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# THE NEED FOR A HISTORICAL EXCEPTION TO GRAND JURY SECRECY IN THE FEDERAL RULES OF CRIMINAL PROCEDURE

*Daniel Aronsohn\**

## I. INTRODUCTION

Imagine that, on March 16, 44 B.C., just after the assassination of Julius Caesar, a group of investigators interviewed the Roman senators. Imagine that those investigators heard from all relevant players in an attempt to unravel the conspiracy. Those interviews were conducted promptly and thoroughly to ensure that the senators' recollections were as clear as possible.

Imagine, too, that the transcripts of those interviews were locked away, perfectly preserved to the present day. Those transcripts would be invaluable resources. They would be firsthand, almost contemporaneous accounts of a momentous historical event that remains cloaked in uncertainty. Access to those transcripts may demystify the conspiracy to kill Julius Caesar by identifying conspirators, exposing plans, and clarifying motives. Imagine, though, that those transcripts were rendered inaccessible.

Although no transcripts regarding Caesar's assassination are known to exist, grand jury records held today at the National Archives provide comparable and contemporaneous insight into similarly momentous events in history. Access to these records is an ongoing centerpiece of litigation, as some courts have denied the petitions of historians and scholars for access to grand jury materials that may provide the only answers to mysteries surrounding critical events such as Watergate and World War II.<sup>1</sup>

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\* J.D. Candidate, May 2020, Loyola Law School, Los Angeles. I wish to thank Professor Levenson for her invaluable support in writing this Note and for teaching me to "love the law." I am so grateful. I would also like to thank my mom, dad, and brother for always believing in me. Finally, I would like to thank the members of the *Loyola of Los Angeles Law Review* for their help in the writing process.

1. *See infra* Part III.

A grand jury serves two principal functions in the criminal justice system: investigative and accusatorial.<sup>2</sup> Where the perpetrator of a crime is apparent, a grand jury adheres only to the latter function.<sup>3</sup> Where there is suspicion of a crime, however, and questions remain as to the identities or roles of those involved, a prosecutor may convene a grand jury to investigate those questions.<sup>4</sup> With nearly unfettered investigatory powers, a grand jury has access to a plethora of information and may conduct a sweeping inquiry.<sup>5</sup> As a result, one cannot underestimate the wealth of information uncovered before a grand jury.

Long hailed as the axiomatic complement to the grand jury is the rule of secrecy.<sup>6</sup> As a general matter, what occurs in a grand jury room must remain confidential.<sup>7</sup> The general rule of secrecy is indefinite, so it may persist long past the existence of the grand jury itself.<sup>8</sup>

The rule of secrecy often poses only a nominal barrier to information, as there are several exceptions by which courts may authorize disclosure of grand jury materials.<sup>9</sup> Grand jury materials come to light, for instance, through a trial brought against the indicted individual.<sup>10</sup> Alternatively, those who testify before the grand jury are not bound by the rule of secrecy and may therefore disclose any information they wish.<sup>11</sup>

A significant challenge arises, though, where a grand jury chooses not to indict an individual while the veil of secrecy remains indefinitely intact. In a high-profile grand jury investigation, silence is

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2. See *United States v. Calandra*, 414 U.S. 338, 343–44 (1974) (explaining that a grand jury investigation is not an issue of guilt but rather an issue of “whether a crime has been committed and whether criminal proceedings should be instituted against any person”).

3. See *id.*

4. 28 U.S.C. § 515; see also SUSAN W. BRENNER & LORI E. SHAW, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* § 6.5 (2d ed. 2019).

5. See, e.g., *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) (“As a necessary consequence of its investigatory function, the grand jury paints with a broad brush.”); *Calandra*, 414 U.S. at 343 (explaining that the grand jury “may determine alone the course of its inquiry”); *United States v. Sahley*, 526 F.2d 913, 915–16 (5th Cir. 1976) (“Mere suspicion that a crime is being committed is sufficient reason for a grand jury to issue a subpoena.”).

6. See *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008) (“The justification for grand jury secrecy inheres in the nature of the proceeding.”).

7. FED. R. CRIM. P. 6(e).

8. See *id.*; see also, e.g., *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979) (“Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.”).

9. See FED. R. CRIM. P. 6(e)(3).

10. See FED. R. CRIM. P. 6(e)(3)(E).

11. See FED. R. CRIM. P. 6(e)(2).

pervasive. Grand jury witnesses may be reticent to speak publicly about their testimony, whether due to their own involvement in the crime or unwillingness to admit their cooperation with the investigative body. Grand jurors may likewise prefer anonymity due to fear of intimidation or undesired media attention. With nobody willing to speak, and with the veil of secrecy still upheld, the nature of the grand jury's investigation is ever unknown.

Because of the contemporaneous fear or danger that may surround major historical events, grand jurors may be the only people to hear the story. Events remain shrouded in uncertainty. Gaps in history persist, and the stories die along with the grand jurors, the witnesses, and the subjects of the investigation. The only answers lie in the grand jury records.

As this Note expounds, the passage of time dispels the fundamental purposes of grand jury secrecy, and the treasure trove of information uncovered by a grand jury remains inaccessible.<sup>12</sup> This quandary is a disservice to historians and, more broadly, the American public. Grand jury information can prove valuable in bringing clarity to history and furthering necessary discussions about, among many other things, government, the press, and war.<sup>13</sup>

This Note proposes a codified historical exception to grand jury secrecy as an addition to Federal Rule of Criminal Procedure 6(e). In exploring the purposes of secrecy as well as the interests in disclosure, this Note concludes that a historical exception meritoriously serves to protect the grand jury and its processes while simultaneously making significant contributions to scholarship.

Part II of this Note will provide background information on the grand jury and the general rule of secrecy. Part III will discuss the existing framework for disclosure of grand jury materials under Federal Rule of Criminal Procedure 6(e) and courts' differing approaches on how to interpret the rule. Finally, Part IV will set forth a proposed historical exception and will address three principal reasons that a legislative exception is the best approach to enhancing the historical record without jeopardizing the important interests protected by the veil of secrecy.

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12. *See infra* Parts III and IV.

13. *See infra* Part IV.

## II. THE GRAND JURY AND THE TRADITION OF SECRECY

The Fifth Amendment guarantees the right to a grand jury<sup>14</sup> in felony prosecutions.<sup>15</sup> Adopted by American colonists, the grand jury serves an intermediary role between the accused and the prosecution, so it is often considered the guardian against oppressive government and the guarantor of fair criminal process.<sup>16</sup> It comprises anywhere from sixteen to twenty-three members<sup>17</sup> and has two principal functions: investigative and accusatorial.<sup>18</sup>

With respect to its investigatory function, a grand jury's objective is to unravel the mystery surrounding a potential crime.<sup>19</sup> Generally unbounded by conventional restrictions such as the rules of evidence,<sup>20</sup> a grand jury is afforded great flexibility in pursuing that objective.<sup>21</sup> The Supreme Court explained the relatively unbounded nature of a grand jury's investigation thus:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any

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14. The Fifth Amendment provides, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

15. The Fifth Amendment requires indictment by a grand jury for crimes punishable by death or for crimes punishable by imprisonment for more than one year. FED. R. CRIM. P. 7(a); *see also* *Green v. United States*, 356 U.S. 165, 183 (1958) ("[A]n 'infamous crime' within the meaning of the Amendment is one punishable by imprisonment in a penitentiary . . . [and] imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year."), *overruled on other grounds by* *Bloom v. Illinois*, 391 U.S. 194 (1968). Although there are some exceptions to the general rule requiring a grand jury in felony prosecutions, those exceptions are not pertinent to this paper.

16. *Hoffman v. United States*, 341 U.S. 479, 485 (1951) ("[T]he most valuable function of the grand jury (has been) not only to examine into the commission of crimes, but to stand between the prosecutor and the accused . . . ." (quoting *Hale v. Henkel*, 201 U.S. 43, 59 (1906))).

17. *See* FED. R. CRIM. P. 6(a).

18. *See* *United States v. Calandra*, 414 U.S. 338, 343–44 (1974) (explaining that a grand jury investigation is not an issue of guilt but rather an issue of "whether a crime has been committed and whether criminal proceedings should be instituted against any person").

19. *Id.* at 344 (quoting *Wood v. Georgia*, 370 U.S. 375, 392 (1962)).

20. Principles of relevance and materiality are stretched to their limits in the course of a grand jury investigation. *See* *People v. Allen*, 103 N.E.2d 92, 96–97 (Ill. 1951) ("In litigated cases, materiality can be fixed with a relatively high degree of precision . . . . No standard of comparable certainty exists with respect to an inquiry by a grand jury.").

