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April 7, 2020

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

Via email: RulesCommittee_Secretary@ao.uscourts.gov

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

Dear Ms. Womeldorf:

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

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

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

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

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

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

*   *   *

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 106.

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

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

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

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

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

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

*   *   *

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

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

. . .

(vi) on petition of any interested person for reasons of historical or public interest, and in consideration of the following non-exhaustive list of factors:

- **the identity of the party seeking disclosure;**
- **whether the defendant to the grand jury proceeding or the government opposes the disclosure;**
- **why disclosure is being sought in the particular case;**
- **what specific information is being sought for disclosure;**
- **how long ago the grand jury proceedings took place;**
- **the current status of the principals of the grand jury proceeding and that of their families;**
- **the extent to which the desired material—either permissibly or impermissibly—has been previously made public;**
- **whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and**
- **the additional need for maintaining secrecy in the particular case in question.**

. . .

(8) Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances.

Thank you for your consideration of this proposal. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions. We would be pleased to discuss the matter further with the Committee at its convenience.

Respectfully,

The Reporters Committee for Freedom of the Press
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Boston Globe Media Partners, LLC
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cc: Allison M. Zieve, Director, Public Citizen Litigation Group