UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF USA FOR AN ORDER PURSUANT TO 28 U.S.C. § 1651(a) PRECLUDING NOTICE OF A GRAND JURY SUBPOENA	Case No. 19-wr-10 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM AND ORDER

A grand jury in the District of Columbia is investigating whether a target has committed any of several federal crimes. *See* First Application for Nondisclosure Order Under 28 U.S.C. 1651(a) ("Application") at 2, ECF No. 1.[1] Separately, the target is a defendant in civil litigation.[2] *Id.* at 1. Believing that several sealed filings in that civil litigation would assist its own ongoing investigation, the grand jury issued a subpoena, on July 26, 2019, to the plaintiffs in the civil litigation to produce the sealed filings. *Id.* at 2. The plaintiffs' counsel has agreed to receive the subpoena on behalf of his clients, but the sealed records are subject to a protective order that requires counsel to notify the target of any disclosure, a step the government hopes to avoid. *Id.* at 2–3 The plaintiffs' counsel, however, has represented that he would abide any court order instructing him not notify the target of the grand jury subpoena. *Id.* at 3.

Consequently, the government filed an application in this Court, on July 29, 2019, seeking an order under the All Writs Act, 28 U.S.C. § 1651(a), directing the civil plaintiffs not to disclose their receipt of the grand jury subpoena. *Id.* at 3–6; *see also* Proposed Order, ECF No. 1-2. By minute order, the Court directed the government to file a supplemental brief addressing

[redacted]

whether, following the D.C. Circuit's opinion in *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), Federal Rule of Criminal Procedure 6(e)(2) must be read "as an exhaustive list of people bound by grand jury secrecy," making issuance of the requested order improper. Minute Order (July 29, 2019). The government filed that brief on August 1, 2019. *See generally* Gov't's Br., ECF No. 2. Upon consideration of that brief, and for the following reasons, the government's application for an order, under the All Writs Act, directing the recipient of the grand jury subpoena *duces tecum* not to disclose the existence of the grand jury subpoena for a period of one year, is denied.

I. ANALYSIS

Federal Rule of Criminal Procedure Rule 6(e) "sets forth in precise terms to whom, under what circumstances and on what conditions grand jury information may be disclosed." *McKeever*, 920 F.3d at 844 (quoting *Fund of Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F 2d 856, 868 (D.C. Cir. 1981)). To start, Rule 6(e)(2)(A) expressly provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Rule 6(e)(2)(B), for its part, "provides a list of 'persons' who 'must not disclose a matter occurring before the grand jury' '[u]nless these rules provide otherwise.'" *McKeever*, 920 F.3d at 844 (quoting FED. R. CRIM. P. 6(e)(2)(B)). Grand jury witnesses are not included on the list of persons subject to grand jury secrecy. Thus, the government in this matter turns to the All Writs Act for its request that the Court order the civil plaintiffs not to disclose the grand jury subpoena for sealed filings from the civil litigation.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The government's resort to

that statute comports with this Court's prior ruling that "the All Writs Act empowers courts, in some circumstances, to issue non-disclosure orders with regard to grand jury subpoenas." *In re United States for an Order Pursuant to 28 U.S.C. § 1651(a) for Order Precluding Notice of Grand Jury Subpoena* ("*Uber*"), No. 17-mc-1604 (BAH), 2017 WL 3278929, at *1 (D.D.C. July 7, 2017). As explained in *Uber*:

> The authority to issue orders under the Act may be exercised in the court's "sound judgment" when necessary "to achieve the rational ends of law" and "the ends of justice entrusted to it." *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 173 (1977) (internal quotation marks and citations omitted). As such, the Act provides a "residual source of authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises," however, "it does not authorize them to issue *ad hoc* writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.*

Id. In other words, the All Writs Act operates where statutes or federal rules have left a vacuum. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." (quoting *Penn. Bureau of Corr.*, 474 U.S. at 43))

