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An Essential Preliminary: The Grand Jury, Its Cloak of Secrecy, and the Misconceived Inherent Authority to Release Grand Jury Materials

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Federal Rule of Criminal Procedure 6(e) enumerates the exceptions under which courts may disclose otherwise secret grand jury materials. Until recently, long-standing Eleventh Circuit precedent allowed district courts in its jurisdiction to disclose grand jury records based on an extratextual reading of Rule 6(e) that relied on district courts' "inherent authority" to disclose grand jury materials. In March of 2020, the Eleventh Circuit moved away from this precedent and held that district courts lack the inherent authority to authorize the disclosure of grand jury records outside of the limited exceptions set forth in Rule 6(e). Although the Eleventh Circuit moved away from its broad interpretation of

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Rule 6(e)'s grant of authority to release grand jury materials, many of its sister circuits are steadfast in their adoption of the "inherent authority" approach to the disclosure of grand jury materials. The Supreme Court had the opportunity to squarely consider this issue, and it chose not to—but on January 21, 2020, the Court expressly stated that whether district courts may exercise their inherent authority to release grand jury materials outside the enumerated exceptions found in Rule 6(e) is an important question. Ultimately, the resolution of the circuit split examined by this Article lies in the hands of the Advisory Committee on the Criminal Rules.

Accordingly, this Article takes the Eleventh Circuit's decision in United States v. Pitch *one step further and, following Judge Adalberto Jordan's lead, advocates that district courts should be authorized to order the disclosure of grand jury materials of particular historical significance. Under the current regime, they cannot. With that understanding, this Article argues that the Advisory Committee on the Criminal Rules should recommend an amendment to Rule 6(e) that would allow for disclosure of grand jury documents of historical significance under certain circumstances. This Article concludes by providing proposed language that could serve as a framework through which the Advisory Committee on the Criminal Rules could prevent district courts from creating exceptions outside Rule 6(e) while simultaneously allowing the disclosure of grand jury materials in historically significant cases and respecting the role grand jury secrecy has played in American jurisprudence.*

INTRODUCTION

> The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an *essential preliminary*, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state, as near as may be to the seat of the offence.
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> - James Madison.[1]

As an "essential preliminary"[2] to criminal proceedings, grand juries and their materials are typically cloaked in secrecy,[3] save for

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[1] James Madison, Address to the First Congress Proposing Amendments to the Constitution (June 8, 1789) [hereinafter Madison, June 8, 1789, Address to First Congress] (emphasis added) (proposing twenty amendments to U.S. Constitution, of which eleven were adopted and eventually passed as Amendments to U.S. Constitution—of which ten are collectively referred to as the Bill of Rights, which included the requirement of grand jury indictments); *see also* U.S. 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 . . . .").

[2] Madison, June 8, 1789, Address to First Congress, *supra* note 1.

[3] *See generally* FED. R. CRIM. P. 6(e)(2) (outlining to whom obligations of grand jury secrecy apply); Butterworth v. Smith, 494 U.S. 624, 629–30 (1990) ("The tradition of secrecy surrounding grand jury proceedings evolved, at least partially, as a means of implementing [safeguards for citizens against an overreaching government] by ensuring the impartiality of that body. . . . Today, grand jury secrecy remains important to safeguard a number of different interests." (citations omitted) (first citing *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218–19 (1979); and then citing J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169, 170 (1983))); Pittsburgh Plate Glass Co. v.

certain exceptions outlined in Federal Rule of Criminal Procedure 6(e).[4] Until recently courts in the Eleventh Circuit possessed the inherent authority to release grand jury records outside the constraints set forth in Rule 6(e).[5] The Eleventh Circuit provided that courts may have only exercised their disclosure authority where there existed "exceptional circumstances consonant with the rule's policy and spirit."[6] This changed as the Eleventh Circuit departed from its long-standing precedent in early 2020.[7] This departure was likely

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United States, 360 U.S. 395, 399 (1959) ("The reasons [for grand jury secrecy] are manifold . . . and are compelling when viewed in the light of the history and modus operandi of the grand jury."); United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958) ("[W]e start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts."); United States v. Johnson, 319 U.S. 503, 513 (1943) ("Nothing could be more destructive of the workings of our grand jury system or more hostile to its historic status. . . . To allow the intrusion . . . into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries . . . ."); 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, 16 (1996) ("The Grand Jury Clause of the Fifth Amendment made grand jury secrecy an implicit part of American criminal procedure.").

[4] *See* FED. R. CRIM. P. 6(e)(3) (outlining exceptions to the secrecy requirements of a grand jury matter); *infra* Part II.

