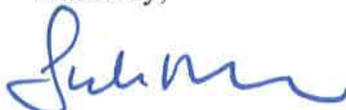
April 28, 2015

Senior Judge Royce C. Lamberth
U.S. District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Senior Judge Lamberth,

I have enclosed a copy of my recent correspondence with Attorney General Loretta Lynch regarding my petition before the U.S. District Court for the District of Columbia, *In re Petition of Luke Nichter,* No. 12-74.

Sincerely,



Luke A. Nichter, Ph.D.

2024 Merlin Drive
Harker Heights, Texas 76548

Phone: 419-378-2502
Email: luke_nichter@yahoo.com
Web: lukenichter.com

April 28, 2015

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Lynch,

While I am sure you have plenty to do in your first week as Attorney General, I would like to bring to your attention an important matter initiated by your predecessor, Attorney General Eric Holder, but never fully implemented. The specific matter was his recommendation for:

> *"an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit 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 National Archives."*

This recommendation was in response to a case brought by Public Citizen Litigation Group, *In re Kutler*, No. 10-547, in which the district court agreed to unseal the 1975 grand jury testimony of former President Richard Nixon.

More than four decades after Watergate, the nation's greatest political scandal, many records remain sealed or otherwise restricted. The unsealing of former President Nixon's grand jury testimony has inadvertently drawn attention to the fact that the rest of the Watergate grand jury materials remain sealed (other than those that were contemporaneously published, at times verbatim, through leaks to the press). The documentary record of that critical period in our nation's history remains fragmented and incomplete. According to Mr. Holder's criteria for releasing additional grand jury records, as well as other vehicles for review such as the Freedom of Information Act, it is now appropriate to consider the remaining Watergate grand jury records for release. The requirement of "great historical significance" has been met. The majority of people involved – prosecutors, witnesses, and grand jurors themselves – are now deceased. In cases where there are legitimate privacy concerns, appropriate redactions could be made by the National Archives Special Access/FOIA Staff – experts who regularly perform such work, and did so in the case of Nixon's grand-jury testimony when it was released in November 2011.

Moreover, I currently have a petition before the U.S. District Court for the District of Columbia, *In re Petition of Luke Nichter,* No. 12-74. In light of the opening of Nixon's grand-jury testimony, Senior Judge Royce Lamberth has indicated a willingness to review and release additional Watergate grand jury records. He has even made mention of Attorney General Holder's proposal to modify rule 6(e). However, it would be helpful to have guidance from your office. If it is likely that there will be an amendment to rule 6(e) permitting the release of

historically important grand jury records after an appropriate interval of time – and it seems this is the direction we are headed based on the release of Nixon's grand jury testimony in 2011 – my petition could be a vehicle to test the implementation of this rule change.

In conclusion, I request that you give consideration to the proposal by Attorney General Holder which resulted in the release of Nixon's grand jury testimony, and the procedure that could be used to review and release additional grand jury materials of historical significance. I further request that such a procedure for review and release be based on the disclosure guidelines contained in the Freedom of Information Act. This is a standard commonly used by the National Archives and has been long established as serving the public interest while making appropriate redactions to protect privacy interests and other restrictions.

It could not be simpler. The rule change was proposed and was received well. It has been implemented in one case with a favorable result. Now we have an opportunity to more fully implement the proposal, with an active petition in a federal district court before a willing judge.

Thank you for your consideration of my request.

Sincerely,

Luke A. Nichter, Ph.D.

2024 Merlin Drive
Harker Heights, Texas 76548

Phone: 419-378-2502
Email: luke_nichter@yahoo.com
Web: lukenichter.com

Attachments:
(1) "U.S. Urges Opening Up Old Grand Jury Records," by Charlie Savage, *New York Times* (October 19, 2011)
(2) Letter from Public Citizen Litigation Group to The Honorable Reena Raggi, Chair, Advisory Committee on the Criminal Rules (December 7, 2011)
(3) American Historical Association's endorsement of Luke Nichter's petition (November 1, 2013)

Copy to: Senior Judge Royce C. Lamberth
U.S. District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

The New York Times | http://nyti.ms/pTAlNu

POLITICS

U.S. Urges Opening Up Old Grand Jury Records

By CHARLIE SAVAGE OCT. 19, 2011

WASHINGTON — The Obama administration, in a move that could open up more transcripts of historically significant grand jury testimony from many years ago, is proposing to change a rule that imposes strict and permanent secrecy requirements on such records.

In a letter to a committee of judges who shape the Federal Rules for Criminal Procedure, Attorney General Eric H. Holder Jr. wrote that the rule making it a crime to disclose grand jury information should be amended to allow courts to lift the veil of secrecy from transcripts that are at least 30 years old if their disclosure would not affect any still-living witness or investigative target. Mr. Holder also proposed allowing all grand jury materials that are deemed historically significant and that are at least 75 years old to be made public through the National Archives, without any need for a court review.

While there are many good reasons to keep grand jury materials secret at the time, Mr. Holder wrote: "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."

