is sought, (5) the age of the grand jury records, (6) the current status—living or dead—of the grand jury principals and of their families, (7) the extent to which the grand jury records sought have been previously made public, either permissibly or impermissibly, (8) the current status—living or dead—of witnesses who might be affected by disclosure, and (9) any additional need for maintaining secrecy. *See Craig*, 131 F.3d at 105–06. At the same time, this test appropriately leaves some room for the courts to exercise their judgment in light of the particular circumstances. *See Douglas Oil Co.*, 441 U.S. at 223 (stating that, under Rule 6(e), “we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion” (citing *Pittsburgh Plate Glass Co.*, 360 U.S. at 399)).

Opinions in cases seeking grand jury records show that this type of test does not result in automatic granting or denial of petitions, but rather guides thoughtful consideration to ensure that unsealing occurs only when it does not threaten the rationale for secrecy and does serve the public interest in a complete record in cases of historical interest. *See, e.g., Craig*, 131 F.3d at 106 (affirming denial of petition); *Tabac*, 2009 WL 5213717, at *2 (after weighing *Craig* factors, granting petition); *Am. Historical Ass’n*, 49 F. Supp. 2d at 297 (after weighing *Craig* factors, granting petition as to part of the record and denying as to part). Release of records under the *Craig* test does not threaten grand jury proceedings or undermine the purposes that support secrecy generally. Significantly, in opposing requests for grand jury records in cases including *Kutler*, *Pitch*, and *McKeever*, the government did not suggest that grand jury materials released on this basis have caused any problems for witnesses, targets, or prosecutors, or in any way undermined grand jury proceedings.

Notably, the Department of Justice has agreed—both in its 2011 letter to the Advisory Committee on Criminal Rules and in a 2019 filing in *Pitch*—that if courts have authority to release historical materials, these factors set forth the appropriate considerations that should guide exercise of that authority. *See* Letter from Att’y Gen., *supra*, at 11; DOJ En Banc Br. at 41, *Pitch v. United States*, No. 17-15016 (11th Cir. Aug. 12, 2019) (stating that “[a]ssuming arguendo that the district court properly entertained Pitch’s petition, the district court did not err in employing the list of factors to be considered in weighing such a request outlined by the Second Circuit in *In re Craig*”);

id. at 42 (stating that “the non-exhaustive factors identified in *Craig* provide rough guidance, while permitting consideration of unique factors that may weigh against disclosure in a given case”).

2. End point for grand jury secrecy

We further propose that Rule 6(e) recognize that, at some point, the bases for the general rule in favor of non-disclosure of grand jury records no longer justify continued secrecy. We suggest 60 years as a reasonable end point, after which grand jury records should be available to the public.

In 2011, when the Attorney General suggested that the Committee consider amending Rule 6(e), he proposed that, 75 years after a case is closed, grand jury records stored at the National Archives and Records Administration (NARA) 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.” Letter from Att’y Gen., *supra*, at 8. The letter explained that “[a]fter 75 years, the interests supporting grand-jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have virtually faded. *Id.*; *see id.* 8 n.4 (noting that classified records are automatically declassified after 75 years).¹ Thus, although the letter suggested a longer time period, the Attorney General himself proposed a temporal end point.

Not all grand jury records are stored at NARA. By statute, the Archivist of the National Archives and Records Administration (NARA) is authorized to direct the transfer to NARA of records that are at least 30 years old and determined by the Archivist “to have sufficient historical or other value to warrant their continued preservation.” 44 U.S.C. § 2107. The head of the agency that has custody of the records, however, can maintain the records for the agency’s use where needed. *Id.* Although records of 60-year-old cases of historical interest presumably will be maintained at NARA, there is no reason to write into the Rule a requirement that the records be at NARA. We therefore propose that the Rule simply provide for a 60-year end point on secrecy of grand jury records.

3. Exceptional circumstances generally

In addition to exercising authority to release materials of historical importance, courts have long exercised inherent authority to disclose grand jury material in exceptional circumstances. Indeed, although in *McKeever* the D.C. Circuit held that courts lack inherent authority to disclose grand jury material to the public in any circumstance, that court in prior cases had recognized that courts do have such authority. For example, the D.C. Circuit released grand jury material concerning journalist Judith Miller because it had become “sufficiently widely known” during the

¹ The Attorney General also proposed that Rule 6(e) should permit courts to order disclosure of grand jury records *only* if those records were at least 30 years old *and* had been transferred to NARA.

subsequent trial and in public statements by grand jury witnesses. *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d at 154–55; *see In re Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (noting that where grand jury witness’s attorney “virtually proclaimed from the rooftops that his client had been subpoenaed,” this fact “lost its character as Rule 6(e) material” (internal quotation marks omitted)); *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (affirming district court decision holding that Rule 6(e) did not bar court from disclosing grand jury report and recommendation to congressional committee); *see also In re Bullock*, 103 F. Supp. 639, 641–42 (D.D.C. 1952) (rejecting a “literal interpretation” of Rule 6(e) and ordering release of grand jury records to the Commissioners of the District of Columbia so that they could undertake a disciplinary investigation of a Metropolitan Police Department officer).

Because exceptional circumstances by their nature cannot necessarily be identified in advance, we recommend that the Committee propose an amendment to Rule 6(e) to make explicit that the Rule does not limit any inherent authority the district courts otherwise possess to unseal grand jury records in exceptional circumstances.

Proposed amendment

For the foregoing reasons, PCLG, American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists request that, the Committee revise Rule 6(e) to add the following bolded text:

(3)(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:

....

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

- (a) the petition seeks grand-jury records of historical importance;**
- (b) at least 20 years have passed since the relevant case files associated with the grand-jury records have been closed;**
- (c) no living person would be materially prejudiced by disclosure, or any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;**
- (d) disclosure would not impede any pending government investigation or prosecution; and**
- (e) no other reason exists why the public interest requires continued secrecy.**

An order granting or denying a petition under Rule 6(e)(3)(E)(vi) is a final decision for purposes of Section 1291, Title 28.

....

(8) Nothing in this Rule prevents disclosure of grand-jury materials more than 60 years after closure of the case file.

(9) Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances.

We would be happy to discuss this proposal further with the Committee.

Sincerely,



Allison M. Zieve
Director, Public Citizen Litigation Group

On behalf of Public Citizen Litigation Group,
American Historical Association, American Society
for Legal History, National Security Archive,
Organization of American Historians, and Society of
American Archivists

cc: Hon. Raymond M. Kethledge,
Advisory Committee Chair
Prof. Sara Sun Beale, Reporter
Prof. Nancy J. King, Associate Reporter