Thus, an essential part of *Uber*'s ruling that the All Writs Act allowed for ordering secrecy from a grand jury witness was that "a non-disclosure order is not prohibited by Federal Rule of Criminal Procedure 6(e)." *Uber*, 2017 WL 3278929, at *2. When *Uber* was issued, many courts had read Rule 6(e)(2) to do no more than "set a default rule of permitting disclosure by witnesses absent a contrary order by the court in that proceeding, but also to leave open the possibility of restrictions where they can be justified by particular and compelling circumstances." *Id.* at *3 (quoting *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005)). Consequently, courts' inherent authority and the All Writs Act each had been cited as

proper bases for issuing a non-disclosure order to grand jury witness. *See, e.g.*, *In re Subpoena To Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1563–64 (11th Cir. 1989) ("We hold that the district court had the authority to prevent witnesses from disclosing materials prepared for or testimony given in the grand jury proceedings or related proceedings."); *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 & n.4 (8th Cir. 1986) (finding district court may order grand jury witness not to disclose a matter occurring before the grand jury to an investigatory target because "[i]t is axiomatic that the grand jury derives its power from the district court and therefore acts under the inherent supervision of the court"); *In re Swearingen Aviation Corp.*, 486 F. Supp. 9, 11 (D. Md. 1979) (explaining that "the court has the power under the All Writs Act, 28 U.S.C. § 1651, to issue" non-disclosure orders). In line with those cases, this Court concluded that Rule 6(e) "allows for 'rare exceptions premised on inherent judicial power' and '[a]bsent restriction, courts have inherent power, subject to the Constitution and federal statutes, to impose secrecy orders incident to matters occurring before them.'" *Uber*, 2017 WL 3278928, at *3 (quoting *In re Grand Jury Proceedings,* 417 F.3d at 26).

Yet, since *Uber*, the D.C. Circuit has instructed that at least one part of Rule 6(e) does more than set default rules. That part—Rule 6(e)(3)—provides exceptions to the "obligation of secrecy" found in Rule 6(e)(2)(A). As the D.C. Circuit has resolved, those exceptions are exhaustive. *McKeever*, 920 F.3d at 845–50. The D.C. Circuit's reasoning was informed by the specificity of the Rule 6(e)(3)'s enumerated exceptions, which reflected "a carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress, which in 1977 directly enacted Rule 6(e) in substantially its present form." *Id.* at 845. Failing to read Rule 6(e)(3) as exhaustive "would render the detailed list of exceptions merely precatory and

impermissibly enable the court to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure." *Id.* (quoting *Carlisle*, 517 U.S. at 426).

Supreme Court precedent, the D.C. Circuit added, casts "grave doubt upon the proposition that the district court has authority to craft new exceptions." *Id.* at 846. At least four times since 1983, the Supreme Court has "suggested the exceptions in Rule 6(e) are exclusive." *Id.* (citing *United States v. Baggot*, 463 U.S. 476, 479–80 (1983); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 (1983); *United States v. Williams*, 504 U.S. 36, 46 n.6 (1992); *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983)). Likewise, D.C. Circuit precedent commanded "hew[ing] strictly to the list of exceptions to grand jury secrecy." *Id.* (citing *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986); *In re Sealed Case*, 250 F.3d 764, 768 (D.C. Cir. 2001)).

While *McKeever* covered exceptions to secrecy found in Rule 6(e)(3), that the rule-based exceptions are an exhaustive list seems equally applicable to Rule 6(e)(2)(B)'s list of who may be bound by an "obligation of secrecy" in the first instance. After all, the two parts of the rule work together and "it is necessary to read the exceptions in subpart (e)(3) in conjunction with the general rule in subpart (e)(2)." *Id.* at 849. Those "two provisions cannot be read in isolation. They appear together in subpart (e), sequentially, and govern the same subject matter." *Id.* (quoting *Carlson v. United States*, 837 F.3d 753, 769 (7th Cir. 2016) (Sykes, J., dissenting)). Moreover, Rule 6(e)(2)(B)'s exclusion of grand jury witnesses from those bound by secrecy, no less than Rule 6(e)(3)'s exceptions, reflects Congress' and the Supreme Court's careful policy considerations. *See* Rule 6(e) advisory committee's note to 1944 amendment ("The rule does not impose any obligation of secrecy on witnesses. . . . The 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.").

The government gives four reasons why *McKeever*'s strict construction of Rule 6(e)(3) does not preclude the non-disclosure order it seeks under the All Writs Act, but none avoids that binding precedent. First, in the government's view, Rule 6(e)(2)(A) governs only the "obligation of secrecy" and the government supposedly seeks something different: "temporary non-disclosure." Gov't's Br. at 4. The government offers nothing in Rule 6(e) that supports distinguishing an "obligation of secrecy" from "temporary non-disclosure." As it happens, the advisory committee notes accompanying the 1977 version of the rule, the year Rule 6(e) was "enacted . . . in substantially its present form," *McKeever*, 920 F.3d at 845, use "obligation of secrecy" and "non-disclosure" interchangeably, *see* Rule 6(e) 1977 enactment (referring to what is now Rule 6(e)(2) both as "carr[ying] forward the current provision that no obligation of secrecy may be imposed on any person except in accordance with this Rule" and as "[h]aving stated the general rule of nondisclosure").

