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Expert Analysis

Grand Jury Secrecy: Discretionary Limits

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Like the Strategic Air Command of yore, grand juries are in a state of continuous empanelment. Witnesses, including former presidents of the United States, testify with the expectation that the proceedings are secret, subject to certain delineated exceptions. On July 29, 2011, a federal district court judge ruled that transcripts of Richard M. Nixon's grand jury testimony related to the Watergate scandal—given with the expectation that it would remain secret—should be released to the public.[1] The decision revisits long-standing questions regarding the extent of a trial judge's discretion to release grand jury transcripts.

Since the decision, the Justice Department has proposed an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure, which codifies the rule of grand jury secrecy and exceptions thereto, in an attempt to confine a court's discretion. The Nixon case provides an opportunity to review the law of grand jury secrecy and instances in which a federal court may order the release of grand jury records.

Governing Statute

The secrecy of proceedings taking place before a grand jury is a tradition "older than our Nation itself."[2] The practice insures that the grand jury can deliberate free from outside influences and protects the privacy of witnesses appearing before the grand jury. The rule of secrecy also protects the innocent accused and prevents the escape of potential criminal defendants.[3] Federal Criminal Procedure Rule 6 guards the secrecy of grand jury proceedings in two ways. First, Rule 6(d)(1) limits the number of individuals involved in a proceeding, providing that only attorneys, witnesses, a court reporter, and an interpreter, when needed, may be present while the grand jury is in session. During deliberations and voting, only the jurors and any necessary interpreters may be present.[4]

The Nixon case provides an opportunity to review the law of grand jury secrecy and instances in which a federal court may order the release of grand jury records.

The second provision, set forth in Rule 6(e), imposes a general rule of secrecy by prohibiting grand jurors, interpreters, court reporters, and government attorneys from disclosing any information about the proceedings.[5] No secrecy obligation is imposed on grand jury witnesses.[6]

Rule 6(e) also sets forth specific and limited exceptions to the rule of secrecy. A grand jury matter may be disclosed to government attorneys "for use in performing that attorney's duty"[7] and government personnel tasked with "assist[ing] an attorney for the government in performing that attorney's duty to enforce federal criminal law."[8] Disclosures also may be made to another federal grand jury[9] or law enforcement, intelligence, immigration, or national security officials with regard to matters involving foreign intelligence or counterintelligence.[10]

In addition, Rule 6(e)(3)(E) sets forth certain circumstances under which a court may authorize disclosure of grand jury matters. It provides that a court may authorize disclosure: (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; (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation; or (iv) at the request of the government if it shows that the matter may disclose a violation of state, Indian tribal, foreign, or military criminal law.

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Judicial Discretion

When Rule 6(e) was adopted in 1944, the Advisory Committee noted that the rule "continues the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*."[11] Subsequently, the Supreme Court stated that "Rule 6(e) is but declaratory" of the discretion of a trial judge to order disclosure of grand jury matters. Thus, federal courts have found that the "courts' ability to order the disclosure of grand jury records has never been confined by Rule 6(e)'s enumerated exceptions."[12]

In *In re Biaggi*,[13] the U.S. Court of Appeals for the Second Circuit reviewed a district court order directing the disclosure of redacted grand jury testimony given by a New York City mayoral candidate. The candidate, Mario Biaggi, a member of the U.S. House of Representatives, sought to have his testimony reviewed by a panel of judges for the sole purpose of rebutting claims made by a New York Times reporter that he had refused to answer questions before the grand jury and invoked the Fifth Amendment. Biaggi's motion was denied, but the government's application to release the testimony to the public in redacted form was granted. Biaggi objected to the public release of the testimony.

The Second Circuit noted that although the tradition of grand jury secrecy was firmly established, it was not absolute. Finding that the release of Biaggi's testimony did not fall within any statutory exception, the court nevertheless affirmed the district court's order under what is commonly referred to as the "exceptional" or "special" circumstances exception. Key to the court's conclusion was the fact that Biaggi had waived the secrecy protections of Rule 6(e) by seeking disclosure of the records himself, albeit to a narrowly defined group. Indeed, it noted that if Biaggi had not made the initial application seeking disclosure, "the [g]overnment could not have procured disclosure…[n]o matter how much, or how legitimately, the public may want to know whether a candidate for high public office has invoked the privilege against self-incrimination before a grand jury, or has lied about having done so."[14]

The Second Circuit further concluded that the government had similarly waived the protections of Rule 6 and that the interests of the grand jurors would not be affected by release of the transcripts. Concerns regarding the interests of third parties named in the questions were addressed through redaction of the transcripts. Thus, the Second Circuit affirmed the release of the transcripts, "rest[ing] on the exercise of a sound discretion under the special circumstances of this case."

