# Office of the Attorney General
Washington, D. C. 20530

October 18, 2011

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

Dear Judge Raggi:

The Department of Justice recommends an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance and to provide a temporal end point for grand-jury secrecy with respect to materials that become part of the permanent records of the National Archives.

Although most other categories of historically significant federal records, including classified records, eventually become part of the public historical record of our Nation, 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 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. For this reason, a number of federal courts have granted third-party petitions to disclose historically significant grand-jury materials—most recently, for example, the transcript of President Nixon's 1975 testimony to the Watergate grand jury—by invoking the inherent authority of federal courts as a justification for deviating from the requirements of Rule 6(e).

The difficulty is that, as the Supreme Court has made clear, federal courts have no inherent authority to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. See, *e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). In our view, the growing acceptance among federal courts of a "historical significance" exception to Rule 6(e) threatens to undermine the essential principle that Rule 6(e) encompasses, within its four corners, the rule of grand-jury secrecy and all of its exceptions and limitations. We therefore propose an amendment to Rule 6(e) that would accommodate society's legitimate interest in securing eventual public access to grand-jury materials of significant historical importance, while at the same time defining the contours of that access within the text of Rule 6(e).

**A. Background**

Rule 6(e) "codifies the traditional rule of grand jury secrecy," *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983), which is "older than our Nation itself," *Pittsburgh Plate Glass*, 360 U.S. at 399. Rule 6(e) imposes a flat prohibition on disclosures by non-witness participants in grand-jury proceedings "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Most of the exceptions, which are enumerated in Rule 6(e)(3), concern disclosures to other government officials or related persons in the course of government business. See Rule 6(e)(3)(A)-(D).

Rule 6(e)(3)(E), in turn, identifies five circumstances in which a district court may order the disclosure of grand-jury materials in its own discretion. It is not an open-ended list: by its plain terms, the rule defines the universe of circumstances in which a district court "may authorize disclosure . . . of a grand-jury matter." Of the five circumstances listed, only two permit disclosures to non-government officials:

> (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:
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> > (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; . . .

Fed. R. Crim. P. 6(e)(3)(E)(i)-(ii).

Neither of these provisions—nor any other provision of law—authorizes a third party to obtain access to grand-jury material merely because it is historically significant. The first exception ("preliminarily to or in connection with a judicial proceeding") cannot support a free-standing petition to release historical grand-jury records. "[O]bviously the permission to disclose for use in connection with 'a judicial proceeding' does not encompass a proceeding instituted solely for the purpose of accomplishing disclosure." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973) (Friendly, J.). Rather, disclosure under Rule 6(e)(3)(E)(I) is permitted only if "the primary purpose" is "to assist in preparation or conduct of a judicial proceeding," *United States* v. *Baggot*, 463 U.S. 476, 480 (1983), and only where the materials are "needed to avoid a possible injustice" and the disclosure is tailored "to cover only material so needed," *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). And all of the other exceptions address specific circumstances in which the need for the materials and identity of the recipient is carefully delineated. In this sense, Rule 6(e) "is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Baggot*, 463 U.S. at 479. The court-ordered disclosure to third-party requesters of grand-jury records in their entirety,

unconnected to any otherwise pending judicial proceeding, without a particularized showing of need, and based solely on the records' historical significance, is outside the contemplation of Rule 6(e).

Nonetheless, some courts have exercised what they have described as their inherent authority to release historically significant grand-jury material. These courts have held that "special circumstances" may justify disclosure of grand-jury materials even when none of Rule 6(e)'s specific exceptions applies. The leading decision is *In re Craig*, 131 F.3d 99 (2d Cir. 1997), in which the Second Circuit stated that "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." *Id.* at 102 (quoting *In re Biaggi*, 478 F.2d at 494 (supplemental opinion)). Under that doctrine, the court reasoned, "historical interest, on its own," may "justify[] release of grand jury material in an appropriate case." *Id.* at 105. "To the extent that the John Wilkes Booth or Aaron Burr conspiracies, for example, led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy." *Ibid.* To the government's argument that Rule 6(e) controls the disclosure of grand-jury material, the court responded that the rule "reflects rather than creates the relationship between federal courts and grand juries," *id.* at 102 (citing *Pittsburgh Plate Glass*, 360 U.S. at 399), and that "permitting departures from Rule 6(e)" is therefore "fully consonant with the role of the supervising court," *id.* at 103.[1]

