COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 14, 2021

I. Introduction

The Advisory Committee on Criminal Rules met in Washington, D.C. on November 4, 2021. Draft minutes of the meeting are attached.

The Advisory Committee has no action items. This report presents several information items. The Committee chose not to pursue several proposed amendments; referred one proposal to a subcommittee for further study; and approved an amendment incorporating Juneteenth in the definition of "legal holiday." That amendment will be included in a package of similar amendments to be presented at a later meeting, and appears here as an information item.

II. Information Items

This report presents the following information items:

- The Committee's decision not to move forward with the following:
  - multiple suggestions to amend Rule 6(e), governing grand jury secrecy, to allow the release of materials of special historical or public interest;
  - a suggestion to address the authority of courts to issue redacted versions of grand jury related judicial decisions;
  - a suggestion to amend Rule 6(c), governing the authority of grand jury forepersons;
  - a suggestion to adopt an amendment or new rule to deal with delays in the disposition of habeas appeals in the federal appellate courts; and
  - a suggestion to amend Rule 59(b)(2), governing objections to findings and recommendations by magistrate judges.
- The Committee's discussion of a suggestion to expand pro se access to electronic filing, which will be considered by a cross-committee group;
- The Committee's decision to appoint a subcommittee to consider an amendment to Rule 49.1 to address concerns about the Committee on Court Administration and Case Management (CACM) guidance included in the committee note; and
- The Committee's decision to approve an amendment to Rule 45(a)(6), recognizing Juneteenth as a national holiday; final action will be requested at a later date.

A. Proposals to Add Exceptions to Grand Jury Secrecy Under Rule 6(e)

The Committee earlier received and referred to a subcommittee multiple suggestions to amend Rule 6(e)(3) to create an exception allowing disclosure in cases of exceptional historical or public interest. After extended consideration of the subcommittee's report, the Committee decided, by a vote of 9 to 3, not to proceed further with the proposed amendments.

1. The Context, the Proposals, and the Committee's Process

The Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it 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*,

[1] The minutes of the meeting on April 22–23, 2012 state:

140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (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. The Sixth and Eighth Circuits had already held that Rule 6(e)'s exceptions are exclusive.[2] But the Second and Seventh Circuits have held that district courts possess inherent authority to release grand jury material in appropriate cases without an express exception. *In re Petition of Craig*, 131 F.3d 99, 102 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 766–67 (7th Cir. 2016). This issue continues to be litigated in other circuits.[3] Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer urged the Committee to resolve this question.[4] Given these developments, the Committee recognized that the situation has changed significantly since 2012.

The Committee's discussion focused on the suggestions submitted by Public Citizen Litigation Group (20-CR-B), the Reporters Committee for Freedom of the Press (20-CR-D), and Joseph Bell and David Shivas (21-CR-F), as well as proposals submitted in 2011, 2020, and 2021 by the Department of Justice during the Obama, Trump,[5] and Biden administrations (20-CR-H and 21-CR-J). Several of these suggestions would authorize not only disclosure of records of special historical interest, but also disclosure that would further the public interest generally. Some suggestions referenced the courts' putative inherent authority to disclose grand jury materials. In

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> 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.

[2] *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.").

[3] 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.).

[4] He wrote:

> 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, 598 (2020).

[5] The Department's 2020 submission described this as a proposal "the Department Could Possibly Support." 20-CR-H at 6.

contrast, the Department's suggestions over the years have all (i) taken the position that courts lack inherent authority to order disclosures not specified in the rule, and (ii) sought only a limited exception for disclosure of historical records. All the proposals submitted to the Committee are summarized in a chart attached as an appendix to this report.

The Committee referred these suggestions to a subcommittee, which held a full-day miniconference in April 2021 to gather the views of experienced prosecutors, defense counsel, historians, journalists, and others affected by grand jury secrecy. The subcommittee also met by telephone four times over the summer. The subcommittee's report to the Committee included (1) a draft 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,[6] and (2) a recommendation by a majority of the subcommittee that the Committee pursue neither a historical records exception to grand jury secrecy, nor a broader exception that would ground a new exception in the public interest or inherent judicial authority.[7]

After lengthy deliberations at its November meeting, the Committee voted 9 to 3 not to proceed with an amendment to Rule 6(e) that would provide for disclosure of grand jury materials of historical or public interest.