Somehow, the government believes that reading Rule 6(e)(2) to treat secrecy and non-disclosure alike puts that part of the rule in tension with Rule 6(e)(3) because "the exceptions in Rule 6(e)(3) contain additional non-disclosure requirements." Gov't's Br. at 4; *see also id.* at 6 n.2 (claiming Rule 6(e) is internally inconsistent). That argument draws first from the portion of Rule 6(e)(2)(A) that prohibits the imposition of an "obligation of secrecy" upon "any person except in accordance with Rule 6(e)(2)(B)" and then notes that Rule 6(e)(3) permits the imposition of further limits on disclosure. *Id.* at 4–5. From there, the government reasons that "[t]he only way to resolve this tension is to view secrecy and non-disclosure as fundamentally different for purposes of the Rule." *Id.* at 4–5. True, Rule 6(e)(2)(A)'s "obligation of secrecy"

must not exceed what Rule 6(e)(2)(B) allows. Yet, Rule 6(e)(2)(B) expressly allows further exceptions where "these rules provide otherwise." Rule 6(e)(3) does just that, in harmony with Rule 6(e)(2). Additionally, trying to separate Rule 6(e)(2) from Rule 6(e)(3), as the government has, directly confronts *McKeever*'s directive that "the two provisions cannot be read in isolation. They appear together in subpart (e), sequentially, and govern the same subject matter." 920 F.3d at 849 (quoting *Carlson*, 837 F.3d at 769 (Sykes, J., dissenting)).

On this same point, the government contends that reading Rule 6(e)(2)(A)'s "obligation of secrecy" as encompassing non-disclosure means that the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, and the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, each of which permits issuing non-disclosure orders to individuals not listed in Rule 6(e)(2)(B), "either lawfully sanction temporary non-disclosure of grand jury information, or they are invalid on their face." Gov't's Br. at 5. The government's first option is precisely right. Each statute, when it applies, modifies Rule 6 to the extent of any inconsistency because each statute was enacted after 1977, the year the relevant provisions of Rule 6(e) were adopted. When a conflict occurs "between a federal rule of criminal procedure and a more recently enacted federal statute, in every case, the more recent statute has been found to modify the rule of criminal procedure." *United States v. Hinton*, 215 F.3d 1338 (10th Cir. 2000); *see also United States v. Mitchell*, 397 F. Supp. 166, 170 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) ("The Court can discern nothing that restricts the power of Congress to repeal, amend, or supersede its delegation of authority under 18 U.S.C. § 3771 or the rules of procedure themselves. The delegation under § 3771 was not so extensive and final that Congress must

either revoke the section or wait for the Supreme Court to propose changes before it can modify the federal rules. Changes may be effected at any time by statute.").[3]

Second, the government insists that *McKeever* was premised on "protecting the integrity and secrecy of grand jury proceedings so that the grand jury can perform its constitutionally established function." Gov't's Br. at 6. Therefore, the government presses, courts should not follow *McKeever*'s analysis when interpreting Rule 6(e)(2) because to do so would produce a result contrary to the very secrecy *McKeever* safeguarded. *Id.* Without a doubt, *McKeever* appreciated the importance of grand jury secrecy. *See* 920 F.3d at 844 ("The Supreme Court has long maintained that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979))). Yet, safeguarding secrecy was not what animated *McKeever*'s holding that "deviations from the detailed list of exceptions in Rule 6(e) are not permitted." *Id.* at 846. Rather, *McKeever* explains that Rule 6(e) is the product of "carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress," which district courts may not circumvent by ignoring the Rule's careful calibrations by, in that case, invoking the court's inherent authority. *Id.* at 845. Consistent application of *McKeever* means that Rule 6(e)(2), like Rule 6(e)(3), is comprehensive and cannot be circumvented. [4]

---

[3] In 1974, 18 U.S.C. § 3771 provided that, "The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts . . . ."