[5] *See* Pitch v. United States (*Pitch I*), 915 F.3d 704, 708 (11th Cir. 2019) ("We have recognized that district courts retain 'inherent power beyond the literal working of Rule 6(e)' to disclose grand jury material not otherwise covered by the exceptions." (citing *In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1268 (11th Cir. 1984))), *vacated,* 953 F.3d 1226 (11th Cir. 2020); United States v. Aisenberg, 358 F.3d 1327, 1347 (11th Cir. 2004) (noting that district courts have inherent authority outside of Federal Rule of Criminal Procedure 6(3) to order disclosure of grand jury materials); *Hastings*, 735 F.2d at 1268 ("The district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported. This is not to say the rule is not normally controlling. It is. But it has been authoritatively said that the rule is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court . . . .").

[6] *Pitch I*, 915 F.3d at 709 ("[C]ourts are not empowered to act outside Rule 6(e) in other than exceptional circumstances consonant with the rule's policy and spirit." (quoting *Hastings*, 735 F.2d at 1275)).

[7] Pitch v. United States (*Pitch III*), 953 F.3d 1226, 1226 (11th Cir. 2020).

because such an extratextual interpretation of the courts' power to circumvent the guidelines set out by the Federal Rules of Criminal Procedure is an abuse of the courts' supervisory discretion over grand jury procedures,[8] which is very limited and "not remotely comparable to the power [courts] maintain over their own proceedings."[9]

The Eleventh Circuit was not alone in its broad interpretation of its authority to disclose grand jury materials under Rule 6(e);[10] other circuits disagreed and have maintained that district courts do not enjoy the authority to circumvent Rule 6(e)(3) by disclosing grand jury materials outside the specific exceptions listed therein.[11] Although Rule 6(e) does not support the Eleventh Circuit's precedent before-March of 2020 that authorized district courts to disclose grand jury materials outside the exhaustive list of circumstances outlined in Rule 6(e)(3),[12] the current regime must change because the needs of this great nation continue to expand, and the call for justice weighs more heavily against the need for continued grand jury secrecy when materials related to historically significant events are sought. Therefore, the Advisory Committee on the Criminal Rules should recommend an amendment to Rule 6(e) that would prevent courts from creating a catch-all exception to grand jury secrecy disclosures by

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[8] *See* United States v. Sells Eng'g, 463 U.S. 418, 425 (1983) ("In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." (citing Illinois v. Abbott & Assoc., 460 U.S. 557, 572–73 (1983))).

[9] *See* United States v. Williams, 504 U.S. 36, 50 (1992).

[10] *E.g.*, Carlson v. United States, 837 F.3d 753, 763 (7th Cir. 2016) (holding that Federal Rule of Criminal Procedure 6 is a permissive rule, which permits courts to exercise its inherent powers, and as a result, the Seventh Circuit may exceed the scope of Rule 6 exclusions).

[11] *E.g.*, McKeever v. Barr, 920 F.3d 842, 850 (D.C. Cir. 2019) (holding that courts within its jurisdiction do not have inherent authority to disclose grand jury records outside exceptions listed in Federal Rule of Criminal Procedure 6), *cert. denied*, 140 S. Ct. 597 (2020); *In re* Special Grand Jury 89-2, 450 F.3d 1159, 1178 (10th Cir. 2006) (recognizing that Supreme Court has not expressly recognized district courts' inherent authority to release grand jury materials).

[12] *See, e.g.*, Pitch v. United States (*Pitch I*), 915 F.3d 704, 707 (11th Cir. 2019) (a case involving an author's request to unseal the grand jury records of the "last mass lynching in American history," the Moore's Ford Lynching).

relying on extratextual inherent authority to circumvent the exceptions set out in the Rule. Such an amendment should also expressly allow courts to release otherwise secret grand jury materials in cases of abiding historical significance so that those materials may be appropriately recorded in the annals of history.[13] Otherwise, petitioners seeking the disclosure of grand jury materials may only do so when courts are amenable to bending the rules.

This Article will primarily discuss the Eleventh Circuit's decisions in *Pitch v. United States*, in which the court ultimately reconsidered the question whether district courts within its jurisdiction have inherent authority to disclose grand jury materials in cases involving "exceptional circumstances."[14] The *Pitch* court initially upheld its decision in *In re Petition to Inspect & Copy Grand Jury Materials* (*Hastings*),[15] but after a rehearing en banc, the court held that district courts *do not* have the inherent authority to order the release of grand jury records.[16] This Article will use *Pitch* as a starting point for the discussion of a remedy to the split among the circuits related to courts' assumed inherent authority to disclose grand jury materials.

Part I will examine the history of grand juries before and after the ratification of the United States Constitution. Part II will outline in detail the process by which amendments are made to the Federal Rules of Criminal Procedure and the protections Rule 6 affords to grand jury secrecy in its current form. Part III will discuss key cases in the Eleventh Circuit's jurisprudence involving its perceived inherent authority to disclose grand jury materials, culminating in a discussion of the *Pitch* cases. Part IV will delve into the state of the law in other circuits regarding whether their district courts enjoy the extratextual inherent authority to release grand jury materials.