2. The Committee's Decision Not to Proceed with a Historical or Public Interest Amendment

In its plenary review of the proposals, the Committee began with the premise that secrecy plays a critical role in the grand jury's effectiveness. As the Supreme Court explained in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211(1979):

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There

[6] The key elements of the subcommittee discussion draft were (a) a requirement that the government be provided with notice and an opportunity to be heard on any petition for release, (b) a threshold requirement that the case have been closed for at least 40 years, and (c) findings that the grand jury matter has "exceptional historical importance" and that "the public interest in disclosing the grand jury matter outweighs the public interest in retaining secrecy." The subcommittee declined to adopt the non-exhaustive list of factors several prior courts have considered, drawn from the Second Circuit's decision in *Craig* (though it referenced that case in the committee note), and it declined to provide for any automatic or presumptive disclosure after a certain period. *See* November 2021 Agenda Book (Criminal Rules Committee).

[7] As noted *infra*, the Department of Justice supported the subcommittee draft, though it proposed two key revisions.

> also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

441 U.S. at 218–19 (citation omitted).

As the Court recognized, the possibility of disclosure can undermine the grand jury's effectiveness. "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.

A majority of the Committee concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution. Members expressed concerns about the likely effects of such an amendment and the possibility of unintended and unforeseeable consequences. They found the interests in favor of disclosure insufficient to risk undermining an institution that has played a critical role in the criminal justice system for almost a thousand years. In assessing these risks, members drew on their own extensive experience with grand jury proceedings as well as the information gained at the miniconference. Five members described their own experience representing witnesses, targets, and other parties with an interest in the secrecy of grand jury proceedings. Nine members (including some who also represented witnesses at other stages of their career) had served as federal prosecutors. Many of these members referenced their experience working with prospective witnesses, seeking to reassure them, and eliciting their testimony.

A majority of members concluded that there was too great a risk that an amendment—even if narrowly tailored—could significantly complicate the process of advising witnesses, endanger witnesses and their families, and ultimately discourage witnesses' cooperation.

Grand jury witnesses typically want to know who will be able to learn about their testimony. Several members expressed the view that having to explain the possibility that a witness's testimony could be released—even after several decades—would impede witness cooperation. Many witnesses are fearful about testifying, especially in cases involving violent crime and criminal activity by groups, including drug cartels, terrorists, gangs, and other organized crime. One member recalled prospective witnesses who had been so frightened that they fled the country rather than testify.

The Committee discussed whether delaying disclosure for many decades, such as the 40-year floor in the draft amendment prepared by the subcommittee, would address this concern. Members explained that even lengthy delays do not negate either the fear or the danger that witnesses may face. Groups such as drug cartels and terrorist organizations have what one miniconference participant called "long memories"; those groups might seek to retaliate against a witness or the witness's family members even after many years have passed. Moreover, even after decades, the revelation of grand jury records could adversely affect the reputational and business interests of witnesses and their families. For example, one member described the devastating effect that a grand jury leak had on the reputation of a major civil rights leader and his family. Such a

revelation, she explained, would have a major impact even after many decades, on not only the affected person and his family, but also many others in the community.

The draft amendment prepared by the subcommittee and considered by the Committee included other safeguards that aimed to preclude any release that would harm or endanger witnesses. The amendment required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy. The draft committee note stressed that "[t]he court must evaluate . . . the possible impact of the particular disclosure on living persons (including witnesses, grand jurors, and persons investigated but not charged)." The draft amendment provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. Given this requirement, several members acknowledged that courts likely would not permit disclosure in a case in which a witness faced physical danger from groups such as terrorists, cartels, or violent criminal organizations. Moreover, as the Department of Justice suggested to the Committee, the amendment could have been revised to heighten the protection for witnesses and others by requiring the court to make a finding that disclosure would not materially prejudice any living person as a prerequisite to any release. The note also drew attention to Rule 6(e)(3), which authorizes the court to order disclosure with redactions or to impose other conditions to prevent prejudice.

