ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 4, 2021

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met in Washington, D.C. on November 4, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge André Birotte Jr. (via Microsoft Teams)
Judge Jane J. Boyle
Judge Timothy M. Burgess
Judge Robert J. Conrad
Dean Roger A. Fairfax, Jr.
Judge Michael J. Garcia
Lisa Hay, Esq.
Judge Bruce J. McGiverin (via Microsoft Teams)
Angela Noble, Esq., Clerk of Court Representative (via Microsoft Teams)
Kenneth A. Polite, Jr., Esq., *ex officio*[1]
Judge Jacqueline H. Nguyen (via Microsoft Teams)
Catherine M. Recker, Esq.
Susan M. Robinson, Esq.
Jonathan Wroblewski, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Jesse M. Furman, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee (via Microsoft Teams)
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

Brittany Bunting, Administrative Analyst, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Burton DeWitt, Esq., Law Clerk, Standing Committee
Bridget M. Healy, Esq., Acting Chief Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center (via Microsoft Teams)
S. Scott Myers, Esq., Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)

[1] Mr. Polite and Mr. Wroblewski represented the Department of Justice.

The following persons attended as observers on Microsoft Teams:

Amy Brogioli	American Association for Justice
Joseph J. Bell, Esq.	Bell & Shivas, P.C.
Dr. Robert G. Bell	Professional Associate of Bell & Shivas
Grant Blakenship	Reporter, Georgia Public Broadcasting
Patrick Egan, Esq.	American College of Trial Lawyers
Mimi Ferraioli	Professional Associate of Bell & Shivas
John Hawkinson	Freelance Journalist
Jeffrey S. Katz, Esq.	Professional Associate of Bell & Shivas
Brian C. Laskiewicz, Esq.	Bell & Shivas, P.C.
Maryann Locklin	Professional Associate of Bell & Shivas
James K. Pryor, Esq.	Practitioner
Larry Purpuro	Professional Associate of Bell & Shivas
Judith Ricucci	Professional Associate of Bell & Shivas
Mike Scarcella	Legal Affairs Reporter, Reuters
Ms. Shirley	Professional Associate of Bell & Shivas
Dan Turner	Professional Associate of Bell & Shivas
Kristie M. Ward	Paralegal, Bell & Shivas
Laura M.L. Wait, Esq.	Associate General Counsel, District of Columbia Courts
Laura Wexler	N/A
Allison Zieve, Esq.	Director, Public Citizen Litigation Group

Opening Business

Judge Kethledge opened the meeting with administrative announcements. He thanked the members in attendance, noting that many had travelled substantial distances. He also thanked the members of the public who were observing the meeting for their interest and for the proposals some of them had made. He drew attention to the fact that this was the first meeting for several new members: Judge André Birotte, Judge Jane Boyle, Judge Robert Conrad, and Assistant Attorney General Kenneth Polite, and for Angela Noble, the new clerk of court representative. The marshals provided a short security briefing, and Ms. Bunting reviewed best practices for in-person and virtual participants.

Ms. Wilson presented the Rules Committee Staff report, drawing attention to the materials beginning on page 56 of the agenda book. At its June meeting the Standing Committee approved proposed new Rule 62 and the other emergency rules for publication. The proposed emergency rules have been posted online, and copies have been sent to all members of the federal judiciary as well as many other interested parties. Comments are due February 16, 2022. The Standing Committee also transmitted the proposed amendment to Rule 16 regarding expert disclosures to the Judicial Conference, which approved them at its September meeting. The proposed amendment has now been transmitted to the Supreme Court, which has until May 1, 2022 to adopt and transmit to Congress.

Ms. Wilson also drew attention to two charts. The first, on pages 125–29, is a regular feature of each agenda book that tracks the progress of each amendment to the Federal Rules. The second, pages 130–33, describes and tracks all legislation that would directly or effectively amend the Federal Rules. She noted that since her report at the spring meeting there has been no action on the only bill that would affect the Federal Rules of Criminal Procedure, the Sunshine in the Courtroom Act—which would impact Rule 53. Ms. Wilson noted that she and the Rules Law Clerk will continue to monitor all legislation that may affect the Federal Rules.

Judge Kethledge drew the Committee's attention to the draft minutes. Professor King asked members who found any typographical errors that did not affect the substance to notify the reporters. A motion to approve the minutes was made, seconded, and passed unanimously.

Noting that there were many new members, and that it had been two years since the Committee met in person, Judge Kethledge asked each member, as well as those who were participating to support the Committee, to introduce themselves.

Commenting that that this was his ninth year on the Committee and his third as chair, Judge Kethledge made some opening comments about the nature of the Committee's work. He first stressed the importance of meeting in person and the important bonds of trust members have in one another, which transcend the things that often divide people. That trust in one another's integrity, good will, and good faith (along with the members' expertise) is the Committee's core asset. It cannot be developed over Zoom. He expressed gratitude for the many members who had been able to attend in person, but noted the need to understand that given different circumstances not all were able to do so. It is important for members to get to know one another as individuals (not on the basis of geography or other affiliations) in order to trust one another and work together. Judge Kethledge explained that the Committee's role is advisory. Its job is not to reflect public opinion, or to advance the interest of one side or another in criminal litigation. Rather, it is to discern, as well as we can based on our diverse experiences and working together, the best response to issues in the criminal justice system.

Rule 6: Historical Exception to Grand Jury Secrecy

Judge Kethledge introduced the grand jury items on the agenda with comments about the grand jury's importance and its ancient lineage, which traces back to the reign of Henry II. The grand jury provided an important role for citizens and developed into a check on prosecutorial power.

He urged the Committee to listen—but not defer—to the subcommittee. He noted that the Chief Justice's appointment of each member showed his confidence in their perspectives. The Committee should take up each issue in a plenary fashion.

Judge Kethledge noted the deep expertise the subcommittee brought to bear on the first item concerning the grand jury secrecy: proposals for an exception for records of historical or public interest. Judge Garcia, the subcommittee chair, was U.S. Attorney when the disclosure of the records concerning Julius and Ethel Rosenberg was litigated. Professor Beale argued the

government's case in *Douglas Oil v. Petrol Stops*, one of the leading Supreme Court cases on grand jury secrecy. Professor Beale and Dean Fairfax are also noted grand jury scholars, and the other members had seen the grand jury up close in practice, including their work representing witnesses and targets who were not prosecuted.

Judge Garcia presented the subcommittee's report. By a vote of five to two, the subcommittee recommended against proceeding with an amendment to allow disclosure of grand jury records of historical interest. When this issue was last considered in 2012, the Committee concluded that no amendment was needed because the system was working well. But since that time, the *McKeever* and *Pitch* cases created a circuit split, placing the D.C. and Eleventh Circuits on one side, barring disclosure, and other circuits, including the Second Circuit with the *Craig* decision, recognizing an exception to grand jury secrecy that could allow disclosure of records of exceptional historical importance. Additionally, in a statement accompanying the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to look again at the issue. The Committee received multiple proposals for an exception for historical records (including proposals from the Department of Justice), and it referred them to the subcommittee.

