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11-CR-D

December 7, 2011

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

On behalf of Public Citizen Litigation Group (PCLG), I am writing in connection with Attorney General Holder's letter to you of October 18, 2011. Writing for the Department of Justice, Mr. Holder "recommends an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance and to provide a temporal end point for grand-jury secrecy with respect to materials that become part of the National Archives."

Mr. Holder's letter was prompted by a recent case brought by PCLG, *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), in which the district court agreed to unseal the 1975 grand jury testimony of former President Richard Nixon. PCLG has also handled other significant cases on unsealing grand jury records based on historical significance. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999).

PCLG strongly supports an amendment along the general lines set forth in the Attorney General's letter, but we write to suggest certain substantive modifications to the proposal. As the law firm that litigated many of the cases on behalf of historians seeking access to grand jury material, we of course disagree with the Department of Justice's view that the existing case law in this area is erroneous in recognizing that courts have inherent authority to open grand jury records in exceptional circumstances outside the scope of Rule 6(e). For present purposes, however, that disagreement is not pertinent.

We write to make two points related to the Department's proposed rule. The Department suggests modifying Rule 6(e) to allow courts to order disclosure of grand jury records where a court finds that (1) the petition seeks only archival grand-jury records, (2) the records are of exceptional historical importance, (3) 30 or more years have passed since the case file associated with the records was closed, (4) no living person would be materially prejudiced by the disclosure or prejudice could be avoided through redactions, (5) disclosure would not impede a pending government investigation or prosecution, and (6) no other reason exists why the public interest requires continued secrecy. PCLG urges the Committee to adopt a rule providing that *either* the first or second criterion listed by the Department be met, but not both. We further suggest that the second criterion be modified, as detailed below.

First, the Department suggests that the rule allow for disclosure of "only archival" records, which is material that the National Archives and Records Administration (NARA) has already determined to have "permanent historical value under Title 44, United States Code." Holder Letter at 6. It separately suggests that Rule 6(e) permit disclosure only after a finding of "exceptional historical importance." Where NARA has already determined material to be of "permanent historical value," however, there is no reason also to require the proposed finding of "exceptional historical importance."

To be sure, in the cases that PCLG has litigated concerning disclosure of grand-jury records, we have argued that the courts' inherent authority to disclose grand jury material exists when the records have "exceptional historical importance." But if Rule 6(e) is amended—as we hope it will be—to expressly address disclosure for historical interest, the disclosure should not be limited to that category of cases. Rather, if NARA has already made a determination of permanent historical value, and if there is no countervailing interest in continued secrecy (criteria 4-6 of the Department's proposed amendment), the material should be disclosable. At that point, the subset of cases that are of "exceptional historical importance" need not be separated from those of "permanent historical importance" because, in either case, the rationale for secrecy has ceased. Although the Department asserts that even within the universe of archival records, "grand-jury secrecy interests still have presumptive force" (Holder Letter at 7), it gives no explanation for that assertion. If disclosure would not prejudice any living person or investigation, and if "no other reason exists why the public interest requires continued secrecy," it is hard to see a basis for that "presumptive force"; or looked at another way, any such presumption has been overcome.

Not only should the second-listed criterion not be required if the first is met, but the first should not be required if the second is met. That is, if the petition otherwise demonstrates adequate historical significance, the rule should not require that the petition seek only archival grand-jury records. Again, satisfying the first criterion should be *sufficient* to demonstrate a level of historical importance adequate to satisfy the rule (subject to the remaining criteria), as discussed above. It should not be *required*, however. Making it a requirement would allow the government to limit the universe of records subject to the amended rule by not tendering materials to NARA for transfer and thus preventing NARA from making a determination of permanent historical importance. Notably, the Department of Justice has objected to unsealing in cases of such indisputable historical significance as the Hiss, Rosenberg, and Watergate grand-jury proceedings (*see* cases cited on page 1) and the Jimmy Hoffa grand-jury proceedings, *see In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009). In light of the Department's position in prior cases, adopting a rule that would allow it to limit the grand-jury records for which disclosure is even a possibility would undermine the amended rule and, potentially, operate to limit disclosure even more than under current law. In addition, the first criterion, if required even when the second is met, may delay availability of records, either because NARA has not yet requested material that it would agree is of permanent historical importance or because the Department or the court has not yet transferred materials. Our experience with records requests is that delays in processing can be significant.

Second, where the grand-jury material sought is not at NARA, the rule should not require a showing of "exceptional historical interest," but of "historical interest." In the prior cases, courts have adopted the "exceptional" standard, and Public Citizen has advocated its use to allow access to grand-jury materials. Those cases, however, involved courts exercising their inherent supervisory authority, in the absence of a specific rule directing their discretion. In that circumstance, it made sense for the courts to impose on themselves a high standard. In a rule expressly providing for unsealing based on historical interest, however, that high standard need not be adopted. Of course, a court would be more likely to order disclosure based on a showing that the historical interest in particular materials is exceptional, as opposed to significant or strong, for example. Nonetheless, if the balance of interests would weigh in favor of disclosing material of lesser importance, the rule should allow disclosure. Indeed, the Department's proposal that NARA be authorized to unseal *all* material, not only "exceptionally" important material, after 75 years supports this view. The 75-year proposal reflects the fact that, as time passes, interests in secrecy diminish to such an extent that *any* degree of historical importance outweighs them. Amending the rule to permit unsealing based on "historical importance" allows courts the flexibility to weigh the various interests case-by-case, recognizing that the degree of historical importance that warrants unsealing in one case may not be the same as in others.

For the foregoing reasons, PCLG requests that, as the Committee evaluates the Department of Justice proposal, it consider allowing disclosure when *either* the petition seeks "archival grand-jury records" *or* "records of historical importance." Revising the Department's proposal in light of this suggestion, the amended Rule 6(e)(3)(E) would thus provide:

(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 only archival grand-jury records or other grand-jury records of historical importance;

(b) at least 30 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 that 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 this paragraph is a final decision for purposes of Section 1291, Title 28.

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

Sincerely,

Allison M. Zieve
Public Citizen Litigation Group

cc: Prof. Sara Sun Beale, Reporter
Prof. Nancy J. King, Assistant Reporter
Peter G. McCabe, Secretary
Eric H. Holder, Jr., Attorney General