Yet the members opposing the amendment concluded that the dangers of expanded disclosure would remain. Members recognized that exceptions to grand jury secrecy already exist, so witnesses cannot be assured that their testimony can never be revealed. But members considered the addition of the exception to be a significant change that would complicate the preparation and advising of witnesses and reduce the likelihood that they would testify fully and frankly. Moreover, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, all of which are intended to facilitate the resolution of other criminal and civil cases, and the investigation of terrorism.

The Committee was aware that the Justice Department had consistently supported an amendment for more than a decade (though with some variation in its proposals); but that support was not enough to overcome members' concern that the amendment could do subtle but incalculable damage to the grand jury as an institution. Members also noted that the Department's support of the amendment was at odds with the grave concerns raised by many current and former career prosecutors at the miniconference and on the Committee who saw the amendment as a threat to the grand jury and opposed it.

Numerous members acknowledged that this was a close issue, and some members agreed with the Committee's view in 2012 that the courts had appropriately handled the rare cases in which they permitted disclosure. Many members also recognized that the public has an interest in the disclosure of grand jury records in cases of exceptional historical interest, such as those involving Julius and Ethel Rosenberg. But some members who stated they were comfortable with the disclosure in rare cases such as *Rosenberg* thought that no amendment could fully replicate the prior judicial practice in these cases. Even with strict limits, an amendment expressly allowing disclosure of these materials would tend increase the number of requests and actual disclosures alike, thereby undermining the critical principle of grand jury secrecy.

Judge Kethledge stated that evolved institutions like this one are distillations of experience and wisdom. They work in ways we are not aware of, and often benefit us in ways we do not understand. The potential for unintended consequences is greater than usual. Moreover, an express exception might encourage potential leakers to define for themselves the situations in which such disclosures were desirable.

The Committee also considered the differences between the common-law and rulemaking approaches to this issue. Without an amendment, historians and other interested parties will continue to seek grand jury records in circuits where inherent authority has not been foreclosed, requiring those courts to develop standards for release. The common-law approach would allow those courts to move incrementally, comparing the case at hand to prior cases, rather than seeking to answer all the relevant questions for disclosure in one fell swoop. Given the existing circuit split, however, members thought the Supreme Court would eventually address the issue whether the courts have this authority. But the Supreme Court as well could choose to act incrementally in this area. In contrast, rulemaking might eliminate the need for the circuits and perhaps the Supreme Court to address that issue, and provide a national standard developed in a deliberative process with broad input. Moreover, the standard could strive to be highly protective of the interests of witnesses and their families, as well as the government's interest in ongoing investigations and prosecutions.

The Committee acknowledged Justice Breyer's call to resolve the circuit split regarding disclosure of grand jury materials. As discussed below, however, members concluded that the question whether courts have inherent authority to order that disclosure is substantive, not procedural, and thus beyond the Committee's purview. The Committee's role, instead, is to recommend whether—as a matter of positive procedural law—Rule 6(e) should be amended to provide for disclosure of grand jury materials of exceptional historical interest. For the reasons stated above, a majority of the Committee chose not to recommend such an amendment.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

3. The Committee's Decision Not to Address Either the Exclusivity of the Exceptions to Secrecy in Rule 6 or the Courts' Inherent Authority

Finally, the Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. On this point, the suggestions received by the Committee were sharply divided. In the Committee's view, however, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Committee's authority under the Rules Enabling Act.

B. Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions

The *McKeever* decision also prompted a request from District of Columbia Chief Judge Beryl Howell and former Chief Judge Royce Lamberth (21-CR-C). They wrote asking the Committee to consider whether Rule 6(e) should be amended to authorize courts "to release

judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The judges 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." The judges further stated that "[t]his practice is critically important to avoid building a body of 'secret law' in the grand jury context." But they also observed that, to the extent "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." The judges thus concluded that "the D.C. Circuit's decision has cast a shadow about the legal basis for this practice," and accordingly the authority to continue this practice "deserves consideration and clarification."