21. *See, e.g.,* *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991) ("As a necessary consequence of its investigatory function, the grand jury paints with a broad brush."); *Calandra*, 414 U.S. at 343 (explaining that the grand jury "may determine alone the course of its inquiry"); *United States v. Sahley*, 526 F.2d 913, 915–16 (5th Cir. 1976) ("Mere suspicion that a crime is being committed is sufficient reason for a grand jury to issue a subpoena.").

particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.<sup>22</sup>

The grand jury's primary evidentiary tool is the power to issue subpoenas.<sup>23</sup> It is by way of the subpoena power that a grand jury will compel the production of documents and witness testimony in an attempt to uncover facts and assess criminality.<sup>24</sup>

Axiomatic to the grand jury investigation is the rule of secrecy.<sup>25</sup> This longstanding rule, explored below, is vital to the administration of the grand jury and the protection of those within the shadow of its inquiry.

### *A. The History of Grand Jury Secrecy*

The early foundations of grand jury secrecy are traceable to twelfth-century England under King Henry II.<sup>26</sup> The King gathered a twelve-member body that surreptitiously informed him of those who had violated the law, thereby giving the local sheriff an opportunity to capture the accused prior to an escape.<sup>27</sup> Over the course of several centuries, the English grand jury evolved to gain independence from the monarch while maintaining the general rule of secrecy in its proceedings.<sup>28</sup>

In the seventeenth century, American colonists brought much of the English legal system to the new world, including the grand jury.<sup>29</sup> Colonists roundly embraced the grand jury and its veil of secrecy.<sup>30</sup>

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22. *Blair v. United States*, 250 U.S. 273, 282 (1919) (citing *Hendricks v. United States*, 223 U.S. 178, 184 (1912)).

23. A grand jury has the power to issue two types of subpoenas: *ad testificandum* and *duces tecum*. These subpoenas compel witness testimony and document production, respectively. BRENNER & SHAW, *supra* note 4, § 8.2.

24. *Id.*

25. *See John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008) (“The justification for grand jury secrecy inheres in the nature of the proceeding.”).

26. In 1166, King Henry II established a “system of local informers” to notify him of criminal activity within his kingdom. Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 6 (1996).

27. *Id.*

28. ADMIN. OFFICE OF U.S. COURTS, HANDBOOK FOR FEDERAL GRAND JURORS 2 (2012) [hereinafter *FEDERAL GRAND JURY HANDBOOK*].

29. *Id.*

30. *See Kadish, supra* note 26, at 6; *see also id.* (“[T]he English tradition of the grand jury was well established in the American colonies long before the American Revolution.”).

Following the conclusion of the American Revolution, the new government ratified the Constitution in 1788<sup>31</sup> and, in 1791, codified the requirement of a grand jury in the Fifth Amendment of the Bill of Rights.<sup>32</sup> Despite no express reference to secrecy, the Grand Jury Clause was said to imply it.<sup>33</sup> For the next century and a half, American courts began to develop and fortify common law surrounding the secrecy of grand jury proceedings.<sup>34</sup>

In 1946, the Supreme Court established the Federal Rules of Criminal Procedure<sup>35</sup> and, within them, the general rule of grand jury secrecy.<sup>36</sup> Through several amendments to the Rules by both Congress and the Supreme Court, the principle of secrecy has endured.<sup>37</sup>

The sanctity of grand jury secrecy remains evident today. For example, the Handbook for Federal Grand Jurors devotes a relatively substantial section to secrecy.<sup>38</sup> Moreover, grand jurors must take an oath<sup>39</sup> that binds them to the “strict obligation of secrecy.”<sup>40</sup> And Federal Rule of Criminal Procedure 6(e)(2) provides a list of

31. *Creating the United States: Convention and Ratification*, LIBRARY OF CONG., <https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html> (last visited Apr. 5, 2020).

32. Kadish, *supra* note 26, at 12.

33. *Id.* at 16; *see also* *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881) (“[P]ublic policy would not permit the transaction before a grand jury to be disclosed . . . .”); *United States v. Smith*, 27 F. Cas. 1186, 1189 (C.C.D.N.Y. 1806) (“[T]he sentiments expressed by jurors, and the facts disclosed by witnesses to them, are secrets . . . .”).

34. *See, e.g.*, *United States v. Papaioanu*, 10 F.R.D. 517, 518 (D. Del. 1950) (“[A]ll proceedings before the Grand Jury should remain secret unless extraordinary circumstances are present . . . .”); *United States v. Am. Med. Ass’n*, 26 F. Supp. 429, 430 (D.D.C. 1939) (“[T]he oath taken by the grand jurors . . . is not limited by time or circumstance. It is a lasting obligation binding all who have served as grand jurors.”); *United States v. Providence Tribune Co.*, 241 F. 524, 526 (D.R.I. 1917) (“Secrecy is essential to the proceedings of a grand jury . . . .”).

35. Kadish, *supra* note 26, at 23.

36. *Id.* at 24.

37. *Id.* at 45–47, 51–52, 62.

38. *See* FEDERAL GRAND JURY HANDBOOK, *supra* note 28, at 13–14.

39. The federal grand juror’s oath is as follows:

Do each of you solemnly swear [affirm] to diligently inquire into and make true presentment or indictment of all such matters and things touching your present grand jury service that are given to you in charge or otherwise come to your knowledge; to keep secret the counsel of the United States, your fellows, and yourselves; and not to present or indict any person through hatred, malice, or ill will, nor to leave any person unrepresented or unindicted through fear, favor, or affection or for any reward or hope or promise thereof, but in all your presentments and indictments to present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding? If so, answer “I do.”

BRENNER & SHAW, *supra* note 4, § 5.3.

40. FEDERAL GRAND JURY HANDBOOK, *supra* note 28, at 13.

persons—including interpreters, court reporters, and government attorneys—similarly obligated to secrecy of grand jury matters.<sup>41</sup>

### *B. The Purposes of Grand Jury Secrecy*

In its earliest form, grand jury secrecy functioned primarily to guarantee capture of the accused.<sup>42</sup> Since then, courts have generally propounded four purposes for secrecy during grand jury proceedings:

- (1) to prevent the subject(s) of an investigation from escaping;
- (2) to ensure unreserved and evenhanded deliberations by grand jurors;
- (3) to promote truthfulness of witnesses; and
- (4) to safeguard the accused from unwanted attention and public judgment.<sup>43</sup>

These objectives are vital to the administration of justice and the protections of the rights of the accused, and the Supreme Court has explained that grand jury secrecy successfully ensures the fulfillment of each of these objectives.<sup>44</sup> But these objectives are vital only for the duration of the grand jury's proceedings; as Former Chief Justice William Rehnquist explained:

When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over.<sup>45</sup>

In other words, the conclusion of the grand jury proceedings displaces the four principal purposes of grand jury secrecy described above.

There are, however, two interests in grand jury secrecy that courts consistently consider to be ongoing. The first is individual privacy, which protects the identities of those mentioned in grand jury

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41. See FED. R. CRIM. P. 6(e)(2).

42. Kadish, *supra* note 26, at 6.

43. See, e.g., *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir. 1954); *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 282–83 (S.D.N.Y. 1999); see also FEDERAL GRAND JURY HANDBOOK, *supra* note 28, at 13–14.

44. See *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979).

45. *Butterworth v. Smith*, 494 U.S. 624, 632–33 (1990).



materials.<sup>46</sup> For instance, privacy protects grand jurors who seek to avoid unwanted media attention due to their affiliation with a high-profile investigation. Privacy also safeguards grand jury witnesses from potential retaliation resulting from their testimony against the grand jury subject. Lastly, because grand juries have the power to engage in a sweeping investigation that may confront innocent individuals,<sup>47</sup> privacy ensures that the shadow of criminality is not cast over undeserving subjects.<sup>48</sup>

The second indefinite interest in grand jury secrecy—an interest that this Note will later criticize as nebulous and unsupported—is institutional integrity, which focuses not on the respective grand juries but on a potential deterrent effect for subsequent grand juries and their participants.<sup>49</sup> The grand jury’s investigative role depends upon its ability to call witnesses and establish a comprehensive understanding of the facts. Witnesses and grand jurors must feel a sense of security in providing testimony or deliberating honestly. In furthering that sense of security, many courts insist upon continued secrecy of grand jury materials to “ensur[e] future grand jurors and grand jury witnesses will not be inhibited due to the possibility of subsequent disclosure of proceedings.”<sup>50</sup>

### III. RULE 6(E): THE GENERAL RULE OF SECRECY AND ITS EXCEPTIONS

Federal Rule of Criminal Procedure (“Rule”) 6(e) sets forth the procedural framework for the secrecy of grand jury records. Rule 6(e) provides the following:

#### **Rule 6. The Grand Jury**

. . . .

#### **(e) Recording and Disclosing the Proceedings.**

. . .

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46. *In re Am. Historical Ass’n*, 49 F. Supp. 2d at 292.

47. With the power to investigate on mere suspicion of criminal activity, a grand jury investigation can be extremely broad. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

48. *See In re Am. Historical Ass’n*, 62 F. Supp. 2d 1100, 1103 (S.D.N.Y. 1999).