Judge Garcia described the subcommittee's process. It reviewed the Committee materials from 2012, as well as the new submissions (some from groups that had previously urged an amendment as well as a proposal from members of the law firm who represented Professor Pitch). It held a miniconference with numerous panels to obtain a wide variety of perspectives. Participants included former U.S. Attorney Patrick Fitzgerald and Beth Wilkinson, former Principal Deputy in the Terrorism and Violent Crime Section, both of whom also had experience representing witnesses in a range of cases, including terrorism, drugs, and special counsel investigations. Other participants included a historian, representatives from Public Citizen and the Reporters Committee, the general counsel of the National Archives and Records Administration, career attorneys from the Department of Justice, and a member of the public who had been injured by grand jury leaks. It was a mix of perspectives, including participants who were working in and with the grand jury, and those who viewed grand jury records as a repository of information of exceptional historical or public importance. The miniconference was exceptionally helpful to subcommittee members.

The subcommittee proceeded first to draft the best possible amendment and committee note, considering the issues that such an amendment would raise before turning to the question whether to recommend pursuing the amendment. Judge Garcia explained that the subcommittee also had to decide what to say about the question of the courts' inherent authority to release grand jury materials. The subcommittee, by a vote of six to one, recommended against wading into that area. In the members' view, this is an Article III issue that is not within the Committee's authority. For the same reason, the subcommittee decided not to address the issue of the exclusivity of the exceptions in Rule 6(e).

Overall, Judge Garcia explained, the subcommittee took a minimalist approach, which he defined as a relatively short textual amendment with more information in the committee note. He

then explained the Committee's thinking on each of the issues noted in the report, beginning on page 137 of the agenda book.

The subcommittee limited the amendment to records of historical interest—rather than the broader criterion of public interest—and it limited the exception further to records of "exceptional" historic interest. It declined, however, the Department's suggestion that the amendment be limited to "archival" grand jury records, as well as Professor Craig's suggestion that the rule provide a special role for historians.

The subcommittee rejected the suggestion in several of the proposals to include in the text the list of factors identified in the Second Circuit's *Craig* decision. Instead, it referred to those factors in the committee note.

The question whether to limit the exception to records only after a stated number of years (a hard floor) was especially difficult. The proposals the Committee received varied widely, from no floor to a floor of 20, 30, or 50 years, with the Department of Justice advocating for each of these at various times. The subcommittee decided the rule should include a floor. Members were influenced by the testimony at the miniconference and the experience of some subcommittee members with witnesses in cases involving terrorism, drugs, and especially sensitive cases. In those cases, witnesses show real hesitation and fear. In the grand jury investigation of the 1993 World Trade Center bombing and other terrorism cases, Judge Garcia recalled seeing that hesitation and fear. He noted that those cases were now more than 20, but less than 30 years ago. He had been thinking of the fear of those witnesses, the role of the grand jury, and the need for it to function effectively.

Judge Garcia explained that the subcommittee settled, uneasily, on a floor of 40 years. The members recognized that any floor could be seen as too low, but also that those who supported disclosure might prefer no rule to one with too high a floor. The floor would be calculated from the closure of the case by the Department of Justice. The Department's procedures for closure are complex, and Judge Garcia noted that members might have questions about that for the Department's representatives.

The subcommittee decided to draft the rule text stating the standard for disclosure in general terms: whether the public interest in disclosure outweighs the need for continued grand jury secrecy. It placed other issues in the note, specifically the impact on any living person or prejudice to an ongoing investigation. The note also emphasizes that this is a narrow exception.

The subcommittee took the same approach to procedural requirements. The text includes only notice to the government and an opportunity to be heard. It leaves flexibility for the court to tailor other procedures to the requirements of an individual case.

The subcommittee rejected proposals to end grand jury secrecy after 60 or 75 years. Like the Advisory Committee in 2012, the subcommittee saw this as too great a departure from the principle of grand jury secrecy.

After it worked though all of these issues and approved the discussion draft on pages 153–55 of the agenda book, the subcommittee took up the question whether to recommend that the Committee move forward with this proposal. Although it was not unanimous, the subcommittee voted to recommend that the Committee not proceed with the amendment.

Judge Garcia described the evolution of his own views. He came in with experience as U.S. Attorney when the court was considering the petition to disclosure the *Rosenberg* records. He felt an interest (as did many others) in the disclosure of the records of such a historically significant case, but also had reservations arising from his experience with grand juries investigating violent crimes, and his representation in private practice of witnesses and targets. But as the subcommittee worked to develop the draft rule, he was increasingly struck by the strangeness of adding a historical exception to the Federal Rules. The existing exceptions to grand jury secrecy in Rule 6(e) all go to investigative and national security interests. An exception for historical interests—even exceptional historical interest—seems unlike the other exceptions recognized in the rule. In 2012, the Committee recognized that the system was working well. Courts were using inherent authority only in truly rare cases, and that led to the decision not to pursue an amendment.

After thanking Judge Garcia for his thorough presentation, Judge Kethledge said he would like comments from other members of the subcommittee first, before calling on other members for their initial thoughts. Then he would open the floor for discussion.

A subcommittee member identified herself as a defense lawyer in Philadelphia. She said her experience had driven her focus. The suggestions we received focused on what she called the "back end"—questions such as how to define historical interest and the factors to be considered. But in her professional experience in two cases (state and federal), the grand jury proceedings were distorted "up front." In a proceeding that involved a participant in the miniconference, the member said she observed the absolutely devastating effect that a leak, a breach of grand jury secrecy, had on the integrity of the grand jury process. So, her focus throughout had been on the "front end": how to maintain the integrity of the process from the outset. Miniconference participants confirmed her view that the protection of the integrity of the process from the outset was more important than considering what might happen after 30, 50, or 70 years. Advising a witness who is about to testify about exceptions to secrecy already undermines the process. Every grand jury witness she represented had asked "who will know what I say?" The more you have to describe exceptions, the more you undermine the process. Her driving principle was to maintain the grand jury's integrity on the front end.

Another subcommittee member emphasized the thoroughness of the subcommittee's process and noted that his views were well described in the third paragraph on page 145 of the agenda book. He commented that not only historians, but also sociologists and others might have scholarly interests and seek grand jury records of historical interest. Another issue of concern was placing the government in the awkward role of serving as the broker of competing interests. Reflecting on his experience giving warnings to witnesses when he was a federal prosecutor and preparing witnesses or targets, he thought having to explain the historical records exception would dilute the security that witnesses, subjects, and targets would feel.

A member of the subcommittee said the miniconference was very helpful and she thanked Judge Garcia for his summary. She ultimately agreed with the recommendation not to amend the rule. The discussion draft was well done, but the more she considered the issues in drafting, the more difficult they became. That was why ultimately she was not persuaded to support an amendment, especially in light of the problem of reassuring witnesses and their families. The historical records exception is qualitatively different than the other exceptions in Rule 6, and it is at odds with the core principle that grand jury secrecy is sacrosanct. And writing a rule for inherent authority doesn't make sense.

Mr. Polite began by noting that although he was a new member, he had had previous contacts with many of the members. He was an undergraduate with Dean Fairfax. He was a fellow AUSA with Judge Furman. He was a fellow U.S. Attorney with Judge Birotte. He was co-counsel with Ms. Recker. And Judge Garcia had hired him as an AUSA.