As Judge Lamberth noted in 'In re Kutler,' the traditional objectives of grand jury secrecy are not implicated where the sole testifying witness has died, the investigation has closed, and 36 years have elapsed since the testimony was given.

In *In re Petition of Craig*,[15] the Second Circuit added more meat to the bones of the "special circumstances" exception to grand jury secrecy. In *Craig*, the government opposed a petition by a doctoral candidate seeking disclosure of the grand jury testimony of Harry Dexter White, a former Assistant Secretary of the Treasury who was accused of being a communist spy in the 1940s. Although Craig conceded that none of the exceptions articulated in Rule 6(e) applied to his petition, he argued that the district court could use its "inherent supervisory authority" over grand juries to release the transcripts due to public interest and historical significance.

The government argued that the court did not have the authority to go beyond the statutory exceptions contained in the rule. The Second Circuit rejected the government's argument and reaffirmed the "'special circumstances' test of *Biaggi*," stating that departures from Rule 6(e) were "fully consonant with the role of the supervising court and [would] not unravel the foundations of secrecy upon which the grand jury is premised."

Although the court declined to establish a formula or rigid set of prerequisites for the "special circumstances" test, it did set forth a list of "non-exhaustive" factors to be considered by a trial court. They 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; (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 has been previously made available; (viii) whether witnesses to the proceeding who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy.[16]

The Nixon Transcripts

Chief Judge Royce C. Lamberth of the District Court for the District of Columbia applied the "special circumstances" exception in ordering the release of the Nixon grand jury transcripts in *In re Petition of Kutler*. Citing the Second Circuit's opinions in *Biaggi* and *Craig*, Chief Judge Lamberth found "ample support for the view that courts' authority regarding grand jury records reaches beyond Rule 6(e)'s literal wording." Specifically he noted the history and expansion of Rule 6(e) since its enactment in 1944, opining that it "was not designed to ossify the exceptions to the general rule of grand jury secrecy." Nevertheless, the court recognized that only "exceptional circumstances" would justify the application of any excep-

tion beyond those enumerated in the Criminal Rules of Procedure.[17]

The court relied on the *Craig* factors in evaluating the merits of the petition for disclosure of Nixon's testimony. Noting that the respected identity of the parties seeking disclosure, the narrow range of records sought, the age of the records, and lack of privacy concerns all weighed in favor of disclosure, Judge Lamberth found particularly significant the records' "great historical importance." "The disclosure of President Nixon's grand jury testimony would likely enhance the existing historical record, foster further scholarly discussion, and improve the public's understanding of a significant historical event."[18]

The court recognized that the application of the special circumstances exception to justify the disclosure of the Watergate-related transcripts would not be the first such application to historically significant materials. Grand jury testimony and records relating to investigations involving Jimmy Hoffa, Julius and Ethel Rosenberg, and Alger Hiss previously have been released on the grounds that the documents' historical importance outweighed the need to maintain the secrecy of the proceedings.[19]

As Judge Lamberth noted in *In re Kutler*, the traditional objectives of grand jury secrecy are not implicated where the sole testifying witness has died, the investigation has closed, and 36 years have elapsed since the testimony was given. Although legitimate secrecy interests remain long after a grand jury proceeding has concluded, including the privacy of subjects not previously identified and the interest in encouraging future grand jury witnesses to testify without fear of disclosure, the court did not find either applicable in this case.[20]

The government vehemently objected to the petition, arguing primarily that the court's inherent supervisory power did not allow it to circumvent Rule 6(e). Judge Lamberth rejected this argument finding that the court's decision did not conflict with the rule, but that the recognition of a special circumstances exception was "consonant with the [R]ule's policy and spirit."[21]

Although it may have lost the battle with respect to the Nixon transcripts, the Justice Department has not taken the decision lying down. On Oct. 18, 2011, Attorney General Eric H. Holder Jr. wrote the Advisory Committee on the Criminal Rules, proposing an amendment of Rule 6(e) to specifically include an exception for archival grand jury materials of great historical significance. Reiterating the government's position that federal courts have no inherent authority to develop rules in circumvention of already-existing rules of criminal procedure, Holder opined that "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."[22]