49. *See, e.g., Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 566 n.11 (1983) (“[S]tringent protection of the secrecy of completed grand jury investigations may be necessary to encourage persons to testify fully and freely before future grand juries.”); *Douglas Oil Co.*, 441 U.S. at 222 (“[T]he courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries.”).

50. *In re Am. Historical Ass’n*, 49 F. Supp. 2d at 292.

**(2) *Secrecy.***

...

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

**(3) *Exceptions.***

...

(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:

- (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;
- (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
- (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened.<sup>51</sup>

Generally, Rule 6(e)(2) states that all “matter[s] occurring before the grand jury” must remain secret.<sup>52</sup> Rule 6(e)(3) also sets forth several exceptions to secrecy, or ways in which a district court may authorize disclosure of grand jury materials.<sup>53</sup> In those situations expressly described in Rule 6(e)(3), disclosure is undoubtedly appropriate.<sup>54</sup>

Whether a district court may authorize disclosure of grand jury materials without express authorization from Rule 6(e)—that is, whether Rule 6(e)’s exceptions are exhaustive—is a juncture of ongoing debate. On the one hand, the Supreme Court has hinted at broader district court authority than Rule 6(e) expressly provides: “disclosure [is] committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.”<sup>55</sup> On the other hand, the Court stated in the very same opinion that “any disclosure of grand jury minutes is covered by [Rule] 6(e).”<sup>56</sup> Similarly, in *Carlisle v. United States*,<sup>57</sup> the Supreme Court warned that district courts may not “develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure,”<sup>58</sup> hinting that any sort of discretionary disclosure would thus be improper as an attempt to circumvent the express exceptions of Rule 6(e).

Circuit courts have been left to search for equipoise between these passages from the Supreme Court. Is disclosure indeed committed to the discretion of the trial court? Or does a discretionary inquiry attempt to sidestep the clearly denoted exceptions within Rule 6(e)? As explored below, the circuit courts that addressed this issue have rendered different results. Based on longstanding Supreme Court precedent and recent legislative action, however, it seems that the

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51. FED. R. CRIM. P. 6.

52. FED. R. CRIM. P. 6(e)(2).

53. FED. R. CRIM. P. 6(e)(3).

54. A party seeking grand jury materials under an established Rule 6(e) exception must nevertheless satisfy the “particularized need” test. *Douglas Oil Co.*, 441 U.S. at 217; *see also* *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983) (“We have consistently construed the Rule . . . to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted.”).

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

56. *Id.* at 398.

57. 517 U.S. 416 (1996), *superseded on other grounds by statute*, FED. R. CRIM. P. 45.

58. *Id.* at 426.

courts holding Rule 6(e)'s exceptions to be exhaustive are on the right side of the analysis.

### *A. An Exhaustive Interpretation of Rule 6(e)'s Exceptions*

The Sixth, Eighth, Eleventh, and District of Columbia (D.C.) Circuits have unequivocally expressed their unwillingness to read beyond the scope of Rule 6(e),<sup>59</sup> while the Third Circuit has hinted at a similarly restrictive interpretation.<sup>60</sup> The Sixth Circuit, for instance, declined to “breach grand jury secrecy for any purpose other than those embodied by the Rule.”<sup>61</sup> The Eighth and Eleventh Circuits echoed that same deference to the legislature.<sup>62</sup> Finally, although reaching the same outcome, the D.C. Circuit differed in its analysis by taking a comprehensive approach to the Rule's subparts.<sup>63</sup> The D.C. Circuit read the clause in subpart 2 of Rule 6(e)—“[u]nless these rules provide otherwise”—to apply to subpart 3 of the Rule.<sup>64</sup> In essence, the court took the position that “the secrecy requirement [in subpart 2] and its exceptions [in subpart 3] must be read together as an integrated whole.”<sup>65</sup> The D.C. Circuit therefore confined the exceptions to those written.<sup>66</sup>

### *B. A Permissive Interpretation of Rule 6(e)'s Exceptions*

Contrarily, some circuit courts that have addressed the exceptions to grand jury secrecy have definitively held that “Rule 6(e)(3)(E) contains a permissive, not exhaustive, list of reasons for release of

59. *Pitch v. United States*, 953 F.3d 1226, 1234–35 (11th Cir. 2020); *McKeever v. Barr*, 920 F.3d 842, 845 (D.C. Cir. 2019); *United States v. McDougal*, 559 F.3d 837, 841 (8th Cir. 2009); *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991).

60. See *McDonnell v. United States*, 4 F.3d 1227, 1247–48 (3d Cir. 1993) (“Before a court must evaluate the need for continued secrecy under subsection (e)(3)(E), the party seeking disclosure must establish that the grand jury material sought falls within one of the six exceptions to the general rule of secrecy enumerated in Rule 6 . . .”).

61. *In re Grand Jury 89-4-72*, 932 F.2d at 488.

62. *Pitch*, 953 F.3d at 1234 (“The rule thus leaves no room for district courts to fashion new exceptions beyond those listed in Rule 6(e).”); *McDougal*, 559 F.3d at 840 (holding that “courts will not order disclosure absent a recognized exception to Rule 6(e)”).

63. See *McKeever*, 920 F.3d at 845.

64. *Id.* (alteration in original).

65. *Carlson v. United States*, 837 F.3d 753, 769 (7th Cir. 2016) (Sykes, J., dissenting).

66. *McKeever*, 920 F.3d at 850. The D.C. Circuit's decision in *McKeever* is an intriguing one in that it seemingly undercuts D.C. Circuit precedent, as the dissent notes. See *id.* at 853–55 (Srinivasan, J., dissenting); see also *Haldeman v. Sirica*, 501 F.2d 714, 715–16 (D.C. Cir. 1974) (authorizing disclosure of materials from the Nixon grand jury despite no express application of a Rule 6(e) exception).

grand jury materials.”<sup>67</sup> Referring to a district court’s “inherent supervisory authority” to control procedures before it, the Second and Seventh Circuits permit petitioners to seek grand jury records outside the bounds of Rule 6(e).<sup>68</sup> Also, as a matter of first impression in the First Circuit, a Massachusetts District Court recently determined that it had authority to release grand jury materials.<sup>69</sup>

For the courts reading the listed exceptions of Rule 6(e) as permissive, there has been a uniform methodology for the disclosure inquiry based on a 1997 opinion out of the Second Circuit. In 1997, the Second Circuit in *In re Craig*<sup>70</sup> enumerated nine factors to determine whether disclosure is appropriate beyond the confines of Rule 6(e).<sup>71</sup> The *Craig* factors work to balance the interests in preserving secrecy with those in authorizing disclosure:

(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.<sup>72</sup>

Over the last couple of decades, these factors have served as the touchstone to analyze whether disclosure of decades-old grand jury materials, brought solely in the name of historical interest, is appropriate.<sup>73</sup>

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67. *Carlson*, 837 F.3d at 766 (majority opinion); see also *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997) (allowing disclosure of grand jury materials in “special circumstances” beyond the express wording of Rule 6(e)).

68. *In re Craig*, 131 F.3d at 101; see *id.* at 103; *Carlson*, 837 F.3d at 766.

69. See *Lepore v. United States*, No. 18-mc-91539-ADB, 2020 BL 64811, at \*2–7 (D. Mass. Feb. 4, 2020).

70. 131 F.3d 99 (2d Cir. 1997).

71. *Id.* at 106.

72. *Id.*

73. See, e.g., *Lepore*, 2020 BL 64811, at \*4–6 (“join[ing] those circuits that have adopted the *Craig* test” in evaluating, and partially granting, the petition of Jill Lepore for grand jury materials

Although the Second Circuit insisted that “there is no talismanic formula” for a disclosure inquiry,<sup>74</sup> subsequent cases tell a different story. In fact, the centerpiece of the disclosure inquiry is consistently twofold: (1) whether there are any living individuals named in the grand jury materials whose privacy would be jeopardized upon disclosure, and (2) how the petitioner aims to use the sought information to benefit the public. Consider the following instances where district courts authorized disclosure of grand jury materials based solely on historical interest, as well as how those courts leveraged the *Craig* factors in doing so.

### 1. Grand Jury Investigation of the *Chicago Tribune* Press Leak During World War II

Following the bombing at Pearl Harbor in 1941, the United States declared war on Japan<sup>75</sup> and thus became an active participant in World War II.<sup>76</sup> Six months later, the Japanese naval fleet prepared a strategic ambush of United States aircraft carriers to overtake position in the Pacific.<sup>77</sup> Unbeknownst to the Japanese military commanders,

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relating to the leak of the Pentagon Papers); *In re Pitch*, 275 F. Supp. 3d 1373 (M.D. Ga. 2017) (using the *Craig* factors to grant a petition for grand jury materials from the 1946 Moore’s Ford lynching), *rev’d*, *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020); *Carlson v. United States*, 109 F. Supp. 3d 1025 (N.D. Ill. 2015) (granting a petition for grand jury materials from the investigation during World War II into media leaks about the Battle of Midway), *aff’d*, 837 F.3d 753 (7th Cir. 2016); *In re Nat’l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015) (granting a petition to historians seeking to unseal grand jury materials relating to the espionage of Julius and Ethel Rosenberg); *In re Nichter*, 949 F. Supp. 2d 205 (D.D.C. 2013) (denying disclosure under the *Craig* factors); *In re Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011) (granting a petition for disclosure of select grand jury materials from the grand jury’s investigation into Richard Nixon and the Watergate scandal); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009) (granting disclosure of some materials from the 1963 grand jury that indicted labor union leader James Hoffa); *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (granting disclosure of grand jury materials about the espionage of Alger Hiss).