Embracing this approach, district courts in several circuits have granted petitions for access to grand-jury materials of historical importance. See, *e.g.*, *In re Petition of Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011) (granting petition for access to grand-jury testimony by President Nixon); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009) (same, grand-jury records concerning the jury-tampering indictment of Jimmy Hoffa); *In re Petition of National Security Archive*, No. 1:08-cv-6599, Docket entry No. 3 (S.D.N.Y. Aug. 26, 2008) (same, espionage indictment of Julius and Ethel Rosenberg); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (same, espionage investigation of Alger Hiss). Following the Second Circuit's reasoning in *In re Craig*, these decisions have all relied on a notion of inherent authority to approve the release of grand-jury records that Rule 6(e) would otherwise require to remain secret. In the *Kutler* case, for example, the district court

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[1] The Eleventh Circuit reached a similar conclusion about the scope of a district court's inherent authority in *In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984), which concerned a petition filed on behalf of a special committee of the court of appeals that was investigating misconduct by a district judge. The Eleventh Circuit rejected the contention that Rule 6(e) spells out the exclusive basis on which a court may order the disclosure of grand-jury records and held that the district court had properly exercised its "inherent power" to grant the special committee's request. *Id.* at 1268; see also *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc). Although *Hastings* relied on inherent authority, the disclosure might alternatively be understood as being "in connection with a judicial proceeding." The court viewed the disclosure to the special committee as "at least closely analogous to the situation for which the explicit Rule 6(e)(3)(C)(I) exception was created." 735 F.2d at 1268.

granted a petition filed by historian Stanley Kutler and various historical organizations for access to the transcript of President Nixon's 1975 testimony before the Watergate special grand jury and certain related files of the Watergate Special Prosecution Force. The petitioners conceded that no provision of Rule 6(e) would permit the court to approve their request. The court nevertheless approved it, holding that the power to release historically significant grand-jury records is "well grounded in courts' inherent supervisory authority to order the release of grand jury materials." 2011 WL 3211516, at *5; see also *id.* at *3 ("[C]ourts' ability to order the disclosure of grand jury records has never been confined by Rule 6(e)'s enumerated exceptions.").

Although historians have an understandable desire for access, many decades after the investigations have closed, to grand-jury records concerning the Watergate investigation, the espionage trial of the Rosenbergs, and similar matters of enduring historical resonance—provided that interests in personal privacy and governmental functions are taken into account and appropriately weighed—the 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. "Whatever the scope of [a court's] 'inherent power,' * * * it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); see also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (refusing to "creat[e] out of whole cloth * * * an exception to" Rule 52(b), "an exception which we have no authority to make" (citing *Carlisle*, 517 U.S. at 425-426)). As the Supreme Court explained in *Bank of Nova Scotia*, the Rules Enabling Act provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. 2072(b); see 487 U.S. at 255. That principle applies *a fortiorari* under Rule 6(e), which in relevant part was enacted directly by Congress. Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977); see *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985) (even a "sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions"). Because Rule 6(e) is, "on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials," *Baggot*, 463 U.S. at 479, a judicially created doctrine of public access to historically significant grand-jury material exceeds the bounds of courts' inherent authority.

Indeed, federal courts do not typically regulate the conduct of a grand jury, which is "an institution separate from the courts, over whose functioning the courts do not preside." *United States* v. *Williams*, 504 U.S. 36, 47 (1992). "Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *Ibid.* Consequently, "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. The notion that a court possesses "inherent supervisory authority to order the release of grand jury materials," *Kutler*, 2011 WL 3211516, at *5, is therefore not only inconsistent with the prescriptive force of Rule 6(e), but also in tension with the institutional relationship between courts and grand juries.

Notably, Judge Friendly's 1973 decision in *In re Biaggi*, the wellspring of the "special circumstances" doctrine, predates the Supreme Court's decisions in *Carlisle*, *Bank of Nova Scotia*, and *Williams*. So, too, does the Eleventh Circuit's decision in *Hastings*. See note 1, *supra*. Indeed, *In re Biaggi* also predates Congress's direct enactment of Rule 6(e) in 1977, which undermines any claim that the rule is open to circumvention through a court's inherent authority. And although the Second Circuit decided *In re Craig* in 1997, the court "reaffirm[ed] the continued vitality of our 'special circumstances' test of *Biaggi*," 131 F.3d at 103, without citing or discussing *Carlisle*, *Bank of Nova Scotia*, or *Williams*.[2]