In response to this suggestion, the reporters prepared a memo that detailed a number of redacted judicial decisions involving grand jury issues. After discussion, the subcommittee chose not to recommend an amendment to address this issue at this time.

After discussion at the November meeting, the Committee likewise decided unanimously not to pursue an amendment. Members thought the current means available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e). Whether judicial opinions may disclose grand jury materials in a manner inconsistent with Rule 6(e), of course, would be a difficult question. Since *McKeever*, however, no one has claimed that disclosure of grand jury material in a judicial opinion violated Rule 6.

C. Rule 6(c) Authority of Grand Jury Forepersons

The Committee declined to move forward with a suggestion from Judge Donald Molloy (21-CR-A) that it amend Rule 6(c) to authorize a grand jury foreperson to excuse members of the grand jury temporarily. The Committee learned that districts within the Ninth Circuit vary considerably as to who has authority to grant temporary excuses to grand jury members. The most common approach 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 N.D. California) allow the foreperson, acting alone, to grant temporary excuse requests.

The Committee saw no reason to displace the varying local practices with a uniform national rule, and no reason to favor one district's practice over others. The districts seem to have chosen systems that work well for them.

D. Time Limits on Habeas Dispositions in the Appellate Courts

The Committee declined to move forward with Mr. Gary Peel's suggestion (21-CR-G) that it adopt an amendment or new rule to deal with "non action" by federal appellate courts in habeas

appeals. The proposal did not include any evidence of a systematic problem in the courts of appeal, and appellate procedure falls outside the Committee's jurisdiction.

E. Rule 59(b)(2) Objections to Findings and Recommendations by Magistrate Judges

The Committee declined to move forward with Judge Patricia Barksdale's suggestion (21-CR-H) that it amend Rule 59(b)(2)—which governs objections to findings and recommendations by magistrate judges—to add language specifying a 14-day period to respond to objections. Judge Barksdale drew the Committee's attention to a discrepancy between Civil Rule 72(b)(2)—which provides a 14-day period to respond to objections—and Criminal Rule 59(b)(2)—which does not set a time for responses. Judge Barksdale provided no information suggesting that the current text of Rule 59 had created any problems, and Committee members thought that parties in criminal cases routinely file such responses. The Committee thus saw no need for an amendment.

F. Rule 49 and Pro Se Access to Electronic Filing

The Committee had a brief initial discussion of Sai's suggestion (21-CR-E) that the Committee expand access of pro se parties to electronic filing in criminal cases. Electronic filing has evolved significantly since the Committee amended Rule 49 in 2018, most recently in response to COVID-19.

Sai also proposed changes in the regulation of electronic filing in the Civil and Bankruptcy Rules. To facilitate cross-committee consideration of these related proposals, Professor Cathie Struve is convening a group made up of the reporters for the various Advisory Committees that will develop more information relevant to the issues.

G. Rule 49.1 and CACM Guidance Referenced in the Committee Note

The Committee discussed Judge Jesse Furman's suggestion (21-CR-I) to amend Rule 49.1 and its committee note. By way of background, 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 a criminal defendant's CJA form 23s (and related affidavits)—submitted by defendants to demonstrate financial eligibility for appointed counsel—are "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common-law and the First Amendment. In contrast, the committee note to Rule 49.1 suggests that these forms should not be made available to the public. The committee note incorporates guidance from the CACM Committee and the Judicial Conference, and provides in relevant part:

> 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:
>
> * * * * *
>
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

* * * * *

> 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).[8]

Judge Furman wrote that the 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." He proposed deletion of the reference to financial affidavits in the committee note, and 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.

The Committee referred Judge Furman's suggestion to a subcommittee, which will consider the privacy interests of indigent defendants, their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee will also coordinate with the Civil and Bankruptcy Committees since their rules have similar language. Finally, the Committee will advise the CACM Committee that it is considering this issue.

H. Juneteenth National Independence Day

The Committee approved an amendment to Rule 45(a)(6) recognizing Juneteenth as a national holiday. At present, this is an information item. Final action will be requested at a later date when the parallel changes to the Appellate, Bankruptcy, Civil, and Criminal Rules will be presented together.

[8] 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.