74. *In re Craig*, 131 F.3d at 106.

75. One day after the bombing, President Franklin D. Roosevelt requested a war declaration from Congress. Franklin D. Roosevelt, President of the U.S., Address to the Congress Asking That a State of War Be Declared Between the United States & Japan (Dec. 8, 1941) (transcript available in the Library of Congress). He declared December 7, 1941—the day of the Pearl Harbor attack—to be “a date which will live in infamy.” *Id.* Less than an hour later, a joint session of Congress voted 470–1 to declare war against Japan. Andrew Glass, *Congress Declares War on Japan, Dec. 8, 1941*, POLITICO (Dec. 8, 2015, 12:01 AM), <https://www.politico.com/story/2015/12/congress-declares-war-on-japan-dec-7-1941-216461>.

76. *Take a Closer Look: America Goes to War*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/america-goes-war-take-closer-look> (last visited Apr. 5, 2020).

77. *The Battle of Midway*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/battle-midway> (last visited Apr. 5, 2020).

American code breakers had cracked the Japanese code and intercepted communications about the impending attack.<sup>78</sup> In what historians describe as “the single most decisive aerial attack in naval history,”<sup>79</sup> the United States military surprised the Japanese fleet with strategic force.<sup>80</sup> The victory in the Battle of Midway was considered to be a significant turning point in World War II.<sup>81</sup>

Upon the conclusion of the Battle of Midway, the *Chicago Tribune* published a front-page story titled *Navy Had Word of Jap Plan to Strike at Sea*.<sup>82</sup> The story, which provided intricate details about the planned Japanese attack, suggested that United States intelligence had intercepted and deciphered the enemy codes.<sup>83</sup> President Franklin D. Roosevelt and other military leaders were furious about the leak.<sup>84</sup> The *Chicago Tribune* story seemingly alerted the enemy about the success of American intelligence efforts, thus allowing the Japanese military to alter its communications. The news story “became one of the biggest and potentially damaging news leaks of World War II.”<sup>85</sup>

A grand jury was convened in August 1942 to investigate the incident as a potential violation of the Espionage Act.<sup>86</sup> The grand jury called several witnesses, including high-ranking military officers and members of the *Chicago Tribune*.<sup>87</sup> In the end, no indictments were returned.<sup>88</sup> Records from that 1942 grand jury investigation remained under seal for decades.

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78. *Id.*

79. Michael E. Ruane, *Unsealed 75 Years After Battle of Midway: New Details of Alarming WWII Press Leak*, CHI. TRIB. (June 6, 2017, 6:30 AM), <http://www.chicagotribune.com/news/nationworld/ct-battle-of-midway-press-leak-20170605-story.html>.

80. See *The Battle of Midway*, *supra* note 77 (“TBD Devastator torpedo-bombers . . . from the USS Enterprise, USS Hornet, and USS Yorktown attacked the Japanese fleet. The Japanese carriers . . . were hit, set ablaze, and abandoned.”).

81. See *id.*

82. Ruane, *supra* note 79.

83. The author of *Navy Had Word of Jap Plan to Strike at Sea* was a war correspondent for the *Chicago Tribune*. He had been aboard one of the U.S. Navy ships to which the deciphered codes were sent. *Id.*; see *Carlson v. United States*, 109 F. Supp. 3d 1025, 1026 (N.D. Ill. 2015), *aff’d*, 837 F.3d 753 (7th Cir. 2016).

84. *Carlson*, 109 F. Supp. 3d at 1026.

85. Ruane, *supra* note 79; see *Carlson*, 109 F. Supp. 3d at 1026.

86. *Carlson*, 109 F. Supp. 3d at 1026–27.

87. Petition for Order Directing Release of Transcripts of Certain Testimony from August 1942 Grand Jury Investigation of the *Chicago Tribune* at 2–3, *Carlson v. United States*, 109 F. Supp. 3d 1025 (N.D. Ill. 2015) (No. 1:14-cv-09244), 2014 WL 6478778.

88. *Carlson*, 109 F. Supp. 3d at 1027.

In 2014, renowned World War II journalist and historian Elliot Carlson petitioned an Illinois district court for access to transcripts from the grand jury.<sup>89</sup> The court used the *Craig* factors in its analysis.<sup>90</sup> The lapse of over seventy years meant that any people mentioned in the grand jury materials had likely passed away. Because of the seventy-year lapse since the grand jury, secrecy interests had “dissipated.”<sup>91</sup>

As for the interests in disclosure, the court found them to be forceful. Several historical groups devoted to the study of World War II joined Carlson in his petition.<sup>92</sup> The court noted that the identity of the petitioners—a World War II expert in association with several historical groups—“*militate[d]* in favor of disclosure.”<sup>93</sup> Furthermore, transcripts from the 1942 grand jury investigation could provide long-sought answers, such as what or whom the grand jury investigated as well as how the *Chicago Tribune* staff was able to obtain highly classified information about the impending attack. Lastly and seemingly most important to the court were the larger implications of these grand jury materials to notions of democracy: “[T]he *Tribune* investigation implicates broader principles, namely, the relationship between the government and the press in a democratic society, particularly as to matters impacting national security. Even now, there is a robust public debate surrounding the government’s prosecution of members of the press for violations of the Espionage Act.”<sup>94</sup> As a result, the court granted Carlson’s petition,<sup>95</sup> a decision that was upheld by the Seventh Circuit on appeal.<sup>96</sup>

## 2. The Petitions of Stanley Kutler and Luke Nichter for Grand Jury Materials Relating to the Watergate Scandal

On June 17, 1972, five men were arrested at the Democratic National Convention headquarters at the Watergate Hotel in

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89. *See id.*

90. *See id.* at 1034–37.

91. *Id.* at 1036.

92. *Id.* at 1034.

93. *Id.* (emphasis added).

94. *Id.* at 1035.

95. *Id.* at 1037.

96. *See Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016).



Washington, D.C.<sup>97</sup> A security guard discovered the group and subsequently called police.<sup>98</sup> The men were equipped with surveillance equipment in “what authorities described as an elaborate plot to bug the offices of the Democratic National Committee.”<sup>99</sup> At first, there was no apparent reason behind the operation. Just a few months later, however, the *Washington Post* broke news that the Watergate intruders were part of a “massive campaign of political spying and sabotage conducted on behalf of President Nixon’s reelection.”<sup>100</sup>

President Nixon and many White House aides were under intense scrutiny for allegedly using the Central Intelligence Agency to obstruct the Federal Bureau of Investigation’s investigation into the break-in.<sup>101</sup> An investigative committee was established within the Senate to look into the scandal.<sup>102</sup> It was later discovered that President Nixon recorded all conversations within the Oval Office, suggesting that audio tapes may have held the key to understanding the truth of Watergate.<sup>103</sup> An eventual subpoena for the audio tapes led to a landmark case before the Supreme Court—in which the Court ordered release of the tapes—regarding notions of separation of powers and executive privilege.<sup>104</sup> After further ridicule and an eventual audio tape labeled the “smoking gun,”<sup>105</sup> Nixon resigned from office in

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97. Alfred E. Lewis, *5 Held in Plot to Bug Democrats’ Office Here*, WASH. POST (June 18, 1972), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/061872-1.htm>.

98. *Select Committee on Presidential Campaign Activities (The Watergate Committee)*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/investigations/Watergate.htm> (last visited Apr. 5, 2020).

99. Lewis, *supra* note 97.

100. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST (Oct. 10, 1972), [https://www.washingtonpost.com/politics/fbi-finds-nixon-aides-sabotaged-democrats/2012/06/06/gJQAoHIJJV\\_story.html?utm\\_term=.4da287eb7d89](https://www.washingtonpost.com/politics/fbi-finds-nixon-aides-sabotaged-democrats/2012/06/06/gJQAoHIJJV_story.html?utm_term=.4da287eb7d89).

101. Faith Karimi, *Watergate Scandal: A Look Back at Crisis That Changed US Politics*, CNN (May 17, 2017, 8:12 AM), <https://www.cnn.com/2017/05/17/politics/watergate-scandal-look-back/index.html?no-st=9999999999>.

102. *Id.*; *Select Committee on Presidential Campaign Activities (The Watergate Committee)*, *supra* note 98.

103. Karimi, *supra* note 101.

104. *See* *United States v. Nixon*, 418 U.S. 683, 713 (1974).

