



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:

(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,

