ADVISORY COMMITTEE
ON
CRIMINAL RULES

November 4, 2021

AGENDA
Meeting of the Advisory Committee on Criminal Rules
November 4, 2021

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- Report of the Rules Committee Staff

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RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter	Associate Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

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Chicago, IL

Reporter

Professor Edward H. Cooper
University of Michigan Law School
Ann Arbor, MI

Associate Reporter

Professor Richard L. Marcus
University of California
Hastings College of Law
San Francisco, CA

Advisory Committee on Criminal Rules

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United States Court of Appeals
Ann Arbor, MI

Reporter

Professor Sara Sun Beale
Duke University School of Law
Durham, NC

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
Nashville, TN

Advisory Committee on Evidence Rules

Chair

Honorable Patrick J. Schiltz
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Minneapolis, MN

Reporter

Professor Daniel J. Capra
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	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

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Honorable Timothy Burgess United States District Court Anchorage, AK	Honorable Robert J. Conrad, Jr. United States District Court Charlotte, NC
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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
Raymond M. Kethledge Chair	C	Sixth Circuit	Member: Chair:	2013 2019	---- 2022
Andre Birotte, Jr.	D	California (Central)		2021	2024
Jane Boyle	D	Texas (Northern)		2021	2024
Timothy Burgess	D	Alaska		2021	2023
Robert James Conrad, Jr.	D	North Carolina (Western)		2021	2024
Roger A. Fairfax, Jr.	ACAD	Washington, DC		2019	2022
Michael J. Garcia	JUST	New York		2018	2024
Lisa Hay	FPD	Oregon		2020	2022
Bruce J. McGiverin	M	Puerto Rico		2017	2023
Jacqueline H. Nguyen	C	Ninth Circuit		2019	2022
Kenneth A. Polite*	DOJ	Washington, DC		----	Open
Catherine M. Recker	ESQ	Pennsylvania		2018	2024
Susan M. Robinson	ESQ	West Virginia		2018	2024
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee		2007	Open

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Honorable Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1

This item will be an oral report.

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
May 11, 2021

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("Committee") met by videoconference on May 11, 2021. The following members, liaisons, and reporters were in attendance:

Judge Raymond M. Kethledge, Chair
Judge Timothy Burgess
Judge James C. Dever, III
Professor Roger A. Fairfax, Jr.
Judge Michael J. Garcia
Lisa Hay, Esq.
James N. Hatten, Esq., Clerk of Court Representative
Judge Denise P. Hood
Judge Lewis A. Kaplan
Judge Bruce J. McGiverin
Nicholas L. McQuaid, Esq., *ex officio*[1]
Judge Jacqueline H. Nguyen
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
Professor Daniel R. Coquillette, Standing Committee Consultant

The following persons participated to support the Committee:

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

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was also in attendance.

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

The following persons attended as observers:

Amy Brogioli, American Association for Justice
Patrick Egan, American College of Trial Lawyers
Peter Goldberger, National Association of Criminal Defense Lawyers
John Hawkinson, a freelance journalist who expressed interest in Rule 16
Jakub Madej, Research Assistant, Yale University
Brent McKnight, Research Assistant, Duke University
Laura M.L. Wait, Assistant General Counsel, D.C. Courts

Opening Business

Judge Kethledge noted several members are leaving the Committee, specifically Judge James Dever, Judge Denise Hood, Judge Lewis Kaplan, and Mr. James Hatton. Judge Kethledge thanked each of them for their service to the Committee. He noted that Judge Dever, who chaired the Rule 62 subcommittee, and Judge Kaplan, who chaired the Cooperators Subcommittee and task force, had carried especially heavy loads. Judge Kethledge also observed that this was the first meeting for Judge Timothy Burgess of the United States District Court for the District of Alaska and for Mr. Nicholas McQuaid, Acting Assistant Attorney General for the Criminal Division in the Department of Justice (DOJ). Finally, Judge Kethledge also congratulated Professor Fairfax on his appointment as Dean of the American University Washington College of Law.

Judge Kethledge welcomed Judge Bates, Judge Furman, and Professor Struve from the Standing Committee, and Professor Capra, who is coordinating all of the emergency rules. Finally, he recognized the observers, and thanked them for their interest in the Criminal Rules.

Review and Approval of Minutes

A motion was made, seconded, and passed to approve the minutes of the Committee's November meeting as presented at Tab 1B of the agenda book.

Report of the Rules Committee Staff

In lieu of a report from the Rules Committee Staff on the materials presented in the first and second bullet points of Tab 1C of the agenda book, Judge Kethledge noted that discussion of the Standing Committee's meeting would be folded into the discussion of Rule 62 and that the report on the Judicial Conference would be presented at the end after the Committee's business was concluded.

Update on Pending Legislation

Judge Kethledge asked Ms. Wilson to provide an update on legislation currently pending in Congress. Ms. Wilson turned the Committee's attention to Tab 1C of the agenda book, specifically to page 101, where the legislation section begins. She highlighted the Sunshine in the Court Room Act, which Senator Chuck Grassley introduced in 2021. The Committee was not made

aware of the legislation before it was introduced, but it had been made aware of a second bill Senator Grassley introduced the same day. Ms. Wilson explained that the Sunshine in the Courtroom Act would give judges discretion to allow media coverage of proceedings at both the district and appellate levels. She noted the Act would potentially impact Rule 53. However, she continued, the Act would instruct the Judicial Conference to promulgate guidelines for how the Act would operate, allowing leeway to protect Rule 53.

Judge Kethledge asked whether the Act would be offered as an amendment to any other legislation already moving through the legislative process. Ms. Wilson replied that, so far, the Administrative Office had no indication that this would happen. She further noted the possibility of discussing the Act with Senator Grassley, given his correspondence with the Administrative Office about other legislation.

Discussion of Public Comments Received for the Text of Rule 16

Judge Kethledge asked Professor Beale to guide the Committee through a discussion of the comments received in response to the publication of the draft amendments to Rule 16, which the Committee had been working on for more than three years. Professor Beale directed the Committee to page 107 in Tab 2 of the agenda book, which contains the reporters' memorandum on the public comments and the Rule 16 subcommittee's discussion of them. Professor Beale explained that the Committee received six public comments, each of which the subcommittee evaluated in a telephone meeting. The subcommittee concluded that no changes to the version of the rule approved in April were warranted, but it agreed on one minor change to the committee note. The change to the committee note is discussed in the following section. Before proceeding further, Professor Beale reminded the Committee that the action before them was consideration of the comments and consideration of whether to send the proposed rule to the Standing Committee with a recommendation that it approve the rule and forward it to the Judicial Conference (and ultimately the Supreme Court and Congress). This meeting would be the Committee's last chance to make changes, and to be sure it fully endorsed the amendment.

The discussion of Rule 16 at points encompassed various topics. For the sake of clarity, these minutes present the discussion topically, rather than in chronological order.

A. Overview of Rule 16 Process

Professor Beale began by giving the Committee a brief overview of the need for a Rule 16 amendment and the process undertaken to date. The idea behind Rule 16 was that some changes were needed to move criminal pretrial discovery of expert witnesses closer to civil discovery of experts. The aim was to achieve earlier and more complete disclosure. The subcommittee began by holding an extremely useful miniconference to gather information and get feedback from practitioners. Given that judges are not ordinarily involved in cases during the pretrial disclosure period, getting the views of both prosecutors and defense lawyers was critical. The miniconference revealed two problems. First, pretrial disclosure related to expert witnesses was insufficiently complete to allow parties to adequately prepare for trial. Second, parties needed an enforceable deadline for disclosure because advocates could not properly meet expert testimony that they had

heard about only a few days before trial. Because Rule 16 lacked a deadline, there was no breach of the rules when disclosures were made at the last minute, even if this created problems for litigants. To solve these problems, the subcommittee attempted to ensure the rule would adequately specify what should be disclosed, and it created an enforceable deadline schedule.

B. Proposals for a Default Deadline

The public comments were very supportive of the idea of amending Rule 16, but four comments suggested changes. Professor Beale explained that three of the comments centered on whether the rule should provide a default deadline, as many state rules do. But the comments varied significantly on what the default deadline should be. When the subcommittee considered these proposals, it concluded there was no single default deadline that would be appropriate in every case. Instead of creating a default rule and asking parties to go to court to seek case-specific changes, the subcommittee concluded it was preferable to adhere to the Committee's position of creating a functional deadline: sufficiently in advance of trial to allow parties to prepare adequately. The judge must set the deadline in individual cases, or districts can create district-wide local rules. The Federal Magistrate Judges Association's ("FMJA") comment argued this latter aspect of the functional approach would create a problem because people would not read the local rules. But the new rule explicitly mentions local rules, and the subcommittee concluded this was sufficient to put parties on notice to consult the local rules. In sum, the subcommittee recommended staying with the Committee's flexible, functional deadline.

Judge Kethledge invited comments related to these proposals but noted that both the subcommittee and Committee had already considered the issue at some length. Hearing no comments on the issue, the Committee declined to add a default deadline.

C. Proposal to Delete "Complete" in "Complete Statement"

Professor Beale then moved to the next issue raised by the public comments, which focused on the rule's requirement that the expert give a "complete statement." Professor Beale observed the Committee deliberately chose to import parts of the civil rules to show that more complete disclosure is required. One comment argued that the phrase "complete statement" could be misleading, and the Committee should omit the word "complete." Professor Beale explained that completeness was a core idea animating the changes to Rule 16, and the subcommittee was unanimous in recommending retention of the "complete statement" language. Judge Kethledge then invited comments related to this suggestion. Hearing none, the Committee declined to omit the word "complete."

D. Proposal to Enlarge Disclosures Required by Rule 16

The next comment the Committee considered was from the National Association of Criminal Defense Lawyers ("NACDL"), which asked the Committee to enlarge the disclosures the rule required. Rather than require only the disclosure of the list of cases in which the expert has previously testified, NACDL proposed also requiring disclosure of any transcripts of testimony in the government's possession. It also proposed adding required disclosure of any information in the

government's possession favorable to the defense on the subject of the expert's testimony or opinion, or any information casting doubt on the opinion or conclusions. NACDL further proposed that these requirements apply to preliminary matters as well as pretrial, trial, and sentencing proceedings. Essentially, the proposal would bring within Rule 16's ambit material that the prosecution is already required to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). However, in its proposal, NACDL recognized that this suggestion could run afoul of the Jencks Act and Rule 26.2.

Professor Beale explained that accepting the NACDL proposal would be a major change and a substantive enlargement of draft Rule 16, requiring republication and a new public comment period. Further, the subcommittee also worried these changes would undermine the unanimous support enjoyed by the current targeted Rule 16 amendments.

Judge Kethledge commented on the importance of the Rule 16 amendment's support. Rule 16 has proved difficult to amend in the past, and there have been two or three attempts that failed after moving a significant way through the process. Judge Kethledge noted that amending Rule 16 is a delicate undertaking, and it is only through the good faith of both the DOJ and the defense bar that the Committee had made it this far over the last three and a half years. The current proposed amendments represent a delicate compromise, and Judge Kethledge urged that it should take a very good reason before the Committee moves to adjust the terms of that compromise.

Professor Beale added that the question for the Committee was whether this proposal would make a real improvement or whether, without it, the rule would be so incomplete that a larger, bolder proposal is necessary. The subcommittee's view was that a targeted, narrower approach was the right step, even if the Committee returns to Rule 16 to consider other changes in the future.

Judge Kethledge then invited comments on the NACDL proposal. A member questioned whether, if an expert witness's statement already implicates *Brady*, that statement would automatically be a part of the process of parties exchanging information. Judge Kethledge thought that was correct in light of the *Brady* obligation being totally independent of Rule 16 and the new *Brady* notification rule under the Due Process Protection Act. Professor Beale agreed that Rule 16 in no way limits the prosecution's *Brady* obligations. To the extent parties and the government are well aware of *Brady* obligations, that would be a part of the on-going disclosure process. Rule 16 is simply one piece of that process that focuses on what must be disclosed regarding experts. But if the government must go further than Rule 16 to meet *Brady*, then of course it must do so. Professor Beale also noted that the FMJA comments proposed that the Note reflect some interaction with *Brady* and Rule 26.2. The subcommittee did not think anyone would conclude that Rule 16 could somehow restrict, or would be intended to restrict, *Brady* obligations.

E. Cross-Reference Issue

Judge Bates noted that on page 115 of the agenda book, at line 19, the reference in the rule should be to (b)(1)(C)(i), not (C)(ii), because (C)(i) is the actual duty to disclose, not the timing of the disclosure. Specifically, the reference should be to the second of two bullet points under (b)(1)(C)(i). After the cross-reference was checked, there was a motion to amend the reference on

line 19 to amend "(ii)" to refer to the correct provision. A judge member seconded the motion, and it passed unanimously.

Later in the meeting, Professor Beale said she had heard from the style consultants on how to address the issue of cross-referencing to bullet points. The language could say: "the second bullet point in item (b)(1)(C)(i)." Suggestions were made and accepted to remove the word "item." A judge member moved to adopt this change. Two members seconded, and the motion passed unanimously.

F. Discussion of Asymmetrical Language in (a)(1)(G)(i)

Judge Bates raised a concern over (a)(1)(G)(i), on pages 114–15 of the agenda book. He noted that the provision contains two sentences. The first sentence describes the government's general disclosure obligation, which says it must disclose information it intends to use at trial "during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed . . . ." The second sentence, which is a more specific disclosure obligation related to evidence the government intends to offer regarding the defendant's mental condition, only references evidence the government "intends to use . . . at trial." This second sentence makes no specific mention of rebuttal evidence. Judge Bates asked whether the two sentences should be made parallel by adding language about the rebuttal to the second sentence. He suggested that the more specific provision regarding evidence of the defendant's mental condition should not be narrower than the general disclosure provision. Could the difference in the language cause problems?

Professor Beale said this point warranted discussion because the Committee had not previously focused on this language. Insanity defenses are relatively infrequent in the federal system. Normally, the insanity defense is raised by the defense during its case-in-chief, and then the government addresses it on rebuttal. The question for the Committee was whether the general disclosure sentence and the specific sentence on evidence relating to mental condition should be parallel so that the second sentence explicitly mentions rebuttal evidence. This made the issue potentially relevant for a defendant's surrebuttal.

A member pointed to an additional difference between the two sentences. The first sentence refers to testimony, but not to evidence. In contrast, the second sentence says: "testimony the government intends to use *as evidence* at trial" (emphasis added). "Testimony" in the first sentence, without the "as evidence" language, is arguably broader because it could potentially include impeachment evidence. This member thought that leaving "at trial" in the second sentence was helpful because it also could include impeachment. Her question thus centered on clarifying what role "as evidence" played in the sentence. Judge Kethledge responded the words "as evidence" referred to the particular species of evidence to which the particular disclosure reference applies—namely, evidence as to mental condition. Professor Beale observed that this difference between the two sentences preexisted the current proposed Rule 16 amendments. She thought Federal Rules of Evidence 702, 703, and 705 would cover evidence, and so the Committee could have deleted "as evidence" in the second sentence on lines 26–27 to make it parallel. She noted the Committee should not change any more than necessary to effect the desired changes. Even so,

the phrase "as evidence" appears to be redundant if the evidence is already being used under Federal Rules of Evidence 702, 703, and 705. Professor King reminded the Committee that the reporters and subcommittee had not previously discussed or focused on this portion of (a)(1)(G)(i).

Professor Struve commented that Judge Bates's earlier point about the erroneous cross-reference could be helpful to this discussion. The cross-reference to (b)(1)(C)(ii) is in the existing rule. And the provision to which it points will become the second bullet point under (b)(1)(C)(i), not (C)(i) in its entirety. It is about giving notice of intent to present expert testimony as to the defendant's mental condition under Rule 12.2. So maybe that would be a built-in limitation on when the scenario in the second sentence of (a)(1)(G)(i) arises.

Turning back to the linguistic difference between the two sentences in (a)(1)(G)(i), Professor Beale noted that the general disclosure obligation on lines 14–15 is currently limited to evidence the government intends to introduce in its case in chief, and the amendment broadens it to include rebuttal of evidence the defendant has timely disclosed. The second sentence, lines 17–28, refers to disclosures regarding the defendant's mental condition. Rule 12.2 imposes a special discovery obligation when the defendant's mental condition is going to be at issue. Professor Beale noted her opinion that the current draft language was adequate and that the two sentences do not need to be parallel. The language "at trial" on line 27 includes the case-in-chief and rebuttal. Judge Bates agreed about the breadth of the language "at trial." But if that is true for the second sentence, it would be true for the first sentence. So why have the two be different? Professor Beale noted that the present text already distinguishes general disclosure from disclosures regarding the defendant's mental condition, and as to the latter "at trial" could include surrebuttal. The Committee decided not to include surrebuttal in the general disclosure provision. And the government's obligation to disclose rebuttal evidence is applicable only for evidence the defendant has timely disclosed. The second sentence is very targeted at a species of evidence regarding the defendant's mental condition that has its own discovery schedule under Rule 12.2. This was a reason the rule distinguished initially, and it is not too jarring to have a difference between the two sentences.

A subcommittee member agreed with Professor Beale on the background of the rule. He added that at the miniconference, a number of defense lawyers expressed frustration that they had been sandbagged with disclosures in connection with rebuttal. That point of emphasis motivated the addition of the obligation to disclose rebuttal evidence to the general provision. The member then suggested a change to make the two sentences more parallel by deleting "as evidence at trial" and then inserting "at trial" after "the government intends to use" in line 24 of the draft rule. This would make them parallel in form, while retaining the language about rebuttal in the general provision.

Professor King noted one consideration to support the deletion of "as evidence" is that the committee note for the 2002 amendments states the Committee took "introduced as evidence" out and substituted it with "used," illustrating this kind of change had been made before. Professor King noted she would prefer removing "as evidence" rather than adding language about rebuttal to the second sentence of (a)(1)(G)(i). Judge Kethledge added that he also disfavored adding language about rebuttal to the second sentence because that would change the scope of the

government's obligation. The Committee had not thought about such a change with respect to mental condition, and he thought it would be unwise to make changes on the fly. Professor Beale also noted that no comments came in about mental condition cases. The phrase "at trial" has been in the rule for a substantial period of time and has caused no problems. In contrast, the limitation to evidence the government intended to present in its case in chief was causing problems, which the amendment addressed with precision, covering only rebuttal to evidence the defendant had timely disclosed. The current amendment was narrowly focused and balanced. But Judge Dever's suggestion described in the previous paragraph would bring greater clarity.

Judge Bates added that the last full paragraph of the committee note on page 123 of the agenda book says the provisions in (a)(1)(G) refer to the case-in-chief and rebuttal. The Note thus seems to apply to both the general and mental capacity provisions without recognizing a distinction between them, despite the textual differences in the rule.

A member moved to insert "at trial" after "to use" on line 24 of the draft rule and to delete "as evidence at trial" on lines 26–27. Two members seconded, and the motion passed unanimously.

G. Possible Different Meanings of the Term "the Disclosure"

Judge Bates noted that in several places, the term "the disclosure" is used, but that the term is used to mean different things. For example, in (a)(1)(G)(ii) the disclosure refers to the entirety of what the government is doing—that is, referencing all of the government's disclosures, even if they are many—but in (iii), the term is used differently to refer to a specific disclosure with respect to a specific witness. Because the government may have more than one disclosure in some cases, this inconsistent usage of a single term could create confusion. Judge Bates illustrated the point by raising a hypothetical scenario. Say that in the last four years the government made a disclosure including an expert report, but then the defendant pleaded guilty, and the case never went to trial. As a result, the expert never testified. Judge Bates asked whether that would be a publication that would then need to be disclosed in a later case involving the same expert. The original report was never made generally available to the public because of the plea, and there was no testimony. Should there be disclosure of the report, and, if so, does the rule capture that? Judge Bates observed that the earlier-disclosed report might not be a publication, and the case might not have to be listed in the Rule 16 disclosure in a later case because the expert never testified.

Professor Beale responded that the hypothetical and Judge Bates's observation about the outcome were accurate. The report was not a publication, there was no testimony, and there would be no disclosure under the amendment. But if the report somehow contained *Brady* material, then it would have to be disclosed. She noted this was not necessarily a bad outcome. The rule only requires listing the cases in which the witness testified but does not require providing the testimony. Judge Bates responded that nothing here would made the defendant aware of the report. Professor Beale agreed, and noted she thought the civil rules have the same phrase and would reach the same result. If Judge Bates believed the report should be disclosed, that would require a major change in the proposed rule.

Judge Kethledge asked the reporters whether the committee note should specify that prior reports are not publications, or whether it was obvious enough as is. Professor King replied that the additional change to the committee note already before the Committee would likely address that concern. Later in the meeting, the Committee discussed Note language intended to address that issue.

Turning back to Judge Bates' concern about the different uses of the term disclosure, Professor King noted the rule is structured so that it sets up the duty to disclose "any testimony" for each expert. From that point on, the rule refers to disclosures for that individual expert. The same language appears in the sections outlining the disclosure obligations of the government and the defense. Professor King asked Judge Bates whether, in light of the rule's structure, he read the rule as talking about multiple disclosures and then moving to a single disclosure, or whether the structure component in conjunction with the "any testimony" language addressed his concern.

Judge Bates responded that his concern was one of style. The term "the disclosure," whether it is in the headings or in the body of the text, refers to two slightly different things. The language to which Professor King pointed does not refer to different things. The rule says, "the disclosure," but multiple disclosures can happen in any given case. He noted language like "any disclosure" or "each disclosure" would work well in many places, but it was ultimately a style concern.

Professor Beale suggested one possibility would be to delete "the" in lines 29 and 32, and to do the same for the parallel provision for the defendant. But she thought this was only a style issue that can be taken up again with the style consultants, asking them whether it is preferable to delete the article or to make some other adjustment.

The Committee agreed to pass the issue along to the style consultants for further consideration.

H. Specifying the Identity of the Witness at the Eve of Trial

A member raised a question regarding circumstances where the government does not know the identity of the witness until the eve of trial. She noted that Rule 16 strikes a balance between identifying and correcting deficiencies in the current rule, but that it must create flexibility for all kinds of situations during criminal cases. One of the differences in the new rule is that the witness has to sign the disclosure. But there are circumstances where the government may know the content of the expert testimony at the time of the disclosure deadline, but it may not know the identity of the expert witness. This would most often arise with forensic experts, such as fingerprint experts. Usually, the government is only able to give a more generalized disclosure until closer to trial, and then the disclosure becomes more specific.

Professor King replied that the government need not have the witness sign if the government can provide a reason why, through reasonable effort, no signature is available. This would arise if the witness is adverse or if it is impossible to identify the witness at that point in time. Professor Beale added that this point had been discussed in connection with forensic firearms

experts because often the government does not know until closer to trial who the particular expert would be. But under the amended Rule 16, the government will have to disclose the content of the testimony, even if the witness remains unidentified.

The member who raised the issue followed up to confirm that the government can meet the generalized disclosure at the deadline set by the judge, and then give more specific information on the eve of trial. Professor Beale said that was essentially the balance the rule strikes. But at some point, the government must ask the court to limit the required discovery. If the government does not know what it will do as the trial date approaches, the question is whether the defense can adequately prepare on the eve of trial. It is a problem if the defense does not yet have the information at such a late stage in its preparations. Professor King pointed the Committee to page 125 of the agenda book, where the committee note discusses this particular scenario, at least when the expert's identity is not critical to the opposing party's ability to prepare. In that circumstance, the disclosing party may provide a statement of the witness's opinions without specifying the witness's identity. To give such a disclosure, the party wishing to call the expert would seek an order under Rule 16(d) to modify discovery. Professor Beale added that the party would, in effect, be asking the judge for the ability to wait until closer to trial to provide information on the witness's identity but to disclose the content now. The central issue then becomes whether the identity of the witness is critical to the opposing party's trial preparation, and that will depend on the nature of the testimony. Professor Beale also noted that Judge Furman had previously raised this issue, and the note language was the result of that discussion. A party may leave out parts that may not be critical to preparation but must do so under an order allowing it to restrict discovery in that way.

At the close of the discussion of Rule 16's text, a member moved to accept the text with the changes discussed during the meeting as well as the authority to address the style issue of how to cross-reference the bullet points in (b)(1)(C)(i).[2] Mr. McQuaid seconded.

The motion passed unanimously. Judge Kethledge thanked the subcommittee and the reporters for their work on Rule 16. He also thanked the DOJ and the defense bar for their notable good faith, understanding, and input throughout the process.

Discussion of Public Comments to Rule 16's Committee Note

Judge Kethledge turned the Committee's attention to the public comments received regarding the committee note to Rule 16. He asked Professor Beale to guide the Committee in a discussion of those comments.

A. Proposals from FMJA and NACDL

Professor Beale explained that the FMJA suggested making clear in the committee note that the rule does not change anything about the government's obligation under *Brady* and the Jencks Act. She reported that the subcommittee did not think this was a serious concern. The rules,

[2] As noted, *supra* page 6, this issue was resolved during the meeting with the assistance of the style consultants.

by default, cannot change constitutional or statutory requirements, and the Committee does not usually provide a disclaimer to that effect in the committee notes.

Further, Professor Beale explained NACDL's proposal to go into more depth about what information is required in the disclosure. Specifically, NACDL proposed that the committee note state the rule should not be read as requiring disclosure sufficient to withstand a challenge under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The NACDL proposal also asked for an explicit reference to a Tenth Circuit decision on this issue. The subcommittee, relying on the Committee's practice not to cite cases in the committee notes, declined to pursue this suggestion. Professor Beale further noted that the Committee has already cut back on any kind of in-depth language about how this rule could be distinguished from civil cases, and adding the suggested material would be inconsistent with that decision.

Judge Kethledge asked for comments on either of these two proposals. Hearing none, the Committee declined to take up either of them.

B. Proposed Language Excluding Internal Government Documents from the Definition of "Publications"

The DOJ proposed adding language to the committee note. Although this provision was considered during the discussion of Rule 16's text, the discussion is reflected here in order to present together all aspects of the discussion of the committee note.

Prior to the meeting, Mr. Wroblewski had relayed a concern from the Drug Enforcement Agency ("DEA") regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The details of that concern are presented in pages 111–12 of the agenda book. The outcome was that the subcommittee decided to revise the committee note to add: "The rule provides that the disclosure regarding the witness's qualifications include a list of all publications the witness authored in the previous 10 years. The term 'publications' does not include internal government documents."

Responding to this new language, a member stated he did not fully understand DEA's concern, because the ordinary understanding of "publication" does not include internal government documents. Thus, if you add the proposed language to the committee note, it suggests the word "publications" is broader than people normally understand it to be, hence the need for a carve out. The member questioned whether the Committee should further explain the term, given the implication of the additional language. Judge Kethledge observed that as an interpretive matter, ordinary meaning is the way the text of a rule or statute is often understood. He gave an example of an opinion in which the positive meaning of the scope of a provision was dictated by the exceptions. The exceptions defined the sphere of the rule. If the new language to the committee note is representative of what is *not* a publication, it implies some other things *are* publications. That could raise concerns.

Judge Kethledge asked the DOJ representatives for input. Mr. Wroblewski thought the concerns just raised were legitimate. He noted DEA had a couple of specific examples of cases they wanted to bring to the Committee's attention that would be implicated by the rule. Mr. Wroblewski did not think adding the language to the committee note was a pivotal provision from the DOJ's perspective, though it addressed something that concerned DEA. He reiterated that the concerns were legitimate, and he was now on the fence about the new language. Judge Kethledge wondered if it might be necessary to include a positive definition of publication if the Note included this language. Mr. Wroblewski explained the positive definition of "publication" the DOJ had also offered. There is very little caselaw on the meaning of that word. If the Committee were to define it, the definition would focus on whether the document had been made available to the public. For instance, there was a case where a doctor spoke at a conference and that was considered a publication. Mr. Wroblewski noted he was unsure whether it would be more helpful to define "publications" or to remove the suggested language from the committee note.

Judge Kethledge observed that the proposed addition could create more problems for the government than it solved. Internally, the government calls some things "publications" that ordinary people would not think of that way.

A member commented that it seemed too difficult to define "publications," and doing so would be a much broader undertaking than the concern that prompted the new language. She also added that this discussion implicated Judge Bates' hypothetical about expert reports developed and produced to the other side for an expert that does not testify. In the member's view, that disclosed report is not an internal government document and thus could be subject to production depending on what the document says. That example, she concluded, puts the Committee in a difficult zone if it were to try to define what is and is not an internal government document.

A subcommittee member stated that when the subcommittee discussed this issue, the discussion centered on *deliberative* internal documentation. But the language proposed for the committee note was broader. Disclosures between agents in the government could arguably be discoverable if they covered the exact topic to which the expert would testify. The language "internal documents" goes further than the deliberative process documents that the member had understood to be the original concern. She also commented that in the civil rules, parties only receive notice of prior deposition or trial testimony. The criminal rule would mirror that. But reports that never saw the light of day through testimony are not subject to being identified as prior testimony, unless the topic of the report implicated the Jencks Act. The member saw no need to change the current proposed rule with regard to disclosing prior reports.

A judge member observed that references to "publications" have been in the civil rules for a long time. The committee notes accompanying those rules do not define it either negatively or positively, which supported the point that including the DOJ's suggested language could create confusion. This judge stated his preference for the committee note without the added language. And if *Brady* or the Jencks Act are implicated by a report, the government will have to comply. He added that if the DOJ is now on the fence about the added language, it might be worth taking it out and not changing the committee note.

Professor Dan Coquillette, who described himself as a note fanatic, strongly urged the Committee not to add the proposed language to the committee note.

A member moved to reject the addition to the committee note, and there was a second. The motion passed unanimously.

C. Discussion of the Committee Note's Language Concerning the (a)(1)(G)(i) Disclosures

As explained above, Judge Bates raised the issue that even though the text of the general provision and the specific provision about mental conditions in (a)(1)(G)(i) are intended to mean different things, the committee note appears to treat them the same way. The Committee returned to this issue during its discussion of the committee note. Judge Bates observed that there was nothing wrong with the language of the committee note, so long as its meaning is what the Committee intended. Professor Beale suggested that in light of the insanity provisions in Rule 12.2, the interlocking discovery rules, and the fact that the government ordinarily presents mental capacity evidence during rebuttal, the committee note was fine as written.

Professor Beale also suggested adding the word "general" to the paragraph to specify that it applied only to the general provision in (a)(1)(G)(i). Judge Bates replied that then the committee note could be read as implicitly saying there is no disclosure obligation in rebuttal for evidence related to mental capacity, which is not the Committee's intent.

The Committee decided to make no changes to that paragraph of the committee note.

There was a motion to transmit the committee note to the Standing Committee. The motion was seconded, and it passed unanimously.

Discussion of the Text of Draft Rule 62

Judge Kethledge turned the Committee's attention to the draft of new Rule 62. He then turned the discussion over to Judge Dever, the Rule 62 subcommittee chair. Judge Dever thanked the members of the subcommittee and the reporters for their work on the new rule. He noted the goal was to approve a draft for public comment. He asked Professor Beale to guide the Committee through the memorandum in Tab 3A of the agenda book.

The discussion of new Rule 62 at points covered a variety of topics. For the sake of clarity, these minutes present the discussion topically, rather than in the chronological order in which each point was raised.

A. Discussion of Subsections (a) and (b)

Professor Beale noted that the changes were to the text of the uniform provisions in subsections (a) and (b) resulted from negotiations between the various Committees and the style consultants. The subcommittee was not seeking to make any adjustments for the conditions of an emergency or how an emergency should be declared. Professor Beale asked Professor Capra if he

had anything to add. He mentioned that subsections (a) and (b) are now essentially uniform across the emergency rules to the extent the Standing Committee wanted them to be. Any variations for the criminal rules have been approved after extensive discussion in the Standing Committee. There is one variance in the civil rules that has yet to be explained to the Standing Committee, but from the criminal perspective, uniformity is established to the extent the Standing Committee wanted it.

Professor Beale further explained that the "no feasible alternative" language has been retained. That is one difference from the other committees' rules, and the other committees do not object to there being a difference in light of the different policy and constitutional implications inherent in the criminal rules. It is important to have this separate, hard check to ensure the criminal rules are not relaxed or modified when they do not need to be. Professor Beale said that outside of this, a few words were deleted as being unnecessary. Otherwise there were no other changes for the Committee to review in subsection (a).

Subsection (b) provides for declarations of emergency. Subsection (b)(1) had no changes. Professor Beale reminded the Committee of its earlier discussion about whether the language should be "court or courts" or should say "locations," which the Bankruptcy Rules Committee had suggested. That language has now been standardized to refer to the court or courts affected. All the committees agreed that 90 days would be the maximum stated period. Earlier, the Committee had wanted mandatory language stating that the Judicial Conference must terminate the declaration for one or more courts before the termination date if the emergency conditions cease to exist. This Committee and the Standing Committee both discussed this issue extensively, especially noting the undesirability of saying the Judicial Conference *must* do something. Who would enforce that? The Judicial Conference has discretion to act, so is there really any reason to have a mandatory obligation? Thus, the language now reflects the uniform decision across the committees that this language should be discretionary, reflecting trust in the Judicial Conference. Professor Capra added that the Judicial Conference has discretion to declare any emergency in the first place. But they do not have to. That same discretion is thus retained in the power to terminate it early. Professor Beale noted that even if some members felt it was preferable for the language to be mandatory, a lot of thought had gone into it, and the direction from the Standing Committee and the other committees was very strong on this point.

Further, this Committee and the Standing Committee were concerned that any additions, extensions, or expansions to a declaration of emergency must meet all the requirements in subsections (a) and (b). At one point we had cross references to both (a) and (b), but after review by the style consultants, the language reads "may issue additional declarations under this rule." "Under this rule" includes both subsections (a) and (b). There is no possibility of using a different standard.

Framing the remaining discussion, Judge Dever emphasized that the subcommittee started with the premise that the rules safeguard critical rights as originally drafted. The Committee has a mandate under the CARES Act to create emergency rules. The subcommittee used a bottom-up process, and it worked to address fundamental issues in subsections (a) and (b) before getting into the details of the emergency procedures.

B. Discussion of the "Soft Landing" Provision

Professor Beale noted the subcommittee had extensive discussion about the "soft landing" provision, subsection (c), which reflects the notion that in certain cases, it might be important and desirable to use the emergency rules to complete a particular proceeding that is already underway once the emergency declaration terminates, when it would be too difficult to resume compliance with the non-emergency rules for the rest of the proceeding. The language, Professor Beale noted, is intended to restrict this fairly narrowly.

Professor Capra added that other committees do not have independent "soft landing" provisions. The appellate rules already include a provision to suspend the rules. And the Bankruptcy and Civil Rules Committees tied the soft landing to extending time limits, within the particular provisions. In contrast, draft Rule 62 has a freestanding provision, and it is important for that to be so in light of public trial and other constitutional rights attendant to criminal proceedings. Professor Beale added that if the emergency ends, the emergency procedures can continue only with the defendant's consent. Why should a defendant be forced to proceed with what he might consider an inferior process if he could revert to more robust procedures?

Professor King relayed how the subcommittee discussed the costs of insisting on the defendant's consent and the costs of not requiring that consent. It concluded that the soft landing provision would not be invoked very often. First, most proceedings for which video and telephone conferencing are authorized under the rule will not be multi-day proceedings that would trigger this provision. Trial is not included. Second, the 90-day termination date for a declaration will be well known to judges. As a result, judges could avoid scheduling multi-day proceedings on the cusp of a potential termination. Further, it is not likely that the defendant would refuse to consent, and would instead insist that a proceeding be delayed until live witnesses were brought into the courtroom, or that the courtroom would have to be opened for in-person presence. And if a defendant did not consent to finishing under emergency procedures, it would not take all that long to resume normal procedures after a declaration terminates if indeed the emergency no longer substantially impairs the ability to function under the existing rules. Accordingly, the subcommittee thought it was important to insist that the defendant consent to the continuation of the use of emergency procedures after the emergency declaration is terminated, in order to address any constitutional concerns raised by the continued use of emergency procedures beyond the termination of the declaration.

Professor King went on to explain there had been three changes to section (c) of the rule since the Committee last saw it. First, it was moved to a different position in the rule because of confusion about the language "these rules" when it had been placed after a long list of emergency provisions. Moving it up in the rule helps clear up that confusion. Second, the consent requirement was added. And finally, the language "resuming compliance" was added to emphasize that the rule is talking about resuming compliance with the regular, existing rules.

A member asked how this would play out practically. First, there has to be a finding, based on a fairly high threshold, that it is not feasible and would work an injustice to resume compliance with the rules. Then, the judge must get the defendant's consent. But in subsection (e), the court

already had the defendant's consent for the substantive provisions in (e)(2), (3), and (4), so it would not affect (e) at all. Thus, the new consent is focused on subsection (d). Subsection (d)(2) already requires the defendant's consent by signature. That leaves public access and alternate jurors and Rule 35. For alternates, what if you've impaneled more than six, and you're going forward, and now you're down to one or two? Do you have to dismiss alternates at that point if you don't get the defendant's consent? The member expressed concern about the practical effect of the defendant's consent under (c) to continue the proceedings after termination of the emergency declaration, when that consent only seems to affect two provisions.

Professor King responded that the subcommittee considered the premise that the prior consent for the emergency procedures would be the same as the consent required here. However, it believed that consent to emergency procedures when a declaration is in place does not necessarily include consent to the continued use of emergency procedures after the declaration ends. There were different views on this, but there was enough concern that the calculus of the defense would be sufficiently different once a declaration ends that an additional consent requirement was not redundant. Professor King stated that the subcommittee did not talk about the alternate jurors scenario presented and suggested the Committee might want to discuss that further. As for public access, the defendant's consent would not address any first amendment problem with the public access provision in the emergency rule, which is in subsection (d)(1). But the subcommittee decided that there would be no serious constitutional concern if public access continues under the emergency rules for a procedure that began under those rules, so long as a reasonable, contemporaneous mode of alternative access is provided.

A member noted that, for a video conference, consent is required for each proceeding. He assumed the defendant must give consent proceeding by proceeding. Professor Beale responded that the question is whether, if a defendant consented to the emergency procedure with the understanding the emergency was continuing, but then the situation changes significantly, the defendant must reconsent under those new circumstances for the proceeding to continue under the emergency rule. Of course, the parties could structure the original written consent to include both situations. But if they did not, the subcommittee's view was that when conditions changed that much, a new consent should be required.

Judge Dever posed a hypothetical scenario. Although multi-day sentencing hearings do not happen often, they do occur. Consider the situation where there is a multi-day sentencing hearing. The first day of the proceeding is during a period of time when an emergency declaration is in effect, and the defendant consents to use Rule 62 emergency procedures. The proceeding goes ahead, and considerable evidence comes into the record. Then, under Rule 32(h), the judge informs the parties he is contemplating a variance from the Guidelines. Suppose, pursuant to *Irizarry v. United States*, 553 U.S. 708 (2008), that the defendant then asks for a continuance. The judge grants it, but he has another trial already scheduled so that it takes another two weeks or a month for the sentencing to resume. If the resumed sentencing hearing was then outside the period of the emergency declaration, the defendant would then need to consent under (c) to continue the sentencing hearing under the emergency procedures. Judge Dever further explained he did not envision defendants needing to consent each day of a multi-day video-conference sentencing hearing when all of those days fall under the time period of an emergency declaration. But if a

delay puts the continuation of the hearing outside the time period of that declaration, the defendant should have the option to insist on being in the court room, in person, with the judge and his family members present, and not consent to continuing the sentence by videoconference. Judge Kethledge thanked the member who had raised the issue for that very helpful exchange.

The Committee returned to section (c) later in the meeting. For coherence, that later discussion has been placed here.

A member raised a further question about the interaction of the "soft landing" provision section (c) with the impaneling of alternate jurors. Subsection (c) refers to continuing the proceeding after the emergency has ended. The consent in subsection (c) is the consent to continue the proceeding, not the particular departure. The member pointed out that a trial cannot be done remotely. Judge Dever agreed. The member responded it could be a problem for an in-person trial in which extra alternates have been impaneled under the emergency rule and the declaration terminates before the end of the trial. What if a defendant does not consent for the proceeding to continue, even though the departure—namely, impaneling an extra alternate juror—happened before? If the defendant does not like how the trial is going, he could say "I don't consent to continuing this proceeding." The member stated that it was worth considering that this could raise a Double Jeopardy issue because jeopardy has attached.

Professor King observed that if the extra alternate could be dismissed when the declaration ended, "resuming compliance" would be feasible. But if the trial was two weeks along and you've used all the additional alternates, and they have taken the place of jurors that have left, then resuming compliance is not feasible. Must the defendant consent in that scenario?

Judge Dever replied that this might also be a question to send out for public comment. His sense was, as a practical matter, that if a court uses all the alternates and they are already in the box, then they have become the twelve jurors prior to the emergency ending. Once the alternates are there, they are impaneled, and a defendant could not remove consent to block alternates from being placed on a jury that dropped below the requisite number. The member who had raised the concern responded that the difficulty is whether that "proceeding," namely the trial, can continue if the alternates are already being used.

Professor King suggested that rather than make any change to subsection (c), the Committee might reconsider the alternate juror provision in subsection (d)(3). Judge Kethledge responded that if jurors are getting sick on a rapid basis during an emergency, the authority to impanel alternates quickly is important. Judge Dever noted a recent trial in front of another judge where six jurors were lost. He added that attendees at the miniconference discussed the need for additional alternative jurors, which is an important concern.

A member stated she thought the alternate juror issue was not as big as it seems. Once the jurors are impaneled, the departure from the rules has already been completed. After the emergency ends, the court would not go back and revisit what already occurred. The rule is clear that authority exists to impanel them. Once that happens, it's done. The defendant's consent is not needed after the initial decision to impanel. It is not a decision to continue to allow them staying on the jury.

As long as the Committee agrees with that reading of it, then the action is completed once the impaneling occurs.

A second member agreed that this reading of the alternate juror provision was the most natural one. If the defendant is unwilling to waive his speedy trial rights, then the rule needs to give district judges the tools to evaluate emergency conditions, get alternate jurors, and ensure that trials can go forward. It is particularly important to have a specific provision in here allowing the district judge—who is in the best position to evaluate the emergency conditions—to impanel ten or twelve alternate jurors, if necessary. The district court can then troubleshoot problems as they arise. If we are three weeks into a six week trial, the district judge can figure that out. The second member concluded it is important to strike the balance in favor of impaneling jurors at the outset.

The Standing Committee liaison stated his strenuous opposition to removing the alternate juror provision. He had conducted a number of trials during the pandemic and having enough jurors had been a challenge. But, he said, he had been persuaded there is an issue because of the language in subsection (c). There is at least an argument that once the declaration terminates, the proceeding cannot be completed without the defendant's consent. Because there is a textual basis for that argument, and the Committee does not intend that result, the Committee should be clear about it. The liaison suggested adding language to the committee note that it doesn't affect an ongoing trial, but if there is ambiguity, it may be better to clear it up in the rule. One option would be to change "may be completed" language to reference departures already adopted and say that those departures can continue. Alternatively, he also suggested adding an additional sentence specific to jurors, saying that any trial that has begun under the authority of this rule may be completed notwithstanding the termination of the declaration.

Professor Capra responded that this should be dealt with in the committee note. He did not think the ambiguity was that dramatic. When the proceeding of empanelment is finished, then it is finished. And this should be stated in the committee note. The member who had raised the concern expressed his support for having the note specify that the procedure is the empanelment, not the trial. Professor Beale suggested that adding something about this in the committee note's discussion of subsection (c) could be difficult, especially because the language in the rule is "proceeding" not "procedure." The member who had raised the issue replied that if the rule is read to mean that the proceeding is the empanelment, not the trial, then that would clear up the issue. Judge Kethledge added that in subsection (c), the rule is saying that the proceeding may continue. But what the Committee is really saying is that the non-compliance under the emergency rules can go forward with the defendant's consent. The Committee is assuming the proceeding will move forward either way.

Professor Coquillette agreed with Professor Capra that the committee note is the proper place to address this. Also, this is an area where the Committee should learn a lot during publication.

Judge Kethledge suggested that the reporters work on language for the note that could be reviewed after lunch or circulated by email for approval after the meeting if necessary. During the lunch break, a working group including the reporters, Judge Kethledge, Judge Dever, and Professor

Capra, worked out draft language for the committee note on this issue. After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group on this issue.

The suggestion was to add to line 77 of the Note: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." This language is targeted at the specific problem, and preferred by the working group over other language that would have been broader. Judge Kethledge added that the next sentence would start with "In addition," to make sure this is a separate point, and would convey that the suggested language clarifies that the termination does not affect this authority of the district judge and that subsection (c) is doing something different, carving out things that otherwise would have been affected by the termination.

Judge Dever asked for reactions to this proposal, specifically whether any of the members objected to it. No one did. Professor Beale asked whether the new language should explicitly refer to jurors who have "previously been" or "already been" impaneled, to drive home the idea this has already been done, but she noted that the sentence is already in the past tense. Judge Dever agreed that the additional language was unnecessary given that it already refers to jurors "who have been" impaneled. Judge Kethledge added that it referenced (d)(3) which is something that happened in the past. And Professor Beale added that it was referring to an ongoing trial so it would be clear that this happened in the past. Judge Kethledge said that adding this to the committee note was the way to go because it would be a misinterpretation of the rule to read it to mean something else, so there is no need to amend the rule itself. But this addition would help avoid the possibility of misinterpretation.

C. Discussion of the Emergency Departures from the Rules Authorized by the Declaration

Professor King then turned the Committee's attention to subsection (d). The reporters' memorandum outlines the changes that responded to the concerns from the Standing Committee and other issues that had arisen since the previous Committee meeting. Professor King explained that in subsection (d)(1), focusing on public access, two changes were made. First, on line 33 of the draft rule the term "preclude" was changed to "substantially impair." This change was intended to ensure that the court provide reasonable alternative access even if emergency conditions provide for some public attendance, but not all. If there was a partial closure caused by the emergency conditions, the court must provide reasonable alternative access. Second, the language "contemporaneous if feasible" was added to line 35. The subcommittee thought it was important that public access would be contemporaneous, if feasible, not a transcript or recording provided after the fact. This additional language reflects that intent.

Professor King explained that the only other change other than deleting the bench trial provision, was to subsection (d)(2), which is the signature provision. This provides an alternative way to secure the defendant's signature for the court when it is difficult to get a signature because of the emergency conditions. Language was changed on lines 36–37 to say: "any rule, including this rule." This was prompted by a concern that (e)(3)(B) requires a request from the defendant in writing. Just as (d)(2) allows for an alternative process for getting a writing under the existing

rules, it also should apply to the writing designated in (e)(3)(B). As a result, the language on lines 36–37 was changed to explicitly reference "any rule, including this rule."

Mr. Wroblewski asked how the affidavit requirement in (d)(2) is triggered. Professor King responded that if the defendant is live before the judge on a video conference, and the judge can see and hear the defendant's consent, then the defense counsel can sign on the defendant's behalf. The judge can be fairly sure the defendant is actually giving consent. Lines 41–42 with the affidavit address the situation where the defendant is not in front of the judge. The judge may not be able to see or hear the defendant, but defense counsel is nonetheless signing for the defendant. This suggested procedure came from the miniconference, at which lawyers and judges talked about how they were managing difficulties during the pandemic. Using affidavits was how they were managing it, and there were no real concerns arising from that practice.

Judge Bates offered two observations. First, he noted his agreement with the Committee's decision to delete the bench trial provision, which was a change in response to concerns from the Standing Committee. Second, Judge Bates asked whether line 49 of the draft rule should include the word "any" to make it the same as Rule 45(b)(2) to mimic the provision Rule 35 which includes the words "any action." Professor Beale noted that it was probably edited out by the style consultants because they would think "an action" is "any action," making the "any" redundant. But that was a guess. The Committee was unsure whether "any" was edited out or had never been in the rule to begin with. Mr. Wroblewski responded that he didn't think there was an intent to limit anything.

The Standing Committee liaison agreed with Judge Bates on deleting the bench trial provision. He asked whether a letter could not suffice instead of an affidavit. Is having all the formal trappings of an affidavit or a declaration really necessary here? A member suggested "affidavit" be modified to say "declaration." A formal document is good, but a declaration is easier because you don't have to go find somebody to notarize it, the lawyer can attest to it herself, and it would be less formal. The Standing Committee liaison replied there is a statute saying a declaration essentially means the same thing as an affidavit. Where an affidavit is required, a party can file a declaration and vice versa. But he was not sure whether the rules elsewhere say something different. He reiterated that his question was more about whether the Committee wanted to require something very formal, or whether the letter would suffice.

A judicial member commented that she felt strongly that the writing should be formal. Declarations and affidavits get filed and put into the record. A letter might not. She said it could be a document that the lawyer could attest to, but it should at least have the formality of a declaration. Professor King agreed, noting that there are two reasons for the requirement, not only to make sure that the defendant actually consents, but also to ensure the document is filed in the record. Having that record going forward is important. Judge Kethledge added that if the issue of consent went up on appeal, the appellate court must look at the closed universe of the record. If it was less formal and didn't make it into the record and there was litigation about consent that would be an awkward situation. Professor Beale noted that the rules use "affidavit" a number of times, but not "declaration." The Standing Committee liaison noted that in his district letters are filed on

the docket, but if that is not the case elsewhere, he agreed that the document should be a part of the docket, and if it takes saying "affidavit" to accomplish that, then so be it.

Another member noted 28 U. S. C.§ 1746 already equates declarations with affidavits, and agreed the declaration is simpler. Judge Dever agreed § 1746 makes the terms interchangeable. A lawyer could file a declaration, but the rules use "affidavit" in light of what the statute says. He said he thought lawyers would know this. He often receives declarations where the rules use "affidavit." It would create a style consistency issue if the Committee used "declaration" here where all the other instances in the rules say "affidavit."

Judge Bates suggested the Committee could change the language to "a written confirmation of the defendant's consent." This would allow something other than an affidavit or declaration, but it would be something that has to be filed on the record. Judge Dever asked for discussion of this suggestion. He pointed out that circumstances vary significantly across districts. In his district, it is highly unusual to have a letter filed on the docket, but not an affidavit. The original language was intended to stress the importance and significance of the defendant's consent. A member noted that in her district, if a party wants to use an affidavit or declaration, they can file it electronically. In theory, they could electronically file a letter, but they aren't commonly put on the docket. A letter sent through U.S. mail may not get to the court quickly, and it might not arrive before the proceeding it was intended to support. Professor Capra noted that the conversation seemed to be a dispute over what happens on the ground. That is a matter for public comment. He suggested the Committee publish the rule with the "affidavit" language and hope for or invite public comment on it. Judge Dever expressed agreement with that idea.

Judge Dever then invited any other discussion of subsection (d). Hearing none, Professor King moved on to subsection (e).

D. Discussion of the Subsection (e) Teleconferencing Provisions

Professor King began with the recommended changes listed on pages 133–34 of the agenda book. The first change was in subsection (e)(2) on line 70 of the draft rule. The word "preclude" was changed to "substantially impair." Professor King highlighted a similar change discussed earlier. The idea behind the change was to give district judges more flexibility to use emergency procedures when their ability to hold in-person proceedings is impaired by emergency conditions, not only when in-person attendance is precluded entirely. In this part of the rule, the chief judge makes a finding for the whole district. Second, there was a minor change to subsection (e)(3) on line 82 to specify a reference to (e)(2)(B) as well as (A). Third, the chief judge parenthetical was removed. Fourth, line 84 was amended to say "substantially impair" instead of "preclude." Fifth, in line 86, the phrase "within a reasonable time" was added. The subcommittee originally preferred including that phrase, but it had inadvertently been left out of the draft.

Several additional changes were made to subsection (e)(4). Earlier, members had wondered why a finding of serious harm or injustice was not required before pleas and sentences could be conducted by teleconference, and why written consent was not required. The changes to (e)(4) were intended to address those concerns. Subsection (e)(4) now separates out into subdivision (A)

the command that every requirement for videoconferencing must be met before teleconferencing can be authorized. This is in lines 94–97 of the draft rule. Further, in lines 99–100, the phrase "particular proceeding" was added to make it clear that the required findings are proceeding specific and that they cannot be made for the whole case or for multiple cases.

The "reasonably available" language in (e)(4)(B)(i) is new and is explained in the committee note. The concern was that other language, such as "cannot be provided for within a reasonable time," would not address all the reasons judges might use teleconferencing instead of video, including the situation where the video shuts off during a videoconference and the parties want to finish on the telephone rather than start over at a later date. Professor King added that the rest of subsection (e)(4) is the same, with new lettering and numbering to account for separating out the requirement that is now (e)(4)(A).

Judge Bates raised two concerns about subsection (e)(4). First, the paragraph says that the requirements under "this rule" have to be met. But for (e)(1), it is not only the requirements of "this rule" that apply. Rather, it is the requirements of Rules 5, 10, 40, and 43(b)(2) that matter. For Rules 5, 10, 40, the only requirement is consent. For Rule 43(b)(2), the case must involve a misdemeanor and there must be written consent. Judge Bates wondered whether saying "this rule" on line 45 in subsection (e)(4) was broad enough to include the requirement that these other rules must also be satisfied.

Professor King said that the subcommittee had considered this issue. Its conclusion was that the language in subsection (e)(1) sufficiently refers to the requirements of Rules 5, 10, 40, and 43(b)(2) so as to dispense with an express reference to those rules in (e)(4). At one point, the draft rule contained brackets listing the other rules. The subcommittee removed the bracketed language, thinking what is now lines 53–62 was sufficient incorporation of the requirements in the other rules to dispense with expressly stating them elsewhere. Judge Bates stated he understood the other rules had to be met under (e)(4), but he wondered whether the language of that provision was sufficient to encompass that.

Judge Kethledge added that Judge Bates' technical point was probably accurate. If a Rule 5 proceeding was held with videoconferencing in violation of Rule 5, you could say there was a violation of Rule 5 but would not say there was an independent violation of (e)(1). There is a reference in (e)(1) but not an incorporation. Judge Kethledge suggested saying "these rules" instead of "this rule." Professor King responded that the problem with using the phrase "these rules" is that the first paragraph of the committee note makes clear that "these rules" refers to all the rules *except* for Rule 62. So any change would have to use some other language or add some other requirement on lines 95–97 to get to Rules 5, 10, 40, and 43(b)(2).

Judge Dever questioned whether the subcommittee had already dealt with this issue in lines 164–74 of the committee note, or at least tried to address it. He thought we clarified this issue in the note.

Professor Beale noted that in in (d)(2), which deals with rules requiring the defendant's signature or written consent the Committee used the phrase "any rule, including this rule." The

Committee could use the same phrase in (e)(4)(A) to specify requirements under which proceedings for video conferencing have been met. It is not elegant, but it is exactly what the Committee did where both Rule 62 and other rules require something to be in writing. That would be one way to make it explicit here.

Judge Bates added that in the committee note for subsection (e)(4), specifically line 255, the Committee could add a sentence that would take care of this issue and leave the language of the rule the same. Adding something there would be a sufficient way to take care of it. But, Judge Bates emphasized, it should be a part of the committee note on (e)(4)(A), not a part of the committee note on (e)(1). Professor King responded that a change to the rule's text might be preferable given that people sometimes do not read the committee notes, but that the language that Professor Beale suggested could go on lines 255 and 256 of the note: All the conditions for conducting a proceeding by videoconferencing under any rule, including this rule, must be met.