105. Andrew Glass, *Watergate ‘Smoking Gun’ Tape Released, Aug. 5, 1974*, POLITICO (Aug. 5, 2018, 6:50 AM), <https://www.politico.com/story/2018/08/05/watergate-smoking-gun-tape-released-aug-5-1974-753086>.

1974.<sup>106</sup> By the end of 1975, three grand juries had been convened to investigate the events.<sup>107</sup>

Professors Stanley Kutler and Luke Nichter separately petitioned the Washington D.C. district court in 2010 and 2013, respectively, for records from one of the grand juries empaneled in connection with the Watergate scandal.<sup>108</sup> In a telling pair of decisions, the district court granted the petition of Kutler,<sup>109</sup> while denying that of Nichter.<sup>110</sup> Faced with petitions for grand jury materials relating to the same monumental historical event, the court differed in its decisions. So, what set Kutler's petition apart from Nichter's?

In short, privacy interests were dispositive for the professors. Kutler's petition sought only a limited range of materials, and the people mentioned in those materials had either passed away or publicly discussed their own involvement.<sup>111</sup> Nichter's petition, however, requested materials that would disclose the identity of a named individual known to be living, while implicating several other individuals whose status was unknown.<sup>112</sup> Although the court ostensibly based its decision on a consideration of all relevant *Craig* factors, it is evident that privacy concerns were controlling. A footnote in the *Nichter* case suggests that, regardless of the relevance of other *Craig* factors, the court would have reached a different result if individual privacy was not at risk: "Disclosure may be appropriate following the death of all persons named in the grand jury materials. The Court would also reconsider its ruling if it was presented with evidence that the named individuals had consented to release."<sup>113</sup>

With privacy interests abated in *Kutler*, the court recognized the vast historical implications of the grand jury's records. Synonymous with scandal, Watergate is a historic political tribulation, and many mysteries persisted. Some documents remained under seal from the Watergate grand juries,<sup>114</sup> including the testimony of President

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106. *Id.*

107. *In re Kutler*, 800 F. Supp. 2d 42, 44 (D.D.C. 2011).

108. *See id.* at 43; *In re Nichter*, 949 F. Supp. 2d 205, 207 (D.D.C. 2013).

109. *In re Kutler*, 800 F. Supp. 2d at 43.

110. *In re Nichter*, 949 F. Supp. 2d at 214.

111. *In re Kutler*, 800 F. Supp. 2d at 49.

112. *In re Nichter*, 949 F. Supp. 2d at 213.

113. *Id.* at 213 n.14.

114. *See id.* at 207; *In re Kutler*, 800 F. Supp. 2d at 43–44.

Nixon.<sup>115</sup> There was no public information as to what was contained on the illegal wiretaps from the Watergate Hotel.<sup>116</sup> Furthermore, historians continually debate what truly motivated the Watergate break-in.<sup>117</sup> More broadly, Watergate “changed American politics forever”<sup>118</sup> and is “widely considered to be the biggest [scandal] in political history anywhere in the world.”<sup>119</sup> With the undeniable historical significance of the Watergate scandal, public interest persists in gaining a comprehensive record to fully understand the motives and planning that went into such an endeavor.

### C. *Why Rule 6(e)’s Exceptions Are Exhaustive*

To begin, the tradition of grand jury secrecy is revered throughout American jurisprudence.<sup>120</sup> Courts have described secrecy as “sacrosanct”<sup>121</sup> and “older than our Nation itself.”<sup>122</sup> In accordance with the apparent holiness of secrecy, the Supreme Court has evinced its unwillingness to permit disclosure of grand jury materials: “In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized.”<sup>123</sup> Against this backdrop, it is more likely that Rule 6(e)’s exceptions are indeed exhaustive. Because of the great weight

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115. President Nixon’s testimony is alleged to have addressed four different subjects, including the “smoking gun” tape and the potential misuse of federal agencies. *See In re Kutler*, 800 F. Supp. 2d at 43–44.

116. *See* Petition to Unseal Specified Documents Related to *United States v. Liddy*, Criminal No. 72-1827 by Luke A. Nichter at 1, *In re Nichter*, 949 F. Supp. 2d 205 (D.D.C. 2013) (No. 1:12-mc-00074-RCL).

117. *See id.*

118. Karimi, *supra* note 101.

119. Hugh O’Connell, *What Was Watergate? Here Are 14 Facts that Explain Everything*, THEJOURNAL.IE (June 24, 2012, 9:15 AM), <https://www.thejournal.ie/what-was-watergate-14-facts-richard-nixon-494970-Jun2012>.

120. *See, e.g.*, *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 (1983) (“Both Congress and this Court have consistently stood ready to defend [grand jury secrecy] . . . . In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized.”); *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979) (“We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”).

121. *United States v. Phillips*, 843 F.2d 438, 441 (11th Cir. 1988) (“The secrecy of the grand jury is sacrosanct.”).

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

123. *Sells Eng’g, Inc.*, 463 U.S. at 425; *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

accorded to grand jury secrecy, disclosure seems permissible only by way of legislation.<sup>124</sup>

Moreover, Supreme Court authority suggests that district courts' reliance on their inherent supervisory authority is misplaced in permitting disclosure of grand jury materials beyond the Rule 6(e) exceptions. A district court's inherent supervisory authority, well-established by the Supreme Court,<sup>125</sup> refers to the ability of the district court to establish its own procedural rules.<sup>126</sup> That authority, however, is not limitless.<sup>127</sup> The Supreme Court has held that this authority relates only to procedures not expressly provided by the Constitution or Congress.<sup>128</sup> As a result, a district court may not establish its own rules that "circumvent or conflict with the Federal Rules of Criminal Procedure."<sup>129</sup>

Disclosure of grand jury materials is far from a mere procedural move. First, the grand jury is not technically within the constitutional province of the judicial branch,<sup>130</sup> and the Supreme Court has therefore "been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure."<sup>131</sup> Second, the

124. Judge Reena Raggi, Chair of the Advisory Committee on Criminal Rules, explained that a change in the presumption of absolute, indefinite secrecy would be "radical" and that "[a] change of that magnitude . . . would have to be accomplished through legislation, rather than a rule change." Minutes from Comm. on Rules of Practice & Procedure Meeting of June 11–12, 2012, at 44 (June 11–12, 2012), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2012-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2012-min.pdf).

125. See, e.g., *Bank of N.S. v. United States*, 487 U.S. 250, 254–55 (1988); *United States v. Hasting*, 461 U.S. 499, 505–06 (1983).

126. See *Bank of N.S.*, 487 U.S. at 254.

127. A court may not exercise its supervisory power "if it conflicts with constitutional or statutory provisions." *Id.* (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985)).

128. See, e.g., *id.* at 254; *Hasting*, 461 U.S. at 505.

129. *Carlisle v. United States*, 517 U.S. 416, 426 (1996), *superseded on other grounds by statute*, FED. R. CRIM. P. 45.

130. The Supreme Court summarized the position of the grand jury relative to the three branches of government:

"[R]ooted in long centuries of Anglo-American history," the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "is a constitutional fixture in its own right." In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length.

*United States v. Williams*, 504 U.S. 36, 47 (1992) (internal citations and quotations omitted) (alternation in original).

131. *Id.* at 49–50; see also *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983) ("Both Congress and this Court have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be

instances in which the Supreme Court has upheld a district court's action by reference to the inherent power relate to judicial economy in litigation presently before the district court,<sup>132</sup> not to procedures decades after its conclusion. Disclosure of grand jury records is not consistent with notions of efficiency, as the prosecution underlying the grand jury was likely concluded decades prior. Third, as the D.C. Circuit recognized in *McKeever v. Barr*,<sup>133</sup> the Supreme Court's deference to a district court's inherent authority has come only within the context of an express Rule 6(e) exception.<sup>134</sup> There has been no such deference without the clear applicability of Rule 6(e).

A final indication of Rule 6(e)'s exhaustiveness comes by way of recent legislation, the Civil Rights Cold Case Records Collection Act (the "Act").<sup>135</sup> The Act mandates publication of civil rights cold case records by the National Archives and Records Administration.<sup>136</sup> The Act suggests that Congress does not believe that courts have the inherent authority to disclose historically significant materials, as any materials subject to disclosure under the Act could surely be disclosed under the *Craig* factors as courts have applied them. In other words, there would be no reason for Congress to enact this sort of legislation if the district courts were to have inherent authority to disclose records from those cold cases.

#### IV. A PROPOSED HISTORICAL EXCEPTION TO GRAND JURY SECRECY

In 2012, the Advisory Committee on the Federal Rules of Criminal Procedure rejected a proposed historical exception, averring that "district judges had reasonably resolved applications by reference

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reluctant to conclude that a breach of this secrecy has been authorized."); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 573 (1983) (denying disclosure of grand jury records to a state attorney general because the "disclosure requested by the State . . . is not permitted by Rule 6(e)").

132. The Supreme Court explained:

The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

*Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 46–51 (1991) (holding that "a federal court may . . . resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct").

133. 920 F.3d 842 (D.C. Cir. 2019).