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[13] *Cf.* Letter from Eric H. Holder, Jr., United States Attorney General, to The Honorable Reena Raggi, Chair, Advisory Comm. on the Criminal Rules (Oct. 18, 2011) [hereinafter 2011 Letter Recommending Amendment to Rule 6] (recommending a historical exception amendment to Federal Rule of Criminal Procedure 6 to Advisory Committee on the Criminal Rules).

[14] *Pitch I*, 915 F.3d at 708–09.

[15] *In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1269 (11th Cir. 1984) (holding that district courts have inherent authority to disclose grand jury materials in exceptional circumstances).

[16] Pitch v. United States (*Pitch III*), 953 F.3d 1226, 1241 (11th Cir. 2020).

Aimed at remedying the current split among the circuit courts of appeals, Part V concludes the discussion by proposing that Rule 6 be amended to include a reasonable historical significance exception. Such an amendment would provide courts the authority to aid in the documentation of historically significant events through the disclosure of grand jury materials without erroneously relying on a supposed inherent authority to go beyond the exceptions listed in Rule 6(e).

I. THE HISTORY OF GRAND JURY SECRECY

The grand jury was "brought to this country by the early [English] colonists and incorporated in the Constitution by the Founders."[17] In American jurisprudence, the grand jury, even in the colonial era, was historically conceived of and employed as a mechanism by which the populace could defend itself against then-monarchical governmental powers.[18] While grand jury secrecy was initially implicit in the oath imposed on jurors,[19] the Supreme Court codified two grand jury secrecy protections in Federal Rule of Criminal Procedure 6 in in 1946.[20] To understand the possible implications of a court's disclosure of otherwise secret grand jury materials in modern American jurisprudence, one must look to the origins of the grand jury and the cloak of secrecy inherent in its materials.

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[17] Costello v. United States, 350 U.S. 359, 362 (1956); *accord* United States v. Mandujano, 425 U.S. 564, 571 (1976) ("The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law."); Russell v. United States, 369 U.S. 749, 761 (1962) ("The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166.").

[18] 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, 589 (2018).

[19] *Id.* (citing GEORGE J. EDWARDS, JR., THE GRAND JURY: AN ESSAY 48 (1906)).

[20] Kadish, *supra* note 3, at 23–25 ("The first provision limited who could be present during grand jury sessions, while the second imposed a general rule of secrecy with specific and limited exceptions.").

A. *Grand Juries Before the Constitution of the United States*

1. ORIGINS: THE ENGLISH GRAND JURY

As originally devised, the grand jury was created to accuse alleged criminals of crimes they were suspected of having committed, expand the Crown's jurisdictional and prosecutorial reach,[21] and prevent the escape of alleged law-breakers.[22] As we know them today, grand juries originated in 1166, when King Henry II of England issued the Assize of Clarendon, which required criminal accusations thereafter to be presented by a network of juries composed of twelve men selected from every township.[23] Under the act, jurors were sworn to keep the matters with which they dealt secret, such that the subjects of the inquest would not know of such jury investigation into their alleged crimes.[24] In the years following the creation of these juries, they were often empowered to conduct other business of the monarchy; they oversaw the assessment of taxes and the inspection and maintenance of public works, including the development of highways, bridges, and jails.[25]

Important in the development of the English grand jury was the adoption of the Magna Carta by King John of England in 1215,[26] to which the "ancestry of the due process clause is universally traced . . . ."[27] While not specifically addressing a grand jury, the "Great Charter" laid the groundwork for equal protection under the law, whether the person accused was king or pauper, by stating that "[n]o freeman shall be taken or [and] imprisoned or disseized or exiled or in any way destroyed, nor will [the government] go upon him nor send upon him, except by the lawful judgment of his peers or

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[21] Thrasher, *supra* note 18, at 588.

[22] EDWARDS, *supra* note 19, at 6.

[23] Thrasher, *supra* note 18, at 588.

[24] EDWARDS, *supra* note 19, at 11.

[25] Kadish, *supra* note 3, at 6–7.

[26] *Id.* at 7. The Magna Carta was reissued by the Crown in 1216, 1217, and 1225. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 949 n.30 (1990). It was the last reissue in 1225 that was confirmed by King Edward I in 1297 and codified in English statute books. *Id.* To wit, the Magna Carta was "confirmed" at least forty-four times subsequently. *Id.*

[27] Riggs, *supra* note 26, at 948.

[and] the law of the land."[28] Such an abdication of supreme authority by the Crown was not insignificant. Following the Magna Carta, subjects of the Crown were granted protections "against arbitrary actions by the [monarch], who in the past had sometimes seized the property of his [or her] subjects or caused them to be exiled, outlawed, imprisoned, killed or subjected to other disabilities, without the benefit of any legal process."[29]

During King Edward III's reign, the twelve-member jury was replaced by a panel of twenty-four knights, which was assigned to inquire at large for the county, named "*le graunde inquest*."[30] Subsequently, the twelve men became known as the "petit jury,"[31] which was "responsib[le] for rendering a verdict of innocent or guilty in capital crimes."[32] Hence, a dual-jury system emerged—in which a *graunde* jury indicted and a petit jury convicted—similar to the dual-jury system in modern American criminal procedure.[33] Not until the seventeenth century, however, did the English grand jury become more recognizable as an ancestor to modern American grand juries.[34]

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[28] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914) (second and fourth alterations in original) (translating the Magna Carta from Latin to English).

[29] Riggs, *supra* note 26, at 949.

[30] EDWARDS, *supra* note 19, at 13.

[31] *Id.*

[32] Kadish, *supra* note 3, at 8.

[33] *See generally* FED. R. CRIM. P. 6 (rule governing grand jury composure, procedure, secrecy, and exceptions to those secrecy requirements); FED. R. CRIM. P. 23. (rule governing juries in federal criminal trials).

[34] *See* Kadish, *supra* note 3, at 9 ("Two celebrated cases became the catalyst for writers to define the rights and powers of English grand juries. When pro-Protestant grand juries in London refused to indict Catholic King Charles II's enemies, Lord Shaftesbury and Stephen Colledge, the grand jury became an institution 'capable of being a real safeguard for the liberties of the subject.'"). *See also* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 710–20 (1972), for a detailed narrative discussion of the immediate facts and circumstances following the cases against Lord Shaftesbury and Mr. Colledge, where two different grand juries refused to indict the alleged criminals due to their perception that the Crown was abusing its power. It was in the wake of the cases against Lord Shaftesbury and Mr. Colledge that the grand

2. THE GRAND JURY IN COLONIAL AMERICA

> Though it was occasionally called upon to play a more spectacular role in provincial, county, or municipal government, the normal work of the grand jury in colonial America consisted of routine presentments and indictments, and most colonials, like most Englishmen, took the institution for granted. However, in the 1680's the struggle in England against Stuart absolutism served to renew interest in the grand jury . . . . Instead of a routine, burdensome institution it became the bulwark of [colonists'] rights and privileges.[35]

The English colonies in America patterned their legal institutions after those found in England, and each adopted the grand jury as a part of its judicial system.[36] As colonial governments and adjudicative mechanisms continued to grow, "the grand jury became an instrument for popular participation in municipal as well as in county and provincial government."[37] The grand jury also served as a vehicle through which the public would be apprised of areas in need of reform[38] and to defend against abuses by the Crown.[39] As

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jury was considered a mechanism whose power was both granted by and protective of the people from unjust prosecution, rather than granted by and protected of the executive. *Id.* at 720.

[35] RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 20–21 (1963).

[36] *Id.* at 5 ("The English colonies in America patterned their legal institutions after those of the mother country, and each adopted the grand jury as a part of its judicial system. But the colonists' grand juries, like their other institutions, developed along lines of their own."); Thrasher, *supra* note 18, at 589 ("[R]oot[ed] in twelfth-century England, the grand jury emerged in 1635 when English colonists brought their institutions to the American colonies.").

[37] YOUNGER, *supra* note 35, at 17.

[38] *Id.* at 18.

[39] *See* Kadish, *supra* note 3, at 10 ("[D]ecidedly unlike its English progenitor, the American grand jury originally began, not as an arm of the executive, but as a defense against monarchy. It established a screen between accusations and convictions and initiated prosecutions of corrupt agents of the government. Therefore, the English progenitor upon which the American grand jury was modeled was the

such, the grand jury was seen as more a part of colonial government than it had been in England.[40]

As tensions against the Crown rose, the grand jury "proposed new laws, protested against abuses in government, and performed many administrative tasks. . . . They enforced or refused to enforce laws as they saw fit and stood guard against indiscriminate prosecution by royal officials."[41] To an extent never before seen, colonial American grand juries were weaponized against English authorities as they blocked perceived abuses of power by the Crown and defended colonists' rights as Englishmen.[42] Such reluctance to succumb to the Crown's sweeping authority made grand juries a medium of propaganda in favor of independence, which spread far and wide throughout colonial America.[43]

Following the colonies' declaration of independence, grand juries adopted patriotic resolutions against the monarchy, although they continued to deal with local issues.[44] Grand juries were often also responsible for many governmental or administrative tasks.[45] For example, grand juries suggested price controls for food products, "recommended new laws to meet special situations[,] . . . inspected public records, audited county or tax books, and set tax

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more enlightened protective grand jury of the 1600s."); Thrasher, *supra* note 18, at 589 ("The adoption of the grand jury in America was a means of checking the abuse of colonial 'assistants,' whom the English monarchy empowered to accuse and adjudge criminals. In this manner, the American grand jury differed from its English counterpart, and was a defense against monarchical power rather than an extension of it.").

[40] Kadish, *supra* note 3, at 10; *see also* YOUNGER, *supra* note 35, at 26 ("By the end of the colonial period the grand jury had become an indispensable part of government in each of the American colonies. Grand juries served as more than panels of public accusers. They acted as local representative assemblies ready to make known the wishes of the people.").

[41] YOUNGER, *supra* note 35, at 26.

[42] *See* Kadish, *supra* note 3, at 11.

[43] YOUNGER, *supra* note 35, at 34 ("[P]atriotic pronouncements [by grand juries] were not only effective in arousing the people of the immediate vicinity: newspapers copied them and gave them wide publicity.").

[44] *Id.* at 37.

[45] *Id.* at 36–38.

rates."[46] Most importantly, grand juries were integral in maintaining law enforcement efficacy during the War of Independence.[47]

While grand juries existed in the post-war era,[48] there is no mention of grand juries in the Articles of Confederation.[49] The Articles of Confederation, enacted in 1781, created an anemic centralized government such that, by 1786, the economic condition in the United States became the fledgling nation's greatest concern.[50] Despite not being referenced in the Articles of Confederation, grand juries were seen as protectorates of the document drafted during the 1787 Constitutional Convention in Philadelphia: the Constitution of the United States.[51]

B. *The Grand Jury Under the Constitution of the United States*

Notwithstanding their importance in the administration of the American colonies under English rule and then under the Articles of Confederation, the United States Constitution also made no mention

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[46] *Id.* at 36–37; *see also* Kadish, *supra* note 3, at 10 (noting that even before the American Revolution, grand juries in Virginia, for example, "met twice a year to levy taxes, oversee spending, supervise public works, appoint local officials, and consider criminal accusations").

[47] *See* YOUNGER, *supra* note 35, at 38–40.

[48] *See id.* at 41 ("The grand jury entered the post-Revolutionary period high in the esteem of the American people. The institution had proved valuable indeed in opposing the imperial government and indictment by a grand jury had assumed the position of a cherished right. . . . However, though their dramatic role in the revolution had served to focus public attention and admiration upon them, most grand jurors went quietly about their traditional routine work.").

[49] *See* Articles of Confederation of 1781 (making no mention of grand juries; however, convictions in the many states must have been given full faith and credit in each other state in the United States under the Articles of Confederation, implying that mechanisms in place for indictment of persons would be implemented under the centralized government); Kadish, *supra* note 3, at 11 ("After the Revolution, the centralized government was created without a federal grand jury.").

[50] Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1709–10 (2012).

[51] *See* YOUNGER, *supra* note 35, at 44 (highlighting importance of grand juries in defending against "'internal enemies' who would seek to destroy the Constitution").

of grand juries as originally drafted.[52] The status of the American federal grand jury, therefore, was in question between the time the Constitution entered into force on June 21, 1788,[53] and the ratification of the first ten Amendments to the Constitution,[54] known as the Bill of Rights.[55] This was likely due to the federal inferior courts having no constitutionally mandated structure or powers[56] because Congress was to vest the "judicial Power of the United States . . . in such inferior Courts as the Congress may from time to time ordain

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[52] *See* U.S. CONST. arts. I–VII; Kadish, *supra* note 3, at 11 ("The Constitution created three separate branches of government and delegated the powers of each, but did not establish grand juries."); YOUNGER, *supra* note 35, at 44 ("The Constitution of the United States, as it went into force in 1789, did not mention grand juries in any way.").

[53] *See* U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."); *see also* Ratification of the Constitution by the State of New Hampshire (June 21, 1788), available at https://avalon.law.yale.edu/18th_century/ratnh.asp [hereinafter Ratification of the Constitution by New Hampshire] (because New Hampshire was the ninth state to ratify the United States Constitution, immediately following the state's ratification, the Constitution entered into force); Ratification of the Constitution by the State of South Carolina (May 23, 1788), available at https://avalon.law.yale.edu/18th_century/ratsc.asp; Ratification of the Constitution by the State of Maryland (Apr. 28, 1788), available at https://avalon.law.yale.edu/18th_century/ratme.asp; Ratification of the Constitution by the State of Massachusetts (Feb. 21, 1788), available at https://avalon.law.yale.edu/18th_century/ratma.asp [hereinafter Ratification of the Constitution by Massachusetts]; Ratification of the Constitution by the State of Connecticut (Jan. 8, 1788), available at https://avalon.law.yale.edu/18th_century/ratct.asp; Ratification of the Constitution by the State of Georgia (Jan. 2, 1788), available at https://avalon.law.yale.edu/18th_century/ratga.asp; Ratification of the Constitution by the State of New Jersey (Dec. 18, 1787), available at https://avalon.law.yale.edu/18th_century/ratnj.asp; Ratification of the Constitution by the State of Pennsylvania (Dec. 12, 1787), available at https://avalon.law.yale.edu/18th_century/ratpa.asp; Ratification of the Constitution by the State of Delaware (Dec. 7, 1787), available at https://avalon.law.yale.edu/18th_century/ratde.asp.

[54] *See* YOUNGER, *supra* note 35, at 44–45.

[55] U.S. CONST. amends. I–X (collectively referred to as the "Bill of Rights").

[56] *See* YOUNGER, *supra* note 35, at 44–45 (noting that lack of a grand jury provision in the Constitution may have been a result of lack of federal inferior courts in original design of the Constitution).

and establish."[57] In their ratifying conventions, however, many states proposed amendments to the Constitution that called for the inclusion of grand jury protections.[58]

In 1791, during its first session, Congress adopted ten amendments to the Constitution, among which was the Fifth Amendment, which reads in its entirety as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[59]

The primacy of the grand jury clause within the text of the Fifth Amendment implies that the clause is of paramount importance to the constitutional foundation of American criminal law.[60] Therefore, the secrecy of grand jury materials is undoubtedly a foundational

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[57] U.S. CONST. art. III § 1.

[58] *See, e.g.*, Ratification of the Constitution by the State of New York (July 26, 1788), available at https://avalon.law.yale.edu/18th_century/ratny.asp ("That . . . a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States . . . ."); Ratification of the Constitution by New Hampshire, *supra* note 53 ("Sixthly That no Person shall be Tried for any Crime by which he may incur an Infamous Punishment, or loss of life, until he first be indicted by a Grand Jury . . . ."); Ratification of the Constitution by Massachusetts, *supra* note 53 ("*Sixthly*, That no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury . . . .").

[59] U.S. CONST. amend. V (emphasis added).

[60] *See* Wood v. Georgia, 370 U.S. 375, 390 (1962) (noting that, historically, grand juries have been "regarded as a primary security to the innocent against hasty, malicious and oppressive persecution").

element of the grand jury protections afforded to Americans because of the inherent secrecy historically cloaking grand jury proceedings and materials.[61]

Despite having no constitutional framework on which to base its direction,[62] grand jurors swore an oath to secrecy, which was implied in the text of the Fifth Amendment.[63] In American jurisprudence, grand juries have continued to evolve, forcing courts to strike a balance between the conflicting needs for secrecy and for disclosure of grand jury materials.[64] Questions regarding the sanctity of grand jury secrecy triggered due process concerns for criminal defendants, who could have reasonably wanted the materials both disclosed, such that their innocence may be proven, and withheld, so as not to prejudice them at trial.[65] Ultimately, courts generally balanced six justifications for grand jury secrecy when determining whether to disclose those materials:

1. preventing criminal offenders from fleeing;
2. preventing the spoliation of evidence;
3. preventing witness tampering;
4. protecting innocent persons from damage to their reputations as a result of a grand jury investigation;
5. facilitating the disclosure of full and truthful testimony by witnesses; and
6. preventing undue prejudice of the public jury pool.[66]

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[61] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (maintaining grand jury secrecy "protect[s] innocent accused who [are] exonerated from disclosure of the fact that [they had] been under investigation . . . .").

[62] *See* Kadish, *supra* note 3, at 12 n.83 (noting that Congress has never passed a generalized bill outlining scope and powers of federal grand juries, only noting that in 1895, Congress established the size of federal grand juries and the necessity for the concurrence of at least twelve grand jurors to indict).

[63] *Id.* at 16.

[64] *See id.* at 17, 22.

[65] *Id.* at 22.

[66] Thrasher, *supra* note 18, at 590.

Not until 1946 would the historical traditions of grand jury secrecy be codified in the form of Federal Rule of Criminal Procedure 6.[67]

II. THE GRAND JURY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Federal Rules of Criminal Procedure have seen many changes since their initial codification, through a comprehensive amendment procedure.[68] Familiarity with the amendment process is, therefore, of great importance when considering solutions to issues concerning grand jury secrecy discussed herein.

A. *The Amendment Process*

Amending the Federal Rules of Criminal Procedure is exceedingly straightforward, albeit arduous and time consuming.[69] The Rules Enabling Act[70] authorizes amendments to the Federal Rules of Procedure to be initially considered by the Rules' respective advisory committees; amendments to the Federal Rules of Criminal Procedure are initially considered by the Advisory Committee on the Criminal Rules.[71] Once the advisory committee decides that a change in the rule would be appropriate, based on suggestions—by anyone[72]—the advisory committee prepares a draft amendment and

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[67] *See* FED. R. CRIM. P. 6; Kadish, *supra* note 3, at 23.

[68] *See* FED. R. CRIM. P. 6 notes to 1966, 1972, 1976, 1977, 1979, 1987, 1993, 1999, and 2002 amendments.

[69] *See* David A. Schlueter, *Federal Rules Published for Public Comment*, 26 CRIM. JUST. 52, 52 (2011) ("[The Amendment] process—from initial drafting by the advisory committee to effective date—typically takes three years.").

[70] 28 U.S.C. §§ 2071–2077 (2018).

[71] *See* Schlueter, *supra* note 69, at 52; Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure, U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Mar. 3, 2023) [hereinafter Overview of Rules of Practice and Procedures].

[72] Overview of Rules of Practice and Procedures, *supra* note 71 ("Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations.").

an explanatory committee note.[73] After the Advisory Committee votes to recommend an amendment, the amendment must be approved by the Standing Committee, which prepares the amendment for publication and distribution for a public comment period (usually six months).[74] After the independent review and subsequent approval by the Standing Committee, the amendment is submitted to the Judicial Conference for approval, which submits the amendment to the Supreme Court.[75] The Supreme Court is authorized by the Rules Enabling Act to "prescribe general rules of practice and procedure . . . for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals" without a period of public comment;[76] however, it must transmit its proposed amendments to Congress, which reviews the amendment for a statutory period of seven months.[77] If approved without change, the rules take effect as a matter of law on December 1 of the year the rule is transmitted.[78]

B. *Federal Rule of Criminal Procedure 6(e): Grand Jury Secrecy as it Stands*

As it appears in its most recent official publication, Federal Rule of Criminal Procedure 6 reads as follows regarding the secrecy of its materials:

> **Rule 6. The Grand Jury**
>
> . . . .
>
> (e) **Recording and Disclosing the Proceedings.**
>
> . . . .
>
> (2) ***Secrecy*.**

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] 28 U.S.C. § 2072(a).
[77] 28 U.S.C. § 2074(a).
[78] *Id.*

(A) No obligation may be imposed on any person except in accordance with Rule 6(e)(2)(B).

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

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) ***Exceptions*.**

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

. . . .

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminary 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 the matter may disclose is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

> (iii) any other person whom the court may designate.[79]

Rule 6 is abundantly clear: Grand jury materials shall not be disclosed except through specified court-supervised and rule-approved disclosures.[80] "The court *may* authorize disclosure,"[81] meaning courts do in fact retain some discretion over the disclosure of grand jury materials—*only* when confronted with one of the five listed scenarios.[82]

Despite express language in Rule 6 stating otherwise, some circuit courts of appeals have nevertheless held that the exceptions to the secrecy of grand jury materials found in Rule 6(e)(3) are merely a non-exhaustive list of exceptions.[83] While district court judges have discretion in releasing grand jury materials,[84] going beyond the textual constraints of Rule 6 as currently drafted is an abuse of that discretion.

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[79] FED. R. CRIM. P. 6(e)(2), (3)(A) & (E). The operative portions outlined above serve as the guidepost for this Article's discussion in Section V.

[80] *Id.*

[81] *Id.* at (6)(e)(3)(E) (emphasis added).

[82] *See id.* at (6)(e)(3)(E)(i)–(v), (F).

[83] *See, e.g.*, Pitch v. United States (*Pitch I*), 915 F.3d 704, 710–11 (11th Cir. 2019) ("We have recognized that district courts retain 'inherent power beyond the literal working of Rule 6(e)' to disclose grand jury material not otherwise covered by the exceptions." (citing *In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1268 (11th Cir. 1984))), *vacated*, 953 F.3d 1226 (11th Cir. 2020); Carlson v. United States, 837 F.3d 753, 763 (7th Cir. 2016) (holding that Federal Rule of Criminal Procedure 6 is a permissive rule, which permits courts to exercise its inherent powers, and as a result, the Seventh Circuit may exceed the scope of Rule 6 exclusions).

[84] *See* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959) ("[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.").

III. THE ELEVENTH CIRCUIT AND THE AUTHORITY TO RELEASE GRAND JURY TESTIMONY UNDER RULE 6(E)(3)

A. *Thinking Makes It So:* In re Petition to Inspect & Copy Grand Jury Materials (Hastings)

The Eleventh Circuit first recognized its supposed inherent power to release grand jury records, without a specific statutory policy favoring disclosure, in *In re Petition to Inspect & Copy Grand Jury Materials* (*Hastings*).[85] In *Hastings*, the Eleventh Circuit was tasked with determining on appeal whether the United States District Court for the Southern District of Florida properly disclosed grand jury records related to the investigation by an Eleventh Circuit special committee of former United States District Judge Alcee Hastings.[86]

Judge Hastings was indicted on charges of soliciting a bribe from attorney William Borders, Jr. (who was also accused, separately tried, and convicted) in exchange for sentence reductions for his clients.[87] Judge Hastings was ultimately acquitted at trial.[88] Following his acquittal, members of the Eleventh Circuit's Judicial Council nevertheless filed a complaint against Judge Hastings with the Council that called for Judge Hastings to be disciplined for violating the Code of Judicial Conduct.[89] The complaint included a recommendation that the House of Representatives impeach Judge Hastings.[90]

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[85] *Hastings*, 735 F.2d at 1267–68.

[86] *Id.* at 1264–65.

[87] *Id.* at 1264.

[88] Reginald Stuart, *Federal Judge Is Acquitted of Bribe Charges in Miami*, N.Y. TIMES, Feb. 5, 1983, § 1, at 6.

[89] *Hastings*, 735 F.2d at 1264.

