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Legal Sidebar

Do Courts Have Inherent Authority to Release Secret Grand Jury Materials?

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The U.S. Constitution requires that any prosecution of a serious federal crime be initiated by "a presentment or indictment of a Grand Jury." The "[g]rand [j]ury" contemplated by the Constitution is a temporary, citizen-comprised body that obtains evidence and considers whether it is sufficient to justify criminal charges in a particular case. Though a grand jury works with federal prosecutors and functions under judicial auspices, it is considered an independent "constitutional fixture in its own right" that "belongs to no branch of the institutional Government, serving as a kind of buffer . . . between the Government and the people." One long-established principle that has been deemed essential to the grand jury's functioning and independence is that matters occurring before it are to be kept secret. Secrecy prevents those under scrutiny from fleeing or importuning the grand jurors, encourages full disclosure by witnesses, and protects the innocent from unwarranted prosecution. For these and other reasons, prosecutors, the jurors themselves, and most others involved in grand jury proceedings are generally prohibited from revealing "such matters as the identities or addresses of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." The prohibition endures even after a grand jury's work is completed.

That said, Federal Rule of Criminal Procedure 6(e), which enshrines the traditional rule of grand jury secrecy, establishes exceptions that allow grand jury materials (such as transcripts of witness testimony) to be disclosed to certain outside parties in limited circumstances. Some of these exceptions allow for automatic disclosure—to necessary government personnel, for example—but many of the exceptions require that disclosure be authorized by the federal district court in the jurisdiction where the jury is convened, as the court ultimately has some degree of "supervisory authority" over the grand jury. Rule 6(e)(3)(E) provides in relevant part that the court "may authorize disclosure . . . of a grand-jury matter" (1) preliminarily to or in connection with a judicial proceeding; (2) to a defendant who shows grounds may exist to dismiss the indictment because of something that occurred before the grand jury; or (3) at the request of the government, to a foreign court or prosecutor or to an "appropriate" state, state-subdivision, Indian tribal, military, or foreign government official for the purpose of enforcing or investigating a violation of the respective jurisdiction's criminal law. Persons seeking court authorization under one of these exceptions must make a "strong showing of particularized need" that "outweighs the public interest in secrecy."

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Relying on a robust conception of a court's "supervisory authority over the grand juries that they have empaneled," three Circuit Courts of Appeals—the Second, Seventh, and Eleventh—and a number of district courts have determined that the list of court-authorized exceptions in Rule 6(e) is not exclusive, and that courts in fact have the inherent authority to permit disclosure of grand jury information and materials in circumstances not expressly contemplated by the text of the Rule. The courts that have found such authority have emphasized the proposition, supported by early Supreme Court precedent, that Rule 6 is merely "'declaratory' of the long-standing 'principle' that 'disclosure' of grand jury materials is 'committed to the discretion of the trial court.'" As such, according to these courts, Rule 6(e)'s enumeration of circumstances in which courts may authorize disclosure of matters occurring before a grand jury "does not, by itself, eliminate the court's power to address situations that the Rule does not describe." Courts that have found they possess inherent authority to permit disclosure of grand jury materials beyond the text of Rule 6(e) have nonetheless generally cabined the exercise of such authority to "special circumstances," most frequently where there is significant public interest in proceedings that have already concluded.

It is by no means settled whether the authority of courts to permit disclosure of grand jury materials extends beyond the exceptions found in Rule 6(e), however, as a case currently under consideration by the U.S. Court of Appeals for the District of Columbia Circuit illustrates. In *McKeever v. Sessions*, Stuart McKeever, a researcher and author, filed a motion in the D.C. district court seeking grand jury records from the investigation of a man who was suspected of, but never charged with, murdering a university professor. McKeever sought the records in connection with a book he was researching on the subject of the professor's disappearance. Though McKeever's request clearly did not fall within any of the textual Rule 6(e) exceptions permitting court-authorized disclosure, he maintained that the court could exercise its inherent authority to release the records based on historical interest in the case. In a 2017 order, the court agreed that it had such authority but determined that the scope of McKeever's request made disclosure inappropriate on the facts of the particular case. McKeever has now appealed the order to the D.C. Circuit, and the government has argued in opposition that the records cannot be released because Rule 6(e)'s exceptions constitute an exclusive enumeration of the circumstances in which court-authorized disclosure is appropriate.

A three-judge panel of the D.C. Circuit heard oral argument in *McKeever* on September 21, 2018 and, according to at least one commentator, appeared skeptical that courts have authority to release grand jury materials in situations not governed by Rule 6(e). Weighing against a finding of such authority is language from an otherwise-inapposite Supreme Court case that suggests "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." And on other occasions, the Court has expressed "reluctan[ce] to conclude that a breach of [grand jury] secrecy has been authorized" absent "a clear indication in a statute or Rule."

At the same time, the D.C. Circuit panel in *McKeever* may need to reconcile its own arguably inconsistent precedent: in a 1974 ruling affirming the disclosure to the House Judiciary Committee of grand jury materials related to the Watergate investigation, the appellate court appeared to accept a lower court's determination that it had inherent power to permit the disclosure because of the significance of the circumstances, regardless of any textual authority contained in Rule 6(e). Yet a more recent D.C. Circuit opinion, in an unrelated context, expressed disagreement with the proposition that courts have general supervisory authority over grand juries, which could give the court in *McKeever* a basis to disavow the existence of extratextual authority over disclosure of matters occurring before a grand jury.

In any event, the *McKeever* decision could have both significant legal implications and practical implications for Congress in its oversight role. Should the D.C. Circuit in *McKeever* decide that federal district courts do *not* have the power to authorize disclosure of grand jury information beyond the exceptions found in Rule 6(e), it will create a circuit split that ultimately may require

Supreme Court resolution or an amendment to the Rule. In the meantime, such a ruling could limit Congress's ability to obtain materials that reveal matters occurring before federal grand juries in the District of Columbia. Assuming Rule 6(e) operates to preclude Congress from obtaining grand jury materials without judicial authorization—which federal courts in the District of Columbia have recognized that it does—any such authorization would have to fall within one of the enumerated exceptions contained in the Rule. Thus, while some case law suggests that an impeachment or other official proceeding could warrant disclosure in accordance with the specific exception concerning "judicial proceeding[s]," for example, a request in the course of an ordinary legislative inquiry potentially would not. Congress is, of course, free to amend Rule 6(e) to permit disclosure in circumstances not currently covered by the Rule, as it has done in the past.

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