The proposed amendment would allow for the release of "archival grand-jury records," defined as those determined to have permanent historical or other value warranting their continued preservation by the government, where (i) at least 30 years have passed since the relevant grand jury case files have been closed;[23] (ii) no living person would be materially prejudiced by the disclosure; and (iii) disclosure would not impede any pending government investigation or prosecution. The government believes such an amendment recognizes the public's legitimate interest in such records, yet "cabins" a court's discretion to the formal exceptions set forth in Rule 6(e).[24] According to the United States Courts website, the proposed amendment was acknowledged on Oct. 21, 2011, and is pending consideration by the Advisory Committee.

Conclusion

Federal courts are endowed with the authority to decide petitions seeking the disclosure of grand jury records typically accorded with secrecy. While there are codified rules governing these decisions, the degree to which a court can use its discretion and inherent supervisory powers to order the disclosure of records outside stated exceptions is open to debate. The Justice Department's recent application for amendment of Rule 6(e) is an admitted effort to tether judicial discretion to the recognized statutory exceptions, without more. Given the development of case law regarding the "special circumstances" exception, it will be interesting to see whether the Advisory Committee follows the government's lead, proposes a broader amendment, or embraces the status quo.

Postscript

We mourn the passing of our partner and friend, Bob Morvillo. Bob was a master tactician. He could advocate with force or with modesty depending on the situation. But he always advocated with evident clarity, directness and honesty. That is why he was recognized as one of the most effective lawyers of this generation.

1. Memorandum Opinion & Order, *In re Petition of Kutler*, —F. Supp.2d—, 2011 WL 3211516 (D.D.C. July 29, 2011).

2. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959).

3. *United States v. Procter & Gamble Co.*, 356 U.S. 677,681-82 n.6 (1958).

4. Fed. R. Crim. Proc. 6(d)(2).

5. Id. 6(e)(2)(B).

6. See Fed. R. Crim. Proc. 6, Notes of Advisory Committee on Rules—1944, Note to Subdivision (e) ("[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate"). Despite this, federal prosecutors may request that a witness refrain from disclosing the fact that he has been subpoenaed by a grand jury. This request is not governed by Rule 6, however.

7. This provision does not authorize disclosure to attorneys for other federal government agencies or to attorneys for states or local governments. For this reason, disclosure of grand jury matters covered by Rule 6(e) to Justice Department attorneys for use in a civil suit is permissible only pursuant to a court order under Rule 6(e)(3)(E)(i). See United States Attorneys Manual, Criminal Resource Manual at 156.

8. Id. 6(e)(3)(A)-(B).

9. Fed. R. Crim. Proc. 6(e)(3)(C).

10. Id. 6(e)(3)(D).

11. Fed. R. Crim. Proc. 6, Notes of Advisory Com-

mittee on Rules—1944, Notes to Subdivision (e) (emphasis added).

12. *In re Petition of Kutler*, 2011 WL 3211516 at *3.

13. 478 F.2d 489 (2d Cir. 1973).

14. Id. at 492-93.

15. 131 F.3d 99 (2d Cir. 1997).

16. Id. at 106. Considering these factors, the Second Circuit concluded that the district court did not abuse its discretion in denying Craig's application.

17. 2011 WL 3211516 at *3-4.

18. Id. at *6.

19. *In re Tabac*, 2009 WL 521373 (M.D.Tenn. April 14, 2009) (release of testimony relating to Hoffa); *In re Petition of Nat'l Sec. Archive*, No. 08-civ-6599, Summary Order at 1-2 (S.D.N.Y. Aug. 26, 2008) (release of grand jury records relating to the Rosenbergs); *In re Petition of Am. Historical Ass'n*, 49 F.Supp.2d 274 (S.D.N.Y. 1999) (release of transcript relating to Hiss).

20. 2011 WL 3211516 at *6.

21. Id. at *4 (internal citations omitted).

22. Letter to Judge Reena Raggi, Chair of the Advisory Committee on the Criminal Rules, from Eric H. Holder, Jr., Attorney General, at 1 (Oct. 18, 2011).

23. The Justice Department also proposes that grand jury secrecy interests cease to apply to records over 75 years old.

24. Id. at 5.