In sum, the Second Circuit's basic insight in *In re Craig*—that in long-closed cases of enduring historical significance, the public's interest in access to the primary-source records of our national history may on occasion "overwhelm any continued need for secrecy," 131 F.3d at 105—seems fundamentally correct. Although the justifications for grand-jury secrecy "are not eliminated merely because the grand jury has ended its activities," *Douglas Oil*, 441 U.S. at 222, neither do those interests remain paramount for all time. But the present state of the doctrine, in which individual district courts entertain motions for disclosure under their inherent authority and subject to their unbounded discretion, is untenable under governing Supreme Court precedent. It is also harmful to the fundamental principle that Rule 6(e) controls the secrecy of grand-jury materials within its four corners.

**B. Description of Proposed Amendment**

The Department of Justice therefore proposes amending Rule 6(e) to authorize the disclosure of historically significant grand-jury materials after a suitable period of years, subject to appropriate limitations and procedural protections. By expressly permitting district courts to act on requests for such records, yet at the same time cabining their discretion through a formal exception to Rule 6(e), the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e). Such an amendment would recognize the public's legitimate interest in gaining access to records that may cast new light on important people and events in American history, while at the same time protect the important goals served by the rule of grand-jury secrecy.

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[2] The Second Circuit in *In re Craig* also relied on *Pittsburgh Plate Glass* for the proposition that Rule 6(e) commits disclosure to the discretion of the trial judge. 131 F.3d at 102. But the Supreme Court in that case emphasized that "any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress." 360 U.S. at 398-399.

Our proposal limits the release of grand-jury records to those determined to have permanent historical value under Title 44, United States Code.[3] Such records are transferred to the National Archives and Records Administration (NARA) as part of Department of Justice case files and form part of its permanent collection. This threshold screening requirement ensures that grand-jury secrecy is not abrogated in routine cases that do not, in themselves, have any recognized historical value. Within the universe of those documents transferred to NARA, the proposal embodies a two-tier approach. First, as to cases at least 30 years old, the rule would authorize district courts, on a case-by-case basis, to determine that the requirements of grand-jury secrecy are outweighed by the records' historical significance. Second, as to cases that are 75 years old or older, grand-jury secrecy interests would cease to be applicable and the records would become available to the public under the same standards applicable to other public records held by NARA.

The current treatment of grand-jury records helps illuminate this proposal. Much grand-jury material is deemed to be of no particular historical value. After the relevant cases are closed and a suitable period has passed, these materials are destroyed pursuant to record schedules approved by NARA. Grand-jury materials of continuing interest or value to the Department of Justice are stored for a period of time. Of these materials, some are ultimately transferred to the Archives' custody on the basis that they have been "determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government." 44 U.S.C. 2107(1). The standards and timetables governing that determination for case files that contain grand-jury information are set forth in records schedules already in place for the Department of Justice and approved by NARA. Under present law, a Freedom of Information Act (FOIA) request filed with NARA for grand-jury records in NARA's custody will be denied under FOIA Exemption 3, 5 U.S.C. 552(b)(3), on the ground that disclosure is barred under Rule 6(e). See, *e.g.*, *Fund for Constitutional Government* v. *National*

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[3] In relevant part, 44 U.S.C. 2107 provides:

> When it appears to the Archivist to be in the public interest, he may—
>
> > (1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government; [and]
> >
> > (2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certifies in writing to the Archivist that they must be retained in his custody for use in the conduct of the regular current business of the agency[.]

44 U.S.C. 2107(1)-(2).

*Archives and Records Service*, 656 F.2d 856, 866-870 (D.C. Cir. 1981).

Under the proposed rule, courts would have authority to consider requests for the disclosure of grand-jury records of great historical significance after they have been transferred to the permanent custody of the Archives. No request could be entertained until the records have been in existence for 30 years. The 30-year benchmark corresponds to the statutory time after which the Archivist may direct that agencies transfer historically significant records to his custody. See note 3, *supra*. Those two limitations ensure that (1) the grand-jury records might have some value to historians and (2) sufficient time has passed both to gauge their historical significance and to create a reasonable possibility that privacy interests have faded to a degree that disclosure might be warranted, with or without redactions.