Judge Kethledge agreed with Judge Bates that (e)(4)(A) does not bring the other requirements of the other rules into Rule 62. He expressed support for putting "any rule, including this rule" into the text of (e)(4)(A), so that people don't have to hunt around in a long note. Professor Beale similarly noted her preference for putting that language in the rule itself, or even adding back the bracketed language that had been removed that specified Rules 5, 10, 40, and 43(b)(2) so that parties would not be left to guess what other rules would have some limits. Judge Kethledge suggested that adding "any rule including this rule" is cleaner, and the specific rules could be added to the committee note. Judges Dever and Bates both expressed agreement with both adding this language to line 95 of the text and putting something more specific in the committee note. Judge Dever observed it would make it similar to line 37. Judge Kethledge said without that phrase, if he were interpreting this rule he would assume that the drafters knew how to say that and chose not to do so. Judge Dever agreed that making the text more similar to line 37 would ensure people would not look at the rule and wonder whether there was a difference between what the two provisions require.

Judge Bates' second point concerned his experience when conducting remote proceedings in which someone has a technological issue and needs to continue by telephone. Sometimes it was the defendant in jail, other times it was the government or the defense counsel, if the latter was not co-located with the defendant. Judge Bates said he has normally allowed that one person to continue by phone, with the defendant's consent, while everyone else remains on video. He questioned whether the proceeding would at that point be a proceeding "conducted by teleconferencing" under Rule 62. If so, would the requirements of the teleconferencing rules kick in, so that the defendant has to have an opportunity to consult with counsel, which may mean you have to have a separate telephone call, if they are in the jail, because they are in the jail and other people would see or hear it? This is a fairly common occurrence with remote proceedings.

Professor King noted the subcommittee did not consider the requirements to apply differently depending on who loses visual contact and has to revert to audio only. The subcommittee was thinking more about the judge, defendant, defense counsel, or a witness under oath dropping off the video, not just anyone who might happen to be on the video call. But she agreed that this was not clear from the rule, and if the Committee was going to limit those to whom

the requirements would apply to if they lost video contact, it might be very difficult to agree on that list.

Mr. Wroblewski added he thought the subcommittee was thinking that if *anyone* loses video, then the proceeding becomes a teleconference. He thought Judge Bates' example had been raised at the miniconference and otherwise and that this was the conclusion. Professor King thought Judge Bates' question was about whether anyone, even a minor participant, lost visual contact, the additional teleconferencing procedures applied. She thought the subcommittee did assume these would apply to anybody who dropped off video, but that Judge Bates was questioning whether this was good policy.

Judge Bates clarified that he only meant that this situation comes up regularly, and clarity would be helpful so that judges know whether they have to stop the proceeding, allow the defendant to consult with counsel, and get the defendant's consent before going forward. He emphasized the need to send a clear message to judges for what they have to do in this common situation.

Judge Dever suggested clarifying this issue in the committee note. Judge Bates agreed that it could go in the committee note and suggested that putting something in the rule's text could overcomplicate it. Professors Beale and King suggested "all participants" or "one or more participants" as being options that could be added to lines 264–67 of the draft committee note. This would trigger the expectation that everybody should be on video, or else you have to go through the teleconferencing requirements. Judge Kethledge asked whether anything in the rules defines "participants" to be limited to only parties and counsel, or whether it includes family members, a victim that will allocute, or some other broader set of people on the call. Professor King replied that nothing defines the group.

The Standing Committee liaison noted that the suggested language in the committee note would not solve the issue that Judge Bates flagged because it is still subject to the rule requiring defense consent *after* consultation with counsel. He suggested that when one person is not able to connect it should be clear that the judge does not have to stop, require consultation, and start over. And this is definitely a commonplace problem. It happens not only in the middle of proceedings, but also at the beginning, when someone cannot get on in the first place, and after much waiting somebody says, "why don't we proceed with me only on audio?" He thought in those circumstances the defendant can consult with counsel before it starts. Professor Beale asked the Standing Committee liaison what he thought the ideal policy should be, less formality before moving to teleconferencing. He responded that he typically tells the defendant if you want to speak with your lawyer at any point, we will make that work. So, in these circumstances he would assume that if the lawyer or client wanted to consult with one another before deciding whether to continue, they would say that, and otherwise continuing with the defendant's consent would suffice without putting them in a breakout room. In his view, confirming consent to continue the proceeding without everyone being on video would be sufficient, even if the defendant did not want to consult with counsel.

Judge Bates added that he thought the importance of getting the defendant's consent to continue could vary depending on who had dropped off the video call. If the defendant can only continue by telephone, then consent is essential. If the defendant's counsel could only participate by telephone, then consent would be a good idea. But if it is the government that can only proceed by telephone, then consent may not be a big issue. If it was the judge at a sentencing hearing, the defendant's consent would again be very important. So, it is going to vary, which makes it complicated to write into the rule. The Standing Committee liaison replied he did not think there was any harm in requiring the defendant's consent in all of these cases. Presumably if it is the prosecutor, it is hard to imagine the defendant not consenting. Mr. Wroblewski thought the defendant's consent was required in all those circumstances. He noted that for the video conference, even before a circumstance needing a teleconference, consent is required. The only additional requirement for the teleconference is that the defendant has an opportunity to consult with his lawyer to decide whether to withdraw consent at the point someone becomes unavailable to continue by video. Judge Bates agreed that consent would be required in all of those circumstances, if you view anyone participating by teleconference to be a proceeding conducted by teleconferencing. Mr. Wroblewski noted that even if you called it a videoconference, you would still need the defendant's consent.

The Standing Committee liaison suggested amending subsection (e)(4)(C) to say the defendant consents after being given an *opportunity* to consult with counsel. The other rules require consultation with counsel anyway. That would mean that in the middle of the proceeding you would say would you like to speak with counsel, let me know. Professor King noted that several places in Rule 62 require consent *after* consultation, and asked if the suggestion was to make (e)(4)(C) the only one requiring consent with simply an opportunity for consultation rather than actually requiring the consultation to occur. Judge Dever noted that the subcommittee changed "opportunity to consult" to "consult" at Judge Kaplan's suggestion because the subcommittee wanted actual consultation.

Professor King asked whether it would be undesirable if the Committee made no change and simply said that any proceeding with even a single audio participant is a teleconference. It just requires the defendant to consult with counsel and consent. The Standing Committee liaison asked whether that meant a court would have to halt an on-going proceeding when one person loses video, provide an opportunity to consult, and then get consent. He noted there is a strong argument that the current text requires that, if we are construing teleconference to be anytime one participant is on audio. But the technological problem often occurs during the middle of the proceeding.

Judge Kethledge noted that the rule is trying to deal with two quite different situations. The first when, before the proceeding commences, the defendant decides to conduct the whole proceeding by teleconference. The second is when someone drops off during what people had hoped would be a video conference. Judge Kethledge suggested that a small group could work on this issue during the lunch break and then report a suggestion back to the Committee.

After lunch, Professor King reported back to the Committee the change suggested by the lunchtime working group as a solution to the consent-after-consultation issue, which she said was based on a suggestion to make it explicit that the defendant only needs an opportunity to consult

with counsel if the interruption in the video feed happens during a proceeding. On line 105 of the rule text, the group suggested breaking (e)(4)(C) into two subdivisions. The proposal would change the text to say:

> (C) the defendant consents—
> (i) after consulting with counsel, or
> (ii) if the proceeding started as a video conference and has not been completed, after being given the opportunity to consult with counsel.

Professor Beale noted that this change was to respond to the concern that when video breaks down in the middle of a proceeding, it is too cumbersome to stop everything, allow separate consultation with counsel, then come back. The group thought in the separate situation where everybody is planning on a telephone only proceeding that has not yet started, there should be advance consultation with counsel about such a dramatically different format.

Professor King further explained that the group also suggested changing line 94 to insert the phrase "in whole or in part" after "proceeding" so it would read: "A court may conduct a proceeding, in whole or in part, by teleconferencing if …"

In addition, the group suggested, in line 95, to replace "this rule" in (e)(4)(A) with the phrase "any rule, including this rule" so that the first requirement for teleconferencing would read "the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing have been met . . . "

Finally, the group put forward the proposal that line 99 include the phrase "all participants in the proceeding" instead of merely saying "the proceeding" so that it would read "the court finds that: (i) videoconferencing is not reasonably available for all participants in the proceeding . . ."

Judge Dever explained that this was an attempt to address a number of the issues raised by Judges Bates and the Standing Committee liaison, including the common occurrence of when one person falls off the video conference during the middle of the proceeding. It also addresses the process for obtaining the defendant's consent when the proceeding has already started and then the issue arises, namely that the judge at that point gives an opportunity to consult with counsel.

Mr. Wroblewski asked about the phrase "in whole or in part" on line 94, whether "in whole" means that everyone is on the teleconference and "in part" means some people are on teleconference and some people are on video. Judge Dever said that was correct. Mr. Wroblewski thought that was not obvious. Professor Beale said she thought that it meant as well that a court could do a part of the proceeding by video and part by audio. Professor King said she had not assumed "in whole or in part" meant some not all participants, but that "in whole or in part" was getting at the preference for the entire proceeding to be by video. The issue of less than all participants was addressed by the changes to lines 99–100. So if a proceeding was going to be partially by teleconference, the court must still go through the (e)(4) consent procedures. Professor King said that if that is not clear, different language may be needed.

A member suggested changing line 94 to say: "a court may conduct a proceeding, or a part of a proceeding, by teleconferencing if . . ." Judge Dever and Mr. Wroblewski both expressed support for this change.

Professor King asked Mr. Wroblewski if the change on lines 99–100 — "videoconferencing for all participants in a proceeding"—reflects what he thought the policy should be. Mr. Wroblewski said yes, the point is to provide an avenue for the proceedings to continue when someone drops off. A member asked for clarification on whether this means it is an all or nothing proposition—either everyone participates by video or everyone participates by phone. Professor King replied that as drafted, the rule says that if anyone needs to participate by phone, then the requirements in (e)(4) kick in. Professor Beale suggested that perhaps it should say "any" and not "all." Professor Capra agreed.

Another member asked for further clarification of what happens when a participant drops off video. If, in the middle of a videoconference, the AUSA drops off, does the defendant get another opportunity to weigh in, object, or consent? Or can the judge just proceed? Does the judge have to make an additional finding that video is not reasonably available for that AUSA after giving him another chance to sign on? Which subparts are triggered in terms of new finding and new consent? Professor King responded that, as drafted, the requirements in (e)(4)(B)—findings that videoconferencing is not reasonably available, and defendant will be able to consult confidentially—kick in whenever there is *anyone* participating by teleconference. On consent, the suggestion is to have a different rule for consent depending on whether the need for telephone occurs before the proceeding begins or after the proceeding started as a video conference. If it started as a videoconference and is not completed at the time the technological problem occurs, all the judge has to do is ask the defendant and counsel if they need an opportunity to consult about consent. So, when a single person drops off, and that person needs to participate by telephone, the defendant must consent. That is how the rule reads. Professor Beale said that is the policy we were asked to draft, so one question is whether this captures that policy. Another is whether that is the right policy.

The Standing Committee liaison stated that he liked the suggested language in (e)(4)(C) on the consent issue. He went on to note that in addressing the situation where the proceeding is a videoconference, but one or more participants can only connect via audio, the rule as drafted could allow a judge, with the defendant's consent, to do the whole proceeding by phone because one person cannot be on video. That might not be the policy the Committee wants. The Committee might prefer that the proceeding goes forward with as many people on video as possible, only allowing telephone participation for the one person that has to be on the phone. It now allows the judge to conduct the entire proceeding by phone if just one participant cannot participate by video. Judge Kethledge responded that he thought the "in whole or in part" language spoke to that, but after hearing the discussion, he was no longer sure. Judge Dever and Professor Beale reiterated they understood the Committee's preference, as a policy matter, was that everyone be on video who can be, even if some participants can only participate by telephone.

Professor Struve suggested solving the problem by changing the language in (e)(4)(B)(i) to say: "the court finds that: videoconferencing is not reasonably available as to the participants

who will participate by teleconference." She thought the Committee was attempting to permit teleconferencing for the one person for whom videoconferencing was not reasonably available. Judge Kethledge agreed this suggestion would narrow it that way. Professor King suggested change "as to" to "for." The Standing Committee liaison suggested changing "the participants" to "any participant." Several members thought "would" makes more sense than "will" or "can only" or "could" because it would suggest the decision has not been made yet. Professor Capra said "participant" should be "person" to avoid "participant who would participate." After changes, the substitute language for (B)(i) at lines 104-106 read: "videoconferencing is not reasonably available for any person who would participate by teleconference."

Circling back to the introductory language in (e)(4)(A), Professor Struve also suggested that it should say "all rules including" instead of "any rules including" this rule. Even though the phrase "any rules including" replicated language in lines 36–37, Professor Struve observed that (e)(4)(A) is structurally different than those lines. Lines 36–37 say "any rules" because Rule 62 has multiple rules that require the defendant's consent. And for any rule that has that requirement, it should be followed. But in (e)(4)(A), the point is that *all* the rules for videoconferencing must be met, in addition to the teleconferencing rules in (e)(4). As a result, "all" might be more appropriate. She suggested that if (e)(4)(A) said "any," it could be misinterpreted to require a court to comply with only one of the videoconferencing requirements. A court must comply with all of them before then also complying with (e)(4) if the proceeding will be by teleconference. Judge Kethledge said he thought that here "any" means "all," and he thought it was unlikely that there would be an issue when more than one rule would prescribe requirements for a particular proceeding. It could create confusion as to which other rules are implicated. Later in the meeting, a participant observed that for this addition to be parallel to its earlier appearance in the rule, the words "including this rule" should be set off by commas.

Going back to the new language on lines 104–06 regarding the finding about the availability of videoconferencing, Mr. Wroblewski raised the concern about how the rule would apply if the defendant doesn't want it to be half teleconference and half video. For example, the defendant may want everyone on teleconference if the defendant has to be on audio, and he doesn't want the victim and prosecution would to be on video while he is on audio. He could refuse to consent to half and half, but the rule does not appear to allow the judge to have it all by teleconference under those circumstances. Judge Kethledge replied that the Committee could leave this to the discretion of district judges instead of proscribing an outcome that most judges will not pursue anyway. Most judges will not automatically switch to doing the entire proceeding by telephone unless there is a good reason. Professor King wondered if this provision should be built around the defendant's choice of who should be on the phone and who cannot; it should be up to the judge, and the defendant consents. The policy preferred by the subcommittee is that participants should be on video when they can be, and the judge should not be able to shift to phone without these findings.

Judge Kethledge added that the provision is trying to accomplish a lot. It is trying to deal with premeditated teleconferenced proceedings, and also with people falling off and coming and going in videoconferencing. At some point, he said, the Committee has to trust the district judge to react appropriately to what is happening in the courtroom. Professor Beale added she thought

earlier they may have to bifurcate the procedures for the premeditated teleconferencing from the on-the-fly situations, then one of the judges mentioned that sometimes a person who thought he could get on the video from the outset is unable to. So there are these middle cases, where you think you have a premeditated situation, but it does not work out as planned. Judge Kethledge observed that the Committee might need to go back to the language about videoconferencing not being reasonably available for all participants. The language might leave a small gap for someone to do something crazy, but a district judge probably isn't going to do something crazy.

A member stated her view that to accomplish the policy goals, a clearer, shorter rule would be helpful to make the point that teleconferencing is not ideal, but the court can adopt it if it is necessary in some way and the defendant consents. She noted that the rule now has a lot of clauses and subparts, but something simpler could be better. She liked interpreting "in whole or in part" as meaning both a proceeding that starts out on the telephone and a proceeding that starts out as video. Now it sounds as if the court cannot choose to start a proceeding where one party is by the phone. In her district the federal prosecutors were never on video because they weren't allowed to use that on their computers for months. So they came in by phone, and the defendants were consenting to video. No one asked the defendants "Do you care if the prosecutor is by phone?" Or "Do you care if the court reporter is not visible?" She didn't think we want to list all the people who have to be on video. Going back to the judge's discretion, she proposed substituting: "A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements under these rules have been met for videoconference, and a party is not able to participate by videoconference." If the requirements under these rules for videoconferencing have been met, then the defendant has consented. Judge Kethledge said he understood "in whole or in part," to speak to both a segment of the proceeding and to different participants.

Professor King asked how this proposal would handle a situation where a judge drops off the videoconference in the middle of sentencing. The member replied that at that point, the whole proceeding stops until the judge gets back on by phone. The court would likely ask the defendant if he wants to continue this way, and the defense counsel would likely have advice for the defendant on how to handle that situation. She doubted the sentencing would continue if the judge could not see the defendant. That would be a pretty big break from the usual procedure. Professor King responded that her question was geared towards understanding how the suggested provision would operate without the requirements in (e)(4)(B) (findings that video is not reasonably available, and that defendant will be able to consult confidentially with counsel). Absent those requirements, Professor King continued, if the judge or even the defendant dropped off the video, the judge could decide to continue the sentencing by telephone if the requirements of videoconferencing had been met, without those additional findings. She concluded that the policy question is whether the Committee wants to restrict in that way the options available to those who some on the Committee have in the past termed "the weaker players."

The member responded that the question was whether during a teleconference the defendant will have the opportunity to consult confidentially with counsel by phone. She thought usually that was not true, they do not have the opportunity to consult very easily.

Judge Kethledge wondered if the rule should require only (B)(i) and the defendant's consent under (C). Professor Beale thought it was important to the subcommittee that the defendant be able to talk confidentially with counsel, and it recognized that could be difficult if there is only one phone line. That led to the requirement in (ii).

A judge member suggested the rule should leave to the judge's discretion what must happen if the judge drops off video. She noted she had dropped off during a plea proceeding once. That is a situation where it is very important for the defendant to see her. In her view, unless something extraordinary occurred, the video would have had to be restarted. In the proceeding where she dropped off, she told the parties to wait a few minutes while she got back into the video conference. But perhaps a proceeding is nearly finished, she continued, and it is in the defendant's advantage to wrap it up then and there. In many instances, that would not be the case, but it should be more open in that situation.

Professor Beale observed that these cases differ in multiple ways. The problem may arise at different times in the proceeding, such as the beginning, middle, or the very end. Beyond that, there is the issue of which parties are not able to continue by video. Professor Beale questioned whether the Committee should return to the guiding principles. The Committee had said that as much should be done by video as possible, but the Committee also wants the defendant to be in the driver's seat. It might be to the defendant's advantage to do the whole thing by teleconference sometimes, or in other instances the defendant would not consent if the person who would participate by phone is really critical. Professor Beale thought the Committee agreed these limits apply when even one person drops off, and only that person participates by phone, but was unsure the rule as modified by the suggested language addressed that. Judge Kethledge thought that the language suggested by Professor Struve for (e)(4)(B)(i) —"not reasonably available for any person who would participate by teleconference"—addressed it.

The member who had proposed simplifying (e)(4)(B) then suggested different language for the Committee to consider:

> A court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements of this rule for videoconferencing have been met but the use of videoconferencing is not readily available to one or more participants, the defendant will have the opportunity to consult confidentially with counsel during the proceeding, and the defendant consents.

Judge Dever replied that something like this language could be helpful because the rule needs to prepare courts for the next emergency. The rule needs elasticity, and the Committee should be able to trust the discretion of district judges within the framework of the rule.

The member who had proposed this language said she suggested "this rule" instead of "any rule, including this rule" because that allows the videoconferencing under Rule 5 to have been met then allow you to switch to teleconferencing. It should be this rule because it allows for videoconferencing after consent after consulting with counsel.

Professor King noted the differences between the proposed language and the current draft. The first part is what had been suggested before, the court may conduct a proceeding, in whole or in part, by teleconferencing, if the requirements for videoconferencing have been met – assuming agreement on whether it should be "this rule" or "any rule, including this rule." The second requirement is that videoconferencing not be reasonably available for one or more participants, which is (B)(i) rephrased. The other requirement is the defendant will have the opportunity to consult confidentially with counsel during the proceeding, which is (B)(ii). But the proposal removes the need for the judge to make findings as to these requirements. And it includes the defendant's consent, which is in (C). Essentially, the proposal modifies the structure somewhat, rephrases some wording, and omits the addition to the consent provision that was added in response to the Standing Committee liaison's suggestion that if the proceedings started as a video conference the defendant needs only to be offered an opportunity to consult with counsel in advance of consent.

On the consent wording, Judge Kethledge agreed that the suggestion elides the consulting with counsel requirement in (e)(4)(C), which had addressed the Standing Committee liaison's concern, but Judge Kethledge said it was another matter whether it overshoots that concern. However, he also thought this could be an example of how the rules can trust the district judge to make on-the-ground decisions to give the defendant an opportunity to consult with counsel. He thought nearly all judges would at least ask the defendant if he wanted to talk to his lawyer in situations like this.

The member who had proposed the new language commented that saying a defendant "will have" the opportunity to consult confidentially with counsel suggests that you are planning to use teleconferencing and know the attorney or defendant will be by phone, but it doesn't require the defendant's consent in advance if somebody drops off. The lawyer should be able to ask the defendant, "This is a new proceeding, do you mind?" They could do that on the record, with everyone present, or could consult confidentially. But it does not require the defendant and his counsel to have talked about it in advance. It does not answer what happens if the judge wants to appear by teleconferencing when video is not readily available for the judge. Mr. Wroblewski observed that this still allows the defendant to not consent to that. It allows more flexibility for the judge about who is going to participate by audio or video, and it allows a little more flexibility about the opportunity to consult. That is the advantage and it simplifies the whole thing.

Several members agreed that the language the member had proposed must be modified to read: "the use of videoconferencing is not *reasonably* available to one or more participants" instead of "readily" available.

The Committee then returned to whether (e)(4)(A) should say "this rule," "these rules," or "any rule, including this rule." After some discussion, the Committee affirmed its earlier decision to say, "any rule, including this rule." The member who proposed the new language thought if you complied with (e)(1) and (e)(4) you could use teleconferencing under Rule 5. Judge Kethledge said you need the additional language "any rule including this rule" to say what the Committee intends. Professor Beale noted that the Committee had decided earlier that the requirements for videoconferencing in Rule 5, 10, 40 and 43(b)(2) existed outside Rule 62 and must be met as well.

Professor Beale also suggested that maybe the rule should just say "requirements for conducting the proceeding by videoconferencing have been met" and leave it at that. Judge Kethledge pointed out that this is the second time in the call the Committee is talking about this same point. He suggested keeping the language on the screen and moving forward. [On the screen at that time was the language, "the requirements under any rule, including this rule, for conducting the proceeding by videoconferencing."] And if there were lingering doubts, Judge Kethledge added, the language still has to go to the Standing Committee and the style consultants, and it could be worthwhile to let them have a pass at this language. Judge Dever agreed.

Professor Struve noted an alternative phrasing in the meeting chat that specifically listed the several rules with requirements for videoconferencing, in the text of (e)(4). Professor King responded that this enumeration would be much clearer, but it might create problems in the future because if one of the other rules were changed, it might also require an amendment to this rule.

Judge Dever suggested that considering the member's proposed language had brought the Committee back almost to where it had started. Considering the text of what we have right now on the screen, would probably be the most straightforward thing, then sending that out for public comment, after it is reviewed by the style consultants. It attempts to address the situation where the prosecutor drops off and couldn't be on videoconference, and the defendant's consent is the most critical part.

Discussion continued regarding whether the draft on the screen should be modified as the member had proposed. Judge Dever noted that the proposed alternative did not set off the requirement in (e)(4)(A) as a separate gate to pass through, and setting it out separately was important to the subcommittee.

Judge Kethledge then suggested modifying the draft on the screen, at line 96, to say "in whole or in part" on line 96, earlier instead of "or part of a proceeding," which would restore (e)(4)(A) as it was earlier. He suggested revising the member's proposed language of (e)(4)(B) to say:

> The court finds that:
>
> (i) videoconferencing is not reasonably available for one or more participants; and
>
> (ii) the defendant will have an opportunity to consult confidentially with counsel before and during the proceeding.

Finally, Judge Kethledge suggested that (e)(4)(C) simply say "the defendant consents," as the member had proposed. Professor Beale noted this would replace the new language suggested after lunch, which had created two subdivisions in (C).

The Standing Committee liaison commented that where one or more participants cannot participate by video, these changes would still leave room for someone to construe this as allowing the whole proceeding by phone, instead of keeping on video those who could be by video. The

Standing Committee liaison said he thought that was fine, but it deviates from the policy preference for keeping people on video.

Professor Beale suggested the issue could be clarified in the committee note as an explanation for the language "in whole or in part" on line 96. Possibly the note could say if some of the participants could proceed by video, the prosecutor could proceed by phone only, for example. In the note, she said, the Committee could make the point that it should be done only to the extent it needs to be done. Mr. McQuaid added that the Committee could trust the district courts to ensure proceedings were fair, and allowing some leeway in the rule was an acceptable risk from the DOJ's perspective. However, he stressed the DOJ's preference for language in the committee note making clear the policy favors videoconferencing.

The Committee briefly considered then declined Professor Beale's suggestion to add introductory language on line 95 that would say: "Though video conferencing is preferred a court may . . ." after Judge Kethledge noted that the criminal rules do not typically use hortatory language. There was a suggestion that this is the sort of thing that goes in the note.

Judge Kethledge then suggested that to address the Standing Committee liaison's point that this language would allow courts to conduct the whole proceeding by phone, instead of keeping on video those who could be by video, the language "persons who would participate by telephone" could be restored. As to the concern about the defendant not consenting if the prosecution cannot be on video, Judge Kethledge wondered whether that issue would ever arise. If the defendant has requested in writing that this proceeding happen remotely, and now to some extent it has to proceed by teleconference, how often would the defendant say "No, not if the prosecutor can't be on video"? It may be a null set scenario here. If we want to follow the policy, we stated earlier that we should limit teleconferences, we could restore the language we had earlier, that Professor Struve suggested for (4)(B)(i). This language, he said, would make it clear you ought to keep teleconferencing to a minimum, and then leave it to the judge's discretion. After some attempt to specify exactly what that language was, Professor Beale stated that the original language to be added back in to (B)(i) was "for any persons who would participate by teleconference."

A member asked for clarification on the scope of the parties this covered. He asked whether the rule covers victims and others present. Professor Beale said that the rule would cover the victim speaking at sentencing. Professor King added that even if the victim was merely observing, the rule would cover that person. It covers anyone on the video call. Judge Kethledge replied that the word "participate" means the person must have a role in the proceedings. Professor King did not think the rule said that and suggested the Committee define "participate" if it intends a more specific definition. Does it include someone with a right to speak even if they don't plan to? Professor Beale did not think this was an issue. Judge Dever added that the issue again goes to the judge's discretion. If there were a large number of victims, a judge might switch to telephone rather than stopping the proceeding. He emphasized that the "may" at the beginning of (e)(4) does a lot of work. A judge doesn't have to do this.

Judge Kethledge stated that what is on the screen at that point reflects the policy view of the Committee, and Judge Dever agreed. At that point (B)(i) read "videoconferencing is not

reasonably available for any persons who would participate by telephone conference." Judge Kethledge suggested it was time to decide about sending this out for comment.

Professor King turned the Committee's attention to a member's earlier question why the colloquy requirement in the committee note is not in the rule itself to ensure that there is consent and there is something in the record in case the defendant later challenges whether the defendant ever discussed this with counsel. Professor King noted that the subcommittee thought it was better to leave it to the judge to decide how to ensure the defendant's consent is voluntary and knowing. The subcommittee did consider including it in the rule, but ultimately decided in favor of the judge having discretion as to what would constitute true consent. The member had also raised other questions about the consent provisions earlier in the meeting, but she said further discussion was not needed at this point.

Judge Dever then suggested the committee decide whether it agreed with the Rule text, with the changes to part (4) to be sent out for public comment.

The member who had proposed a shorter simpler text asked whether there was any interest in having the rule presented as a paragraph, not broken out into various subparts. Judge Kethledge noted that the subcommittee thought it was important to have (e)(4)(A) broken out as a separate component, because we had such confusion on that point and that clears it up. He also noted, and Professor Beale agreed, that even if the Committee voted on it as a paragraph, the style consultants would likely break it up again anyway.

A member then moved to have the language on the screen to be adopted as the Committee's draft and sent forward, and there was a second. The motion passed with one member voting in opposition.[3]

Discussion of the Draft Committee Note for Rule 62

Professor King guided the Committee through various changes to the committee note accompanying Rule 62. After running through several corrections to cross references in the version of the Note that appeared in the agenda book, Professor King explained the various changes to the Note described in the reporters' memorandum on pages 134–35 of the agenda book.

In response to the language added to lines 4–6 of the note, a member pointed out instances on lines 168 and 209 where "new rule" had not been changed to "this rule" or "this emergency rule." These were corrected. There were no additional comments from the Committee about the changes reviewed in the memo.

[3] The initial vote on the text had no opposition. However, later in the meeting, when the Committee considered a motion to approve the note language as revised, Ms. Hay expressed her opposition to adopting any emergency rule, and her statement is included in the minutes at that point. Judge Kethledge responded that in light of Ms. Hay's position, she should be shown as voting against the adoption of the text as well as the Note, and she agreed, stating she meant to oppose both text and note.

Professor King then explained changes to the note suggested or raised after the memorandum had been submitted for the agenda book. On line 26, Judge Bates suggested adding the word "even" between "that" and "if" so that it would read "that even if the Judicial Conference determines . . . ." In lines 31–32, Judge Bates suggested "period" be changed to "periods" and Professor Struve suggested substituting "extensive" for "substantial." Judge Bates also suggested that line 89 use the word "term" instead of "phrase," thinking that was more apt. There were no objections to these changes. Professor Struve had also suggested taking out the language about whether the chief judge is unavailable leaving only the reference to the U.S. Code, given the chief judge's availability is implicit in the statutory reference. Professor King noted the Committee had already considered and voted on changes to lines 76–78 regarding alternate jurors, and noted that new language would be drafted in lines 270–75 to explain the changes to (e)(4).

A member suggested that line 112 should say "the defendant's consent" not "defense consent." The defense is about the whole team, but the focus of that provision is on the defendant. That change was accepted.

The Committee discussed the addition to lines 141–43 regarding Rule 35. A member expressed concern that the second clause after the comma in that sentence may not have been approved by the subcommittee and is a point contested by defense attorneys. It said that Rule 35 was "intended to be very narrow and to extend only to those cases in which an obvious error and mistake has occurred." She urged that we should not have a statement in this Note about the scope of Rule 35. If Rule 35 is to be interpreted narrowly or broadly, it should be in the note to Rule 35. This note, she suggested, could just say "Nothing in this provision is intended to expand the authority to correct a sentence under Rule 35." Professor Beale asked whether that line only referred to Rule 35(a), the clear error provision, which is the only thing covered by Rule 45(b)(1). The member said that even so, if this line was about the scope of Rule 35, she did not think it was needed. Mr. Wroblewski commented that he thought he had copied that line directly from the existing committee note in Rule 35. Professor King confirmed that the language is, in fact, in the Rule 35 Note. The member who had raised the issue reiterated that if the Rule 35 Note already includes this information, then there was no reason to repeat it in the Rule 62 Note. Judge Kethledge said that if the sentence is deleted as the member suggested, then the Note is talking about Rule 62. The disputed clause is about Rule 35, and that seems gratuitous. Professor Beale noted that she supported deleting the sentence.

Another member agreed with the concern that had been raised, and she suggested adding "under Rule 35(b)(1)" to fix a missing the parallel reference. Earlier in the same paragraph, the committee note referenced Rule 35(a)'s fourteen-day limitation. The material in question here referred to Rule 35(b)(1)'s one-year limitation. Adding the reference made the two parts of the paragraph parallel. Judge Dever and Professor Beale agreed. The member who had initially raised the issue replied that the sentence still might be unnecessary given the previous sentence is about time periods. Judge Kethledge thought having the sentence was helpful to disabuse anyone from trying to use a creative interpretation to bypass Rule 35's restrictions. Judge Dever then suggested: "Nothing is intended to expand the authority to correct or reduce a sentence under Rule 35." That would capture both Rule 35(a) and (b), and would delete the additional clause that was causing

concern. Both the DOJ and the objecting member agreed to that change, and Judge Dever's suggestion was accepted.

Finally, Professor Beale commented that Judge Bates had suggested adding references to Rules 5, 10, 40, and 43(b)(2) on lines 255–59. Because other changes would already have to be made to that part of the Note, Professors Beale and King agreed to consider the issue in the new draft discussing the changes in (e)(4), which they would circulate to the Committee.

There was a motion to approve the committee note with the changes adopted during the meeting and with the recognition that the Committee would still need to approve additional language regarding (e)(4).

Ms. Hay stated that she appreciated all the work that has gone into the rule and wanted to explain why she would vote against it. In her view, an emergency rule is not needed. Through many emergencies the courts have managed without an emergency rule. Congress was able to pass the CARES Act fairly quickly, it is a deliberative, representative body. In addition to being unnecessary, an emergency rule creates a dangerous precedent. The emergency procedures become the new norm against which later incursions on rights will be measured. These emergency measures will become measures of convenience, she warned, and we will start to treat rights less seriously because we've seen how they can be encroached upon. Last, she objected to having the judiciary declare its own emergency. These are very important rights we are protecting in the rules, she said, and the people's representatives in Congress should be the ones to determine whether there is an emergency that should change the legal process. The judiciary itself should not declare the emergency that causes us to limit some of the rights these rules protect. For all those reasons—which she set out a letter that is in the record[4]—she said she was going to vote against the rule and the note. She also said, however, that if we are going to have an emergency rule, this reflects the best protection of rights that we could have wanted. Judge Kethledge then noted that Ms. Hays' no vote would be shown for the text as well as the note, and she agreed. The motion to approve the note was seconded, and it passed, with Ms. Hay voting against the motion.

Judges Dever and Kethledge expressed their gratitude to the incredibly hard work of the subcommittee members and the reporters on this effort.

Later in the meeting, Judge Kethledge recalled that the Committee's discussion of Rule 62 had not considered the reporter's memorandum regarding whether there should be emergency rules for cases arising under §§ 2254 and 2255. No members suggested that the Committee pursue such rules.

Report of Rule 6 Subcommittee

After completing its work on Rules 16 and 62, Judge Kethledge asked Judge Garcia to report on the miniconference conducted on April 13 by the Rule 6 subcommittee.

[4] Ms. Hay's objections appear following page 193 in the Committee's November 2020 agenda book. https://www.uscourts.gov/sites/default/files/2020-11_criminal_rules_agenda_book.pdf.

Judge Garcia turned the Committee's attention to the memorandum in Tab 4. He noted the Committee had now received several proposals related to the release of grand jury materials of historical or public interest. Although the Committee declined to act on a similar proposal in 2012, subsequent events have raised the issue again. Circuit decisions in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), had spurred the Committee to seek a broad range of opinions on the subject. The subcommittee hosted a full-day miniconference with four panels considering the various proposals, including both an exception to grand jury secrecy for materials of public or historical interest, and a proposal from the DOJ about delayed notice. The speakers included former prosecutors, representatives from the DOJ, academics, representatives from the Public Citizen Litigation Group and the reporters Committee for Freedom of the Press. There was also a speaker who had experienced the effects of improperly leaked grand jury information.

The miniconference provided perspectives on a number of issues, such as whether a rule amendment should set a floor, such as 20 or 30 years, below which material cannot be released.

Judge Garcia also commented that after the miniconference the Committee received a new proposal from the petitioners in *Pitch* that the subcommittee would also consider. Judge Garcia concluded that he hoped the subcommittee could provide recommendations on all the proposals at the Committee's meeting in the fall. Professor Beale commented that the subcommittee would have a great deal of work to do, and the reporters would be circulating materials, including the most recent proposal.

Discussion of New Suggestions

The reporters guided the Committee through a discussion of each of the new suggestions submitted to the committee.

A. Authority to Release Redacted Versions of Grand Jury–Related Judicial Decisions (Rule 6)

Judge Kethledge asked Professor Beale to discuss this suggestion from Chief Judge Howell. Professor Beale explained that Chief Judge Beryl Howell and Senior Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia suggested consideration of an amendment allowing judges to release redacted versions of grand jury-related judicial decisions. Their concern, in light of the D.C. Circuit's decision in *McKeever*, was that their established practice of publishing redacted judicial decisions discussing grand jury materials could constitute a Rule 6 violation. The judges stated that so far *McKeever* has not led to any case in which there was a problem, but it could arise.

Professor Beale noted this proposal was related to the work the Rule 6 subcommittee was already doing to explore amending the rule in light of *McKeever* and *Pitch*. Judge Kethledge noted that this is a significant issue, concerning at least a potential conflict between Rule 6 and established judicial practices. The suggestion was assigned to the Rule 6 subcommittee for further consideration.

B. Authority to Excuse Grand Jurors Temporarily (Rule 16)

Judge Kethledge explained that the second suggestion came from former Committee chair Judge Donald Molloy to allow grand jury forepersons to excuse grand jurors on a temporary basis. Professor Beale added that this arose because of a surprisingly wide range of practices across the Ninth Circuit. Judge Molloy had assisted the reporters in gaining information about these practices. She suggested that if the Committee has the capacity to handle the suggestion, it might be worth considering. The lack of uniformity and the idea that forepersons were temporarily excusing people without knowing how that would affect the quorum made it an issue worth exploring. But, she noted, the issue might look very different if districts were facing very different problems.

Judge Garcia thought that it would be appropriate for his subcommittee to take the suggestion up, and it was assigned to the Rule 6 subcommittee for further consideration.

C. Requiring Courts to Inform Prosecutors of Their Brady *Obligations (Rule 16)*

Judge Kethledge noted that the third suggestion came from Judge Donald Molloy and lawyer John Siffert. As Professor King explained, they proposed that instead of allowing each district to promulgate a model order as required by the Due Process Protection Act's amendment to Rule 5, the Committee should adopt a uniform order regarding *Brady* obligations and locate it within Rule 16. Page 180 of the agenda book stated their proposed language for the model order.

Professor King noted that the question was whether to assign the proposal to a subcommittee for further consideration, but that the Committee also had another option of putting it on the "study agenda" rather than deciding one way or another at this meeting. She thought it could be helpful to ask the Rules Law Clerk to gather more information about the orders around the country as they are promulgated and then revisit the issue at a future date. Professor Beale added that there likely would not be enough information to revisit it at the November meeting. The timeline would likely be longer to see how everything would play out in local districts and then in the circuits.

Judge Bates added that the language Judge Molloy and Mr. Siffert were proposing was largely drawn from the local rule in the District of Columbia. Judge Bates noted that local rule was the product of a hotly contested multi-year process. And further, the orders required under the Due Process Protection Act are much shorter, and in fact, the District of Columbia was using the shorter orders to comply with the local rule. Some of the additional language in this proposal was drawn from Judge Emmet Sullivan's rule, which no other judge in that district employs.

Judge Bates further observed that if the Committee does consider this issue, it should be very careful to look at the Due Process Protection Act's language. The Act gives responsibility to the Judicial Council in each circuit to promulgate a model order, but then each individual court in the circuit may use the model order as it determines is appropriate. The Act allows for significant discretion and variety. Judge Bates urged care as to whether the Committee has the authority to embark upon a different course than the Act charts.

Judge Kethledge added that there is potentially a conflict between this Committee prescribing an order to be used nationwide and Congress's approach. He recommended putting the proposal on the study agenda for at least one year to see how everything unfolds and to consider further whether the Committee even has the authority to depart from the dispersion of decisionmaking Congress specified in the Act.

D. Suggestion Regarding Closing Arguments (Rule 29.1)

Judge Kethledge moved the discussion to the fourth suggestion, which suggested disallowing the government's rebuttal during closing arguments. Professor King explained that Mr. Ryan Kerzetski submitted the proposal based on a law review article by John Mitchell. The idea is that the defense should have the last word during closing arguments. The prosecution would speak, then the defense, and that would be it. To effectuate the suggestion would require the Committee to amend Rule 29.1 to eliminate subsection (c). Professor King stated her view that this likely did not warrant the Committee's attention at this time, in part because more than half the circuits have held that the government cannot bring up new topics on rebuttal. As a result, there should not be any new arguments the defense would need to rebut. Further, if the government does bring new information, some judges have allowed defendants an opportunity to respond to it.

Judge Bates suggested there was not a clear difference between this proposal and also getting rid of reply briefs and reply arguments on appeal and in civil cases. He did not see it being a viable proposal. Mr. McQuaid observed that given the structure of trials and the burden of proof, there are good reasons to give the government the opportunity to speak at the end and to rebut arguments raised by the defense. He recommended the Committee not pursue this proposal further. Additionally, a member noted that from the perspective of defendants, the proposal is an interesting idea. But she agreed that there are likely other topics on which the Committee should be focusing at this juncture that would also be protective of defendants' rights.

The Committee decided not to have a subcommittee pursue this proposal.

E. Pleas of Not Guilty by Reason of Insanity (Rule 11)

Judge Kethledge turned the Committee's attention to the final new suggestion, which concerned having a provision in the rules about pleading not guilty by reason of insanity (NGRI). Professor King elaborated that the proposal came from Mr. Gerald Gleeson, a lawyer who recently had a case where both the prosecution and the defense agreed that the defendant should be found not guilty by reason of insanity. However, Rule 11 does not provide for this type of plea, though some states do. Professor King reported that the Rules Law Clerk had researched this issue and found that seven circuits have at least implicitly endorsed a different procedure in these cases where both parties agree that an NGRI verdict is warranted but wish to avoid a jury trial. That different procedure is to have a bench trial at which all the facts are stipulated in advance. This satisfies the verdict requirement in the NGRI statute without using the Rule 11 plea procedure. The Federal Judicial Center and the DOJ had no internal training or other materials on this situation

or the procedure. She invited comments as to whether this was a problem warranting an amendment, or if the stipulated bench trial was adequate.

A member stated that the reason Rule 11 does not account for an NGRI verdict is that it would be difficult for defense counsel to meet Rule 11's requirements. The defendant, because of his mental state, may be unable to appreciate his role in the offense or to enter a plea knowingly and voluntarily. Instead, the alternate procedure is based on 18 U.S.C. § 4242, which allows a special verdict of NGRI at a bench trial. The parties can agree to the facts without the defendant's consent, and then the judge can find the verdict. Of course, there are some cases where the defendant is not competent at the time of the crime and then regains some competency. But the member would not support having Rule 11 contain an NGRI plea provision instead of requiring the current statutory procedure.

Mr. Wroblewski noted that the DOJ did look into this. Several lawyers in the criminal chief's working group had experience with this type of case. The workaround procedure of a bench trial on stipulated facts can be a bit cumbersome but is doable. He thought it could be worth exploring the issue further to see if the current alternative is the best way to handle these cases, or whether there might be another option.

Judge Kethledge asked the reporters if they had any thoughts on this proposal from the institutional perspective of the Committee's history. Professor King observed that the Committee's response over the years has been not to meddle with provisions that are not causing problems. To warrant devoting the resources of the Committee to a given issue, there is some burden to show that the status quo is really causing harm in some way. Is this proposal just an interesting question, or is there a problem that needs solving? Professor King further noted that there could be alternatives to a rule amendment that could similarly solve the problem. For example, the Committee has in the past recommended that the Federal Judicial Center add something to the Bench Book.

Professor Beale added that she was more interested in this idea for reasons similar to those Mr. Wroblewski mentioned. The current alternative seems cumbersome. Professor Beale thought there was a possibility of doing something with a negotiated factual basis for a plea while still ensuring the court could be confident that the defendant had sufficient mental competence. She also thought it was unlikely the government would too easily agree to such pleas. The question here is whether this is a high enough priority where an alternative already exists and even has some advantages (such as creating a better record)). She noted the issue did not seem urgent.

Judge Kethledge asked whether the Rules Law Clerk could look at this issue empirically to see what was happening across the country in these cases. Professor Beale noted that Mr. Crenny has already done some work on this issue but was primarily focused on appellate cases. She and Judge Kethledge agreed to get a fuller memorandum on the issue for the fall meeting.

Report on the Meeting of the District Judge Representatives to the Judicial Conference

Judge Kethledge noted that Judge Bates presented to the meeting of the district judge representatives following the Judicial Conference meeting in March. Judge Kethledge asked Judge Bates to talk about feedback he received concerning remote proceedings.

Judge Bates explained that he was asked to address the question of further use of remote proceedings once the emergency proceedings used during the pandemic were no longer applicable. He gave them some history of the Committee's view on this issue. His takeaway from that meeting was that there are many judges who have liked the remote proceedings. They are comfortable with it, think it works, and think doing remote proceedings works no diminishment of the defendant's rights. There may be a little disconnect between the Committee's views and those of at least these district judges. Similar views have also been expressed in task forces and other contexts, but he could not say how strong or prevalent these views are. Judge Bates observed that the Committee might receive comments about this when the draft Rule 62 goes out for public comment. He urged that judges should be encouraged to bring these suggestions to the Committee and not to take the issue to Congress or try to accomplish it by some other method.

Judge Kethledge noted that multiple suggestions along these lines have come in over time. They usually come from judges, not litigants, and the Committee has always adamantly opposed them. The Committee is a steward not of judicial convenience but of the transcendent interests that are protected and made real by the criminal rules. Some of those are constitutional interests, or penumbras of constitutional interests, but they are interests critically important to the fairness and accuracy of the most important proceedings in federal court, especially ones where people lose their liberty. Acknowledging that he had personally never sentenced anyone, Judge Kethledge emphasized his view that sentencing is the most solemn procedure in federal court, and it is one of, if not the most, important days in a defendant's life. Often, the defendant's family members are present. The victims have the right to allocute in court, and often do so. Seeing all of this at one time in three dimensions, seeing the body language of the participants, and assessing the sincerity of the defendant during allocution are all part of one the most important decisions district judges make. And that decision is largely insulated from appellate review.

The Committee has held the line on this, but it welcomes suggestions, and more judges have now done remote proceedings and thought they went well. The Committee is here to listen and to consider any suggestions that come in. But institutionally, Judge Kethledge thought it was his duty to explain where the Committee has come down on these issues in the past.

Judge Kethledge thanked everyone for their contributions to the meeting. The meeting was adjourned.

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates's thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee's feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees' proposals now use the same definitional language. The proposals all state that a rules emergency may be declared when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to" a court, "substantially impair the court's ability to perform its functions in compliance with these rules." The proposed emergency Criminal Rule adds a requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this "no feasible alternative" language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a "soft landing" provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the "soft landing" issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." Professor Capra described this as a "half-full / half-empty" distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The "no feasible alternative measures" requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)'s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee's spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book's version, Rule 62(e)(3)'s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)'s requirement, because Rule 62(e)(3)(A)'s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read "the requirement in (2)(B)," eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62's "soft landing" provision. As noted previously, the "soft landing" provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but "does not terminate … the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment." This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note's discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when "conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access" which should be "contemporaneous if feasible." The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public "if access to the video transmission is not feasible." This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note's suggestion that video access should be provided to the public if "feasible" seemed to raise an undue barrier for courts—such as this member's court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not "feasible"—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note's language about "feasibility" should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with "reasonable alternative access." The first judge endorsed the Rule's feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in "heroics" to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)'s provision that a noncapital defendant who has pleaded guilty "waives the right to be present … when the defendant is voluntarily absent during sentencing." In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*'s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless "the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing." The phrase "requests in writing" had replaced "consents in writing" in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the "requirements in (2)(B) and (C)" on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words "and consents" after "in writing" in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant's lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule's requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King's, that lines 110-11 might require that a defendant "consent by requesting in writing." But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant "consents after consulting with counsel"—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that "the court may sign for" a pro se defendant "if the defendant consents on the record," but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that "an adequate opportunity to consult"—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than "consulting."

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said "the defendant consents." This might resolve the pro se defendant issue. In (e)(3)(B) the word "consent" could be added somewhere. And (e)(4)(C) simply requires that "the defendant consents." This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say "after the opportunity to consult." A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting "consent in writing" for "request in writing." Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee's policy choice, "consent in writing" would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase "after consulting with counsel" be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant's consent "after consultation with counsel." So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the "opportunity" to consult, Professor King suggested, would not be inconsistent with the Advisory Committee's intent.

Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member's drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King's point that "request" was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court's use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an "opportunity to consult," it should use the "adequate opportunity" language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the "opportunity" or "consultation" language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant's ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through "a method that is reasonably calculated to give notice." The Rule states that "[t]he court may order" such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a "soft landing" provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own "soft landing" provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that re-start civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a "soft landing" provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

"[a]n act authorized by an order under" Rule 87(c)(2) "may be completed under the order after the emergency declaration ends."

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration "state any restrictions on the authority" granted in subsequent portions of Criminal Rule 62. The Criminal Rule's formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court's discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra's suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: "[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days." Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a "court may order service" through an alternative method instead of saying that a "court may authorize service?" Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used "order" rather than "authorization" because an "order" guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the "order" would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say "[t]he court may by order authorize." Professor Cooper and Judge Dow approved of this change.

The member's second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word "plaintiff" because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read "unless the court, after notice and an opportunity to be heard, modifies or rescinds the order."

A third change agreed upon was to delete (for style reasons) "authorized by the order" from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.") Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) ("a timely motion … under Rule 54(d)(2)") was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of "bankruptcy court" instead of "court" throughout the proposed rule. Bankruptcy Rule 9001 defines "court" as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use "bankruptcy court" when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates's question concerned (c)(4)'s provision on "Further Extensions or Shortenings." He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge's extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur "only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee." Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, "notice and a hearing" is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act sua sponte. Professor Hartnett asked about the significance of saying that "only" these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words "and only" could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words "and only" on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules' proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee's suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed "within the time allowed by" the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed "within the time allowed by" the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only "if the motion is filed no later than 28 days after the judgment is entered." This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed "within the time allowed for filing a motion under Rule 59." That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)'s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

Action Items

Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that "as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended." Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 "brings all rule of completeness questions under one rule." He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that "[t]he court may

admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together"). Professor Capra responded that Judge Bates's question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

Publication of Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz introduced the proposed amendment to Rule 615, a "deceptively simple" rule providing, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge's order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member's comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom "includes exclusion of witnesses from a virtual trial."

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word "one" was missing from "only <u>one</u> witness-agent is exempt at any one time"). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not "bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness," but then goes on to say that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis." The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note's drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court's discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude "a person authorized by statute to be present," was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party's request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, "must" be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee's work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses). Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993), which directs that "the trial judge must determine at the outset, pursuant to Rule 104(a)," whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

Action Items

Final Approval of Restyled Rules Parts I and II. Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act). Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre–CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest). Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court's electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word "Agent" to "Agent for Receiving Service of Process."

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal). The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income). Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that "an individual . . . filing for bankruptcy under Chapter 11" must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added "(other than under subchapter V)" to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series). Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim). Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than $10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

Action Items

Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g). Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,

there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow's district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead "any identifying designation provided by the Commissioner with the final decision"; a conforming change was made to the committee note. Supplemental Rule 6's language was clarified. The committee note now observes that the rules' scope encompasses instances where multiple people will share in an award from a claim based on one person's wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4's provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney's Office for the relevant district and "to the appropriate office within the Social Security Administrations' Office of General Counsel." The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the "appropriate office."

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from "after the court disposes of all motions" to "after entry of an order disposing of the last remaining motion"). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges' ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 ("Notice to the Commissioner is sent to the appropriate regional office") should mirror the language in Supplemental Rule 3 itself (referencing notice being sent "to the appropriate office within the Social Security Administration's Office of General Counsel"). Judge Bates asked if deleting the word "regional" would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what "any identifying designation provided by the Commissioner" referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like "including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier." This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was "provided by the Commissioner." Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund "identifying" in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

(1) The complaint must:
  (A) state that the action is brought under § 405(g);
  (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  (C) state the name and the county of residence of the person for whom benefits are claimed;
  (D) name the person on whose wage record benefits are claimed; and
  (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word "regional" on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,[†] decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings. The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee's April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

[†] Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

Information Items

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

Action Item

Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection). Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference**, with the sole change of the removal of the committee-note sentence identified by Professor Beale.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

Action Items

Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act. Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment[‡] might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling requirement that the court of appeals "must" dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at https://www.law.cornell.edu/rules/frcp/rule_84). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.

Judge Bates asked whether the new, combined Rule 40 could not be titled simply "Petitions for Panel or En Banc Review" rather than (as in the current proposal) "Petition for Panel Rehearing; En Banc Determination." Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested "Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc."

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying "transferred" rather than "abrogated." This judge had two other comments. First, this judge thought it would be better to change "or" to "and" on page 218 (subdivision (c)(1)) to accord with the "and" on page 217 (subdivision (b)(2)(A)); the "and" in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)'s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words "hear[] or" before "rehear[]" at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the "and" versus "or" discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using "or" in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a "petition [for initial hearing en banc] must be filed no later than the date when the appellee's brief is due." The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the "legacy" rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that "the full court's consideration is therefore necessary to secure and maintain

uniformity of the court's decisions" must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules' substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

Information Item

Amicus Disclosures. Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

OTHER COMMITTEE BUSINESS

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee's strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference's Strategic Plan for the Federal Judiciary, a list of the Standing Committee's initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.

Agenda E-19 (Summary)
Rules
September 2021

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 23-25

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

Agenda E-19
Rules
September 2021

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

Information Items

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting);
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status);
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11);
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement);
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Official Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition

defaults that may have occurred. The amended rule includes proposed stylistic changes throughout.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

Information Items

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

Information Items

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 would fix two problems with Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended to address two issues. The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702, such testimony must be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

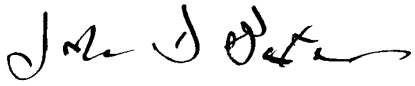
Information Items

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	The proposed amendment would conform the rule to the proposed amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Proposed conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subdivision (c) replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised October 19, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sep 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Revised October 19, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sep 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d).	

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Senate Bill Text (HR text not available):** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates

Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17.

Bankruptcy Venue Reform Act of 2021	H.R. 4193 *Sponsor*: Lofgren (D-CA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 **Summary:** Modifies venue requirements relating to Bankruptcy proceedings.	• 6/28/21 Introduced in House, Referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	S. 2497 *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21 Introduced in Senate, Referred to Judiciary Committee

TAB 2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 6(e)(3)—Suggestions Proposing an Amendment Allowing Disclosure of Grand Jury Records of Exceptional Historical or Public Interest, or Disclosure Based on the Courts' Inherent Authority**

DATE: **October 6, 2021**

I. Introduction

The Committee has received multiple suggestions to amend Rule 6(e)(3) to create an exception allowing disclosure in cases of exceptional historical or public interest.

The situation has changed significantly since 2012, when the Committee last addressed the question whether there should be an exception to grand jury secrecy for materials of exceptional historical importance and concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority."[1] Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3).

The *McKeever* and *Pitch* decisions deepened a split in the circuits, leading to renewed calls for an amendment—either one tailored narrowly to address only historically significant grand jury materials, or one that encompasses historical grand jury materials within a broader category of the public interest or inherent judicial authority. In addition to the recent decisions in *McKeever* and *Pitch*, earlier decisions in two other circuits state that Rule 6(e)'s exceptions are exclusive. *United States v. McDougal*, 559 F.3d 837, 840-41 (8th Cir. 2009) ("'Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside,' . . . courts will not order disclosure absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation.") (alteration and citation omitted); *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) ("[W]ithout an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.").