The Department of Justice appreciated the patience of the subcommittee. The Department's position has changed over the last three administrations, and Attorney General Garland has considered this anew. Despite the changes, there were constants. Mr. Wroblewski had been a pillar upon which the Department relied throughout. The Department consistently urged that the only exceptions to grand jury secrecy were those stated in Rule 6; it has argued for decades in cases across the country that the district courts have no authority to create exceptions beyond the text. There is now a circuit split on that issue. The Department has consistently supported an historical interest exception because it believes Rule 6 covers the waterfront of exceptions, but that in limited circumstances historically important grand jury materials should be made available to historians and others. A well-crafted amendment can preserve the critical tradition of grand jury secrecy and the primacy of the Federal Rules while allowing release in cases where significant time has elapsed and the public interest in the release of historical records outweighs the remaining need for continued secrecy.

The Department's 2011 proposal permitted release after 30 years if specific conditions were met: (1) the grand jury records had exceptional historical interest, (2) no living person would be materially prejudiced by disclosure, and (3) disclosure would not impede any pending grand jury investigation or prosecution. The 2011 proposal also provided blanket authority to the archivist to release grand jury records 75 years after closure of the relevant records without a petition to the courts.

The Department, Mr. Polite said, still believes this is generally the right approach. It recognizes that there is no clear cut or scientific basis for the number of years for the threshold for release, and its proposals have laid out different benchmarks. The Department supports a 25-year time frame if the rule limits release to cases in which the district court finds (1) no living person would be materially prejudiced by disclosure, (2) disclosure would not impede any pending grand jury investigation or prosecution, and (3) the public interest in disclosure outweighs the interest in retaining secrecy. The Department also supports a temporal end to secrecy for materials that become part of the National Archives. The need for secrecy in case of historical importance is eventually outweighed by the public's legitimate interest in preserving and accessing documentary

legacy, and after 70 years the interest in preserving secrecy and in the privacy of living persons normally has faded.

The next speaker identified herself as a Federal Defender and the other subcommittee member who favored adding an exception to Rule 6. She noted that not all defense attorneys were in agreement. All recognized the competing interests in individual privacy versus the value of reviewing the government's use of its authority. From the public interest perspective, the grand jury is a powerful, secret institution the government uses to gather information about people and entities, require testimony, and seek charges. There is a public benefit in some cases in having that information for historians and those who may want to revise how the government works. Sunshine on the use of authority is beneficial.

The member favored an exception for materials of historical interest, and she argued that the split in the circuits made it incumbent on the Committee to decide what the rules do allow. If the Committee takes no action, the district courts and courts of appeal will have to decide how to handle petitions for disclosure. Some circuits (such as the Second and Seventh) now allow disclosure, but others (including the D.C. Circuit and Eleventh) do not, and a case on the issue is now pending in the First Circuit. If we don't come up with a limited exception, courts will continue to review petitions for disclosure, coming to various conclusions, including some with less protection for grand jury secrecy than we might wish. So we should decide what the rule should allow. There is no need to decide the question of inherent authority. We can just say what the rule does allow. She supported a clear rule with disclosure permitted after 25 years. Forty years is excessive.

Judge Kethledge offered his own comments. The question before the Committee is a close one. Thinking of cases like *Rosenberg*, he could see the appeal of disclosure. The interest may be not only historical, but also whether the government's authority was abused, and it has been 40 years since the prosecution. On the other hand, this is like "high neck surgery" on a venerable institution in our criminal justice system. Evolved institutions like this one are distillations of experience and wisdom. They work in ways we are not aware of, and often benefit us in ways we do not understand. The potential for unintended consequences is greater than usual. But, as the last speaker said, the reality is that if our Committee does not act, the courts will. We now have a four to two circuit split, with the issue pending in another circuit, and Justice Breyer urged the Committee to resolve the issue.

The Committee's job, Judge Kethledge said, is to give our best advice on the question whether, as a matter of positive law, we should have an exception in the rule. That's the only decision the Committee has to make, and the only one it has the authority to make. The question of inherent authority—whether the authority to disclose grand jury material inheres in the judicial power vested by Article III—is beyond the Committee's purview. The Committee decides procedural matters, and that is a question of substantive constitutional law. As Justice Barrett wrote as an academic, sometimes courts have inherent authority, but Congress can override that with positive law. So the Committee should decide whether it thinks an exception to grand jury secrecy is a good idea.

Noting that he would not repeat points made in Judge Garcia's excellent summary, a member emphasized the value of the miniconference, especially the statement of Patrick Fitzgerald, who emphasized that the long memories that terrorist and organized crime groups can extend not only to witnesses but also their families.

Judge Kethledge then called on members not on the subcommittee for their initial thoughts.

A member expressed concern about the slippery slope created by adding an exception for historical interest. What, exactly, is historical interest? Disclosure in the interest of "good government" is another very broad concept. The member advocated waiting for the Supreme Court to define the courts' inherent authority, rather than trying to guess or put a floor on it in this context.

Another member agreed it was a difficult issue. He said he had struggled with it, but at the end of the day he was most struck by the concerns about the long memories of some groups, witnesses' fear, and unintended consequences. He had concluded that the preservation of the institution outweighs the potential benefits of greater disclosure. It is better to leave things as they are.

The next member stated that the Department of Justice's comments were lucid and thoughtful, but subject to change. In contrast, the views of line prosecutors were less subject to change, more focused on the ultimate purpose and effect of the grand jury, and weighed heavily in favor of secrecy. The member favored being careful and prudent about change–about both intended and unintended consequences.

Another member characterized his own views as "persuadable." Like Judge Garcia, the member initially felt an historical interest exception would be valuable if it could be put into a rule that would still be protective of the functioning and secrecy of the grand jury and the protection of the participants. He raised a several questions for discussion. First, for those with experience in private practice representing witnesses, wouldn't it be easier to explain an exception in the rule, rather than the effect of a multifactor test set out in cases like *Craig*? And for miniconference participants, since some courts have been considering and granting disclosure of historical records for some years, have there been any adverse effects? Has this impaired the function of the grand jury? Has there been any harm to witnesses, members of grand juries, or others?

A member of the subcommittee who represents witnesses responded that she had never advised those witnesses of the historical interest exception or *Craig* factors. Cases of extreme historical interest like *Nixon* and *Rosenberg* don't come up often enough for her to try to explain issues like inherent authority to lay witnesses, who would not understand if she tried.

On the second question, Judge Garcia said there was no testimony that anyone was hurt by the disclosures in *Rosenberg*, etc. Indeed in 2012 the Committee decided there was no problem with disclosure in these very rare cases. But amending the formal rule to give this authority would change the calculation. Plus the subcommittee did hear that witnesses fear disclosure. He himself had known potential witnesses who were so frightened they left the country to avoid testifying.

Professor Beale noted the second question was asked at the miniconference. Ms. Shapiro, who has for many years litigated these cases for the Department of Justice, stated that as far as the Department knows, no identifiable person has been hurt by disclosure for historical interest. Rather, the harm is to the institution of the grand jury and its functioning in the future. Harm can be cumulative, she said, and in some cases speculative.

A member asked if he was correct in understanding that the Department of Justice had been consistent for the last three administrations on the following points: (1) an exception for historical grand jury records should be recognized, (2) this can be done consistent with the protection of grand jury secrecy and the functioning of the grand jury as an institution, and (3) the rulemaking process is the way to do this.

Mr. Wroblewski said that was correct.

