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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.

**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

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[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.