Two circuits hold that district courts retain inherent authority to release grand jury material in appropriate cases without an express exemption. *In re Petition of Craig*, 131 F.3d 99, 102 (2d

[1] The minutes of the meeting on April 22-23, 2012 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, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766-67 (7th Cir. 2016). This authority is sufficiently broad to include historical grand jury materials of exceptional importance in appropriate cases.

Finally, the matter is not settled in other circuits, and the issue continues to be litigated. On June 10, 2021, the First Circuit held oral argument in a case raising this issue. *In re: Petition for Order Directing Release of Records (Lepore v. United States)*, No. 20-1836 (1st Cir.).

In a statement respecting the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to resolve the question that has divided the circuits:

> Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.

McKeever v. Barr, 140 S. Ct. 597 (2020).

At its May meeting, the Committee referred these proposals to the Rule 6 Subcommittee. This memo focuses on the proposals submitted by Public Citizen Litigation Group (Suggestion 20-CR-B), the Reporters Committee for Freedom of the Press (Suggestion 20-CR-D), Joseph Bell and David Shivas (Suggestion 21-CR-F), as well as proposals submitted in 2011, 2020, and 2021 by the Department of Justice during the Obama, Trump,[2] and Biden administrations (Suggestions 20-CR-H and 21-CR-J). Several of these proposals authorized disclosure not only for records of historical interest, but also more generally disclosure in the public interest. Some would authorize disclosure based on the courts' inherent authority. In contrast, the Department sought an amendment to abrogate or disavow inherent authority to order disclosures not specified in the rule. The attached chart summarizes each of the proposals, and allows for comparisons.

This memo describes the subcommittee's work and its recommendations. The subcommittee held a miniconference in April 2021 to gather the views of experienced prosecutors, defense counsel, historians, journalists, and others affected by grand jury secrecy. It then met by telephone four times over the summer.

As described in greater detail in Section II, the subcommittee first sought to develop the best possible amendment defining a limited exception to grand jury secrecy for historical records that would balance the interest in disclosures with the vital interests protected by grand jury secrecy. The draft discussed in that section is the result of that effort.

[2] We note that the Department's 2020 submission described this as a proposal "the Department Could Possibly Support." Suggestion 20-CR-H at 6.

Part III discusses the subcommittee's recommendations. As described in Part III.A, a majority of the subcommittee recommend against proceeding further with an historical records exception to grand jury secrecy, though a minority support the current draft.[3]

Parts III.B. and C. discuss the subcommittee's views on the broader proposals for exceptions allowing disclosure in the public interest, or disclosures when permitted by the courts' inherent authority. The subcommittee recommends against adding a broad public interest or residual exception to grand jury secrecy. Finally, it recommends against proceeding with proposals in the various submissions that Rule 6 be amended to recognize, rely upon, disavow, or abrogate the courts' inherent authority to allow the disclosure of grand jury materials. In the subcommittee's view, the issue of inherent authority is a question of the constitutional authority of Article III courts, which the Committee has no authority to resolve.

II. The Subcommittee's Discussion Draft

Based on a comparison of the current proposals as well as the discussion at the miniconference, the reporters and the subcommittee identified the following issues that should be resolved in drafting an exception for the disclosure of matters of historical interest:

- how to define historical interest;
- whether to adopt the non-exhaustive list of factors prior courts have considered, drawn from the Second Circuit's decision in *Craig*;
- whether to specify a minimum period before materials may be disclosed, and, if so, what that time frame should be;
- whether to specify other limiting criteria;
- whether to specify any procedural requirements; and
- whether to provide for any automatic or presumptive disclosure after a certain period.

This portion of the memo describes the subcommittee's resolution of these issues.

A. Defining Historical Interest

Although the proposals by Public Citizen, the Reporters' Committee, and Bell & Shivas do not attempt to define "historical interest," the Department of Justice proposals from 2011 and 2020 included two potential limiting descriptions. First, the Department proposed adding a new definition of "archival grand jury records."[4] This provision was intended to serve as "a threshold

[3] As noted *infra*, the Department of Justice supports the current draft, though it has suggested some revisions.

[4] The Department's proposal provided (emphasis added):

> **(j) "Archival Grand jury Records Defined.** For purposes of this Rule, "archival grand jury records" means records from grand–jury proceedings, including recordings, transcripts, and exhibits, where the relevant case files *have permanent historical or other value warranting their continued preservation under Title 44, United States Code*.

screening requirement to ensure that grand jury secrecy is not abrogated in routine cases that do not, in themselves, have any recognized historical value." Suggestion 11-CR-C at 6.[5] Second, the Department's proposal limits disclosure to grand jury materials in the permanent custody of the Archives that are found to be of "*exceptional* historical importance" (emphasis added). In contrast, the proposals from the Reporters Committee, Public Citizen, and Bell & Shivas refer only to "historical . . . interest" and "historic importance."

Additionally, at the miniconference one of the participants (Dr. Bruce Craig, a historian and a litigant in cases involving grand jury secrecy) urged that professional associations of historians should play an important role in the determination of historical importance.

After discussion, the subcommittee concluded that given the critical purposes served by grand jury secrecy, any exception to grand jury secrecy should be limited to records of "exceptional" historical interest. The discussion included a concern that grand jury secrecy not be breached because of a family member's private quest for information and that the exception be limited to situations in which the public would benefit from more information about a historically significant event or case. The subcommittee was not persuaded, however, that it would be beneficial to define a category of archival grand jury records, nor was it necessary to provide for a special role for associations of professional historians. The committee note does acknowledge, however, that "[e]xpert testimony may assist the court in assessing the historical importance of the records in question."

B. Whether to Incorporate the *Craig* Factors

The other issues noted on page 3 are all affected by a foundational difference between the proposals, namely, whether they incorporate the so-called *Craig* factors in the text of the rule. *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997), provided an influential, "non-exhaustive" list of factors to be considered in determining whether to grant a petition for disclosure of grand jury materials not covered by any exception in Rule 6(e):

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of

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Records determined to have permanent historical value are transferred to the National Archives and Records Administration (NARA) as part of the Department's case files, which form part of NARA's permanent collection under 44 U.S.C. § 2107.

[5] After a case is closed and a certain period has elapsed, grand jury materials deemed to have no significant historical value are destroyed pursuant to record schedules approved by NARA. Grand jury materials of continuing interest or value to the Department are stored for a period of time, and some of these materials are ultimately transferred to NARA when they have been "determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government." 44 U.S.C. § 2107(1). As Mr. Stern (NARA's general counsel) explained at the miniconference, the standards and timetables for case files containing grand jury records are set forth in records schedules in place at the Department of Justice and approved by NARA.

> the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

The Reporters Committee and Bell & Shivas proposals are based upon and incorporate the *Craig* factors in the text of their proposed amendments, specifying that these are a "non-exhaustive list of factors to be considered." In 2011, the Department of Justice acknowledged *Craig*, but suggested that these factors are better left to elaboration in the committee note and development in the case law. *See* Suggestion 11-CR-C at 7. The Department did not mention *Craig* in 2020. Public Citizen follows the approach of the Department's 2011 proposal.

Incorporating the *Craig* factors would endorse the approach currently taken by the Second Circuit and several district courts.[6] It would rely on the sound exercise of discretion by the district courts to evaluate the factors. The proponents of this approach, including several miniconference participants, note that no one had identified any case in which the court had abused this discretion, or any case in which the disclosure of historic grand jury materials caused harm.

On the other hand, the concerns expressed at the miniconference—particularly the concern that disclosure be allowed only after a lengthy period (20, 30, or even 50 years)—counseled against basing an amendment entirely on the more open-ended *Craig* approach.

Concluding that it would be critically important to place limits on any new exception to grand jury secrecy, the subcommittee rejected the open-ended *Craig*-factor approach.

C. Specifying a Minimum Period Before Disclosure Could Be Considered

1. Whether to Specify a Minimum Period

Many of the speakers at the miniconference endorsed the view that any amendment should specify a lengthy minimum period before petitions for disclosure of historical grand jury materials could be considered. As noted, this contrasts with the current approach, based on the *Craig* factors, which considers the length of time since the grand jury proceedings as only one of the factors to be considered. On the other hand, at least one participant expressed the view that the current process of evaluating the *Craig* factors is working well, and there is no need to set a floor.

The Department and many of the current and former prosecutors who participated in the miniconference argued in favor of such a clear benchmark period, based in part on the need to provide specific reassurance to prospective witnesses. They emphasized the difficulty of predicting and explaining how the *Craig* discretionary factors would work.

[6] Although the Seventh Circuit endorsed *Craig*'s analysis of the district courts' inherent authority, it did not discuss the *Craig* factors. *Carlson v. United States*, 837 F.3d 753, 766-67 (7th Cir. 2016).

Subcommittee members generally agree that the discussion draft should specify a minimum period.

2. The Term of Any Minimum Period

The proposals before the subcommittee suggest different cutoff periods. They vary from 20 years (Public Citizen), to 25 years (DOJ in 2021), 30 years (DOJ in 2011), and 50 years (DOJ in 2020). Mr. Stern, representing NARA, suggested that 30 years would be appropriate. He explained that it would capture most of the petitions and parallel 44 U.S.C. § 2108(a), which presumes that any restrictions on materials transferred to NARA lapse unless longer restrictions are agreed to by the agency or NARA.[7] Imposing a 30-year floor would also treat grand jury materials like other highly sensitive government materials, such as classified or national security information and IRS records.

Other speakers argued that priority should be given to the need to protect those who testify before the grand jury as well as any innocent accused, and that 20 years was insufficient for that purpose. For example, one former U.S. Attorney stated 20 years was too short a time to protect witnesses who testify against groups with "long memories," such as drug cartels and terrorist organizations. Another former prosecutor agreed that in cases involving drug cartels, even after the death of a witness, the witness's children might feel at risk if grand jury records were released. Moreover, they suggested that the possibility that witnesses might have relatives overseas also supported a later floor. It would be difficult to contact such individuals to seek consent for disclosure, and indeed doing so might call attention to them and cause harm. Another concern was that after 20 years had passed the defendant might be released, or nearing release from prison.

Other kinds of cases also showed the need for a longer floor. One miniconference participant noted that 20 years would be insufficient to protect against the lasting reputational damage to a police officer whose testimony broke the code of silence, or the privacy interests of a survivor of sexual assault. Another stated that President Nixon, who agreed to a deposition that would be read to the grand jury, insisted on absolute confidentiality. She believed he would not have done so if he had been informed his deposition could be made public after 20 years. A participant noted that in all special counsel cases witnesses ask when what they say will be made public. He urged the Committee to consider the possible impact on such cases, and the need to avoid politicizing them. He also warned that unless a substantial period of time must pass before grand jury material can be released for historical purposes, prosecutors will likely shift to office interviews, which result in no transcript and no historical record.

[7] 44 U.S.C. § 2108(a) provides:

> . . . Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period.

On the other hand, another participant argued that a cutoff of 20 years would be sufficient. In her view, 50 years is too long, as it would have precluded disclosure in five of the eight cases that have allowed disclosure of historical grand jury materials. The Hiss and Watergate materials were released after 36 years. Disclosure would also have been barred in the Hoffa case, as well another concerning the police response to a riot in Tennessee. Yet all were important for history and the understanding of the judicial system. The participant also noted that Congress has placed much shorter timelines on the disclosure of other sensitive materials: 25 years for FOIA, and 25 years for National Security. Why, she asked, should grand jury materials be subject to greater protections than the most sensitive classified information?

For purposes of the discussion draft, 40 years was chosen as the midpoint in the range of cutoff periods initially favored by subcommittee members. However, several members continued to express concern that 40 years would be insufficient.

D. Other Limiting Criteria

The Department of Justice's earlier proposals included two other criteria, requiring the court to make findings that:

> (d) no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps that the court may direct; [and]
>
> (e) disclosure would not impede any pending government investigation or prosecution. . . . .

The Department's 2011 and 2020 proposals bar disclosure unless both criteria are met. Although the Department's current memorandum does not include a draft amendment, it notes that the Attorney General supports the inclusion of these criteria.

The subcommittee agreed that it would be crucial for the courts to consider whether disclosure would cause prejudice to living persons or interfere with pending investigations and prosecutions. But it chose not to incorporate these in the text as criteria that must be met, which might be unworkable. Members expressed concern, for example, that as a practical matter it would be difficult for the government to prove and for the court to make a finding that no living person would be prejudiced. And how would the court proceed in making a finding that no pending investigation or would be impeded? The subcommittee phrased the text in more general terms, which it supplemented with more detail in the committee note. If the request met all of the other criteria, the proposed amendment would require the court to find that "(c) the public interest in disclosing the grand jury matter outweighs the public interest in retaining secrecy." The committee note explains the range of interests protected by retaining secrecy, including but not limited to these two factors:

> If the court makes those threshold findings, it must then determine whether disclosure is in the public interest, given the critical importance of the interests served by grand jury secrecy, and the traditional reluctance to lift the veil of that secrecy. These interests include reassuring prospective witnesses who might

> otherwise be hesitant to come forward voluntarily, preventing retribution or inducements that might prevent witnesses' full and frank testimony, and assuring that those the grand jury decides not to charge will not be exposed to public ridicule. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 218-19. Courts must consider the effects of disclosure not only upon a particular grand jury, but also on the functioning of future grand juries. "Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Id*. at 222. By limiting disclosure of historical records to truly exceptional cases after a minimum of 40 years, the rule protects the functioning of future grand juries, allowing prosecutors to reassure grand jurors and prospective witnesses of the strong protection afforded by grand jury secrecy.
>
> A person seeking grand jury materials under Rule 6(e) must show that need for disclosure is greater than the interests in continued secrecy, and that the request is structured to cover only material so needed. *Id*. The rule requires the court to weigh the public interest in the disclosure of particular historical grand jury records against the critical interests served by grand jury secrecy. The court must evaluate not only the impact on future grand juries, but also the possible impact of the particular disclosure on living persons (including witnesses, grand jurors, and persons investigated but not charged), as well as any prejudice or interference in ongoing investigations or prosecutions. This is a fact-intensive determination, and a court may consider a variety of other factors as well. *See, e.g.*, *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997).

E. Procedural Requirements

The Department of Justice proposals require "notice to the government and an opportunity for a hearing," and they also specify that the court must make a finding "on the record by a preponderance of the evidence" that a petition for the disclosure of historical grand jury materials meets the criteria of the new exception. And, as noted above, the proposals reference the possibility of redacting or taking other steps to prevent prejudice to living persons. Finally, by stating that "an order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 29," the Department's proposals provide an avenue for appellate review of decisions to grant or deny disclosure.

At the miniconference, Ms. Betsy Shapiro explained how the process now works in the courts that allow disclosure under the *Craig* factors. After receiving authority to access the grand jury material, she reviews the material page by page to identify every person involved, and she reaches out to each of them to determine whether they oppose disclosure. She does not seek to find children or families outside the United States. It is a significant responsibility, and she said she worries that she may inadvertently miss someone.

The subcommittee discussed whether any amendment should include procedural requirements. Given the importance of grand jury secrecy and the fact that grand jury records are maintained by the government, it concluded there is good reason to require notice to the government and an opportunity for a hearing. But the subcommittee concluded it was not appropriate to include a host of other detailed requirements, such as:

- Whether the court provide an in camera hearing for the government to respond?
- Whether the rule should require the government to give notice to the persons who may be affected by disclosure, as it does now?
- If the court or the government has a duty to notify potentially affected people, whether this notice be given only to the individuals who participated in the process (witnesses, targets, grand jurors, etc.), or should it extend further to their families?
- Finally, should the amendment also include a provision defining the decisions in question as final orders subject to appeal?

The committee note addresses some of these issues, commenting that the court has discretion to tailor the procedures for the hearing and noting the role the government has traditionally played:

> The amendment requires that the court give the government, which has custody of grand jury materials, notice and an opportunity for a hearing on whether the disclosure should be granted and, if granted, the scope and conditions of any disclosure. The rule does not specify the procedures for the hearing. The court may, for example, provide notice and the opportunity to be heard to persons other than the government. Before making this determination, courts have generally directed the government to review the records in question to identify interested persons (including witnesses, grand jurors, and targets or subjects not charged), contact those still living to determine whether they would object to disclosure, and inform the court of any objections to disclosure.

F. Automatic or Presumptive Disclosure

In 2011, the Department of Justice proposed allowing NARA to release any grand jury materials in its collection 75 years after the conclusion of the proceedings. Writing to the Committee in 2012, the Archivist strongly supported this provision, urging that an amendment for historic grand jury materials should "establish an end point in time far enough in the future that the need for grand jury secrecy is no longer necessary" with respect to NARA's permanent archival records. He concluded:

> . . . after the appropriate period of time has passed, all of the permanent records here in the National Archives must eventually be made available for research by the public, including grand jury-information for very old cases in which all of the participants can be presumed to be deceased. At such point in time, it should not be necessary for a researcher or I, as Archivist of the United States, to file a petition in federal court to obtain an order authorizing the release of historical grand jury records.

Mr. Stern confirmed at the miniconference that the Archivist continues to support 75 years as an appropriate period, but is also open to considering other periods. And at the miniconference, Ms. Zieve expressed the view that grand jury materials that survive for 60 years should be unsealed; materials of this age will generally meet all of the *Craig* factors, and in unusual cases any sensitive information could be redacted.

A provision triggering automatic access has several advantages. It would make grand jury materials more readily available for study while reducing the burden on the courts, the Department, and the Archivist. Moreover, after 75 or more years, there is generally little reason to maintain secrecy, since all of the participants would probably be dead, and all related prosecutions long concluded.

On the other hand, when the Committee considered the Department's proposal in 2012, there was substantial concern about the inclusion of the provision for automatic disclosure after 75 years, which was seen as too great a departure from the fundamental principle of grand jury secrecy. The subcommittee agreed.

In its most recent submission—which was received after the subcommittee decided not to include any date for automatic or presumptive disclosure—the Department of Justice again expressed supports an end point of 70 years:

> We also believe there should be a temporal end point for grand jury secrecy for materials that become part of the permanent records of the National Archives. Although most categories of historically significant federal records, including classified records, eventually become part of the public historical record of our country, Rule 6(e) recognizes no point at which the blanket of grand jury secrecy is lifted. The public policies that justify grand jury secrecy are, of course, "manifold" and "compelling." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). But as Attorney General Holder indicated in his letter to the Committee in 2011, they do not forever trump all competing considerations. After a suitably long period, in cases of exceptional or significant historical importance, the need for continued secrecy is eventually outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government.
>
> The Department believes that after 70 years, the interests supporting grand jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have normally faded. That is generally true for government records that are highly protected against routine disclosure. For example, most classified records in the custody of the Archivist that have not previously been declassified become automatically declassified. We think Rule 6 should provide that after 70 years, grand jury records would become available to the public in the same manner as other archival records in NARA's collections, typically by requesting access to the records at the appropriate NARA research facility or by filing a FOIA request. *See generally*, 36 C.F.R. Part 1256, Subpart B.

III. The Subcommittee's Recommendations

A. Whether to Propose an Amendment for Historical Grand Jury Materials

Although members expressed the view that the discussion draft was as good an amendment as one could draft, a majority of members opposed proceeding with the amendment.

Members stressed the critical importance of grand jury secrecy, which one member referred to as "sacrosanct." Given the importance of grand jury secrecy, members were concerned about the potential consequences of the proposed exception. Recalling powerful statements at the miniconference regarding the need for secrecy to protect witnesses and their families, one member stressed the importance of grand jury secrecy and expressed concern about the "unknown unknowns" if an amendment is adopted.

After echoing the general sentiment that grand jury secrecy serves important purposes, a member noted several additional reasons for his skepticism towards the amendment. He had questions about how the rule would work in practice, including how the government would handle being a broker between interested parties and its own interests. Even if the government favors disclosure, it must still convey objections to the court. The member expressed concern about how to define historical importance and how discussions between practitioners and witnesses will change if lawyers must advise witnesses of the potential that 40 years from now there could be disclosure. Finally, he pointed to concern about third-party interests and how there are reputations and legacies involved. In the member's view, historical inquiry does not rise to the same level as the reasons supporting other exceptions for disclosure, and so he was ultimately opposed to amending.

Another member stated that she opposed the amendment, drawing upon analogous experiences she has had in cases with public scrutiny involving grand jury leaks, and what it has done to the grand jury process. Every grand jury witness requires reassurance about secrecy. The more that has to be explained regarding exceptions and disclosure, particularly in a case with public scrutiny from the start, the more the integrity of the whole process is weakened.

Another member agreed with the views stated by other members, noting that the rule has operated substantially in this manner for centuries and that the subcommittee cannot really predict how this sort of change would affect the functioning of grand juries. In addition, the grand jury serves critically important purposes which have little to do with historical research or media interest. He also questioned whether having this sort of exception would make leaks more frequent, since it would establish a precedent that disclosure of grand jury material to reporters and other interested parties is sometimes permissible. There is, however, a counterargument that if the Committee does not act the courts will decide the inherent authority issue, which conceivably could lead to broader disclosure than the draft amendment.

The chair of the subcommittee noted that he originally supported an amendment, thought the subcommittee could come up with one, and thought it needed to address the split. But his thinking had evolved over time, and as the subcommittee dealt with the challenges of the floor and

ceiling, and the closure of files, he became more concerned about the practical rule and then the context of placing the rule inside Rule 6(e). The other exceptions in the rule are tied to the criminal investigative process, requiring disclosure for investigative purposes or within the judicial proceeding itself, or for national security reasons, all of which are a far cry from historic interest. He expressed hesitation at the idea of putting this exception on par with national security interests or the other exceptions, and worried that this sends the wrong message regarding grand jury secrecy and the value of grand jury proceedings.

Two members of the subcommittee, including the Department of Justice, supported an amendment allowing disclosure for grand jury materials of exceptional historical interest, and they favored moving forward with the discussion draft.

Speaking on behalf of the Department of Justice, Mr. Wroblewski thanked the subcommittee for its patience as the Department's views have changed, noting that it has consistently taken the position that the exceptions in Rule 6(e) are exclusive and that judges do not retain inherent authority. When an exception is needed, it must be in the rule. In the Department's view, there is a public interest for historical grand jury materials to be made public at some point. The Department continues to support an amendment, and it will vote yes on the proposal when presented to the full Committee, though it would prefer some changes to the discussion draft.[8]

Another member argued that grand jury secrecy should not trump other important interests, and the draft balances the known benefits of transparency in government with the historic preference for secrecy. Without the amendment, courts ruling on disclosure requests will decide cases without the benefit of the rulemaking process and the standards provided by the draft amendment. Different courts will continue to take very different approaches. In that member's view, the Committee has an obligation to address the existing circuit split. By failing to put forth an amendment, it would not give needed direction to courts.

B. Whether to Propose a Residual or "Public Interest" Exception

For the reasons stated above, there was little support on the subcommittee for a more general, less structured public interest exception, such as one based on the *Craig* factors. It was noted that such an exception might effectively nullify the carefully crafted limitations in the existing exceptions, as well as any new exception for historical grand jury records.

One member, however, expressed strong support for this option, noting that the courts in multiple circuits had employed the *Craig* standards to balance the need for continued secrecy against other values, particularly transparency in government, and that there had been no instances of harm attributed to these disclosures.

[8] As noted in the Department's most recent submission, Suggestion 21-CR-J, it supports adding to the text the requirements that the court find that "no living person would be materially prejudiced by disclosure (or that any prejudice could be avoided through redaction or other reasonable steps) and that disclosure would not impede any pending government investigation or prosecution."

C. Whether to Propose an Amendment Addressing the Exclusivity of the Exceptions or the Courts' Inherent Authority

Finally, the subcommittee considered the question whether to propose an amendment that would address the exclusivity of the exceptions in Rule 6(e), which is intertwined with questions concerning the courts' inherent authority. The attached memorandum, prepared for the subcommittee, describes the proposals that include provisions on inherent authority, discusses the nature and scope of inherent authority, and identifies barriers to drafting an amendment addressing inherent authority. Since it provided a basis for the subcommittee's discussion and recommendation, we have included an excerpted version here.

With one dissent, the subcommittee recommends against an amendment that would seek to define, cabin, or negate the courts' inherent authority to order disclosures not provided for in Rule 6. In the subcommittee's view, the issue of inherent authority is question of the constitutional authority of Article III courts, which the Committee has no authority to resolve.

If the Committee agrees, it will be necessary to work out how this should be communicated, particularly in light of Justice Breyer's suggestion in his statement respecting the denial of certiorari in *McKeever* that the Committee resolve the issue of the circuit split.

Suggestion	Bell & Shivas	Reporters Committee	Public Citizen	2011 DOJ Proposal	2020 DOJ Proposal	2021 DOJ Proposal
Clear exception for historical importance?	Yes – "(vi) on petition of any interested person for reasons of *historical* or public interest…" (same as Reporters Committee)	Yes – "(vi) on petition of any interested person for reasons of *historical* or public interest…" (same as Bell & Shivas)	Yes – "(vi)(a) the petition seeks grand-jury records of *historical importance*"	Yes – "(vi)(b) the records have *exceptional historical importance*" Specifies that historical importance must be exceptional.	Yes – Same as 2011 proposal verbatim "(vi)(b) the records have *exceptional historical importance*" Specifies that historical importance must be exceptional.	Yes- *Exceptional or significant historical importance*.
Residual or catch-all exception?	Yes – "(vi) on petition of any interested person for reasons of historical *or public interest*" Public interest exception functions like a residual or catch-all. (Same as Reporters Committee)	Yes – "(vi) on petition of any interested person for reasons of historical *or public interest*" Public interest exception functions like a residual or catch-all. (Same as Bell & Shivas)	No – The only explicitly mentioned exception is for exceptional historical importance.	No – The only explicitly mentioned exception is for historical importance.	No – The only explicitly mentioned exception is for exceptional historical importance.	No – The only explicitly mentioned exception is for exceptional or significant historical importance. (Introductory paragraph references "historical value *and interest to the public*" but later refers only to historical value.)
Timeframe?	Somewhat – No specific timeframe but a factor for consideration is "(vi)(e) how long	Somewhat – No specific timeframe but a factor for consideration is "(vi) how long	Yes – Uses the framework of the 2011 proposal but adjusts the specific timeframes	Yes – After 30 years the court may authorize disclosure: "(vi)(c) at least 30 years have passed since	Yes – Uses the framework of the 2011 proposal but adjusts the timeframe for when the courts can	Yes – The courts may consider petitions for release of grand jury information after 25 years

	ago the grand jury proceedings took place" (Same as Reporters Committee)	ago the grand jury proceedings took place" (Same as Bell & Shivas)	involved and never explicitly references NARA or archival records. After 20 years the court may authorize disclosure: "(vi)(b) at least 20 years have passed since the relevant case files associated with the grand-jury records have been closed" After 60 years the records may be released: "(8) Nothing in this Rule prevents disclosure of grand-jury materials more than 60 years after closure of the case file"	the relevant case files associated with the grand-jury records have been closed" After 75 years NARA may release archival grand-jury materials in its collections: "(C) Nothing in this Rule shall require the Archivist of the United States to withhold from the public archival grand-jury records more than 75 years after the relevant case files associated with the grand-jury records have been closed." This proposal also recommends defining "archival grand-jury records" in the rules themselves	authorize disclosure from after 30 years to 50 years and does not set a time at which all archival grand-jury materials may be presumptively released (justification that this is too great a departure from traditional grand-jury secrecy). After 50 years the court may authorize disclosure: "(vi)(c) at least 50 years have passed since the relevant case files associated with the grand-jury records have been closed" This proposal also recommends defining "archival grand-jury records" in the rules themselves	following the end of the relevant grand jury. After 70 years, grand jury records would become available to the public in the same manner as other archival records in NARA's collections (requesting access at NARA facility or filling a FOIA request)
Incorporates *Craig* factors?	Yes – "in consideration of the following non-exhaustive list of factors" and then includes all 9 *Craig*	Yes – "in consideration of the following non-exhaustive list of factors" and then includes all 9	No – Instead, uses the findings that the district court must make from the 2011 proposal with	No – Acknowledges *Craig* but believes those factors "are better left to elaboration in the	No – Acknowledges the relevance of the *Craig* factors for a contextual analysis of what constitutes	No – No explicit mention of the *Craig* factors in the memo.

	factors. (some minor formatting differences but same as Reporters Committee)	*Craig* factors. (some minor formatting differences but same as Bell & Shivas)	the exception of "(a) the petition seeks only archival grand-jury records" and of changing the timeframe for permissible disclosure from 30 years to 20 years. But in the suggestion, the authors write, "the 'special circumstances' test articulated in *Craig* and applied by district courts in several subsequent cases provides an appropriate starting point." (pg. 8).	Advisory Committee Notes and then to development in the case law" (pg. 7), and provides its own list of findings the district court must make: (a) The petition seeks only archival grand-jury records (b) The records have exceptional historical importance (c) At least 30 years have passed since the relevant case files associated with the grand-jury records have been closed (d) 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 (e) Disclosure would not impede any pending government	"exceptional historical significance" but does not include in text of rule. Instead, uses the findings that the district court must make from the 2011 proposal with two alterations. (1) Says, "(a) the petition seeks archival grand-jury records" rather than "(a) the petition seeks *only* archival grand-jury records" in the 2011 proposal. (2) Changes the timeframe for permissible disclosure from 30 years to 50 years.	The memo does note that the district court must find that (1) No living person would be materially prejudiced by disclosure (or that prejudice could be avoided through redaction or other reasonable steps) (2) Disclosure would not impede any pending government investigation or prosecution. (3) Release should only be authorized when the court finds that the public interest in disclosing outweighs the public interest in secrecy.

				investigation or prosecution and (f) No other reason exists why the public interest requires continued secrecy.		
Codifies the inherent authority of the district courts?	Yes/Somewhat – "(vii) on petition of any interested entity or person for any additional reason presenting exceptional circumstances where disclosure may be authorized *pursuant to the inherent authority of the court*." "(viii) This rule recognizes and codifies the existence of the *inherent authority of the court* to authorize disclosure under exceptional circumstances" "(8) Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records	Somewhat – "(8) Nothing in this rule shall limit *whatever inherent authority courts possess* to unseal grand jury records in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (8) leaves how much inherent authority the district courts have up for debate. However, the existence of the catch-all exception in the Reporters' Committee suggestion means that courts should not have to rely	Somewhat – "(9) Nothing in this Rule shall limit *whatever inherent authority the district courts possess* to unseal grand-jury records in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (9) leaves how much inherent authority the district courts have up for debate.	No – Not referenced in the text of the recommended amendment and in suggestion writes, "[t]he Supreme Court has specifically rejected the proposition that a district court has inherent authority to create exceptions to the rules of criminal procedure adopted by the Court in its rulemaking capacity." (pg. 4).	No – The DOJ would like the amendment to "contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive" unless the Court addresses that question in *Department of Justice v. House Committee on the Judiciary*. Oral argument in this case was postponed and has not been rescheduled.	No – No reference to the inherent authority of the courts.

	in exceptional circumstances." Qualifying "inherent authority" with "whatever" in (8) leaves how much inherent authority the district courts have up for debate. However, (viii) codifies the existence of an inherent authority to authorize disclosure without the qualification of "whatever", and the existence of the catch-all exception in the Bell & Shivas suggestion means that courts should not have to rely on inherent authority.	on inherent authority.				
Final decision language?	No – Not discussed.	No – Not discussed.	Yes – "(vi) 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."	Yes – "(vi) An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28."	Yes – "(vi) An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28."	No – Not discussed

Rule 6. The Grand Jury

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(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

* * * * *

(E) The court may authorize disclosure—at a time, and in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

* * * * *

(vi) at the request of any person if, after it has provided notice to the government and the opportunity for a hearing, the court finds:

- at least 40 years have passed since closure of the relevant case files associated with the grand-jury records;

- the grand-jury matter to be disclosed has exceptional historical importance; and

- the public interest in disclosing the grand jury matter outweighs the public interest in retaining secrecy.

Committee Note

The grand jury occupies a unique role in our criminal justice system, serving as an investigatory body charged with the initial responsibility of determining whether a crime has been committed. *United States v. R. Enterprises, Inc*., 498 U.S. 292, 297 (1991). The Court "'consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'' *United States v. Sells Eng'g, Inc*., 463 U.S. 418, 424 (1983) (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)). New subparagraph (e)(3)(E)(vi) provides a narrow exception to grand jury secrecy permitting courts to authorize disclosure of certain historically significant grand jury materials if several requirements are met.

At least 40 years must have passed since the closure of the relevant case files. Requiring the passage of four decades after the case files have closed significantly reduces, but does not nullify, the interest in grand jury secrecy. *See id.* at 222 ("the interests in grand jury secrecy,

although reduced, are not eliminated merely because the grand jury has ended its activities"). The Department has record retention policies that determine when cases files are closed.

The court must also find that the records have exceptional historical importance, as was the case, for example, with the grand jury deposition given by President Richard Nixon and the grand jury records concerning the prosecution of Julius and Ethel Rosenberg. *In re Kutler*, 800 F. Supp. 2d 42, 45-46 (D.D.C. 2011) (granting petition for access to grand jury testimony by President Nixon); *In re Petition of National Security Archive*, No. 1:08-cv-6599, docket entry No. 3 (S.D.N.Y. Aug. 26, 2008) (granting access to records concerning indictment of Ethel and Julius Rosenberg). Expert testimony may assist the court in assessing the historical importance of the records in question.

If the court makes those threshold findings, it must then determine whether disclosure is in the public interest, given the critical importance of the interests served by grand jury secrecy, and the traditional reluctance to lift the veil of that secrecy. These interests include reassuring prospective witnesses who might otherwise be hesitant to come forward voluntarily, preventing retribution or inducements that might prevent witnesses' full and frank testimony, and assuring that those the grand jury decides not to charge will not be exposed to public ridicule. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 218-19. Courts must consider the effects of disclosure not only upon a particular grand jury, but also on the functioning of future grand juries. "Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." *Id.* at 222. By limiting disclosure of historical records to truly exceptional cases after a minimum of 40 years, the rule protects the functioning of future grand juries, allowing prosecutors to reassure grand jurors and prospective witnesses of the strong protection afforded by grand jury secrecy.

A person seeking grand jury materials under Rule 6(e) must show that need for disclosure is greater than the interests in continued secrecy, and that the request is structured to cover only material so needed. *Id*. The rule requires the court to weigh the public interest in the disclosure of particular historical grand jury records against the critical interests served by grand jury secrecy. The court must evaluate not only the impact on future grand juries, but also the possible impact of the particular disclosure on living persons (including witnesses, grand jurors, and persons investigated but not charged), as well as any prejudice or interference in ongoing investigations or prosecutions. This is a fact-intensive determination, and a court may consider a variety of other factors as well. *See, e.g.*, *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997).

The amendment requires that the court give the government, which has custody of grand jury materials, notice and an opportunity for a hearing on whether the disclosure should be granted and, if granted, the scope and conditions of any disclosure. The rule does not specify the procedures for the hearing. The court may, for example, provide notice and the opportunity to be heard to persons other than the government. Before making this determination, courts have generally directed the government to review the records in question to identify interested persons (including

witnesses, grand jurors, and targets or subjects not charged), contact those still living to determine whether they would object to disclosure, and inform the court of any objections to disclosure.

The new exception, like the existing exceptions in Rule 6(e)(3)(E), permits the court to authorize disclosure "at a time, and in a manner, and subject to any other conditions that it direct." For example, the court may order material to be redacted to protect the interests of individuals who might otherwise be prejudiced by disclosure, or to prevent interference with other investigations or prosecutions. Or it may limit the disclosure to certain recipients with conditions.

MEMO TO: **Rule 6 Subcommittee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: ***** [O]ther exceptions to grand jury secrecy**

DATE: **August 1, 2021 (excerpted October 6, 2021)**

This memo discusses several proposals that seek an amendment to Rule 6(e) addressing a court's authority to disclose grand jury materials beyond the defined exceptions to grand jury secrecy in Rule 6(e)(3). The proponents ask the Committee to resolve the current split in the circuits on this question. They differ, however, on whether such residual authority should be recognized, and, if so, how best to do so. Proponents either ask for language stating the defined exceptions are exclusive, or for language stating that the courts retain residual authority to authorize disclosure beyond the defined exceptions.

After describing the proposals, this memo discusses the potential barriers to the development of an amendment resolving the question . . . .

* * * * *

A. The proposals

The Department of Justice (20-CR-H at 6) advocates "that any amendment to Rule 6 should contain *an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive*." Ms. Shapiro repeated and emphasized that point at the miniconference.

Four other proposals advocate an amendment that would explicitly *authorize* courts to order disclosure not covered by any of the specific exemptions, or, in the alternative, at least leave the door open to the exercise of such authority. Some proposals refer expressly to "inherent authority"; others seek a broad "public interest" or "ends of justice" exception that would provide a clear source of authority for the exercise of discretion that has been characterized as inherent authority.

- Bell & Shivas (20-CR-F) propose adding the following affirmative statements regarding "inherent authority":

    - **(e)(3)(viii)** This rule *recognizes and codifies the existence of the inherent authority of the court* to authorize disclosure under exceptional circumstances.
    - **(e)(3)(vii)** on petition of any interested entity or person for any additional reason presenting *exceptional circumstances where disclosure may be authorized pursuant to the inherent authority of the court*. (Emphasis added).

- Alternatively, both the Reporters Committee and Bell & Shivas—joined by Public Citizen (20-CR-B)—propose that Rule 6(e) be amended to add language that expressly

leaves the door open for the exercise of inherent authority, without taking a position on the existence or scope of that authority:

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

- Without suggesting specific language, McKnight (20-CR-J) proposes the addition of a general catch-all or residual exception allowing courts to authorize disclosure to serve the ends of justice upon a showing of particularized need. This would provide a clear source of authority, making it unnecessary to resolve the question whether the courts retain inherent authority or the rule's exemptions are exhaustive.

- Similarly, both the Reporters Committee (20-CR-D) and Bell & Shivas (20-CR-F) support allowing disclosure "(vi) on petition of any interested person *for reasons of . . . public interest*."

* * * * *

We also note that Justice Breyer has urged the Committee to address and resolve the circuit split on the question whether Rule 6's exceptions to grand jury secrecy are exhaustive. *McKeever v. Barr*, 140 S. Ct. 597, 597-98 (2020) (Breyer, J.) (statement respecting the denial of certiorari) ("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.").

B. Barriers to resolving the question

Resolution of the question by amendment would likely involve sustained conflict, given the polarized views of stakeholders and judges. Committee consensus on this issue appears, at this point, unlikely. The Department is adamantly opposed to language in the rule that would recognize inherent or residual judicial authority to disclose matters before the grand jury. It argues that inviting such open ended judicial discretion greatly increases the difficulty of persuading witnesses to cooperate and testify truthfully and undermines all of the traditional interests protected by grand jury secrecy. The proponents of recognizing or preserving residual authority adamantly defend its importance and past exercise. Its elimination would tie the courts' hands in situations that cannot all be foreseen, even if the interests of justice would be served by disclosure, with little or no harm to the traditional interests protected by grand jury secrecy.[1]

In addition, an amendment adopting the Department of Justice's preferred option expressly disavowing or abrogating any inherent authority for disclosure outside the Rule would require the Committee to tackle several difficult issues that might have implications for the other advisory committees as well: the nature and scope of the courts' inherent authority and the issues

[1] *Cf. In re Biaggi*, 478 F.2d 489 (2d Cir. 1973) (affirming release of a witness's redacted grand jury testimony at request of both the government and the witness—a candidate for public office—with redactions to protect all third parties mentioned).

raised by any effort to abrogate those powers under the Rules Enabling Act. Similarly, any effort to expressly incorporate the courts' inherent authority would require a greater understanding of that authority.

We recognize, however, that the Subcommittee may decide that it is precisely these challenges – polarized views and difficult issues – that make the rules process an appropriate forum resolving this particular dispute. A brief overview of those issues follows. If the Subcommittee concludes that it wishes to pursue an amendment seeking to abrogate inherent authority, then we will provide a more thorough research memorandum.

1. The nature and scope of the courts' inherent authority

The Supreme Court has repeatedly recognized the existence of the court's inherent authority, but has not defined the source of that authority. In *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016), it stated:

> … this Court has long recognized that a district court possesses inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co*., 370 U.S. 626, 630–631, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); *see also United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259 (1812).

There is little agreement on the nature, source, and scope of the federal courts' inherent authority. We provide here just a brief sampling of the literature.

Drawing on both judicial opinions and scholarship, then Professor Amy Coney Barrett provided the following overview of the arguments in favor of inherent judicial power over procedure:

> A long and well-established tradition maintains that some powers are inherent in federal courts simply because Article III denominates them "courts" in possession of "the judicial power." In other words, inherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation. The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it. Nonetheless, there are limits to what Congress can do in regulating the courts' inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court. It cannot, however, wholly withdraw that power or, even short of that, impose regulations that would cripple courts in its exercise.
>
> In a significant number of cases, the Supreme Court has identified procedure as a matter over which federal courts possess inherent authority . . . In some of these cases, the Court has explicitly asserted that federal courts possess inherent authority to formulate rules of procedure in the course of adjudication. In others, the Court has addressed not so much the authority to prescribe procedural rules as the authority to take

> actions related to the progress of a suit. Perhaps because of these cases, and perhaps because the idea makes good sense, scholars have echoed these assertions.
>
> In light of these cases, the argument grounding authority to make procedural common law in the inherent authority of the federal courts is straightforward: Federal courts have inherent authority to adopt procedures governing litigation before them; thus, they have the authority to develop procedural common law. Their inherent power over procedure authorizes them to act in the absence of enabling legislation, but if Congress acts, the courts must generally give way. There are, nonetheless, limits to what Congress can do. It cannot wholly withdraw the courts' power over procedure, and there are some–albeit few–procedural matters that are entirely beyond congressional regulation. Article III, in sum, allocates to federal courts a special role in regulating this area committed to exclusive federal control.

Amy Coney Barrett, *Procedural Common Law,* 94 VA. L. REV. 813, 842-45 (2008) (footnotes omitted).

After a review of the relevant sources—the constitutional text and structure and the historical record—Professor Barrett concluded that Article III should be construed as implicitly granting the federal courts inherent procedural authority:

> Indeed, the assumption that federal courts possess inherent authority over procedure is so deeply held that, as a practical matter, rolling it back likely requires forceful evidence to the contrary. Such evidence does not exist here. Thus, given that the historical record puts the modern claim of inherent procedural authority on reasonably firm ground, and given that the modern claim reflects a sensible approach to interbranch balance in matters of procedure, Article III is best construed as implicitly granting federal courts procedural authority.

Id. at 878.

But if we assume that inherent authority does exist, there is little agreement on its source and scope. In their classic article, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV . 1010, 1023 (1924), Frankfurter and Landis note some of the issues raised by the concept of inherent judicial powers:

> Whence and why do the powers "inhere" which are claimed to "inhere" in the inferior Federal courts? Do they "inhere" in nature, so that to deny these powers and yet to conceive of courts is a self-contradiction? Do they "inhere" in our history, so that the formulated experience of the past embodies them? Do they "inhere" in the idea of a court's usefulness, so that the courts would otherwise obviously fail in the work with which they are entrusted?

More recently, Professor Barrett identified several possible sources: (1) the authority to make common procedural as well as substantive law where federal law is exclusive, (2) the limited authority that necessarily inheres in the authority granted by Article II, and (3) the

broader implied incidental authority to "get the job done." Barrett, *Procedural Common Law*, at 835-47. A commentary on an effort to limit inherent authority in the Fed. R. Civ. P. 37(e)[2] described the wide divergence in both the cases and scholarship, as well as the some of the sources of the confusion:

> Both the academic literature and case law reflect highly divergent views of the appropriate scope of inherent authority. As the Third Circuit noted in 1985, "[d]espite historical reliance on inherent powers, including Supreme Court jurisprudence dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as 'shadowy.'" The court recognized several factors that give rise to this lack of clarity, including: (1) the paucity of published decisions; (2) the inconsistent use of generic terms to describe "several distinguishable court powers;" and (3) reliance on precedent underlying one form of inherent power to support the use of a different power.
>
> One commentator summarized the doctrinal uncertainty in this area as arising from two sources. The first is the lack of clear standards establishing when courts may invoke their inherent authority absent express statutory authorization, a situation resulting in the Supreme Court jurisprudence appearing "schizophrenic." The second source of confusion is a lack of consensus over the constitutional authority of Congress to abrogate common-law rules governing the use of inherent authority. As the Third Circuit has observed, the Supreme Court has failed to provide clarity with respect to "the conceptual and definitional problems regarding inherent power that have bedeviled commentators for years." The confusion is reflected, and perhaps exacerbated, by regular use of the term "inherent power" that conflates "certain implied powers" purportedly arising from the structure of the Constitution itself, with "inherent authority" which refers to powers originating outside of the Constitution. Notwithstanding the semantic distinction, the Supreme Court and the lower courts have repeatedly used the terms "implied power" and "inherent power" interchangeably.

James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 SEDONA CONF. J. 613, 618-20 (2016) (footnotes omitted).

Although most of the decisions authorizing disclosure of grand jury materials not covered by exceptions under Rule 6 use the phrase inherent authority (or power), at least one uses the phrase supervisory power,[3] as does the *Williams* case, which we discuss below in connection with the special role of the grand jury.[4] We will focus on inherent authority in this memo, and

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[2] At the Committee's spring meeting in 2019, Judge Campbell, the Standing Committee Chair, drew attention to the controversy surrounding Rule 37(e):

> Judge Campbell commented that when the Civil Rules Committee amended Rule 37(e), concerning spoliation, it intended to eliminate side litigation and included a comment stating the intent of the rule was to occupy the field and eliminate inherent authority. But the first judge to construe the rule held that the rule could not do that, and the court still had inherent authority. So even if we try, we might not be successful.

Minutes, Advisory Committee on Criminal Rules, May 7, 2019, Alexandria, Va., at 15.

[3] *In re Hastings*, 735 F.2d 1261, 1267 (11th Cir. 1984).

[4] *United States v. Williams*, 504 U.S. 36, 47-48 (1992).

defer a discussion of any differences between it and "supervisory power"[5] for a later memo, if the Subcommittee decides it wants additional research on inherent authority.

For other scholarship on the nature and scope of the courts' inherent authority, *see, e.g.*, Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts,* 61 CATH. U. L. REV. 1 (2011); Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411 (2020); and Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

2. Authority to extinguish the courts' inherent authority

Although some of the Supreme Court's opinions seem to state categorically that Congress can limit or extinguish the courts' inherent authority, Article III may place some outer limits on Congress's authority.

There are categorical statements in both In *Dietz v. Bouldin* (which concerned Fed. R. Civ. P. 57) and *Bank of Nova Scotia v. United States* (which concerned Fed. R. Crim. P. 52). In *Dietz* the Court stated:

> Although this Court has never precisely delineated the outer boundaries of a district court's inherent powers, the Court has recognized certain limits on those powers.
>
> First, the exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice. *Degen v. United States*, 517 U.S. 820, 823–824, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996). *Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute*. *See id.,* at 823, 116 S. Ct. 1777; Fed. Rule Civ. Proc. 83(b) (districts courts can "regulate [their] practice in any manner consistent with federal law"); *see, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) (holding that a district court cannot invoke its inherent power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)).

136 S. Ct. at 1892 (emphasis added).

[5] Supervisory power is a form of inherent judicial authority. One important distinction is that the Supreme Court has used the term "supervisory power" to refer to its own authority to establish procedural rules for the federal courts, in contrast to district courts' use of inherent authority to make procedural rulings not intended to have precedential effect (such as authorizing the disclosure of particular grand jury records). For contrasting views of supervisory power, *compare* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (arguing that the federal courts' inherent authority over procedure is grounded in Article III's grant of "the judicial power," which provides an ample basis for the Supreme Court's rulings on procedural issues, but not substantive matters extrinsic to the litigation process) *with* Amy Coney Barrett*, The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006) (arguing that the federal courts have inherent authority over only their own procedures, and accordingly the Supreme Court has no inherent authority to regulate the procedure of inferior courts).

But this categorical statement and a similar statement in *Bank of Nova Scotia* are at odds with some of the Court's other opinions, and with a separation of powers analysis detailed in the scholarship on inherent authority. We turn again to Professor Barrett, who explained:

> No one doubts Congress's power to abrogate substantive common law. Congress's power to abrogate procedural common law, by contrast, is open to doubt. There is substantial agreement that Congress possesses wide authority to regulate judicial procedure. *But there is also substantial agreement that Congress's authority to regulate judicial procedure is subject to some limit. In other words, the disagreement centers less on the existence of a limit than on its boundaries*. Some scholars have taken a fairly restrictive view of Congress's power to regulate procedure. … Other scholars take a more expansive view of congressional power… Even scholars taking a more expansive view, however, stop short of characterizing Congress's power as unbounded. …Similarly, the Supreme Court, while typically acquiescing in congressional regulation, has deliberately left open the question whether some procedural matters lie wholly within the judiciary's discretion. Whatever the limits of congressional authority, the widely shared sense that some limit exists reflects an implicit judgment that judicial authority over procedure is different in kind than its authority over substance.

Barrett, *Procedural Common Law*, at 833-34 (emphasis added). For a description of the narrow and broad views, and an assessment of their application to Fed. R. Civ. P. 37(e), *see* Francis & Mandel, *Limits on Limiting Inherent Authority*, at 621-632.

3. Inherent authority and the special role of the grand jury

The grand jury is not assigned by the Constitution to any of the three branches of the federal government, and its unique constitutional role must also be taken into account in considering the proposals to recognize—or prohibit—the use of inherent authority to authorize disclosure of grand jury materials.

The Supreme Court has recognized that there are limitation on the courts' authority to prescribe grand jury procedures. In a 5-to-4 decision, the Court limited the courts' "supervisory power" to craft rules of procedure for grand jury proceedings. *United States v. Williams,* 504 U.S. 36, 47-48 (1992). Although working from the common premise that the framers modeled the federal grand jury on the English grand jury, the justices disagreed on the question how much authority the courts have to supervise the grand jury and to establish procedural rules for the prosecutors who appear before it. Emphasizing the grand jury's traditional independence from the court as well as from other branches of government, the majority concluded that the grand jury's "operational separateness from its constituting court" led to a proper reluctance to invoke judicial supervisory power to prescribe modes of grand jury procedure. 504 U.S. 49-50. The majority concluded that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id.* at 50. Accordingly, the Court declined to impose on federal prosecutors a duty to present exculpatory evidence, a duty which would be incompatible with the traditional role of the grand jury.

In contrast, recognition of the court's authority to authorize exceptions to grand jury secrecy on a case-by-case basis does not intrude upon the grand jury's operational separateness, and it is consistent with the traditional role of the court. Although early decisions of the Supreme Court recognize the principle of grand jury secrecy, *e.g., Post v. United States*, 161 U.S. 583, 613 (1896), the Court has also recognized that the courts had the power to permit disclosure in the interests of justice. For example, in *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 234 (1940), the Supreme Court stated that "Grand Jury testimony is ordinarily confidential. . . . [b]ut after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[6]

* * * * *

[6] For a more detailed explanation of this argument, see Sara Beale and Nancy King, Memo to the Rule 6 Subcommittee, Background information related to proposed amendment to Rule 6(e) at 2-4 (Feb. 27, 2011). This memo was included in the Committee's April 2011 agenda book.

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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 by 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

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Bruce D. Brown, Executive Director

April 7, 2020

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

Via email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal to Revise Federal Rule of Criminal Procedure 6(e) in No. 20-CR-B

Dear Ms. Womeldorf:

The Reporters Committee for Freedom of the Press (the "Reporters Committee") and the 30 undersigned media organizations (hereinafter, collectively, the "Media Coalition") write regarding the recommendation made by Public Citizen Litigation Group and several historical organizations and societies (hereinafter, collectively, "Public Citizen") that the Advisory Committee on Criminal Rules amend Rule 6(e) of the Criminal Rules of Civil Procedure to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public. Letter No. 20-CR-B from Allison Zieve to Rebecca A. Womeldorf, (March 2, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-b_suggestion_from_allison_zieve_-_rule_6_0.pdf. Like Public Citizen, the Media Coalition supports an amendment to Rule 6(e). However, in the view of the Media Coalition, the proposed amendment set forth herein, which mirrors the flexible test that has been applied by courts in this context, better balances the public's interest in obtaining access to grand jury materials of particular historical and public interest with the interests underlying grand jury secrecy.

The Reporters Committee is an unincorporated nonprofit association that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Attorneys from the Reporters Committee represented a group of petitioners led by Elliot Carlson—a journalist and historian—in successfully petitioning for the release of transcripts of certain historically important witness testimony given before a grand jury in Chicago in August of 1942. The opinion of the Seventh Circuit in that case, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) ("*Carlson*"), was cited by Justice Breyer in his concurrence with the Supreme Court's denial of historian Stuart A. McKeever's petition for certiorari in *McKeever v. Barr*, 539 U.S. __, 2020 WL 283746 (Jan. 21, 2020). As Justice Breyer noted, *Carlson*, as well as prior court of appeals decisions in *Craig v. United States*, 131 F.3d 99 (2d Cir. 1997) ("*Craig*"), and *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) ("*In re Hastings*"), appear to comport with "the considered views of the Rules Committee," yet conflict with the recent holding of the majority of a three-judge

panel of the D.C. Circuit in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019) ("*McKeever*"). In March, after the Supreme Court's denial of certiorari in *McKeever*, the Eleventh Circuit sitting en banc overruled its own decades old precedent in *In re Hastings*, joining the D.C. Circuit across the ledger from the Second and Seventh Circuits on this issue. *See Pitch v. United States*, --- F.3d ----, No. 17-15016, 2020 WL 1482378 (11th Cir. Mar. 27, 2020) ("*Pitch*").

As discussed in greater detail below, the release of the grand jury materials at issue in *Carlson*—as well as the additional cases cited in Public Citizen's letter—served the public by offering a more complete record of an important historical event without threatening the general rule of grand jury secrecy. For this reason, the D.C. Circuit's decision in *McKeever* and the Eleventh Circuit's decision in *Pitch* are concerning, premised as they are in a rigid interpretation of Rule 6(e). *McKeever*, 920 F.3d at 846, 850 (interpreting Rule 6(e) to "require a district court to hew strictly to the list of exceptions to grand jury secrecy") [1]; *Pitch*, 2020 WL 1482378, at *1 ("We now hold that Rule 6(e) is exhaustive, and that district courts do not possess inherent, supervisory power to authorize the disclosure of grand jury records outside of Rule 6(e)(3)'s enumerated exception.").[2] In order to clarify that Rule 6(e) does not displace district courts' discretion to permit the release of grand jury materials in appropriate circumstances, the Media Coalition proposes that the Advisory Committee on Criminal Rules amend Rule 6(e) to (i) recognize the existence of that authority and (ii) foreground the factors identified by the Second Circuit in *Craig* and applied by other courts, including the Seventh Circuit in *Carlson*, for district courts to consider when a petitioner argues that special circumstances warrant the disclosure of particular grand jury materials.

---

[1] (Now Chief) Judge Srinivasan dissented from the majority opinion in *McKeever*. Citing the D.C. Circuit's en banc decision in *Haldeman v. Sirica*, 501 F.2d 714 (1974), he would have held that district courts have discretion to release grand jury materials in situations other than those expressly enumerated in Rule 6(e). *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting). As the dissent persuasively argues, permitting district courts to exercise their inherent authority in this manner "squares with the Advisory Committee's evident reason for declining to add a Rule 6(e) exception for historically-significant materials—viz., that district courts already authorized such disclosures as a matter of their inherent authority." *Id.* at 855.