134. *Id.* at 846 (citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 396 n.1 (1959)).

135. *See* Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019).

136. *Id.*

to their inherent authority.”<sup>137</sup> But this comment came at a nascent stage in the development of Rule 6(e)’s jurisprudence. It came before the 2019 decision in *McKeever v. Barr*, in which the D.C. Circuit limited disclosure of grand jury materials solely to the delineated exceptions under Rule 6(e).<sup>138</sup> It also came before the enactment of the Civil Rights Cold Case Records Collection Act, another suggestive move by the legislature that Rule 6(e) forecloses disclosure beyond the express exceptions.

The jurisprudence surrounding disclosure of historically significant materials under Rule 6(e) will only become more unclear without a statutory exception. The Eleventh Circuit, which just recently heard oral arguments en banc in the case of grand jury materials related to the Moore’s Ford lynching in 1946, will soon determine whether its courts have inherent disclosure authority under Rule 6(e).<sup>139</sup> And, similarly, a Boston district court currently faced with a petition for grand jury materials related to the 1971 leak of the Pentagon papers<sup>140</sup> will have to determine the scope of Rule 6(e) as a matter of first impression within the First Circuit.<sup>141</sup> With circuit courts differing as to the scope of Rule 6(e), and with the immense historical significance of these untapped grand jury materials, it is time for the Advisory Committee on the Federal Rules of Criminal Procedure to reassess the historical exception to grand jury secrecy. This Note proposes the following exception as an amendment to Rule 6(e):

(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:

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137. Memorandum from Hon. Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to Hon. Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice and Procedure 20 (May 17, 2012), [https://www.uscourts.gov/sites/default/files/2012-05-criminal\\_rules\\_report\\_0.pdf](https://www.uscourts.gov/sites/default/files/2012-05-criminal_rules_report_0.pdf).

138. *McKeever*, 920 F.3d at 844, 850.

139. See Debra Cassens Weiss, *Lawyer Urges Full 11th Circuit to Release Grand Jury Records of Unsolved 1946 Lynching*, A.B.A. J. (Oct. 24, 2019, 10:36 AM), <https://www.abajournal.com/news/article/lawyer-urges-full-11th-circuit-to-release-grand-jury-records-of-unsolved-1946-lynching>.

140. See *Lepore v. United States*, No. 18-mc-91539-ADB, 2020 BL 64811, at \*1–2 (D. Mass. Feb. 4, 2020).

141. Although the First Circuit has not expressly decided the issue, it has suggested that a district court’s inherent power could permit disclosure of historically significant materials in “extraordinary circumstances.” *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005); see also *Lepore*, 2020 BL 64811, at \*3.

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**(vi) on the petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record by a preponderance of the evidence that:**

- (a) the petition seeks grand jury records;**
- (b) the records would have a material effect on the historical record;**
- (c) at least 40 years have passed since the relevant case files associated with the grand-jury records have been closed;**
- (d) 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;**
- (e) no other reason exists that requires continued secrecy.<sup>142</sup>**

A statutory exception is beneficial because it works toward uniformity among circuits, which is an important objective in all facets of the law. More pointedly, this proposal accomplishes three important objectives: (1) historical clarity through firsthand accounts; (2) adherence to the true and longstanding objectives of grand jury secrecy; and (3) resolution of governmental concerns about disclosure. Each of these objectives is explored below.

#### *A. A Comprehensive Historical Record*

A full and accurate record is firstly important to discover the truth of what happened. It is vital to comprehensively inform scholars of the events which they interpret and analyze. But it is not the inherent value in comprehensiveness that underlies a historical exception. Instead, the foremost motivation of the exception is that each petition for historically significant materials has broader implications. For example, disclosure may unearth information that has the potential to

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142. This historical exception is based largely on Attorney General Eric Holder's 2011 proposal to the Advisory Committee on the Criminal Rules. *See* Letter from Eric H. Holder, Jr., Attorney Gen., to Hon. Reena Raggi, Chair, Advisory Comm. on the Criminal Rules 9 (Oct. 18, 2011), [legaltimes.typepad.com/files/holder\\_letter\\_grand\\_jury.pdf](http://legaltimes.typepad.com/files/holder_letter_grand_jury.pdf).

supplement an important debate, or to shine light on governmental missteps, or to foster trust in government.

Consider the impact of a full historical record on American society. Perhaps nothing is more fundamental to the operation of democratic change than access to information, which allows for critical analysis of government actions.<sup>143</sup> The *Carlson* court permitted disclosure in large part due to the tense and controversial relationship between government and the media, especially during wartime.<sup>144</sup> The grand jury records relating to the *Chicago Tribune* leak were an important supplement to the ongoing “robust public debate surrounding the government’s prosecution of members of the press for violations of the Espionage Act.”<sup>145</sup>

Similarly, the *Kutler* court authorized disclosure for materials relating to Watergate,<sup>146</sup> an unprecedented instance of corruption by President Nixon. The court noted that the significance of the Watergate scandal “cannot be overstated” as a way to “foster further scholarly discussion, and improve the public’s understanding.”<sup>147</sup> Grand jury materials from both *Carlson* and *Kutler* could materially supplement topical issues, especially given the tense relationship

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143. James Madison once wrote: “A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.” James Madison, *Letter from James Madison to W. T. Barry (Aug. 4, 1822)*, in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 276, 276–81 (Phila.: J.B. Lippincott & Co. 1865); see also Steven L. Katz, *Transparency in the U.S.: Towards Worldwide Access to Government*, J. PUB. INQUIRY, Fall/Winter 2001, at 55, 55 (“In a democracy, citizens are the governors and the governed. Nothing is more essential to the concept of self-governance than access to government information.”).

144. See *Carlson v. United States*, 109 F. Supp. 3d 1025, 1035 (N.D. Ill. 2015), *aff’d*, 837 F.3d 753 (7th Cir. 2016).

145. *Id.*

146. *In re Kutler*, 800 F. Supp. 2d 42, 47 (D.D.C. 2011).

147. *Id.* at 48.



between the government and the media,<sup>148</sup> as well as the ongoing accusations of misconduct against sitting President Trump.<sup>149</sup>

A comprehensive historical record provides further benefits, articulated by New York District Judge Leisure:

Access to [grand jury] information inevitably enhances the accuracy of history and undermines the false conspiracy theories and revisionism that tend to arise when information remains secret. Moreover, disclosure can only, in the long run, build confidence in our government by affirming that it is open, in all respects, to scrutiny by the people.<sup>150</sup>

Without a statutory historical exception to grand jury secrecy, these benefits of a comprehensive historical record are difficult to attain. Under the existing framework, the possibility that a district court authorizes disclosure solely for historical or academic reasons depends entirely on the district court's location. If a district court sits in the D.C. Circuit, for instance, disclosure of grand jury materials for historical significance is impermissible,<sup>151</sup> as opposed to a district court in the Second Circuit.<sup>152</sup> Because only the district in which the grand jury was empaneled has the authority to release the materials, the comprehensiveness of the historical record therefore varies based upon where the grand jury was convened.<sup>153</sup> This geographical arbitrariness looms as a potential hindrance to documents of vital

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148. See, e.g., Margaret Sullivan, *Trump's Attacks on the News Media Are Accelerating. You Can Expect Three Results*, WASH. POST (Sept. 3, 2019, 8:48 AM), [https://www.washingtonpost.com/lifestyle/style/trumps-attacks-on-the-news-media-are-accelerating-you-can-expect-three-results/2019/09/03/fedfff66-ce3d-11e9-87fa-8501a456c003\\_story.html](https://www.washingtonpost.com/lifestyle/style/trumps-attacks-on-the-news-media-are-accelerating-you-can-expect-three-results/2019/09/03/fedfff66-ce3d-11e9-87fa-8501a456c003_story.html); Peter Baker, *Trump Bars CNN's Jim Acosta from the White House*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/trump-cnn-acosta-white-house.html>.

149. Stephen Collinson, *New Revelations from First Public Hearings Paint Damning Portrait of Trump*, CNN (Nov. 14, 2019, 10:14 AM), <https://www.cnn.com/2019/11/14/politics/donald-trump-impeachment-hearing/index.html>.

150. *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 295 (S.D.N.Y. 1999).

151. See *McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019) (limiting disclosure of grand jury materials to the exceptions stated in Rule 6(e)).

152. See *In re Craig*, 131 F.3d 99, 107 (2d Cir. 1997) (permitting disclosure of grand jury materials beyond the Rule 6(e) exceptions).

153. A petitioner must petition the district court where the grand jury was convened. See FED. R. CRIM. P. 6(e)(3)(F); see also *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 224–25 (1979) (“The federal courts that have addressed the question generally have said that the request for disclosure of grand jury minutes under Rule 6(e) must be directed toward the court under whose auspices the grand jury was empaneled.”).

importance, especially considering the D.C. Circuit's recurring role in major political affairs.