But even within that universe of records, grand-jury secrecy interests still have presumptive force, and the grant of a disclosure order under Rule 6(e) should not be routine. Rather, it should be relatively rare—as it has been to date. Courts should evaluate each request on a case-by-case basis to assess whether the records have true value to historians and the public and whether that value outweighs the secrecy interests of living persons. While such an evaluation will inevitably involve a measure of judgment and discretion in light of the specific facts and context, courts will be guided by the paradigm examples of disclosure to date—*e.g.*, the Nixon, Rosenberg, and Hiss grand-jury testimony—and by the factors considered by the courts that ordered disclosure in those cases. Those factors include:

> (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.

*In re Craig*, 131 F.3d at 106. The proposed rule authorizing disclosure of grand-jury material does not spell out these factors, which are better left to elaboration in the Advisory Committee Notes and then to development in the case law. But it does require the district court to make appropriate findings, before authorizing disclosure, to determine that the records have "exceptional historical importance" above and beyond their possession in the custody of the Archivist; to confirm that they have been in existence for at least 30 years; to ensure that the legitimate interests of any living witnesses or investigative targets whose interests might be

prejudiced through disclosure are not prejudiced; and to confirm that no impairment of ongoing law enforcement activities would result. The rule also allows the court to impose reasonable conditions, such as redaction, to protect ongoing privacy or other interests.

Our proposal provides that an order granting or denying a petition for the release of historically significant grand-jury material is a final decision subject to appeal under 28 U.S.C. 1291. The Rules Enabling Act specifically provides that the federal Rules "may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." 28 U.S.C. 2072(c). Because a petition to disclose grand-jury materials created in connection with a long-closed investigation or criminal case is neither a continuation of a criminal matter nor a traditional civil action, it seems appropriate to clarify that a district court order granting or denying such a petition is an appealable decision in its own right.

After 75 years, the interests supporting grand-jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have virtually entirely 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 after 75 years.[4] Thus, we propose that Rule 6(e) be amended to provide that, after 75 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.

**C. Language of Proposed Amendment**

Our proposed amendment includes three parts.

1. We propose to define the term "archival grand-jury records" by adding a new Rule 6(j), following the existing definition of "Indian Tribe" in Rule 6(I). (Alternatively, if the Committee preferred, these definitions could be consolidated into a single "definitions" paragraph.)

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[4] Under Executive Order 13526, many classified records are automatically declassified at 25 years and most of the remaining classified records are automatically declassified after 75 years:

> Records exempted from automatic declassification under this paragraph shall be automatically declassified on December 31 of a year that is no more than 75 years from the date of origin unless an agency head, within 5 years of that date, proposes to exempt specific information from declassification at 75 years and the proposal is formally approved by the Panel.

Exec. Order No. 13,526, § 3.3(h)(3), 3 C.F.R. 310 (2010). For additional information on the automatic declassification process, see http://www.justice.gov/open/declassification-faq.html.

**(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 been determined to have permanent historical or other value warranting their continued preservation under Title 44, United States Code.**

2. We propose the following 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 30 years in appropriate cases:

(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 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 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 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.**

3. Finally, we propose to make the following addition to Rule 6(e)(2) to establish the authority of NARA to release archival grand-jury materials in its collections after 75 years. Because Rule 6(e) is the only impediment to NARA's acting on a FOIA request for grand-jury records, all that is necessary is to state that Rule 6(e) shall not prohibit disclosure after that time.

The "require . . . to withhold from the public" formulation tracks the terms of FOIA Exemption 3, 5 U.S.C. 552(b)(3).

> (2) Secrecy.
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> ....
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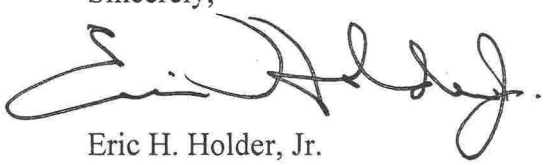
> **(C) Nothing in this Rule shall require the Archivist of the United States to withhold from the public archival grand-jury records more than 75 years after the relevant case files associated with the grand-jury records have been closed.**

* * *

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it will eliminate the prevailing uncertainty over the authority of district courts to deviate from the scope of Rule 6(e) when faced with petitions for access to historically significant grand-jury material. We also believe it strikes the appropriate balance between safeguarding the purposes of grand-jury secrecy and acknowledging the public's legitimate interest in obtaining access to grand-jury records that have enduring significance for the history of our Nation.

We look forward to discussing this with you and the Committee.

Sincerely,



Eric H. Holder, Jr.
Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter