

# An Institution “at Arm’s Length”: Reconsidering Supervisory Power over the Federal Grand Jury

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*Grand jury proceedings are shrouded in secrecy. No judge presides over them, no reporter annotates them, and when they have concluded, no juror may speak about them. While secrecy serves many important functions for the grand jury, its veil may be lifted under certain circumstances. Grand jury records may be released if they fall under a disclosure exception laid out in Federal Rule of Criminal Procedure 6(e). While some courts limit release to the exceptions laid out in the Rule, others look to an alternative source of authority.*

*Several courts of appeals have held that district court judges may exercise inherent supervisory power in authorizing the release of grand jury records. Judges may consider the public interest in disclosure, compare it to the institutional interest in secrecy, and decide for themselves. Other circuits find no such power.*

*The circuits have reached an impasse on the text of the Rule alone, with each side offering compelling but incomplete justifications for their interpretation. This Comment provides an alternative path forward. By examining the history of the grand jury and the relationship between the Federal Rules and common law supervisory power, this Comment argues that district court judges lack inherent supervisory power over the grand jury to order disclosure. Courts that follow the exhaustive position—that Rule 6(e)(3) limits the exceptions when a court may authorize disclosure—better align with the understanding of the grand jury as an independent body. Conscious of this historical positioning, this Comment returns to both influential and overlooked Supreme Court precedent and offers a more contextually grounded interpretation of each. Judges have discretion to act within the bounds of Rule 6(e), not outside of it.*

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## INTRODUCTION

Stuart McKeever wants to know what happened in an infamous grand jury room over sixty years ago. A Columbia University professor named Jesús de Galíndez Suárez had disappeared in 1956.<sup>1</sup> Suárez, a sharp critic of Dominican dictator Rafael Trujillo, was presumed to have been kidnapped and murdered by the Trujillo regime.<sup>2</sup> After an FBI agent was suspected in the crime and questioned before a grand jury, the case went cold.<sup>3</sup> McKeever had been writing about Suárez’s disappearance for forty years, and he believed that the agent’s sealed grand jury records held the key to the decades-old mystery.<sup>4</sup> All the court had to do was authorize their release.

But McKeever’s case was felled by a humble procedural rule, one that the court explained provided an exhaustive list of

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<sup>1</sup> *McKeever v Barr*, 920 F3d 842, 843 (DC Cir 2019), cert denied, 140 S Ct 597 (2020).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.* at 843–44 (noting that the grand jury did not find probable cause to indict).

<sup>4</sup> See *id.* at 843.

situations in which a judge could authorize disclosure of grand jury materials. While McKeever acknowledged that disclosure on the grounds of historical significance fell outside the scope of Federal Rule of Criminal Procedure 6(e) (the “Rule”), he argued that a district court judge could exercise supervisory power to disclose grand jury proceedings.<sup>5</sup>

The DC Circuit held that the district court had no such power.<sup>6</sup> This decision broke with the Second, Seventh, and Eleventh Circuits at the time, which had each held that judges have some inherent power to act outside the Rule’s exceptions.<sup>7</sup> I will refer to that as the “permissive” approach. The DC Circuit remarked that “we simply cannot agree” with the Seventh Circuit’s position, thereby acknowledging its creation of a circuit split.<sup>8</sup> I will refer to the DC Circuit’s interpretation as the “exhaustive” approach. *McKeever v Barr*<sup>9</sup> was the first decision to squarely confront the permissive approach and to decidedly reject it.

The circuits have reached an impasse. The recent cases reveal an interpretative divide over whether courts are endowed with inherent power to act outside of the Federal Rules. The Seventh, Eleventh, and DC Circuits have each chosen to focus on the language of Rule 6(e) and found answers within the confines of the text. The Seventh Circuit determined that the Rule is clearly intended to be permissive, the DC Circuit confidently declared the opposite, and the Eleventh Circuit recently switched from the permissive to the exhaustive approach.

Beyond differing interpretations of a procedural rule, the split reveals a division in the understanding of the institutional relationship between federal courts and the grand jury: To what extent do judges have judicial authority over grand jury

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<sup>5</sup> See *McKeever*, 920 F3d at 845.

<sup>6</sup> *Id.* at 850.

<sup>7</sup> After *McKeever* was handed down in April 2019, the Eleventh Circuit voted to rehear *Pitch v United States*, 915 F3d 704 (11th Cir 2019) (*Pitch I*), en banc in June of that year. *Pitch v United States*, 925 F3d 1224, 1224–25 (11th Cir 2019). On March 27, 2020, the Eleventh Circuit reversed its prior panel decision and held that district court judges do not have inherent power to disclose outside the exceptions in Rule 6(e), overturning its influential precedent in *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F2d 1261 (11th Cir 1984) (*Hastings*), and siding with the DC Circuit. *Pitch v United States*, 953 F3d 1226, 1241 (11th Cir 2020) (en banc) (*Pitch II*).

<sup>8</sup> *McKeever*, 920 F3d at 850. Whether the DC Circuit created a new split or shed light on an existing one is addressed in Part II.E.1. Because the latest decisions under the permissive approach viewed their position to be unanimous, it seems appropriate to refer to *McKeever* as creating a new split.

<sup>9</sup> 920 F3d 842, 843 (DC Cir 2019).

proceedings? I aim to resolve the circuit split by first understanding the relationship of the grand jury to the judiciary. Once established, I determine whether supervisory power survived the codification of the Federal Rules. Finally, I reexamine Supreme Court precedent to question the view that supervisory power extends over the grand jury.

I argue that district court judges lack inherent supervisory power to order disclosure of grand jury materials. The exhaustive position—that Rule 6(e)(3) is exhaustive in its exceptions as to when a court may authorize disclosure—has a solid basis in the original understanding of the grand jury as an independent body. Further, Congress abrogated any supervisory power over the grand jury that existed at common law by codifying Rule 6(e). This interpretation aligns with a contextualized reading of the oft-cited Supreme Court decisions on this matter.

The Supreme Court denied *McKeever*'s petition for writ of certiorari on January 21, 2020.<sup>10</sup> In denying review, the Court has left the issue to percolate among the circuits. Justice Stephen Breyer, in a statement respecting the denial of certiorari, issued a call to action: “Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the [Advisory Committee on Criminal Rules (Rules Committee)] both can and should revisit.”<sup>11</sup>

Settling this question will provide clarity to four key stakeholders: the remaining circuits, the Rules Committee, the government, and members of the public seeking these records. The majority of circuits, yet to weigh in on the issue, must look beyond the opposing textual analyses of the circuit split. This Comment provides a novel solution to these stakeholders. By accepting the textual ambiguity that courts thus far have refused to acknowledge, this Comment looks instead for clues in the history of the grand jury and overlooked Court precedent.

This Comment is composed of three parts. Part I provides a background on the grand jury, Rule 6(e), and supervisory power. Part II describes the circuit split, tracing the expansion of the judge-made supervisory-power exception and culminating in the current divide between the Second and Seventh Circuits on one side and the Eleventh and DC Circuits on the other. Part III

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<sup>10</sup> *McKeever v Barr*, 140 S Ct 597 (2020).

<sup>11</sup> *Id* at 598 (Breyer respecting denial of certiorari).

argues that Rule 6(e) should be read exhaustively, as any supervisory power that courts may have had over the grand jury was accounted for in the exceptions provided within the Rule. Recent decisions justify departure from the Rule by explaining that access to these documents serves the press and the public. If disclosures outside the current exceptions promote the public interest, the courts and the public should push Congress to amend the Rule.

## I. BACKGROUND

Background on the grand jury and the possible sources of authority over it will help clarify whether Rule 6(e)’s exceptions are exhaustive or permissive. I first describe the role of the grand jury and how the grand jury differs from the trial jury. I then introduce Rule 6(e), the statutory authority for when grand jury proceedings may be disclosed. Finally, I explain the idea of supervisory power and its relationship to the Federal Rules.

### A. The Grand Jury

A grand jury must determine whether to initiate judicial proceedings before any serious federal crime is brought to trial.<sup>12</sup> From an initial pool of randomly selected citizens, twenty-three are selected to serve on the jury for a period not to exceed eighteen months.<sup>13</sup> A district court judge administers an oath, under which jurors swear that they will perform their investigations diligently, they will indict truthfully, and they will not disclose anything they learn.<sup>14</sup> After administering the oath, the judge retires, her formal involvement with the process complete.<sup>15</sup> Then, the prosecutor takes over.<sup>16</sup>

Once proceedings have begun, the grand jury reviews the case and weighs the evidence that the prosecutor presents.<sup>17</sup>

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<sup>12</sup> See US Const Amend V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”).

<sup>13</sup> Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L Rev 260, 265 (1995).

<sup>14</sup> See Administrative Office of the United States Courts, *Handbook for Federal Grand Jurors* \*3–6, archived at <https://perma.cc/YS32-S5WM>.

<sup>15</sup> Leipold, 80 Cornell L Rev at 265 (cited in note 13).

<sup>16</sup> See id at 266. See also *United States v Williams*, 504 US 36, 47 (1992) (“Judges’ direct involvement in the functioning of the grand jury has generally been confined to . . . calling the grand jurors together and administering their oaths of office.”).

<sup>17</sup> See Leipold, 80 Cornell L Rev at 266 (cited in note 13).

When a federal prosecutor presents a case before the grand jury, she is both the jury's legal advisor and the party seeking an indictment.<sup>18</sup> The prosecutor informs the jurors of the charges, decides what evidence to present, and answers juror questions on the law.<sup>19</sup> By representing the federal government, the prosecutor has an obligation "to execute the laws in an impartial and just manner."<sup>20</sup> She ought to advise the grand jury of the evidence without directing the jurors to indict.<sup>21</sup>

Throughout the course of the proceedings, grand jurors may ask questions of the witnesses and the prosecutor.<sup>22</sup> Rather than evaluating guilt or innocence, the grand jurors must determine whether there is probable cause to believe that the suspect has committed a crime.<sup>23</sup> If at least twelve jurors agree that there is probable cause, they will return a "true bill."<sup>24</sup> A true bill constitutes the basis of an indictment, sparking a criminal case and framing the charges that will be brought against the defendant.<sup>25</sup> If the grand jury is not convinced of probable cause, the case cannot move forward.<sup>26</sup>

Endowed with significant investigative powers, grand jurors must decide what comes next for the accused. Jurors are allowed to consider, for example, evidence that was obtained illegally, hearsay, and their preexisting knowledge of the crime.<sup>27</sup> Prosecutors are not required to present the evidence in a neutral manner, meaning that exculpatory evidence does not need to be disclosed.<sup>28</sup>

The grand jury is thus distinct from the trial jury in several important respects. While the trial jury clearly falls under the judicial branch, the grand jury is better understood as a "quasi-political

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<sup>18</sup> See Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 Cath U L Rev 311, 332–33 (1993).

<sup>19</sup> See *id.*

<sup>20</sup> *Id.* at 332, citing *Berger v United States*, 295 US 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation [is] to govern impartially.").

<sup>21</sup> Schiappa, 43 Cath U L Rev at 332 (cited in note 18).

<sup>22</sup> See Leipold, 80 Cornell L Rev at 266 (cited in note 13).

<sup>23</sup> See *id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Georgetown L J 1265, 1276, 1280 (2006).

<sup>26</sup> See Leipold, 80 Cornell L Rev at 266 (cited in note 13).

<sup>27</sup> *Id.* at 267.

<sup>28</sup> *Id.* See also *McKethan v United States*, 439 US 936, 938 (1978) (Stewart dissenting from denial of certiorari) ("In grand jury proceedings, the ordinary rules of evidence do not apply. Leading questions and multiple hearsay are permitted and common.").

institution.”<sup>29</sup> Trial juries are seen as “officers of the court[ ]” who follow the instructions of the presiding judge and aim to reach an outcome consistent with the law.<sup>30</sup> It is the job of the judiciary, the trial jury included, to interpret and apply the law as written.<sup>31</sup> In contrast, grand jurors have “independent authority” to reject given applications of the law and to indict without a judge presiding over them.<sup>32</sup> The grand jury is understood “as an institution that is neither strictly prosecutorial, nor strictly judicial, but sometimes exercises political or quasi-legislative powers.”<sup>33</sup> With full control over whether to indict, grand juries have a veto-like power to push back on unpopular laws.<sup>34</sup> This positioning dates back to their inclusion in the Bill of Rights rather than the Constitution or the First Judiciary Act.<sup>35</sup> This institutional distance is important, as it suggests that grand juries exist as a check on the government, including the judiciary, by the people.

#### B. Federal Rule of Criminal Procedure 6(e)

Today, the structure and requirements of grand jury proceedings are dictated by Federal Rule of Criminal Procedure 6. The Federal Rules of Criminal Procedure, codified in 1946, aim “to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”<sup>36</sup> Congress passed legislation in 1940<sup>37</sup> that authorized the Supreme Court to promulgate rules for criminal procedure, striving to balance the needs of law enforcement and the accused.<sup>38</sup> The Court created a single set of rules of criminal procedure, which were sent to

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<sup>29</sup> Kevin K. Washburn, *Restoring the Grand Jury*, 76 Fordham L Rev 2333, 2367 (2008).

<sup>30</sup> Id.

<sup>31</sup> See id.

<sup>32</sup> Id.

<sup>33</sup> Washburn, 76 Fordham L Rev at 2367 (cited in note 29).

<sup>34</sup> See id at 2366 (“Blocking a law is not necessarily a prosecutorial function nor an adjudicative function, but a political and somewhat legislative one.”).

<sup>35</sup> See id (arguing that the grand jury “was enshrined in the Bill of Rights for its ability to undermine unpopular laws or to block their application in the local community”).

<sup>36</sup> FRCrP 2.

<sup>37</sup> See Sumners Courts Act, Pub L No 76-675, 54 Stat 688 (1940), codified as amended at 28 USC §§ 2071–72.

<sup>38</sup> 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, 23 n 155 (1996).

Congress and approved.<sup>39</sup> The adoption of Rule 6 incorporated the common law understanding of the grand jury into statutory law.<sup>40</sup> The default understanding of secrecy for the protection of the accused remained intact through subsections (d) and (e).<sup>41</sup> Only the attorney for the government, the witness, the jurors, and a court reporter may be present during the proceedings.<sup>42</sup> When it is time to vote, the grand jurors shall be left alone.<sup>43</sup> But the Rule also recognizes the practical challenges for law enforcement that total secrecy creates. The Rule allows, for example, a government attorney to share grand jury information with another federal grand jury.<sup>44</sup> This ensures that conflicting accounts from witnesses or accused parties do not escape scrutiny across juries.

Rule 6 details the procedural framework for how federal grand juries operate.<sup>45</sup> Subsections (a)–(d) provide procedural instructions for how to convene. These subsections explain how to summon a jury, how to object to a juror, how to appoint a foreperson, and who may be present during the proceedings. Rule 6(e) outlines the requirements for disclosure or recording of the grand jury proceedings.<sup>46</sup> Rule 6(e)(1) informs the parties that all proceedings are to be recorded, and any records are to be retained by the attorney for the government unless otherwise ordered by the court.<sup>47</sup>

The subsections at issue in the circuit split are (e)(2) and (e)(3)—entitled “Secrecy” and “Exceptions,” respectively. Most of the debate is focused on Rule 6(e)(3)(E).

The secrecy subsection is designed to inform the parties of who must remain silent and who may later speak about the proceedings. Rule 6(e)(2)(B) states that “[u]nless these rules provide otherwise, the following persons must not disclose a matter

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<sup>39</sup> See *id.* See also Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum L Rev 1433, 1440 (1984).

<sup>40</sup> See Kadish, 24 Fla St U L Rev at 24 (cited in note 38).

<sup>41</sup> See *id.*

<sup>42</sup> FRCrP 6(d)(1).

<sup>43</sup> FRCrP 6(d)(2). If any juror requires assistance for a hearing or speech impairment, the Rule also allows for an interpreter to be present to aid that juror. FRCrP 6(d)(2).

<sup>44</sup> FRCrP 6(e)(3)(C).

<sup>45</sup> Alex Thrasher, *Judicial Construction of Federal Rule of Criminal Procedure 6(e)—Historical Evolution and Circuit Interpretation Regarding Disclosure of Grand Jury Proceedings to Third Parties*, 48 Cumb L Rev 587, 590 (2018).

<sup>46</sup> See FRCrP 6(e).

<sup>47</sup> FRCrP 6(e)(1).

occurring before the grand jury,”<sup>48</sup> and then lists all the parties present in the proceedings listed in subsection (d), with the exception of witnesses. Witnesses may speak freely as to what they were asked and what they revealed. Jurors may not.

The exceptions subsection provides the list of situations in which the previous requirement of secrecy may not apply. Subsections (e)(3)(A)–(D) detail exceptions to the nondisclosure obligation for government prosecutors.<sup>49</sup>

Subsection (e)(3)(E) is the most relevant exception for the purposes of the split and this Comment because it lays out the instances in which *the court* may authorize disclosure.<sup>50</sup> The first of the five options allows a court to disclose grand jury matter that is “preliminarily to or in connection with a judicial proceeding.”<sup>51</sup> This is the only listed exception under which the court may authorize disclosure without previously receiving a request from another party. The next listed exception allows a judge to disclose grand jury matter at the request of a defendant on the grounds that the material may reveal an indictment to be in error.<sup>52</sup> The last three exceptions are each at the request of the government to show violations of the law.<sup>53</sup>

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<sup>48</sup> FRCrP 6(e)(2)(B).

<sup>49</sup> See FRCrP 6(e)(3)(A)–(D).

<sup>50</sup> Rule 6(e)(3)(E) states:

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. See FRCrP 6(e)(3)(E):

- (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.

<sup>51</sup> FRCrP 6(e)(3)(E)(i).

<sup>52</sup> FRCrP 6(e)(3)(E)(ii).

<sup>53</sup> FRCrP 6(e)(3)(E)(iii)–(v).

### C. Supervisory Power

Supervisory power is considered to fall within the judicial power conferred by Article III.<sup>54</sup> The term “supervisory power” refers to a court’s inherent authority to govern its own proceedings.<sup>55</sup> In *Bank of Nova Scotia v United States*,<sup>56</sup> the Supreme Court explained that “[i]n the exercise of its supervisory authority, a federal court may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”<sup>57</sup> A court may invoke this power when necessary to protect judicial integrity.<sup>58</sup> The Supreme Court has noted that this power is justified by the judge’s need to ensure the fairness of proceedings and rebuke misconduct of the parties.<sup>59</sup>

The Court first addressed the concept of supervisory power in 1943 in *McNabb v United States*.<sup>60</sup> In *McNabb*, federal officers interrogated several suspects accused of murder before arraigning them.<sup>61</sup> Over the course of the interrogation, the suspects made several admissions and produced evidence that the government wished to use at trial.<sup>62</sup> The officers had purposely delayed bringing the suspects before a presiding judge until they admitted to the crime, and the Court questioned whether their interrogation tactics exceeded the scope of permissible conduct.<sup>63</sup> Regarding the admission of their statements into evidence at trial, the Court held that “a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.”<sup>64</sup> The exclusion of the evidence was necessary to avoid making the courts “accomplices in wilful disobedience of the law.”<sup>65</sup>

The Court reached this determination by relying on its “supervisory authority over the administration of criminal justice in the federal courts.”<sup>66</sup> The principles for refusing to admit evidence

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<sup>54</sup> See Beale, 84 Colum L Rev at 1464 (cited in note 39).

<sup>55</sup> Schiappa, 43 Cath U L Rev at 335 (cited in note 18).

<sup>56</sup> 487 US 250 (1988).

<sup>57</sup> Id at 254 (quotation marks omitted).

<sup>58</sup> See Beale, 84 Colum L Rev at 1464 (cited in note 39).

<sup>59</sup> See Schiappa, 43 Cath U L Rev at 336 (cited in note 18).

<sup>60</sup> 318 US 332 (1943).

<sup>61</sup> Id at 334–38.

<sup>62</sup> Id.

<sup>63</sup> See id at 338–39.

<sup>64</sup> *McNabb*, 318 US at 347.

<sup>65</sup> Id at 345.

<sup>66</sup> Id at 341.

are not limited to those laid out in the Constitution, the Court argued, but are supplemented by “rules of evidence” that “this Court has, from the very beginning of its history, formulated.”<sup>67</sup> The Court explained that federal courts have a duty to ensure the administration of justice and that this responsibility includes “maintaining civilized standards of procedure and evidence.”<sup>68</sup>

The Court later clarified in *Carlisle v United States*<sup>69</sup> that procedural rules established by the Constitution or Congress abrogate the scope of a federal court’s authority to create its own procedural rules. Federal courts “may, within limits, formulate procedural rules,” but “[w]hatever the scope of this inherent power, [ ] it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.”<sup>70</sup> Courts may not disregard federal rules, constitutional provisions, or existing statutes in exercising those powers.<sup>71</sup> When one of those sources of authority exists and applies to the issue at hand, the judge should follow the guidance of that authority.<sup>72</sup> A judge may exercise supervisory power over trial proceedings only when there is no applicable controlling guidance.<sup>73</sup>

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There are two possible sources of authority over the federal grand jury. This Part has described the differences between the federal grand jury and the federal trial jury, showing that the two entities have distinct roles and responsibilities. While a trial jury is an extension of the judge in seeking to determine what the law says, the grand jury has independent authority to indict or not indict without the supervision of a presiding judge. Grand jurors are still instructed and guided by a prosecutor, both subject to clear protocols laid out in Federal Rule of Criminal Procedure 6. The question then is whether the Federal Rules are the sole source of authority over the grand jury, or, as with the trial jury,

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<sup>67</sup> *Id.*

<sup>68</sup> *McNabb*, 318 US at 340.

<sup>69</sup> 517 US 416 (1996).

<sup>70</sup> *Id.* at 426 (quotation marks omitted). See also *Bank of Nova Scotia*, 487 US at 254 (“[I]t is well established that even a sensible and efficient use of the supervisory power is invalid if it conflicts with constitutional or statutory provisions.”) (quotation marks and alterations omitted).

<sup>71</sup> See *Carlisle*, 517 US at 426.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

a district court judge can exercise supervisory power over it. This question has produced conflicting answers among the circuits, as the courts grapple with whether there is a singular source of authority or that codified authority allows room for discretionary power. The following Part describes the slow, steady acceptance of supervisory power by some in following the permissive approach, and the total rejection of it by others.

## II. THE CIRCUIT SPLIT

The DC Circuit created a circuit split last year over the correct interpretation of Rule 6(e). The Second, Seventh, and Eleventh Circuits had each previously found that disclosures outside of the listed exceptions in Rule 6(e) could be justified by a district court judge's use of the supervisory power. In contrast, the DC Circuit held that Rule 6(e) provides an exhaustive list of exceptions to the default of secrecy in grand jury proceedings. The DC Circuit found support for its decision from the Sixth and Eighth Circuits, though closer examination of their holdings reveals that these opinions are less supportive than the DC Circuit assumed. With the Eleventh Circuit's recent reversal, the exhaustive approach gained critical on-point support.

This Part proceeds in five sections. Part II.A examines the introduction of supervisory power in grand jury cases by the Second Circuit. Part II.B describes the Eleventh Circuit's embrace of supervisory power for cases "closely analogous"<sup>74</sup> to the listed exceptions within the Rule. Part II.C details the beginning of the "historical significance" exception. In creating this exception, the Second Circuit expanded on its earlier precedent to show that records related to events of public interest could qualify as extraordinary circumstances. The first three sections show that the supervisory-power exception has evolved from a one-off allowance that all parties agreed was warranted to a broader, more contested authorization when the judge finds the aim socially worthwhile.

The final two sections describe the current divide over the use of supervisory power to disclose grand jury records deemed historically significant. While the Eleventh Circuit plays a role in the current split, the Seventh and DC Circuits provide the clearest

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<sup>74</sup> *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984) (*Hastings*).

contrast in views. Despite their contrast in conclusions, both circuits believe the answer clearly lies in a close examination of the Rule.

A. The Second Circuit’s Initial Departure from Rule 6(e)

In *In re Biaggi*,<sup>75</sup> the Second Circuit first addressed the possibility that disclosure could be permitted outside the Rule. The case before the court was unique because both the witness and the prosecutor endorsed disclosure.<sup>76</sup> The witness, then-Congressman Mario Biaggi, was running for mayor of New York City.<sup>77</sup> Biaggi had previously testified before a grand jury, and a *New York Times* report claimed that a reliable source had revealed that Biaggi refused to answer questions related to his finances during those proceedings.<sup>78</sup> Wanting to counter the report, Biaggi sought release of his grand jury testimony.<sup>79</sup> Likewise, the US attorney agreed to move for disclosure of Biaggi’s testimony so long as the records removed the portions that related to other named witnesses.<sup>80</sup>

Chief Judge Henry Friendly began by acknowledging that this case fell outside the scope of the disclosure exceptions listed in the Rule.<sup>81</sup> The court struggled, however, to find an argument for secrecy when the witness himself sought disclosure to clear his name.<sup>82</sup> Rather, if secrecy “was designed for the protection of the witnesses who appear, Mr. Biaggi waived this protection by seeking complete disclosure in the form of a motion requesting disclosure of his own testimony.”<sup>83</sup> Furthermore, “[i]nsofar as the rule exists for the benefit of the Government, the United States Attorney [ ] waived it in the clearest terms.”<sup>84</sup> The Second Circuit

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<sup>75</sup> 478 F2d 489 (2d Cir 1973).

<sup>76</sup> *Id.* at 491.

<sup>77</sup> *Id.* at 490.

<sup>78</sup> *Id.*

<sup>79</sup> *Biaggi*, 478 F2d at 490–91.

<sup>80</sup> *Id.* at 491.

<sup>81</sup> *Id.* at 492.

<sup>82</sup> See *id.* at 493. But see *United States v Johnson*, 319 US 503, 513 (1943) (emphasizing that grand jury secrecy is “as important for the protection of the innocent as for the pursuit of the guilty”). Biaggi, of course, could have repeated his testimony without a court order, but he needed a court order to obtain the record of his testimony. See note 18.

<sup>83</sup> *Biaggi*, 478 F2d at 493 (quotation marks and citation omitted).

<sup>84</sup> *Id.*

decided that Biaggi and the government could waive their secrecy protection, and the court authorized disclosure.<sup>85</sup>

The dissent recognized the stakes of this decision: “[W]ithout the support of any authority in the statute or the case law, [the majority] created another exception, applicable to the situation where a witness waives the secrecy requirement by seeking release of the grand jury minutes.”<sup>86</sup> This decision, according to Judge Paul R. Hays, went beyond the scope of the Rule and its list of exceptions.<sup>87</sup> In a supplemental opinion following the public release of Biaggi’s testimony, Chief Judge Friendly responded to the sharp dissent and cabined the court’s decision to its unique facts.<sup>88</sup> Chief Judge Friendly emphasized that “[o]ur decision should therefore not be taken as demanding, or even authorizing, public disclosure. . . . [Disclosure] rests on the exercise of a sound discretion under the special circumstances of this case.”<sup>89</sup> Unsatisfied, Judge Hays replied: “The law forbids the publication of these Grand Jury minutes. In my opinion the rules of law are a more reliable guide to the administration of justice than the personal views of judges as to what ‘the public interest’ may require.”<sup>90</sup>

#### B. Supervisory Power over “Closely Analogous” Cases from the Eleventh Circuit

In *In re Petition to Inspect and Copy Grand Jury Materials*<sup>91</sup> (*Hastings*), the Eleventh Circuit relied on the Second Circuit’s decision in *Biaggi* to hold that the district court did not abuse its discretion when it exercised supervisory power over a situation similar to an authorized exception.<sup>92</sup> The case concerned the grand jury proceedings of then-Judge Alcee Hastings who was under investigation for a bribery charge and was later indicted and acquitted.<sup>93</sup> A special committee of judges sought to determine whether Judge Hastings should stay on the bench, and the committee requested access to the jury records to assess his conduct.<sup>94</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 494 (Hays dissenting).

<sup>87</sup> *Biaggi*, 478 F2d at 493–94 (Hays dissenting).

<sup>88</sup> See *id.* at 494 (supplemental opinion).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (Hays dissenting).

<sup>91</sup> 735 F2d 1261 (11th Cir 1984).

<sup>92</sup> See *id.* at 1268.

<sup>93</sup> *Id.* at 1263.

<sup>94</sup> *Id.* at 1263–64.

He opposed, arguing that disclosure of the records was not permitted under Federal Rule of Criminal Procedure 6(e).<sup>95</sup> The district court allowed the disclosure, but in seeking to “minimize the breach of secrecy,” the court required that the records only be available for ninety days, stored in the office of the US attorney, and visible to the five members of the judicial committee investigating Judge Hastings.<sup>96</sup>

The Eleventh Circuit affirmed, holding that the committee’s work is “at least closely analogous” to a judicial proceeding, an exception to secrecy allowed under Rule 6(e)(3)(C)(i).<sup>97</sup> “The procedures . . . may not be a ‘judicial proceeding’ in the strict sense . . . but they are very similar,”<sup>98</sup> and therefore disclosure was appropriate.<sup>99</sup> The court added that the limited scope of the disclosure and the importance of the mission of investigating possible corruption in the judiciary merited the use of supervisory power.<sup>100</sup>

The *Hastings* court cited to *Biaggi* for the notion that common law principles still applied,<sup>101</sup> and to an earlier Supreme Court decision to advance its idea that “the [R]ule is not the true source of the district court’s power.”<sup>102</sup> The court relied on the following language in *Pittsburgh Plate Glass Co v United States*<sup>103</sup> to justify its conclusion that the district court had inherent power: “[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.”<sup>104</sup> The *Hastings* court explained that this language showed that courts have inherent supervisory power beyond the language of the Rule to decide whether to order disclosure.<sup>105</sup> Several more circuits would go on

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<sup>95</sup> *Hastings*, 735 F2d at 1264.

<sup>96</sup> *Id.* at 1265.

<sup>97</sup> *Id.* at 1268.

<sup>98</sup> *Id.*

<sup>99</sup> *Hastings*, 735 F2d at 1268. But see *Pitch v United States*, 953 F3d 1226, 1242 (11th Cir 2020) (en banc) (*Pitch II*) (Pryor concurring) (supporting the outcome but not the reasoning of its precedent, as “the ‘judicial proceeding’ exception, [Rule] 6(e)(3)(E)(i), plainly permitted the limited disclosure of the grand jury records to the Investigating Committee of the Judicial Council of the Eleventh Circuit in *Hastings*”).

<sup>100</sup> *Hastings*, 735 F2d at 1268.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> 360 US 395 (1959).

<sup>104</sup> *Id.* at 399.

<sup>105</sup> See *Hastings*, 735 F2d at 1268.

to rely on *Hastings* and its interpretation of *Pittsburgh Plate Glass Co* to justify discretionary power decisions. As I show, this reliance proved problematic.

C. Adopting “Special Circumstances” for Historically Significant Cases

Twenty-five years after deciding *Biaggi*, the Second Circuit was asked to expand the exception again. To address future cases, the court created a multifactor test to determine whether disclosure outside of the Rule was justified, and this test and its reasoning have become the standard for other courts.<sup>106</sup> *In re Petition of Craig*<sup>107</sup> concerned a doctoral student’s request for a seventy-nine-page grand jury transcript.<sup>108</sup> Bruce Craig was writing his dissertation on Harry Dexter White, a former government official who had been accused of being a communist spy.<sup>109</sup> White appeared before a grand jury in 1948 to answer questions pertaining to the allegation before passing away several months later.<sup>110</sup> Craig argued that he had reviewed all publicly available evidence on White but needed access to the grand jury transcript to complete his dissertation.<sup>111</sup> Craig asked the court to rely on its supervisory power to order disclosure because the information was historically important and release served the public interest.<sup>112</sup>

After emphasizing the important protections that secrecy enables, the court quoted the same language as *Hastings* from *Pittsburgh Plate Glass Co*.<sup>113</sup> Like the Eleventh Circuit’s opinion, cited approvingly by the Second Circuit, the court used this language to determine that courts have discretion outside the Rule.<sup>114</sup> The *Craig* court supplemented this understanding by drawing upon the “special circumstances” language of its own precedent in

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<sup>106</sup> See, for example, *Carlson v United States*, 837 F3d 753, 766 (7th Cir 2016); *Pitch v United States*, 915 F3d 704, 710–11 (11th Cir 2019) (*Pitch I*).

<sup>107</sup> 131 F3d 99 (2d Cir 1997).

<sup>108</sup> *Id.* at 100–01.

<sup>109</sup> *Id.* at 101.

<sup>110</sup> *Id.*

<sup>111</sup> *Craig*, 131 F3d at 101.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 102, quoting *Pittsburgh Plate Glass Co*, 360 US at 399 (“[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.”).

<sup>114</sup> *Craig*, 131 F3d at 102.

*Biaggi* as evidence that its analysis did not need to be confined to the Rule.<sup>115</sup>

Drawing on *Pittsburgh Plate Glass Co*, *Biaggi*, and *Hastings*, the court put forward a set of nonexhaustive factors for courts to consider when dealing with “highly discretionary and fact-sensitive ‘special circumstances’” cases, effectively weighing the continued need for secrecy against the public interest in learning about the case.<sup>116</sup> One such factor advises courts to consider why the disclosure is being sought but does not clarify which justifications are worthy. The last factor on the list ponders whether secrecy is still needed in that particular case. These factors and others leave a fair amount of room for judicial weighing and discretion. It is not clear what a judge should consider to determine if secrecy is still needed in a particular case. Furthermore, even if a witness or the accused no longer requires secrecy, does release of any formerly secret case erode the expectation of secrecy in future proceedings?

#### D. The Current Permissive Approach

The previous three sections show the course that the supervisory-power exception has taken to reach the current permissive view. The Second Circuit opened up the possibility of disclosures outside the Rule when it allowed a subject of the grand jury investigation access to his own records to clear his name.<sup>117</sup> The Eleventh Circuit then determined that the kind of extraordinary circumstance found in the Second Circuit’s case could also merit disclosure in situations closely analogous to the exceptions within the Rule.<sup>118</sup> Finally, the Second Circuit created

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<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 106. The Second Circuit identified nine factors for district courts to consider. *Id.*

(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>117</sup> See Part II.A.

<sup>118</sup> See Part II.B.

a balancing test, weighing the public interest in the material against the continued need for secrecy.<sup>119</sup>

There are two main takeaways from the prior three sections. First, the supervisory-power exception has grown in scope, meaning that judges will face the question whether they are authorized to exercise supervisory power more often. Second, the courts up to this point had been in agreement, each finding that there are instances in which disclosure outside of the text of Rule 6 is allowed. This unanimity is important to remember in evaluating the current divide. The Seventh and Eleventh Circuits seemed to have taken as given that disclosure was allowed, until a recent reversal by the Eleventh Circuit. The DC Circuit now has the support of a sister circuit in pushing back, just as confident in its own view as its sister circuits are in the opposite conclusion. The Seventh Circuit still finds room for supervisory power in the Rule's permissive language.

The Seventh Circuit's opinion in *Carlson v United States*<sup>120</sup> is the primary example of supervisory power justifying disclosure of historically significant grand jury materials.<sup>121</sup> Chief Judge Diane Wood wrote that the answer was clear: supervisory power over grand jury disclosure clearly exists and works alongside the permissive disclosure exceptions within the Rule.<sup>122</sup>

The Seventh Circuit offered a thorough review of Supreme Court precedent to argue for the existence of supervisory power. The court began by citing to *United States v Williams*,<sup>123</sup> the most recent applicable Supreme Court precedent, to note that the grand jury works "in the courthouse and under judicial auspices."<sup>124</sup> The Seventh Circuit's opinion quickly moves on from *Williams*, as most of that opinion focuses on why the grand jury is *separate* from the judiciary. Citing to *Pittsburgh Plate Glass Co* and *United States v Socony-Vacuum Oil Co*,<sup>125</sup> the court explained

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<sup>119</sup> See Part II.C.

<sup>120</sup> 837 F3d 753 (7th Cir 2016).

<sup>121</sup> For a case using the idea of inherent power to bolster the secrecy requirement, see *In re Grand Jury Proceedings*, 417 F3d 18, 26 (1st Cir 2005) (holding that the court had "inherent judicial power" to increase the category of people bound to secrecy). See also *In re Special Grand Jury 89-2*, 450 F3d 1159, 1178 (10th Cir 2006) (noting that "some relief may be proper under the court's inherent authority" but sending the case back to the district court without deciding the issue).

<sup>122</sup> See *Carlson*, 837 F3d at 755–56.

<sup>123</sup> 504 US 36 (1992).

<sup>124</sup> *Carlson*, 837 F3d at 761 (quotation marks omitted), quoting *Williams*, 504 US at 47.

<sup>125</sup> 310 US 150 (1940).

that disclosure was “committed to the discretion of the trial judge.”<sup>126</sup> Satisfied that supervisory power existed, the Seventh Circuit cautioned that Court precedent showed that “supervisory power is ‘a very limited one’” that “may be used only to ‘preserve or enhance the traditional functioning’ of the grand jury.”<sup>127</sup>

Even with this limitation, the court explained that the ability to disclose at the judge’s discretion existed at common law and continues to exist today.<sup>128</sup> The court repeated the language from *Socony-Vacuum Oil Co*—a case decided before the creation of the Rules—that release of materials “rests in the sound discretion of the [trial] court’ and ‘disclosure is wholly proper where the ends of justice require it.’”<sup>129</sup> The Rules did not eliminate this discretion because “permissive rules do not ‘abrogate the power of the courts’ to exercise their historical ‘inherent power’ when doing so does not contradict a rule.”<sup>130</sup> Rules are permissive, the court continued, when the text permits a court to pursue some action without limiting language.<sup>131</sup> The use of “may” in Rule 6(e)(3)(E), the court emphasized, shows the Rule to be permissive.<sup>132</sup>

The Seventh Circuit held that the list of exceptions in Rule 6(e)(3)(E) is not intended to be exhaustive, meaning the district court may act on its inherent authority without contravening the Rule.<sup>133</sup> Subsection (e)(3)(E) lists five specific exceptions for when a court may authorize disclosure of grand jury proceedings. The dissent argued that subsection (e)(2)—entitled “Secrecy”—imposes a “broad secrecy norm . . . unless [the Rules] provide otherwise.”<sup>134</sup> The Seventh Circuit explained that the key issue was whether subsection (e)(2)’s limiting language of “unless these rules provide otherwise” carries over to subsection (e)(3)(E).<sup>135</sup> Chief Judge Wood wrote that the use of explicit limiting language elsewhere in the Rule suggests that the lack of similar language

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<sup>126</sup> *Carlson*, 837 F3d at 761, citing *Pittsburgh Plate Glass Co*, 360 US at 399 (applying the disclosure principle after the codification of the Federal Rules), and *Socony-Vacuum Oil Co*, 310 US at 234 (doing the same before the Federal Rules).

<sup>127</sup> *Carlson*, 837 F3d at 762, quoting *Williams*, 504 US at 50.

<sup>128</sup> See *Carlson*, 837 F3d at 762.

<sup>129</sup> *Id.*, quoting *Socony-Vacuum Oil Co*, 310 US at 233–34.

<sup>130</sup> *Carlson*, 837 F3d at 763, quoting *Link v Wabash Railroad Co*, 370 US 626 (1962) (holding that the language of FRCrP 41(b) allowing a defendant to dismiss a case for lack of prosecution does not abrogate a court’s inherent power to dismiss sua sponte).

<sup>131</sup> *Carlson*, 837 F3d at 763.

<sup>132</sup> *Id.* at 764.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 768 (Sykes dissenting) (emphasis omitted), citing FRCrP 6(e)(2)(B).

<sup>135</sup> *Carlson*, 837 F3d at 764.

in subsection (e)(3)(E) is dispositive of permissive intent.<sup>136</sup> If the Rule's drafters intended the court's authority to be limited to the Rule's exceptions, they would have explicitly said so.<sup>137</sup> The phrase "[t]he court may authorize disclosure" does not include limiting language such as "only" or "unless listed below."<sup>138</sup> Therefore, the list should be interpreted to be permissive, and judges may act on their discretion in cases that fall outside of one of the five categories.<sup>139</sup> The Seventh Circuit concluded that the Second, Eleventh, and DC Circuits shared this view.<sup>140</sup> Summarizing its opinion, the court remarked that there was not a single court that had accepted the government's interpretation of the Rule as exhaustive, seemingly establishing the *Carlson* majority's view of the issue as settled among the courts of appeals.<sup>141</sup>

Judge Diane Sykes wrote an equally confident dissent, casting doubt on the majority's assertion that no federal court had sided with the government's position and downplaying the support of a sister circuit. The majority had listed the DC Circuit's opinion *Haldeman v Sirica*<sup>142</sup> as additional support for the permissive position because the court in that case affirmed the disclosure by a district court that was not clearly within the exceptions to the Rule.<sup>143</sup> Judge Sykes noted that the *Haldeman* court did not reason through the use of supervisory power. Rather, the DC Circuit simply affirmed en banc the decision of the district court.<sup>144</sup> Judge Sykes seemed to suggest that the court never reached the issue.

Stronger support, Judge Sykes continued, came from the Eighth Circuit. While the relevance of *Haldeman* was a question

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<sup>136</sup> *Id.*

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> See *Carlson*, 837 F3d at 764–65 (“A rule of nonexclusivity does not mean that Rule 6(e)(3)(E) is pointless: it would be entirely reasonable for the rulemakers to furnish a list that contains frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances.”).

<sup>140</sup> *Id.* at 765–66. But see *McKeever*, 920 F3d at 847 n 3 (interpreting its own precedent differently).

<sup>141</sup> *Carlson*, 837 F3d at 755–56, 765 (“[E]very federal court to consider the issue has adopted Carlson’s view that a district court’s limited inherent power to supervise a grand jury includes the power to unseal grand-jury materials when appropriate.”).

<sup>142</sup> 501 F2d 714 (DC Cir 1974).

<sup>143</sup> *Carlson*, 837 F3d at 766. See also *Haldeman*, 501 F2d at 715 (holding that Rule 6 did not bar a district judge from disclosing grand jury proceedings to the House Judiciary Committee in the context of impeachment).

<sup>144</sup> *Carlson*, 837 F3d at 770 (Sykes dissenting).

of interpretation, Judge Sykes explained that the Eighth Circuit precedent supported her interpretation of the Rule.<sup>145</sup> In a prior decision, the Eighth Circuit held that the exceptions to Rule 6(e)(3)(E) were exhaustive.<sup>146</sup> Notwithstanding the majority’s statements to the contrary, Judge Sykes believed that there was at least one sister circuit on her side.

Moving to the substance of the issue, Judge Sykes explained that the majority’s reading of the Rule would make the list of exceptions nonsensical.<sup>147</sup> By limiting the language of the previous subsection—“unless these rules provide otherwise”—to that section alone, the exceptions become nonexclusive.<sup>148</sup> This reading turned a list of five detailed exceptions into mere examples of what a court could do, leaving a court free to disclose grand jury testimony “to persons and for purposes not identified in the rule.”<sup>149</sup> Rebuking the majority’s argument that the inherent authority of courts is “very limited,” Judge Sykes instead criticized the decision as a step too far.<sup>150</sup> Though the majority suggested that it recognized and relied upon a limited power, Judge Sykes found the decision to be an expansive policy judgment: “It’s hard to see how this ‘very limited’ authority includes the sweeping power to release grand-jury records to the general public for reasons that strike the judge as socially desirable—here, historical significance.”<sup>151</sup> The DC Circuit would go on to explicitly reject this type of exception.

#### E. The Current Exhaustive Approach

The DC Circuit and the Eleventh Circuit offer the two most recent appellate decisions on this matter, and they are now the two clearest examples of the exhaustive approach. The DC Circuit broke from the other courts while the Eleventh Circuit was still in the permissive camp. After reviewing its recent decision en banc, the Eleventh Circuit reversed and overturned its decades-

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<sup>145</sup> See *id.*

<sup>146</sup> See *United States v McDougal*, 559 F3d 837, 840 (8th Cir 2009) (“[C]ourts will not order disclosure absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation.”). *McDougal* is discussed in detail in Part II.E.

<sup>147</sup> See *Carlson*, 837 F3d at 769 (Sykes dissenting).

<sup>148</sup> See *id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 771.

<sup>151</sup> *Carlson*, 837 F3d at 771 (Sykes dissenting).

old precedent, joining the DC Circuit in holding that there is no inherent power outside of the Rule.

1. The DC Circuit's confident rejection.

The most recent and thorough argument for limiting disclosure exceptions to the confines of the Rule comes from *McKeever*, a case in which an academic sought grand jury records related to the disappearance of a professor and a suspected cover-up.<sup>152</sup> *McKeever* made three arguments for disclosure, none of which persuaded the court. First, *McKeever* argued that courts are not bound to secrecy because they are absent from the list of "persons" bound by Rule 6(e)(2).<sup>153</sup> Second, he asserted that Rule 6 did not eliminate the preexisting authority of the trial court at common law, leaving the exceptions laid out in Rule 6(e)(3) as nonexhaustive.<sup>154</sup> Third, *McKeever* urged that the public benefit of disclosure was greater than the interest in secrecy.<sup>155</sup>

The court dismissed the first argument that Rule 6(e)(2) does not apply to courts because "Rule 6 assumes the records are in the custody of the Government, not that of the court."<sup>156</sup> Attorneys for the government are included on the list of persons barred from disclosure; if a court ordered disclosure, it would do so by "ordering 'an attorney for the government' who holds the records to disclose the materials."<sup>157</sup>

The DC Circuit rejected the argument that district courts have preexisting authority outside the bounds of the Rule while acknowledging that the Seventh Circuit had recently come out the other way.<sup>158</sup> While the Seventh Circuit argued that there was no statutory language that required curtailing the Rule to the exceptions of Rule 6(e)(3), the DC Circuit replied that "[t]he limiting language the Seventh Circuit sought is plain: Rule 6(e)(2) prohibits disclosure of a grand jury matter unless these rules provide otherwise."<sup>159</sup> The court argued that subsections (e)(2) and (e)(3) must be read together.<sup>160</sup> Allowing a district court to go beyond

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<sup>152</sup> See *McKeever*, 920 F3d at 843.

<sup>153</sup> *Id.* at 847. See also FRCrP 6(e)(2).

<sup>154</sup> *McKeever*, 920 F3d at 848. See also FRCrP 6(e)(3)(E).

<sup>155</sup> *McKeever*, 920 F3d at 849.

<sup>156</sup> *Id.* at 848.

<sup>157</sup> *Id.*

<sup>158</sup> See *id.* at 848–49.

<sup>159</sup> *McKeever*, 920 F3d at 848 (quotation marks and citation omitted).

<sup>160</sup> *Id.* at 845.

those explicit exceptions would “render the detailed list of exceptions merely precatory and impermissibly enable the court to ‘circumvent’ or ‘disregard’ a Federal Rule of Criminal Procedure.”<sup>161</sup> Though the DC Circuit’s decision marked the clearest break from the other circuits, the majority relied on support from two sister courts, the Sixth and the Eighth Circuits.

The Sixth Circuit emphasized in *In re Grand Jury 89-4-72*<sup>162</sup> that “Rule 6(e)(3)(C)(i) is not a rule of convenience.”<sup>163</sup> Grand jury secrecy is not something to be taken lightly, and courts should exercise caution before considering disclosure: “[W]ithout an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.”<sup>164</sup> Both the DC Circuit and Sixth Circuit cited the Supreme Court statement that “[i]n 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>165</sup> The Sixth Circuit held that an investigation into a state judge did not fall within the bounds of being “preliminarily to or in connection with a judicial proceeding” and therefore denied disclosure of the material.<sup>166</sup> While the sentence from the Sixth Circuit that the DC Circuit cited seems like direct support for its position, the context of the Sixth Circuit’s opinion concerned a different subsection of Rule 6.<sup>167</sup> The order of the Rule’s subsections has been edited over the years, and the subsection referenced in the quote pertained to whether disclosure to a commission investigating a state judge is ordered “preliminarily to or in connection with a judicial proceeding.”<sup>168</sup>

While the Sixth Circuit precedent is not precisely on point, the court’s position still suggests an exhaustive interpretation of the Rule. While many of the circuits emphasize the importance of grand jury secrecy, the Sixth Circuit places great weight on the Rule itself. The Rule is not to be followed simply when it is convenient, and courts should be hesitant to disclose without a rule

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<sup>161</sup> *Id.*, quoting *Carlisle*, 517 US at 426.

<sup>162</sup> 932 F2d 481 (6th Cir 1991).

<sup>163</sup> *Id.* at 488.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 483, quoting *United States v Sells Engineering, Inc.*, 463 US 418, 425 (1983). See also *McKeever*, 920 F3d at 844.

<sup>166</sup> *In re Grand Jury 89-4-72*, 932 F2d at 482 (quotation marks omitted).

<sup>167</sup> For the current location of the language, see FRCrP 6(e)(3)(E)(i).

<sup>168</sup> See *In re Grand Jury 89-4-72*, 932 F2d at 482 (quotation marks omitted).

or statute authorizing them to do so. While the Sixth Circuit has not weighed in on the precise question before the other courts, it seems likely that the Sixth Circuit will interpret its precedent to provide support for an exhaustive approach.

The DC Circuit relied on the Eighth Circuit for more direct support for its reasoning. In *United States v McDougal*,<sup>169</sup> Susan McDougal sought an unsealed copy of her own testimony in an earlier civil contempt proceeding.<sup>170</sup> The court noted that “[a]lthough McDougal’s appellate brief and argument suggest that her request for access was motivated by a desire to recount in a screenplay or novel [the independent counsel]’s allegedly coercive tactics in the Whitewater investigation, she did not mention this in the district court.”<sup>171</sup> Instead, McDougal’s only argument for disclosure was that significant time had passed and “[t]he reasons for sealing the record have now grown stale and disappeared.”<sup>172</sup> The court found this argument unpersuasive, explaining that “courts will not order disclosure absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation.”<sup>173</sup> The majority in *McKeever* and Judge Sykes’s *Carlson* dissent identified this language as supportive of their side of the debate.

## 2. The Eleventh Circuit’s long road to the exhaustive approach.

The Eleventh Circuit first decided *Pitch v United States*<sup>174</sup> (*Pitch I*) in February 2019. The case marked the most recent court of appeals decision affirming supervisory power. In *Pitch I*, the Eleventh Circuit considered an argument for a historical significance exception to Rule 6(e).<sup>175</sup> The court relied on its prior decision in *Hastings* and the Second Circuit’s *Craig* factors to determine that the district court did not abuse its discretion in disclosing the records.<sup>176</sup>

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<sup>169</sup> 559 F3d 837 (8th Cir 2009).

<sup>170</sup> *Id.* at 838.

<sup>171</sup> *Id.* at 841 (quotation marks omitted).

<sup>172</sup> *Id.*

<sup>173</sup> *McDougal*, 559 F3d at 840.

<sup>174</sup> 915 F3d 704 (11th Cir 2019).

<sup>175</sup> *See id.* at 707.

<sup>176</sup> *See id.* at 707, 711–13.

The majority in *Pitch I* explained that it affirmed the use of supervisory power because it was bound by *Hastings*.<sup>177</sup> But the *Hastings* opinion was narrower. The *Hastings* court emphasized that the case before it was “closely analogous” to an exception within the Rule.<sup>178</sup> While the court did authorize the use of inherent power, the court cabined its decision by focusing on the situation’s similarity to the Rule’s exception. It is not obvious that a rule allowing disclosure on the policy ground of historical significance must follow from *Hastings*.

After a deeply divided opinion, the Eleventh Circuit chose to rehear the case en banc. Not only did the court reverse its decision in *Pitch I*,<sup>179</sup> it also overruled *Hastings*, “the seminal case on non-6(e) grand jury disclosure,” in the process.<sup>180</sup> The stakes of reversal are significant. *Hastings* was responsible for the interpretation of Supreme Court precedent that influenced the Second Circuit in *Craig*, which the Seventh Circuit in turn relied on in *Carlson*.

Despite its influential role in the early adoption of the permissive interpretation, the Eleventh Circuit now holds that “Rule 6(e) by its *plain terms* limits disclosures of grand jury materials to the circumstances enumerated therein.”<sup>181</sup> The Eleventh Circuit addressed the precedential support from the Supreme Court<sup>182</sup> and the DC Circuit before grounding its answer in the text.<sup>183</sup> According to the Eleventh Circuit, not only is there no historical significance exception, there is also no inherent power to disclose whatsoever.<sup>184</sup> Like its sister circuits, the Eleventh Circuit found comfort in the plain language of the Rule.

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<sup>177</sup> *Id.* at 707 (“Because we are bound by our decision in *Hastings*, we affirm.”).

<sup>178</sup> *Hastings*, 735 F2d at 1268.

<sup>179</sup> See *Pitch II*, 953 F3d at 1241.

<sup>180</sup> *Craig*, 131 F3d at 103.

<sup>181</sup> *Pitch II*, 953 F3d at 1234 (emphasis added).

<sup>182</sup> See *id.* at 1235 (“[T]he Supreme Court explained that the exception ‘is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials.’”), quoting *United States v. Baggot*, 463 US 476, 479 (1983).

<sup>183</sup> See *Pitch II*, 953 F3d at 1234:

The text and structure of Rule 6(e) thus indicate that the rule is not merely permissive. Rather, it imposes a general rule of nondisclosure, then instructs that deviations from that rule are not permitted “[u]nless these rules provide otherwise,” and then provides a detailed list of exceptions that specifies precisely when the rules “provide otherwise.”

<sup>184</sup> See *id.* at 1236–37.

Satisfied with the text, the court then addressed the implications for the grand jury itself if the permissive approach continues unchecked. Recognizing inherent power to disclose—and specifically, recognizing that power for historically significant documents—puts far too much discretionary power in the hands of judges:

[T]he creation of a historical-significance exception involves two layers of policy judgments. The first is the decision to recognize an exception for matters of historical significance generally. The second involves deciding what it means for something to be so “historically significant” that the interest in disclosure outweighs any interest that the grand jurors, witnesses, and future generations, among others, have in maintaining the secrecy of the proceedings. Under [Marion] Pitch’s interpretation of Rule 6(e), then, a single district judge would have the authority to substitute his or her own judgments on these policy questions on a case-by-case basis, with the inevitable result that the exceptions to the general rule of grand jury secrecy would vary from one court to the next across the nation.<sup>185</sup>

This case-by-case decision-making means that witnesses and jurors may no longer be able to rely on the promised secrecy of the proceedings.<sup>186</sup> If these participants fear that their responses will one day be released, the concern may “have a chilling effect on future grand jury witnesses and would render the grand jury as an institution inoperable.”<sup>187</sup>

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The circuit split reveals a muddled landscape of decisions unlikely to be reconciled on their own. The courts have sought to bolster their stances with precedent from their sister circuits, even when the support is ambiguous. Likewise, some of the courts have relied on precedent that is inapposite when viewed in context. The problem arises in part from the indeterminate boundaries of supervisory power. Over time courts have built on one another’s allowances until supervisory power has grown to allow disclosure when the judge deems release appropriate. What

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<sup>185</sup> *Id.* at 1236 n 9.

<sup>186</sup> *See id.*

<sup>187</sup> *Pitch II*, 953 F3d at 1236 n 9.

began as a one-time exception in *Biaggi*, where all parties sought disclosure, grew to incorporate cases that were closely analogous to the Rule. From there, the exception grew to allow disclosure for historically significant documents, and courts taking the permissive approach began to rely on a fact-intensive and nonexhaustive balancing test for guidance. The DC Circuit rejected this approach, returning to the Rule in holding that the text was exhaustive. The Eleventh Circuit has now joined it.

### III. BEYOND THE TEXT: A MORE CONTEXTUALIZED PROPOSAL FOR AN EXHAUSTIVE INTERPRETATION OF THE RULE

The current divide offers a thorough and complete analysis of the text of the Rule. If the remaining circuits continue to debate the text alone, however, the stalemate will likely continue. Both sides have compelling textual arguments, but neither is correct in maintaining that the text is decisive. This Part begins by explaining why the DC Circuit’s reasoning, though coming to the correct conclusion, is unconvincing. Text alone is unlikely to persuade the remaining circuits, as the permissive approach has equally strong textual arguments. After showing why a textual analysis is insufficient, this Comment lays out alternative sources of authority that, when considered collectively, make a strong case for an exhaustive interpretation.

First, the historical origins of the grand jury show that the institution was a separate entity from the executive and the judiciary, suggesting that any supervisory power over those proceedings was intended to be limited. Second, any disclosures allowed by way of supervisory power were absorbed into the codification of the Rule on grand jury disclosure. Third, the circuits advocating for a permissive approach misread post-Rules Supreme Court precedent, confusing discretion within the Rule with discretion outside of the Rule. Fourth, more recent Supreme Court precedent sharply undermines the argument that district courts retain supervisory power over the grand jury. Finally, while increases in the use of supervisory power to justify disclosure may be a judicial response to perceived weakness in the grand jury, policy pushes against judicial overreach. Instead, Congress should authorize broader disclosure power for district courts under the Rule. With any important grand jury record, there may come a point when the public’s interest in learning the truth of the nation’s past outweighs the continuing need for secrecy. Congress, not individual

district court judges, should decide when that time has come. The former is capable of amending the Rule for all, ensuring the Rule's primacy as the source of controlling guidance. The latter could only release outside of the Rules or not at all, risking case-by-case confusion.

#### A. The DC Circuit's Approach Is Incomplete

The Eleventh and DC Circuits have the right answer—but for the wrong reasons. The DC Circuit relies almost exclusively on a textual analysis, concluding that the language is clearly exhaustive and therefore no supervisory power exists over disclosure. This result is both puzzling and unsatisfying. Both sides of the split seem unwilling to acknowledge that there is genuine uncertainty within the text.

Congress could have made the answer clear by including explicit limiting language. Rule 6(e)(3)(E) could read, for example, that the “court may authorize disclosure . . . of a grand jury matter *only*” in the following situations before listing the five exceptions. Alternatively, Congress could have concluded the list of exceptions with the phrase “and in no other circumstances.” According to the permissive approach, the lack of clear Congressional signals reveals that the Rule was intended to be open-ended.

The exhaustive approach has several arguments in response. There *is* explicit limiting language in the “Secrecy” subsection, the section immediately preceding the exceptions listed in Rule 6(e)(3). When Congress authorized Rule 6(e)(2) to read “[u]nless *these rules* provide otherwise” in limiting disclosures,<sup>188</sup> surely they intended that limitation to extend to *these* rules and not only the subsection in which that language is found. If disclosure is not allowed unless authorized by these rules, courts have no basis for looking outside of them. Even if a court wanted to limit its analysis to the “Exceptions” subsection, it must acknowledge that there are five listed exceptions for a court. If Congress intended courts to have more opportunities to disclose, why did it not include a catchall for extraordinary circumstances? According to the exhaustive approach, the limiting language in Rule 6(e)(2) clearly applies to the section that follows, and the use of a list of exceptions should be understood to be finite.

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<sup>188</sup> FRCP 6(e)(2) (emphasis added).

While both sides argue persuasively for their interpretations, the most likely answer is that the Rule is simply unclear on its face. Textual evidence points in both directions. Just as there is no “only,” there is no clear “not limited to” or “and in extraordinary circumstances” exception. There is a subsection on secrecy, followed immediately by a subsection on exceptions. No mention of supervisory power, historical significance, or disclosures outside the norm of secrecy can be found in the text.

The absence of textual clarity means that the solution must be found elsewhere. I argue that the Eleventh and DC Circuits reach the correct conclusion, but their arguments would have been aided by a look at the historical origins of the grand jury. This history reveals that the grand jury was never meant to fall under the judiciary but rather to operate as a separate entity, one endowed with both judicial and prosecutorial powers. This history begins to make the case for why supervisory power is more limited in the context of the grand jury than the trial. By showing that supervisory power over grand jury disclosures no longer exists, my analysis finds a way around the textual ambiguity. Without supervisory power over grand juries, the exceptions to the Rule stand alone.

#### B. History Shows the Grand Jury Was Intended to Be Independent

The historical origins of the grand jury reveal that the institution was designed to act autonomously, free from executive and judicial interference. Returning to the rise of the grand jury in England and its later adoption in the colonies, I argue that the grand jury was intended to operate as a hybrid, independent institution for the public. Combining judicial setting and procedure with executive-like power to indict, the grand jury was set up as a panel for the people—a check on the two branches that it was created to resemble.

##### 1. English origins.

The grand jury originated in England in the twelfth century.<sup>189</sup> It initially involved royal justices and a jury composed of

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<sup>189</sup> See generally R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U Chi L Rev 613 (1983).

men selected by the Crown.<sup>190</sup> These twelve “good and lawful men” of every township were designated as the accusing body.<sup>191</sup> They served as “a system of local informers,” disclosing the names of suspected offenders to the king.<sup>192</sup> Over time, the juries began considering allegations made by nonjury members and nonofficials.<sup>193</sup> A royal prosecutor would lay out the evidence and witnesses of the accused.<sup>194</sup> If the jury was convinced, it returned a “true bill,” a decision marking the allegation as true, or a “no bill,” a decision deeming the allegation to be false.<sup>195</sup> Because of royal involvement, “no bills” were rarely found.<sup>196</sup> Any jury that failed to indict a suspect that the Crown put forward was fined.<sup>197</sup> Despite the involvement of royal prosecutors, jury members kept the ability to accuse and indict on their own.<sup>198</sup>

The jury’s task was not limited to indicting enemies of the Crown; it investigated conduct that affected the people in their daily lives.<sup>199</sup> Jurors inquired about the collection of taxes and the condition of public works, including the upkeep of roads, highways, bridges, and jails.<sup>200</sup> An oath of secrecy also developed during this period, as the men declared that “they will lawful presentment make of such chapters as shall be delivered to them in writing and in this they will not fail for any love, hatred, fear, reward, or promise, and that they will *conceal the secrets*, so help them God and the Saints.”<sup>201</sup>

An expanded role and the ability to keep its discussions secret allowed the grand jury to grow in power and popularity. Grand juries stood up to political pressure from the Crown and from the government, solidifying a reputation for courage and

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<sup>190</sup> See Richard D. Younger, *The People’s Panel: The Grand Jury in the United States, 1634–1941* 1 (Brown 1963). See also Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am Crim L Rev 701, 708 (1972).

<sup>191</sup> Younger, *The People’s Panel* at 1 (cited in note 190). See also Helmholz, 50 U Chi L Rev at 617 (cited in note 189) (explaining that the earliest iterations of the grand jury asked men “to give voice to common fame,” to share who was “publicly suspected”).

<sup>192</sup> Kadish, 24 Fla St U L Rev at 6 (cited in note 38).

<sup>193</sup> See Younger, *The People’s Panel* at 1 (cited in note 190).

<sup>194</sup> See *id.*

<sup>195</sup> *Id.*

<sup>196</sup> See Kadish, 24 Fla St U L Rev at 6–7 (cited in note 38).

<sup>197</sup> *Id.* at 7.

<sup>198</sup> See Younger, *The People’s Panel* at 1 (cited in note 190).

<sup>199</sup> See Kadish, 24 Fla St U L Rev at 7 (cited in note 38).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 7 n 41 (emphasis added).

independence.<sup>202</sup> Proponents of the grand jury heralded it as a vehicle for liberty and public oversight.<sup>203</sup> That reputation quickly caught the attention of the American colonists.<sup>204</sup>

## 2. Colonial adoption.

Grand juries were already well on their way in the colonies, with colonists following the English path and relying on jurors for indictments.<sup>205</sup> In contrast to England, the colonial grand juries exercised more independence from the start.<sup>206</sup> While English juries had to rely on royal officials to refer bills of indictment, limited local government and policing meant that the colonial juries took on this task themselves.<sup>207</sup> Colonial grand jurors often presented matters on their own, turning the investigation upon magistrates or local leaders, like ministers who negligently failed to do their duty by “not checking upon those who failed to attend church on Sunday.”<sup>208</sup>

Grand juries gained favor in the colonies in no small part because of the political writings of English advocates. Lord Chancellor John Somers, an English proponent of the grand jury and popular author in the colonies, proposed that grand juries did not need to rely on judges in carrying out their role.<sup>209</sup> Somers argued that jury power should be construed broadly and was not limited to the matters that the judge presented to them.<sup>210</sup> The English legal theorist Sir John Hawles praised the grand jury as the protector of the public against government persecution, rejecting the idea that courts have the power to influence their decisions.<sup>211</sup> Finally, the English writer Henry Care emphasized that grand juries must be able to make autonomous decisions, free from judicial oversight and involvement.<sup>212</sup> These works guided the colonists as to the proper power and role of the grand jury.<sup>213</sup>

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<sup>202</sup> See Washburn, 76 *Fordham L Rev* at 2342 (cited in note 29). See also Younger, *The People’s Panel* at 2 (cited in note 190).

<sup>203</sup> See Washburn, 76 *Fordham L Rev* at 2342–43 (cited in note 29).

<sup>204</sup> See *id.* at 2343.

<sup>205</sup> See Younger, *The People’s Panel* at 2 (cited in note 190).

<sup>206</sup> See *id.* at 5.

<sup>207</sup> See Washburn, 76 *Fordham L Rev* at 2343 (cited in note 29).

<sup>208</sup> Younger, *The People’s Panel* at 11 (quotation marks omitted) (cited in note 190).

<sup>209</sup> *Id.* at 21.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Younger, *The People’s Panel* at 21 (cited in note 190).

<sup>213</sup> See *id.* at 21–22.

By the time of the Revolution, the grand jury was a key part of colonial checks on government. These juries represented the people, enforcing only those laws they deemed to be just and standing up against persecution at home and abroad.<sup>214</sup> The struggle to wrest authority from the grand jury came to a head in 1768 when Boston grand jurors refused to indict the editors of the *Boston Gazette* for libel of the governor.<sup>215</sup> The chief justice of Massachusetts instructed the jury that “they might depend upon being damned if they did not find a true bill.”<sup>216</sup> Nevertheless, the jurors refused, and “the chief justice was helpless” to change their minds.<sup>217</sup>

When the Constitution of the United States went into effect, the grand jury was left out.<sup>218</sup> The centralized government would include three separate branches, and the Constitution prescribed the powers of each.<sup>219</sup> When the federal court system was expanded under the Judiciary Act of 1789, the grand jury was still excluded.<sup>220</sup>

The public’s desire for the right to indictment through a grand jury was taken up by the states in ratification.<sup>221</sup> In 1791, Congress approved twelve constitutional amendments that were then sent to the states for ratification.<sup>222</sup> The Fifth Amendment was adopted with the Bill of Rights, constitutionally enshrining the grand jury: “[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”<sup>223</sup> The Framers sought for the American grand jury, “like its English forerunner, to act as both a ‘sword and a shield.’”<sup>224</sup> More specifically:

As a sword, the grand jury has extraordinary power to carry out its investigatory function. . . . Although these powers are exercised under the court’s supervision and are not

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<sup>214</sup> *Id.* at 26.

<sup>215</sup> *See id.* at 28.

<sup>216</sup> Younger, *The People’s Panel* at 28 (quotation marks omitted) (cited in note 190).

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* at 45.

<sup>219</sup> Kadish, 24 Fla St U L Rev at 11 (cited in note 38).

<sup>220</sup> *Id.*

<sup>221</sup> *See* Younger, *The People’s Panel* at 45 (cited in note 190).

<sup>222</sup> Kadish, 24 Fla St U L Rev at 12 (cited in note 38). Ten of the twelve amendments were ratified in the Bill of Rights, one has since been ratified as the Twenty-Seventh Amendment, and one is still before the states.

<sup>223</sup> US Const Amend V.

<sup>224</sup> Schiappa, 43 Cath U L Rev at 330 (cited in note 18).

unlimited, the grand jury may use them to obtain every man’s evidence. As a shield, the grand jury is designed to provide a fair method for instituting criminal proceedings. The grand jury, after deliberating in secret, allows the government to prosecute only those persons for whom it has probable cause to believe have committed a crime.<sup>225</sup>

Long after the proceedings are over, the deliberations remain secret. The Supreme Court affirmed in *United States v Johnson*<sup>226</sup> that secrecy is “as important for the protection of the innocent as for the pursuit of the guilty.”<sup>227</sup> Those who are not indicted can move on, free from the shadow of persecution that would remain if their testimony was disclosed.<sup>228</sup> Those who will later be called as witnesses may speak freely, knowing that their answers will not be revealed to those that may wish them harm.<sup>229</sup> Those jurors who are called upon to weigh the statements of those witnesses can trust that the witnesses or conspirators are not privy to the statements of those who have testified before them.<sup>230</sup> Those that

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<sup>225</sup> Id at 330–31 (quotation marks and citations omitted).

<sup>226</sup> 319 US 503 (1943).

<sup>227</sup> Id at 513. For a summary of the Court’s longstanding justifications for secrecy, see *United States v Procter & Gamble Co*, 356 US 677, 681 n 6 (1958):

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

<sup>228</sup> See *Pittsburgh Plate Glass Co*, 360 US at 405.

<sup>229</sup> See id.

<sup>230</sup> See John Somers, *The Security of Englishmen’s Lives: Or, The Trust, Power, and Duty of Grand Juries of England* 29 (Dublin 1766):

Yet the reason will be still more manifest for keeping secret the accusations and the evidence by the grand inquest, if it be well considered, how useful and necessary it is for discovering truth in the examinations of witnesses in many, if not in most cases that may come before them; when if by this privacy witnesses may be examined in such manner and order, as prudence and occasion direct; and no one of them be suffered to know who hath been examined before him, nor what questions have been asked him, nor what answers he hath given, it may probably be found out whether a witness hath been biassed in his testimony by malice or revenge, or the fear or favour of men in power, or the love or hopes of lucre and gain in present or future, or promises of impunity for some enormous crime.

are called upon to judge their peers have the privacy to evaluate the indictment free from the oversight of a judge.<sup>231</sup>

Since before the time of the Founding, the grand jury has possessed “broad inquisitorial powers.”<sup>232</sup> While these powers were “derived from the government,” the juries are “of the people, not of the state.”<sup>233</sup> While the grand jury is weaker and more reliant on the prosecution than it once was, the historical separation sheds light on the intended relationship between the government, the judiciary, and the grand jury. The grand jury was intended to be independent of both. As prosecutors have exerted more power over grand jury proceedings, judges may react by seeking to insert themselves into the proceedings as well as a form of oversight. While well-intentioned, executive overreach does not justify the same from the judiciary.

History shows that the grand jury solidified its position in the Bill of Rights by serving as the voice of the people and a check on the government. Rather than an appendage or subsidiary of the courts, the grand jury has always operated in a gray area, operating under the auspices of the judiciary while maintaining investigative power more similar to that of the executive. This positioning continues to be important today, as judges must recognize that the grand jury is intentionally different from the trial jury over which they preside. The independent grand jury that the colonists sought was not guided or directed by a judge. That institutional relationship suggests that supervisory power was limited from the beginning. If there was little to no supervisory power from the start, the current argument for maintaining supervisory power loses its foundation.

### C. Pre-Rules Uses of Supervisory Power Were Incorporated into the Rule’s Codified Exceptions

The permissive view emphasized pre-Rules discretion as a sign that supervisory power existed at common law. But the type

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<sup>231</sup> See *id.* at 30:

Yet further, their private examinations may discover truth out of some disagreement of the witnesses, when separately interrogated, and every of the grand inquest ask them questions for his own satisfaction, about the matters which have come to his particular knowledge, and this freely, without awe or control of judges, or distrust of his own parts, or fear to be checked for asking impertinent questions.

<sup>232</sup> Younger, *The People’s Panel* at 245 (cited in note 190).

<sup>233</sup> *Id.*

of disclosures allowed through pre-Rules discretion are now allowed by the Rule’s listed exceptions, suggesting that the Rule has absorbed that authority.

The Seventh Circuit in *Carlson* relied on *Socony-Vacuum Oil Co* for a pre-Rules testament to common law discretion. The court pointed to language that release of materials “rests in the sound discretion of the [trial] court” and “disclosure is wholly proper where the ends of justice require it.”<sup>234</sup> In *Socony-Vacuum Oil Co*, the Court wrote that “use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge.”<sup>235</sup> While it initially appears compelling that judges were permitted discretion, it is worth situating this discretion in the historical moment, a time before the codification of the Rules and before any disclosure was formally authorized.

The decision in *Socony-Vacuum Oil Co* illustrates an attempt by the Court to allow for some disclosure. The grand jury was historically expected to keep all matters secret. With no formal rule allowing for disclosure and a default of secrecy, the Court recognized that release of some materials may benefit the proceedings. To help the grand jury reach its verdict, for example, the Court allowed jurors to have access to previously undisclosed statements of witnesses.<sup>236</sup> Total secrecy was not in the interest of the grand jury and *Socony-Vacuum Oil Co* recognized that there were some situations in which disclosure aided the process, such as with recall of evidence.

This discretion was already closely related to the needs of the particular grand jury in session, and the Federal Rules used similar examples when it adopted exceptions to the secrecy norm. The allowed disclosure within *Socony-Vacuum Oil Co* now seemingly falls within the scope of Rule 6(e)(3)(E)(i)—using grand jury material to refresh a witness’s recollection is using it “in connection with a judicial proceeding.”<sup>237</sup> Rather than showing that inherent discretion survived the codification of the Rules, *Socony-Vacuum Oil Co* should be read as an example of the kind of disclosure that they incorporated. The Rule’s exceptions are limited in their scope and are acknowledgments that secrecy may not always be the

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<sup>234</sup> *Carlson*, 837 F3d at 762 (quotation marks omitted) (alterations in original), quoting *Socony-Vacuum Oil Co*, 310 US at 233–24.

<sup>235</sup> *Socony-Vacuum Oil Co*, 310 US at 233.

<sup>236</sup> *Id.*

<sup>237</sup> FRCrP 6(e)(3)(E)(i).

best approach for the mission of the grand jury. Allowing a witness access to review his own previous statement is a far cry from permitting full release of records to a doctoral student for his dissertation.

This interpretation aligns with the understanding that Rule 6(e)'s adoption codified the common law pertaining to grand jury secrecy.<sup>238</sup> The Advisory Committee Note for Rule 6(e) explains that the Rule “continues the traditional practice of secrecy . . . except when the court permits a disclosure.”<sup>239</sup> This allowance for disclosure meant that the preexisting principle of grand jury secrecy, developed in England and continuing throughout the institution's history, persisted with the exception that courts now could exercise a disclosure option.<sup>240</sup>

Professors Lori E. Shaw and Susan W. Brenner, authors of an oft-cited treatise on the grand jury, refer to the Rule's approach as “common law plus.”<sup>241</sup> Rule 6 “codified the common law *plus* it authorized disclosure to defendants challenging an indictment for grand jury irregularities.”<sup>242</sup>

If pre-Federal Rules courts did have the “inherent power” to give defendants grand jury information, the rule absorbed that power; if they did not have that power, the rule gave it to them. Either way, Rule 6(e) represents the *sum total* of a federal court's authority to allow access to “matters occurring before the grand jury.”<sup>243</sup>

The accused may challenge perceived misconduct or procedural errors, and these were common reasons why judges resorted to their inherent power to disclose at common law.<sup>244</sup> Accordingly,

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<sup>238</sup> See Susan W. Brenner and Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice* § 18:2 (West 2d ed 2019) (arguing that supervisory power did not survive the codification of the Federal Rules).

<sup>239</sup> FRCrP 6, Notes of the Advisory Committee on Rules—1944 Amendment, Note to Subdivision (e).

<sup>240</sup> See Brenner and Shaw, *Federal Grand Jury* § 18:2 (cited in note 238).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* (emphasis added).

<sup>243</sup> *Id.* (emphasis added). See also Janice S. Peterson, *Criminal Procedure—Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy?*, 12 *W New Eng L Rev* 245, 259 (1990) (“The rule, as originally enacted, continued the common law practice in the federal courts.”); Beale, 84 *Colum L Rev* at 1493 (cited in note 39) (“Although provisions such as Rule 6 of the Federal Rules of Criminal Procedure, which was promulgated pursuant to statutory authority, are presumptively valid, no presumptive validity should attach to rulings premised only on supervisory power.”).

<sup>244</sup> See Brenner and Shaw, *Federal Grand Jury* § 18:2 (cited in note 238).

the Rule now allows a court to disclose information pertaining to a grand jury proceeding to “a defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”<sup>245</sup> Because there was “no right of discovery before trial” at common law, judges often had to rely on inherent power arguments in order to rectify this perceived wrong.<sup>246</sup> Congress incorporated this judge-made discretion into one of the Rule’s exceptions.<sup>247</sup> Shaw and Brenner argue that the Rule continues the default understanding of secrecy while absorbing the common law need for disclosure.

Pre-Rules discretion has been used as evidence in support of continued supervisory power, but this earlier discretion is not dispositive evidence of discretion today. Shaw and Brenner convincingly make the case for a “common law plus” understanding of the Rule, where any supervisory power that existed at common law was incorporated into the Rule’s exceptions. Early supervisory power was itself limited and a response to the judiciary’s need to allow for some disclosure under the harsh default of complete secrecy. Complete secrecy is no longer required. Judges may allow the same releases they sought at common law, now through the authority of the Rule. This understanding is bolstered by the Court’s handling of supervisory power after the Rule’s codification.

#### D. *Pittsburgh Plate Glass Co* Has Been Misinterpreted

The permissive approach likewise relies on Court precedent that describes judicial discretion as a justification for its use of supervisory power. Critically, courts have read *Pittsburgh Plate Glass Co*’s language regarding discretion out of context. This problem was exacerbated when the Eleventh and the Seventh Circuits cited to and followed the language of the Second Circuit’s original misreading of *Pittsburgh Plate Glass Co*.

Courts adopting the permissive view repeatedly cite to one line in *Pittsburgh Plate Glass Co*: “[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial

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<sup>245</sup> Id (quotation marks omitted).

<sup>246</sup> Id (quotation marks omitted).

<sup>247</sup> See id. See also FRCrP 6, Notes of the Advisory Committee on Rules—1944 Amendment, Note to Subdivision (e), citing *Schmidt v United States*, 115 F2d 394, 397 (6th Cir 1940), and *United States v American Medical Association*, 26 F Supp 429, 431 (DDC 1939).

judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.”<sup>248</sup> From only this line, it is understandable that this language has been interpreted to mean that the Rule has done nothing to change a judge’s ability to exercise discretion regarding disclosure of grand jury materials. If supervisory power existed before the Rule, the argument goes, it apparently continues to do so today. The problem with this approach is that the “discretion” referred to by the Court pertains to discretion of a judge to *deny* disclosure even when it is permitted by one of the Rule’s exceptions. The Court was describing a very different type of discretion—the discretion a trial court judge has *within* the parameters of the Rules, not outside of them.

The problem with the permissive approach becomes clear when one returns to the rest of the Court’s *Pittsburgh Plate Glass Co* opinion. The petitioner argued that the district court was required to release the grand jury materials because the case fell under one of the prescribed exceptions in Rule 6(e).<sup>249</sup> But the Supreme Court was not persuaded.<sup>250</sup> It was not enough that the case fell under the scope of the Rule because the petitioner failed to meet the burden of “particularized need.”<sup>251</sup> To “outweigh[ ] the policy of secrecy,” one must show a particularized need for the specific materials requested.<sup>252</sup> Whether that burden has been met is up to the discretion of the trial judge.<sup>253</sup> Therefore, *Pittsburgh Plate Glass Co* should not be understood as allowing trial judges broad discretion in any case concerning grand jury disclosures. Rather, the precedent supports disclosure only in those cases that already fall within the confines of an exception to Rule 6(e). The sentence immediately preceding the contested language makes this argument decisive: “Petitioners concede, as they must, that *any disclosure* of grand jury minutes is covered by [Rule] 6(e) promulgated by this Court in 1946 after the approval of Congress.”<sup>254</sup>

The circuits following the permissive interpretation have continually relied on *Socony-Vacuum Oil Co*’s pre-Rules interpretation and *Pittsburgh Plate Glass Co*’s post-Rules justification. As

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<sup>248</sup> *Pittsburgh Plate Glass Co*, 360 US at 399 (citations omitted).

<sup>249</sup> *Id.*

<sup>250</sup> See *id.* at 400.

<sup>251</sup> *Id.*

<sup>252</sup> *Pittsburgh Plate Glass Co*, 360 US at 400.

<sup>253</sup> See *id.* at 399.

<sup>254</sup> *Id.* at 398–99 (emphasis added).

the previous two sections show, this reliance seems to have led the circuits astray from the original intention of the Court. While the Court over time acknowledged that some disclosures were helpful for the operation of the grand jury, secrecy has always been the norm. Where discretion has been authorized, it has been authorized for courts to lean toward the choice to not release, rather than to release. Secrecy, rather than disclosure, is the default assumption. More recent Supreme Court precedent, mostly overlooked by the permissive view but addressed by the dissent in *Carlson*, call into question the belief that supervisory power exists outside of the Rule.

E. Recent Supreme Court Precedent Also Sharply Undermines the Permissive Argument

In relying so heavily on *Socony-Vacuum Oil Co* and *Pittsburgh Plate Glass Co*, courts miss more recent Supreme Court guidance on supervisory power over the grand jury. Two cases, *United States v Williams*, authored in 1992, and *United States v Baggot*,<sup>255</sup> handed down in 1983, call into the question the assumption that supervisory power exists over the grand jury at all.

1. *United States v Williams*.

The Supreme Court in *Williams* stressed the limited nature of the judiciary’s power over the grand jury. The question before the Court was whether a district court could dismiss an indictment that was otherwise valid because the attorney for the government did not disclose “substantial exculpatory evidence” to the grand jury.<sup>256</sup> John H. Williams Jr, the subject of an indictment for financial crimes,<sup>257</sup> argued that the Court’s previous holding in *United States v Hastings*<sup>258</sup> suggested that disclosure should be allowed under district courts’ supervisory power.<sup>259</sup> In *Hastings*, the Court had noted that federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or by the Congress.”<sup>260</sup> Writing for the Court, Justice Antonin Scalia explained that decisions on discretion in the trial context

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<sup>255</sup> 463 US 476 (1983).

<sup>256</sup> *Williams*, 504 US at 37–38.

<sup>257</sup> *Id* at 38.

<sup>258</sup> 461 US 499 (1983).

<sup>259</sup> *Williams*, 504 US at 45.

<sup>260</sup> *Hastings*, 461 US at 505.

were distinguishable from the grand jury context. Looking to history, Justice Scalia emphasized that grand juries were different: “Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, *no such ‘supervisory’ judicial authority exists.*”<sup>261</sup> The Court held that the federal judiciary lacks supervisory authority to compel a prosecutor to disclose exculpatory evidence.<sup>262</sup> More important for present purposes, it gave a clear signal about the lack of supervisory power over the grand jury.<sup>263</sup>

Justice Scalia began with a reminder that the grand jury “has not been textually assigned [ ] to any of the branches”<sup>264</sup> and is therefore “a constitutional fixture in its own right.”<sup>265</sup> While acknowledging that the grand jury “normally operates . . . in the courthouse and under judicial auspices,” he argued that its relationship to the judiciary was “*at arm’s length.*”<sup>266</sup> The role of a judge in these proceedings was limited to calling the grand jurors and administering their oaths.<sup>267</sup> The grand jury must be “free to pursue its investigations unhindered by external influence or supervision”<sup>268</sup> as “the Fifth Amendment’s constitutional guarantee *presupposes* an investigative body acting independently of either prosecuting attorney *or judge.*”<sup>269</sup>

After establishing the operational independence of the grand jury, Justice Scalia explained that “it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.”<sup>270</sup> If federal courts have the power to create rules of grand jury procedure, it “is a very limited one, not remotely comparable to the power they maintain over their own proceedings.”<sup>271</sup>

*Carlson* began its defense of supervisory power by citing to *Williams*, but the Seventh Circuit’s view advocates a position that

<sup>261</sup> *Williams*, 504 US at 47 (emphasis added).

<sup>262</sup> *Id.* at 55.

<sup>263</sup> *Id.* at 47.

<sup>264</sup> *Id.*

<sup>265</sup> *Williams*, 504 US at 47 (quotation marks omitted), quoting *United States v Chanen*, 549 F2d 1306, 1312 (9th Cir 1977).

<sup>266</sup> *Williams*, 504 US at 47 (emphasis added).

<sup>267</sup> *Id.* For more background on the judge’s limited role, see Part I.A.

<sup>268</sup> *Williams*, 504 US at 48–49, quoting *United States v Dionisio*, 410 US 1, 17–18 (1973).

<sup>269</sup> *Williams*, 504 US at 49 (quotation marks omitted) (emphasis in original).

<sup>270</sup> *Id.* at 49–50.

<sup>271</sup> *Id.* at 50.

*Williams* apparently rejects. Justice Scalia firmly endorsed grand jury independence and cautioned against courts extending their powers onto them. While the Seventh Circuit cited to *Williams* for the point that courts had “a very limited” power over grand juries,<sup>272</sup> the sentence in full read that “[t]hese authorities suggest that *any* power federal courts *may* have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not *remotely* comparable to the power they maintain over their own proceedings.”<sup>273</sup> This language is not an endorsement of supervisory power of the grand jury. Instead, Justice Scalia said that even if there is limited power—a question the Court did not decide—it is nowhere near as expansive as that of courts’ supervisory power over trials.

Furthermore, even if there is limited supervisory power, it is one thing to say there is limited supervisory power over proceedings, and quite another to say there is limited supervisory power *to disclose* those proceedings. The former allows for intervention to ensure the legitimacy and integrity of the proceedings. The latter affords a judge the singular authority to reveal what is otherwise secret. While *Carlson* uses *Williams*’s language that the grand jury convenes “in the courthouse and under judicial auspices” to support the idea that it operates under judicial control,<sup>274</sup> *Williams* again says in full that “[a]lthough 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.”<sup>275</sup> *Williams* and the permissive approach circuits are making different points: *Williams* brings up the institutional relationship to question the extent of judicial control. The permissive approach relies on judicial control as a given to justify the use of supervisory power.