Another member expressed appreciation for the subcommittee's work and explained her own perspective and experience. She was an AUSA for 17 years, working with many grand juries, and has been on the defense side for nearly 10 years, representing witnesses and targets who have not been charged. She is concerned not just with the potential for physical injury from disclosure, but also injury to businesses and personal reputations. She now advises her clients that their testimony cannot be disclosed without a court order. If someone is indicted, the protections for witnesses are greatly reduced. Her main concern is the sanctity of the grand jury and the secrecy that protects those never indicted, who have no forum in which to respond to accusations. The grand jury hears only one side; it never hears the accused person's side.

The member said she was pleased that the discussion draft did not include a broader exception for disclosure in the public interest. Her experience included civil litigants seeking grand jury materials. For example, after a major investigation of the failure of a large financial institution, there were multiple civil lawsuits seeking to obtain all of the grand jury's records. The government prevailed in those cases. Other private litigants were affected by water pollution, and indeed the whole city was affected. One might argue there was a public interest in disclosure because of the sheer number of affected persons. She agreed with the earlier comment about a potential slippery slope starting with historical interest and the interest in government function. She concluded with a question: since the Supreme Court can resolve the circuit split, what is the harm in not taking this up now?

Judge Furman, the Standing Committee's liaison, thanked Judge Garcia and the subcommittee for its work on a close question with strong arguments on both sides. Noting he was speaking only for himself, he said he favored an amendment. Otherwise the Supreme Court will have to resolve the circuit split. If the Court agrees with the Department that the exceptions in the rule are exclusive, then there should be no disclosure in *Rosenberg*, though most of us seemed to favor disclosure (though it should be *very* rare). Alternatively, if the Court decides there is inherent authority, that would leave its development to the common law process, without the thoughtful limits the Committee would design. If we don't adopt a rule, we kick the can down the road to the courts. The rulemaking process would be superior. For some, the most salient concern is the long

memories of certain groups, such as terrorists and drug cartels. Judge Furman noted he had served as a prosecutor and was aware of these concerns, but he saw very little danger that records in these kinds of cases would be released under the proposed rule, though it would allow disclosure in *Rosenberg*.

Judge Furman thought the most salient concerns are about what one member called the "front end." He pointed to two reasons to think a rule would not cause harm at the front end. First, the Department of Justice, which is the most concerned about preserving the functioning of the grand jury, supports a rule. And second, since there are already multiple exceptions in Rule 6(e), one cannot now tell a witness that his or her testimony cannot be revealed. Indeed, a rule would be easier to explain to a witness than the *Craig* factors. Even national security materials are eventually released. On balance he supported a rule.

Judge Bates thanked the subcommittee for its work on a difficult and close question, and stated that he shared many of Judge Furman's views. He asked whether it was the subcommittee's intent to limit disclosure to cases like *Rosenberg*, to that narrow a category. If so, there is less concern about a slippery slope. Judge Bates thought it was hard to imagine that more than one tenth of one percent of cases would fall into that narrow definition of exceptional historical interest *and* the public interest in disclosure outweighs the need for continued secrecy more than 40 years after the case closed. So if the rule is that narrow, perhaps the concerns expressed are not as weighty.

Judge Garcia responded that the subcommittee tried to capture what the Committee in 2012 thought had been working well: disclosure only in truly exceptional cases. But as we tried to put this into a formal exception, it was difficult to replicate that limited approach. Although the discussion draft represents our best effort to do that, subcommittee members still were uneasy that whatever we put in the rule it will not be exactly that.

Judge Garcia thought it was hard to analogize the release of grand jury records to the release of national security materials. Like many of the members, he had dealt with intelligence agencies and national security issues, and he commented that they have their own system to deal with sources and methods, which are different than the grand jury.

So the subcommittee's goal was to bottle those previous inherent power cases in a rule, but the concern is that incorporating it in Rule 6 may change the calculus.

Professor Coquillette commented as a legal historian, noting that he and a coauthor had recently completed a two volume history of Harvard Law School that resulted in the revocation of its shield. Harvard Law School had a 60 year seal on historical records, and a 90 year seal on records concerning tenure and promotion. Professor Coquillette said he and his coauthor were able to work with those limits, finding alternative sources—as there must be for grand jury minutes. On the one hand, he stressed, history is very important for the health of our country. On other hand, historians can work effectively under a rule that precludes disclosure when there would be material prejudice to individuals and would bar disclosure for 60 years.

In response to the question of the breadth of the proposed exception—which might determine how much it would raise various concerns—Professor Beale drew attention to the discussion draft beginning on page 153. The text limits disclosure to cases of "exceptional historical interest," and the note strongly signals this is like the very restricted common law approach, referring to the *Rosenberg* and *Nixon* cases to define exceptional historical interest. The goal was to carry forward that very limited category.

Professor Beale also noted that in some respects the draft rule is *narrower* than the common law precedents because it applies only after 40 years, though some of the cases had allowed disclosure earlier. She thought some proponents of disclosure might prefer no exception in the rule, and the applicability of the *Craig* factors. If disclosure is to be permitted under any circumstances, this rule would arguably cabin it more than the current common law precedents, which in some cases allowed disclosure, for example, after 30 some years. The draft rule also requires the court to find that the public interest in disclosure outweighs the interest in continued secrecy. That should ensure that judges would be made aware of the long memories that are of concern in certain cases. There may still be an unintended signal from adding one more exception of a different kind. But the goal was to write a rule that would be no broader, and in some senses narrower, than what the courts have been doing, and to set clearer boundaries. Some might prefer broader disclosure in circumstances where some courts would permit that now. So it presents a close question.

Judge Garcia had faith that in terrorism cases courts would consider the effect of disclosure on witnesses, but he still had concerns about the "front end" functioning of grand juries. Even if we are confident courts would not release material regarding individuals in investigations concerning violent crimes or drug cartels, there are concerns about how adding an exception would influence the process. In response to a question about the *Rosenberg* case, he explained that it arose in the Second Circuit, where the courts apply the *Craig* factors under their inherent authority outside Rule 6.

A member who had earlier expressed support for the subcommittee's decision not to propose a broader public interest exception commented that she had struggled to understand how to define the concept of public interest for the historical interest exception, and to balance it against the need for continued secrecy. Another member chimed in, agreeing with the concern that private interests could override the need for secrecy.

Judge Kethledge asked for further discussion on the question whether to propose an amendment, focusing on what members had been calling the "front end" concerns. He asked members whether these concerns would be assuaged if we have a *very* narrow protective rule: a threshold of at least 50 years, extraordinary historical interest, and the interest in disclosure outweighs the need for continued secrecy. Or would it still be impossible to reassure witnesses, so that the institution of the grand jury would suffer?

Judge Garcia responded that this issue was critical for many on the subcommittee. The majority wanted to further narrow the rule, for example setting a higher number of years for the

floor. Eventually it was an almost astronomical number, say more than 50 years. At that point, the rule would not capture prior cases where disclosure had been allowed, and it was unclear whether it would make a difference to explain a 50-year versus a 35-year floor to a witness.

The member who first articulated the "front end" concerns said when she talks to witnesses in high profile cases, she doubts they could distinguish between exceptional historical interest and the current case in which they are being called to testify. Instead of thinking about the *Rosenberg* case, they will be thinking of the publicity in the current case. So with even the narrowest and most restrictive rule, she believed an explanation of the exception would undermine the quality of the testimony. No limits on the rule could alleviate her concerns.