The paradigmatic example of this danger comes in the form of Special Counsel Robert Mueller's grand jury. Mueller recently convened a grand jury in Washington, D.C., to investigate collusion between the Russian government and the presidential campaign of Donald Trump.<sup>154</sup> With the D.C. Circuit's recent decision in *McKeever v. Barr*, however, matters before a Washington D.C. grand jury can never be disclosed unless they fall within a specific Rule 6(e) exception.<sup>155</sup> It is conceivable, then, that the teachings of Mueller's grand jury are lost.<sup>156</sup> Decades from now, scholars will be unable to analyze an unprecedented investigation in American history. Prosecutors would be deprived of potentially valuable insight as to the investigation of high-profile subjects, especially those in the American government. And the public may be kept in the dark about the years-long investigation into one of its elected leaders.

Furthermore, there is a strong likelihood that the exceptions to secrecy are indeed exhaustive.<sup>157</sup> Based on existing Supreme Court precedent and recent legislative moves, it seems more likely than not that a district court's inherent supervisory authority does not extend so far as to permit circumvention of the rules of grand jury secrecy.<sup>158</sup> Once this power is inevitably curtailed—whether through the legislature or the Supreme Court—disclosure in instances of academic or historical interest may be entirely foreclosed, meaning that historians and scholars would be denied access to these valuable materials.

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154. Katelyn Polantz, *Grand Jury Investigation Started by Mueller 'Continuing Robustly,' Prosecutor Says*, CNN (Mar. 27, 2019, 10:05 PM), <https://www.cnn.com/2019/03/27/politics/Mueller-grand-jury-investigation/index.html>.

155. *McKeever*, 920 F.3d at 850.

156. Although the secrecy protections remain in place over the grand jury materials with respect to the general public, a district court recently authorized disclosure of the Mueller grand jury materials to the House of Representatives under one of the Rule 6(e) exceptions. The district court determined that Rule 6(e)(3)(E)(i), which authorizes disclosure "preliminarily to or in connection with a judicial proceeding," applied to the sought materials for use in impeachment proceedings. *In re Comm. on the Judiciary*, 414 F. Supp. 3d 129, 164–65 (D.D.C. 2019).

157. *See supra* Part III.

158. *See supra* Part III.

### B. Preservation of Secrecy Interests

The second objective accomplished by a historical exception is the balance between disclosure and the preservation of the general rule of secrecy. A historical exception maintains the ongoing presumption of secrecy as a backdrop for all disclosure petitions to protect individuals who are named in grand jury materials, yet it also ensures access to important grand jury records by adhering to the true reasons for indefinite secrecy.

#### 1. The Ongoing Presumption of Secrecy

The most important caveat in a historical exception to grand jury secrecy is the preservation of the secrecy presumption. Secrecy is overwhelmingly significant for the protection of citizens, so it should not be sidestepped.

The presumption persists by way of three provisions in the proposal. The first is the requirement that the grand jury records will have a “material effect on the historical record.” This determination, which courts can undertake by an *in camera* review,<sup>159</sup> seeks to combine three of the *Craig* factors that courts have afforded considerable weight: the identity of the petitioner, the reason(s) disclosure is requested, and the specific information sought.<sup>160</sup> A petitioner does not carry an easy burden to establish that she seeks historically significant information that will materially affect the historical record. Moreover, by limiting disclosure only to those materials that will have a genuinely cognizable effect on the historical record, any extraneous materials are not unnecessarily released.

Second, the forty-year requirement similarly works to safeguard the presumption of secrecy. To be sure, the passage of time is not dispositive in a disclosure inquiry, but it is a sweeping first step in displacing privacy concerns.<sup>161</sup> For one, it increases the likelihood that someone named in the grand jury materials is deceased. Additionally, it almost guarantees that investigations have been able to run their

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159. The *Nichter* court reviewed grand jury materials *in camera* and determined that the sought materials would not “help resolve any ambiguities in the historical record.” *In re Nichter*, 949 F. Supp. 2d 205, 214 (D.D.C. 2013).

160. *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997).

161. *See, e.g., id.* at 107 (“[T]he passage of time erodes many of the justifications for continued secrecy.”); *Carlson v. United States*, 109 F. Supp. 3d 1025, 1036 (N.D. Ill. 2015) (“[A]fter so many years the traditional reasons for maintaining grand jury secrecy have typically dissipated.”), *aff’d*, 837 F.3d 753 (7th Cir. 2016).

course, so disclosure does not jeopardize ongoing or future criminal proceedings. Finally, with respect to a court’s determination of the historical value of grand jury materials, forty years is a sufficient benchmark such that ongoing academic interest suggests actual historical significance in uncovering and analyzing what the grand jury undertook.

Third, the “catch-all provision” under subpart (e)—“no other reason exists that requires continued secrecy”—ensures that courts will not permit disclosure if it is improper. If the government can identify any ongoing privacy interest, the grand jury record should remain sealed.<sup>162</sup> One conceivable situation necessitating ongoing secrecy is where disclosure would be detrimental to national security or law enforcement. If, for instance, disclosure of grand jury materials would jeopardize an ongoing investigation or leak valuable government secrets, disclosure would be wholly inappropriate. After all, a historical exception to grand jury secrecy is meant to benefit the public.

## 2. Protecting Individual Privacy and Dispelling Institutional Integrity

As discussed above in Part II, courts consistently cite two long-term purposes of secrecy: individual privacy and institutional integrity.<sup>163</sup> Individual privacy is of the utmost importance, as it effectively protects the reputations and well-being of those involved

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162. Courts have consistently adhered to secrecy where privacy concerns remain. *See, e.g., In re Nat’l Sec. Archive*, 104 F. Supp. 3d 625, 627, 629 (S.D.N.Y. 2015) (granting the renewed petition brought by historians and archivists following the deaths of witnesses from a grand jury convened to investigate Julius and Ethel Rosenberg); *In re Nichter*, 949 F. Supp. 2d at 213 (denying a petition for Watergate grand jury materials where “at least one of the subjects of grand jury testimony . . . is still living”); *In re Kutler*, 800 F. Supp. 2d 42, 49–50 (D.D.C. 2011) (granting a petition for Watergate grand jury materials where the “sole testifying witness passed away in 1994”); *In re Shepard*, 800 F. Supp. 2d 37, 41–42 (D.D.C. 2011) (denying a petition for Watergate grand jury materials where secrecy concerns were prevalent and the petitioner failed to adequately address those concerns); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717, at \*2–3 (M.D. Tenn. Apr. 14, 2009) (authorizing disclosure of grand jury materials related to the deceased Jimmy Hoffa and prohibiting disclosure of materials naming other individuals unknown to be living or deceased); *In re Nat’l Sec. Archive*, No. 08 Civ. 6599, 2008 WL 8985358, at \*1–2 (S.D.N.Y. Aug. 26, 2008) (ordering disclosure of materials from a grand jury, the witnesses for which were deceased or had consented to disclosure of their identities).

163. *See supra* Part II.

with the grand jury. Courts sensibly recognize it as the driving force behind ongoing secrecy.<sup>164</sup>

Even where individual privacy is nonexistent, though, courts generally hail grand jury secrecy as an indefinite necessity under the guise of institutional integrity. But institutional integrity is abstract and unsupported. It is the idea that, decades into the future, witnesses may not testify honestly because their statements may eventually be disclosed after their deaths. Even the Supreme Court has tenuously referred to this interest, mentioning a “*possible* [deterrent] effect”<sup>165</sup> on future grand juries and that preserving secrecy for institutional integrity “*may* be necessary.”<sup>166</sup>

There is no evidence that a witness would be deterred from testifying—or a grand juror would be deterred from deliberating honestly—if she knew her name would be publicized or her statements might be disclosed after her death. One court, in fact, expressly discounted the idea of institutional integrity for the same reasons.<sup>167</sup> It is far too unsubstantiated a notion to be the sole anchor for ongoing secrecy, especially in relation to historically significant grand jury records.<sup>168</sup>

In addition to the mere absence of evidence supporting the idea of institutional integrity, its basis seems rather senseless. In most grand

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164. Individual privacy has generally been determinative of whether disclosure of grand jury materials is appropriate. Compare *In re Nichter*, 949 F. Supp. 2d at 213 (prohibiting disclosure where at least one individual was living), and *In re Am. Historical Ass’n*, 62 F. Supp. 2d 1100, 1102 (S.D.N.Y. 1999) (prohibiting disclosure of certain grand jury materials relevant to two witnesses who “have not been confirmed to be deceased and are not known to have consented to release of the relevant testimony”), with *In re Kutler*, 800 F. Supp. 2d at 49 (authorizing disclosure where the people mentioned in a limited range of materials had either passed away or publicly discussed their own involvement), and *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274, 293 (S.D.N.Y. 1999) (authorizing disclosure where people named in the grand jury materials were confirmed to be deceased or had consented to disclosure).

165. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979) (emphasis added).

166. *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 566 n.11 (1983) (emphasis added).