[4] Charitably, the government's approach to Rule 6(e) has been inconsistent. On the one hand, the government has been adamant that Rule 6(e)(3) occupies the universe of instances in which matters occurring before the grand jury may be revealed. That was the government's position in *McKeever*. *See* 920 F.3d at 845 (emphasizing government's advocacy for reading Rule 6(e)(3) as an exclusive list). That was also the government's position in 2011, as articulated in a letter then-Attorney General Eric Holder submitted to the Advisory Committee on the Criminal Rules as that Committee considered whether to add an exception to Rule 6(e)(3) that would establish procedures for the release of historically significant grand jury materials. In that letter, Attorney General Holder insisted that the judicial trend of relying on inherent authority to disclose matters occurring before the grand jury in circumstances not captured by Rule 6(e)(3)(E) is "harmful to the fundamental principle that Rule 6(e) controls the secrecy of grand-jury materials within its four corners." Letter from Eric Holder, Attorney General, to

Third, the government urges that *McKeever* can be put aside because it did not concern the All Writs Act, but rather "the muddy concept of 'inherent authority.'" Gov't's Br. at 8. That is true, but irrelevant. Courts may turn to the All Writs Act to fill gaps in the law. *See Carlisle*, 517 U.S. at 429 ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." (quoting *Penn. Bureau of Corr.*, 474 U.S. at 43)). *McKeever*, however, teaches that Rule 6(e) has not left gaps. Whether courts might have filled a gap through inherent authority or the All Writs Act makes no difference if the gap does not exist.

Fourth, the government implores the Court to consider the consequences of taking *McKeever* at face value: "It is easy to conceive of situations in which non-disclosure is required to protect life, limb, or property." Gov't's Br. at 9. That possibility does not save the government from *McKeever*'s clear command because the Court can neither ignore Rule 6(e)(2)(A)'s prohibition on imposing secrecy obligations on any person other than specified in Rule 6(e)(2)(B) not add to Rule 6(e)(2)(B)'s list of people obliged to keep grand jury matters secret. If dire circumstances like those the government forecasts were to arise, the government

---

Reena Raggi, Chair of Advisory Committee on the Criminal Rules (Oct. 18, 2011) at 5; *see also id.* (encouraging Committee to amend Rule 6(e)(3) to permit district courts to release historically significant grand jury records so that "the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e)."). The Committee turned away Attorney General Holder's proposal because "in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority," *see* Minutes of Meeting of April 22–23, 2012, Advisory Committee on Criminal Rules, at 7–8, a position at odds with *McKeever*. On the other hand, for Rule 6(e)(2), as exemplified in this matter and others, the government has construed the rule as a default norm, which courts may depart from as circumstances dictate. *See, e.g.*, *In re Grand Jury Proceedings*, 417 F.3d at 20 ("At the government's behest, the district court also directed Lawyer I not to reveal to anyone (other than his own counsel) the 'substance of the government's motion to compel'—an order the government thought essential to protect against the risk that Lawyer I might affect or influence other potential grand jury witnesses."); *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d at 677 (summarizing government's position that, pursuant to courts' "inherent power" or under "either the Right to Financial Privacy Act, 12 U.S.C. §§ 3401–22 or the All Writs Act, 28 U.S.C. § 1651," courts may issue non-disclosure orders to grand jury witnesses). Perhaps these seemingly incongruent views of whether Rule 6(e) is comprehensive are, in fact, reconcilable. Here, however, the government has not explained how that might be so.

must find tools other than a grand jury subpoena to obtain the information it seeks. The Stored Communications Act might be an option in some cases since that statute authorizes the court to issue orders for "such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order." 18 U.S.C. §2705(b). Yet, counterintuitive as it seems, under *McKeever*'s binding force, the government has lost the operational flexibility many courts have read Rule 6(e)(2) to permit. Therefore, when the government needs to maneuver under a cloak of secrecy, a grand jury subpoena to obtain information might not be the preferable option.

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that the government's First Application for Nondisclosure Order Under 28 U.S.C. § 1651(a), ECF No. 1, is DENIED; and it is further

ORDERED that the government shall submit, by August 9, 2019, any proposed redactions to portions of this Memorandum and Order that must remain sealed so that the remainder may be unsealed and made publicly accessible.

SO ORDERED.

Date: August 6, 2019

Beryl A. Howell

BERYL A. HOWELL
Chief Judge