Judge Kethledge asked whether a highly restricted rule with a threshold of 60 years would alleviate the concerns. The member responded that she did not know if that would be sufficient. She explained that the leak discussed at the miniconference concerned a towering figure in Philadelphia's civil rights community, whose reputation and legacy were destroyed by misrepresentations concerning a targeted leak. Even after 60 years such revelations would have an impact.

Another member commented that in his youth as a prosecutor, 50 years seemed a long time, but less so now. If a contemporary researcher wanted to explore federal drug policy in the 1980s and 1990s, physical safety could still be an issue for witnesses and their families. Perhaps the judge would take that into account. The member also noted that in the academic world there is now a focus on names and legacies, and names are being removed from buildings and programs. Decades ago, grand jury witnesses were told their testimony would *never* be disclosed. That might make someone think twice if a nebulous historical interest exception is written into the rule. But he also recognized strong arguments the other way. He agreed there was only a remote chance of disclosure in a run of the mill case, but added that the exception would burden the discussion with witnesses, and disclosure could affect their reputations, impacting their children, grandchildren, etc. Judge Kethledge added that the reputation of targets could be affected as well.

Mr. Polite emphasized that the Department of Justice had consistently sought to limit the exception to cases in which the court finds no living person would be materially prejudiced by disclosure and no pending investigations would be prejudiced. These requirements are not in the current Committee discussion draft (though they are in the committee note). The Department continues to support their inclusion in the text.

There was discussion of the question whether adding the historical interest exception would affect the inherent authority issue. Judge Kethledge said it would have no de jure effect, but would have an effect de facto. Professor Beale noted that there have been very few inherent authority cases granting disclosure, and most of them have concerned historical interest. A few, such as the *Hastings* case, could have been decided on alternative grounds; some concurring judges in *Pitch* argued that inherent authority was not needed because disclosure could be made under another exception in Rule 6(e). Mr. Wroblewski pointed out, however, that Chief Judge Howell had raised the use of inherent authority in other grand jury contexts. So even if we resolve historical interest,

there still will be other inherent authority issues. Professor Beale agreed that this was an important qualification to her answer. Judge Kethledge observed that, as Professor Barrett had written, everyone agrees that district courts have some inherent authority, but the courts do not control the grand jury, so their authority over the grand jury may differ from that over other matters.

Judge Kethledge again asked members for any further comments on the question whether even a very narrow rule would still have a negative impact on the "front end," the functioning of the grand jury.

A member who supported an amendment explained that the current rule already provides multiple exceptions to secrecy, including use in a criminal case. Anyone advising a grand jury witness now has to say that if this person is indicted, your testimony may be disclosed. Since there are many other more important factors, such as leaks, she thought the disclosure of the new historical exception would have little impact on the "front end."

Judge Kethledge expressed concern that creating an express exception for historical importance could send a signal to potential leakers that disclosure is not categorically a bad thing. A potential leaker might think, "This is where they draw the line on the public interest in disclosure, but I draw it here."

Professor Beale drew the Committee's attention to another potentially broad exception of which witnesses should be informed: disclosure for use "preliminarily to or in connection with a judicial proceeding." For that exception, the petitioner must show "particularized need" to warrant use in a later civil case. Because there are already multiple exceptions to grand jury secrecy, this brings the Committee back to the question how much difference it would make to add this additional exception.

Following a lunch break, Judge Kethledge reconvened the meeting and asked for discussion regarding the threshold question: Whether the Committee ought to proceed with a new exception to Rule 6. If it the answer was yes, then they would work out the particulars.

A member reiterated her position the Committee should recommend an exception. She said she appreciated the comments about the Department's consistent position on several of these points and that the rulemaking process is the best place to address the issue of releasing matters of historical importance. She said she hoped that the discussion had brought more people around to the idea that this is the right body to add an exception addressing exceptional historical significance. If this Committee does not do so, this important issue will be left to different district courts reaching contradictory positions, and it will leave to the Supreme Court the question of inherent authority. The Committee could sidestep that authority question by a clear rule that tells judges, "This is the floor after which a historical exception can be evaluated, and here are the criteria to use." An exception would create greater consistency and protect the grand jury more than leaving things open to the district courts.

She said the subcommittee took seriously the need to limit the exception. It came up with good language about "exceptional" historical significance. It debated whether the rule should set

a number of years in the rule as a floor, or whether it should say after a sufficient time, and everybody agreed there needed to be a number in the rule. She agreed with the Department of Justice that 25 years is the right number, after which the district court can decide whether the weighing of public interest versus the interest of grand jury secrecy merits disclosure. Putting a hard threshold in the rule, saying exceptional historical importance, and including language in the comments about other factors that the court should weigh, will serve the judiciary by clarifying this. In light of the discussion, she hoped people had been persuaded to agree with adding the exception.

A member clarified that the current draft has a floor of 40 years, not 25.

Judge Kethledge commented on which entity ought to make these decisions, following up on earlier observations about the difference between the rule approach and the common law approach. The rule approach has the benefit of a broadly inclusive deliberative process, involving many people with different experiences. It is a more aggressive process though, designing the entirety and trying to answer all the questions at one swoop. The common law methodology allows courts the option of being very incremental. In the *Rosenberg* case, a court might say we will allow an exception here, and these are the reasons why we think it makes sense here. Then in the next case the court will ask is this like *Rosenberg*? It might conclude the next case is not exactly the same, but that it has some other element the court thinks is important. These refinements accrete and start building out into a rule. It's a slower and different way of doing things. It doesn't have input from the broad group as we do, but it does have its own virtues. And even if the issue goes to the Supreme Court, the Court can do that too.

Judge Kethledge asked for other comments. Hearing none he asked for a roll call vote on whether the Committee thought it was wise to proceed with a new exception to the secrecy requirement in Rule 6. Professor Beale clarified, and Judge Kethledge agreed, that a yes vote would leave open the details of the draft, such as whether the floor is 25 or 50 years. The question is, in principle, if we have the best possible draft should the Committee move forward with it? Or not?

The Committee members voted nine to three not to proceed further with an amendment to Rule 6. (The Department of Justice and two other members voted to proceed.)

Judge Kethledge thanked everyone on the Committee for their careful attention, particularly the members of the subcommittee and Judge Garcia.

Rule 6: Authority to Temporarily Excuse Grand Jurors

Professor Beale turned to the agenda item at Tab 3, a proposal from the former chair of this Committee, Judge Donald Molloy, at page 254 of the agenda book. Judge Molloy suggested that Rule 6 be amended to authorize the grand jury foreperson to give temporary excuses to individual grand jurors. He noted that this worked well in his district, and that he had been surprised to learn that other districts in the Ninth Circuit followed different practices. The proposal had been referred to the Rule 6 subcommittee.

With Judge Molloy's assistance, the subcommittee learned about the wide variation of practices in the districts of the Ninth Circuit, shown on the chart on page 252. Three districts said the foreperson cannot grant temporary excuses. Other districts allow the foreperson to temporarily excuse grand jurors as Montana does. And some districts permit only the jury office, or only the judge to do so.