[2] Several Eleventh Circuit judges departed from the en banc majority opinion in *Pitch*. Judge Wilson, joined by two others judges, dissented, concluding that the plain text of Rule 6(e) "does not expressly eliminate courts' inherent authority to release grand jury materials," and further, that "the history of the rule and the Advisory Committee Notes also [show] that Rule 6(e) was meant to codify—not 'ossify'—the common law." *Pitch*, 2020 WL 1482378, at *23–24 (Wilson, J., dissenting). Judge Rosenbaum wrote a separate dissent; in her view, the Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019) (codified at 44 U.S.C. § 2107) "depends for its operability on construing Rule 6(e) not to abrogate the courts' common-law inherent power to authorize release of grand-jury materials when appropriate, even in the absence of an articulated exception under Rule 6(e)," and thus demonstrates Congress' intent. *Id.* at *26 (Rosenbaum, J., dissenting). Finally, though Judge Jordan concurred in the majority's opinion, he wrote separately to note that the guidepost for disclosure of grand jury materials in the pre-Rules era "was only whether the ends of justice would be furthered," and to encourage this Committee to consider amending Rule 6(e). *Id.* at 16–18 (Jordan, J., concurring).

* * *

The Media Coalition commends Public Citizen's thorough summary of the law, and its analysis of the background of Rule 6(e), which is not repeated herein. The Media Coalition writes separately, however, to urge that the Advisory Committee on Criminal Rules adopt a more straightforward amendment affirming district courts' discretion to unseal grand jury materials in special circumstances, and directing district courts to look to the factors identified in *Craig* in deciding whether the disclosure of particular grand jury materials is warranted for reasons of historical or public interest.

I. Rule 6(e) should make explicit that it does not displace district courts' authority to order the disclosure of grand jury materials in appropriate cases.

The Media Coalition's proposal, like that of Public Citizen, clarifies that Federal Rule of Criminal Procedure 6(e) does not displace or override district courts' longstanding supervisory authority to unseal grand jury materials in appropriate circumstances not expressly addressed in Rule 6(e). Rule 6(e) was enacted in 1944 to "continue[]"—not fundamentally alter— "the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." Fed. R. Crim. P. 6(e), Advisory Committee Notes 1944 (italics added) (citations omitted); *see also In re Report & Recommendation of June 5,1972 Grand Jury*, 370 F. Supp. 1219, 1229 (D.D.C. 1974) (stating that Rule 6(e) "was not intended to create new law," and "remains subject to the law or traditional policies that gave it birth"); *Craig*, 131 F.3d at 102 (explaining that the Rule originated to "reflect[] rather than create[] the relationship between federal courts and grand juries").

As the Seventh and Second Circuits have recognized, the enumerated exceptions to the general rule of grand jury secrecy found in Rule 6(e)(3)(E) were added gradually, over time, to conform Rule 6(e) to the "developments wrought in decisions of the federal courts." *See Carlson*, 837 at 765; *Craig*, 131 F.3d at 102. For example, it was district courts' "recognition of the occasional need for litigants to have access to grand jury transcripts [that] led to the provision" now found in Rule 6(e)(3)(E)(i) "that disclosure of grand jury transcripts may be made 'when so directed by a court preliminarily to or in connection with a judicial proceeding.'" *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 220 (1979). Similarly, "in 1979 the requirement that grand jury proceedings be recorded was added to Rule 6(e) in response to a trend among [federal] courts to require such recordings." Fed. R. Crim P. 6(e)(1), Advisory Committee Notes to 1979 Amendment. And when Rule 6(e) was amended in 1983 to permit disclosure of material from one grand jury for use in another, this Committee again looked to the practices of the courts, noting that "[e]ven absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances." Fed. R. Crim. P. 6(e)(3)(C), Advisory Committee Notes to 1983 Amendment.

Simply put, the proposed amendment would make clear that Rule 6(e) is not—as it was never intended to be—a "straitjacket on the courts." *In re American Historical Ass'n*, 49 F. Supp. 2d 274, 284 (S.D.N.Y. 1999) ("*Historical Ass'n*"). And the time is right for the Committee to reexamine the Rule. Justice Breyer, in regards to the Supreme Court's denial of certiorari in *McKeever*, and Judge Jordan, in his concurrence in the Eleventh Circuit's en banc decision in *Pitch*, both have urged the Committee to do so. *McKeever v. Barr*, 539 U.S. __, 2020

WL 283746 (Jan. 21, 2020) ("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit."); *Pitch*, No. 17-15016, 2020 WL 1482378, at *16 (11th Cir. Mar. 27, 2020) ("I encourage the Judicial Conference's Advisory Committee on Criminal Rules to address whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance."). Such an amendment will ensure that Rule 6(e) continues to develop over time in response to district courts' measured interpretation of the appropriate scope of grand jury secrecy in particular circumstances.

II. Rule 6(e) should be further amended to incorporate the non-exhaustive list of factors identified by the Second Circuit in *Craig*, which allow courts flexibility to balance the public interest in disclosure with that in grand jury secrecy on a case-by-case basis.

The nuanced and flexible test employed by the Second Circuit in *Craig* allows courts to appropriately consider not only the weight of the public interest, but also any other specific factual matters relevant to a particular request to unseal specific grand jury materials for reasons of historical or public interest. *Craig* arose from the petition of a scholar researching Harry Dexter White, "a former Assistant Secretary of the Treasury who was accused of having been a communist spy." 131 F.3d at 101. The scholar sought the transcript from a special grand jury proceeding during which White answered the charges against him; White died just months later, shortly after denying the accusation before the House Un-American Activities Committee. *Id.* The case reached the Second Circuit on appeal from the U.S. District Court for the Southern District of New York, which held that although "disclosure of grand jury materials under circumstances other than those specifically enumerated in Federal Rule of Criminal Procedure 6(e)(3) is sometimes permissible," *id*., the facts specific to Craig's petition did not overcome the interest in grand jury secrecy. *See In re Craig*, 942 F.Supp. 881, 883 (S.D.N.Y. 1996). The Second Circuit affirmed both the denial of Craig's petition, and the district court's holding (for which it found authority in the earlier Second Circuit case, *In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973)) that "special circumstances" could warrant disclosure of grand jury materials:

> It is, therefore, entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information. To the extent that the John Wilkes Boothe or Aaron Burr conspiracies, for example led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy. And to say that a certain factor—like historical interest—can never suffice as a matter of law misunderstands the fact-intensive nature of the inquiry that is to be conducted. Indeed, the "special circumstances" departure from Rule 6(e) is simply incompatible with per se rules and absolutes.

Craig, 131 F.3d at 105. The Second Circuit went on to offer a "non-exhaustive list of factors that a trial court might want to consider when confronted with these highly discretionary and fact-sensitive 'special circumstances' motions":

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why

> disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Id. at 106.

These same factors were cited by and guided the decision of the U.S. District Court for the Northern District of Illinois and the Seventh Circuit in granting the petition to unseal grand jury transcripts in *Carlson*. There, the lead petitioner, historian Elliot Carlson, sought records of grand jury testimony "concern[ing] an investigation into the *Chicago Tribune* in 1942 for a story it published revealing that the U.S. military had cracked Japanese codes"—a closely held military secret at the height of World War II. *Carlson*, 837 F.3d at 755. Following the publication of the *Tribune* article, which "appeared to be . . . based on a classified Navy communiqué that alerted naval commanders to the impending attack on Midway Island," the government empaneled a grand jury and launched an investigation into the *Tribune* and one of its reporters under the Espionage Act of 1917. *Id.* at 756. Acknowledging the Second Circuit's reasoning in *Craig* to be "the most comprehensive" appellate-level analysis of the issue written after the promulgation of the Federal Rules of Criminal Procedure, the Seventh Circuit held that "Rule 6(e)(3)(e) is permissive, not exclusive, and it does not eliminate the district court's long-standing inherent authority to make decisions as needed to ensure the proper functioning of a grand jury . . . includ[ing] the power to unseal grand jury materials in circumstances not addressed by Rule 6(e)(3)(E)." *Id.* at 766–67.

Disclosure of the grand jury materials sought in *Carlson* served important historical and public interests. Release of the *Tribune* grand jury transcripts gave the news media, as well as historians and scholars, a more complete understanding of a singular event in American history: the first and, to date, only time that the government has sought the indictment of a major news organization for allegedly violating the Espionage Act by publishing classified information. For example, included in the *Tribune* grand jury materials were previously unknown details about how *Tribune* reporter Stanley Johnson obtained the information in question. *See*, *e.g.*, Michael E. Ruane, *75 Years Ago, an Epic Battle—and an Alarming Press Leak*, Washington Post, June 6, 2017, B01, 2017 WL 17428030 ("The dispatch wound up in the hands of the [aircraft carrier USS Lexington's rescued executive officer, Cmdr. Morton Seligman, who was bunking with Johnson."). And the grand jury records at issue in *Carlson* spoke to more contemporary issues as well. Commentators drew comparisons to more recent government efforts to pursue "leak" investigations under the Espionage Act, *see*, *e.g.*, Ofer Raban, *Assange's New Indictment: Espionage and the First Amendment*, Columbus Telegram, May 15, 2019, 2019 WLNR 1621339 ("An incensed President Franklin Roosevelt demanded that Espionage Act charges be brought against the reporter, the managing editor, and the *Tribune* itself. But unlike Assange's grand jury, the Tribune's grand jury refused to issue indictments."), and unauthorized disclosures of government information to members of the news media, in general. *See, e.g.*, *The Grave Danger Posed by Leakers*, Providence Journal, Sept. 3, 2017, A13, 2017 WLNR 27137979 (arguing that

"[t]he same issues that prevented justice after Midway are still in play today"); Noah Feldman, *World War II Leak Case is a Win for Edward Snowden*, Times of Oman, Sept. 21, 2016, 2016 WLNR 28720320.

The Media Coalition's proposal that Rule 6(e) be amended to incorporate the *Craig* factors finds support in a number of district court decisions. *See, e.g.*, *In re Petition of Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at *2 (M.D. Tenn. April 14, 2009); *Historical Ass'n*, 49 F. Supp. 2d 274, 291 (S.D.N.Y. 1999) (granting petition in part). It also finds support in correspondence and court filings made by the government. As Public Citizen notes, *see* Letter No. 20-CR-B (March 2, 2020), at 2, the Department of Justice wrote in a 2011 letter to this Committee that "the Second Circuit's basic insight in *[Craig]* . . . seems fundamentally correct." Letter from Attorney General to Advisory Comm. On Criminal Rules, Oct. 18, 2011, at 5, 7, *reprinted in* Advisory Comm. On Crim. Rules, Agenda Book 217 (Apr. 2012).[3] The Justice Department reiterated that position in an en banc brief to the Eleventh Circuit in *Pitch v. United States*, 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 *[Craig]*." DOJ En Banc Br. at 41, *Pitch v. United States*, No. 17-15016 (11th Cir. Aug. 12, 2019); *see also Carlson v. United States*, 837 F.3d 753, 767 (7th Cir. 2016) (government concedes that the district court did not abuse its discretion in applying the factors in *Craig*, assuming it had the authority to do so).

Indeed, application of the non-exhaustive list of factors identified in *Craig* allows courts the flexibility to balance all relevant factors and circumstances with respect to specific grand jury materials, and thus better reflects the balance of authority on this issue than the amendment proposed by Public Citizen. Though the Media Coalition agrees with Public Citizen as to the benefits of making explicit district courts' authority to unseal grand jury materials in circumstances not expressly addressed in Rule 6(e), the proposal made by the Media Coalition guides district courts to conduct a nuanced balancing like that conducted by the Second Circuit in *Craig*. District courts are well-equipped to weigh all relevant factors in response to requests to unseal grand jury materials for reasons of historical and public interest; indeed, this Committee has previously acknowledged as much. The proposal made by the Justice Department in the above-mentioned 2011 letter would have limited district courts' authority to unseal grand jury materials for reasons of historical or public interest to circumstances in which "30 years have passed since the relevant case files associated with the grand-jury records have been closed," *See* Letter from Attorney General to Advisory Comm. On Criminal Rules, Oct. 18, 2011, at 9. The Committee rejected that proposal, reasoning that a rule on disclosure that is "subject to specific procedures [] and . . . provide[s] a specific point in time at which it is presumed that materials may be released" is unnecessary, because "in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority." Committee on Rules of Practice of Procedure, Minutes of Meeting of June 11–12, 2012, at 44.[4]

[3] Available at https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.
[4] Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06- 2012-min.pdf.

* * *

For the reasons herein, the Media Coalition proposes the following amendment (added text bold) to Rule 6(e):

> (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 for reasons of historical or public interest, and in consideration of the following non-exhaustive list of factors:**
>
> - **the identity of the party seeking disclosure;**
> - **whether the defendant to the grand jury proceeding or the government opposes the disclosure;**
> - **why disclosure is being sought in the particular case;**
> - **what specific information is being sought for disclosure;**
> - **how long ago the grand jury proceedings took place;**
> - **the current status of the principals of the grand jury proceeding and that of their families;**
> - **the extent to which the desired material—either permissibly or impermissibly—has been previously made public;**
> - **whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and**
> - **the additional need for maintaining secrecy in the particular case in question.**
>
> . . .
>
> **(8) Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances.**

Thank you for your consideration of this proposal. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to discuss the matter further with the Committee at its convenience.

Respectfully,

The Reporters Committee for Freedom of the Press
The Associated Press
Association of American Publishers, Inc.
Atlantic Media, Inc.
Boston Globe Media Partners, LLC
Cable News Network, Inc.
The E.W. Scripps Company
Gannett Co., Inc.
Hearst Corporation
Inter American Press Association
International Documentary Assn.
Los Angeles Times Communications LLC
The McClatchy Company
The Media Institute
MediaNews Group Inc.
MPA - The Association of Magazine Media
National Press Club Journalism Institute
The National Press Club
National Press Photographers Association
The New York Times Company
The News Leaders Association
Newsday LLC
NYP Holdings, Inc.
POLITICO LLC
Radio Television Digital News Association
Reveal from The Center for Investigative Reporting
Society of Environmental Journalists
Society of Professional Journalists
Tribune Publishing Company
Tully Center for Free Speech
The Washington Post

cc: Allison M. Zieve, Director, Public Citizen Litigation Group

U.S. Department of Justice

Criminal Division

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

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

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

RE: Proposed Amendment to Rule 6(e) Authorizing: (1) the Release of Historically Important Grand Jury Material, and (2) Grand Jury Non-Disclosure Orders

DATE: July 10, 2020

I. Introduction

This is a follow-up to our Subcommittee call of June 30th. We very much appreciate the deliberative course you have set for the Subcommittee, and we look forward to the consideration of the important issues before us. As you requested, this memorandum lays out our current thoughts on these issues.

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As I mentioned on our call, for at least the last several Administrations, the Department of Justice has taken the position – in litigation and in policy debates – that Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of grand jury material unless there is specific authorization for disclosure set out in the Rules. The Department has argued that Rule 6(e) displaces the common law and includes all of the exceptions to grand jury secrecy, and that district courts lack inherent authority to release grand jury material beyond the listed exceptions.

In opposition to a petition for certiorari in *McKeever v. Barr*, the Solicitor General last year argued that "Rule 6(e)'s prohibition on disclosure '[u]nless these rules provide otherwise,' Fed. R. Crim. P. 6(e)(2)(B), makes clear that the circumstances listed in [the Rule] are the only circumstances in which a district court may order disclosure." Brief for Respondent at 10, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020) (No. 19-

307). The Department recognized that the *McKeever* decision created a circuit split among the federal courts of appeals. *Compare In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766-767 (7th Cir. 2016) with *McKeever*, 920 F.3d at 842*; Pitch v. United States*, 953 F.3d 1226 (11th Cir, 2020) (en banc); *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009). Nonetheless, the Solicitor General argued that the petition should be denied "because the question whether and under what circumstances historically significant grand jury materials should be disclosed can be resolved through the rulemaking process, as overseen by this Court under the Rules Enabling Act, 28 U.S.C. 2072." Brief for Respondent at 19, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307). The Solicitor General went on to state that "[r]ulemaking would be a better forum than judicial review to address the policy judgments involved in deciding whether and when grand jury secrecy should expire, including for historically significant records." *Id.* at 20.

In its filing in the Supreme Court, the Solicitor General noted that in 2011, Attorney General Holder proposed amendments to Rule 6(e) that would have "permit[ted] the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance." *Id.* at 3. *See also*, Letter from Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Crim. Rules (Oct. 18, 2011). The Attorney General explained in the proposal that, although grand jury records of historical significance are catalogued and preserved at the National Archives, no legal mechanism exists for allowing public access to those records. As you know, the Department's 2011 proposal would have authorized release of historically important grand jury material after 30 years, in certain circumstances. *Id*. It would also have granted blanket authority to the Archivist of the United States to release grand jury material 75 years after the relevant case files associated with the grand jury were closed, even without a petition. *Id*.

This past December, the Supreme Court denied the petition for certiorari in *McKeever*. In a statement issued along with the denial, Justice Breyer wrote –

> Whether district courts retain authority to release grand jury material outside of those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.

Statement of Justice Breyer respecting the denial of certiorari, *McKeever v. Barr*, 140 S. Ct. 597 (2020) (No. 19-307).

Following the denial of certiorari, the Advisory Committee received two formal amendment suggestions that Rule 6(e)'s provisions on grand jury secrecy be changed to authorize release of certain grand jury material, including historically important grand jury material. Consistent with the Solicitor General's filing before the Court, we supported the Committee's decision to fully consider such a possible amendment.

II. The Department of Justice Continues to Support a Limited Exception to Grand Jury Secrecy for Historically Important Grand Jury Material

We continue to support an amendment to Rule 6(e) that would preserve the tradition of grand jury secrecy and the exclusivity of the Federal Rules of Criminal Procedure while allowing the release of grand jury records in cases where significant time has elapsed and where the historical value of the records and the interests of the public for their release outweigh any remaining need for continued secrecy.

Rule 6(e) mandates that enumerated categories of individuals maintain grand jury secrecy "unless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). All but two of Rule 6(e)(3)'s exceptions to grand jury secrecy apply to disclosures to a government official. *See* Fed. R. Crim. P. 6(e)(3)(A)-(E). The non-governmental disclosure provisions state:

(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:

(i) preliminarily to or in connection with a judicial proceeding; [and]

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before a grand jury; . . .

Fed. R. Crim. P. 6(e)(3)(E).

Neither of these provisions – nor any other provision of current law – authorizes a petitioner to access historically significant grand jury information. Nor do the rules provide any authorization for release of grand jury material by the National Archives no matter how much time has passed.

Despite the clear text of Rule 6(e), courts nonetheless have looked beyond the exceptions enumerated in Rule 6(e) and have exercised what they have found to be their "inherent authority" to release grand jury material. These courts have found that "special circumstances" justify disclosure of certain historically significant grand jury materials, even when none of Rule 6(e)'s specific exceptions is satisfied. For example, and as we discussed on our call, in *In re Petition of Craig*, 131 F.3d at 99, the Second Circuit found that historical significance can justify disclosure, while affirming non-disclosure on the particular facts.

That courts have no authority to release grand jury materials outside the specific authorization provided by Rule 6(e) is consistent with the Advisory Committee notes accompanying the rules, which state that "Rule 6(e) continues to spell out the general rule of secrecy of grand-jury proceedings and the exceptions to that general rule." Fed.R.Civ.P. 6(e), advisory committee notes, 2002 Amendments; *see also*, 1 Wright & Miller, Federal Practice and Procedure Section 106 ("reliance on the inherent powers doctrine is suspect"). But while there is no delineated exception for historically significant grand jury material, we recognize – as have the decisions of the courts that have authorized disclosure of historical grand jury records – that the need for secrecy diminishes with the lengthy passage of time and that an amendment to Rule

6(e) authorizing release of historically significant grand jury material is appropriate in certain limited circumstances.

Of course, not all grand jury material is of historical value, and not all is subject to preservation as permanent archival records. Records of "permanent historical value," as that term is defined in title 44 of the United States Code, are determined through records schedules developed jointly by the Department of Justice and the National Archives and approved by the Archivist of the United States. These records are transferred to the National Archives after a period of time – usually a decade or more – when that material may yet be needed for business purposes by the Department. Under current law, Freedom of Information Act requests for the grand jury records directed to the Archives are denied as contrary to Rule 6(e). *See* 5 U.S.C. §552(b)(3).

We believe an amendment to Rule 6(e) would be appropriate to authorize the release of grand jury records of "exceptional historical significance" in certain circumstances after 50 years. As you know, in 2011 the Department proposed possible disclosure after 30 years. Upon further review, we now think 30 years is too short. The 30-year benchmark in the 2011 proposal was based on 44 U.S.C. § 2108(a), which allows the Archivist to disclose certain agency records that have been in existence for more than 30 years notwithstanding certain permissive, statutory restrictions. But this provision has never been interpreted to overcome grand jury secrecy, and we think there are retention standards more akin to what often is in grand jury material and that are the better benchmark here. For example, investigative records of the House of Representatives which contain information involving personal data relating to a specific living person are closed for 50 years. *See*, House Rule VII. https://www.archives.gov/legislative/research/house-rule-vii.html. Similarly, Senate Resolution 474 from the 96th Congress provides that "investigative files relating to individuals and containing personal data, personnel records, and records of executive nominations" cannot be accessed for 50 years. *See*, https://www.archives.gov/legislative/research/senate-resolution-474.html. A 50-year time period would also correspond to the automatic declassification period for certain classified material under Executive Order No. 13,526, § 3.3(b), (c) (2010).

We also no longer believe that Rule 6(e) materials should ever be presumptively available to the public. Presumptive release raised concern with the Committee in 2012 as too dramatic a departure from the traditional rule of grand jury secrecy. We believe now that providing a presumption of release, even after 75 years, would undermine many of the purposes of grand jury secrecy and would have a detrimental effect on grand jury proceedings. Grand jury secrecy should be preserved except in the most extraordinary cases of historical value. We believe that a third-party movant seeking release of grand jury material should always be required to make some showing of need, even in the case of old, historically significant records. There is no strong justification for an automatic disclosure provision; if materials are of historic import, individuals will have every incentive to request them, and providing for automatic disclosure of records no one has seen fit to request is unnecessary.

As to the specific material that would be authorized for release, because there is no simple formula for determining what constitutes "exceptional historical significance" and whether the historical interest outweighs the interest of secrecy, the analysis we suggest be

required – and codified – must inevitably be contextual rather than based upon a rigid formula. Thus, such an amendment should permit a fact-sensitive judicial analysis. Courts could weigh any number of factors, including the age of the materials, the privacy interests at stake, why disclosure is being sought, the specific information being requested, and more. *See*, *In re Petition of Craig*, 131 F.3d at 106.

As we stated in 2011, by articulating broad guidelines for instructing lower courts on the exercise of discretion on this matter, yet at the same time limiting this discretion to the confines of an explicit exception to Rule 6(e), the Committee can maintain the integrity of the Criminal Rules, recognize the important role of the rulemaking process, and preserve the tradition of grand jury secrecy. An explicit historical significance would do all of this, while allowing for enough judicial discretion and flexibility to make an appropriate assessment of historical significance and the need for disclosure.

Such an amendment would recognize the legitimate interest of historians and others interested in gaining access to records. Although the determination of what qualifies as worthy of disclosure under the historical significance exception is inevitably contextual, there are several critical elements that we believe the Committee should address, including the length of time that must necessarily pass after the grand jury testimony is taken before disclosure is permissible. Similarly, we think disclosure should only be permitted when no living person – witness, accused or otherwise (including living descendants) – would be materially prejudiced by disclosure (or in the alternative that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct), disclosure would not impede any pending government investigation or prosecution, and no other reason exists why the public interest requires continued secrecy.

III. Non-Disclosure Orders

In addition to an amendment to Rule 6(e) authorizing disclosure of historically significant grand jury material in certain circumstances, we believe the rule should simultaneously be amended to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances.

Occasionally, Department prosecutors seek orders temporarily blocking disclosure when subpoenaing business or other records as part of a grand jury investigation, mostly to protect ongoing investigations. These orders have traditionally been issued pursuant to the court's authority over the grand jury or pursuant to the All Writs Act, and the courts of appeals have upheld their use. *See, e.g.*, *In re Grand Jury Proceedings,* 417 F.3d 18, 26 (1st Cir. 2005); *In re Subpoena To Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1563-64 (11th Cir. 1989); *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 (8th Cir.), *cert. dismissed* 479 U.S. 1013 (1986).

In response to the *McKeever* decision, however, some district courts are now stepping back from issuing delayed disclosure orders, pointing out that Rule 6(e) does not explicitly permit such an order, and the courts lack the authority to issue one. *See, e.g.*, *In re Application of USA for an Order Pursuant to 28 U.S.C. § 1651(A) Precluding Notice of a Grand Jury*

Subpoena, Case No. 19-wr-10 (BAH), August 6, 2019. We therefore suggest that an additional amendment to Rule 6 – along with the proposal related to historically important grand jury material – be made that would authorize such delayed disclosure orders after consideration of relevant factors. The need for delayed disclosure orders to protect ongoing investigations has been recognized by Congress and the courts. Congress has authorized delayed disclosure orders in certain circumstances in other contexts, like the Stored Communications Act and the Right to Financial Privacy Act, and the proposal we recommend mirrors those congressional authorizations and the weighing of interests required by them.

IV. Inherent Authority

As I mentioned on our conference call, the Department believes that any amendment to Rule 6 should also contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive. A few days after our call, however, the Supreme Court granted review in *Department of Justice v. House Committee on the Judiciary*, 19-1328 (July 2, 2020), which also involves Rule 6(e) and the scope of disclosure permitted by it. It is possible that the issue of whether or not courts retain authority to release grand jury material beyond the list of exceptions to grand jury secrecy contained in the Rule could be addressed by the Court. As a result, we think the Subcommittee should defer consideration of whether or not to include in any Rule 6 amendment a provision on whether the rule contains the full catalogue of exceptions to grand jury secrecy – or whether courts retain authority to release grand jury material beyond the exception in the rule – until after the Court renders a decision, mostly likely in early 2021.

V. Proposal the Department Could Possibly Support

To assist in the consideration of all of these issues, we set out below the text of an amendment that embodies the elements we suggest. We hope it will be helpful in the Subcommittee's consideration.

a. Definition of "archival grand-jury records" through the addition of a new Rule 6(j), following the existing definition of "Indian Tribe" in Rule 6(i).

(j) "Archival Grand-jury Records Defined. For purposes of this Rule, "archival grand-jury records" means records from grand-jury proceedings, including recordings, transcripts, and exhibits, where those files have been determined to have permanent historical or other value warranting their continued preservation under Title 44, United States Code.

b. Addition to Rule 6(e)(3)(E) to permit district courts to grant petitions for the release of archival grand-jury records that have exceptional historical importance after 50 years in appropriate cases.

(E) The court may authorize disclosure—at a time, and in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

. . .

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

(a) the petition seeks archival grand-jury records;

(b) the records have exceptional historical importance;

(c) at least 50 years have passed since the relevant case files associated with the grand-jury records have been closed;

(d) 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;

(e) disclosure would not impede any pending government investigation or prosecution; and

(f) 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.

c. Addition to Rule 6(e)(2) to provide an obligation of secrecy for those persons or entities receiving a court order precluding them from disclosing the existence of a subpoena, warrant or court order issued in relation to grand jury proceedings.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(viii) a person or entity who receives a court order under Rule 6(e)(8) precluding the person or entity from notifying any person of the existence of a grand jury subpoena and related matters occurring before the grand jury.

d. Creation of a new Rule 6(e)(8), specifying the circumstances under which a district court can enter a non-disclosure order and how long such an order should remain in place.

(8) Non-Disclosure Order. The government may apply for a court order delaying disclosure of a grand-jury matter for a period not to exceed ninety days:

(i) if the court determines that there is reason to believe that notification of the existence of the matter may have an adverse result described in paragraph (ii) of this subsection;

(ii) An adverse result for the purposes of paragraph (i) of this subsection is—

(A) endangering the life or physical safety of an individual;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(iii) Extensions of the delay of notification of up to ninety days each may be granted by the court upon application of the government.

VI. Conclusion

We hope this memorandum and the proposed amendment text are helpful. We look forward to our discussions and the consideration of these issues over the coming months.

cc: Judge Raymond Kethledge
Professor Sara Sun Beale
Professor Nancy King

H. Brent McKnight, Jr.

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November 8, 2020

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

Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Suggestion To Add a Residual Exception to Fed. R. Crim. P. 6(e)

Dear Ms. Womeldorf,

I am a third-year student at Duke University School of Law writing with regard to the proposals submitted by the Public Citizen Litigation Group, et al.,[1] and the Reporters Committee for Freedom of the Press, et al.,[2] suggesting that the Advisory Committee on Criminal Rules amend Rule 6(e). Like those proposals, I also support an amendment to Rule 6(e). However, in my view, the Committee should consider adding a residual exception to the Rule rather than, or at least in addition to, an exception tailored to grand jury materials of significant historical interest. A residual exception would not only cover those materials but would also cover other situations in which disclosure might be appropriate.

This suggestion and the reasoning behind it are detailed in my paper, *Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy*, 70 DUKE L.J. 451 (2020), which is enclosed. It argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, caution against judge-made exceptions to grand jury secrecy. Yet, it recognizes there may be instances where disclosure is appropriate even though the Rule does not allow it. To provide for these situations, the Committee should consider adding a residual exception to give courts flexibility and discretion, but also a clear source of authority and guidance, when considering requests for disclosure outside the Rule's enumerated exceptions.

Thank you for considering this suggestion. I would be happy to discuss it further with the Committee.

Sincerely,

Brent McKnight

[1] Letter from Allison M. Zieve, Dir., Pub. Citizen Litig. Grp., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc., No. 20-CR-B (March 2, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-b_suggestion_from_allison_zieve_-_rule_6_0.pdf.
[2] Letter from Reps. Comm. for Freedom of the Press to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc., No. 20-CR-D (April 7, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-d_suggestion_from_reporters_committee_for_freedom_of_the_press_-_rule_6_0.pdf.

KEEPING SECRETS: THE UNSETTLED LAW OF JUDGE-MADE EXCEPTIONS TO GRAND JURY SECRECY

H. BRENT MCKNIGHT, JR.†

ABSTRACT

Federal Rule of Criminal Procedure 6(e) functionally binds everyone who is present during grand jury proceedings (except witnesses) to secrecy. But questions arise when courts are asked to make exceptions to grand jury secrecy outside those enumerated in the rule, such as exceptions for Congress or for the release of historically significant grand jury records.

This Note examines the propriety of judge-made exceptions to grand jury secrecy. Contrary to some courts authorizing disclosure outside of Rule 6(e), this Note argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, caution against this practice. The tension between the current practice of some courts and the apparent meaning of Rule 6(e) renders the law of grand jury secrecy unsettled. To clarify the law, the Advisory Committee on Criminal Rules should add a residual exception to Rule 6(e) that would not only give courts flexibility and discretion but also a clear source of authority on which to authorize disclosures.

INTRODUCTION

The grand jury, which traces its history back to twelfth-century English common law,[1] traditionally functions as both a sword and a

† Duke University School of Law, J.D. expected 2021; University of North Carolina at Chapel Hill, B.A. 2016. Many thanks to Professors Sara Sun Beale and Jeremy Mullem for their insightful comments, edits, and suggestions. Also, many thanks to *Duke Law Journal* editors Catie Carberry, John Hall, Katie Lew, Jamie Noel, and Kaitlin Ray for their feedback and edits. The views and mistakes herein are, of course, my own.

1. *See* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 5–12 (1996) (tracing the history of the grand jury from the Assize of Clarendon in 1166 to the 1600s and its adoption in the United States).

shield.[2] As a shield, the grand jury protects the innocent from unmerited criminal charges.[3] By contrast, the grand jury functions as a sword by using its subpoena power and the ability to grant immunity to witnesses to help prosecutors investigate potential crimes.[4] Grand jury proceedings are largely obscured from public view by longstanding secrecy rules. Federal Rule of Criminal Procedure 6(e)(2) provides a list of people who, "[u]nless these rules provide otherwise, . . . must not disclose a matter occurring before the grand jury."[5] The burden of secrecy falls not only upon the grand jurors themselves, but also onto interpreters, court reporters, operators of recording devices, transcribers, government attorneys, and those to whom disclosure is made pursuant to certain exceptions to the rule.[6] Functionally, it binds everyone present during grand jury proceedings, except for witnesses.[7] The rule attempts to prevent targets of investigation from fleeing, to protect the freedom and independence of the grand jurors' deliberations, to protect against "subornation of perjury or tampering with the witnesses," to encourage free disclosure by witnesses, and "to protect [the] innocent accused . . . from disclosure of the fact that he has been under investigation."[8]

But questions arise when courts are asked to make exceptions to grand jury secrecy outside those enumerated in the rule. For example, in *McKeever v. Barr*,[9] lawyer and historian Stuart McKeever[10]

2. *See, e.g.*, SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, GRAND JURY LAW AND PRACTICE § 1:7 (2d ed. 1997), Westlaw GJURLAW (last updated Nov. 2019) (discussing the grand jury as both a sword and shield); Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1273 (2006) [hereinafter Kuckes, *The Democratic Prosecutor*] (same).

3. *See* BEALE ET AL., *supra* note 2, § 1:7 (saying that after an individual is accused of criminal conduct, the grand jury "determine[s] whether there is sufficient evidentiary support to justify holding the accused for trial on each charge"). *But see id.* § 1:1 ("In many states the grand jury is no longer the principal pretrial check against unfounded charges.").

4. *See id.* § 1:7 (describing the grand jury's investigative role as a sword when it acts "to discover and attack criminal conduct").

5. FED. R. CRIM. P. 6(e)(2)(B).

6. FED. R. CRIM. P. 6(e)(2)(B)(i)–(vii).

7. *See infra* note 73 and accompanying text.

8. MICHAEL A. FOSTER, CONG. RSCH. SERV., R45456, FEDERAL GRAND JURY SECRECY 6 (2019) (alteration in original) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958)); *see also* BEALE ET AL., *supra* note 2, § 5:1 (identifying additional rationales such as "preventing prejudicial leaks of information to potential defendants").

9. McKeever v. Barr, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020).

10. *Bio*, STUART A. MCKEEVER, AUTHOR, http://www.stumckeever.com/bio [https://perma.cc/7DX4-JXJP].

petitioned the District Court for the District of Columbia for the release of grand jury records he believed would aid his research into the unsolved disappearance of Columbia University Professor Jesús de Galíndez Suárez in 1956.[11] When Galíndez disappeared, some in the news media suggested that Rafael Trujillo, the dictator of the Dominican Republic, had kidnapped and murdered Galíndez in retaliation for Galíndez's criticism of the Trujillo regime.[12]

McKeever believed that "John Joseph Frank, a former FBI agent and CIA lawyer who later worked for Trujillo," had orchestrated the disappearance.[13] In 1957, a grand jury indicted Frank for violations of the Foreign Agents Registration Act of 1938 but did not indict him for any crimes related to Galíndez's disappearance and murder.[14] At trial, the prosecution introduced evidence implying "that [Frank] was connected with [Galíndez's] disappearance."[15] On appeal, the court reversed Frank's conviction and remanded his case for a new trial on the basis that this evidence was too prejudicial to have been properly admitted.[16] However, the discussion of the evidence at trial and on appeal supported McKeever's theory of Frank's involvement and the possibility that the grand jury records would hold even more information.

The district court held that although Rule 6(e) did not authorize McKeever's request, the court had inherent authority to go beyond the rule "to disclose historically significant grand jury matters."[17] Even so, the district court denied the request as overbroad.[18] In a split decision on appeal, the D.C. Circuit affirmed but on different grounds.[19] The D.C. Circuit ruled that the exceptions in Rule 6(e) are an exhaustive

11. *McKeever*, 920 F.3d at 843.

12. *See id.* ("News media at the time believed Galíndez, a critic of the regime of Dominican Republic dictator Rafael Trujillo, was kidnapped and flown to the Dominican Republic and there murdered by Trujillo's agents."); *see also* Frank v. United States, 262 F.2d 695, 696 (D.C. Cir. 1958) ("[Galíndez's] disappearance in circumstances that suggested murder was a matter of common knowledge.").

13. *McKeever*, 920 F.3d at 843.

14. *Id.* at 843–44.

15. *Frank*, 262 F.2d at 696.

16. *Id.* at 697.

17. *McKeever*, 920 F.3d at 843.

18. *Id.*

19. *Id.*

list,[20] and moreover, district courts have no inherent authority to order disclosure outside the confines of the rule.[21]

Although access to sixty-year-old grand jury materials for historical research into a little-known case may seem innocuous, allowing judge-made exceptions authorizing disclosure, especially within the D.C. Circuit, would have had broader implications. For example, Rule 6(e) contains no explicit exception for Congress.[22] Unless courts have inherent authority to disclose information outside of the rule, Congress might be denied access to grand jury materials, even if those materials would be useful to a congressional investigation.

This tension between grand jury secrecy and Congress's desire for information came to the fore at the conclusion of Special Counsel Robert Mueller's investigation.[23] After completing his investigation, Mueller submitted a confidential final report to Attorney General William Barr.[24] Congressional leaders requested the full report, ostensibly because the four-page summary provided by the attorney general was insufficient.[25] Barr agreed to provide the report, but only after making redactions, including of information subject to Rule

20. *See id.* at 845 ("The only rule to [allow disclosure] is Rule 6(e)(3). Rules 6(e)(2) and (3) together explicitly require secrecy in all other circumstances.").

21. *Id.* at 850.

22. FOSTER, *supra* note 8, at 1–2.

23. Acting Attorney General Rod Rosenstein appointed Robert Mueller as special counsel to investigate possible ties between the Trump campaign and the Russian government in connection with Russian interference in the 2016 election as well as whether President Trump or others obstructed Mueller's investigation. *See* Rod J. Rosenstein, Acting Att'y Gen., U.S. Dep't of Just., Ord. No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download [https://perma.cc/E8VJ-2LW8].

24. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019), https://www.justice.gov/storage/report.pdf [https://perma.cc/BC55-NMKZ]. Confidentiality was required. 28 C.F.R. § 600.8(c) (2020) (requiring "a confidential report explaining the prosecution or declination decisions reached by the Special Counsel").

25. *See* Jeff Mason & Susan Heavey, *Democrats Push for Mueller Report to Congress by Next Week, Republicans Resist*, REUTERS (Mar. 25, 2019, 9:41 AM), https://reut.rs/2TBe56I [https://perma.cc/6KSC-VTCB] (describing Democratic leaders' push for Barr to release the report).

6(e).[26] The House Judiciary Committee subpoenaed the full report, but Barr ignored the order.[27]

Around the same time Congress and the Department of Justice began to fight over the report's release, the D.C. Circuit handed down its decision denying McKeever's request for grand jury materials.[28] *McKeever* foreclosed the possibility that Chief Judge Beryl Howell, who presided over the Mueller grand jury, could order materials to be disclosed to Congress outside of an enumerated exception to Rule 6(e). It was not until the House began an impeachment inquiry that Chief Judge Howell authorized disclosure of some of the materials under an exception that allows disclosure preliminarily to or in connection with a judicial proceeding.[29] The D.C. Circuit affirmed.[30] Without the impeachment inquiry, Congress would likely not have had access to those materials.

However, not all courts agree with *McKeever*'s reasoning and outcome. Indeed, a circuit split exists over whether judges may authorize disclosure of grand jury materials outside the bounds of Rule 6(e).[31] This Note explores such judge-made exceptions to grand jury

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26. Letter from William P. Barr, Att'y Gen., U.S. Dep't of Just., to Lindsey Graham, Chairman, Senate Comm. on the Judiciary & Jerrold Nadler, Chairman, House Comm. on the Judiciary 1 (Mar. 29, 2019), https://www.justice.gov/ag/page/file/1153021/download [https://perma.cc/WXB9-Y8G9].

27. *See* David Morgan, *Second Deadline for DOJ To Give Congress Full Mueller Report Expires*, REUTERS (May 6, 2019, 9:19 AM), https://reut.rs/2vCKuAv [https://perma.cc/7RZA-SMW6] (reporting on Barr's noncompliance).

28. *See* McKeever v. Barr, 920 F.3d 842, 842 (D.C. Cir. 2019) (decided Apr. 5, 2019), *cert. denied*, 140 S. Ct. 597 (2020); Mason & Heavey, *supra* note 25 (noting Congress's push for release of documents from the Mueller investigation in March 2019).

29. *In re* Application of Comm. on the Judiciary, 414 F. Supp. 3d 129, 137, 147, 182 (D.D.C. 2019), *aff'd*, 951 F.3d 589 (D.C. Cir. 2020), *cert. granted*, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020).

30. *Comm. on the Judiciary*, 951 F.3d at 603.

31. Some circuits, like the *McKeever* court, hold that courts cannot make disclosures outside the bounds of the rule. *See, e.g.*, Pitch v. United States, 953 F.3d 1226, 1241 (11th Cir. 2020) (en banc) ("Rule 6(e) is exhaustive. District courts . . . do not possess the inherent, supervisory power to order the release of grand jury records in instances not covered by the rule."), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020); United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009) (same); *In re* Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) (same).

Other circuits disagree and hold that courts have inherent authority to authorize the disclosure. *See, e.g.*, Carlson v. United States, 837 F.3d 753, 767 (7th Cir. 2016) ("Rule 6(e)(3)(E) does not displace [the district courts'] inherent power. It merely identifies a permissive list of situations where that power can be used."); *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997) ("[T]here are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of [Rule 6(e)(3)]." (quoting *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion))); *cf. In re* Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005)

secrecy.[32] Contrary to some courts' practice of authorizing disclosures outside of Rule 6(e), this Note argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, show that courts lack clear authority to do so. Of course, there may be circumstances where policy considerations would justify the disclosure.[33] The Advisory Committee on Criminal Rules should clarify the law and provide for these circumstances by adding a residual exception to Rule 6(e) that would not only give courts flexibility and discretion but also a clear source of authority on which to authorize these disclosures.

Part I introduces the grand jury, focusing on its unique position as a quasi-judicial and quasi-executive, but ultimately independent, body

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(holding that district courts have inherent power to impose a secrecy requirement even when Rule 6(e) does not provide for it).

32. Plenty has been written on grand jury secrecy. This Note's primary contribution, however, is its close analysis of Rule 6(e) and its proposed amendment to the rule in light of the tension between the rule and current practice. For a discussion of other topics, see generally FOSTER, *supra* note 8; R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 IND. L.J. 823 (2016); Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1 (2018); Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994); Kadish, *supra* note 1; Kuckes, *The Democratic Prosecutor*, *supra* note 2; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004); William B. Lytton, *Grand Jury Secrecy—Time for a Reevaluation*, 75 J. CRIM. L. & CRIMINOLOGY 1100 (1984); John M. Nataro, *Grand Jury Secrecy: Prohibitions on Witness Disclosure*, 2 NU F. 29 (1997); Daniel C. Richman, Essay, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999); Lori E. Shaw, *The USA PATRIOT Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495 (2005); Fred A. Bernstein, Note, *Behind the Gray Door:* Williams*, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563 (1994); M.R.K., Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623 (1984); JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237 (1997); Andrea M. Nervi, Comment, *FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. CHI. L. REV. 221 (1990); Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury:* United States v. Williams, 43 CATH. U. L. REV. 311 (1993); Alex Thrasher, Comment, *Judicial Construction of Federal Rule of Criminal Procedure 6(e)—Historical Evolution and Circuit Interpretation Regarding Disclosure of Grand Jury Proceedings to Third Parties*, 48 CUMB. L. REV. 587 (2018).

In addition, there is a recent piece examining the courts' supervisory authority over grand jury procedure. *See generally* Rebecca Gonzalez-Rivas, Comment, *An Institution "at Arm's Length": Reconsidering Supervisory Power over the Federal Grand Jury*, 87 U. CHI. L. REV. 1647 (2020). Although that piece and this Note cover many similar topics, the two part ways in several respects, especially regarding the clarity of Rule 6(e)'s text and some of the reasons why courts may lack inherent authority to create exceptions outside the rule.

33. The policy rationales that would justify disclosure depend largely on the circumstances. As a result, this Note has a primarily doctrinal focus.

within the legal system. It also examines the development of grand jury secrecy as well as introduces Rule 6(e)'s secrecy rule and exceptions. Part II examines the text of Rule 6(e), arguing that the rule limits the exercise of judicial power to create new exceptions. The language of the rule, the detailed and specific nature of the rule's exceptions, and the evolution of the rule over time suggest that Rule 6(e) covers the field of grand jury secrecy and departures from it.

Part III moves beyond the text of the rule to consider judges' inherent authority to regulate grand jury procedure. It argues that because of the grand jury's independence, limitations on courts' inherent authority over grand jury procedure are greater than those on courts' inherent authority to regulate their own proceedings. As a result, these limitations indicate courts should be wary of creating grand jury procedural rules outside the bounds of Rule 6(e).[34] Finally, Part IV surveys efforts to amend the rule and proposes that the Advisory Committee clarify this area of grand jury procedure by adding a residual exception to Rule 6(e).

I. BACKGROUND

The courts' role in maintaining grand jury secrecy and authorizing disclosure is defined, in part, by the unique role the grand jury plays as an independent body in the legal system and the way in which long-standing secrecy rules developed into Federal Rule of Criminal Procedure 6(e). This Part surveys both.

A. The Grand Jury's Unique Constitutional Role

The grand jury's dual sword and shield functions make it a special institution in the criminal justice system.[35] The grand jury both investigates whether there is probable cause that a crime has been

34. This Note focuses on federal courts, but the same conclusion may be true of some state courts. *See, e.g.*, Goldstein v. Superior Ct., 195 P.3d 588, 589–90 (Cal. 2008) ("[W]e hold that California courts do not have a broad inherent power to order disclosure of grand jury materials to private litigants . . . . '[T]he superior court's powers to disclose grand jury testimony are only those which the Legislature has deemed appropriate.'" (quoting Daily J. Corp. v. Superior Ct., 979 P.2d 982, 989 (Cal. 1999))); *In re* 38 Studios Grand Jury, 225 A.3d 224, 239–40 (R.I. 2020) ("There is no inherent authority in the Superior Court to disclose grand jury materials beyond that which is permitted by the Superior Court Rules of Criminal Procedure.").

35. *See* United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) ("The grand jury occupies a unique role in our criminal justice system. It . . . 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" (quoting United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950))).

committed and protects the innocent against "unfounded criminal prosecutions."[36] These twin roles are denoted the "investigative" and the "indicting" grand jury, respectively.[37] The same group of impaneled jurors plays both roles.

The grand jury responds to two branches of government: the executive and judiciary.[38] As "a tool of the Executive,"[39] the investigating grand jury has a role "akin to that performed by the police."[40] It is a "grand inquest . . . the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."[41] Procedural and evidentiary rules for trials generally do not apply.[42] The grand jury neither needs probable cause to issue a subpoena[43] nor requires authorization from the court to begin an investigation or return an indictment.[44] Further, the Double Jeopardy Clause does not apply to grand jury proceedings,[45] and many circuits have held that the right to counsel does not extend to testifying witnesses.[46] In short, the investigating grand jury is a powerful tool for scrutinizing potentially criminal behavior.[47]

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36. Branzburg v. Hayes, 408 U.S. 665, 686–87 (1972); *see* United States v. Dionisio, 410 U.S. 1, 16–17 (1973) (stating the grand jury's "mission is to clear the innocent, no less than to bring to trial those who may be guilty").

37. BEALE ET AL., *supra* note 2, § 1:7.

38. *See* Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1266 ("[T]he federal grand jury occupies an uneasy middle ground, operating in the zone between prosecutorial and judicial action.").

39. United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

40. BEALE ET AL., *supra* note 2, § 1:7.

41. Blair v. United States, 250 U.S. 273, 282 (1919).

42. *See* United States v. R. Enters., Inc., 498 U.S. 292, 298 (1991) ("[M]any of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions."); *cf.* United States v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983) (explaining the grand jury has immense powers to investigate and to self-direct its efforts).

43. *R. Enters.*, 498 U.S. at 297.

44. United States v. Williams, 504 U.S. 36, 48 (1992).

45. *Id.* at 49.

46. *See, e.g.*, *In re* Grand Jury Proceedings, 713 F.2d 616, 617 (11th Cir. 1983) (per curiam) (citing United States v. Mandujano, 425 U.S. 564, 581 (1974)) ("Grand jury witnesses have no right to the presence of counsel in the [grand] jury room during questioning."); *In re* Grumbles, 453 F.2d 119, 122 (3d Cir. 1971) (per curiam) (citing *In re* Groban, 352 U.S. 330, 333 (1957)) (finding a witness's claim to the right to counsel during grand jury questioning to be meritless).

47. For more information on how typical rules do not apply to grand juries, see Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1181–82 (2008).

In contrast, the indicting grand jury is similar to "a judicial officer at a preliminary hearing . . . screening the evidence."[48] The grand jury "reviewing an accusation"[49] to protect the innocent ostensibly ensures justice is done through the grand jury's work. The grand jury's investigative powers help fulfill this role. The investigative functions are "incidents of the judicial power of the United States"[50] because the grand jury's subpoena power is derived from the court,[51] and such investigative powers are often necessary to reveal that a charge is unfounded.[52] Because the grand jury derives its power from the court, "[t]he grand jury is an arm of the court," and its mention in the Fifth Amendment "makes the grand jury a part of the judicial process."[53]

The Constitution guarantees the use of the grand jury in the Fifth Amendment,[54] but it commits the grand jury neither to the executive nor to the judiciary exclusively.[55] Instead, the Supreme Court has explained that the grand jury "is a constitutional fixture in its own right."[56] An independent institution, it responds both to the judicial and executive branches but belongs to neither. To fulfill its purpose, the grand jury must be "free, within constitutional and statutory limits, to operate 'independently of either prosecuting attorney or judge.'"[57]

48. BEALE ET AL., *supra* note 2, § 1:7.

49. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1275.

50. Blair v. United States, 250 U.S. 273, 280 (1919).

51. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1272.

52. *See* United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (describing the grand jury's broad powers as necessary to fulfill both its investigative and indicting functions).

53. Levine v. United States, 362 U.S. 610, 617 (1960). Some argue prosecutorial misuse and grand jurors passively capitulating to prosecutors' requests has thwarted this role. *See, e.g.*, BEALE ET AL., *supra* note 2, § 1:1 ("In recent years critics have charged that the grand jury has lost its traditional independence and does little more than rubber stamp the prosecutor's decisions."); Futrell, *supra* note 32, at 25–26 (discussing the prosecutor's relationship to the grand jury and concluding that "prosecutors have significant control over the direction and outcome of the grand jury process, and secrecy serves to obscure the nuance of that control").

54. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

55. *See* United States v. Williams, 504 U.S. 36, 47 (1992) (discussing the grand jury's position in the legal system based on its placement in the Constitution); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1460 (1984) ("[T]he grand jury is not assigned to any one of the three branches of government.").

56. *Williams*, 504 U.S. at 47 (quoting United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977)).

57. *Sells Eng'g*, 463 U.S. at 430 (quoting Stirone v. United States, 361 U.S. 212, 218 (1960)).

As Part III discusses, the grand jury's independent position affects judges' authority to create rules of grand jury procedure.[58]

B. Codifying Grand Jury Secrecy in Rule 6(e)

For the first 140 years of the federal judiciary, there were no unified federal procedural rules, and what rules existed were dictated primarily by Congress.[59] The Court acceded to congressional rulemaking, holding that the Necessary and Proper Clause gave Congress the power to regulate federal judicial procedure.[60] The Court generally construed the judiciary's power narrowly and treated Congress's rules as authoritative.[61] Congress continued to be the primary source of procedural rules until the 1930s.[62]

During this same period of time, federal common law included a strong grand jury secrecy norm.[63] But some defendants challenged grand jury secrecy on grounds that the evidence the grand jury considered could not support the indictment.[64] To address this, courts asserted "discretionary power" to allow parties in some cases to inspect grand jury materials to determine an indictment's validity.[65] However, courts held that this power should be rarely exercised.[66]

In the 1930s, Congress authorized the Supreme Court to create uniform rules of civil and criminal procedure.[67] The new criminal rules,

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58. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1274 (noting that who controls the grand jury bears on the extent to which judges can regulate grand jury procedure).

59. Beale, *supra* note 55, at 1436. The Judiciary Act of 1789 and the Process Act passed shortly thereafter are early examples. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73; Process Act of 1789, ch. 21, 1 Stat. 93; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 747–48 (2001) (noting that the Process Act came quickly after the Judiciary Act to limit judicial discretion over procedure).

60. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825); *see also* Pushaw, *supra* note 59, at 752–54 (discussing *Wayman*, related cases, and the Court's deference to Congress).

61. *See* Beale, *supra* note 55, at 1438–39 (describing the Court's deference to Congress and the few exceptions to it).

62. *Id.* at 1436. Even so, the only uniform rules were those of equity and of admiralty, which the Supreme Court created not via its inherent authority but rather "[p]ursuant to express statutory authority." *Id.* at 1437.

63. FOSTER, *supra* note 8, at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. The Supreme Court was authorized to make civil procedural rules so long as the rules did not "abridge, enlarge, nor modify the substantive rights of any litigant." Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064. Authority to create rules of criminal procedure followed soon after in 1940. Act of June 29, 1940, Pub. L. No. 76-675, 58 Stat. 688. The statutory authorization for promulgating both civil and criminal rules of procedure was consolidated in 28

enacted in 1944,[68] codified common law grand jury secrecy into Rule 6(e).[69] The rule has been amended a number of times.[70] It currently states:

> (2) *Secrecy*.
> (A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).
> (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
> (i) a grand juror;
> (ii) an interpreter;
> (iii) a court reporter;
> (iv) an operator of a recording device;
> (v) a person who transcribes recorded testimony;
> (vi) an attorney for the government; or
> (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).[71]

In short, the rule provides that, unless otherwise specified, the group of persons listed in (2)(B) must keep grand jury materials secret. The list encompasses those present during grand jury proceedings except witnesses,[72] who are free to disclose their testimony.[73]

U.S.C. §§ 2071–2077 by the Judicial Improvements and Access to Justice Act, §§ 401–407, Pub. L. No. 100-702, 102 Stat. 4642, 4648–52 (1988).

68. Order, 327 U.S. 825 (1946) (incorporating the 1944 rules into the first Federal Rules of Criminal Procedure).

69. Illinois v. Abbott & Assocs., 460 U.S. 557, 566 n.11 (1983) ("The General Rule of Secrecy codifies a longstanding rule of common law which we have recognized as 'an integral part of our criminal justice system.'" (quoting Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 n.9 (1979))); *see also* FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966).

70. *See* 18 U.S.C. app. at 440–49 (2018) (describing amendments to Rule 6(e)).

71. FED. R. CRIM. P. 6(e)(2). For the significance of the structure of the rule as reproduced here, see *infra* Part II.A.

72. *Compare* FED. R. CRIM. P. 6(d)(1) (allowing prosecutors, the witness, interpreters, and a court reporter or an operator of a recording device to be present during a grand jury session), *with* FED. R. CRIM. P. 6(e)(2)(B) (omitting the witness from the list of those bound to secrecy).

73. BEALE ET AL., *supra* note 2, § 5:5 (noting that witnesses are free to disclose their testimony but may not be compelled to do so, including in separate proceedings).

Notably, judges are not included in the list of persons subject to grand jury secrecy, for two reasons. First, judges are not listed among those who may be present while the grand jury is in session, and who are then made subject to grand jury secrecy. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) ("No judge presides to monitor [the grand jury's] proceedings."); FED R.