Grand jury information in routine cases is eventually destroyed, but the Justice Department maintains archived copies of material in cases that are deemed historically significant. But while the rules governing most kinds of secret records — including classified national security documents — allow them to become public eventually, the rule governing grand jury transcripts, known as Rule 6(e), fixes no end point after which they may be disclosed to historians and the world at large.

Still, in recent years several district courts have granted requests by historians to make public a few transcripts of very old grand jury testimony, including the early cold war-era espionage cases against Alger Hiss and Julius and Ethel Rosenberg, a 1964 jury-tampering case against the labor union leader James R. Hoffa, and — most recently — the 1975 testimony by former President Richard M. Nixon in the Watergate case.

The Justice Department did not appeal those orders. But Mr. Holder's letter notes that the text of the rules does not seem to empower judges to take that step, so courts have instead invoked their own "inherent authority" to supervise grand juries.

While those rulings have stood unchallenged, Mr. Holder's letter says that this presents a "difficulty": Supreme Court precedent has made clear that courts do not have the inherent authority to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure, he argued.

"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," Mr. Holder wrote.

He continued: "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)."

Steven Aftergood, the director of the Project on Government Secrecy at the Federation of American Scientists, said that it was important to preserve general secrecy around the grand jury so witnesses would testify "freely and without fear," but that there was a need to balance that concern with the public interest in eventual disclosure of historically significant information.

He said the 30-year rule appeared to be a good fit, because all the cases to date in which judges decided to disclose the records would have fit within it, but reserved judgment on whether the right backstop for general disclosure needed to be as long as 75 years.

Still, Mr. Aftergood applauded the general effort, saying it could "add clarity and stability to what has been an ad hoc process up to now."

A version of this article appears in print on October 20, 2011, on page A20 of the New York edition with the headline: U.S. Urges Opening Up Old Grand Jury Records.

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PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW • Washington DC 20009
202/588-1000 • www.citizen.org

11-CR-D

December 7, 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:

On behalf of Public Citizen Litigation Group (PCLG), I am writing in connection with Attorney General Holder's letter to you of October 18, 2011. Writing for the Department of Justice, Mr. Holder "recommends an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit 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 National Archives."

Mr. Holder's letter was prompted by a recent case brought by PCLG, *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), in which the district court agreed to unseal the 1975 grand jury testimony of former President Richard Nixon. PCLG has also handled other significant cases on unsealing grand jury records based on historical significance. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999).

PCLG strongly supports an amendment along the general lines set forth in the Attorney General's letter, but we write to suggest certain substantive modifications to the proposal. As the law firm that litigated many of the cases on behalf of historians seeking access to grand jury material, we of course disagree with the Department of Justice's view that the existing case law in this area is erroneous in recognizing that courts have inherent authority to open grand jury records in exceptional circumstances outside the scope of Rule 6(e). For present purposes, however, that disagreement is not pertinent.

We write to make two points related to the Department's proposed rule. The Department suggests modifying Rule 6(e) to allow courts to order disclosure of grand jury records where a court finds that (1) the petition seeks only archival grand-jury records, (2) the records are of exceptional historical importance, (3) 30 or more years have passed since the case file associated with the records was closed, (4) no living person would be materially prejudiced by the disclosure or prejudice could be avoided through redactions, (5) disclosure would not impede a pending government investigation or prosecution, and (6) no other reason exists why the public interest requires continued secrecy. PCLG urges the Committee to adopt a rule providing that *either* the first or second criterion listed by the Department be met, but not both. We further suggest that the second criterion be modified, as detailed below.

First, the Department suggests that the rule allow for disclosure of "only archival" records, which is material that the National Archives and Records Administration (NARA) has already determined to have "permanent historical value under Title 44, United States Code." Holder Letter at 6. It separately suggests that Rule 6(e) permit disclosure only after a finding of "exceptional historical importance." Where NARA has already determined material to be of "permanent historical value," however, there is no reason also to require the proposed finding of "exceptional historical importance."

To be sure, in the cases that PCLG has litigated concerning disclosure of grand-jury records, we have argued that the courts' inherent authority to disclose grand jury material exists when the records have "exceptional historical importance." But if Rule 6(e) is amended—as we hope it will be—to expressly address disclosure for historical interest, the disclosure should not be limited to that category of cases. Rather, if NARA has already made a determination of permanent historical value, and if there is no countervailing interest in continued secrecy (criteria 4-6 of the Department's proposed amendment), the material should be disclosable. At that point, the subset of cases that are of "exceptional historical importance" need not be separated from those of "permanent historical importance" because, in either case, the rationale for secrecy has ceased. Although the Department asserts that even within the universe of archival records, "grand-jury secrecy interests still have presumptive force" (Holder Letter at 7), it gives no explanation for that assertion. If disclosure would not prejudice any living person or investigation, and if "no other reason exists why the public interest requires continued secrecy," it is hard to see a basis for that "presumptive force"; or looked at another way, any such presumption has been overcome.