The subcommittee thought this was sufficient information without surveying the policies in other circuits. Any national rule would require the majority of districts in the Ninth Circuit to change their procedures, even though no one had indicated that the procedures in those districts were unsatisfactory.

Although Judge Molloy reported that what they were doing in Montana worked very well, and other districts may like that approach, those districts could adopt the practice by local rule if they wished to do so. Some districts reported reasons for their different rules. For example, Arizona said they did not want to put this responsibility on the individual jury foreperson, and it was easier for the jury office to handle excuses, as it is looking at the quorums. Other districts prefer to leave this with the presiding judge, who develops a good overview.

The lack of uniformity has not been shown to be a problem. No one thought grand jurors were confused, or that they were concerned that they would have been treated differently in another district. Given the inconsistency, it was appropriate for the subcommittee to review the issue. But we investigated and concluded there was no need to move ahead with proposing a change in the national rules.

Judge Garcia, the subcommittee chair, added that the terrific survey revealed districts were using what worked for them. There is now flexibility that we would be taking away with a one-size-fits-all model. The subcommittee was unanimous. Professor Beale concluded that the subcommittee recommended that no further action be taken and that this item be removed from the agenda.

Judge Kethledge asked for discussion on the subcommittee's recommendation. Hearing none, he determined there was a consensus not to move forward. There was no objection to that conclusion. Professor Beale noted that Judge Kethledge will communicate the decision to Judge Molloy.

Rule 6: Authority to Reveal Grand Jury Information in Judicial Decisions

Professor King introduced the next agenda item, a proposal on page 263 of the agenda book at Tab 4, submitted to the Committee by Chief Judge Howell and Judge Lamberth from the District Court for the District of Columbia. In light of the D.C. Circuit's recent decision holding district courts do not have inherent authority to disclose grand jury information, Chief Judge Howell and Judge Lamberth sought clarification of their ability to publish decisions that include grand jury material. They expressed concern that without inherent authority they would not be able to continue their practice of publishing redacted judicial decisions that might reveal some grand jury matters. In the last paragraph on page 263 that carries over to the next page, they indicated that

this practice is critically important to avoid building a body of secret law in the grand jury context. They want to be able to explain their judicial decisions. In their view, sometimes that requires revealing grand jury information.

The subcommittee took this proposal very seriously. The reporters' memo to the subcommittee that appears on pages 265 through 276 discusses our research on how judges handled grand jury information in their decisions on issues such as motions to quash. We found judges were able to issue opinions on grand jury issues using redaction, sometimes noting that the grand jury material referenced in the opinion had become public and was no longer secret under Rule 6. Some decisions we found were redacted so heavily that it was difficult to tell what the motion was about or what the rationale of the decision was. But most of these opinions provided some information on the matter at hand, with redaction.

The subcommittee considered the memo, deliberated about the proposal, and concluded that an amendment to Rule 6 was not advisable. There were two rationales expressed at the time. One was that the current tools available to judges—particularly redaction—are adequate to allow for sufficient disclosure of their rulings. (Although subcommittee members commented that in some cases redaction had been insufficient and too much was revealed, no one suggested that we codify the rules for redaction.) The second reason that subcommittee members expressed for deciding not to move forward with the Howell/Lamberth proposal was that it was not ripe, and was only a hypothetical problem. There had been no ruling challenging an opinion on the basis that it violated Rule 6, and it was not clear that this would be a problem going forward. A third reason for not attempting to clarify this in Rule 6 was not discussed directly by the subcommittee, but it was addressed by the subcommittee when discussing the historical exception. The judges may have been seeking clarification in Rule 6 of their inherent authority, and the subcommittee was unwilling to add language about inherent authority to the rule. For those reasons, the subcommittee recommended that the proposal not move forward and that it be removed from the Committee's agenda. Professor King reemphasized that no deference whatsoever to the subcommittee's recommendation was expected or required.

Judge Kethledge asked Professor King about the point that the proposal was not ripe and asked what such a challenge would look like. Professor King responded that the government could object to a decision on a motion to unseal a document with redaction. Several cases involved a judicial opinion that had been sealed initially and then someone sought to unseal it. The judge consulted with the parties before unsealing it to see if the redaction in the opinion was adequate. It might come up in that scenario.

Judge Kethledge commented that judges usually don't circulate a draft opinion or tell the parties what they are planning to do. If a party says to the judge you need to do more to avoid revealing matters before the grand jury, and the judge disagrees, how can that be challenged? Mandamus the judge?

Professor King noted that several of the cases in the subcommittee memo did involve opinions in which judges explained that they had consulted with the parties, and that the parties

had agreed to the amount of redaction. She emphasized she did not want to mislead anyone about the weight that this particular concern had in the subcommittee's deliberations. Different members of the subcommittee may have been moved by different reasons. But the subcommittee was unanimous in its conclusion that redaction should be sufficient, and that no amendment was required.

Judge Kethledge opened the floor for comments, noting that it is a serious proposal, and the judges are probably most worried about instances where it appears that redaction would divulge information that does remain protected under Rule 6. What does the judge do in that instance? These judges want to have clarity about the law before they act.

Professor Beale added there could be close questions about whether something is covered by grand jury secrecy and whether the redaction is sufficient to prevent the disclosure. The judges in the D.C. Circuit have felt protected because if some disclosure does cross into that gray area, they believed they had the authority to reveal information as necessary to fully explain their ruling and the law. Their concern is that without clarification of that authority, judges will have to redact more, perhaps making the law less helpful. And we do not want secret law. The concern is this gray area. They were not saying that they could decide that they would release everything.

Judge Bates was asked to comment. He said that in the District of Columbia this is uniquely a chief judge problem. Issues with the grand jury go to the chief judge. That is why Chief Judge Howell, and one of her predecessors (Judge Lamberth) are most concerned. Most of the judges in his district never see this issue, so it is not something that they have experienced.

Judge Kethledge asked for additional comments. Hearing none, he asked if there was any disagreement with the subcommittee's recommendation. When no one responded, he concluded the sense of the Committee was to endorse the subcommittee's recommendation not to proceed further with this proposal.

Rule 49: Pro Se Access to Electronic Filing

Professor Beale introduced the agenda item at Tab 5, starting on page 278, which is a proposal to amend Rule 49 to allow pro se parties to file electronically, instead of prohibiting them from doing so unless the court finds good cause to allow electronic filing. It is a very thoughtful discussion by Sai, an individual who has done a lot of pro se filing. Sai argues it is a huge advantage to be able to use electronic filing and that the system is now stacked against pro se individuals. Sai has presented this argument to the Civil, Appellate, and Bankruptcy Rules Committees and has adjusted it in the context of criminal proceedings, recognizing the unique situation of prisoners. But pro se defendants who are not incarcerated, Sai argues, should have the same access as anyone else.