167. See *In re Kutler*, 800 F. Supp. 2d at 49 (“[T]he Court does not believe that disclosing thirty-six-year-old records for historical purposes will deter future witnesses from providing grand jury testimony.”).

168. The late attorney Samuel Dash explained a common phenomenon in law:

One of the weaknesses of the American criminal law is that legal fictions become so firmly entrenched that it is considered sacrilegious to disclose or dislodge them. A concept that is apparently antiquated will be retained solely because of the sacrosanct preeminence ascribed to it by tradition. As other legal institutions attempt to adjust to and grow with the times, the legal fiction, with remarkable resilience, continues unimpeded and unchanged.

Samuel Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 818 (1972).

juries convened to investigate events of historical significance, there was widespread media coverage of the event. Although grand jurors or witnesses may have had an interest in keeping their privacy during their lifetimes, “the often extensive contemporaneous attention given to the case is likely to . . . make the possibility of disclosure decades hence based on historical interest seem a trifling concern, or even an inevitability.”<sup>169</sup>

Accordingly, this Note’s proposal for a historical exception recognizes the reality of the need for secrecy and does not include the idea of institutional integrity as a basis for prohibiting disclosure. The proposed subpart (d) permits disclosure only where “no living person would be materially prejudiced” by it. Because the need for secrecy is really coterminous with the lives of the individuals named in the grand jury materials, it is necessary for a district court to determine whether any of those individuals are living, or perhaps even whether there is a possibility that any of those individuals are living.<sup>170</sup> But once those privacy concerns subside, “[s]ecrecy for secrecy’s sake should no longer be the rule . . . . Rather, the maintenance of the wall of secrecy around grand jury testimony should be grounded upon sound reason.”<sup>171</sup>

### *C. Addressing the Government’s Concerns*

The government has expressed two overarching concerns in its opposition to petitions for grand jury materials on the basis of historical significance. First, the government argues, permitting district courts to determine the boundaries of their own authority under Rule 6(e) is perilous.<sup>172</sup> Permitting disclosure beyond Rule 6(e)

169. *In re Am. Historical Ass’n*, 49 F. Supp. 2d at 292.

170. *See In re Nichter*, 949 F. Supp. 2d 205, 213 (D.D.C. 2013) (preserving secrecy of grand jury materials where it was “possible that other individuals—grand jurors and witnesses—named in the materials [were] still living”).

171. *Parlapiano v. Dist. Court in & for the Tenth Judicial Dist.*, 491 P.2d 965, 968 (Colo. 1971).

172. *See, e.g.*, En Banc Brief for Appellant at 16–31, *Pitch v. United States*, 915 F.3d 704 (11th Cir. 2019) (No. 17-15016), 2019 WL 3815069, at \*16–31; Response of the United States in Opposition to Petitioner’s Request for Order Directing Release of Transcripts and Related Materials on the Grand Jury Convened in the Middle District of Georgia on December 2, 1946, Pertaining to the “Moore’s Ford Lynching” at 3–6, *In re Pitch*, 275 F. Supp. 3d 1373 (M.D. Ga. 2017) (No. 5:14-MC-2); United States’ Opposition to Petitioners’ Motion for Order Directing Release of Transcripts of Certain Testimony from August 1942 Grand Jury Investigation of the *Chicago Tribune* at 6–23, *Carlson v. United States*, 109 F. Supp. 3d 1025 (N.D. Ill. 2015) (No. 1:14-cv-09244); Department of Justice’s Response to Petition to Unseal at 18–23, *In re Nichter*, 949 F. Supp. 2d 205 (D.D.C. 2013) (No. 1:12-mc-00074-RCL); Department of Justice’s Opposition

renders unpredictability, and the analysis could lend itself to the pernicious decay of Rule 6(e) into futility. Second, the government invokes a “floodgate” argument, contending that this exception would invite all members of the public to enjoy grand jury access by simply invoking a historical purpose.<sup>173</sup> The codification of a historical exception to grand jury secrecy comprehensively addresses these issues.

### 1. Placing a Limit on District Courts’ Inherent Supervisory Authority

The government’s concern as to some courts’ expansive view of Rule 6(e) is a valid one. If a district court may cite to its “inherent supervisory authority” to implement its own rules, where might this authority end? Rule 6(e) was enacted for a reason, and its provisions must be given effect.

A statutory exception would limit petitions based on historical significance to the express terms of Rule 6(e) while also suggesting that Rule 6(e) is indeed exhaustive in its exceptions to secrecy. A historical exception would therefore curtail the inherent supervisory authority while bringing more predictability to disclosure inquiries. It would further work to avoid many of the contentious and time-consuming briefs put forth by litigants regarding the scope of Rule 6(e), an issue that tends to be dispositive in many of these petitions.

### 2. The “Floodgate” Concern

The government has raised concerns that the source of historical interest can easily be confounded. That is, there may be an influx of petitions—many of which would be granted—“simply to satisfy the public’s curiosity about what occurred before the grand jury,”<sup>174</sup> rather

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to Petition to Unseal Transcript of Richard M. Nixon’s Grand Jury Testimony of June 23–24, 1975 and Associated Materials of the Watergate Special Prosecution Force at 4–6, *In re Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011) (No. 1:10-mc-00547-RCL).

173. See, e.g., En Banc Brief for Appellant, *Pitch v. United States*, *supra* note 172, at 40; United States’ Opposition to Petitioners’ Motion, *Carlson v. United States*, *supra* note 172, at 22–23; Department of Justice’s Response to Petition to Unseal, *In re Nichter*, *supra* note 172, at 22–23; Department of Justice’s Opposition to Petition, *In re Kutler*, *supra* note 172, at 18.

174. En Banc Brief for Appellant, *Pitch v. United States*, *supra* note 172, at 24; see also Department of Justice’s Response to Petition to Unseal, *In re Nichter*, *supra* note 172, at 22–23 (“Even if part of a significant project of historical scholarship, such requests could not easily be distinguished from journalistic inquiries into subjects of public interest or requests based simply on individual or public curiosity.”); Department of Justice’s Opposition to Petition, *In re Kutler*, *supra*

than to foster valuable discussion in an academic or historical context. With its *Craig* opinion in 1997, the Second Circuit anticipated this argument, noting that “[h]istorical interest is . . . distinguishable from journalistic intrigue, public curiosity, or even a subjective importance to family and friends.”<sup>175</sup>

The proposed subpart (b), which requires that “the records . . . have a material effect on the historical record,” cures the government’s concern by ensuring that the materials sought will indeed be put to good use. Thus, a court’s analysis regarding disclosure is not whimsical in nature, and a historical exception to grand jury secrecy would not be a limitless invitation to seek grand jury materials. District courts, in looking to whether the petitioner could leverage the materials to materially affect the historical record, are able to make a fact-specific determination and ensure that disclosure is indeed consistent with the underlying purpose of the historical exception, namely the genuine enhancement of the historical record. When scholars seek historical records to enhance the public record in hopes of fostering intellectual debate, this comes in stark contrast to mere curiosity of a layperson.

## V. CONCLUSION

In early 2020, a Massachusetts District Court determined that it possessed the inherent authority to release grand jury materials relating to the leak of the Pentagon Papers.<sup>176</sup> Less than two months later, the Eleventh Circuit reached the opposite result, determining that its district courts cannot disclose historically significant grand jury materials under Rule 6(e).<sup>177</sup> Evidently, the uncertainty continues.

Each new petition invites tireless litigation, as the government and the petitioners pen extensive briefs based primarily on the procedural contours of Rule 6(e) instead of the petition’s merits. As more historians seek to unravel the mysteries of the past, and as more district and circuit courts confront the disclosure inquiry, jurisprudence surrounding Rule 6(e) will become even more inconsistent and unpredictable. A statutory exception for grand jury

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note 172, at 23–24 (“[S]uch requests could not easily be distinguished from journalistic inquiries into subjects of public interest or requests based simply on individual or public curiosity.”).

175. *In re Craig*, 131 F.3d 99, 105 n.8 (2d Cir. 1997).

176. *See Lepore v. United States*, No. 18-mc-91539-ADB, 2020 BL 64811, at \*6 (D. Mass. Feb. 4, 2020).

177. *See Pitch v. United States*, 953 F.3d 1226, 1241 (11th Cir. 2020).



materials of historical significance eliminates the need for procedural contentions. It promotes judicial economy, creating less work for both litigants and the courts so that they can begin to focus on the substantive historical requests and the grand jury materials' effect on the present-day understanding of history.

In sum, the longstanding rule of grand jury secrecy must remain intact. At the same time, grand jury records of prodigious historical significance must be accessible to historians for the benefit of democratic change and scholarly debate. The proposed historical exception harmonizes these two notions by establishing a uniform methodology for disclosure among district courts. Where secrecy no longer serves its purpose, and where historians can profoundly impact academia or democracy, grand jury records "should languish on archival shelves, behind locked doors, no longer."<sup>178</sup>

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178. *In re Am. Historical Ass'n*, 49 F. Supp. 2d 274, 297 (S.D.N.Y. 1999).