Subsection (3) governs "Exceptions," of which there are two categories: those that allow the attorney for the government to disclose materials without prior authorization and those that require approval from the court. First, subparagraphs (3)(A) to (D) provide exceptions that do not require judicial authorization. Rule 6(e)(3)(A) allows disclosure of grand jury materials, except for the jurors' deliberations and votes, to (i) a government attorney "for use in performing that attorney's duty," (ii) any government personnel that a government attorney needs "to assist in performing that attorney's duty to enforce federal criminal law," or (iii) any person authorized under 18 U.S.C. § 3322,[74] which governs disclosure to enforce certain financial and banking laws.[75] Those who receive grand jury information under the latter two exceptions are also bound to secrecy.[76] In addition, Rule 6(e)(3)(C) allows government attorneys to disclose grand jury materials to other federal grand juries.[77] Finally, Rule 6(e)(3)(D) permits disclosure of materials related to foreign intelligence and national security.[78]

CRIM. P. 6(d)(1) (making no allowance for judges to be present). The majority in *Pitch v. United States* went so far as to say that "Rule 6 does not permit the district judge to be present in the grand jury room at all." *Pitch*, 953 F.3d 1226, 1237 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). Judges do not "participa[te] in the grand jury proceedings, and thus [are] not ordinarily privy to those proceedings unless and until a party raises an issue having to do with the grand jury, or the district court is called upon by the grand jury to enforce a subpoena." *Id.* (citing FED R. CRIM. P. 6(e)(3)(E)(ii)).

Second, judges have a limited role in grand jury proceedings. "The extent of the district court's 'involvement . . . has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office,' or to enforcing grand jury subpoenas." *Id.* (quoting United States v. Williams, 504 U.S. 36, 47–48 (1992)). The court impanels the grand jury, instructs it, gives it the subpoena power, and discharges it when it is finished. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1272. The prosecutor controls the rest, including the cases the grand jury considers, the evidence it sees, and the charges on which it votes. *Id.* The prosecutor is also the grand jury's legal adviser. *Id.* at 1273. Because judges have a limited role in the grand jury's work and are not present during the proceedings, explicitly including judges in the general secrecy rule is unnecessary. Plus, judges do not make the actual disclosure, they merely authorize it.

74. FED. R. CRIM. P. 6(e)(3)(A)(i)–(iii).

75. 18 U.S.C. § 3322 (2018).

76. FED. R. CRIM. P. 6(e)(2)(B)(vii) (providing that the secrecy rule applies to those "to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)").

77. FED. R. CRIM. P. 6(e)(3)(C).

78. FED. R. CRIM. P. 6(e)(3)(D).

Second, some exceptions require judicial authorization. Rule 6(e)(3)(E) provides:

> (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:
> (i) preliminarily to or in connection with a judicial proceeding;
> (ii) 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;
> (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
> (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
> (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.[79]

The rule uses a permissive "may," signifying that although judicial authorization is required, the judge may refuse.[80] When the judge does authorize disclosure, she is free to impose time, manner, and other restrictions.[81]

To move for disclosure under one of the exceptions requiring judicial authorization, parties must show "particularized need" for the disclosure.[82] In *Douglas Oil Co. of California v. Petrol Stops*

79. FED. R. CRIM. P. 6(e)(3)(E).

80. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive . . . .").

81. FED. R. CRIM. P. 6(e)(3)(E).

82. United States v. Baggot, 463 U.S. 476, 480 (1983).

Northwest,[83] the Court defined the test as requiring parties to "show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."[84] Thus, although exceptions codified in Rule 6(e)(3)(E) define the "*kind* of need that must be shown,"[85] the particularized need test defines the "*degree*" to which a party must have that need to justify disclosure.[86] At its core, the test weighs the need for disclosure under an enumerated exception against the need for continued secrecy and requires that the request for disclosure be tailored to the need.

In sum, Rule 6(e) provides a general secrecy rule followed by a detailed list of enumerated exceptions, some requiring judicial authorization and some that do not. When a party moves for disclosure under an exception requiring judicial authorization, the party must show a particularized need for that disclosure. The question remains whether Rule 6(e) allows judges to authorize disclosure not otherwise provided for in the rule's text.

II. TEXTUAL LIMITATIONS ON DISCLOSURE OUTSIDE OF RULE 6(E)

The text of Rule 6(e) suggests there is no basis for authorizing disclosure outside of its enumerated exceptions. Rule 6(e)(2)(A) states that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)."[87] Rule 6(e)(2)(B) gives the general secrecy rule and provides a list of people who "[u]nless these rules provide otherwise, . . . must not disclose a matter occurring before the grand jury."[88] Then, Rule 6(e)(3)(E) stipulates that "[t]he court may authorize disclosure—at a time, in a manner, and subject to

83. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211 (1979).

84. *Id.* at 222.

85. *Baggot*, 463 U.S. at 480.

86. *Id.*; *see also* United States v. McDougal, 559 F.3d 837, 840–41 (8th Cir. 2009) ("A request for disclosure that falls under one of these specified exceptions must also contain a 'showing of particularized need for grand jury materials' before disclosure becomes appropriate." (quoting United States v. Sells Eng'g, Inc., 463 U.S. 418, 443 (1983))); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (explaining the moving party must show "a compelling necessity . . . with particularity"). For more on this test, see Lytton, *supra* note 32, at 1115–17 (explaining the mechanics of the test and the difficulties in passing it).

87. FED. R. CRIM. P. 6(e)(2)(A).

88. FED. R. CRIM. P. 6(e)(2)(B).

any other conditions that it directs—of a grand-jury matter" and lists five situations in which the court may allow the disclosure.[89] Two provisions bear on whether the text permits disclosure outside the bounds of the rule: the "unless these rules provide otherwise" language that limits the general secrecy rule and the exception providing for judicially authorized disclosure.

A. Textual Limits on the General Secrecy Rule

Grand jury secrecy is not absolute. Rather, secrecy is required "[u]nless these rules provide otherwise,"[90] which they do in a list of exceptions following the secrecy rule. Judges grappling with the rule's text have disagreed over the reach and strength of the phrase "unless these rules provide otherwise." Some have reasoned that the phrase limits disclosure of grand jury material to only those situations allowed by the enumerated exceptions in Rule 6(e)(3).[91] Others have said the phrase limits only the types of people who must keep grand jury materials secret, while the list of exceptions requiring judicial authorization gives courts guidance without being exclusive.[92] The former reading better adheres to the text and structure of the rule. This Section first looks at the plain text meaning of the secrecy rule before showing that the history of the rule supports that plain text reading.

1. *Plain Text Meaning of Rule 6(e).* The word "unless" introduces the rule's limiting language. Typically, words should be given "their ordinary, contemporary, common meaning,"[93] except when "the context indicates that they bear a technical sense."[94] There is no indication that "unless" has a technical meaning here. It functions as a conjunction.[95] In this usage, "unless" means "except under the

89. FED. R. CRIM. P. 6(e)(3)(E).

90. FED. R. CRIM. P. 6(e)(2)(B).

91. *See* Pitch v. United States, 953 F.3d 1226, 1234 (11th Cir. 2020) (en banc) (stating that Rule 6(e) "is not merely permissive" but "instructs that deviations . . . are not permitted '[u]nless these rules provide otherwise'" (quoting FED. R. CRIM. P. 6(e)(2)(B))), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020); McKeever v. Barr, 920 F.3d 842, 845–46 (D.C. Cir. 2019) ("[D]eviations from the detailed list of exceptions in Rule 6(e) are not permitted . . . ."), *cert. denied*, 140 S. Ct. 597 (2020).

92. *See* Carlson v. United States, 837 F.3d 753, 764 (7th Cir. 2016) (finding this reading "far more reasonable").

93. Perrin v. United States, 444 U.S. 37, 42 (1979).

94. SCALIA & GARNER, *supra* note 80, at 69–77 (explaining the ordinary-meaning canon).

95. *See Unless*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/215075 [https://perma.cc/5UGB-HKMZ] (illustrating uses of "unless" as a conjunction).

circumstances that."[96] Using this definition, the general secrecy rule might be rewritten as "except under the circumstances that these rules provide, the following persons must not disclose a matter occurring before the grand jury." Thus, rather than limiting the group of people who are bound to secrecy, this language refers to situations in which disclosure would be appropriate.

Rule 6(e)(2)(A), which comes just before the secrecy rule and its limiting language, supports this reading. It says no person may be obligated to secrecy except those listed in Rule 6(e)(2)(B).[97] Effectively, the rule binds everyone, besides witnesses, who is in the room during the grand jury proceedings and thus would have information to disclose.[98] If the limiting language means essentially the same thing—that it only restricts the group of people who are bound to secrecy—then either it or Rule 6(e)(2)(A) must be superfluous. Yet, statutes generally should be interpreted so that "'no clause' is rendered 'superfluous, void, or insignificant.'"[99] If Rule 6(e)(2)(A) and the limiting language both restrict who has an obligation to keep grand jury materials secret, then one of them is unnecessary.

Taking the ordinary meaning of "unless" together with the need to avoid surplusage, the limiting language refers to the circumstances when those bound to secrecy may break their silence by pointing the reader forward to the exceptions in Rule 6(e)(3). This forward outlook fits the structure of Rule 6(e)(2). After all, Rule 6(e)(2)(A) explicitly points the reader forward to 6(e)(2)(B). Within that provision, 6(e)(2)(B)(vii) explicitly points the reader forward to two of the exceptions in 6(e)(3).[100] Further, the limiting language modifies the entire phrase following it, which states that "the following persons must not disclose a matter occurring before the grand jury."[101] As the general

96. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2080 (2d ed. 2001); *see also* OXFORD ENG. DICTIONARY, *supra* note 95 (defining "unless" to mean "except" or "except if" when it is "followed by an adverb, phrase, or participial clause without verb, expressing the manner, place, time, or other circumstance in which an exception to a preceding (or following) statement applies").

97. FED. R. CRIM. P. 6(e)(2)(A).

98. *See supra* notes 72–73 and accompanying text (explaining that witnesses and judges are not listed among those bound by secrecy).

99. Young v. UPS, Inc., 575 U.S. 206, 226 (2015) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)); *see also* SCALIA & GARNER, *supra* note 80, at 174–79 (explaining the surplusage canon).

100. FED. R. CRIM. P. 6(e)(2)(B)(vii) (requiring that "a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)" is bound to secrecy).

101. FED. R. CRIM. P. 6(e)(2)(B).

prohibition against disclosure, this is the secrecy rule's core.[102] The prohibition itself must be followed unless the rules provide exceptions.

One problem with this reading is that it emphasizes a phrase that limits the general secrecy rule, but which is located in a subpart within the rule. As one court explained, the government in that case failed to show "why a limitation buried in subsection (B) of subpart (2) of Rule 6(e) secretly applies to the rule as whole, or even worse . . . to an entirely different subpart."[103] Certainly, the general presumption is that language within a subpart relates only to that subpart and language indented underneath it.[104] The presumption raises a question of why the limiting language in *subsection* (2)(B) should apply to a different *subpart* of the rule—Rule 6(e)(3)—rather than apply only to the *subsection* where it is located.

The answer lies in the rule's design. The rule's drafters placed the general secrecy requirement that is the focus of subpart (2) in a subsection within that part. The text of subpart (2) is merely the title, "Secrecy,"[105] of the subsections underneath it, just as subpart (3), "Exceptions,"[106] is merely the title of the subsections following it. Instead of placing the general rule directly after the title, as the drafters did in subpart (1),[107] the drafters placed the secrecy rule in a subsection under its title, as it did for all of the exceptions.[108] Thus, language limiting the secrecy requirement naturally appears in the subsection alongside the primary secrecy rule. By recognizing that subparts 6(e)(2) and 6(e)(3) are each structured as a short title followed by enumerated subsections, the language limiting the general secrecy rule is not "buried" in a subsection but is placed next to the core rule, which itself is no more buried than any of its exceptions.

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102. McKeever v. Barr, 920 F.3d 842, 844–45 (D.C. Cir. 2019) ("Rule 6(e)(2)(B) sets out the general rule . . . . Rule 6(e)(3) then sets forth a detailed list of 'exceptions' . . . ."), *cert. denied*, 140 S. Ct. 597 (2020); *see also* Pitch v. United States, 953 F.3d 1226, 1234 (11th Cir. 2020) (en banc) (describing the structure of the Rule), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

103. Carlson v. United States, 837 F.3d 753, 764 (7th Cir. 2016); *see Pitch*, 953 F.3d at 1255 (Wilson, J., dissenting) (arguing the same). For the text of the rule, see *supra* notes 71, 79 and accompanying text.

104. *See* SCALIA & GARNER, *supra* note 80, at 156 (describing the scope-of-subparts canon).

105. FED. R. CRIM. P. 6(e)(2) (emphasis omitted).

106. FED. R. CRIM. P. 6(e)(3) (emphasis omitted).

107. *See* FED. R. CRIM. P. 6(e)(1) ("*Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device.").

108. *See* FED. R. CRIM. P. 6(e)(3)(A)–(G) (being placed under the title "*Exceptions*").

2. *Drafting History of Rule 6(e)*. The history of Rule 6(e) supports the plain text reading. Similar to the current iteration, the 1976 rule allowed disclosure to government attorneys without judicial authorization.[109] The rule then imposed a secrecy requirement on those in the courtroom, except for witnesses, during grand jury sessions, saying that disclosure could occur "only when so directed by the court" under two circumstances.[110] The first was preliminarily to or in connection with a judicial proceeding, and the second was at the request of a defendant who could show there might be a reason to challenge an indictment's validity based on the grand jury's proceedings.[111]

That same year, the Advisory Committee tried to amend the rule to define "attorneys for the government" according to Rule 54(c) and to allow disclosure without judicial authorization to other government personnel necessary to helping government attorneys with their work.[112] When the amendment was sent to Congress, the House Judiciary Committee became concerned because critics of the amendment argued "it would permit too broad an exception to the rule of keeping grand jury proceedings secret."[113] The concern was that "lack of precision" regarding the scope of the amendment would lead to prosecutorial "misuse of the grand jury."[114] Indeed, both the House and Senate committees agreed that because the rule did "not clearly

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109. Labeled "Secrecy of Proceedings and Disclosure," the Rule provided, in part,

> Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977).

110. FED. R. CRIM. P. 6(e), 383 U.S. at 1196.

111. FED. R. CRIM. P. 6(e), 383 U.S. at 1196.

112. SUBCOMM. ON CRIM. JUST., H.R. COMM. ON THE JUDICIARY, 95TH CONG., AMENDMENTS: FEDERAL RULES OF CRIMINAL PROCEDURE TRANSMITTED TO CONGRESS ON APRIL 26, 1976, at 1 (Comm. Print 1977).

113. *See* H.R. REP. NO. 95-195, at 4 & n.8 (1977) (noting critics' concerns). Indeed, the Subcommittee on Criminal Justice surveyed U.S. attorneys' offices and found that "there [was] no consistent practice concerning what things can be disclosed, to whom they can be disclosed, and under what circumstances they can be disclosed." *Id.* at 4.

114. *See* S. REP. NO. 95-354, at 6–8 (1977) ("[C]riticism . . . seemed to stem more from the lack of precision in defining . . . the intended scope of the proposed change than from a fundamental disagreement with the objective.").

spell out when, under what circumstances, and to whom grand jury information can be disclosed," it needed "to be rewritten entirely."[115]

The 1977 rule was the product of Congress's redrafting. For the first time, the rule was split into two subparts, one for the general rule and one for the exceptions.[116] Although the exceptions were no longer in the same subpart as the general rule, Congress added language to the general secrecy rule limiting disclosure, saying that persons identified by the rule "shall not disclose matters occurring before the grand jury, *except as otherwise provided for in these rules*."[117] In the exceptions requiring judicial authorization, Congress reiterated the secrecy rule, saying "[d]isclosure otherwise prohibited by this rule . . . may also be made[] (i) when so directed by a court preliminary to or in connection with a judicial proceeding; or (ii) when permitted by a court at the request of the defendant" to challenge the defendant's indictment.[118] Thus, Congress set out the secrecy rule and cabined exceptions to those listed in the rules. Congress emphasized this by adding language in each set of exceptions that referred back to the general secrecy rule, just as the limiting language in the rule pointed readers forward to the exceptions.

This general structure remained the same until 2002, when the Advisory Committee restyled the language and structure of rule.[119] The changes were "intended to be stylistic," except as provided in the Advisory Committee's notes.[120] The stylistic changes rewrote the limiting language to what it is presently: "[u]nless these rules provide otherwise."[121] The restyling also dropped the repetitive phrase "[d]isclosure otherwise prohibited by this rule" in the rule's

115. *Compare* H.R. REP. NO. 95-195, at 5 ("Rule 6(e) is unclear. . . . It ought to be rewritten entirely."), *with* S. REP. NO. 95-354, at 7 ("In this state of uncertainty, the Committee believes it is timely to redraft subdivision (e) of Rule 6 to make it clear.").

116. FED. R. CRIM. P. 6(e)(1), Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319, *reprinted in* 18 U.S.C. app. at 1386 (Supp. II 1979) (superseded 1979).

117. FED. R. CRIM. P. 6(e)(1), 91 Stat. 319 (emphasis added).

118. FED. R. CRIM. P. 6(e)(2)(C), 91 Stat. 319–20. Congress used identical language related to prohibited disclosure in the section listing exceptions not requiring judicial authorization. FED. R. CRIM. P. 6(e)(2)(A), 91 Stat. 319.

119. One smaller structural change occurred in 1979 when Rule 6(e)(1) was added to require the proceedings to be recorded and the general secrecy rule became Rule 6(e)(2). *See* FED. R. CRIM. P. 6(e) advisory committee's note to the 1979 amendment (discussing the content and benefits of the then-proposed Rule 6(e)(1)).

120. FED. R. CRIM. P. 6(e) advisory committee's note to 2002 amendment.

121. FED. R. CRIM. P. 6(e)(2)(B), 535 U.S. 1175, 1185 (2002), *reprinted in* 18 U.S.C. app. at 1387 (Supp. II 2004) (superseded 2006).

exceptions.[122] Yet these two changes were not meant to change the meaning of the rule—namely, that Rule 6(e) provides the exclusive grand jury secrecy rule and exceptions to it.

B. The Exceptions Requiring Judicial Authorization

Although the limiting language in Rule 6(e) cabins exceptions to grand jury secrecy to those enumerated, the exceptions requiring judicial authorization might still allow judges to disclose material outside of the rule. Under Rule 6(e)(3)(E), "[t]he court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter."[123] It then lists five circumstances in which the court may allow the disclosure. Because the circumstances are specific and wide-ranging, the rule should be read as providing an exhaustive list of exceptions.

Generally, "[t]he expression of one thing implies the exclusion of others."[124] However, this is the case only when what is specified "can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved."[125] This determination largely depends on context.[126] However, "[t]he more specific the enumeration, the greater the force of the canon."[127] The exceptions requiring judicial disclosure go beyond simply giving judges discretion to authorize the disclosure. Rather, they list the circumstances in which a judge may do so. Those circumstances are specific, allowing judges to authorize disclosure "(i) preliminarily to or in connection with a judicial proceeding;" "(ii) 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;" at the request of the government for (iii) aiding a criminal investigation "by a foreign court or prosecutor," (iv) to enforcing the criminal law of other specified jurisdictions, or (iv) if the materials may show a violation of the Uniform Code of Military Justice.[128] These circumstances both cover a wide range of possibilities and are specific, often listing who may request the disclosure, what a party must show to obtain disclosure, and for what purpose a disclosure may be used.

122. FED. R. CRIM. P. 6(e)(3)(A)–(C), 535 U.S. at 1186 (superseded 2004).
123. FED. R. CRIM. P. 6(e)(3)(E).
124. SCALIA & GARNER, *supra* note 80, at 107 (explaining the negative-implication canon).
125. *Id.*
126. *Id.*
127. *Id.* at 108.
128. FED. R. CRIM. P. 6(e)(3)(E)(i)–(v).

Within these circumstances, judges have discretion whether to authorize the disclosure and whether to impose time, manner, or other conditions on it.[129]

Finally, the Supreme Court has spoken directly to the type of rule structure at issue here, saying that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition," as is the case with Rule 6(e), then "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[130] Thus, by negative implication, the rule does not contemplate judges authorizing disclosure outside of the enumerated circumstances.

Nevertheless, some courts have held that the enumerated circumstances are merely a nonexclusive list of examples setting out "frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances."[131]As mere examples, then, the authority to authorize disclosure presumably comes not from the rule, but from courts' inherent authority, which Part III discusses in detail. After all, any inherent authority the court might have to create new exceptions predated the adoption of Rule 6(e). And, as Part III explains,[132] for a rule to limit courts' inherent authority, it must do so by "a much clearer expression" than a negative implication.[133] The tension, then, between the strong negative implication in Rule 6(e) and courts' longstanding exercise of inherent authority renders the law unsettled. Congress has enumerated specific exceptions outside of which courts arguably should not venture. Yet courts have long created new exceptions to grand jury secrecy under their inherent authority, and something more than a negative implication is necessary to limit that authority.

Two considerations arguably tip the scale toward foreclosing judge-made exceptions to the rule. First, the rule relies on more than just a negative implication. The general secrecy rule contains limiting

129. FED. R. CRIM. P. 6(e)(3)(E).

130. *Cf.* Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980).

131. Carlson v. United States, 837 F.3d 753, 764–65 (7th Cir. 2016); *see also In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997) ("[B]y delimiting the exceptions . . . Rule 6(e)(3) governs almost all requests[, but] . . . there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." (quoting *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion))); *In re* Hastings, 735 F.2d 1261, 1269 (11th Cir. 1984) ("[W]e do not believe that the district court's power . . . must stand or fall upon a literal construction of the language of Rule 6(e)."), *overruled by* Pitch v. United States, 953 F.3d 1226 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

132. *See infra* Part III.A.

133. Link v. Wabash R.R. Co., 370 U.S. 626, 630–32 (1962).

language, described in detail above, that limits exceptions to grand jury secrecy to those circumstances enumerated in the rule, including those requiring judicial authorization. Second, Congress's role in the evolution of Rule 6(e) shows concern for specifying exactly when, and to whom, disclosures may be made.[134] As a result, Rule 6(e) is the exclusive grand jury secrecy rule and the exhaustive list of exceptions to it.

III. COURTS' INHERENT AUTHORITY TO REGULATE GRAND JURY PROCEEDINGS

Beyond the text of Rule 6(e), federal courts have relied on inherent supervisory authority to promulgate rules of grand jury procedure.[135] This authority is one "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs."[136] It is power that courts have simply by being courts. However, there is no consensus regarding the source or scope of this power.[137] In the context of grand jury secrecy, courts have asserted inherent authority to authorize disclosures outside of Rule 6(e) at least since the 1970s. But even then, not all judges agreed about doing so. For example, when the Second Circuit ruled on *In re Biaggi*[138] in 1973, Chief Judge Henry Friendly held the court could "rest[] on the exercise of a sound discretion under the special circumstances" of a case to order disclosure.[139] In dissent, Judge Paul Hays pointed out that Rule

134. *See supra* note 115 and accompanying text. Congress was particularly concerned about prosecutorial abuse. *See* S. REP. NO. 95-354, at 8 (1977) (noting the redrafted rule tried to "allay the concerns of those who fear that [prosecutorial power to disclose grand jury materials] will lead to misuse of the grand jury to enforce non-criminal Federal laws"). But as detailed above, Congress paid close attention to judge-ordered disclosures as well in redrafting the rule. *See supra* note 118 and accompanying text.

135. BEALE ET AL., *supra* note 2, § 9:29.

136. Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016) (quoting *Link*, 370 U.S. at 630–31).

137. *See id.* ("[T]his Court has never precisely delineated the outer boundaries of a district court's inherent powers . . . ."); Beale, *supra* note 55, at 1455–62 (describing the use of supervisory power by lower federal courts—generally, not just specifically for the grand jury—and saying the "source" of that authority "has not been identified"). Professor Sara Sun Beale outlines the possible sources of authority for general supervisory power, which include the federal common law, the Supreme Court's own authority, and the authority derived from being a part of the judiciary. *Id.* at 1464. Beale argues, however, that these are not sufficient, especially given how lower courts use supervisory power. *Id.* at 1464–68. Inherent authority at least derives from the judicial power granted by Article III as an implied ancillary judicial power, but the Supreme Court "has had little occasion to focus on the scope of that implied authority." *Id.*

138. *In re* Biaggi, 478 F.2d 489 (2d Cir. 1973).

139. *Id.* at 494 (supplemental opinion).

6(e) "forbids disclosure of grand jury proceedings with certain carefully limited exceptions."[140] He chided the majority for creating an exception "without the support of any" statute or precedent.[141] In Hays's view, the court should have relied on "rules of law" rather than a judge's view of "what 'the public interest' may require."[142] The Second Circuit affirmed *Biaggi* decades later, crafting a test for "'special circumstances' in which" judges may release grand jury records outside of Rule 6(e).[143]

This Part considers courts' inherent authority regarding grand jury secrecy rules. It briefly surveys the source, scope, and limits of courts' inherent authority over their own proceedings before arguing that Supreme Court precedent likely places additional limitations on this power in the grand jury context. Finally, it considers and rejects a counterargument that Rule 6(e)'s common law history, in conjunction with Federal Rule of Criminal Procedure 57(b), justifies exceptions made via courts' inherent authority. Ultimately, this Part concludes that courts' inherent authority over grand jury procedure is sufficiently limited so as to cast doubt on the propriety of judge-made exceptions outside the boundaries of Rule 6(e).

A. Overview of the Source, Scope, and Limitations of Courts' Inherent Authority

Courts' inherent authority stems from the Vesting Clause in Article III of the Constitution.[144] Although its scope is unclear, it generally encompasses powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[145] Because the Article III power is vested in each individual court, the power is inherently a local power necessary for administering a court's

140. *Id.* at 493 (Hays, J., dissenting).

141. *Id.* at 494.

142. *Id.*

143. *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997).

144. Beale, *supra* note 55, at 1468 (arguing, based on Supreme Court precedent, "authority to regulate judicial procedure is an incidental or ancillary power implied in the article III" Vesting Clause); *see supra* note 137. The Article III Vesting Clause provides, "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

145. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

own proceedings.[146] Thus, the substance of a procedural rule adopted using "inherent procedural authority lies fundamentally within the discretion of the adopting court" and applies to that specific court's proceedings, though they are reviewable on appeal.[147]

The degree of necessity justifying the use of inherent authority is unclear. Some suggest that the use of inherent authority is bound by strict necessity.[148] Others take a broader approach, noting that the Supreme Court has delineated an inviolable core of inherent judicial authority rather than defined its outer bounds.[149] However, those taking a broader view still acknowledge that courts' inherent authority is limited, recognizing that in most cases courts should defer to contrary rules made by Congress.[150] This Note assumes the latter, broader view.[151]

The authority to craft procedural rules is not exclusive to the judicial branch. Congress has broad authority to regulate judicial procedure via the Necessary and Proper Clause.[152] For example, Congress passed legislation authorizing the Supreme Court to promulgate the federal rules of civil and criminal procedure.[153] This statutory authority has become the primary mechanism to create and ensure uniformity in federal judicial procedure.[154] Because the rules stem from a congressional authorization, they carry significant weight, such that lower courts "have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions."[155] It follows that courts may only use their inherent

146. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 817 (2008) (arguing that "any procedural authority conferred by Article III is entirely local" because it only "empowers a court to regulate its own proceedings").

147. *Id.*

148. *See, e.g.*, Pushaw, *supra* note 59, at 847 (arguing inherent authority can be used only if courts cannot otherwise adequately "perform their express constitutional functions").

149. *See, e.g.*, Barrett, *supra* note 146, at 880–81 (arguing that requiring strict necessity "overread[s]" the cases).

150. *See id.* at 816 (stating Congress has authority to regulate procedure, but likely cannot regulate over and against "some small core of inherent [judicial] procedural authority").

151. The broader view reflects how courts actually operate. *See* Pushaw, *supra* note 59, at 849 (saying the use of inherent authority outside of strict necessity has become "entrenched").

152. Beale, *supra* note 55, at 1472.

153. *See supra* note 67 and accompanying text; *see also* 28 U.S.C. § 2072(a) (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

154. Barrett, *supra* note 146, at 887.

155. Bank of N.S. v. United States, 487 U.S. 250, 255 (1988).

authority to create procedural rules for matters on which neither the Constitution nor Congress has already spoken.[156] However, the Court held in *Link v. Wabash Railroad Co.*[157] that when a rule's purpose is to "abrogate" what was previously an area regulated under courts' inherent authority, it must do so by "a much clearer expression" than a negative implication.[158]

In 2016, the Court summarized several previous cases and affirmed this general framework in *Dietz v. Bouldin*.[159] There, the Court held that district courts have inherent power outside of enumerated procedural rules to manage their "own affairs."[160] However, two limitations constrain the use of inherent authority: (1) exercises of inherent supervisory authority "must be 'a reasonable response to the problems and needs' confronting the court's fair administration of justice," and (2) they "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[161] The latter requirement prohibits both directly contradicting a rule and indirectly circumventing it.[162] And *Dietz* did not alter the earlier requirement that a rule must contain more than a negative implication to abrogate courts' inherent authority.[163]

B. Limitations on Inherent Authority over Grand Jury Procedure Specifically

The *Dietz* Court did not expressly say whether courts' inherent authority over their own proceedings extends to grand jury procedure. Because the grand jury is an "arm of the court,"[164] courts' inherent

156. *Id.* at 254.

157. Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

158. *Id.* at 630–32 (holding Federal Rule of Civil Procedure 41(b) could not abrogate inherent authority merely on the basis of a negative implication); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 46–49 (1991) (stating that inherent power can be limited by a rule but a court will "not lightly assume that Congress has intended" to so limit that power).

159. Dietz v. Bouldin, 136 S. Ct. 1885, 1891–92 (2016).

160. *Id.* at 1891 (quoting *Link*, 370 U.S. at 630) (affirming that district courts may use inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (quoting *Link*, 370 U.S. at 630–31)).

161. *Id.* at 1892 (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).

162. Carlisle v. United States, 517 U.S. 416, 426 (1996) (stating inherent authority cannot be used "to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure").

163. *See supra* note 158 and accompanying text.

164. *See supra* note 53 and accompanying text.

authority, bound by *Dietz*, likely does extend to the grand jury.[165] However, because the grand jury is independent, belonging neither to the executive nor the judiciary,[166] grand jury proceedings are not wholly a court's own proceedings. As a result, they are different than the inherent authority to regulate local procedure contemplates.[167] Due to this structure, limitations in addition to those in *Dietz* narrow the extent to which courts may use inherent authority to create grand jury procedural rules.[168]

In the grand jury context, the Supreme Court has invoked the principle that courts cannot use inherent authority contrary to an express rule. And the Court later went beyond this rule to restrict inherent authority in grand jury proceedings even when there was no express rule restricting the court's action. First, in *Bank of Nova Scotia v. United States*,[169] the district court used its inherent authority to dismiss an indictment for prosecutorial misconduct during the grand jury proceedings even though the misconduct was not prejudicial to the defendant.[170] The dismissal circumvented Federal Rule of Criminal Procedure 52(a), which provides that courts should ignore harmless errors.[171] The Supreme Court held that district courts cannot use inherent authority to avoid Rule 52(a) and thereby dismiss an indictment for nonprejudicial prosecutorial misconduct during grand

165. One other indication that it applies is that *Dietz* cites *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), discussed *infra*, as an example of the proposition that "inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz*, 136 S. Ct. at 1892. Because *Bank of Nova Scotia* involved the grand jury, there is some evidence the *Dietz* Court intended its two-part framework for inherent power to apply to grand jury procedure.

166. *See supra* Part I.A.

167. *See* Beale, *supra* note 55, at 1492–93 ("[G]rand jury proceedings are not simply an extension of the judicial proceedings regulated by the federal courts' ancillary authority.").

168. BEALE ET AL., *supra* note 2, § 9:31 ("In practical terms, the most significant limitations flow from the Congressionally authorized adoption of a comprehensive general framework of procedural rules, including the Federal Rules of Criminal Procedure."). In light of Congress's broad power to regulate judicial procedure—and concerns about whether a supervisory power over judicial procedure even extends to grand jury procedure—"it is doubtful whether this authority is broad enough to legitimate all of the supervisory power rulings establishing procedural rules for grand jury proceedings." *Id.*; *see infra* note 181 and accompanying text.

169. Bank of N.S. v. United States, 487 U.S. 250 (1988).

170. *Id.* at 253.

171. FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

jury proceedings.[172] In short, lower courts cannot avoid explicit rules by invoking inherent authority.

Second, in *United States v. Williams*,[173] the Court relied on *Bank of Nova Scotia* to again limit courts' inherent authority over grand jury proceedings.[174] Here, the district court granted the defendant's motion to receive all exculpatory grand jury transcripts.[175] After the disclosure, the defendant moved for, and the district court granted, dismissal of the indictment based upon the prosecution's failure to show the grand jury evidence negating an element of the crime charged.[176] The circuit court affirmed, relying on an earlier circuit decision in which the court had used inherent authority to impose a duty on prosecutors to disclose exculpatory information to the grand jury.[177] The Supreme Court reversed.[178]

Summarizing the holding in *Bank of Nova Scotia*, the Court stated that district courts may not use their inherent authority "as a means of prescribing . . . standards of prosecutorial conduct in the first instance" as they could for regulating "prosecutorial conduct before the courts themselves."[179] Thus, the circuit court erred by establishing "standards of prosecutorial conduct" for grand jury proceedings.[180] Given that judges do not preside over grand jury proceedings, generally "no such 'supervisory' judicial authority exists."[181] Further, because the grand jury is an independent body, the Court hesitated to allow inherent authority to be "a basis for prescribing modes of grand jury procedure."[182] Thus, whatever authority courts may have to create such

172. *See Bank of N.S.*, 487 U.S. at 254 (disallowing the use of inherent authority "to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)").

173. United States v. Williams, 504 U.S. 36 (1992).

174. *See id.* at 46–47 (describing the holding of *Bank of Nova Scotia*). *See generally* Schiappa, *supra* note 32 (exploring the *Williams* decision and its aftereffects).

175. *Williams*, 504 U.S. at 39.

176. *See id*. (describing how the trial court dismissed the indictment because the exculpatory evidence created a reasonable doubt about defendant's guilt).

177. *Id.* at 43 & n.4; *see also* Schiappa, *supra* note 32, at 315–16 (stating that before the Court's holding, a majority of circuits held there was no duty to disclose exculpatory information because "an accused's guilt or innocence" should be determined at trial).

178. *Williams*, 504 U.S. at 55.

179. *Id.* at 47 (emphasis omitted).

180. *See id.* ("It is this latter exercise [of prescribing conduct] that respondent demands.").

181. *Id.*

182. *Id.* at 49–50.

rules "is a very limited one, not remotely comparable to the power they maintain over *their own proceedings*."[183]

The Court's decision in *Williams* differs from *Bank of Nova Scotia* in at least one key respect. In *Bank of Nova Scotia*, the lower court used inherent authority to avoid applying an express rule. But, in *Williams*, the circuit court's imposition of a duty on prosecutors did not contradict or circumvent an existing rule or statute. Nevertheless, the Court held that the circuit court's use of its inherent authority was improper. This suggests a stronger constraint on the use of inherent authority in relation to the grand jury than the limits summarized in *Dietz*, which prohibited the use of inherent authority "contrary to any *express* grant of, or limitation on," courts' inherent authority and even then only to solve a problem of the administration of justice.[184] *Williams* shows that in the grand jury context, courts also cannot act contrary to some *implicit* grants of or limitations on inherent authority.[185]

The circuit court's decision to impose a duty on prosecutors may not have violated an explicit procedural rule, but it was contrary to implicit rules governing the "relationships between the prosecutor, the constituting court, and the grand jury itself."[186] Grand juries do not determine the merits of the accused's guilt or innocence but make an independent assessment as to whether a charge is appropriate.[187] Imposing a duty to disclose exculpatory evidence alters the role of the grand jury to be an adjudicator of guilt and innocence.[188] This would be a fundamental change in what grand juries are impaneled to accomplish.[189]

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183. *Id.* at 50 (emphasis added).

184. *See* Dietz v. Bouldin, 136 S. Ct. 1885, 1888, 1891–92 (2016) (emphasis added) (explaining how "the Court has recognized certain limits" on courts' inherent authority). Although *Dietz* was decided more than a decade after *Williams*, the limitations on inherent authority that it announced were not new. Rather, they merely summarized prior case law, which allows for the comparison made here.

185. By "implicit," this Note refers to something uncodified, though it might be "express" in the sense that court precedent reflects its existence.

186. *See Williams*, 504 U.S. at 50 (stating "that any power" a court might have to create grand jury procedural rules "would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself").

187. *Id.* at 51.

188. *Id.*

189. *See id.* at 53 ("We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor.").

On one reading, contrary to the one presented in Part II,[190] using inherent authority to create new exceptions to Rule 6(e) does not directly contradict an explicit provision in the rule. However, secrecy is a core rule of grand jury procedure, and so there is an implicit limit on judges creating new exceptions, at least when the exception would undermine core grand jury functioning.[191] The key roles of the grand jury as sword and shield depend upon the secrecy of its proceedings.[192] If a grand jury's proceedings were public or its records could be easily disclosed, witnesses might not be fully candid for fear of retribution, and targets of the investigation might be more likely to flee or influence the grand jurors' votes.[193] Concerns such as these are not surface level but rather implicate core grand jury functions. Secrecy is an important procedural rule that protects the twin roles of the grand jury. If a judge-made exception to Rule 6(e) would erode the secrecy rule in a way that undermines these core functions, courts may lack inherent authority to create it.

In sum, courts' inherent authority over grand jury procedure is subject to three limitations. First, any exercise of it must be a reasonable solution to a problem of the administration of justice. Second, it cannot be contrary to or an attempt to circumvent an express federal rule. And finally, a judge-made procedural rule may not contravene implicit limits on interfering with or changing core functions of the grand jury.

The first limitation cuts against judge-made exceptions to grand jury secrecy in many cases because requests for disclosure outside the bounds of Rule 6(e) are not problems of judicial administration as much as reflections of needs by parties outside the grand jury to access those materials. Problems of judicial administration, such as needing grand jury materials for other judicial or grand jury proceedings, already have enumerated exceptions, making the use of inherent

190. *See supra* Part II (arguing for a different reading based on the text, structure, and history of the rule).

191. *Cf.* BEALE ET AL., *supra* note 2, § 9:31 (saying, with respect to "general procedures [that] do not involve the interpretation or application of any procedural rule, statute, or constitutional provision," that "it is doubtful whether there is authority for supervisory power rulings of this nature that . . . impair the effectiveness, independence, or traditional functions of the grand jury").

192. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

193. *Id.* at 219.

authority unnecessary.[194] Judge-made exceptions may implicate the second limitation insofar as they circumvent the limiting language in the rule.[195] And as discussed in this Section, judge-made exceptions may very well run afoul of the third limitation.

C. Rule 6(e)'s Common Law History

Some courts using inherent authority to create exceptions to grand jury secrecy have justified doing so, in part, based on Federal Rule of Criminal Procedure 57(b). Entitled "Procedure When There Is No Controlling Law," the rule states that "[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."[196] Relatedly, grand jury secrecy is a common law doctrine that was later codified into Rule 6(e).[197] When the rule was first promulgated in 1944, the Advisory Committee recognized the common law history of the rule, explaining that the "rule continues the traditional practice of secrecy . . . except when the court permits a disclosure."[198] Before the rule was codified, courts relied on inherent authority to disclose grand jury materials when they deemed it appropriate.[199]

Courts have used this common law history in conjunction with Rule 57(b) to authorize disclosure outside of Rule 6(e). For example, in *Carlson v. United States*,[200] the Seventh Circuit noted it could not contradict an express rule under *Dietz*.[201] And because, in the court's view, Rule 6(e) does not expressly forbid creating new exceptions to grand jury secrecy, the court reasoned that, under Rule 57(b), it could use its inherent authority to authorize disclosure.[202] In addition, the

194. FED. R. CRIM. P. 6(e)(3)(C), (E)(i).

195. *See supra* Part II.A (discussing the rule's limiting language).

196. FED. R. CRIM. P. 57(b).

197. *See supra* Part I.B.

198. FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rule.

199. This was often framed in terms of judges' discretion. *See, e.g.*, United States v. Oley, 21 F. Supp. 281, 281 (E.D.N.Y. 1937) ("The court has power in its sound discretion to grant a motion for the inspection of grand jury minutes. This discretion should be rarely exercised."); *In re* Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa. 1933) (stating that grand jury secrecy is "relaxed . . . whenever the interest of justice requires," a "determination . . . rest[ing] largely within the discretion of the court").

200. Carlson v. United States, 837 F.3d 753 (7th Cir. 2016).

201. *Id.* at 762.

202. *See id.* at 763 (explaining that Rule 57(b) allows a court to authorize disclosure absent a "clear[] expression" of intent to abrogate a court's inherent authority (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 631 (1962))).

court quoted the 1944 Advisory Committee Notes, reading the phrase "except when the court permits a disclosure" as permission to craft exceptions to the rule.[203] Finally, the court noted that many of Rule 6(e)'s amendments codified exceptions created by courts using inherent authority.[204]

One way to read Rule 6(e) in light of its common law history is to compare it to common law statutes, which are often defined by two features.[205] First, they are built on the common law tradition, and second, they are written in "sweeping, general terms,"[206] leaving room for courts to define their content.[207] Although Rule 6(e) is not a statute per se, it is a rule promulgated by the Supreme Court and approved by Congress that carries the force of a statute.[208] And because rules carry similar force to statutes, rules that carry the same characteristics as common law statutes should be treated similarly.

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203. *See id.* at 765 (quoting FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rule). Although the 1944 Advisory Committee Notes use the "except when the court permits a disclosure" language, the 1944 rules already had exceptions requiring judicial authorizations. FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966). This could just as easily refer to those exceptions as to inherent authority to create disclosures.

204. *See Carlson*, 837 F.3d at 765 (explaining that the Committee has updated the rule "in response to court practices"); *In re* Kutler, 800 F. Supp. 2d. 42, 44–45 (D.D.C. 2011) (explaining that the "exceptions . . . have 'developed historically alongside the secrecy tradition'" such "that courts' authority regarding grand jury records reaches beyond Rule 6(e)'s literal wording" (quoting *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997))). *But see* McKeever v. Barr, 920 F.3d 842, 850 (D.C. Cir. 2019) ("[T]he district court has no authority outside Rule 6(e) to disclose grand jury matter."), *cert. denied*, 140 S. Ct. 597 (2020).

205. Treating a rule of criminal procedure as a common law statute is not unheard of. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1378 & n.84 (1988) (suggesting that *Harris v. United States*, 382 U.S. 162 (1965), was interpreting a common law statute). In *Harris*, the Court overturned an earlier precedent through an interpretation of Federal Rule of Criminal Procedure 42(a). *Harris*, 382 U.S. at 162–63, 167.

206. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting). *But see* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 90 (Shyamkrishna Balganesh ed., 2013) (arguing that neither trait particularly delineates common law statutes as a specific category).

207. *See* Lemos, *supra* note 206, at 95 (explaining that Congress writes common law statutes in broad terms so that "federal courts [will] interpret them by developing legal rules on a case-by-case basis in the common law tradition" (quoting *Guardians Ass'n*, 463 U.S. at 641 n.12)). The Sherman Antitrust Act is a classic example. *Id.*

208. *See* Bank of N.S. v. United States, 487 U.S. 250, 255 (1988) (holding that "Rule 52 is . . . as binding as any statute duly enacted by Congress, and federal courts" cannot disregard the Rule any more than they can "disregard constitutional or statutory provisions").

A statute built on the common law codifies a law developed by the courts over time.[209] A codification of common law "might signal an implicit delegation to courts" to continue developing the doctrine.[210] Rule 6(e)'s general secrecy rule codified long-standing common law.[211] And a number of the rule's amendments codified exceptions adopted by courts after the rule was first promulgated in 1944. For example, a 1977 amendment added an exception allowing disclosure to government personnel necessary to assist a government attorney with the enforcement of criminal law.[212] In the notes accompanying that amendment, the Advisory Committee cited *In re William H. Pflaumer & Sons, Inc.*,[213] in which the judge allowed disclosure of grand jury materials to IRS agents in connection with an investigation.[214] The Advisory Committee noted that the "trend seems to be in the direction of allowing disclosure" and codified the exception.[215]

In addition to being derived from the common law, these statutes are written in broad, sweeping terms, leaving room for courts to develop the doctrine.[216] One reading of the original 1944 Advisory

209. *See* Lemos, *supra* note 206, at 98–99 ("Most of the statutes that appear regularly on the 'common law' list codify legal principles that had been developed by the courts as common law.").

210. *Id.*; *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 43–44 (1985) (explaining that, absent specific intent otherwise, Congress codifying common law should be understood as a delegation of common law power to courts).

211. *See supra* note 1 and accompanying text; *see also supra* Part I.B.

212. FED. R. CRIM. P. 6(e) Senate Committee on the Judiciary's notes to 1977 amendment; *In re* Hastings, 735 F.2d 1261, 1268 (6th Cir. 1984) (describing the development of this amendment), *overruled by* Pitch v. United States, 953 F.3d 1226 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). See *Hastings* for another example regarding a 1983 amendment. *Id.* at 1268–69.

213. *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

214. *Id.* at 476–77 (providing "IRS agents access to the records so long as they remain under the aegis of attorneys for the government"). When *Pflaumer* was decided, Rule 6(e) allowed disclosure "to the attorneys for the government for use in the performance of their duties." FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977). But the focus was on *attorney* use, not on other government personnel. *Pflaumer*, and cases like it, allowed disclosure to *nonattorney* government personnel necessary to the attorney's work. Allowing disclosure to nonattorney government personnel was a recognition of the realities of the attorneys' work, but it was also a new exception to the secrecy norm. Seeing this trend, the Advisory Committee proposed to codify the exception into what is now Rule 6(e)(A)(ii). *See generally* FED. R. CRIM. P. 6(e) advisory committee's note to proposed 1977 amendment. The committee's proposal prompted Congress to rewrite Rule 6(e), but the rewriting ultimately included this new exception. *See supra* Part II.A.2.

215. FED. R. CRIM. P. 6(e) advisory committee's notes to 1977 amendment. See *supra* note 214 for the history of the Advisory Committee's proposed adoption of the rule, followed by Congress's rewriting.

216. *See supra* note 207 and accompanying text.

Committee Notes indicates the rule invited courts to further develop grand jury secrecy rules in precisely this way.[217] However, two considerations suggest that the current version of the rule is no longer written in broad, sweeping terms and no longer invites judge-made exceptions. First, as discussed earlier,[218] Congress rewrote Rule 6(e) in 1977 because the rule did "not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed."[219] The resulting rule included limiting language both with the general secrecy rule and with the exceptions, limiting disclosures to those listed in the rule.[220] Thus, Congress's intent to write a clear, specific rule may indicate that the 1977 rewriting was a break with the sentiment expressed in the 1944 Notes.

Second, the current language of the rule is detailed and specific. The general secrecy requirement includes limiting language pointing the reader forward to a set of specific, enumerated exceptions. The exceptions differentiate between those circumstances requiring judicial authorization and those that do not,[221] provide a specific set of rules governing disclosure for use in foreign intelligence and national security,[222] provide for disclosure from one grand jury to another,[223] and define cases in which those who receive disclosure are bound to secrecy.[224] And finally, the rule covers many instances where courts might authorize disclosure for the purposes of administrability.[225] This

217. The notes accompanying the original 1944 rules stated that Rule 6(e) "continues the traditional practice of secrecy on the part of members of the grand jury, except when a court permits a disclosure." FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rules. Some courts have interpreted the line "except when a court permits a disclosure" to be an invitation for courts to recognize new exceptions to grand jury secrecy when appropriate. *See, e.g.*, Carlson v. United States, 837 F.3d 753, 765 (7th Cir. 2016) (noting that the history of the rule and the same phrase from 1944 committee notes supported the court's conclusion that it could authorize disclosure outside the rule).

218. *See supra* notes 112–18 and accompanying text.

219. *See* H.R. REP. NO. 95-195, at 5 (1977) (noting the concerns of the House Judiciary Committee); *supra* note 115 and accompanying text.

220. *See supra* notes 117–118 18 and accompanying text.

221. *Compare* FED. R. CRIM. P. 6(e)(3)(A) (permitting certain disclosures without judicial authorization), *with* FED. R. CRIM. P. 6(e)(3)(E) (listing disclosures requiring the court's permission).

222. FED. R. CRIM. P. 6(e)(3)(D).

223. FED. R. CRIM. P. 6(e)(3)(C).

224. FED. R. CRIM. P. 6(e)(2)(B)(vii).

225. *See supra* note 194 and accompanying text.

specificity suggests courts should no longer treat Rule 6(e) as a common law statute.[226]

Many statutes leave gaps or ambiguous language implying a delegation of rulemaking authority to courts.[227] But that is categorically different than the type of language and rulemaking in focus here.[228] Creating an exception to Rule 6(e) to allow disclosure of historically significant grand jury materials, for example, does not resolve an ambiguous term or fill an obvious gap that currently exists in the rule.

Further, cases decided before the promulgation of the Federal Rules of Criminal Procedure now carry a different weight, to the extent their holdings conflict with the rules.[229] For example, *United States v. Socony-Vacuum Oil Co.*,[230] decided four years before the creation of the Federal Rules of Criminal Procedure, held that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[231] Rule 6(e) neither places a time limit on grand jury secrecy nor does it include an exception for disclosure where "the ends of justice require it."[232] Instead, the original 1944 rule established exceptions to grand jury secrecy specifying which ends warrant it.

The 1944 rule gave courts discretion to authorize disclosure "preliminarily to or in connection with a judicial proceeding,"[233] an

226. *See* McKeever v. Barr, 920 F.3d 842, 845 (D.C. Cir. 2019) (reasoning that Rule 6(e)'s specificity supports reading the rule as exhaustive, foreclosing the use of inherent authority), *cert. denied*, 140 S. Ct. 597 (2020); *see also* Pitch v. United States, 953 F.3d 1226, 1236 (11th Cir. 2020) (en banc) (saying the exceptions cannot be "merely precatory" because "[i]t is hard to imagine why Congress and the Rules Committee would bother to craft and repeatedly amend these detailed exceptions if they were meant only to be an illustration" and not exhaustive), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

227. *See* Lemos, *supra* note 206, at 95 (stating that in the absence of a governing agency, judges are left with the job of filling gaps and resolving ambiguities in statutes).

228. *See id.* at 90 (arguing the differences between developing a common law statute and merely resolving ambiguity and filling gaps is one of degree, not of categorical difference).

229. Regarding the "bootstrapping rule" in *Glasser v. United States*, 315 U.S. 60 (1942), the Court stated that "*Glasser* . . . w[as] decided before Congress enacted the Federal Rules of Evidence in 1975," which "now govern the treatment of evidentiary questions in federal courts." Bourjaily v. United States, 483 U.S. 171, 177–78 (1987).

230. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

231. *Id.* at 234; *accord* Carlson v. United States, 837 F.3d 753, 762 (7th Cir. 2016).

232. *Socony-Vacuum*, 310 U.S. at 234.

233. FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966) ("[A] juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury . . . when so directed by the court preliminarily to or in connection with a judicial proceeding . . . .").

exception that still exists today.[234] After the rules went into effect, the Court continued to use the "ends of justice" language, but then in connection with the judicial-proceedings exception. For example, in *Pittsburgh Plate Glass Co. v. United States*,[235] the Court authorized disclosure of grand jury materials to defense counsel for use on cross-examination.[236] The Court said that a judge could exercise discretion to allow grand jury minutes to be used at trial when the "ends of justice require it."[237] As an example of that longstanding use, the Court cited *United States v. Procter & Gamble Co.*,[238] which examined a request for discovery of grand jury materials in a civil case, that is, in a specific type of judicial proceeding.[239] Although the Court has continued to use language from cases predating the rules, this does not necessarily indicate that Rule 6(e) is a common law statute. Rather, the use of the language changed, becoming a way to define when courts should allow disclosure pursuant to the enumerated exceptions requiring judicial authorization.[240] Thus, although Rule 6(e) has historically been shaped by court precedent, the current rule is sufficiently different from the original 1944 rule that courts should hesitate before relying on the rule's common law history as a source of authority to formulate new exceptions.[241]

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234. FED. R. CRIM. P. 6(e)(3)(E) ("The court may authorize disclosure . . . preliminarily to or in connection with a judicial proceeding . . . .").

235. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). For a similar discussion of this case, see Gonzalez-Rivas, *supra* note 32, at 1683–85.

236. *Pittsburgh Plate Glass*, 360 U.S. at 400.

237. *Id.* (quoting *Socony-Vacuum*, 310 U.S. at 234).

238. United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

239. *See id.* at 678 (describing how defendants moved for discovery of grand jury minutes to use in preparation for trial).

240. *See* McKeever v. Barr, 920 F.3d 842, 846 (D.C. Cir. 2019) (explaining that *Pittsburgh Plate Glass* "plainly fell within the exception for use 'in connection with a judicial proceeding'" (quoting *Pittsburgh Plate Glass*, 360 U.S. at 396 n.1), *cert. denied*, 140 S. Ct. 597 (2020))); Pitch v. United States, 953 F.3d 1226, 1238 (11th Cir. 2020) (en banc) (same), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). *But see Pitch*, 953 F.3d at 1251, 1254 (Wilson, J., dissenting) (referencing *Pittsburgh Plate Glass* for the proposition that Rule 6 simply declares the common law rule that judges have discretion to order disclosure of grand jury materials). However, the particularized need test, *see supra* notes 82–86 and accompanying text, may have replaced the "ends of justice" analysis. Even so, the particularized need test is only invoked once a party has requested disclosure under one of the rule's enumerated exceptions.

241. For a different view of how Rule 6(e)'s common law history influences courts' supervisory authority, but which ultimately arrives at the same conclusion, see Gonzalez-Rivas, *supra* note 32, at 1682–83 (describing a "common law plus" conception of Rule 6(e) in which the rule codified the common law rules and thus "absorbed [any inherent] power" to authorize disclosure of otherwise secret materials (citing 2 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 18:2 (West 2d ed. 2019))).

In sum, courts have relied on inherent authority to authorize disclosure outside of the rule. They cite the rule's common law history as an invitation to do so in the absence of an explicit statement limiting their inherent authority, and they cite Rule 57(b) as further permission.[242] However, the grand jury's independence, the Court's restrictions on the use of inherent authority, and the uncertainty of Rule 6(e)'s status as a common law statute make it unclear that courts can justifiably rely on inherent authority to authorize disclosure outside the bounds of the rule.

IV. A RESIDUAL EXCEPTION TO RULE 6(E)

Regardless of whether courts may authorize disclosure outside of the enumerated exceptions, there may be instances where the need for disclosure for the sake of the public interest is so great or the interests of grand jury secrecy so diminished that disclosure might be warranted even when Rule 6(e) does not provide for it. Although the policy considerations that justify disclosure will vary with the circumstances, the Advisory Committee on Criminal Rules should clarify the law and provide flexibility and discretion to judges to address these situations by amending Rule 6(e). This Part surveys efforts to change the rule before arguing that the Advisory Committee should adopt a residual exception to the rule. It concludes by illustrating how a residual exception would function by reprising the earlier examples of requests for disclosure by Stuart McKeever and Congress.