The reporters' memo explains that when the Committee amended Rule 49 in 2018, it thought a lot about whether, and under what circumstances, pro se defendants and prisoners should be permitted to file electronically. The committee note to Rule 49 recognizes that electronic and filing and service is in widespread use, but also that it is designed for attorneys and not for

laypeople. The Committee's judgment was that the rules must allow ready access to the courts for pro se defendants and incarcerated individuals. Perhaps in the future it would become more feasible for these persons to file electronically, but in 2018 they often lacked reliable access to the internet or email. Accordingly, Rule 49(a)(3) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Sai believes it is time to change that rule and open things up more for pro se parties on the criminal side as well as the civil side. The reporters for the Civil Rules Committee have noted that we are gaining relevant experience in courts that expanded access to electronic in response to COVID-19. But we do not know exactly what changes, including kiosks, are being made in the prisons to make electronic filing more available to individuals there, or more available to pro se criminal defendants. The civil reporters concluded it may be premature to amend the rule. Instead, they suggested, we might place the issue on a study agenda, and the committees could work together to gather information about what's happening, looking towards potential revisions in these parallel interlocking rules about pro se filing. Noting that the Civil Rules Committee had already met, Professor Beale suggested that Professor Struve or Judge Bates could report that committee's discussion of this proposal.

Judge Bates confirmed both the Civil and Bankruptcy Rules Committees had met. He said Sai is a very thoughtful litigant, with a lot of ideas, some of which have been taken up within the rules process. Judge Bates has asked Professor Struve to head up a discussion among all the reporters to identify a wise course forward for joint consideration and potentially for development of more information relevant to this issue. Professor Struve will be getting the reporters together to discuss it sometime in the future.

Professor Struve said she was looking forward to that joint endeavor. She noticed that the advisory committees have very distinct perspectives based on the kinds of things that tend to happen in their particular sets of rules. The bankruptcy folks have a particular perspective based on the hundreds of different kinds of docket events that you could have in a bankruptcy case. The civil rules folks are intrigued by this, and are focusing possibly on the distinction between case initiating filings and other filings, once a case is under way. The appellate folks have been looking with interest at the discussions in other committees and saying maybe we could have an appellate rule on this, even if the trial courts don't go for it yet. So it will be interesting to see how much develops jointly and how much develops in different ways across these sets of rules.

Judge Kethledge asked members for their thoughts, though he noted that the Committee would not be acting on the proposal immediately.

The clerk of court liaison commented that there many logistical issues involved in putting something like this together, including, for example, what version of CM/ECF each district uses, and attorney admissions issues, which limit the options now in the member's district. It is going to be very difficult. The member was not opposed to a rule like this, but to have uniformity is going

to be a tremendous task. She welcomed the idea of putting a subcommittee together to discuss it or to have further discussion on it, and thought it was worth exploring.

Judge Furman stated he was in favor of providing electronic access to those who are able to use it and do not abuse it, and that he supported a joint venture to explore it further. He was curious about how much of an issue or a problem it is. In his district there is a form to apply for ECF privileges as a pro se litigant, and the applicant must attest to certain things. That conveys a sense of seriousness about it, but he said he basically grants any application of that sort. In the pandemic his district has allowed people to email things to be filed. It might be better putting the onus on a pro se litigant who wants this privilege to request it, but maybe it is a problem elsewhere. This is an empirical question to investigate.

A member noted that there are very few pro se defendants who are not in prison in her district. She also noted that where there is a 2255 motion, there is a criminal case and a civil case going along together. She did not know if this pro se filing would count for the 2255's, too. She had no opinion about the proposal.

Judge Kethledge said because this is a reporters' task at the moment, he would not be convening a subcommittee. Professor Beale confirmed that was her understanding. If the reporters determine they need responses from each advisory committee on particular questions, then a subcommittee might be needed. But it is too early to say.

Time Limits on Habeas Dispositions in Appellate Courts

Professor King introduced the proposal at Tab 6, page 308, which is a suggestion for time limits for courts of appeal to decide matters in habeas cases. This is another proposal from Mr. Gary Peel who came to the Committee a few years ago proposing that something be done to speed up district court rulings in habeas cases. At that point, there was evidence of significant delays in district court disposition of habeas cases, enough to concern the Committee. The Committee referred the issue to the Judicial Conference Committee on Court Administration and Case Management ("CACM") for study. This proposal concerns courts of appeal, which are not in this Committee's bailiwick. Also, the proposal was not accompanied by any evidence that there is a systemic problem at the courts of appeal. The reporters recommend that the Committee decline to take further action on the suggestion and remove it from the Committee's agenda.

Judge Kethledge asked a member to comment. The member said he totally agreed that this suggestion should be removed from consideration. He said his court does not have a backlog in these cases, and he was not aware of a problem that warrants further study.

Judge Kethledge agreed these cases are not held up in his circuit. Hearing no other comments, he concluded that the Committee will not take action on that proposal.

Rule 59: Add Text Noting a 14-day Period for Reply to Objections

Professor King introduced the proposal at Tab 7, page 316: a suggestion from Judge Barksdale to add to Rule 59 text noting a 14-day period to respond to another party's objections.

The civil and the criminal provisions on responding to objections to magistrate judge rulings are not identical. The sentence noting a 14-day period to respond to another party's objections appears in Civil Rule 72 but not in Criminal Rule 59. Judge Barksdale commented that the reason for the difference is unclear, and that briefing from both sides is helpful in both contexts.

In preparing the memo in the agenda book, the reporters asked Judge McGiverin for his views on the proposal and the concern that the absence of the language in the criminal rule may lead judges to bar responses that would otherwise be allowed if there was some reference to a deadline for a reply. He responded that he has never seen a judge take a position that the rules do not allow a party to respond to the other side's objection. The reporters concluded that no change is needed because the existing rule is not broken, and suggested that this does not warrant a subcommittee. But of course it is up to the Committee to decide whether a subcommittee should look into this further.

Jonathan Wroblewski said he found it comforting that there was someone else out there who is bothered by asymmetry. But other than that, he agreed with the reporters' judgment.

Judge McGiverin added that parties should be allowed to respond to the other side's objection to a magistrate judge's decision, but at least in his district they are allowed to do so, with or without leave of the court. On the other hand, he noted his observation might not be representative, and that if other judges or practitioners find that this has created a problem, then it might be something to look into. He added that 28 U.S.C. § 636 includes only the 14-day period to object. He guessed that when the Committee drafted the criminal rule, they followed the statute, which includes nothing about a date for a reply. He also noted that other parts of the criminal rules, such as Rule 12, talk about different motions that a defendant can file. There is nothing in those rules about the government's ability to respond to the motion, although he would be very surprised if any court held the government could not respond to a motion to suppress evidence or other such motions.

Professor Beale added that Judge Barksdale does not say the omission in Rule 59 has caused a problem. It was more a concern on her part of a difference in the two civil and criminal rules.

With no more comments, Judge Kethledge confirmed that the Committee did not wish to take further action on this suggestion at this time.

Amending Rule 49.1 to Delete CACM Guidance from Committee Note

Professor Beale turned to Tab 8, page 319: a suggestion from Judge Furman to amend Rule 49.1. Judge Furman had occasion to rule on whether a defendant's CJA application and related affidavits were judicial documents that must be disclosed, with appropriate redactions, under the common law or First Amendment rights of access. The issue prompted him to examine Rule 49.1 and the committee note that was adopted as part of the cross-committee effort in response to the E-Government Act of 2002. The committee note includes guidance for implementation concerning privacy and public access to electronic criminal case files. It says the

"following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse," and the list that follows includes financial affidavits filed in seeking representation pursuant to the Criminal Justice Act. Professor Beale noted that the guidance in the note was essentially reaffirmed by the Judicial Conference when it added to its list victim statements, subsequent to the adoption of the committee note. Judge Furman found the guidance problematic, if not unconstitutional, as well as contrary to the views taken by most courts that have ruled on the issue.