Not only should the second-listed criterion not be required if the first is met, but the first should not be required if the second is met. That is, if the petition otherwise demonstrates adequate historical significance, the rule should not require that the petition seek only archival grand-jury records. Again, satisfying the first criterion should be *sufficient* to demonstrate a level of historical importance adequate to satisfy the rule (subject to the remaining criteria), as discussed above. It should not be *required*, however. Making it a requirement would allow the government to limit the universe of records subject to the amended rule by not tendering materials to NARA for transfer and thus preventing NARA from making a determination of permanent historical importance. Notably, the Department of Justice has objected to unsealing in cases of such indisputable historical significance as the Hiss, Rosenberg, and Watergate grand-jury proceedings (*see* cases cited on page 1) and the Jimmy Hoffa grand-jury proceedings, *see In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009). In light of the Department's position in prior cases, adopting a rule that would allow it to limit the grand-jury records for which disclosure is even a possibility would undermine the amended rule and, potentially, operate to limit disclosure even more than under current law. In addition, the first criterion, if required even when the second is met, may delay availability of records, either because NARA has not yet requested material that it would agree is of permanent historical importance or because the Department or the court has not yet transferred materials. Our experience with records requests is that delays in processing can be significant.

Second, where the grand-jury material sought is not at NARA, the rule should not require a showing of "exceptional historical interest," but of "historical interest." In the prior cases, courts have adopted the "exceptional" standard, and Public Citizen has advocated its use to allow access to grand-jury materials. Those cases, however, involved courts exercising their inherent supervisory authority, in the absence of a specific rule directing their discretion. In that circumstance, it made sense for the courts to impose on themselves a high standard. In a rule expressly providing for unsealing based on historical interest, however, that high standard need not be adopted. Of course, a court would be more likely to order disclosure based on a showing that the historical interest in particular materials is exceptional, as opposed to significant or strong, for example. Nonetheless, if the balance of interests would weigh in favor of disclosing material of lesser importance, the rule should allow disclosure. Indeed, the Department's proposal that NARA be authorized to unseal *all* material, not only "exceptionally" important material, after 75 years supports this view. The 75-year proposal reflects the fact that, as time passes, interests in secrecy diminish to such an extent that *any* degree of historical importance outweighs them. Amending the rule to permit unsealing based on "historical importance" allows courts the flexibility to weigh the various interests case-by-case, recognizing that the degree of historical importance that warrants unsealing in one case may not be the same as in others.

For the foregoing reasons, PCLG requests that, as the Committee evaluates the Department of Justice proposal, it consider allowing disclosure when *either* the petition seeks "archival grand-jury records" *or* "records of historical importance." Revising the Department's proposal in light of this suggestion, the amended Rule 6(e)(3)(E) would thus provide:

> **(vi) on petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record that:**
>
> > **(a) the petition seeks only archival grand-jury records or other grand-jury records of historical importance;**
> >
> > **(b) at least 30 years have passed since the relevant case files associated with the grand-jury records have been closed;**
> >
> > **(c) 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;**
> >
> > **(d) disclosure would not impede any pending government investigation or prosecution; and**
> >
> > **(e) 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.**

American Historical Association

Organized 1884 Incorporated by the Congress 1889

November 1, 2013

The Honorable Royce C. Lamberth
U.S. District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington, D.C. 20001

Dear Senior Judge Lamberth:

We are writing on behalf of the American Historical Association to express our support for Luke Nichter's petition to unseal the grand jury records pertaining to *U.S. v. Liddy* (case number 1:12-mc-00074-RCL).

We appreciate the court's previous rulings, including the November 2, 2012 decision directing the government to unseal 36 folders of documents totaling approximately 950 pages and the subsequent court order and memorandum opinion of May 13, 2013 unsealing 75 pages of new documents.

We hope that you will continue to favor transparency in considering the matters that remain before the court, including unsealing additional grand jury records and unsealing Watergate-related national security records in the possession of the court.

A compelling case can be made for the historical significance of these records. The American Historical Association has long advocated the principles of transparency and access to government records. Historians have a professional interest in open access to, and public discussion of, the historical record. Beyond that professional interest, we believe that enhancing the quality of the history that scholars can produce by allowing them access to crucial materials ultimately enhances the quality of democratic deliberations and decision-making. We therefore believe that the historical interest in the requested records outweighs any remaining privacy or national security interest in continued secrecy concerning events of forty years ago, especially as the National Archives and Records Administration will review all documents prior to release.

The American Historical Association is a nonprofit membership organization founded in 1884 and incorporated by the United States Congress in 1889 for the promotion of historical studies and the dissemination of historical research. As a disciplinary association representing over 15,000 historians, the American Historical Association is committed to openness and public access to government records, in accordance with a free and democratic society.

Respectfully,

Kenneth Pomeranz
President

James Grossman
Executive Director

400 A Street, S.E. Washington, D.C. 20003 | 202-544-2422 | aha@historians.org | www.historians.org