A. Proposed Amendments to Rule 6(e)

In 2011, then-Attorney General Eric Holder proposed that the Advisory Committee amend Rule 6(e) to include an exception for materials of historical interest.[243] Holder explained that none of the rule's enumerated exceptions authorized the disclosure of grand jury records "based solely on the records' historical significance,"[244] but he argued that current doctrine allowing courts "unbounded discretion"

242. This Note, however, argues for a different reading of Rule 6(e)'s text. *See supra* Part II. If correct, Rule 6(e)'s limiting language may foreclose a line of reasoning that relies on Rule 57(b) as a source of authority.

243. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to the Hon. Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Crim. Proc. 5–9 (Oct. 18, 2011), https://www.uscourts.gov/sites/default/files/fr_import/11-CR-C.pdf [https://perma.cc/HP9L-R47H].

244. *Id.* at 2–3.

to "entertain motions for disclosure under their inherent authority" was "untenable."[245] Thus, he proposed adding an exception for historically significant grand jury records.

Holder's proposal contained several components. First, it divided records into separate age categories. Courts would not be able to hear requests for disclosure of records younger than thirty years old.[246] Records older than thirty years but younger than seventy-five years could be disclosed after a judge "determine[d] that the requirements of grand-jury secrecy are outweighed by the records' historical significance."[247] Records seventy-five years or older would automatically become available to the public under the standards for public records used by the National Archives and Records Administration ("NARA"), which would house the records.[248]

For those records in the thirty- to seventy-five-year age category, the proposal required courts, before authorizing disclosure, to find by a preponderance of the evidence that (1) the moving party only sought archived grand jury materials; (2) the materials have "exceptional" historical significance; (3) the case files have been closed for at least thirty years; (4) "no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions" or other reasonable means; (5) "disclosure would not impede any pending government investigation or prosecution;" and (6) there is no other public interest that warrants continued secrecy.[249] In addition, Holder maintained that these specific factors would not preclude looking at additional criteria, such as those already established in case law.[250]

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245. *Id.* at 5.

246. *Id.* at 6, 9.

247. *Id.* at 6.

248. *Id.*

249. *Id.* at 9.

250. *Id.* at 7. Holder refers to *In re Craig*, 131 F.3d 99 (2d Cir. 1997), as listing factors considered in "the paradigm examples of disclosure to date," such as the releases of "the Nixon, Rosenberg, and Hiss grand-jury testimony." *Id. Craig* provides the following "non-exhaustive" list:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Upon consideration, the Advisory Committee decided not to amend the rule.[251] In the discussion, the Committee noted that cases requesting disclosure were relatively rare, that district courts had appropriately resolved the cases under their inherent authority,[252] and that creating a nationally applicable rule was premature.[253] In addition, the subcommittee was concerned that creating a presumption of public availability after seventy-five years would be a major change to the presumption that grand jury records would always be "secret absent an extraordinary showing in a particular case."[254] And the subcommittee members agreed that NARA should not be "the gatekeeper for grand jury materials."[255]

After the Advisory Committee declined to act on Holder's proposal, the issue laid relatively dormant until 2020. When the Supreme Court denied certiorari in *McKeever v. Barr*, Justice Breyer wrote separately to highlight the question of courts' inherent authority to disclose grand jury materials outside of Rule 6(e).[256] Noting that the D.C. Circuit's decision created a circuit split, Justice Breyer wrote that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules . . . is an important question. It is one I think the Rules Committee both can and should revisit."[257] Shortly after Justice Breyer issued this statement, the Eleventh Circuit deepened the circuit split when it handed down *Pitch v. United States*.[258] The court's en banc decision overruled earlier precedent to hold that Rule 6(e) is

Id. at 106.

251. Memorandum from the Hon. Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Crim. Proc., to the Hon. Mark R. Kravitz, Chair, Standing Comm. on Rules of Prac. & Proc. 20 (May 17, 2012), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE - JUNE 2012, at 629, 648 (2012) [hereinafter Hon. Reena Raggi Memorandum], https://www.uscourts.gov/sites/default/files/fr_import/ST2012-06_Revised.pdf [https://perma.cc/GEG6-3H47] (agenda book).

252. Of course, this conclusion assumes the propriety of courts authorizing disclosure under their inherent authority. As this Note argues, however, that assumption may not be as settled as the Committee's conclusion indicates. *See supra* Part III.

253. Hon. Reena Raggi Memorandum, *supra* note 251.

254. Advisory Comm. on Crim. Rules, Draft Minutes 7 (Apr. 22–23, 2012), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE - JUNE 2012, *supra* note 251, at 653, 659.

255. *Id.*

256. McKeever v. Barr, 140 S. Ct. 597, 597–98 (2020) (statement of Breyer, J.).

257. *Id.*

258. Pitch v. United States, 953 F.3d 1226, 1241 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

exhaustive and exclusive and that district courts do not have inherent authority to act outside its bounds.[259]

At the same time, the Public Citizen Litigation Group and the Reporters Committee for Freedom of the Press, on behalf of themselves and other organizations, separately proposed amendments to Rule 6(e). First, the Public Citizen Litigation Group proposed amending Rule 6(e) along the same lines as the Holder proposal.[260] This new proposal was nearly identical to Holder's proposal except that it shifted the time frames involved. It would allow a court to authorize disclosure, under the same factors, after twenty years, not thirty, and would allow records to become public after sixty years.[261]

Second, the Reporters Committee for Freedom of the Press, on behalf of a number of news organizations, also proposed that the Advisory Committee amend Rule 6(e).[262] Instead of following the Holder proposal, the Reporters Committee's proposal was significantly broader, since it would apply both to historical records and to other issues of "public interest."[263] It is thus more like a residual exception of the type this Note advocates rather than an exception focused only on historical materials. As criteria for authorizing disclosure, the Reporters Committee proposed using the factors from the balancing test announced by the Second Circuit in *In re Craig*.[264] Those factors include considerations such as who is seeking disclosure, "whether the defendant to the grand jury proceeding or the government opposes the disclosure," "why disclosure is being sought," "what specific information is being sought," "how long ago the grand jury proceedings took place," and whether witnesses to the proceedings might be affected by the disclosure.[265]

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259. *Id.*

260. *See* Letter from Allison M. Zieve, Dir., Pub. Citizen Litig. Grp., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc. 10–11 (Mar. 2, 2020) [hereinafter Public Citizen Litigation Group Proposal], https://www.citizen.org/wp-content/uploads/PCLG-letter-to-Rules-Committee.pdf [https://perma.cc/CZ67-QLKF] (proposing an amendment to Rule 6(e)).

261. *Id.*

262. Letter from Reps. Comm. for Freedom of the Press to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc. 1 (Apr. 7, 2020) [hereinafter Reporters Committee Proposal], https://www.rcfp.org/wp-content/uploads/2020/04/4.7.2020-RCFP-Letter-to-Advisory-Committee.pdf [https://perma.cc/RR2M-RZS2].

263. *See id.* at 7 (proposing to amend Rule 6(e)(3)(E) to permit disclosure "on petition of any interested person for reasons of historical or public interest").

264. *Id.* at 2.

265. *In re* Craig, 131 F.3d 99, 106 (2d Cir. 1997). For the full list, see *supra* note 250.

In addition to these proposed exceptions, both groups suggested adding a blanket statement in Rule 6 that would read, "Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."[266] Although this general provision would supersede the textual indications that Rule 6(e) is the exclusive and exhaustive rule, it would not fully resolve the matter of inherent authority because it provides no affirmative grant of authority. By qualifying "inherent authority" with "whatever," the proposed provision assumes, without deciding, that such inherent authority exists. Further, the term "whatever" leaves the quantum of authority indeterminate.[267] As such, it provides no guidance on how much inherent authority district courts actually have over grand jury procedure. Because courts' inherent authority to disclose grand jury materials outside of Rule 6(e) is unsettled and perhaps very limited,[268] the proposed phrasing would do no more than push the question beyond the text of the rule itself.

Thus, with respect to historically significant grand jury materials, the Public Citizen Litigation Group proposal would resolve the current circuit split. However, with respect to courts' inherent authority to disclose grand jury materials in other circumstances,[269] the proposal pushes the discussion beyond the text of the rule but does not clarify the law. Because of its broader scope, the Reporters Committee's proposal functions more as a residual exception and so would be more successful since it would give courts not only guidance and clarity but an affirmative grant of authority in a wide range of circumstances. As a result, the need for a separate provision about inherent authority would be diminished, since it would only need to be invoked for circumstances not falling under the "historical or public interest."[270]

266. *Compare* Public Citizen Litigation Group Proposal, *supra* note 260, at 11 ("Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."), *with* Reporters Committee Proposal, *supra* note 262 (using nearly identical language).

267. *See Whatever*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/228087 [https://perma.cc/4DT9-ZPTA] (defining whatever, when used "[a]s nominal relative, in a generalized or indefinite sense," to be an adjective indicating "[a]ny . . . at all").

268. *See supra* Part III.B.

269. Requests by Congress are an example of another circumstance where courts might be asked to rely on inherent authority but for which a clear grant of authority would be helpful. *See infra* Part IV.B.2.

270. *See* Reporters Committee Proposal, *supra* note 262 (proposing an amendment granting explicit authority to disclose materials "of historical or public interest").

B. Proposal for a Residual Exception

The Advisory Committee should add a residual exception to Rule 6(e) rather than an exception focused only on historical grand jury materials. A residual exception would provide courts with discretion to order disclosure of historically significant records and offer flexibility in other unforeseen circumstances. Residual exceptions are already used in other areas of the law, such as in the evidentiary hearsay rules.[271] Adding one to Rule 6(e) would have the benefit of giving courts a clear, affirmative source of authority on which to rely when considering whether to authorize a disclosure not otherwise covered by an exception to Rule 6(e). Moreover, it would do so while avoiding the need for courts or the Advisory Committee to decide the source and scope of courts' inherent authority over grand jury procedure. Finally, adding a residual exception is important because unless a disclosure falls under an exception not requiring judicial authorization, all other disclosures must be authorized by the court. As a result, if there is no clear authority on which to authorize disclosure outside the current exceptions, some grand jury materials may remain secret despite great public interest in their disclosure.

A residual exception would also guide courts and parties seeking disclosure about how to approach the decision. First, a residual exception could ask judges to consider whether disclosure would be contrary to the policies supporting grand jury secrecy.[272] This ensures that the disclosure would not contravene implicit rules vital to the grand jury's core functioning.[273] Second, the rule could ask courts to consider whether disclosure would serve the "ends of justice,"[274] invoking the language used by the Supreme Court both before and after the original promulgation of Rule 6(e).[275] Finally, the rule could require courts to use the particularized need test, thus keeping the exception consistent with the way disclosures under the other exceptions are already adjudicated. The moving party would have to show that the need for continued disclosure outweighs the need for

271. *See, e.g.*, FED. R. EVID. 807 (providing a "Residual Exception" and allowing admission of otherwise inadmissible hearsay if a judge determines the hearsay to be sufficiently probative and trustworthy).

272. *See supra* Introduction (listing policies underlying grand jury secrecy).

273. This factor attempts to bring the residual exception within the guidance given by the Supreme Court in *United States v. Williams*. For a discussion of *Williams*, see *supra* Part III.B.

274. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

275. *See supra* Part III.C.

secrecy and that the request is tailored to include only the materials needed.[276] This balancing test encompasses the considerations set out in *Craig*, but expressly stating those factors in Rule 6(e) might provide greater clarity.[277]

Reprising two earlier examples illustrates how a residual exception could operate.

1. *Stuart McKeever's Request for Disclosure*. A residual exception could have been used to decide whether to release grand jury materials to Stuart McKeever to aid his research into the murder of Professor Galíndez. First, disclosure of sixty-year-old grand jury materials probably would not undermine any core rules necessary to the functioning of a grand jury. After all, the investigation into Agent Frank had long finished, and most people associated with the case are probably no longer alive. However, setting a precedent that materials might be disclosed, even after sixty years, could make witnesses in future investigations less forthcoming and candid, thus impeding the functioning of future grand juries.

Second, the ends of justice are served by disclosure. If the materials would help to solve the disappearance and murder of Professor Galíndez, then justice is served, even if it is long overdue. Finally, if McKeever's request was tailored specifically to materials pertaining to Professor Galíndez or circumstances surrounding his disappearance and murder, and McKeever could show that such information was not reasonably obtainable by some other source, then there would be a particularized need for disclosure. In this case, analysis under a residual exception would probably favor disclosure, especially given the age of the materials in question.

2. *Requests for Disclosure by Congress*. Requests for disclosure of more contemporaneous grand jury information could also be considered under a residual exception. For example, the need for Congress to have access to grand jury materials for the sake of an investigation might be important to the public interest. Yet there is no general exception allowing disclosure to Congress within Rule 6(e). Currently, Congress's primary access to grand jury materials is through

276. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979). Though the *Douglas Oil* test has a prong for whether the material "is needed to avoid a possible injustice in another judicial proceeding," this prong would unduly narrow a residual exception. *Id.*

277. For a list of the *Craig* factors, see *supra* note 250.

an impeachment inquiry—such as those of Presidents Nixon and Trump—which courts have held to fall under the exception allowing disclosure preliminarily to or in connection with a judicial proceeding.[278]

Yet there may be other times when it would be valuable, and in the public interest, for Congress to have access to grand jury records.[279] Although Congress has its own broad investigative power and could have the same witnesses testify that appeared before the grand jury,[280] disclosure of grand materials might still be warranted. For instance, an impeachment is a grave undertaking. Allowing a House committee to see a select portion of grand jury materials in advance of an inquiry might either justify or allay concerns that the impeachment inquiry is necessary. But this might not fall under an exception in Rule 6(e) because it might not yet be preliminary to a judicial proceeding.

Congress might also seek disclosure of grand jury materials outside the impeachment context. For example, in the late 1970s, the Department of Justice used a grand jury to investigate whether Gulf Oil was in violation of the Sherman Act for participating in uranium price fixing.[281] Although prosecutors recommended indictments, the grand jury returned none. Instead, an information was filed against the company, which pleaded nolo contendere to a misdemeanor violation of the Act.[282] Concerned about this outcome, the Senate Judiciary

278. *See, e.g.*, *In re* Application of Comm. on the Judiciary, 414 F. Supp. 3d 129, 137, 147, 182 (D.D.C. 2019), *aff'd*, 951 F.3d 589 (D.C. Cir. 2020) (authorizing disclosure of Mueller grand jury materials to the House Judiciary Committee in connection with its impeachment inquiry regarding President Trump), *cert. granted*, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020); *see also* Haldeman v. Sirica, 501 F.2d 714, 716–17 (D.C. Cir. 1974) (MacKinnon, J., concurring in part, dissenting in part) (suggesting that disclosure of grand jury materials to the House during Watergate could be justified as "being made 'preliminarily to [and] in connection with a judicial proceeding'" (alteration in original) (quoting FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977))); McKeever v. Barr, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019) (adopting Judge MacKinnon's view in *Haldeman*), *cert. denied*, 140 S. Ct. 597 (2020).

279. Rule 6(e)(3)(D) authorizes disclosure, without needing judicial authorization, of foreign intelligence and counterintelligence related to "federal law enforcement, intelligence, protective, immigration, national defense, or national security official[s]." FED. R. CRIM. P. 6(e)(3)(D). Members of Congress may perhaps fit under this exception in some situations.

280. *See* FOSTER, *supra* note 8, at 35–36 (surveying Congress's investigative power).

281. William E. Weinberger, Note, *Congressional Access to Grand Jury Transcripts*, 33 STAN. L. REV. 155, 155 (1980).

282. *Id.* For context, an "information" is a criminal charge brought by a prosecutor without an indictment by a grand jury. *See Information*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the federal context, misdemeanors can be charged by indictment, information, or complaint. *See* FED. R. CRIM. P. (7)(a)(1)(B), 58(b)(1).

Subcommittee on Antitrust investigated whether foreign government influence or some limitation in antitrust law had prevented the grand jury from returning felony indictments.[283] The subcommittee brought Assistant Attorney General John Shenefield to testify before the full Senate Judiciary Committee.[284] Shenefield refused to discuss the investigation, citing grand jury secrecy.[285] The District Court for the District of Columbia then denied disclosure of grand jury records to the Judiciary Committee on grounds that it did not fit within any enumerated exception.[286]

If this were happening now, disclosure to investigate foreign government influence might fall under the exception allowing disclosure of matters related to foreign intelligence and national security.[287] However, this would not cover materials related to defects in antitrust law. Under a residual exception, a court could consider this request. Whether the ends of justice favored disclosure might turn on whether the congressional investigation was connected to a "valid legislative purpose."[288] Further, the court could consider whether the request was tailored to the legislative purpose and whether similar information could not be obtained from other sources, thus indicating a particularized need for the disclosure. Finally, the court could weigh whether disclosure to Congress would impair the proper functioning of the grand jury. In this case, it would probably be a close call. On the one hand, disclosure might chill corporate cooperation with grand jury proceedings and lead to less than full and frank testimony in the future. On the other hand, a disclosure tailored to Congress's needs might minimize the adverse impact on future grand juries.

283. Weinberger, *supra* note 281, at 155.

284. *Id.*

285. *Id.*

286. *Id.* at 156–57.

287. FED. R. CRIM. P. 6(e)(3)(D). This was added in 2002 as part of the USA PATRIOT Act of 2001. FED. R. CRIM. P. 6(e)(3)(D) advisory committee's notes to 2002 amendment.

288. FOSTER, *supra* note 8, at 35–36. Foster notes that although in other contexts a "valid legislative purpose" may protect a congressional committee from judicial scrutiny under the Speech and Debate Clause, this has only twice been successfully used to justify disclosing grand jury materials. *Id.* 35–39 (first citing *In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1307 (M.D. Fla. 1977); and then citing *In re* Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075 (S.D. Fla. 1987)). Foster further notes that the D.C. Circuit and the Department of Justice take the position that grand jury materials may only be released to Congress if Rule 6(e) permits. *Id.* at 38–39. Because in other contexts a valid legislative purpose gives weight to congressional investigations, analysis under a residual exception might properly consider whether Congress's request is in pursuit of such a purpose.

CONCLUSION

Secrecy is a long-standing part of grand jury procedure and is integral to its proper functioning. Although grand jury secrecy began as a common law rule, it is now codified in Rule 6(e), which, by its text and evolution, covers the field of grand jury secrecy and the departures from it. Beyond Rule 6(e), courts have limited inherent authority to craft new exceptions to the rule. Nevertheless, historical and current practice in many circuits is to authorize disclosure outside the rule when, in the judge's discretion, such disclosure is warranted. The tension this creates between doctrine and practice renders the law of grand jury secrecy unsettled. The Advisory Committee should settle the law by adding a residual exception to Rule 6(e). Doing so would provide a clear grant of authority for courts to authorize disclosure while also giving courts and litigants guidance on what to consider when making a disclosure determination.

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April 30, 2021

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 Marion E. Pitch, personal representative of the Estate of Anthony S. Pitch, and Laura Wexler ("Petitioners"), petitioners who have sought disclosure of the grand jury materials of the grand jury convened in December 1946 in connection with the Moore's Ford Lynching which occurred within the vicinity of Monroe, Georgia on July 25, 1946, our office[1] is writing to propose an amendment to Federal Rule of Criminal Procedure 6(e) ("Rule 6" or "Rule 6(e)"). This proposal is also provided in response to the submissions of the Public Citizen Litigation Group ("Public Citizen"), Reporters Committee for Freedom of the Press ("Reporters Committee"), and the United States Department of Justice ("Department of Justice"). Petitioners hereby advance a proposed amendment to Rule 6(e) which would explicitly recognize: (1) the District Court's authority to order the disclosure of grand jury materials in cases of historical significance; and (2) a residual exception authorizing such disclosure under other exceptional circumstances; and (3) codifying the District Court's inherent supervisory authority. Like Public Citizen and the Reporters Committee, Petitioners support an amendment to Rule 6(e). Petitioners propose an amendment that expands on the proposal of the Reporters Committee by accounting for the most recent developments in jurisprudence in this area of the law and adding a residual exception to supplement the proposed amendment which codifies the factors set forth in the case *In re Petition of Craig for Order directing Release of Grand Jury Minutes ("In re Craig")*, 131 F.3d 99 (2d Cir. 1997).

[1] Petitioners' attorneys at Bell & Shivas, P.C., in Rockaway, New Jersey, Joseph J. Bell, Esq., Hon. Paul W. Armstrong, J.S.C. (Ret.), retired Judge of the Superior Court of New Jersey, and Brian C. Laskiewicz, Esq., are all admitted to practice before the United States Supreme Court and in several jurisdictions, including the Bar of the State of New Jersey. Counsel gratefully acknowledges the assistance of Irene Karsos, law clerk, Seton Hall University School of Law, Juris Doctor Class of 2021 and candidate for the July 2021 Universal Bar Exam.

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Introduction

Our office represents Petitioners, who have long sought disclosure of the above-referenced grand jury materials in connection with research into the Moore's Ford Lynching. Marion E. Pitch is the representative of the Estate of the Late Anthony S. Pitch, a noted historian who passed away on June 29, 2019, and whose works include a 2016 book on this heinous crime, *The Last Lynching: How a Gruesome Mass Murder Rocked a Small Georgia Town.* Laura Wexler is also a noted historian who authored a 2003 book on the same subject, entitled *Fire in a Canebrake: The Last Mass Lynching.* The Moore's Ford Lynching involved the killing of two (2) African-American couples during the onset of the modern Civil Rights Movement by a group of assailants estimated to be over twenty-five (25) in number. This crime generated national outrage, the establishment of a Civil Rights Commission by President Harry S. Truman, commentary by NAACP Counsel and future United States Supreme Court Justice Thurgood Marshall, a letter to the editor of *The Atlanta Journal Constitution* newspaper from then-student Martin Luther King, Jr., an investigation by the Federal Bureau of Investigation ("FBI"), and convening of the grand jury in district court which failed to bring about any justice for the victims in spite of numerous interviews and over 100 witnesses testifying. *See* Anthony Pitch, *The Last Lynching* 48-49, 56, 120-121; Laura Wexler, *Fire In A Canebrake* 190; Executive Order 9808 (President Harry Truman, Dec. 5, 19460; Letter from Thurgood Marshall, NAACP General Counsel to Attorney General Tom Clark, Dec. 27, 1946, NAACP Records, Library of Congress; Letter from Martin Luther King, Jr., to Editor, *The Atlanta Constitution*, published Aug. 6, 1946; Moore's Ford Grand Jury Decision, Dec. 19, 1946.

As part of their research, both historians sought disclosure of the records of the grand jury convened in December 1946, which constitute the last unexamined portion of the historical record in order to provide insight into this shocking act. This petition was initially brought in the United States District Court for the Middle District of Georgia, where the Court ordered the disclosure of the grand jury materials in 2017 due to its historical significance and the inherent supervisory authority of the District Court. A panel of the United States Court of Appeals for the Eleventh Circuit initially affirmed in February 2019, before the full panel ultimately reversed in an opinion dated March 27, 2020. *See Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 624 (2020). Petitioners sought review by the United States Supreme Court, where their petition for a writ of certiorari was denied on October 19, 2020. *See Pitch v. United States*, 141 S. Ct. 624 (2020).

This denial occurred within an ever-evolving legal landscape concerning grand jury secrecy. Federal Courts have developed a Circuit Split on the issue of whether a District Court has the inherent authority to order the disclosure of grand jury records, including transcripts, outside the explicit exceptions allowing disclosure contained within Rule 6(e). The United States Supreme Court's denial of a similar petition in the case of *McKeever v. Barr* in January 2020 included a statement by Justice Stephen Breyer recognizing a circuit split and suggesting that Rule 6(e) be reevaluated following these developments. *See McKeever v. United States*, 539 U.S. __, 2020 WL 283746 (2020) (Breyer, J., concurring). On a legislative track, the recently-enacted Civil Rights Cold Case Records Collection Act of 2019 ("Cold Case Act") authorizes the creation of a Cold Case Commission to collect and disclose records relating to civil rights criminal cold cases

occurring between 1940 and 1979. The Cold Case Act, however, does not explicitly include grand jury materials in its definition of records, does not create a private right of action, and is dependent on appropriations, appointments, and completion of work within four (4) years of enactment. The Cold Case Act also has no applicability to historically significant cases or exceptional circumstances outside of civil rights cold cases as defined in the Act. Notably, the enactment of the Cold Case Act supports the existence of inherent supervisory authority by district courts with respect to Rule 6(e). *See* Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019) (codified at 44 U.S.C. § 2107); *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), at 1250, n. 2 (Jordan, J., concurring in the judgment), at 1263-1264 (Rosenbaum, J., dissenting), *cert. denied*, 141 S. Ct. 624 (2020)

Against this backdrop, Petitioners advance the instant proposed revision of Rule 6(e). Petitioners recognize and commend the proposals submitted by Public Citizen, the Reporters Committee, and the Department of Justice. Petitioners' proposed amendment differs from those of Public Citizen and the Department of Justice, both of which contain proposed exceptions based in significant part on specific time-based restrictions. Rather, Petitioners seek an amendment such as proposal of the Reporters Committee, supplemented with additional language. Petitioners' proposal includes revisions which would explicitly recognize both an exception authorizing disclosure of grand jury records in historically significant cases based upon factors listed in the case *In re Craig* and a residual exception for disclosure in exceptional circumstances. Petitioners also propose not only that the inherent supervisory authority of the District Court not be limited by Rule 6, but rather, that the existence of such authority be specifically recognized, as several Circuit and District Courts have done.

Rule 6(e) should clearly set forth an exception for disclosure of records in cases of historical significance.

The Federal Rules Committee on Criminal Procedure ("Advisory Committee") should promulgate a change to Federal Rule of Criminal Procedure 6(e)(3) to allow for an exception for the disclosure of grand jury records in cases of historical significance. This is because historic significance outweighs the public interest in secrecy the rule intends to safeguard.

Federal Rule of Criminal Procedure 6 governs grand jury proceedings and records in Federal District Courts, including grand jury secrecy. *See* Fed. R. Crim. P. 6(c), 6(d), 6(e); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973). This Rule provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). Under this Rule, specific persons must "not disclose a matter before the grand jury" "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e) lists five (5) "Exceptions" to the secrecy imposed, including authorizing disclosure "preliminarily to or in connection with a judicial proceeding", to a defendant where such records may provide grounds for dismissal of an indictment due to "a matter before the grand jury", or to the government regarding other criminal investigations. Fed. R. Crim. P. 6(e)(3).

Rule 6(e) is tellingly silent regarding the authority of the District Court to release grand jury records in other circumstances. Rule 6(e) states that, "[u]nless these rules provide otherwise,

the following persons must not disclose a matter occurring before the grand jury" before listing certain specific persons, which do not include the Court itself. Fed. R. Crim. P. 6(e)(2).

Importantly, several District Courts have ordered the release of such records in matters involving historical significance under their inherent supervisory authority. The Second and Seventh Circuits have held that under Rule 6(e), District Courts retain the inherent supervisory authority to release grand jury records under exceptional circumstances where the interest in disclosure far outweighs the continuing need for secrecy, including in matters of historical significance, great public interest, and the passage of time. *See In re Petition of Craig for Order Directing Release of Grand Jury Minutes ("In re Craig")*, 131 F.3d 99 (2d Cir. 1997); *Carlson v. United States,* 837 F.3d 753 (7th Cir. 2016). Additionally, the First and Tenth Circuits have recognized the inherent supervisory authority of District Courts under other circumstances. *See In re Grand Jury Proceedings*, 417 F.3d 18, 20 (1st Cir. 2005), *cert. denied*, 546 U.S. 1088 (2006); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1178 (10th Cir. 2006). The First Circuit precedent governs an appeal wherein noted historian Jill Lepore is currently seeking access to records of the Boston 1971 Grand Jury convened in the Pentagon Papers case, where the United States District Court for the District of Massachusetts ordered disclosure of same. *See In re Petition of Lepore*, Case No. 1:18-mc-91539 (D. Mass. judgment entered June 23, 2020), *on appeal*, 1st Cir. Case No. 20-1836. This result is entirely consistent with the Rule, which prevents the court from imposing any "obligation of secrecy ... except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). Although Rule 6(e) does not specify a temporal endpoint on grand jury secrecy, the listed exceptions establish that temporal limits exist on a case-by-case basis. *See* Fed. R. Crim. P. 6(e)(3).

The need for a revision to Rule 6(e) arises due to the existence of a split among the Circuit Courts of Appeal concerning the inherent supervisory authority of the District Court. Decisions in the DC., Eleventh, Eighth, and Sixth Circuits have opined that District Courts lack the authority to disclose grand jury records in exceptional circumstances outside of the five (5) enumerated exceptions set forth in Rule 6(e). *See McKeever v. United States*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 539 U.S. __, 2020 WL 283746 (2020) (Breyer, J., concurring); *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 624 (2020); *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009); *In re Grand Jury 89-4-72*, 932 F.2d 481 (6th Cir. 1991). It is this very split which is ripe for consideration by the Committee. *See McKeever v. United States*, 539 U.S. __, 2020 WL 283746 (2020) (Breyer, J., concurring).

The cases contemplated by this proposed amendment arise very infrequently in relation to the total number of cases involving grand juries. Indeed, District Courts have ordered disclosure of grand jury materials in cases of historical significance in a handful of instances. The small number of authorized grand jury disclosures provides evidence of the public interest in such disclosures. *See Carlson*, 837 F.3d at 756-757 (major intelligence leak during World War II); *In re Petition of Am. Historical Ass'n et al. for Order Directing Release of Grand Jury Minutes*, 49 F. Supp.2d 274, 278-279, 291-297 (S.D.N.Y. 1999) (espionage for the Soviet Union); *In re Petition of Kutler*, 800 F. Supp.2d, 42-44, 48-49 (D.D.C. 2011); *In re Petition of Tabac*, 2009 WL 5213717 (M.D.Tenn., April 14, 2009) (indictment of James Hoffa).

Furthermore, the presumption of grand jury secrecy is not absolute, and secrecy should diminish whenever it outlives its usefulness and public interest in disclosure becomes favored, a position which was acknowledged by the Department of Justice upon proposing its own amendment to Rule 6(e) in October 2011. *See, e.g., In re Craig* at 131 F.3d at105; *see also* Letter from Hon. Eric H. Holder, Jr., Att'y Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Oct. 18, 2011)[2]; Advisory Comm. on Crim. Rules, Agenda Book at 222 (Apr. 2012) (acknowledging that "the public's interest in access to the primary-source records of our national history" will occasionally "overwhelm any continued need for [grand jury] secrecy", quoting *In re Craig*, 131 F.3d at 105)[3]. After the Advisory Committee declined to recommend an amendment, the Department of Justice indicated that it would maintain a policy of objecting to petitions based upon inherent authority, while believing that under appropriate circumstances that disclosure may be permitted. *See* Advisory Comm. on Criminal Rules of the U.S. Courts, Minutes of Apr. 22-23, 2012 ("April 2012 Minutes") at 8.[4] In reviewing the Department of Justice's proposed amendment and ultimately declining to recommend same, the Advisory Committee weighed all available evidence in concluding that inherent supervisory authority did exist and was being employed carefully with appropriate discretion by District Courts. *See* April 2012 Minutes at 7; Comm. on Rules of Practice and Procedure, Minutes of June 11-12, 2012 at 44.[5]

Accordingly, Petitioners propose an amendment to Rule 6(e) which encompasses the list of factors set forth by *In re Craig*. In this respect, Petitioners adopt the proposal set forth by the Reporters Committee, as District Courts are particularly well-situated to weigh and balance the factors to determine whether exceptional circumstances exist which would warrant disclosure of grand jury materials in cases involving historical significance. The relatively small number of such disclosures as set forth above demonstrate that District Courts have exercised a high level of caution and discretion with respect to such disclosures. Petitioners agree with such proposal in the belief that a bright-line time-based rule may bring about an arbitrary outcome. By way of example, a rule authorizing disclosure of historically significant grand jury materials after fifty (50) years have elapsed could lead to the result where records of a historically significant case are *per se* unavailable until the elapse of fifty (50) years to the date. Such an outcome may fail to weigh factors which might warrant an earlier disclosure or impact pending litigation where historically significant grand jury materials are nearing such age.

Such a rule would resolve the Circuit Split and provide for disclosure in the relatively narrow range of historically significant cases, including with respect to the factual questions presented in Moore's Ford Lynching case. Such an amendment would also be extremely useful to the public's interest in any other cases of historical significance wherever disclosure may outweigh the interest in continued secrecy under the general rule of grand jury secrecy.

Rule 6(e) should clearly set forth a residual exception for disclosure of records.

The Federal Rules Committee on Criminal Procedure should additionally promulgate a change to Federal Rule of Criminal Procedure 6(e)(3) to allow for a residual exception for the

[2] Available at http://www.uscourts.gov/sites/default/files/fr_import/11-CR-C.pdf.
[3] Available at https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.
[4] Available at http://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2012.pdf.
[5] Available at http://www.uscourts.gov/sites/default/files/fr_import/ST06-2012-min.pdf.

disclosure of grand jury records. This is because historic significance as well as certain other situations, some perhaps not yet encountered by the courts, outweigh the public interest in secrecy the rule intends to safeguard. The Supreme Court maintains that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (S. Ct. 1979). That secrecy safeguards vital interests in (1) preserving the willingness and candor of witnesses called before the grand jury; (2) not alerting the target of an investigation who might otherwise flee or interfere with the grand jury; and (3) preserving the rights of a suspect who might later be exonerated. *See id.* at 219. In *United States v. Sells Engineering*, the Supreme Court said "both the Congress and [the Supreme] Court have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized." 463 U.S. 418 (1983). It is important to distinguish, however, between unwarranted and necessary "intrusion" into grand jury records.

The lack of access to grand jury records has been detrimental to many cases throughout history. In *McKeever v. Barr*, a researcher filed a petition requesting release of grand jury records in investigation of a former FBI agent arising from agent's alleged work for foreign government. The Court of Appeals held that the District Court did not possess the requisite inherent authority to disclose grand jury records, the Supreme Court denied certiorari, and thus an investigation into the historical circumstances surrounding a disappearance and potential murder was hindered. *See McKeever v. United States*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 539 U.S. __, 2020 WL 283746 (2020).

Historically, perhaps no cases have been negatively impacted quite like *Pitch v. United States*. In *Pitch*, a historian petitioned for an order unsealing federal grand jury transcripts concerning the murder of four (4) African-Americans in the "Moore's Ford lynching." *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 624 (2020). The United States District Court for the Middle District of Georgia granted the petition, and the Government appealed. *See id.* On rehearing en banc, the Court of Appeals held that District Courts lack inherent supervisory power to authorize the disclosure of grand jury records outside of the enumerated exceptions contained in Federal Criminal Role of Procedure 6(e), overruling *In re Petition to Inspect and Copy Grand Jury Materials (In re Hastings)*, 735 F.2d 1261 (11th Cir. 1984). *Id.* The Supreme Court denied certiorari. *See Pitch v. United States*, 141 S. Ct. 624 (2020). This holding by the Eleventh Circuit followed by the denial of certiorari have had an extremely detrimental effect on society and the healing and evolution of the individuals damaged by the Moore's Ford Lynching. The Court maintains that secrecy safeguards the willingness of individuals to testify as well as their safety by promoting secrecy, but surely it cannot intend to do this to the detriment of innocent citizens whose healing is contingent on disclosure of certain records. An amendment to the rule would allow the Court to continue to safeguard the protections offered by secrecy without having to choose between doing this and releasing records of such importance under narrow, limited circumstances.

Besides cases in which individuals seek grand jury records for situations involving historical significance, such as *McKeever* and *Pitch*, allowing a residual exception beyond the list enumerated in Federal Rule of Criminal Procedure 6(e) would have broader benefits as well. There are situations in which Congress or another judicial or quasi-judicial body needs access to grand

jury records and cannot obtain them, and this residual exception would allow for such access. *See Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (Watergate grand jury report provision to House Judiciary Committee); *In re Petition to Inspect and Copy Grand Jury Materials (In re Hastings)*, 735 F.2d 1261 (11th Cir. 1984) (grand jury records of indictment of District Judge Alcee Hastings provided to Judicial Investigating Committee of the Eleventh Circuit); Brent McKnight, *Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy*, 70:451, Duke Law Rev. 451, 488 (2020) (examining issue in relation to grand jury records and Mueller Report).

In addition to satisfying the need for disclosure in situations involving historical significance and in cases of need by Congress, a residual exception would also solve a current Circuit Split surrounding the issue. Several Circuits' holdings align with those of the *McKeever* Court while others disagree. The holdings of *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 624 (2020), *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009), and *In re Grand Jury 89-4-72*, 932 F.2d 481 (6th Cir. 1991) align with the holding of *McKeever*. Conversely, the decisions in *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016), and *In re Craig*, 131 F.3d 99 (2d Cir. 1997), and *See In re Grand Jury Proceedings*, 417 F.3d 18, 20 (1st Cir. 2005), *cert. denied*, 546 U.S. 1088 (2006) all favor disclosure of grand jury materials under exceptional circumstances.

There have been prior proposed amendments to Federal Rule of Civil Procedure 6(e). In 2011, there was a proposal for the rule to be amended to include a historical interest exception. Then-Attorney General Eric Holder wrote a letter to the Advisory Committee on the Criminal Rules ("Committee") suggesting that the rule making it a crime to disclose grand jury information should be amended to allow courts to lift the veil of secrecy from transcripts that are at least thirty (30) years old if disclosure would not affect any still-living witness or investigative target. *See* Charlie Savage, *U.S. Urges Opening Up Old Grand Jury Record*, The New York Times (Oct. 19, 2011).[6] He also proposed allowing all grand jury materials that are deemed historically significant and that are at least seventy-five (75) years old to be made public through the National Archives, without any need for a court review. *See id.* It was noted by Attorney General Holder that, although there are good reasons for the strong emphasis Courts place on grand jury secrecy, "they do not forever trump all competing considerations. 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." *Id.*

Despite Attorney General Holder's efforts, the Committee denied his proposal for various reasons: (1) the Committee reasoned that cases requesting disclosure of grand jury records were rare; (2) District Courts had appropriately resolved the cases under their inherent authority; (3) a nationally-applicable rule was premature; (4) the seventy-five (75)-year-old public availability presumption would be too much of a change to the presumption that grand jury records would be kept secret; and (5) the National Archives and Records Administration ("NARA") should serve as

[6] Available at https://www.nytimes.com/2011/10/20/us/politics/administration-proposes-opening-up-more-historic-grand-jury-transcripts.html.

a gatekeeper for grand jury materials. *See* Brent McKnight, *Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy*, 70:451, Duke Law Rev. 451, 488 (2020).

The instant proposal for a residual exception to Federal Rule of Criminal Procedure 6(e) disagrees with the reasons given for the denial of Attorney General Holder's proposal, namely reasons numbered one (1), two (2), three (3), and five (5) above. Although cases requesting disclosure of grand jury records are rare, as set forth in the first reason for the Committee's rejection, this does not diminish their significance by any means, and thus this reason for denying disclosure should fail. Regarding the second reason given by the Committee, this reason no longer stands since the Supreme Court's denial of certiorari in *Pitch* and *McKeever*. The Court refused to review the Eleventh and D.C. Circuits' holdings that District Courts lack the inherent authority to release grand jury records, and thus in numerous Circuits this is the case. After these denials of certiorari, Justice Breyer issued a statement suggesting that the Rules Committee should revisit the issue of District Courts' authority to release grand jury records, going as far as saying that the denials of certiorari by the Court seem to conflict with the views of the Rules Committee. *McKeever v. Barr*, 140 S. Ct. 597 (2020) (Breyer, J., concurring). In regards to the third reason, a nationally applicable rule is not premature, as the Eleventh, D.C., Eighth, Sixth, Seventh, Second, and First Circuits have all addressed the issue. Lastly, an amendment to the rule would not affect NARA's role as a gatekeeper. An amendment would merely allow for Courts to explicitly exercise discretion over whether disclosure is necessary in "rare" circumstances of significance, and Congress would favor such an exception given its intent that protection of the records only be enforced in certain limited circumstances.

Attorney General Eric Holder is far from being the only person or entity to suggest that Rule 6(e) is in need of an amendment. In 2020, Public Citizen and the Reporters Committee each proposed an amendment to Rule 6(e). *See* McKnight, *supra*, at 489. Public Citizen's proposal matched that of Attorney General Holder's 2011 proposal, except it shifted the time frames involved, and the Reporters Committee made a broader proposal that would apply to both historical records and public interest issues, proposing the use of the balancing factors given by the Court in the case *In Re Craig*. *See id.* The factors include considerations such as who is seeking disclosure, "whether the defendant to the grand jury proceeding or the government opposes the disclosure," "why disclosure is being sought," "what specific information is being sought," "how long ago the grand jury proceedings took place," and whether witnesses to the proceedings might be affected by the disclosure. *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997); Reporters Committee proposal to the Committee on Rules of Practice and Procedure, April 7, 2020. The proposals both suggested adding a blanket statement saying that "nothing in this rule shall limit whatever inherent authority the District Court possesses to unseal Grand Jury records in exceptional circumstances." McKnight *supra* at 490. A residual exception to the rule would give Courts an affirmative grant of authority in a wider range of circumstances than an exception based solely on historical significance.

There are additional reasons that Congress or other entities may need to be able to gain access to grand jury records. Some are for public interest, others, are quasi-judicial in nature. For example, in *Haldeman v. Sirica*, former presidential aides who had been indicted by grand jury sought to prohibit the district court from turning over to House of Representatives Committee on the Judiciary certain materials which the grand jury had considered. *See Haldeman v. Sirica*, 501

F.2d 714 (D.C. Cir. 1974). This case involved the infamous Watergate Scandal which was of enormous public concern and evidences the need for a residual exception to grand jury secrecy in such unique circumstances. Such need is also demonstrated by *In re Hastings*, a case since overruled by the Eleventh Circuit in *Pitch*.

There is also a proactive need for a residual exception to the general rule providing for grand jury secrecy. In the recent turmoil that has been facing the nation, both with civil rights and other social justice concerns at the forefront, events such as the Capitol Riot on January 6, 2021 present scenarios in which grand jury records may need to be released outside the bounds of the current exceptions in the public interest.

Rule 6(e) exceptions should be based upon disclosure pursuant to public interest.

In the case *In Re Biaggi*, the Second Circuit held that the district judge had power to direct the disclosure of grand jury records that had been sought, and it was for the judge to determine what reasonable conditions should be imposed. *See In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). In this case, public interest outweighed the bounds of Rule 6(e)'s enumerated exceptions, and there is great potential for such interest in the future. It is also true that an exception to the Federal Rules of Criminal Procedure would alleviate burden of the Supreme Court to have to keep addressing such an issue, which is bound to arise again.

As set forth above, in the case *In Re Craig*, the Court explained that although the proper functioning of the grand jury system depends upon the secrecy of grand jury proceedings, there are certain special circumstances in which the release of grand jury records is appropriate, even outside of the boundaries of Rule 6(e). The Court listed the following as considerations for Courts when determining if disclosure is appropriate: (1) identity of the party seeking disclosure; (2) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (3) the reason disclosure is being sought in the particular case; (4) the specific information being sought for disclosure; (5) how long ago the grand jury proceedings took place; (6) the current status of the principals of the grand jury proceedings and that of their families; (7) the extent to which the desired material, either permissibly or impermissibly, has previously been made public; (8) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (9) the additional need for maintaining secrecy in the particular case in question. *See In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997). Going forward, if there were a residual exception for the disclosure of grand jury records, Courts could use the *Craig* factors in conjunction with their discretion as an additional safeguard to evaluate whether disclosure is appropriate. Accordingly, Petitioners propose that Rule 6(e) be amended to include a residual exception allowing for disclosure of grand jury records pursuant to the inherent supervisory authority of the District Court.

Proposed amendment

For the reasons herein, Petitioners proposes the following amendment (added text bold) to Rule 6(e):

(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 for reasons of historical or public interest, and in consideration of the following non-exhaustive list of factors:

(a) the identity of the party seeking disclosure;
(b) whether the defendant to the grand jury proceeding or the government opposes the disclosure;
(c) why disclosure is being sought in the particular case;
(d) what specific information is being sought for disclosure;
(e) how long ago the grand jury proceedings took place;
(f) the current status of the principals of the grand jury proceedings and that of their families;
(g) the extent to which the desired material—either permissibly or impermissibly—has been previously made public;
(h) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and
(i) the additional need for maintaining secrecy in the particular case in question.

(vii) on petition of any interested entity or person for any additional reason presenting exceptional circumstances where disclosure may be authorized pursuant to the inherent authority of the court.

(viii) This rule recognizes and codifies the existence of the inherent authority of the court to authorize disclosure under exceptional circumstances.

. . .

(8) Nothing in this rule shall limit whatever authority courts possess to unseal grand jury records in exceptional circumstances.

Conclusion

Thank you for the courtesy of your review and consideration of this proposal. We would be happy to further discuss this proposal with the Committee at its convenience.

Respectfully submitted,

Joseph J. Bell, Esq.

Hon. Paul W. Armstrong, J.S.C. (Ret.)

Brian C. Laskiewicz, Esq.

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

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

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

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

DATE: September 13, 2021

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

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

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

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

included: that the grand jury material is of exceptional historical importance; that no living person would be materially prejudiced by disclosure (or that any prejudice could be avoided through redaction or other reasonable steps); and that disclosure would not impede any pending government investigation or prosecution. *Id*. The proposal would also have granted blanket authority to the Archivist of the United States to release grand jury material 75 years after the relevant case files associated with the grand jury were closed, even without a court petition. *Id*.

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

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

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

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

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

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These are a summary of the Department's views. These proposals may benefit from some procedural safeguards. We look forward to our discussions and the consideration of these issues over the coming months.

cc: Judge Raymond Kethledge
Professor Sara Sun Beale
Professor Nancy King

TAB 3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 6(c)—Authority to Temporarily Excuse Grand Jurors (Suggestion 21-CR-A)

DATE: September 29, 2021

In Suggestion CR-21-A, Judge Donald Molloy proposed amending Rule 6(c) to add the following language as the last sentence of that paragraph: "For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session."

He explained that in reviewing the jury plans for districts in the Ninth Circuit he had become aware that the districts varied in designating the person or office with the authority to grant temporary excuses for a particular session. He commented:

> The change would be practical and permit the foreperson to relieve an individual juror for a specific session, a need not uncommon in rural districts where the jurors often travel significant distances to attend. The court would still retain ultimate authority either for permanent excuses or, if need be, for temporary excuses.

At its May meeting, the Committee this proposal was assigned to the Rule 6 Subcommittee for further consideration.

This memo explains the Rule 6 Subcommittee's consideration of this proposal and its recommendation against an amendment. Section I describes the considerable variation among districts in the Ninth Circuit; the approaches of each district (except Guam) are also shown on the chart at the end of the section. Since the Ninth Circuit provided a good sample of different approaches, the Subcommittee decided it was not necessary to extend our research to other circuits.

Section II describes the subcommittee's conclusion that there is no need for a uniform national rule. Because no significant problems have arisen, there is no need to displace the different local practices that seem to be working well by imposing a national rule. The districts have chosen their preferred processes, and—as far as we can determine—the inconsistent approaches across districts have caused no problems.

I. A Survey of Approaches in the Ninth Circuit

With Judge Molloy's assistance, we received information about all of the districts within the Ninth Circuit except Guam. There is considerable variation. The most common approach to temporary excuses requires review by the district jury office. Other districts refer requests to the grand jury foreperson or to the chief judge.

Only three districts (Idaho, Montana, and the Northern District of California) allow the foreperson, acting alone, to grant temporary excuse requests. Two districts (the Eastern District of California and Northern Mariana Islands) require a judge to handle the process. Two districts (Arizona and the Eastern District of Washington) allow the jury coordinator, the jury office, the jury clerk, or the jury staff ("jury office") to grant excuses. Arizona provided a justification for this approach. In order to maintain quorum, the jury office sometimes needs to decline requests and the jury office has more authority to turn people down than does the foreperson.

Several districts use a multi-step process or divide the excuse process between more and less formal requests. Of these, two districts (the Southern District of California and the Eastern District of Washington), require that grand jurors submit requests to the jury office, which then forwards the requests to the judge for a final determination. Two districts (Alaska and Hawaii) require the jury office to handle most requests but allow the foreperson to handle requests where a grand juror needs a single day off in the middle of a session or where a grand juror needs to leave early during a session.

Districts provided information with varying degrees of specificity. Three districts (Nevada, Oregon, and the Central District of California) did not permit the foreperson to grant excuse requests but did not identify what process they had adopted. Some districts specified that they used a multi-step process (with the jury office forwarding requests to the judge), while other districts only stated that the judge made the final call, which does not necessarily preclude a multi-step process.

The approaches are displayed below.

Process	**Number**	**Districts**
Jury Office Only	2	Arizona; E.D. Wash.
Judge Only	2	E.D. Cal.; Northern Mariana Islands
Foreperson Only	3	Idaho; Montana; N.D. Cal.
Jury Office & Judge	2	S.D. Cal.; E.D. Wash.
Jury Office & Foreperson	2	Alaska; Hawaii
Not Foreperson	3	Nevada; Oregon; C.D. Cal.

II. Whether a National Rule is Needed

After discussing these practices, the subcommittee unanimously concluded that neither the information gathered, nor Judge Molloy's submission demonstrated a need to displace the local practices with a national rule. There is no evidence that grand jurors are confused by the lack of uniformity, and it seems very unlikely individual grand jurors would be aware that another district uses a different process. Inclusion in the Federal Rules of Criminal Procedure provides clear notice of procedures, but individual grand jurors are unlikely to refer to the rules to determine whom to contact if they wish to request a temporary excuse. They are more likely to ask the foreperson when the grand jury is in session or to call their district's jury office at other times.

The limited information we gathered suggests that districts have chosen their procedures for a variety of reasons. Arizona prefers the jury office to handle requests because the jury office

has more authority to decline requests in order to maintain quorum. Arizona believes that grand jurors would be more likely to question the decision of the foreperson than to question the decision of the jury office. The districts that allow the foreperson to handle excuse requests are likely motivated by efficiency and convenience, particularly if the grand jurors have to travel long distances to attend sessions, as noted in Judge Molloy's proposal. Districts that forward all excuse requests to the chief judge did not provide reasoning, but presumably believe that it is important that the chief judge see all the requests.

We were unable to identify a compelling reason to favor one district's reasoning over another. The districts have chosen the systems that work best for them and have established procedures in accordance with their choices. Certain approaches might suit some districts better than others, and factors like the geographical size of the district or the organization and role of the district's jury office might dictate a particular approach. Individual districts are in the best position to evaluate these factors, and it seems likely that requiring many districts to change their practices might generate significant opposition. At least one judge who was contacted in the course of our information gathering reportedly expressed opposition to the possibility that the judge's district would have to change its procedures. Indeed, since there is no majority approach in the Ninth Circuit, any national rule would require a majority of districts to change their approach.

Moreover, if any district finds its current processes are not working satisfactorily, it can modify them without going through the time-consuming procedures required by the Rules Enabling Act.

Accordingly, the subcommittee recommends no further action on this suggestion and that it be removed from the Committee's agenda.

January 14, 2021

Advisory Committee on Criminal Rules
ATTN: Rebecca Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

To the Chair and Members of the Criminal Rules Committee:

Recently the Congress passed into law an amendment to Rule 5(f) of the Federal Rules of Criminal Procedure. * * * * * Additionally, it has come to my attention that the issue of grand juror excuses is not uniformly applied under Rule 6, F.R.Cr.P. and I ask the Committee to consider a minor change to address the discrepancy.

* * * * *

I also propose amending Rule 6(c) to add the following language as the last sentence of that paragraph. "For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session." I make this recommendation because in reviewing the jury plans for districts in the Ninth Circuit it is evident there are inconsistencies concerning who has the authority to "temporarily" excuse a grand juror from a particular session. The amendment proposed would not conflict with paragraph 6(h) nor would it interfere with any judicial obligation regarding the Grand Jury. The change would be practical and permit the foreperson to relieve an individual juror for a specific session, a need not uncommon in rural districts where the jurors often travel significant distances to attend. The court would still retain ultimate authority either for permanent excuses or, if need be, for temporary excuses. I have attached a redline version of the proposed change.

* * * * *

Sincerely,

Donald W. Molloy
U.S. District Judge

* * * * *

Rule 6. The Grand Jury

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson--or another juror designated by the foreperson--will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders. For good cause, the foreperson may temporarily excuse a juror from an individual grand jury session.

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(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv) an operator of a recording device;
(v) a person who transcribes recorded testimony;
(vi) an attorney for the government; or
(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand juror's vote--may be made to:

> **(i)** an attorney for the government for use in performing that attorney's duty;
> **(ii)** any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
> **(iii)** a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.
(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.
(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--
• actual or potential attack or other grave hostile acts of a foreign power or its agent;
• sabotage or international terrorism by a foreign power or its agent; or
• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or
(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--
• the national defense or the security of the United States; or
• the conduct of the foreign affairs of the United States.

(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:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) 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;
(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;
(ii) the parties to the judicial proceeding; and
(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the

indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

TAB 4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 6(e)—Judicial Decisions that Reveal Matters Occurring Before the Grand Jury
(Suggestion 21-CR-C)

DATE: October 4, 2021

Chief Judge Beryl A. Howell and Senior Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia requested that the Committee consider whether an amendment to Rule 6(e) was needed to clarify "the authority of the court to release judicial decisions issued in grand jury matters" when "even in redacted form," those decisions reveal "matters occurring before the grand jury." They explained that "[t]he practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury." They state that "[t]his practice is critically important to avoid building a body of 'secret law' in the grand jury context." But, they continue, "to the extent that judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in *McKeever* rejected those bases." "While no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice," and the authority to continue this practice "deserves consideration and clarification."

At its spring meeting, the Committee referred this proposal to the Rule 6 Subcommittee. After considering the attached research memorandum, the subcommittee unanimously concluded that an amendment to the rule for judicial decisions is not needed at this time. Practices employed under the existing rule, particularly redaction, already provide judges with an adequate opportunity to release decisions on grand jury issues that comply with the rule, members decided. It is possible that at some point in the future a judicial decision including unredacted grand jury information may be challenged under the rule. If that happens, the issue may require revisiting. At this time, however, the subcommittee recommends unanimously that no further action be taken on the proposal and that it be removed from the Committee's agenda.

From: Beryl Howell
Sent: Sunday, January 3, 2021 8:49 AM
To: John Bates
Cc: Royce Lamberth
Subject: Consideration of Changes to Fed. R. Crim. P. 6(e)

Thank you for the good news that the Criminal Rules Committee is taking up the issue invited by Justice Breyer's statement concurring in the denial of certiorari in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), which rejected the view that courts have inherent authority to disclose grand jury material outside the enumerated exceptions set out in Fed. R. Crim. P. 6(e). *See McKeever v. Barr*, 140 S. Ct. 597, 597-98 (2020)(Breyer, J.)("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit."). We understand that some proposed amendments to Rule 6(e) have already been submitted to the Committee, including a proposed exception allowing release of otherwise secret grand jury material of historical importance, a version of which proposal the Department of Justice previously (and unsuccessfully) urged the Committee to consider. *See* Letter from Eric Holder, Attorney General, to Reena Raggi, Chair of Advisory Committee on the Criminal Rules (Oct. 18, 2011) (encouraging Committee to amend Rule 6(e)(3) to permit district courts to release historically significant grand jury records so that "the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e).").