Professor Beale said that the problem, if the Committee agrees with Judge Furman's analysis, is that the committee note is pointing courts in a direction that seems inconsistent with the First Amendment and the common law right of access. This Committee cannot amend a committee note without amending the rule itself. So, as noted on page 320, Judge Furman suggests that we add to the text, "subject to any applicable right of public access." That would signal that there are potentially applicable rights of public access and allow the Committee to write a new committee note explaining why that language was added.

The question before the Committee, she continued, is whether to have a subcommittee work on this. If so, that subcommittee would probably need to contact the Civil and Bankruptcy Rules Committees because Rule 49.1 was adopted as part of a cross-committee, parallel action. Another question would be how to work with the CACM Committee and the Judicial Conference to obtain clarification of the guidance. Although that is outside of our realm as a rules committee, it might be part of the interaction and outreach.

Judge Furman said Professor Beale did an amazing job laying the issue out, but if one wants a more thorough discussion of the particulars and is having trouble sleeping, his opinion was attached. He conducted a survey of the law and found that the relevant case law varies a little bit by circuit and in terms of whether and when the documents can be kept under seal or have to be released. But most courts have generally taken the view that under some circumstances they are subject to release. This rule and committee note language seems contrary to that, which struck him as problematic.

He recognized that one might ask whether there is a problem if courts are generally reaching the right result. He provided two reasons it is still desirable to amend the rule and note. First, neither the Criminal Rules nor the committee notes should be inconsistent with the Constitution or the common law. Second, courts may be misled. He found at least one decision from a judge in the Eastern District of New York that relied on the committee note to reject a disclosure motion, simply saying the note says it is not to be released, therefore it is not released.

Recognizing that any amendment to the committee note requires amending the rule itself, Judge Furman proposed an amendment. The amendment does not say these are judicial documents, but only makes a minimal change to avoid leading people astray and to signal to judges that they need to be mindful and engage in analysis, rather than blindly following the old committee note.

Judge Kethledge agreed that there is a problem. He described a 2014 case addressing the requirements for sealing documents that are part of the record. If documents are in the judicial

record and the court makes a decision, the public has a very strong presumptive right of access to review those documents to be able assess the court's opinion. In his circuit, sealing was wildly overused in that particular case. It was a class action, with serious allegations of wrongdoing by the defendant that affected millions of people in Michigan in a serious way. The plaintiffs retained an expert witness at the expense of $3 million, which would come out of a significant class recovery. Class members who were not named parties were barred from reviewing that expert's report to determine whether to object to the settlement because the district court said it was subject to a protective order. The court conflated the Rule 26 protective order standard with the sealing standard. So members of the class could not review most of the documents in the record in that case before deciding whether to object to the settlement. He said he had seen casual use of sealing in motion practice, which is a problem. He thought Judge Furman might have a point that this language in the rule or in the note could be making a small contribution to this mindset among the judiciary.

A member added that in her district, CJA financial affidavits are considered judicial documents and are not disclosed. There is probably a reason the Judicial Conference wrote that policy statement many years ago. Indigent defendants have a privacy interest in not having their personal financial information disclosed. A person who has enough money to retain counsel retains those privacy rights, and indigent defendants should not have that privacy violated. The CJA form asks for a list of dependents, debts, and other information that might be considered personal. That is one reason it is considered a private document.

There is also the Sixth Amendment right to counsel. Defendants should not be in the position of having to weigh giving up privacy in order to get a court appointed attorney, and the Judicial Conference likely thought that was too big a burden. The member said she was dismayed to hear that in some districts, the documents are considered public. A subcommittee on this topic would be worthwhile, and she requested being on it, but she would be taking the alternative approach of how to shore up this rule so that these documents are not revealed in other circuits.

Judge Kethledge noted the member made an interesting point that perhaps these forms even under the appropriate standard are just categorically not subject to disclosure. It is kind of a strict scrutiny standard once it is a judicial record; show a compelling interest to seal, and then the sealing has to be very narrowly tailored.

Mr. Wroblewski asked whether a subcommittee would be asked to determine whether this particular document is subject to public disclosure or whether presentence reports are subject to public disclosure or any other document. He did not think Judge Furman was asking for that, and Mr. Wroblewski expressed the hope that we would not have a Committee debate on the First Amendment right of access to every possible document.

Judge Furman agreed with Mr. Wroblewski's understanding that his proposal was limited. In response to the concerns about privacy he also agreed there are some serious issues and arguments may vary case by case. His point was simply that (other than perhaps one case from the Eastern District of New York) the courts have not generally taken a categorical approach that these

are not public documents. They have tended to analyze the facts and circumstances of the case, the possibilities for redactions and so forth. And that is not consistent with what the note says. He expressed concern that the note creates a trap for the unwary. It is inconsistent with what the law is. The First Circuit expressed doubt as to whether the CJA forms are judicial documents. Then in the alternative they equivocated a little bit on that and said, even if they are, we think the magistrate judge here weighed the balancing properly in not disclosing them. In the Second Circuit, you cannot reach that conclusion. They are clearly judicial documents, but in a particular case how that weighs and whether they should be public is a different story. His point was not to wade into that so much as to not have a note that is inconsistent with the law in some circuits, and that would lead people astray.

Judge Kethledge said the note seems to say that these CJA documents are categorically not available to the public. The question for a subcommittee is whether the rule or the note should instead allow that issue to be decided on a case-by-case basis. A subcommittee should address this. He asked Judge Birotte to chair the subcommittee, and Judge Birotte agreed to do so. Judge Kethledge said he would announce the other members of the subcommittee later. Judge Kethledge also stated he would follow up with Judge Bates on the suggestion to coordinate with civil and bankruptcy since they have similar language, and to advise the CACM Committee that this Committee is looking at the issue.

Rule 45(a)(6): Juneteenth National Independence Day

Professor King introduced the proposed addition of Juneteenth to Rule 45(a)(6). She noted the other advisory committees are considering the same addition and that the reporters recommend that the Committee approve an amendment that would insert the words "Juneteenth National Independence Day" immediately following the words Memorial Day. Professor Struve confirmed that that is entirely consistent with what other advisory committees are doing.

Judge Furman asked about the need for (a)(6)(A). On the theory that all of those holidays are declared a holiday by the President or Congress and therefore encompassed within (a)(6)(B), why have a rule that we have to update every time?

Professor Beale suggested that it may have been a belt and suspenders approach. Once a national holiday is declared, it should click in right away, but it would be easier for people to see it listed there and not have to try to look up if Juneteenth had been declared, or to find the legislation.

Professor Struve said this particular structure was carried forward when we did the time computation project back in 2009. And it is a handy reference. But that was still a good question.

Judge Kethledge commented that it is much clearer once it is listed in the rule. Professor Coquillette agreed that belt and suspenders is the correct explanation.

A member asked why the memo has the date June 19 added after the holiday name, but other holidays do not. Professor Beale clarified that the recommendation is to add "Juneteenth National Independence Day" without the date.

A motion to recommend the amendment was made and seconded, followed by a unanimous voice vote in favor.

Next Meeting and Adjournment

Judge Kethledge reminded everyone that the next meeting is scheduled for April 28, 2022, in Washington, D.C., thanked the Committee members, and adjourned the meeting.