## 2. *United States v Baggot*.

While *Williams* explained why supervisory power is so limited over the grand jury, *Baggot* suggested that the Court would not consider disclosure under the supervisory power to be a possibility. The Supreme Court in *Baggot* answered whether a

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<sup>272</sup> *Carlson*, 837 F3d at 762 (quotation marks omitted), quoting *Williams*, 504 US at 50.

<sup>273</sup> *Williams*, 504 US at 50 (emphasis added).

<sup>274</sup> See *Carlson*, 837 F3d at 761 (quotation marks omitted), quoting *Williams*, 504 US at 47.

<sup>275</sup> *Williams*, 504 US at 47 (emphasis added).

district court could allow grand jury documents to be disclosed in order to assess a grand jury defendant's income tax liability.<sup>276</sup> The district court had concluded that disclosure was not authorized under the Rule but had allowed its release under the district court's "general supervisory powers over the grand jury."<sup>277</sup> The Supreme Court did not mention this supervisory power again in its opinion. Instead, it looked to the Rule to determine whether disclosure was allowed.<sup>278</sup> The Court, when given the opportunity, made no indication that there was an alternative to the listed exceptions. In contrast, the Court emphasized the language and specificity of the text: "[The list of exceptions] reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy."<sup>279</sup> Thus, the Supreme Court focused on applying the Rule as written, with no indication that supervisory power existed as an alternative.

When given the chance to address supervisory power to disclose, the Court ignored its use and decided the case based solely on the language of the Rule. This decision suggests that the Court believes the Rule to be the only valid source of disclosure authority.

#### F. Policy Cautions Against Expanding Judicial Intervention

The permissive approach began as a one-off allowance in *Biaggi*. Then, *Hastings* permitted disclosure when the Rule was closely analogous to the situation. Now, the permissive approach endorses disclosure when the end is socially desirable. This evolving expansion results in judicial overreach. While the Supreme Court has affirmed the existence of some supervisory power, the lack of statutory or constitutional grounding means that judges are without guidance as to its breadth or application to the grand jury.<sup>280</sup>

Unencumbered by doctrinal limitations, the open-ended language of the phrase "supervisory power" has invited an expansive interpretation. Courts employing supervisory power have

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<sup>276</sup> *Baggot*, 463 US at 477.

<sup>277</sup> *Id* at 478.

<sup>278</sup> *Id* at 479–82.

<sup>279</sup> *Id* at 480.

<sup>280</sup> See Beale, 84 Colum L Rev at 1434 (cited in note 39).

generally felt relatively free to adopt rules intended to promote what the courts identify as the ends of justice and good public policy.<sup>281</sup>

While this poses a problem for the lower courts in general, it is especially vexing in the context of grand jury proceedings.<sup>282</sup> Cases in which a judge would exert supervisory power over a grand jury create a “conflict between the Executive and Judicial branches of the federal government over their respective relationships to the federal grand jury.”<sup>283</sup> Professor Sara Sun Beale contends that judicial interference with the grand jury should be extremely limited so that it may “be free to pursue its investigations unhindered by external influence or supervision.”<sup>284</sup> The lack of interference ensures that grand juries are free to make the decision that reflects the will of the people. Grand juries are not determining guilt or innocence. They are determining whether the government has made a sufficient case to indict an accused. They have independent authority to indict or not to indict. Though a prosecutor may argue for a certain outcome, the choice is supposed to ultimately be the grand jury’s own as the voice of the people. The grand jury developed secrecy in part to protect itself from judicial interference.<sup>285</sup> More oversight is not necessarily for the better.

While this view was endorsed by the Supreme Court in *Williams*, limiting judicial oversight to the Rule’s exceptions creates the understandable concern that matters of public interest will never see the light of day. District court judges within jurisdictions that follow the exhaustive approach may not release grand jury records on their own. It is worth considering whether that outcome is socially desirable.

The current exhaustive approach presumes that grand jury records that are not covered by an exception will remain secret forever.<sup>286</sup> Perhaps this is correct. Secrecy, as has been shown above, is vitally important to the functioning of the grand jury.

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<sup>281</sup> *Id.*

<sup>282</sup> See *id.* at 1459.

<sup>283</sup> *Id.*

<sup>284</sup> Beale, 84 Colum L Rev at 1492 (cited in note 39) (stipulating that interference is only justified when necessary to protect the rights of witnesses), quoting *Dionisio*, 410 US at 17–18.

<sup>285</sup> See Kadish, 24 Fla St U L Rev at 15 (cited in note 38).

<sup>286</sup> See Judicial Conference Committee on Rules of Practice and Procedure, Minutes of Meeting \*44 (June 11–12, 2012), archived at <https://perma.cc/65SZ-HWQQ> (noting that grand jury proceedings have historically been afforded “absolute secrecy”).

Does our need for secrecy ever wane? The Second Circuit wrote that “[t]o the extent that the John Wilkes Booth or Aaron Burr conspiracies . . . led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy.”<sup>287</sup> There is merit to this point, and, perhaps surprisingly, the government agrees.<sup>288</sup>

Attorney General Eric Holder put forward a proposal to add a historical significance exception to the Rule in 2011,<sup>289</sup> and the time has come for Congress and the Rules Committee to reconsider this position. The government took the position that Rule 6(e) is exhaustive and would therefore continue to presumptively bar attempts for release.<sup>290</sup> But the government recognized that the public has a legitimate interest in learning about these significant proceedings.<sup>291</sup> Holder therefore proposed that a historical significance exception be created within the text of the Rule.<sup>292</sup>

This proposal did not pass.<sup>293</sup> Several of the opinions dismiss that decision as inconclusive evidence for either side,<sup>294</sup> but it is worth considering what has changed since. The committee minutes show deference to legislative action, concern that this proposal would switch the default from secrecy to release, and skepticism that change would be premature.<sup>295</sup> Only a couple of

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<sup>287</sup> *Craig*, 131 F3d at 105.

<sup>288</sup> See Letter from Hon Eric H. Holder Jr, Attorney General, to Hon Reena Raggi, Chair, Advisory Committee on Criminal Rules \*3 (Oct 18, 2011), archived at <https://perma.cc/4S8Q-N27K> (Letter from Holder to Raggi), quoting *Craig*, 131 F3d at 105.

<sup>289</sup> See generally Letter from Holder to Raggi (cited in note 288).

<sup>290</sup> See *id.* at \*5.

<sup>291</sup> See *id.*

<sup>292</sup> See *id.* at \*5–7, 9–10.

<sup>293</sup> See Judicial Conference Committee, Minutes of Meeting at \*44 (cited in note 286).

<sup>294</sup> See *Carlson*, 837 F3d at 765 (“We give this history no weight one way or the other.”); *id.* at 771 n 2 (Sykes dissenting) (“My colleagues decline to give this history any weight ‘one way or the other,’ and I agree.”) (citation omitted); *Pitch v United States*, 953 F3d 1226, 1241 (11th Cir 2020) (en banc) (*Pitch II*) (“The Advisory Committee minutes are especially unreliable considering that they reflect statements made not by Congress or the Supreme Court—the only institutions with the authority to change the rule—but by a subcommittee of judges and other legal professionals.”). But see *id.* at 1250 (Jordan concurring) (citations omitted):

Although the Advisory Committee deemed Attorney General Holder’s proposed amendment unnecessary, its determination implicitly contemplated that a historical importance exception might be ripe for consideration at some future date. Given the current circuit split and the Supreme Court’s recent denial of certiorari on the issue, it appears that day is upon us.

<sup>295</sup> See Judicial Conference Committee, Minutes of Meeting at \*44 (cited in note 286).

district courts had dealt with the issue at the time, and the minutes explain that they resolved the issue through inherent power.<sup>296</sup> Since then, that inherent power has been challenged. Because the Supreme Court has chosen to let the issue lie for now, Congress is the only remaining body with authority to change the Rule.<sup>297</sup>

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More disclosures may be beneficial to the public interest and the integrity of the grand jury as an institution, but supervisory power is not the solution. As the Eleventh Circuit persuasively wrote, policy choices over when to allow disclosure are best left to Congress.<sup>298</sup> Allowing courts to make these decisions at their discretion would “lay dangerous precedent for future judicial encroachment upon the role of the grand jury.”<sup>299</sup> Witnesses, jurors, and even judges benefit from guidance on the rules of the grand jury. Inherent power “threatens to undermine the essential principle that Rule 6(e) encompasses, within its four corners, the rule of grand-jury secrecy and all of its exceptions and limitations.”<sup>300</sup> As long as case-by-case discretion is on the table, those who play a role in the grand jury proceedings cannot be sure of what will be kept secret and what will be disclosed. If permitting disclosure is desirable for the benefit of the public, any rule authorizing such disclosure should be clearly defined and applied across the board.

Given the historical independence of the grand jury from the control of both the executive and the judiciary, courts should abide by the exceptions within the Federal Rule. If disclosures outside the current exceptions promote the public interest, Congress may consider revising the Rule.<sup>301</sup> If Congress authorized such procedural changes, the Rule could be amended to accommodate the judicial desire for more disclosures.<sup>302</sup> Until then, courts should interpret Rule 6(e) to be exhaustive. Academics and the general public may strongly desire more transparency in the workings of the grand jury, and this may in turn motivate Congress to intervene. The Supreme Court, in forgoing the chance to

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<sup>296</sup> See *id.*

<sup>297</sup> See *id.*

<sup>298</sup> See *Pitch II*, 953 F3d at 1236.

<sup>299</sup> Schiappa, 43 Cath U L Rev at 349 (cited in note 18).

<sup>300</sup> Letter from Holder to Raggi at \*1 (cited in note 288).

<sup>301</sup> See Schiappa, 43 Cath U L Rev at 350 (cited in note 18).

<sup>302</sup> See *id.*

weigh in, has left it to the circuits and the Rules Committee to work through the issue.<sup>303</sup> Though the goal of increased transparency around historically significant events is a valuable one, individual judicial discretion is the wrong approach. The Rules Committee may, through Congress, determine that the best course of action is to amend the Rules. Courts can expedite that process by denying any petitions that do not fall within the current exceptions.

### CONCLUSION

In disputes over historically significant records, the equities of the situation appear aligned with the permissive approach, which affords courts discretion over whether to release accounts of grand jury proceedings. Some of the grand jury proceedings occurred decades before, the relevant parties may be deceased, and the public may benefit from learning the truth of high-profile historical events. It is unsurprising that when asked to authorize disclosure, many judges find that the benefit of disclosure outweighs the continued need for secrecy in that case. Judges who find this a socially valuable end can rely on the Rule's ambiguity and may interpret the lack of specific prohibition as permission to exercise supervisory power.

But historical origins and principles of the grand jury, as well as overlooked Supreme Court precedent, weigh in favor of an exhaustive view of the Rule—one that limits courts' discretion to only the exceptions explicitly listed in the Rule. If judges allow broad disclosure whenever a member of the public seeks access to interesting records, the result would vitiate the grand jury's promise of secrecy that protects those accused in the past and facilitates the success of future investigations.

Therefore, a solution to the interpretive problem must be consistent with the interest in protecting the grand jury from encroaching judicial oversight while acknowledging how far the grand jury has veered since its inception. The text of the Rule can hold clues for both sides, and a decision that relies solely on textual analysis is ultimately unsatisfying and unpersuasive.

The most sensible solution is to look beyond the text of the Rule and consider the positioning of the grand jury relative to the

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<sup>303</sup> See *McKeever v Barr*, 140 S Ct 597, 597 (2020) (Breyer respecting denial of certiorari) (calling on the Rules Committee to take up the issue).

judiciary—an institution “at arm’s length.” By understanding the institutional relationship, it becomes clear that judges have far less influence over the grand jury than they do over their own proceedings. Any supervisory power that the judiciary had over the grand jury was supplanted by the exceptions to the Rule. This conclusion is rooted in the history of the grand jury as a separate institution, the adoption of the Federal Rules as the guiding source for judges, and Supreme Court precedent that emphasizes the need for secrecy and independence in grand jury proceedings.

Supervisory power is the wrong approach to a difficult question, but that does not mean that the aim of the approach is unsound. If more disclosure is socially desirable because the public benefits from learning about previously unreported events, it should be left to Congress to revise the Rule. Discretionary decisions by individual courts on a case-by-case basis not only exceed judicial authority and harm the independence of the grand jury, they also muddy the doctrinal landscape and create confusion for future courts. The Rules Committee and Congress ought to reexamine the Rule itself as well as the arguments for adding an additional exception for extraordinary circumstances. Until then, courts should abide by the exceptions to the Rule and let Congress determine whether more judicial control over the modern grand jury is needed.