At the risk of adding to the Committee's workload, Royce Lamberth and I would like to raise another issue we believe deserves consideration and clarification post-*McKeever*, at least in this Circuit: the authority of the court to release judicial decisions issued in grand jury matters, since these decisions, even in redacted form, arguably reveal "matters occurring before the grand jury," Fed. R. Crim. P. 6(e), given the broad scope of that phrase. *See Bartko v. United States DOJ*, 898 F.3d 51, 73 (D.C. Cir. 2018)(describing scope of Rule 6(e) as covering "information that would 'tend to reveal some secret aspect of the grand jury's investigation, including the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, or the deliberations or questions of jurors.'" (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)); *In re Sealed Case No. 99-3091 (Office of Indep. Counsel Contempt Proceeding)*, 192 F.3d 995, 1001 (D.C. Cir. 1999)("this court's definition of 'matters occurring before the grand jury' … encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'"(quoting *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir.)). Judicial decisions in grand jury matters may arise in historically significant matters, *e.g.*, Watergate investigation of former President Nixon; Whitewater and related investigations of former President Clinton, but not always.

The practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury. *See,*

e.g., In re Sealed Case, 932 F.3d 915, 940 (D.C. Cir. 2019)(releasing publicly redacted version of decision affirming district court's contempt orders against two Chinese Banks for failing to comply fully with grand jury subpoenas for records that might clarify how North Korea finances its nuclear weapons program). This practice is critically important to avoid building a body of "secret law" in the grand jury context. *See Leopold v. United States*, 964 F.3d 1121, 1127 (D.C. Cir. 2020) ("The common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch. At bottom, it reflects the antipathy of a democratic country to the notion of 'secret law,' inaccessible to those who are governed by that law.")(internal citations and quotations omitted); *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)(construing FOIA exemption to require "disclosure of all opinions and interpretations which embody the agency's effective law and policy," as consistent with "a strong congressional aversion to secret [agency] law," and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law.") (internal citations and quotations omitted; brackets in original); *Elec. Frontier Found. v. United States DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (discussing policy of applying FOIA exemptions "to avoid the development of "'secret law'" by federal agencies).

Nevertheless, to the extent that judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in *Mckeever* rejected those bases. *McKeever*, 920 F.3d at 844 (holding district court has no "inherent authority to disclose what we assume are historically significant grand jury matters"); *id*. at 845 (holding district court has no authority to disclose grand jury matters outside exceptions in Rule 6(e)(3)). While no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice and the Committee's clarification of the issue would be helpful.

Thank you so much for your offer to pass our concerns along to the Criminal Rules Committee.

Chief Judge Beryl A. Howell
Judge Royce C. Lamberth
United States District Court
for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Ave., NW, Room 2010
Washington, D.C. 20001

MEMO TO: Rule 6 Subcommittee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Memo #3 for Subcommittee call on August 16; Judicial decisions that reveal matters occurring before the grand jury

DATE: August 2, 2021 (corrected)

In addition to considering [the other proposals], we request that the Subcommittee consider how to respond to the request by Chief Judge Howell and Judge Lamberth regarding "the authority of the court to release judicial decisions issued in grand jury matters" when "even in redacted form," those decisions reveal "matters occurring before the grand jury." 21-CR-C.

Chief Judge Howell and Judge Lamberth explain that "[t]he practice by this Court's Chief Judges, who are tasked with handling grand jury matters, and by the D.C. Circuit has been to release publicly redacted versions of judicial decisions resolving legal issues in grand jury matters, after consultation with the government and affected parties, despite the arguable revelation thereby of some matters occurring before the grand jury." They state that "[t]his practice is critically important to avoid building a body of 'secret law' in the grand jury context." But, they continue, "to the extent that judicial decisions in grand jury matters have been released based on the court's inherent authority or the fact that Rule 6 imposes no secrecy obligation on courts, which are notably absent from the enumerated list of persons bound by Rule 6(e)'s prohibition on disclosure, the majority of the D.C. Circuit panel in *McKeever* rejected those bases." "While no party has yet raised *McKeever* to object to court orders to release redacted versions of grand jury-related judicial decisions, the D.C. Circuit's decision has cast a shadow about the legal basis for this practice," and the authority to continue this practice "deserves consideration and clarification."

The proposal presents two basic questions for the Subcommittee. First, assuming the practice of disclosing opinions resolving grand jury issues described here, or some version of it, is desirable as a policy matter, is an amendment required for judges to engage in this practice? If so, what should that amendment permit? The bulk of this memo addresses the first question. A short preview of the second question is included at the end.

1. Is an amendment to Rule 6(e) required for adequate disclosure of judicial decisions on grand jury issues?

We begin by assuming that judges should have some discretion, appropriately limited to accommodate the reasons for grand jury secrecy, to issue or unseal judicial decisions that "resolv[e] legal issues in grand jury matters, after consultation with the government and affected parties." Not only is public access to reasoned judicial decisions presumptively required by Constitutional and common law, legal issues in grand jury proceedings may recur, and access to decisions resolving such issues can advance the consistency, efficiency, and accuracy of later decisions, and promote the development of the law. The stickier issue is whether the existing limits on disclosure in Rule 6, absent inherent authority, already permit courts to release or

unseal judicial decisions resolving legal issues with the detail needed to inform the public and future cases. Put differently, the Subcommittee should consider whether the scope of allowed disclosure under the existing Rule is adequate. If it is, no amendment or clarification is needed. If it is not, additional language might be warranted.

The key provision here is Rule 6(e)(6) "Sealed Records." It provides that "records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Rule 6(e)(6) regulates the disclosure of judicial opinions. As the Committee Notes to the 1983 Amendments explain, this provision was added as a response to a problem identified by the Comptroller General that grand jury secrecy was being undermined by "documents presented at open preindictment proceedings and filed in public files."[1] We found no cases suggesting that the reference to "records" and "orders" excludes judicial opinions, and multiple cases assuming that it applied to judicial opinions. But Rule 6(e)(6) allows disclosure of judicial opinions under some conditions. It requires sealing only "to the extent … necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."[2]

As to what is an "unauthorized" disclosure, one source of possible authority is inherent authority, in those circuits that recognize it.[3] Where inherent or residual authority has been rejected, as in the D.C. Circuit by *McKeever*, there is only the existing authority in Rule 6. The following sections address the scope of existing authority in Rule 6 to release judicial opinions resolving grand jury related issues. The first section considers situations where courts can release judicial decisions, specifically examining two approaches that courts already use to comply with Rule 6(e)(6): (1) including only general arguments or other reasoning that does not fall within the definition of a matter occurring before a grand jury; and (2) redacting any information that does qualify as a matter occurring before a grand jury. The second section considers situations where these approaches may be inadequate to permit release of a decision resolving a grand jury issue.

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[1] FED. R. CRIM. P. 6(e)(6), Committee Notes to the 1983 Amendments (quoting COMPTROLLER GENERAL, MORE GUIDANCE AND SUPERVISIONS NEEDED OVER FEDERAL GRAND JURY PROCEEDINGS 10 (1980)).

[2] *Cf. In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1130 (D.C. Cir. 2020) ("Unlike the Stored Communications Act, [Rule 6(e)(6)] expressly directs secrecy as the default position, and thus displaces the common-law right of access. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). And unlike the Pen Register Act, Rule 6(e)(6) also specifies a standard for sealing — 'as long as necessary to prevent the unauthorized disclosure of a matter occurring before the grand jury.' ")

[3] *See*, for example, *Carlson v. United States*, 837 F.3d 753, 764 (7th Cir. 2016), where the Seventh Circuit rejected the government's argument that Rule 6(e)(6) bars disclosure of materials from a grand jury investigation into the *Chicago Tribune* in 1942 for a story about cracking Japanese codes. The court reasoned that Rule 6(e)(6) "says nothing about when disclosures are 'unauthorized'" and then held that courts have inherent authority to disclose grand jury materials that do not fall within an express exception in Rule 6.

(a) Releases that comply with existing Rule 6.

i. Releasing information that is not protected as "a matter occurring before a grand jury." Rule 6(e)(6) requires sealing only to the extent necessary to prevent the disclosure of "a matter occurring before a grand jury." As the cases cited in footnotes illustrate, this phrase includes witness testimony, grand jury transcripts and deliberations, and the names of grand jurors, grand jury witnesses, targets, and subjects.[4] Additionally, information that would reveal this core material is also protected by Rule 6(e).[5]

Despite this broad definition, courts have also identified material that is *not* protected.[6] Probably the most important category is information that has been publicized and can no longer be considered "secret." Courts have held that information that would otherwise be protected by Rule 6 as a matter before the grand jury *loses* that protection if by the time disclosure is sought "the general public is already aware of the information."[7]

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[4] *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1002 (D.C. Cir. 1999) ("Information actually presented to the grand jury is core Rule 6(e) material that is afforded the broadest protection from disclosure."); *In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988) (holding "confidential documentary information not otherwise public but obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury' just as much as testimony before the grand jury.").

[5] *In re Sealed Case No. 99-3091*, 192 F.3d at 1001 (D.C. Cir. 1999)("this court's definition of 'matters occurring before the grand jury' … encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'"(quoting *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir.)); *Bartko v. United States DOJ*, 898 F.3d 51, 73 (D.C. Cir. 2018) (describing scope of Rule 6(e) as covering "information that would 'tend to reveal some secret aspect of the grand jury's investigation, including the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, or the deliberations or questions of jurors.'" (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013).

[6] *E.g.*, *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1003 (D.C. Cir. 1999) (concluding that where reported prosecutorial deliberations "do not reveal that an indictment *has been* sought or *will be* sought, ordinarily they will not reveal anything definite enough to come within the scope of Rule 6(e)"); *In re Grand Jury Investigation*, 903 F.2d 180, 184 (3d Cir. 1990) (concluding that the date that the grand jury would terminate was not a matter occurring before a grand jury under Rule 6, citing S. Beale & W. Bryson, 2 *Grand Jury Law and Practice* § 7.06, at 30 n. 2 (1986) (ministerial grand jury records, such as records reflecting empaneling and extension of grand jury, are not within reach of Rule 6(e) because they reveal nothing of substance about the grand jury's investigation)).

[7] *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1007 (D.C. Cir. 1999) (President's status as a witness before the grand jury was a matter of widespread public knowledge article at issue and the President had revealed fact on national television the day of his testimony); *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1093–94 (9th Cir. 2014) (authorizing release of order, stating "by the time the confinement hearing was held, Duran's status as a grand jury witness had

ii. Redacting information that is protected as a matter occurring before a grand jury. When an opinion does involve protected information, courts often redact that information, releasing their decision with only de-identified and less specific information about the issue and reasoning that does not fall within the scope of information protected under Rule 6(e)(6).

This is a common practice. One of our research assistants collected and reviewed dozens of redacted opinions involving grand jury issues issued by federal district or appellate courts. The decisions from the D.C. Circuit and the Chief Judge of the D.C. District Court addressed issues including prosecutorial misconduct, the application of the *Perlman* doctrine to orders denying Rule 41(g) motions, and efforts by witnesses to resist compliance with subpoenas on various grounds including FISA immunity, attorney client privilege, and the right to counsel. Decisions from other courts addressed misconduct allegations and objections to subpoenas as well, including work product and act-of-production issues. Many involved extensive redactions, while others redacted little more than specific identifying information, but all preserved general information conveying to varying degrees the court's decisions about the law and its application of the law in the case.[8]

iii. Examples of released decisions that complied with Rule(6)(e)(6), without reliance on inherent authority. A prominent example of a ruling combining these two approaches before releasing an opinion is *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1138–41 (D.C. Cir. 2006). The court explained why it agreed to disclose eight pages of an opinion that had previously been redacted:

> "Now that the grand jury has returned an indictment against I. Lewis Libby for perjury, obstruction of justice, and making false statements to federal investigators, amicus curiae Dow Jones & Company moves to unseal the eight pages—or, failing that, portions thereof relating to matters that are now public. *See* D.C. Cir. R. 47.1(c). Although objecting to unsealing the opinion in its entirety, the special counsel informs us that nothing in the concurring opinion remains classified and agrees that portions of the redacted opinion may be made public without jeopardizing grand jury secrecy. . . .
>
> … Judicial materials describing grand jury information must remain secret only "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6) (emphasis added); *cf. Dow Jones*, 142 F.3d at 502 (explaining that identical language in Rule 6(e)(5) requires courts to open judicial hearings ancillary to grand jury affairs to the public whenever consistent with grand jury secrecy). Our case law, moreover, reflects the common-sense proposition that secrecy is no longer "necessary" when the contents of grand jury matters have

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been publicly reported"; *United States v. Harmon*, 2014 U.S. Dist. LEXIS 74381 (N.D. Cal. 2014) (redacted opinion denying motion for a new trial based on prosecutorial misconduct before the grand jury, with the following explanation of redactions: "The Court seals in this Order any testimony presented to the grand jury, with the exception of any information publicly disclosed during trial regarding the testimony that was presented to the grand jury.").

[8] This compilation of example cases is available to members upon request.

> become public. For example, in the wake of Iran-Contra we ordered the release of the independent counsel's report detailing the outcome of his investigation, notwithstanding the fact that the report was primarily based on grand jury testimony. *In re North*, 16 F.3d 1234 (D.C. Cir.1994). We reasoned that "[t]here must come a time ... when information is sufficiently widely known that it has lost its character as Rule 6(e) material. The purpose in Rule 6(e) is to preserve secrecy. Information widely known is not secret." *Id.* at 1245. During the grand jury's investigation into the Monica Lewinsky matter, we similarly held that staffers at the Office of the Independent Counsel could not have violated Rule 6(e) when they told the New York Times they believed then-President Clinton should be indicted for perjury and obstruction of justice. *In re Sealed Case*, 192 F.3d 995, 1001–05 (D.C. Cir.1999). Although we recognized that revealing a witness's identity and naming the target of a grand jury's investigation would ordinarily constitute Rule 6(e) violations, *id.* at 1004, we found that the staffers "did not reveal any secret, for it was already common knowledge" both that President Clinton had testified and that the grand jury was investigating possible perjury and obstruction charges against him, *id.* at 1004–05.
>
> For similar reasons, we are satisfied here that there is no longer any need to keep significant portions of the eight pages under seal. Libby's indictment, now part of the public record, reveals some grand jury matters, and we see little purpose in protecting the secrecy of grand jury proceedings that are no longer secret. Because discrete portions of the eight pages can be redacted without doing violence to their meaning, today we unseal those portions containing grand jury matters that the special counsel confirmed in the indictment or that have been widely reported.

Later, in the same litigation, *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 153–54 (D.C. Cir. 2007), the court explained its resolution of a post-trial request to unseal additional material:

> . . . Rule 6(e)(6) requires that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings" remain sealed only "to the extent and as long as necessary to prevent the unauthorized disclosure" of such matters. Moreover, as we held in *In re North*, 16 F.3d 1234 (D.C. Cir.1994), when once-secret grand jury material becomes "sufficiently widely known," it may "los[e] its character as Rule 6(e) material." *Id.* at 1245.
>
> . . . Although not every public disclosure waives Rule 6(e) protections, one can safely assume that the "cat is out of the bag" when a grand jury witness- in this case Armitage -discusses his role on the CBS Evening News …

But the court rejected "Dow Jones's request to unseal these materials in their entirety," stating:

> Even if the Armitage revelation created a compelling public interest in them- . . . this is irrelevant given that there is no First Amendment right of access to secret grand jury matters. *Rule 6(e) governs what we may or may not release to the public. Insofar as materials concern still-secret grand jury matters, they must remain sealed.*

Id. at 154 (emphasis added).

In neither of these decisions did the court mention inherent authority, or any other basis for disclosing material other than Rule 6. Instead, it concluded that unsealing did not involve an "unauthorized disclosure of a matter occurring before a grand jury" barred by Rule 6(e)(6) because the information had already been disclosed by trial testimony or other means. The court in *Miller* stated plainly "Rule 6(e) governs what we may or may not release to the public. Insofar as materials concern still-secret grand jury matters, they must remain sealed." The court's later holding in *McKeever* rejecting inherent authority to disclose grand jury matters is not in conflict with this reasoning. There was no suggestion in *McKeever* that the information sought in that case had "lost its character as Rule 6 material" because it was public knowledge already.[9]

Another example is *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1093–94 (9th Cir. 2014), where the court stated that "by the time the confinement hearing was held, Duran's status as a grand jury witness had been publicly reported," concluded that "redaction is an adequate alternative" to sealing, and ordered the unsealing of an order of confinement and related documents, "subject to any redactions the government may propose and the district court finds appropriate."

A third illustration is a 2010 case from the Tenth Circuit ordering two prior opinions from appeals related to grand jury subpoenas to be unsealed in order "to advance the law on certain issues." *In re Grand Jury Proceedings*, 616 F.3d 1172, 1176 (10th Cir. 2010). The court noted that the grand jury had been discharged without returning an indictment against the subject after the opinions had been sealed, and that the subject of the grand jury asked to keep them sealed or, alternatively, that they be published with redactions. The subject's suggested

[9] Chief Judge Howell, in a pre-*McKeever* 2018 decision, did rely on inherent authority and applied the *Craig* factors in her opinion granting in part a request by CNN to unseal dockets related to the Independent Counsel's 1998 Investigation of President Clinton. She also stated, however, "Given the voluminous grand jury materials already disclosed in the Starr Report, however, even under its 'narrow view,' [rejecting inherent authority to disclose outside of Rule 6] DOJ also concurs with unsealing significant portions of these sealed dockets. Accordingly, for the reasons discussed below, CNN's petition is granted in large part, but certain documents within some of the dockets shall remain under seal," *In re Unseal Dockets Related to Indep. Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 327 (D.D.C. 2018).

redactions were agreeable to the United States Attorney, and the court ordered the opinions unsealed as redacted.[10]

(b) When release in compliance with Rule 6 may be not be possible.

Although redaction may allow a court to disclose its legal reasoning without violating Rule 6(e)(6) in some cases, other cases will require more redaction than a court would consider reasonable or realistic. When this happens, the court may not be able to release its opinion or decision without some additional source of authority such as inherent authority or a new targeted exception.

For example, distinguishing *Miller*, one court declined to unseal an order denying a motion to quash grand jury subpoenas after stating that redaction was not practicable, as it was too difficult to separate already-public information from non-public information.[11]

Even if distinguishing between still-secret and publicly disclosed information is possible, specifics about the recipient of a subpoena or about the investigation may be so integral to the court's reasoning that redacting those specifics would result in an opinion that conveys an incomplete or even misleading version of the court's reasoning. One example may be the case

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[10] For yet another example, consider *United States v. Jack* 2010 U.S. Dist. LEXIS 121209 (E.D. Cal. 2010), where the court discussed the legal standard for dismissal of an indictment for prosecutorial misconduct, that the defendant carried the burden, that the burden was difficult to meet, that the prosecutor must have knowingly submitted perjured testimony, and that that testimony must have been material, it then concluded the legal analysis with thirteen straight redactions which presumably applied the legal standard to the facts of the grand jury proceedings. The opinion concluded "[t]herefore, defendants' motion to dismiss Count Three for prosecutorial misconduct is DENIED." It reveals nothing about the *application* of the law, but it does set out the law that the court applied.

[11] *See In re Grand Jury Subpoenas Dated Mar. 2, 2015*, 44 Media L. Rep. 2461, 2016 WL 6126392, at *5 (S.D.N.Y. Oct. 19, 2016):

> …assuming that the Court could perfectly sort the public from non-public information in the Sealed Materials, doing so would require wholesale redaction of many pages and significant redactions to others that would undermine significantly the value of disclosure. Given the intertwining of public and non-public information in the Sealed Materials, redaction would be cumbersome and largely impractical…. The Court is not at all confident that a release of redacted information would not inadvertently disclose non-public information.

See also United States v. Index Newspapers LLC, 766 F.3d 1072, 1095 (9th Cir. 2014) ("Although redaction is an adequate alternative in Duran's case, we emphasize that, under different circumstances, it may not be. For example, even seemingly innocuous information can be so entangled with secrets that redaction will not be effective."); *Cf. Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir.2010) (en banc) ("[T]here will be occasions when, as a practical matter, secret and nonsecret information cannot be separated.")."

provided by Chief Judges Howell and Lamberth as an example of an opinion "arguably" revealing matters occurring before the grand jury, *In re Sealed Case*, 932 F.3d 915, 940 (D.C. Cir. 2019). The court of appeals discussed in great detail the investigation that led to the subpoenas at issue in the case but deleted the names of the banks that received the subpoenas. We include some of that detail in a footnote to illustrate the type of information disclosed.[12] The

[12] *In re Sealed Case*, 932 F.3d 915, 919–20 (D.C. Cir. 2019):

> … According to government investigators, however, North Korea manages to evade the sanctions by using Chinese front companies that cloak the true ownership of the funds involved.
>
> The facts uncovered by this investigation so far are a case in point. The U.S. government has collected substantial evidence that a now-defunct Chinese company called [Redacted] ("the Company") acted as a front for [Redacted], a North Korea-owned entity ("the NKE"), by facilitating transactions that violated the sanctions orders. In fact, to date the government's "investigation [has] not yield[ed] *any* evidence that" the Company "was *ever* used as a legitimate business." Declaration of [Redacted] ("FBI Declaration") ¶ 10, Joint Appendix ("J.A.") 864. Unsurprisingly, then, in addition to the NKE itself, the government has sanctioned the Company and two of its alleged founders. Actions Taken Pursuant to Executive Order 13382, [Redacted] (designating the NKE); Notice of [Office of Foreign Asset Control (OFAC)] Sanctions Actions, [Redacted] (designating the Company); Notice of OFAC Sanctions Actions, [Redacted] (designating alleged co-founder [Redacted]); Notice of OFAC Sanctions Actions, [Redacted] (designating alleged co-founder [Redacted]).
>
> According to the government, the scheme operated like this: Hobbled by the worthlessness of North Korea's currency, the NKE would use the Company to make or receive payments in U.S. dollars. These transactions helped North Korea access resources that would otherwise have been beyond its reach. For example, the Company's assistance allegedly enabled North Korea to export hundreds of millions of dollars of coal and other minerals, generating revenue in U.S. currency that North Korea could then use to requisition other commodities vital to its weapons program.
>
> In these transactions, the Company routinely took advantage of U.S. correspondent bank accounts—that is, accounts held by banks outside the United States at banks located inside the United States. *See* 31 U.S.C. § 5318A(e)(1)(B) (defining "correspondent account" to mean "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution"). Such accounts allow foreign "banks to conduct business and provide services for their customers in" the United States even if "the banks have no physical presence" here. Minority Staff of the Senate Permanent Subcommittee on Investigations, *Correspondent Banking: A Gateway for Money Laundering*, S. Hrg. 107-84, 107th Cong., app. 287 (2001). This, in turn, enables a foreign bank's customers to "receive many or all of the services offered by [a] U.S. bank" without forming a direct-client relationship with an American Institution. *Id.* Correspondent banking arrangements are fairly ubiquitous: "[d]ue to U.S. prominence in international trade and the high demand for U.S. dollars due to their overall stability, most foreign banks that wish to provide international services to their customers have accounts in the United States

opinion, for example, identified which of the unnamed banks had branches within the United States, an important point in the analysis that followed.

Although the case was decided more than three months after *McKeever*, nowhere in the opinion did the court of appeals mention grand jury secrecy, sealing, inherent authority, or Rule 6. Chief Judge Howell, too, had released two opinions in the same case addressing these issues, one prior to the release of *McKeever* and one five days after, revealing much of the same information while also redacting identifying information about the banks objecting to jurisdiction. The first opinion granted the government's "Motion to Compel Production of Documents Requested via Bank of Nova Scotia Subpoena," the other found the banks in civil contempt but stayed fines of $50,000 per day pending appeal. The two district court opinions also did not mention grand jury secrecy, sealing, inherent authority, or Rule 6. There was no indication in any of these decisions that the government or anyone else had objected to the disclosures made in the opinions. But if Chief Judge Howell or the court of appeals had redacted all information about the banks and the activity that led the court to reject options other than enforcing the subpoena through contempt, the redacted decisions would have been much less helpful to those attempting to understand the law and its application.

Courts sometimes published opinions despite redactions so heavy that the opinion released conveyed little that would assist a reader in evaluating the court's legal analysis. For example, in *United States v. Seleznev*, 2016 US. Dist. LEXIS 47356 (W.D. Wash. 2016), even subheadings were redacted (e.g., "Threats to [TEXT REDACTED BY THE COURT]"), and a reader can discern only that the court concluded that there was no prosecutorial misconduct, not the defendant's grounds for alleging prosecutorial misconduct.

(c) Supreme Court decisions.

We also note that in its own grand jury related opinions since Rule 6(b)(6) was added to the Rule, the Supreme Court has sometimes included references to information that appears to fall within the definition of "matters occurring before the grand jury." It has done so without any mention that it was revealing such information and without noting any authority for doing so.

> capable of transacting business in U.S. dollars." *Id.* In short, then, correspondent bank accounts allow foreign banks to offer their clients services—including obtaining and transacting in U.S. currency—without opening a U.S. branch.
>
> These accounts are how the appellant banks (collectively, the "Banks") enter the story. All three are China-based—indeed, the Chinese government owns a substantial minority of each—and hold correspondent accounts in the United States. Banks One and Two also operate branches in the United States, but according to the government the Company relied on the three Banks' U.S. correspondent accounts to execute its scheme.
>
> To better grasp the full scope of the Company's operations, the government seeks certain records from the Banks.

Although we have not yet worked through the history of each of these cases to determine if the information included in the opinion was revealed at an earlier stage, prior to review by the Supreme Court, some of these cases involve information about grand jury investigations that became public through litigation below or other means. In *United States v. Hubbell*, 530 U.S. 27, 30–32 (2000), for example, the Court's decision considered an order dismissing a second indictment based on evidence obtained after Hubbell was granted act of production immunity for documents. The Court's opinion detailed the reason for the investigation, the subpoena at issue, and the name of the recipient of the subpoena, Webster Hubbell, as well as information about his family and business. Some of this may have been considered public already given that the investigation was to determine if Hubbell had lived up to his part of a previous plea bargain in a well-known criminal prosecution involving the Whitewater Development Corporation.[13]

Three other decisions involving challenges to subpoenas reveal much less information; they conceal, for example, the name of the person challenging the subpoena. Nevertheless, the Court included some basic information about each investigation in each decision. In *United States v. Doe*, 465 U.S. 605, 606–07 (1984) (footnotes omitted), the Court revealed the following information, together with two footnotes describing the items sought by the subpoena[14]:

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[13] *See also Bank of Nova Scotia v. United States*, 487 U.S. 450 (1988) (reviewing lower court ruling on motion to dismiss indictment, discussing subject matter, various allegations of prosecutorial misconduct, but not naming witnesses); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 420–22 (1983) (relating information about investigation leading to indictment and defendants' guilty plea prior to motion to disclose grand jury information by Civil Division attorneys); *Braswell v. United States*, 487 U.S. 99, 100–02 (1988) (reviewing lower court rulings on motion to quash a subpoena for corporate documents that had been addressed to the corporation's president, Braswell, relating information about Braswell's relationship with the company, as well as the role of his family members).

[14] Footnotes one and two stated:

> The categories of records sought by the third subpoena were: 1) general ledgers; 2) general journals; 3) cash disbursement journals; 4) petty cash books and vouchers; 5) purchase journals; 6) vouchers; 7) paid bills; 8) invoices; 9) cash receipts journal; 10) billings; 11) bank statements; 12) cancelled checks and check stubs; 13) payroll records; 14) contracts and copies of contracts, including all retainer agreements; 15) financial statements; 16) bank deposit tickets; 17) retained copies of partnership income tax returns; 18) retained copies of payroll tax returns; 19) accounts payable ledger; 20) accounts receivable ledger; 21) telephone company statement of calls and telegrams, and all telephone toll slips; 22) records of all escrow, trust, or fiduciary accounts maintained on behalf of clients; 23) safe deposit box records; 24) records of all purchases and sales of all stocks and bonds; 25) names and home addresses of all partners, associates, and employees; 26) W–2 forms of each partner, associate, and employee; 27) workpapers; and 28) copies of tax returns.
>
> The only documents requested in the fourth subpoena that were not requested in the third were the company's stock transfer book, any corporate minutes, the corporate charter, all correspondence and memoranda, and all bids, bid bonds, and contracts. The request for

> Respondent is the owner of several sole proprietorships. In late 1980, a grand jury, during the course of an investigation of corruption in the awarding of county and municipal contracts, served five subpoenas on respondent. The first two demanded the production of the telephone records of several of respondent's companies and all records pertaining to four bank accounts of respondent and his companies. The subpoenas were limited to the period between January 1, 1977 and the dates of the subpoenas. The third subpoena demanded the production of a list of virtually all the business records of one of respondent's companies for the period between January 1, 1976, and the date of the subpoena. The fourth subpoena sought production of a similar list of business records belonging to another company. The final subpoena demanded production of all bank statements and cancelled checks of two of respondent's companies that had accounts at a bank in the Grand Cayman Islands.

In *United States v. John Doe, Inc. I*, 481 U.S. 102, 104–05 (1987), the Court introduced its opinion with this paragraph:

> In March 1982, attorneys in the Antitrust Division of the Department of Justice were authorized to conduct a grand jury investigation of three American corporations suspected of conspiring to fix the price of tallow being sold to a foreign government and financed by the Department of State's Agency for International Development. After subpoenaing thousands of documents from the three corporate respondents, and taking the testimony of numerous witnesses, including the five individual respondents, the Department of Justice conferred with some of respondents' attorneys and concluded that although respondents had violated § 1 of the Sherman Act, 15 U.S.C. § 1, criminal prosecution was not warranted under the circumstances. In early June 1984, the grand jury was discharged without returning any indictments.

Finally, *in Doe v. United States*, 487 U.S. 201, 202–03 (1988), the Court stated:

> Petitioner, named here as John Doe, is the target of a federal grand jury investigation into possible federal offenses arising from suspected fraudulent manipulation of oil cargoes and receipt of unreported income. Doe appeared before the grand jury pursuant to a subpoena that directed him to produce records of transactions in accounts at three named banks in the Cayman Islands and Bermuda. Doe produced some bank records and testified that no additional records responsive to the subpoena were in his possession or control. When questioned about the existence or location of additional records, Doe invoked the Fifth Amendment privilege against self-incrimination.
>
> The United States branches of the three foreign banks also were served with subpoenas commanding them to produce records of accounts over which Doe had signatory authority. Citing their governments' bank-secrecy laws, which prohibit the disclosure of account records without the customer's consent,1 the banks refused to

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"corporate" minutes and the "corporate" charter is puzzling because the company named in the subpoena was an unincorporated sole proprietorship.

comply. *See* App. to Pet. for Cert. 17a, n. 2. The Government then filed a motion with the United States District Court for the Southern District of Texas that the court order Doe to sign 12 forms consenting to disclosure of any bank records respectively relating to 12 foreign bank accounts over which the Government knew or suspected that Doe had control. The forms indicated the account numbers and described the documents that the Government wished the banks to produce.

It may be relevant that these Supreme Court decisions, except for *Hubbell*, were all decided before the Court questioned its supervisory authority over the grand jury in its decision in *Williams* in 1992. For a discussion of *Williams*, see Memo #2.

(d) Summary of answer to question 1.

In sum, existing Rule 6 allows judges to release decisions about legal issues related to grand juries, without reliance upon inherent authority, if they redact all information that qualifies as a matter occurring before a grand jury and ensure that all unredacted information in the opinion is already public knowledge or for other reasons does not qualify as a matter occurring before a grand jury.

The existing language of the Rule, however, appears to bar the release of judicial decisions without such redaction, if a judge concludes redaction is unrealistic or would result in an opinion that is misleading or incomprehensible. Despite the language of the Rule, lower courts as well as the Supreme Court have included limited grand jury information in their decisions resolving issues that arise related to grand jury investigations. Generally, courts do not mention in their opinions that they are revealing grand jury matters or the authority to do so.

2. If an amendment to Rule 6(e) is needed to ensure adequate disclosure of judicial decisions on grand jury issues, what should it say?

*** * * * ***

[remainder of the original memo omitted]

TAB 5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49—CM/ECF Filing by Pro Se Defendants (Suggestion 21-CR-E)

DATE: September 28, 2021

Sai proposes amending Rule 49 to allow all pro se filers the presumptive right to use CM/ECF. Sai has also addressed proposals the Civil and Bankruptcy Committees. Although the first two pages of the proposal refer only to the Civil Rules, pages 13-37 include a detailed proposal to amend Criminal Rule 49.

Sai includes a lengthy statement of the advantages of e-filing and the disadvantages for those who are able but not permitted to file through the CM/ECF system. Sai's proposal recognizes that many pro se filers, including prisoners, will not be able to file electronically, but Sai argues that all pro se filers should permitted—but not required—to file electronically. Sai provides a detailed proposal to amend the rule with the following elements:

- All registered users permitted to file electronically.
- Electronic filing generally required but
    - An exception for persons not represented by an attorney unless the court finds good cause to require electronic filing and
    - A prohibition against requiring a pro se prisoner to file electronically.
- Courts may prohibit electronic filing for good cause, but not because a person is filing pro se or is not an attorney.

All pro se prisoners would have an absolute right to file by paper if they prefer to do so. To address concerns that pro se parties are not sufficiently familiar with the CM/ECF system, Sai's proposal permits courts to require pro se or non-attorney filers to complete the same CM/ECF training and registration requirements ordinarily imposed on attorney filers.

When it amended Rule 49 in 2018, the Committee considered at length the question whether and under what circumstances pro se defendants and prisoners should be permitted to file electronically. As the committee note to Rule 49(a)(3) and (4) explains:

> Subsections (a)(3) and (4) list the permissible means of service . . . .
>
> By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.
>
> But the e-filing system is designed for attorneys, and its use can pose many

> challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic-filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) 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.

There is, however, a new development. As Sai's proposal notes, many districts experimented with expanded pro se access to e-filing during the COVID-19 pandemic, and at some point this experience could provide a basis for reconsideration of Rule 49, as well as related provisions in the Civil and Bankruptcy Rules.

The question for discussion at the November meeting is whether to assign this proposal now to a subcommittee for further study. The Civil Rules Committee's reporters have recommended taking no action now, but retaining the issue of the availability of e-filing for pro se parties on that Committee's agenda, noting that both coordination with other advisory committees and more information about developments in the district court would be needed to take these issues up. We think a similar approach would be appropriate for this committee.

Dear Committee on Federal Rules of Civil Procedure —

I've submitted a proposal to amend FRCP 4(i) for more efficient summons on the Government. I note that it almost exclusively benefits those who can *initiate* a case through CM/ECF.

As the Committee may recall from my in-person testimony at the Nov. 2016 FRCP hearing, where I was the only person to speak about the proposed change to Rule 5, I strongly oppose the current Rule 5(d)(3). It acts as a total bar to CM/ECF case initiation for *pro se* litigants.

The Committee based its denial of my counter-proposal, *attached*, entirely on

1. a desire to put prior restraint on certain speech by a class that the Committee disfavors
2. to prevent harms that are implausible, remediable *post hoc*, or actually Constitutional rights
3. based on speculative hypotheticals unsupported by evidence, but rooted in a paternalistic and sometimes hostile view of *pro se* litigants as a class.

I had considered asking you to at least conduct a test run, so you'd see your fears were unfounded. Fortunately — to the sad extent that such a word can be applied to a pandemic — many courts have been forced to conduct that experiment by intervening circumstances. So instead, I now ask you to:

1. submit my counter-proposal[1], together with the full record[2], as a new suggestion;
2. survey the courts that have accepted electronic *pro se* case initiation (e.g. by email); and
3. pass my proposal based on the empirical evidence (i.e. if indeed the sky *hasn't* fallen[3]).

[1] Version dated Feb. 15, 2017, "Comments re proposed changes to CM/ECF filing rules for pro se litigants".
[2] *Attached*, including transcript of my testimony, and all substantive Committee discussion of the iterations.
[3] Please specifically compare to the scenarios claimed in opposition to my proposal: in *case initiation* filings, has there been an *unusually* high rate of: porn? libel? improper participation in others' cases? large filings, e.g. from *Meads* style OPCALs? bad docketing? ...? I doubt it, but if the facts are against me, I'll freely admit error. Please do likewise.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[4]
President, Fiat Fiendum, Inc.
sai@fiatfiendum.org
April 14, 2021

[4] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

VII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

a) Using the Court's Electronic Filing System. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature. A paper filed electronically is written or in writing under these rules.

b) …

3. Means Used by Represented and Unrepresented Parties.

VIII. F. R. Criminal P. — Rule 49. Serving and Filing Papers

A. Service on a Party.

1. …

3. Service by Electronic Means.

*a) Using the Court's Electronic Filing System. **A registered user** may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney **is not required to do so unless otherwise required** by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.*

b) …

4. …

B. Filing.

1. …

2. Means of Filing.

a) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. A paper filed electronically is written or in writing under these rules.

b) …

3. Electronic filing and signing

a) Generally Required. Unless an exception or prohibition applies, every person must file electronically.

b) Exceptions. A person may file nonelectronically if:

a) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

b) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

4. …

C. Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

D. ~~…~~

*(1) nonelectronic filing is allowed by the court for good cause**,** or is allowed or required by local rule**,***

(2) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.

(a) No court may require a prisoner not represented by an attorney to file electronically.

c) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

4. …

*C. Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed **Rule 49(b)(3),** court order**,** or local rule.*

D. ~~…~~

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

…

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

Committee Note

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By listing service by filing with the court's electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) 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.

…

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

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…

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system ~~and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature~~. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

…

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

necessary.

…

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used~~, depending upon whether the party is represented by an attorney~~. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but **subsection (b)(3)(B)** provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B)**(ii)(a) prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~**E**lectronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

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The rule provides that nonparties~~, like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person**.

…

Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai[2]. I do many things, but relevant here is my legal advocacy work[3] and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction[4], and was subsequently awarded prevailing party status and costs.[5]

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

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[2] I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

[3] *See* https://s.ai/work/legal_resume.pdf

[4] *Sai v. DHS et al.,* 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

[5] *Id.,* ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule[6] confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.[7] It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

[6] Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

[7] Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.[8] This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.[9]

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in[10], should

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[8] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

[9] I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, Greenspan did not raise, and that court did not consider, the arguments presented here; the case was principally about whether Greenspan could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer … or the skills needed to maneuver through the electronic case filing system", *id*. at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

[10] I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.[11]

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

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court makes a particularized determination overcoming this presumption.

[11] For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.[12] For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cmty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

[12] Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.[13]

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), *citing* *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).[14] In today's era of

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[13] Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus filed* April 27, 2016) (re copyrightability of the Klingon language). *See* http://conlang.org/axanar.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). *See* https://www.makeyourlaws.org/fec/bitcoin/caf and https://www.makeyourlaws.org/fec/bitcoin/.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

[14] The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.[15]

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli*-cent.[16]

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about $5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.[17]

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

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[15] *Pro se* litigants are given no special consideration for procedural standards such as filing times.
[16] *See* e.g. https://aws.amazon.com/s3/pricing/ (storage and transfer costs ~2¢ per *gigabyte*).

[17] *See e.g.* Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about $5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.[18]

Electronic documents are better for everyone than scanned paper. They are more readable on a

[18] *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. *See e.g.* the U.S. Access Board's new regulations under the Rehabilitation Act § 508: https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities[19], as may the judge[20]. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.[21]

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

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[19] *See e.g.* http://www.blindlawyer.org/

[20] For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. *See e.g.*:
http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms
http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

[21] *See* e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under 28 U.S.C. § 1654.

The Supreme Court has explicitly "reject[ed] the … claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.[22]

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

[22] I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal[23] than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.[24] But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.[25]

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.[26] It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailing individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

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[23] The legal humor site Lowering the Bar provides at least a couple examples, e.g.:
https://loweringthebar.net/2015/04/to-f-this-court.html
https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

[24] This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

[25] Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

[26] *See e.g.* http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.[27] Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

---

[27] As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.[28]

[28] I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai

TAB 6

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Requiring Action by Appellate Courts on Habeas Appeals (Suggestion 21-CR-G)

DATE: September 28, 2021

Gary Peel requests consideration of an amendment or new rule that would deal with what he describes as the problem of "non action by federal appellate courts on habeas corpus appeals." Mr. Peel states that for two and one half years he had received no decision on his appeal from the denial of his petition for a writ of habeas corpus, despite his repeated requests for a status report.[1]

Subsequent to the filing of Mr. Peel's suggestion, the court of appeals issued a decision affirming the district court, holding that Mr. Peel had presented "no debatable argument that he qualifies for habeas corpus review." *Peel v. Zarrick*, No. 18-2732, 2021 U.S. App. LEXIS 21952 *1 (7th Cir. June 4, 2021).

Mr. Peel's suggestion contains no information suggesting that delays of this nature are common. To the contrary, he provides information showing that other cases were moving more quickly through the court. Moreover, the court's opinion (attached) details the unusual procedural complexity and the variety of arguments Mr. Peel advanced. These may have contributed to the delay in the resolution of his appeal.

We recommend that the Committee decline to take further action on this suggestion and that it be removed from the Committee's agenda.

[1] Mr. Peel's current proposal concerns delays in the courts of appeals, a subject on which this Committee lacks authority to act. The Committee referred Mr. Peel's earlier proposal to address delay in the district courts to CACM in 2018. *See* the attached Reporters' Memorandum Regarding Suggestion 18-CR-D (August 20, 2019).

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 28, 2021

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

Under date of April 17, 2019, I had communicated with you concerning a suggestion to amend the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas corpus motions. A copy of my April 17, 2019 letter is attached for your convenience. You were kind enough to address this issue, and in a response to me the Rules Committee felt that a new Criminal Rule wasn't needed, but that perhaps the courts could address the issue via local rules.

Despite the passage of two and a half (2-1/2) years since my letter to you, the U.S. Court of Appeals still has made no substantive ruling on my habeas corpus appeal. I have made five (5) semi-annual requests for a status report only to receive responses suggesting that the habeas appeal is proceeding as the court's docket permits and that a dispositive Order would be forthcoming "as soon as the court's docket permits." [Seventh Circuit Order of 4-13-21, docket No. 18-2732].

However, according to the Seventh Circuit's government website, http://www.ca7.uscourts.gov/opinions-and-oral-arguments/opinions-arguments.htm, as of 7:00 p.m. on 3-18-21 the Seventh Circuit had rendered at least 888 opinions, dissents, rulings, or corrected opinions in cases that were filed ***AFTER*** **mine [18-2732] was docketed, to wit:**

Appellate Case Numbers 18-2735 through 18-2799 =	20
Appellate Case Numbers 18-2803 through 18-2899 =	29
Appellate Case Numbers 18-2905 through 18-2993 =	16
Appellate Case Numbers 18-3000 through 18-3737 =	166
Appellate Case Numbers 19-1004 through 19-3534 =	537
Appellate Case Numbers 20- 1006 through 20-8005 =	120
Total	= 888

Facing the frustration of two and a half (2-1/2) years with no decision on the Seventh Circuit's own Order to show cause, with no brief filed by the government/respondent/appellant and no dispositive order on the habeas appeal, I resigned myself to filing a Petition for Writ of Mandamus with the Supreme Court to

compel some action, any action, by the seventh circuit. My mandamus, filed on 3-23-21 was summarily denied on 4-26-21. See Supreme Court Docket No. 20-7597.

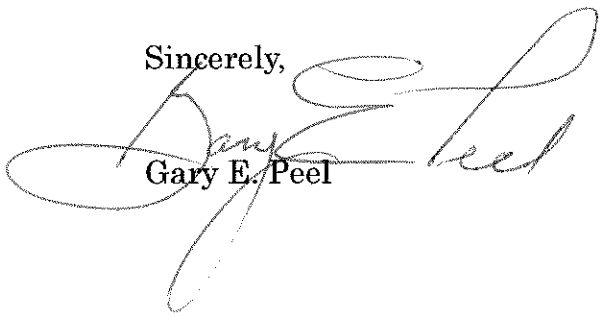
Again, I am NOT asking that you intervene in my habeas appeal. Instead, I am asking that your committee revisit the need for a change or amendment to the federal rules of criminal procedure to address the problem of non-action by the federal appellate courts on habeas corpus appeals.

When those courts refuse to act on pending habeas matters, and when the Supreme Court refuses to mandate appellate court action after a reasonable period of time, the habeas petitioner is left with NO option, despite having to endure the "in custody" restrictions imposed his/her freedoms.

Should you have any questions of me, I can be reached at Garyepeel@Hotmail.com or via cell phone at 618-514-7203

Thank you again for your time.

Sincerely,



Gary E. Peel

GEP:gep
Encl. (1)

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 17, 2019

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

I had previously suggested an amendment to the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas motions. At the time, my concern was directed to the U.S. District Courts. You graciously informed me, by letter of 10-12-18 that my proposal had been declined but was being forwarded to the Advisory Committee for further consideration by the Judicial Conference Committee on Case Administration and Case Management.

The purpose of this letter is to seek reconsideration in light of similar delays that occur at the *appellate* level. Again, I am NOT seeking any intervention in my current appeal to the Seventh Circuit Court of Appeals (Case No. 18-2732), but I wanted to advise your office that the inexplicable delays at both the District and Appellate levels are particularly prejudicial to habeas petitioners who lose standing if they are no longer "in custody."

My appeal was opened by the Seventh Circuit on 8-9-18. Eight months has now passed, and the matter has not even been assigned a briefing schedule. However, on 4-15-19, oral argument was heard on six (6) cases and five of those [non-habeas] cases were filed *at a later date* than my habeas appeal.

Do you think that my case now serves as an example of how habeas cases are placed on the back burner and should perhaps warrant a reconsideration of a rules change?

Thank you for your consideration.

Very truly yours,

Gary E. Peel

From: Gary Peel
To: RulesCommittee Secretary
Subject: RE: Suggestion on Criminal Rules
Date: Friday, May 14, 2021 4:42:59 PM

Thank you for your response.

I have two suggestions for the committee.

1. Amend the civil and criminal rules to provide that all potentially *dispositive* motions be addressed (decided) within a certain number of days (e.g. 30, 60, 90, ?) after the final Response, Reply or Sur-Reply Brief is due, and
2. Add a new civil and criminal rule that obligates all appellate courts to render merit-based decisions on a chronological basis, i.e. the oldest pending appeal should be addressed and decided first (or as near to chronological as reasonable).

Exceptions can be permitted to the above rules, for example,

a. in the case of an emergency filing, the appellate court could announce that it is taking up the case immediately, or earlier than normal, because of the emergency nature of the appeal, or
b. a case pending in the Supreme Court could be potentially dispositive of the pending appellate case and for that reason alone, the appellate decision on the merits could be postponed.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 2:51 PM
To: Gary Peel
Subject: RE: Suggestion on Criminal Rules

Mr. Peel – Your letter was also docketed as a suggestion on appellate rules (Docket No. 21-AP-F) and forwarded to the Chair and Reporter of the Advisory Committee on Appellate Rules. Thank you.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 1:26 PM
To: Gary Peel
Subject: Suggestion on Criminal Rules

Good afternoon. The office of Rules Committee Staff received your April 28 letter concerning a new rule mandating a time frame for motion resolution. The suggestion has been forwarded to the Chair and Reporters of the Advisory Committee on Criminal Rules, and the Chair of the Standing Committee. We are posting the suggestion to the Rules & Policies page of the uscourts.gov website. Your suggestion will be located under the Rules Suggestions section as Docket No. 21-CR-G.

The minutes from the meetings of the Advisory Committees will reflect any action taken on your suggestion. The Judiciary's Rulemaking website houses the minutes and agenda materials for each Advisory Committee meeting at Records of the Rules Committees.

We very much welcome suggestions and appreciate your interest in the rulemaking process. Please do not hesitate to contact us with questions.

RULES COMMITTEE STAFF
Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts
(202) 502-1820 | www.uscourts.gov
One Columbus Circle NE | Room 7-300 | Washington, DC 20544

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Time for Ruling on Habeas Motions (18-CR-D)

DATE: August 20, 2019

At its fall meeting in 2018, the Committee discussed Mr. Gary Peel's proposal for "new federal civil and/or criminal court rules (or the mandating of local court rules)" requiring "district court judges to issue decisions/opinions on pending motions within a specified number of days [he suggests 60 or 90 days] absent exigent circumstances." He stated that the failure of judges to rule on motions in Section 2254 and 2255 cases, in particular, is a "systemic problem," and that it is not uncommon for Section 2254 and 2255 motions to remaining "pending" or "under consideration" for a year or more. He added that efforts to remedy this situation have been ineffective.

Although members expressed concern about the significant delays in habeas cases, they generally agreed that the Committee did not have the authority to address the problem. Discussion then focused on one factor that may contribute to delays: the exemption of habeas cases from the list of pending motions that must be reported as pending for more than six months under the Civil Justice Reform Act. Multiple speakers acknowledged that exclusion may lead judges to give other reportable motions priority. They also noted that CACM has previously recommended changes to the CJRA reporting requirements in order to encourage timely disposition of certain classes of cases. There was support for referring this issue to CACM for further consideration in light of the statistics showing lengthy delays, and the concern that the exclusion from reporting may be contributing to the problem. Judge Molloy informed the Committee that he would write to CACM to raise the issue for their consideration, but he would not state a position on how the issue should be resolved.

In June, 2019, the chair of CACM, Judge Audrey Fleissig, responded to Judge Molloy. She wrote that after a lengthy discussion, CACM agreed unanimously "that the current approach, which treats these filings as civil cases, but not civil motions, is appropriate given the unique procedural and substantive issues associated with section 2254 petitions and 2255 motions." The remainder of her letter (included *infra*) provides a fuller explanation.

This is presented as an information item.

TAB 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 59(b)(2)—Adding a 14-day Period to Respond to Objections (Suggestion 21-CR-H)

DATE: October 4, 2021

Judge Patricia Barksdale has written drawing the Committee's attention to a discrepancy between Civil Rule 72(b)(2) and Criminal Rule 59(b)(2), both of which govern objections to findings and recommended dispositions by magistrate judges. Both rules provide that within 14 days after being served with the recommended disposition, a party may serve and file specific written objections.[1] But only the civil rule adds that "[a] party may respond to another party's objections within 14 days after being served by a copy."

Judge Barksdale notes that it is unclear why Criminal Rule 59(b)(2) omits any mention of the response to objections filed by another party, and she notes that briefing from both sides is equally helpful in criminal as in civil cases.

We asked Judge McGiverin to provide his views on this proposal in advance of the meeting. He responded that although it is interesting that the civil and criminal rules do not match, addressing the discrepancy would be a low priority. In his experience, parties have generally filed responses, or requested leave to do so, and he had never seen a judge take the position that the rules do not allow a party to respond to the other side's objection. His district's local rule granting 14 days to respond to any motion likely covers objections to the magistrate's proposed disposition and findings. Moreover, there may be reasons the response time in a criminal case should not be the same as in a civil case.

This item is on the agenda for discussion of the question whether to appoint a subcommittee to consider an amendment to Rule 59(b)(2).

[1] Fed. R. Crim. P. 59(b)(2) allows for the filing "[w]ithin 14 days after being served … or at some other time the court sets."

From: Patty Barksdale
To: RulesCommittee Secretary
Subject: Suggestion: Amendment to Federal Rule of Criminal Procedure 59(b)(2)
Date: Monday, June 21, 2021 12:36:10 PM

Please consider adding to Fed. R. Crim. P. 59(b)(2) a 14-day period to respond to objections. The counterpart in the civil rules, Fed. R. Civ. P. 72(b)(2), includes this period. Why there is a difference is unclear. Briefing from both sides is helpful in both contexts. Thank you for considering this suggestion.

Rule 59(b)(2):
(2) Objections to Findings and Recommendations. Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

Rule 72(b)(2):
(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202
(904) 549-1950

TAB 8

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49.1—Public Access to Financial Disclosure Forms (Suggestion 21-CR-I)

DATE: October 4, 2021

Judge Jesse Furman has written to the Committee suggesting that it consider a change to Rule 49.1 to acknowledge that the financial disclosure forms defendants submit to demonstrate financial eligibility for appointed counsel may be judicial documents subject to a right of public access under either the common law or the First Amendment. In *United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021), Judge Furman held that the defendant's CJA form 23s (and related affidavits) were "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment.

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002.

As Judge Furman explains, he questioned the language in the committee note (and the 2004 guidance from CACM and the Judicial Conference on which it was based), which suggest that such forms should never be made available to the public. That guidance, "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files," is included in the committee note to Rule 49.1, and it states (emphasis added):

> 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 or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and

- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation).

> To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).[1]

The quoted Guidance has been updated since the adoption of Rule 49.1 to add "or victim statements" to the parenthetical in the last bullet, but otherwise it remains unchanged.[2]

Judge Furman concludes that the Judicial Conference's Guidance is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." Stating that he is aware that amendments to the Note without a corresponding amendment of the Rule are disfavored, Judge Furman has proposed the following amendment to Rule 49.1(d), along with deleting the material quoted above from the committee note:

> **(d) Filings Made Under Seal.** Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

This item is on the agenda for discussion of the question whether to appoint a subcommittee to consider Judge Furman's suggestion.[3]

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[1] This language was added after the public comment period. The committee note includes the following description of changes made after publication:

> Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

[2] *See* https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files.

[3] If a subcommittee is appointed, it may be desirable to coordinate with the Civil and Bankruptcy Rules Committees, because the text of their E-Government Act rules is identical to Rule 49.1(d). *See* Fed. R. Civ. P. 5.2(d) and Fed. R. Bank. P. 9037(c).

From: Jesse Furman
Sent: Thursday, August 12, 2021 6:04 PM
To: RulesCommittee Secretary
Subject: Suggestion re Criminal Rule 49.1
Attachments: United States v Avenatti.pdf

To the Rules Committee Secretary,

I write to suggest that the Criminal Rules Committee consider a change to Rule 49.1 to acknowledge that the financial disclosure forms that defendants submit to demonstrate financial eligibility for appointed counsel (CJA Form 23s or the equivalent) may be judicial documents subject to a right of public access under either or both the common law or the First Amendment. I addressed the issue in *United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021), which is attached for your consideration. As you'll see, I concluded that the defendant's CJA Form 23s (and related affidavits) are indeed "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment. In the process, I questioned the language that appears in the Note to Rule 49.1 (and the guidance from CACM and the Judicial Conference upon which it is based), which appears to suggest that such forms should never be made available to the public. *See* pages *3 and *11 n.7. For reasons I explain in the opinion, I think the language in the Note (and the guidance on which it is based) is problematic, if not unconstitutional. Notably, although courts around the country have taken different approaches to the issues (and some have been more friendly toward sealing than I was), I think that the Note language and guidance is inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date.

I am aware that amendments to the Note without a corresponding amendment of the Rule are disfavored. To that end, I would propose the following amendment to Rule 49.1(d):

> **(d) Filings Made Under Seal. Subject to any applicable right of public access, t~~T~~he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

I would then propose deleting from the Note the following reference to the CACM Guidance:

> The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:
> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
> - unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

> To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

In my view, the Guidance is unnecessary and only likely to invite problems. At a minimum, I would propose adding a Note stating something to the effect of the following: "Subsection (d) of the rule was amended to add the words 'Subject to any applicable right of public access' to ensure that parties and courts are mindful of any applicable law providing a right to public access to a document. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20 (2d Cir. 2006) (holding that there is a common law right of public access to judicial documents and a qualified First Amendment right of public access to certain judicial documents)."

Please let me know if you have any questions or need additional information. Otherwise, thank you for your consideration.

Yours,
Jesse M. Furman

Jesse M. Furman
United States District Judge
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United States District Court, S.D. New York.

UNITED STATES of America,
v.
Michael AVENATTI, Defendant.

19-CR-374-1 (JMF)
|
Signed 07/27/2021

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OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

***1** The Sixth Amendment to the Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has interpreted this guarantee to require the appointment of counsel, at public expense, to represent indigent defendants in most criminal cases. *See Alabama v. Shelton*, 535 U.S. 654 (2002); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Criminal Justice Act ("CJA"), enacted by Congress in 1964, governs such appointments in federal criminal cases. *See* 18 U.S.C. § 3006A. To the extent relevant here, it mandates the appointment of counsel for any person charged with a felony if the court is "satisfied after appropriate inquiry that the person is financially unable to obtain counsel." *Id.* § 3006A(b). The Act itself does not prescribe what form the court's required "inquiry" must take. In practice, however, it usually involves the defendant's submission of an affidavit describing his or her financial circumstances. To that end, the Administrative Office of the United States Courts has created a standard form for the purpose, commonly known as CJA Form 23.

The questions presented here are whether or when the CJA Form 23 or similar documents may be sealed and whether or when they must be made available to the public — questions that are surprisingly unsettled despite the more than half century of experience with the CJA. They arise in connection with the prosecution of Michael Avenatti, a formerly high-profile and seemingly successful lawyer, for an alleged scheme to defraud a former client. In August 2020, the Court appointed counsel for Avenatti pursuant to the CJA based on affidavits he had filed attesting to his inability to afford counsel. The Court temporarily granted Avenatti's request to file the affidavits under seal — and did the same with respect to affidavits he has since filed attesting to his continuing eligibility (together with the initial affidavits, the "Financial Affidavits") — but directed him to show cause why they should remain sealed. He argues that sealing is necessary to protect his Fifth Amendment privilege against self-incrimination because the Government could use his statements in the affidavits against him. A member of the press, having intervened, argues that the affidavits must be disclosed because they qualify as judicial documents to which the public, under the common law and the First Amendment, has a right of access and that Avenatti's Fifth Amendment interests do not outweigh the public's rights.

For the reasons that follow, the Court holds that Avenatti's Financial Affidavits are indeed judicial documents subject to the common law and First Amendment rights of public access. Additionally, in light of Second Circuit precedent emphasizing that determinations regarding the appointment of counsel pursuant to the CJA should be made in traditional, open adversary proceedings and holding that a defendant's Fifth Amendment interests are adequately protected by a prohibition on the use of the defendant's statements as part of the prosecution's case-in-chief, the Court concludes that there are no countervailing factors or higher values sufficient to outweigh the public's right to access the documents. Accordingly, and for the reasons that follow, the Court holds that Avenatti's Financial Affidavits must be unsealed (subject to the possibility of narrowly tailored redactions to serve other interests).

BACKGROUND

***2** The Court begins with a brief discussion of the relevant background, starting with the CJA and the role of the documents at issue here and then turning to the history of this case.

A. The Criminal Justice Act

Congress enacted the CJA to effectuate the Sixth Amendment right to counsel "[i]n all criminal prosecutions," U.S. Const. amend. VI, which the Supreme Court has construed to mean that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial," *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Act "establishes the broad institutional framework for appointing counsel for a criminal defendant who is financially unable to obtain representation." *United States v. Parker*, 439 F.3d 81, 91 (2d Cir. 2006). It provides that "[e]ach United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a). In accordance with the Act, this District has a Plan for Furnishing Representation Pursuant to the Criminal Justice Act (the "CJA Plan"), the operative version of which was adopted in 2019. *See* U.S. DIST. CT., S. DIST. OF N.Y., REVISED PLAN FOR FURNISHING REPRESENTATION PURSUANT TO THE CRIMINAL JUSTICE ACT (2019), https://www.nysd.uscourts.gov/sites/default/files/2019-11/1-2019-plan-final-october.pdf ("CJA Plan").

To the extent relevant here, the CJA mandates the appointment of counsel "for any person" charged with a felony offense who is "financially unable to obtain adequate representation." 18 U.S.C. § 3006A(a); *see id.* § 3006A(c) (providing for the appointment of counsel if, "at any stage of the proceedings, ... the court finds that the person is financially unable to pay counsel whom he had retained"). The Court may appoint counsel in this manner, however, only "if [it is] satisfied after appropriate inquiry that the [defendant] is financially unable to obtain counsel." *Id.* § 3006A(b). It is the defendant's burden to establish financial eligibility. *See United States v. O'Neil*, 118 F.3d 65, 74 (2d Cir. 1997). The court's inquiry is usually based, at least in part, on information "provided by the person seeking the appointment of counsel either: 1) by affidavit sworn to before a district judge, magistrate judge, court clerk, deputy clerk, or notary public; or 2) under oath in open court before a district judge or magistrate judge." CJA Plan 5; *see Parker*, 439 F.3d at 93 ("Courts have utilized a broad range of considerations in conducting an 'appropriate inquiry' into financial eligibility under 18 U.S.C. § 3006A.... In many cases, the court's inquiry may properly be limited to review of financial information supplied on the standard form financial affidavit." (internal quotation marks omitted)). Indeed, the CJA Plan provides that, "[w]henever possible," a defendant "shall" complete and use a standard financial affidavit created by the Administrative Office of the United States Courts — known as CJA Form 23, a blank copy of which is attached as Exhibit A. CJA Plan 5. "CJA Form 23, a standard financial affidavit, requires comprehensive financial data, including employment income of the defendant and his or her spouse; all other income, cash, and property; identification of the defendant's dependents; and all obligations, debts, and monthly bills." *Parker*, 439 F.3d at 86 (internal quotation marks omitted).

***3** Notably, the CJA explicitly provides that a defendant may seek certain services — namely, "investigative, expert, or other services necessary for adequate representation" — by way of "an ex parte application" and provides that a court's determination of an application for such services is to be made "after appropriate inquiry in an ex parte proceeding." 18 U.S.C. § 3006A(e)(1). Another subsection of the Act provides that "the amounts paid ... for services in any case shall be made available to the public ... upon the court's approval of the payment," but it permits a court to delay or limit such disclosure if necessary to protect, among other things, "any person's 5th amendment right against self-incrimination," "the defendant's 6th amendment rights to effective assistance of counsel," "the defendant's attorney-client privilege" or "the work product privilege of the defendant's counsel." *Id.* § 3006A(d)(4). By contrast, the CJA is conspicuously silent on how a court should handle documents demonstrating a defendant's financial eligibility for appointed counsel in the first instance — that is, whether and when such documents (including but not limited to the CJA Form 23) should be sealed or disclosed and whether and whether or how they may be used. This District's CJA Plan, however, provides that "[t]he Government may not use as part of its direct case, other than a prosecution for perjury or false statements, any information provided by a defendant in connection with his or her request for the appointment of counsel pursuant to this Plan." CJA Plan 6.

Meanwhile, the Judicial Conference of the United States (in its Guide to Judiciary Policy and its current Policy on Privacy and Public Access to Electronic Case Files) and the Advisory Committee on the Criminal Rules (in the Advisory Committee note to Rule 49.1 of the Federal Rules of Criminal Procedure) have gone further, stating that "financial affidavits filed in seeking representation pursuant to" the CJA and "ex parte requests for authorization of investigative, expert or other services pursuant to" the CJA "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." Fed. R. Crim. P. 49.1 note; 10 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY § 340; Jud. Conf. of the U.S., *Judicial Conference Policy on Privacy and Public Access to Electronic Case Files* (March 2008), https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files. Neither explains the rationale for that direction, but the Advisory Committee note cites March 2004 Guidance from the Judicial Conference Committee on Court Administration and Case Management ("CACM"). The CACM Guidance, in turn, provides no explanation of why "financial affidavits filed in seeking representation pursuant to" the CJA made its list of documents to be withheld from the public or how the list was compiled, noting only that "because of the security and law enforcement issues unique to criminal case file information, some specific criminal case file documents will not be available to the public remotely or at the courthouse." JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES 3, 5 (2004), https://www.uscourts.gov/sites/default/files/implement031604.pdf.

B. Relevant Factual Background

Until 2019, Avenatti was a high-profile attorney who, at least publicly, seemed to be quite financially successful. As he describes it in a submission unrelated to the treatment of his Financial Affidavits, as of early 2018, he "was a practicing civil trial lawyer in California who had obtained numerous multi-million dollar judgments for his clients through various verdicts and settlements in courts throughout the United States. Many of Mr. Avenatti's cases received extensive local and national press coverage." ECF No. 115, at 6. In February 2018, Avenatti was hired to represent Stephanie Clifford, an adult entertainer more commonly known by her stage name, Stormy Daniels, "in connection with various matters relating to her previous liaison with the 45th President of the United States," Donald J. Trump. *Id.* at 6. As part of what he describes as "an extensive legal and media strategy," Avenatti "represented Ms. Clifford in various forums, including the court of public opinion." *Id.* at 7. As a result, it is fair to say that by late 2018, Avenatti, like Ms. Clifford, had become "a household name." *Id.*

***4** Avenatti's life took a dramatic turn in early 2019. First, in March 2019, he was arrested and charged in this District with bank and wire fraud related to an alleged scheme to extort Nike ("*Avenatti I*"). *See* Sealed Compl., *United States v. Avenatti*, No. 19-CR-373 (PGG) (S.D.N.Y. March 24, 2019), ECF No. 1. Then, in April 2019, he was indicted in the Central District of California on charges stemming from an alleged scheme to defraud and embezzle several of his clients. Indictment, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. Apr. 19, 2019), ECF No. 16. Finally, in May 2019, he was indicted in this case with a scheme to defraud Ms. Clifford. *See* ECF No. 1 ("Indictment"). In February 2020, after a trial before Judge Gardephe, a jury found Avenatti guilty of transmission of interstate communications with intent to extort (Count One), attempted extortion (Count Two), and honest services wire fraud (Count Three) in *Avenatti I*. *See* Verdict, *Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. Feb. 14, 2020), ECF No. 265. On July 8, 2021, Judge Gardephe sentenced him to twenty-four months' imprisonment on Count One and thirty months' imprisonment on Counts Two and Three, with all terms to be served concurrently. Judgment, *Avenatti I*, No. 19-CR-373 (PGG) (S.D.N.Y. July 15, 20201), ECF No. 339. The California case, meanwhile, was severed into two sets of charges. Trial on one set of the charges began July 13, 2021. Minutes, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. July 13, 2021), ECF No. 553. The second trial is scheduled to begin October 12, 2021. *See* Order, *United States v. Avenatti*, No. 8:19-CR-61 (JVS) (C.D. Cal. Nov. 13, 2020), ECF No. 386.

In this case, trial was originally scheduled to begin on April 21, 2020, ECF Nos. 23, 36, but due to the COVID-19 pandemic it was adjourned to January 10, 2022, ECF No. 103. On July 27, 2020, the attorneys who had been retained to represent Avenatti moved to withdraw, *see* ECF No. 61, and shortly thereafter, he applied for an order pursuant to the CJA appointing the Federal Defenders of New York to be his counsel going forward, ECF No. 66. To demonstrate his eligibility for appointment of counsel, Avenatti filed a CJA Form 23 and an attached declaration (together, the "Initial

Financial Affidavit"). By letter dated July 31, 2020, his then-counsel moved for the Initial Financial Affidavit to be kept under seal until the conclusion of these proceedings and the criminal proceedings pending against Avenatti in the Central District of California. *See* ECF No. 68. In support of that request, counsel explained only that the judge presiding over the California case had granted a request two days earlier to seal the same documents. *See id.* "A contrary ruling in this case," counsel contended, "would frustrate [the California] Order and prejudice Mr. Avenatti." *Id.* The Court granted the request. *Id.*

On August 7, 2020, during a conference conducted on the record by telephone, the Court granted counsel's motion to withdraw. ECF No. 87 ("Aug. 7, 2020 Tr."), at 13; *see also* ECF No. 73. Based on a review of the Initial Financial Affidavit, the Court found that Avenatti was eligible for the appointment of counsel and, on that basis, appointed Federal Defenders to be his new counsel. *See* Aug. 7, 2020 Tr. 15; ECF No. 73. In doing so, however, the Court noted Avenatti's acknowledgement in the Initial Financial Affidavit that he had "certain assets" with an "undetermined" value "that might yield funds in the future such as contingency lawsuits and the like." Aug. 7, 2020 Tr. 15. That raised "the possibility, however remote," that Avenatti's financial circumstances could change such that he would no longer be eligible for appointed counsel. *Id.* at 16. To ensure that it would be aware of any such change, the Court ordered Avenatti to submit an affidavit every four months "regarding his financial circumstances and noting with specificity any change in those circumstances since the prior affidavit." *Id.* The Court also directed counsel from Federal Defenders to keep track of their hours to ensure that, if there was a basis to do so, it could order Avenatti to reimburse the taxpayers for legal fees. *Id.*; *see* 18 U.S.C. § 3006A(f) ("Whenever the ... court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid ... to the court for deposit in the Treasury as a reimbursement to the appropriation ....").

***5** Additionally, the Court ordered Avenatti to show cause in writing why the Initial Financial Affidavit (and, by implication, any of the affidavits to be filed every four months thereafter) should not be unsealed. Aug. 7, 2020 Tr. 10-12; ECF No. 73. The Court noted that, "upon reflection," it had decided that "the question of whether [the Initial Financial Affidavit] should be public in this case warrants further briefing." Aug. 7, 2020 Tr. 10. The Court acknowledged that the documents may "contain private information or information that Mr. Avenatti may not want to share with the public. But at the same time, there is obviously some public interest in ensuring that taxpayer dollars are spent appropriately," particularly "given that not long ago, Mr. Avenatti certainly had sufficient funds to afford plenty of lawyers." *Id.* at 10-11. The Court noted also that the mere fact that the California judge had agreed to seal a similar document — the sole basis for Avenatti's July 31, 2020 application to seal — was not sufficient reason to maintain the Initial Financial Affidavit under seal, particularly because the law on public access in the Second and Ninth Circuits might differ. *Id.* at 11. In response to the Court's Order, Avenatti filed a letter brief arguing that the Initial Financial Affidavit should remain under seal. ECF No. 80 ("Def.'s Mem."). Thereafter, the Court received submissions from Inner City Press, a media outlet that intervened to seek disclosure of the Financial Affidavits, ECF Nos. 85, 90, 99; a letter from the Government, ECF No. 86 ("Gov't Opp'n"); and additional submissions from Avenatti, ECF Nos. 89 ("Def.'s Reply"), 91 ("Def.'s Sur-Reply"). Since that time, in compliance with the Court's directives, Avenatti has filed supplemental affidavits every four months, all of which — like the Initial Financial Affidavit itself — remain under seal.

DISCUSSION

Avenatti contends that his Financial Affidavits should remain under seal in their entirety. His primary argument is that sealing the documents is necessary to safeguard his Fifth Amendment privilege against self-incrimination because "there is a real and appreciable risk" that the Government will use his sworn statements against him." Def.'s Mem. 1. But he also disputes the proposition, advanced primarily by Inner City Press, ECF No. 85, at 2-3; ECF No. 99, at 2-3, [1] that the documents are judicial documents subject to a right of public access in the first instance. *See* Def.'s Reply 1 n.1; Def.'s Sur-Reply 1. [2] In the alternative, Avenatti asks the Court to delay disclosure of his Financial Affidavits until after the Government has presented its case-in-chief at trial and to give him an opportunity to propose redactions to the documents. *See* Def.'s Reply 4-5. The Court will begin with an overview of the well-established legal principles that govern whether and when the public has either a First Amendment or common law right to access documents in criminal cases before explaining why, in light of those principles, disclosure of Avenatti's Financial Affidavits (subject to the possibility of narrowly tailored redactions) is required.

1 References to page numbers in the submissions by Inner City Press are to the page numbers automatically generated by the Court's Electronic Case Filing ("ECF") system.

2 The Defendant initially argued that the Government lacked standing "to assert any right on behalf of the public to access Mr. Avenatti's sworn financial statements." Def.'s Mem. 7 n.1 (citing *United States v. Hickey*, 185 F.3d 1064 (9th Cir. 1999)). Subsequently, however, the Court granted leave to Inner City Press to be heard on the Defendant's motion, ECF No. 85, which indisputably does have standing to assert such rights.

A. Applicable Legal Principles Regarding Public Access to Judicial Documents

It is well established that the First Amendment provides a qualified right of access to criminal proceedings, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality op.), including pretrial proceedings, *Press-Enter. Co. v. Superior Ct.* ("*Press-Enter. II*"), 478 U.S. 1, 10 (1986), and to certain documents filed in connection with criminal proceedings, *see United States v. Biaggi* (*In re N.Y. Times Co.*), 828 F.2d 110, 114 (2d Cir. 1987); *see also Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) ("[O]ur precedents establish[ ] the public's and the press's qualified First Amendment right to attend judicial proceedings and to access certain judicial documents."). Separate and apart from the First Amendment, the common law provides a "right of public access to judicial documents." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). The common law right arises from "the need for federal courts, although independent — indeed, particularly because they are independent — to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo* ("*Amodeo II*"), 71 F.3d 1044, 1048 (2d Cir. 1995).

***6** In light of the common law presumption in favor of public access, "the Second Circuit has established a three-part test for determining whether documents may be placed under seal." *Coscarelli v. ESquared Hosp. LLC*, No. 18-CV-5943 (JMF), 2020 WL 6802516, at *1 (S.D.N.Y. Nov. 19, 2020). First, a court must determine whether "the documents at issue are indeed 'judicial documents' " to which the "presumption of access attaches." *Lugosch*, 435 F.3d at 119. The Second Circuit has defined a "judicial document" as one that is "relevant to the performance of the judicial function and useful in the judicial process," *United States v. Amodeo* ("*Amodeo I*"), 44 F.3d 141, 145 (2d Cir. 1995). "A document is ... relevant to the performance of the judicial function if it would reasonably have the *tendency* to influence a district court's ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court's decision." *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019) (internal quotation marks omitted). Second, the court "must determine the weight of that presumption," which is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). "The weight of the common law presumption is strongest for 'matters that directly affect an adjudication ....' " *United States v. Correia*, No. 19-CR-725-3 (JPO), 2020 WL 6683097, at *1 (S.D.N.Y. Nov. 12, 2020) (quoting *Lugosch*, 435 F.3d at 119). "Finally, ... the court must balance competing considerations," including "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure," against the presumption. *Lugosch*, 435 F.3d at 120 (internal quotation marks omitted).

Separate and apart from whether the common law presumption of access mandates disclosure of a document, the Court must determine "whether a First Amendment presumption of access also exists," because the constitutional presumption "gives rise to a higher burden on the party seeking to prevent disclosure than does the common law presumption." *Id.* at 124, 126. In determining whether a First Amendment right of access attaches to a particular filing, courts should consider (1) whether the filing at issue has "historically been open to the press and general public" and (2) whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8. A court should also ask "whether the documents at issue 'are derived from or are a necessary corollary of the capacity to attend the relevant proceedings.' " *Newsday LLC v. County of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013) (quoting *Lugosch,* 435 F.3d at 120). Applying these tests, "[t]he Second Circuit has recognized a qualified First Amendment right of access to a wide variety of judicial documents associated with criminal proceedings, including pretrial suppression hearings, suppression motion papers, voir dire, and more." *Correia*, 2020 WL 6683097, at *2. "Indeed, the Second Circuit has consistently affirmed that the right

of access applies to 'judicial documents' in criminal cases." *United States v. Smith*, 985 F. Supp. 2d 506, 517 (S.D.N.Y. 2013) (citing cases). If the "more stringent First Amendment framework applies, continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124 (*citing In re N.Y. Times*, 828 F.2d at 116).

B. The Rights of Public Access Apply to Avenatti's Financial Affidavits

As an initial matter, there is no question that the Financial Affidavits are judicial documents subject to the common law presumption of public access. As discussed above, the Second Circuit has broadly defined a "judicial document" for purposes of the common law as a document that is "relevant to the performance of the judicial function" — meaning "it would reasonably have the *tendency* to influence a district court's ruling on a motion" — "and useful in the judicial process." *Brown*, 929 F.3d at 49 (internal quotation marks omitted). CJA Form 23s generally — and, *a fortiori*, the Financial Affidavits specifically — "fit comfortably within the Second Circuit's capacious definition," *Correia*, 2020 WL 6683097, at *1: They are relevant, indeed critical, to the "appropriate inquiry" a court is statutorily mandated to conduct when tasked with determining if a criminal defendant is financially eligible for appointment of counsel at public expense. 18 U.S.C. § 3006A(b); *see Parker*, 439 F.3d at 93-96 (discussing the role of CJA Form 23s in connection with fulfilling the CJA's mandate to conduct "appropriate inquiry" regarding the eligibility for appointment of counsel); 7 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY § 210.40.20(a) ("The determination of eligibility for representation under the CJA is a *judicial function* to be performed by the court or U.S. magistrate judge after making appropriate inquiries concerning the person's financial condition." (emphasis added)); *see also, e.g.*, *United States v. Hadden*, No. 20-CR-468 (RMB), 2020 WL 7640672, at *2 (S.D.N.Y. Dec. 23, 2020) (rejecting a request to seal financial statements submitted in connection with an application for CJA counsel "because the documents are both useful and relevant to the judicial process and the application for appointed counsel").

***7** So too, the Court concludes that there is a qualified First Amendment right of access to the Financial Affidavits. Significantly, the Second Circuit addressed a similar issue in *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989), holding that there is a First Amendment right to access to "CJA forms on which judicial officers have approved payments to attorneys or to others who provided expert or other services to appellants, such as investigators, interpreters and computer experts," *id.* at 629-30. Citing "recent decisions ... dealing with the public's right of access to courtroom proceedings in criminal cases and to papers filed in connection with them," the court held that "the principles" of these cases applied to the CJA forms at issue given that they "were submitted to the federal district judge in charge of the criminal case ... and the submission was obviously in connection with the criminal proceeding." *Id.* at 630-31. The court acknowledged that "there is no long tradition of accessibility to CJA forms," but it noted "that is because the CJA itself is, in terms of tradition, a fairly recent development." *Id.* at 631 (internal quotation marks omitted). Moreover, the court reasoned, "[t]he lack of tradition with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms." *Id.* (internal quotation marks omitted). The court concluded: "Because there is no persuasive reason to ignore the presumption of openness that applies to documents submitted in connection with a criminal proceeding, ... the public has a qualified First Amendment right of access to the CJA forms after payment has been approved." *Id.*

Suarez all but compels the conclusion that the Financial Affidavits at issue here are judicial documents subject to the First Amendment right of public access. *See Correia*, 2020 WL 6683097, at *2 ("The Court sees no reason why the declarations at issue depart from judicial documents associated with criminal pretrial proceedings as to which the Second Circuit has previously recognized the First Amendment right of access." (citing *Suarez*, 880 F.2d at 631)). In fact, if anything, there is a stronger argument for granting First Amendment status to the CJA Form 23 and similar documents than there was for granting it to the forms at issue in *Suarez*. Whereas the forms at issue in *Suarez* provided only "barebones data" regarding "who was paid, how much and for what services," 880 F.2d at 631 (internal quotation marks omitted), the CJA Form 23 plays a critical role in the determination of an applicant's substantive right to appointed counsel under both the CJA and the Sixth Amendment — a right that is fundamental to the fairness of many criminal trials and the criminal justice system as a whole. In addition, an applicant's statements on the CJA Form 23 are subject to the penalties of perjury, the court's inquiry

is generally made in the context of the adversarial process, and the decision to deny or terminate appointed counsel can be appealed. *See, e.g.*, *United States v. Harris*, 707 F.2d 653, 658, 660-62 (2d Cir. 1983); *see also United States v. Coniam*, 574 F. Supp. 615, 617 (D. Conn. 1983) (noting the "role of the government" and the "adversarial process" in "[e]nsur[ing] the propriety of [a] defendant's receipt of services of counsel under the CJA").

In short, here, as in *Suarez*, "there is no persuasive reason to ignore the presumption of openness that applies to documents submitted in connection with a criminal proceeding." 880 F.2d at 631. Put differently, "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. II*, 478 U.S. at 8-9. Much like the right to a public trial generally, the right to public access here ensures that "the public may see [a defendant] is fairly dealt with and not unjustly" denied an important substantive right. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks omitted). Further, knowledge that the form is subject to public scrutiny serves to "keep [a defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions" — that is, it helps ensure "that judge and prosecutor carry out their duties responsibly" — and it "discourages perjury." *Id.* (internal quotation marks omitted). Critically, these values inhere even where there is no reason to believe that an applicant has lied, and the prosecution does not question the applicant's eligibility for the appointment of counsel. That is, "the sure knowledge that *anyone* is free" to access a CJA Form 23 "gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Ct.* ("*Press-Enter. I*"), 464 U.S. 501, 508 (1984). While public scrutiny "will more likely bring to light any errors that do occur, it is the openness of the [document] itself, regardless of [what is actually in the document or whether anyone accesses it], that imparts 'the appearance of fairness so essential to public confidence in the system' as a whole." *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012) (quoting *Press-Enter. I*, 464 U.S. at 508).

***8** Notably, Avenatti barely disputes that the Financial Affidavits are subject to both the First Amendment right of public access and the common law presumption in favor of public access. Indeed, he relegates the issue to a footnote in his reply, *see* Def.'s Reply 2 n.1, and to one sentence in his sur-reply, *see* Def.'s Sur-Reply 1, neither of which is sufficient to raise the issue, *see, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived ...."); *Pirnik v. Fiat Chrysler Autos., N.V.*, 327 F.R.D. 38, 43 n.2 (S.D.N.Y. 2018) (stating that an argument "relegated to a footnote ... does not suffice to raise [an] issue" and citing cases). In any event, his argument is easily rejected, as he relies solely on the majority opinion in *United States v. Connolly* (*In re Boston Herald, Inc.*), 321 F.3d 174 (1st Cir. 2003). The *Boston Herald* majority did indeed hold (in what appears to be the only court of appeals decision squarely addressing the issue) "that neither the First Amendment nor the common law provides a right of access to financial documents submitted with an initial application to demonstrate a defendant's eligibility for CJA assistance." *Id.* at 191. But that holding is obviously not binding here and, if the Court were writing on a blank slate, it would conclude that Judge Lipez, writing in dissent, had the better of the argument. *See id.* at 191-206 (Lipez, J., dissenting). In any event, the Court does not write on a blank slate, but is bound by both *Suarez* and the Second Circuit's broad definition of "judicial documents" for purposes of the common law right. As Judge Lipez's dissent confirms, it is difficult, if not impossible, to reconcile the *Boston Herald* majority's analysis and conclusion with these precedents. *See id.* at 200-01 & n.13 (Lipez, J., dissenting) (relying on *Suarez*).

In sum, the Financial Affidavits are subject to a right of public access under both the First Amendment and the common law. That said, this "right of access ... is a qualified one; it is not absolute." *Suarez*, 880 F.2d at 631. Thus, the Financial Affidavits "may be kept under seal if 'countervailing factors' in the common law framework or 'higher values' in the First Amendment framework so demand." *Lugosch*, 435 F.3d at 124. That is the primary basis on which Avenatti resists disclosure. To these arguments, the Court thus turns. [3]

3 Strictly speaking, the second step of the common law analysis is to "determine the weight" of the presumption in favor of public access, which is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (internal quotation marks omitted). In *Correia*, Judge Oetken concluded that similar documents (namely, declarations submitted by counsel explaining a defendant's non-payment as the reason for a motion to withdraw) were subject to only a "moderate presumption of access" because they "related to the court's supervision or management of counsel, authority ancillary to the

court's core role in adjudicating a case, and closer in nature to filings associated with discovery or in limine proceedings than to dispositive motions or trial documents." 2020 WL 6683097, at *1 (cleaned up). By contrast, in *Boston Herald*, Judge Lipez took the position that "the CJA Form 23 information unmistakably falls on the 'strong presumption' end of the Article III continuum" because it is of "the utmost importance to the court" and, "[i]n many cases, ... may be the only evidence submitted in the eligibility proceeding." 321 F.3d at 198 (Lipez, J., dissenting). The Court need not and does not wade into this debate because, whatever weight the presumption has here, there are — for the reasons discussed below — no countervailing interests that would justify sealing.

C. There Are No Countervailing Factors or Higher Values that Justify Sealing

Avenatti proffers only one countervailing factor or higher value in an effort to justify sealing of the Financial Affidavit: his Fifth Amendment privilege against self-incrimination. Avenatti argues that he "was compelled to make" the statements in the Financial Affidavit "to obtain counsel under the Sixth Amendment." Def.'s Mem. 1. "His Fifth Amendment right against self-incrimination," Avenatti continues, "prevents those very same statements from being weaponized against him." *Id.* at 4; *see* Def.'s Mem. 4-9; Def.'s Reply 2-4.

The courts of appeals have taken varying approaches to the question of whether and when CJA Form 23s can or should be sealed, *see United States v. Hilsen*, No. 03-CR-919 (RWS), 2004 WL 2284388, at *8-9 & nn.7-9 (S.D.N.Y. Oct. 12, 2004) (citing and discussing cases), but at least one — the Eighth Circuit — has adopted the theory pressed by Avenatti in explicitly approving the sealing of CJA Form 23s, *see United States v. Anderson*, 567 F.2d 839, 840-41 (8th Cir. 1977) (per curiam); *see also United States v. Gravatt*, 868 F.2d 585, 590-91 (3d Cir. 1989) (holding that, where a defendant refuses to complete a CJA Form 23, a district court has "discretion" either to require the applicant to submit the information for *in camera* review, following which "the financial data should be sealed," or, if the district court "deems an adversary hearing ... to be appropriate," to "grant use immunity to the defendant's testimony at that hearing" (internal quotation marks omitted)). [4] As the Eighth Circuit put it, to require a defendant seeking appointed counsel to disclose the financial information requested by the CJA Form 23 "would force [him] to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination. Such a choice is constitutionally impermissible." *Anderson*, 567 F.2d at 840-41 (citing *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969), and *Simmons v. United States*, 390 U.S. 377 (1968)).

4 Avenatti asserts that the Third, Fourth, Fifth, and Ninth Circuits have also held that defendants' financial affidavits "should be sealed and reviewed by courts *in camera*," Def.'s Reply 2; *see also* Def.'s Mem. 4-6, but that is not accurate. In the Third Circuit case cited by Avenatti, *Gravatt*, the court (as noted above) held that district courts *could* seal such documents, not that they "should" do so. 868 F.2d at 590-91. In the Fourth Circuit case, *United States v. Davis*, 958 F.2d 47, 49 n.4 (4th Cir. 1992) (per curiam), *abrogation on other grounds recognized in United States v. Ductan*, 800 F.3d 642, 652 n.5 (4th Cir. 2015) (per curiam), the court merely observed that the district court had "avoided any serious Fifth Amendment challenge by conducting an *ex parte* examination" of the defendant and sealing his answers; it did not opine on the propriety of sealing. In *Seattle Times Co. v. United States District Court for the Western District of Washington*, 845 F.2d 1513, 1519 (9th Cir. 1988), the Ninth Circuit actually *reversed* a district court's decision to seal a financial affidavit. (Although not cited by Avenatti, the Ninth Circuit's decision in *United States v. Ellsworth*, 547 F.2d 1096, 1097-98 (9th Cir. 1976), upheld the denial of an application for CJA counsel where the defendant had refused to complete the CJA Form 23 despite having been assured that it would "be sealed after review." But like the *Davis* Court, it did not address the propriety of sealing.) Avenatti, meanwhile, does not actually cite a decision from the Fifth Circuit. Judge Sweet's decision in *Hilsen* provides a helpful survey of the differing approaches among the circuits. *See* 2004 WL 2284388, at *4, *9 & nn.6-9.

***9** The problem for Avenatti is that the Second Circuit has explicitly rejected the Eighth Circuit's decision in *Anderson* and adopted a different approach to the balancing of a defendant's Fifth Amendment and Sixth Amendment rights in connection with the appointment of CJA counsel. In *Harris*, the district court had appointed counsel to represent John L. Harris based on his CJA Form 23. *See* 707 F.2d at 654-55.

A few months later, however, the prosecution moved for a determination that Harris "was not financially unable to obtain counsel and hence [wa]s not entitled" to appointed counsel under the CJA. *Id.* at 655 (internal quotation marks omitted). Harris disputed the prosecution's conclusions but refused to submit additional evidence when the district court denied his request to do so "at an in camera, ex parte proceeding." *Id.* Thereafter, the district court terminated Harris's appointment of counsel. *See id.* In an interlocutory appeal, he argued that "further inquiry should have been appropriately conducted through an ex parte, sealed in camera hearing." *Id.* at 662. The Second Circuit acknowledged that *Anderson* provided "some support" for this argument, but it rejected the Eighth Circuit's approach for several reasons. *Harris*, 707 F.2d at 662. First, citing 18 U.S.C. § 3006A(e)(1), the court noted that the CJA "specifically provides for ex parte applications for services other than counsel, while there is no such requirement for proceedings involving the appointment or termination of counsel." *Id.* (citation omitted). [5] "[S]ince Congress obviously knew how to provide for an ex parte proceeding when it seemed appropriate," the court observed, "the failure to do so in the context of appointment of counsel seems significant." *Id.* Second, the court reasoned that "our legal system is rooted in the idea that facts are best determined in adversary proceedings; secret, ex parte hearings are manifestly conceptually incompatible with our system of criminal jurisprudence." *Id.* (internal quotation marks omitted).

5 As the *Harris* court explained, "ex parte proceedings for services other than counsel are provided for to ensure that a defense would not be 'prematurely' or 'ill-advisedly' disclosed" — "considerations" that "are not relevant to proceedings concerning the appointment or termination of counsel." *Id.* (quoting *Criminal Justice Act of 1963: Hearings on S.63 and S.1057 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 173 (1963)).

Finally, the court observed that there "are numerous situations where a defendant must face the unappealing choice ... of testifying in open court or losing a constitutional claim." *Id.* (internal quotation marks omitted). Quoting from the Supreme Court's decision in *Simmons* and its own earlier decision in *Branker* — the same two cases cited by the Eighth Circuit in *Anderson* — the Second Circuit continued:

> However, "intolerable tension[s]" between constitutional rights have been alleviated by applying the rule that a defendant's testimony at a pretrial hearing will not be admissible at trial on the issue of guilt unless he fails to object. See *Simmons v. United States*, supra, 390 U.S. at 394; see also Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 Colum. L. Rev. 674, 678-81 (1976). We have held that "the government should not be permitted to use as part of its direct case any testimony given by a defendant at a hearing where he is seeking *forma pauperis* relief or the assignment of counsel on the ground of his financial inability to ... afford counsel," *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969), and that holding is directly applicable to the case before us.

Harris, 707 F.2d at 662-63. [6] The court found no merit to Harris's contention that the "*Simmons* and *Branker* rule ... affords inadequate protection." *Id.* at 663. "Harris's claim of fifth amendment violation by use of his testimony at a later time," the court explained, "is speculative at this point. See *United States v. Peister*, 631 F.2d [658, 662 (2d Cir. 1980)]. Moreover, we believe that the speculative possibility of inadequate protection of defendant's fifth amendment rights is outweighed by the need to determine facts through adversarial proceedings." *Id.*

6 Needless to say, the Second Circuit's reading of *Simmons* and *Branker* casts some doubt on the soundness of the Eighth Circuit's decision in *Anderson*. But because this Court is bound by the Second Circuit's decisions, whether *Anderson* is sound or not is irrelevant.

In short, the Second Circuit in *Harris* held that applications for appointment of counsel pursuant to the CJA should be addressed in traditional, open "adversarial proceedings" and "that constraints on the subsequent use of a defendant's testimony submitted in support of an application for appointed counsel" — that is, "use immunity" — "will strike an appropriate balance between a defendant's Fifth and Sixth Amendment rights where those rights are arguably in conflict." *Hilsen*, 2004 WL 2284388, at *4. Following *Harris*, "courts in this circuit have almost uniformly denied requests to file a CJA affidavit *ex parte*, including where the defendants were charged with fraud." *United States v. Kolfage*, — F. Supp. 3d —, No. 20-CR-412 (AT), 2021 WL 1792052, at *6 (S.D.N.Y. May 5, 2021) (discussing cases in denying the "analogous" request of a defendant charged with fraud to file financial data under seal in seeking the release of seized assets to hire counsel); *see, e.g.*, *Hilsen*, 2004 WL 2284388, at *1 (denying leave to file the CJA Form

23 under seal despite the defendant's argument that it would disclose facts "directly related, if not identical, to the facts the government must establish at trial"); *Coniam*, 574 F. Supp. at 616-17 & n.2 (explaining, in rejecting a request to seal the defendant's CJA Form 23 in a prosecution for securities fraud and mail fraud, that "[e]x parte proceedings are not consistent with traditional adversarial proceedings. The evidence in a preliminary hearing on qualification can be excluded. The conflict between the Fifth and Sixth Amendments is not unreconcilable."); *United States v. Hennessey*, 575 F. Supp. 119, 120 (N.D.N.Y. 1983) (Miner, J.) (describing a tax prosecution in which the defendant submitted a CJA Form 23 after the court had deemed his asserted Fifth Amendment privilege "premature" and ordered that the prosecution "would be prohibited from using as part of its direct case any information supplied by [the] defendant demonstrating inability to obtain counsel"), *aff'd*, 751 F.2d 372 (2d Cir. 1984) (unpublished table decision); *see also Correia*, 2020 WL 6683097, at *1-2 (denying a motion to seal a lawyer's declaration, submitted in support of a motion to withdraw, explaining that the defendant had not paid his fees and would likely qualify for appointed counsel). *But see United States v. McPartland*, No. 17-CR-587 (JMA), 2021 WL 722496, at *4 & n.1 (E.D.N.Y. Feb. 23, 2021) (relying in part on *Boston Herald* in holding that the defendants' "CJA-related applications" could remain under seal, without citing either *Suarez* or *Harris*).

***10** Avenatti attempts to distinguish *Harris* and its progeny on two grounds, but his arguments are unpersuasive. First, he contends that, unlike the defendants in these cases, "whose Fifth Amendment concerns were deemed premature or insubstantial, there can be no question that disclosing [his] sworn financial statements to the government would render his right against self-incrimination null and void." Def.'s Reply 3-4; *see* Def.'s Mem. 10 (arguing that, in contrast to *Harris*, "the risk of self-incrimination should Mr. Avenatti's sworn statements be unsealed is not speculative; it is a near certainty"). "[T]he government," Avenatti asserts, "allege[s] a direct, nefarious connection between discrete sources of [his] income and outstanding financial obligations, inextricably intertwining [his] finances with his alleged misconduct. [His] sworn statements are therefore replete with information that could provide leads for probative evidence ...." Def.'s Mem. 9. As evidence that these risks are not speculative, Avenatti points to the trial before Judge Gardephe in *Avenatti I*, in which "the same prosecutors litigating this case" used his "lack of income and indebtedness against him" by arguing that they "demonstrated his need and motive to quickly generate substantial sums of money, at the time when he engaged in the charged conduct." *Id.* at 2-3 (internal quotation marks omitted). In short, Avenatti argues that, unlike the defendants in *Harris* and its progeny, he faces a " 'real and appreciable' hazard of self-incrimination" that justifies sealing the Financial Affidavits altogether. *Id.* at 6 (quoting *United States v. Hyde*, 208 F. Supp. 2d 1052, 1056 (N.D. Cal. 2002)).

Admittedly, Avenatti's argument does find some support in a handful of decisions by district courts in other circuits. *See Hilsen*, 2004 WL 2284388, at *8-10 (noting that some courts have approved *ex parte* proceedings where "the conflict between a defendant's Fifth and Sixth Amendment rights is deemed to be immediate and real" and citing cases). But it cannot be squared with *Harris*, which "did not limit its discussion of the proper balance to strike between assertions of Fifth Amendment privilege made in conjunction with applications for appointed counsel pursuant to the Sixth Amendment to the particular facts before it." *Hilsen*, 2004 WL 2284388, at *10. Yes, the Second Circuit observed that "Harris's claim of fifth amendment violation by use of his testimony at a later time is speculative at this point." *Harris*, 707 F.2d at 663. In support of that proposition, however, the *Harris* Court cited the Tenth Circuit's decision in *Peister*, which rejected a defendant's refusal to complete a financial affidavit on Fifth Amendment grounds. *See Peister*, 631 F.3d at 661-62. Critically, though, the Tenth Circuit's decision was *not* based on the nature of the information or relationship between that information and the charges in the case; it was based on the fact that, *until trial*, "any conflict with the Fifth Amendment right" was "speculative and prospective only." *Id.* at 662; *cf. United States v. Allen*, 864 F.3d 63, 86 (2d Cir. 2017) ("[T]he Fifth Amendment is a personal *trial* right — one violated only at the time of 'use' rather than at the time of 'compulsion.' "). As the *Peister* Court put it: "The time for protection will come when, if ever, the government attempts to use the information against the defendant at trial. We are not willing to assume that the government will make such use, or if it does, that a court will allow it to do so." 631 F.2d at 662. Harris's claim, in other words, was "speculative" because it was pressed before trial, not because the defendant's financial status lacked a sufficient nexus to the charges against him. It follows that the Second Circuit's solution for the tension between a defendant's Fifth and Sixth Amendment rights — use immunity — applies to all cases and is not dependent on the nature of the charges against the defendant.

In any event, assuming for the sake of argument that sealing *could* be justified where a defendant showed a "real and appreciable" risk of self-incrimination, Def.'s Mem. 6, it would not be justified here. As noted, in arguing otherwise, Avenatti relies heavily on the fact that "the same prosecutors ... already (and aggressively) used [his] financial condition against him in *Avenatti I*." *Id.* at 9. But far from supporting Avenatti's argument, that fact undermines it. That is, as Avenatti himself concedes, the Government *already has* ample evidence that he "is millions of dollars in debt." *Id.* at 9-10; *see* Gov't Opp'n 3 ("[T]he Government has already conducted a thorough financial investigation of the defendant and already has access to significant information about his finances relevant to the charged conduct."). Thus, it is pure speculation to suggest, as Avenatti does, *see* Def.'s Reply 4, that the information in the Financial Affidavits will lead the Government to "new" evidence, let alone evidence that the Government would endeavor to use at trial. *See, e.g.*, *Hilsen*, 2004 WL 2284388, at *10 (characterizing the defendant's claim "that the government may be able to develop leads from information contained in his CJA 23" as "mere speculation"); *see also Coniam*, 574 F. Supp. at 617 (similar). And even if it did, there is a good chance that the evidence would be inadmissible, either on relevance grounds (given that the Indictment charges a scheme between July 2018 and February 2019, *see* Indictment ¶¶ 32, 34, and the Financial Affidavits only contain information regarding Avenatti's financial circumstances in July 2020 or later) or on cumulativeness grounds. *See* Fed. R. Evid. 401-403. In short, Avenatti's assertion of a Fifth Amendment risk is indeed "both premature and speculative." *Hilsen*, 2004 WL 2284388, at *11. It is thus not weighty enough to override the common law presumption of public access, let alone the public's First Amendment right.

***11** Avenatti's second argument for distinguishing *Harris* and its progeny is that here, unlike in those cases, "there is no credible basis for challenging [his] financial eligibility." Def.'s Mem. 9; *see* Def.'s Reply 3-4. That is, whereas the prosecution disputed the defendant's eligibility for counsel in *Harris*, here "the government has been pellucid that there is no basis to question [Avenatti's] financial inability; accordingly, there is no dispute to resolve and no adversarial proceeding to protect." Def.'s Reply 3-4. But that argument misunderstands the nature of the common law and First Amendment rights — and overlooks that these rights belong to the *public*. Put simply, the "supposition that a bona fide public interest in CJA eligibility only materializes if and when" the prosecution contests a defendant's application "is difficult to harmonize with the principles underlying the common law presumption of access to judicial documents" and the First Amendment right. *Bos. Herald*, 321 F.3d at 196 (Lipez, J., dissenting). Or to put it differently: Much as the public's right to attend a trial for a witness's testimony does not rise or fall on whether the prosecution chooses to cross-examine the witness, the public's right to a CJA Form 23 does not rise or fall on whether the prosecution elects to contest it.

In any event, Avenatti overstates the Government's position. The Government does not concede that Avenatti qualifies for appointed counsel. Instead, it "take[s] no position, based on the information available to it, on the request." Gov't Opp'n 3. That is hardly surprising given that, to date, the Government has been kept in the dark with respect to what is in Avenatti's Financial Affidavits. As the Government notes, "[a]bsent knowledge of what is contained in the defendant's CJA form and accompanying affidavit, the Government is unable to advise the Court on its view of the accuracy of that information, or whether efforts to recoup fees would be appropriate." *Id.* Leaving the Government in such darkness is hard to justify given its right to be heard on the question of whether a defendant is eligible for appointment of counsel pursuant to the CJA. *See United States v. Herbawi*, 913 F. Supp. 170, 173 (W.D.N.Y. 1996); *see also United States v. Jenkins*, No. 5:11-CR-602 (GTS), 2012 WL 12952829, at *3 n.1 (N.D.N.Y. Oct. 9, 2012) ("[T]he government always has the right, and indeed is charged with the responsibility, of bringing to the Court's attention any possible misuse or waste of public funds." (internal quotation marks omitted)). More fundamentally, it cannot be reconciled with the Second Circuit's admonition that "our legal system is rooted in the idea that facts are best determined in adversary proceedings" and that "secret, ex parte hearings are manifestly conceptually incompatible with our system of criminal jurisprudence." *Harris*, 707 F.2d at 662 (internal quotation marks omitted); *see also Hilsen*, 2004 WL 2284388, at *8 ("[T]he *ex parte* approach ... is incompatible with [*Harris*'s] emphasis on adversarial proceedings ....").

In sum, Avenatti's proffered justifications for sealing his Financial Affidavits — that it is necessary to protect his Fifth Amendment and Sixth Amendment rights — fall short. That is, *Harris* and its progeny already provide Avenatti with the protection to which he is entitled: use immunity. It follows that Avenatti's Fifth Amendment interests are not sufficiently weighty "countervailing factors" to override the common law presumption in favor of public access. *Lugosch*, 435 F.3d at

124. Nor do they make sealing "necessary to preserve higher values." *Id.* [7]

7 Needless to say, the guidance of the Judicial Conference, the Advisory Committee on the Criminal Rules, and CACM — that financial affidavits to obtain CJA counsel should *never* be made available to the public — does not provide a basis for this Court to seal the Financial Affidavits, particularly given the First Amendment foundation of the public's right of access. Notably, their categorical guidance is hard to square even with those decisions that have allowed for the sealing of financial affidavits, which have generally required a showing that "the conflict between a defendant's Fifth and Sixth Amendment rights is ... immediate and real." *Hilsen*, 2004 WL 2284388, at *9 (citing cases). Even more notably, their guidance appears to have played a role in leading at least one district court in this Circuit astray. *See McPartland*, 2021 WL 722496, at *4 & n.1 (emphasizing the Judicial Conference and Advisory Committee guidance in holding that the defendants' "CJA-related applications and submissions" could remain under seal). In the Court's view, it would be appropriate for the Judicial Conference, the Advisory Committee, and CACM to revisit the issue and, if not change their guidance, at least alert courts that the common law or First Amendment may require public disclosure.

D. Avenatti's Alternative Requests for Delayed Release and Redaction

***12** That does not end the matter because Avenatti asks, in the alternative, for the Court to "delay disclosure of the documents until after the government rests and/or until the defense has had an opportunity to offer redactions for the Court's consideration." Def.'s Reply 5. The former request is easily rejected. As the Second Circuit has held, the presumption — "under both the common law and the First Amendment" — is for "*immediate* public access to" judicial documents. *Lugosch*, 435 F.3d at 126 (emphasis added). Given that, and the protections afforded by *Harris* and its progeny, there is no basis to delay public access any longer. By contrast, the Court grants Avenatti's request to keep the Financial Affidavits under seal so that he may propose for the Court's consideration redactions consistent with this Opinion and Order. *See, e.g.*, *Hadden*, 2020 WL 7640672, at *2 n.2 ("The Court will provide the defense the opportunity to redact personal information such as social security numbers, names of minor children, dates of birth, financial account numbers, and home addresses."); *see also Suarez*, 880 F.2d at 633 ("It may be ... that some modest redaction before disclosure of a particular CJA form will be justified ...."). To be clear, however, any such redactions would have to be justified by an interest other than the Fifth Amendment — with respect to which use immunity provides all the protection to which Avenatti is entitled — and narrowly tailored to that interest. [8]

8 In light of the fact that the Financial Affidavits will remain under seal pending the Court's consideration of any proposed redactions, Avenatti's request for a two-week stay of any order to unseal in order to consider an interlocutory appeal, *see* Def.'s Reply 2 n.2; Def.'s Sur-Reply 1 n.1, is denied as unripe. In the event that Avenatti believes such a stay would still be warranted, he may renew the request in conjunction with any request for redaction.

CONCLUSION

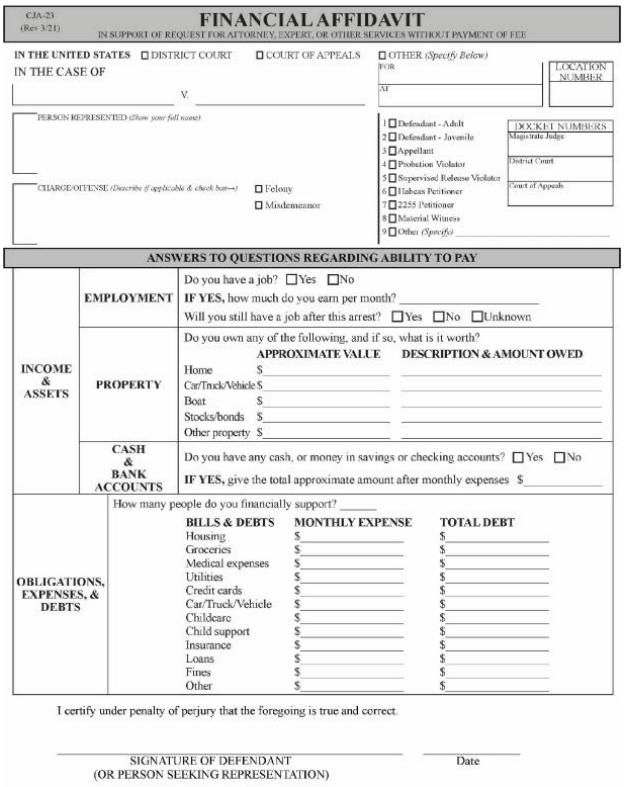
As is true for any criminal defendant, Avenatti's Fifth and Sixth Amendment rights are undoubtedly of paramount importance. Given the protections already available under Second Circuit law, however, the Court concludes that these rights are insufficient to override the public's rights — under both the First Amendment and the common law — to access the Financial Affidavits that Avenatti filed in this case to secure counsel at public expense. More specifically, the Court holds that:

- Avenatti's Financial Affidavits are "judicial documents" subject to the common law presumption in favor of public access and to the qualified First Amendment right of public access;
- that Avenatti's Fifth Amendment privilege against self-incrimination does not rebut the common law presumption or override the qualified First Amendment right because, under *Harris* and its progeny, Avenatti is adequately protected by the rule that his statements cannot be used against him in the Government's case-in-chief; and
- that Avenatti may propose limited redactions to protect other interests, but otherwise the public is entitled to immediate disclosure of the Financial Affidavits.

Avenatti shall propose any redactions to the Financial Affidavits, not inconsistent with this Opinion and Order, no later than **August 10, 2021**. Avenatti shall do so in accordance with the procedures set forth in Paragraph 10 of the Court's Individual Rules and Practices for Criminal Cases, available at https://nysd.uscourts.gov/hon-jesse-m-furman. As relevant here, those procedures require Avenatti to file a letter-motion seeking leave for any proposed redactions (other than redactions of two narrow categories of information for which Court permission is not required) that explains both the purpose of the proposed redactions and how they are narrowly tailored to serve an interest that outweighs the common law presumption and First Amendment right of public access. In the event that Avenatti does not seek leave for any redactions by the deadline, he shall promptly file all of the Financial Affidavits on ECF.

SO ORDERED.

EXHIBIT A



CJA-23 (Rev 3/21)

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT, OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN THE UNITED STATES ☐ DISTRICT COURT ☐ COURT OF APPEALS ☐ OTHER (Specify Below)

FOR

AT

LOCATION NUMBER

IN THE CASE OF

V.

PERSON REPRESENTED (Show your full name)

CHARGE/OFFENSE (Describe if applicable & check box→) ☐ Felony ☐ Misdemeanor

1 ☐ Defendant - Adult
2 ☐ Defendant - Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Supervised Release Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify)

DOCKET NUMBERS
Magistrate Judge
District Court
Court of Appeals

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

INCOME & ASSETS

EMPLOYMENT

Do you have a job? ☐ Yes ☐ No

IF YES, how much do you earn per month? _____

Will you still have a job after this arrest? ☐ Yes ☐ No ☐ Unknown

PROPERTY

Do you own any of the following, and if so, what is it worth?

	APPROXIMATE VALUE	**DESCRIPTION & AMOUNT OWED**
Home	$_____	_____
Car/Truck/Vehicle	$_____	_____
Boat	$_____	_____
Stocks/bonds	$_____	_____
Other property	$_____	_____

CASH & BANK ACCOUNTS

Do you have any cash, or money in savings or checking accounts? ☐ Yes ☐ No

IF YES, give the total approximate amount after monthly expenses $_____

OBLIGATIONS, EXPENSES, & DEBTS

How many people do you financially support? _____

BILLS & DEBTS	**MONTHLY EXPENSE**	**TOTAL DEBT**
Housing	$_____	$_____
Groceries	$_____	$_____
Medical expenses	$_____	$_____
Utilities	$_____	$_____
Credit cards	$_____	$_____
Car/Truck/Vehicle	$_____	$_____
Childcare	$_____	$_____
Child support	$_____	$_____
Insurance	$_____	$_____
Loans	$_____	$_____
Fines	$_____	$_____
Other	$_____	$_____

I certify under penalty of perjury that the foregoing is true and correct.

_____ _____

SIGNATURE OF DEFENDANT (OR PERSON SEEKING REPRESENTATION) Date

All Citations

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TAB 9

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: **Proposed Amendment to Rule 45(a)(6)**

DATE: October 5, 2021

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, Pub. L. No. 117-17, 135 Stat. 287 (2021), which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays "Juneteenth National Independence Day, June 19."

Criminal Rule 45(a)(6) defines "legal holiday" as follows:

> **(6)** ***"Legal Holiday" Defined.*** "Legal holiday" means:
>
> (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, or Christmas Day;
>
> (B) any day declared a holiday by the President or Congress; and
>
> (C) for periods that are measured after an event, any other day declared a holidayby the state where the district court is located. (In this rule, "state" includes the District of Columbia and any United States commonwealth or territory.)

To reflect the new public legal holiday, we recommend that the Committee approve an amendment to Rule 45(a)(6) to insert the words "Juneteenth National Independence Day," immediately following the words "Memorial Day," and that such change be recommended to the Standing Committee for approval without publication.

At their fall meetings, the Bankruptcy and Civil Rules Committees approved parallel amendments to their rules—Bankruptcy Rule 9006(a)(6) and Civil Rule 6(a)(6)(A). The Appellate Rules Committee will consider a parallel amendment to Appellate Rule 26(a)(6) at its spring meeting.