[90] *Id.* at 1263. Judge Hastings was impeached by the United States House of Representatives on August 3, 1988, by a vote of 413 to 3. Tom Kenworthy, *House Votes to Impeach Judge Hastings*, WASH. POST (Aug. 4, 1988), https://www.washingtonpost.com/archive/politics/1988/08/04/house-votes-to-impeach-judge-hastings/84d94212-8661-45bf-8b77-02f98b0874f5. Judge Hastings was removed from office on October 20, 1989, by the United States Senate on a sixty-nine to twenty-six vote, becoming the first federal official to have "been impeached and removed from office for a crime he had been acquitted of by a jury." Ruth Marcus,

Thereafter, a special committee composed of five Eleventh Circuit judges, including the Chief Judge, was established to investigate the complaint.[91] To aid in its investigation, the committee filed a petition with the United States District Court for the Southern District of Florida seeking to access Judge Hastings's indicting grand jury's records.[92] Judge Hastings vehemently opposed the committee's petition and filed a cross-petition in favor of the public disclosure of the grand jury records.[93] Despite the cross-petition asking for public disclosure, Judge Hastings argued, inter alia, that *any* disclosure of the records would be unlawful, as it would be in violation of Federal Rule of Criminal Procedure 6(e).[94] The district court, rejecting Hastings's arguments, granted the committee access to the grand jury materials because "Rule 6(e) did not provide the exclusive basis for releasing grand jury materials."[95] The district court, denying Hastings's petition for the public disclosure of grand jury records, held that the court, as the "supervisor of the grand jury," could "order disclosure under its inherent power" if "the interests of justice . . . outweighed the important and long-established policy of grand jury secrecy."[96]

On appeal, Judge Hastings argued that the court lacked the inherent authority to "set aside the usual secrecy surrounding grand jury records in favor of the Committee."[97] Judge Hastings primarily argued that Rule 6(e) does not allow for the disclosure under the circumstances surrounding his case, so the court could not make an exception to the rule of secrecy that generally applies to grand jury

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Senate Removes Hastings, WASH. POST (Oct. 21, 1989), https://www.washingtonpost.com/wp-srv/politics/campaigns/junkie/links/hastings102189.htm; *see also* David Johnston, *Hastings Ousted as Senate Vote Convicts Judge*, N.Y. TIMES, Oct. 21, 1989, § 1, at 1.

91 *Hastings*, 735 F.2d at 1263–64.

92 *Id.* at 1264.

93 *Id.*

94 *Id.*

95 *Id.* at 1265.

96 *Id.* (first citing Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 218–19 (1979); and then citing United States v. Procter & Gamble Co., 356 U.S. 677, 681–82 (1958)).

97 *Id.* at 1267.

proceedings.[98] While the district court acknowledged and accepted that the exceptions listed in Rule 6(e) did not apply to the matter before it, it rejected that Rule 6(e) "'provides the exclusive framework within which [the court's] discretion is to be exercised,'" and held that the court was entitled to fashion "'an alternate method for disclosure under its general supervisory authority over grand jury proceedings and records.'"[99] The Eleventh Circuit agreed.[100]

Of chief importance to later cases following its precedent, the court made two findings: (1) the source of the district court's inherent power comes from the courts' collective role in shaping the Federal Rules of Criminal Procedure as courts develop the laws,[101] and (2) the committee's investigation created an exceptional circumstance where it was appropriate for the district court to exercise its inherent power to disclose grand jury materials.[102] Ultimately, the Eleventh Circuit panel[103] unanimously held that the district court's granting of the committee's petition was not an abuse of discretion.[104]

Hastings set the stage for the Eleventh Circuit to allow for the extratextual disclosure of grand jury materials under what it perceived to be the district courts' inherent authority to do so.[105] Thereafter, district courts did just that, and the Eleventh Circuit reaffirmed its decision time and time again.

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[98] *Id*

[99] *Id.* at 1267–68 (quoting *In re* Petition to Inspect & Copy Grand Jury Materials, 576 F. Supp. 1275, 1280 (1983)).

[100] *Id.* at 1269 ("[W]e do not believe that the district court's power to permit the Committee access to the otherwise secret grand jury minutes must stand or fall upon a literal construction of the language of Rule 6(e).").

[101] *Id.* at 1268–69.

[102] *Id.* at 1269.

[103] Of particular interest, the panel that decided *Hastings* was comprised of three judges sitting by designation: Chief Judge Levin H. Campbell of the First Circuit; Judge Wilbur F. Pell, Jr. of the Seventh Circuit; and Judge Amalya Lyle Kearse of the Second Circuit. *Id.* at 1263.

[104] *Id.* at 1273.

[105] *Id.* at 1268–69.

B. *Boats Against the Current, Borne Back Ceaselessly into the Past:* United States v. Aisenberg

In *United States v. Aisenberg*, the court also considered whether the trial court abused its discretion in granting a petition for the release of grand jury transcripts outside Rule 6(e)'s enumerated exceptions to secrecy.[106] In *Aisenberg*, the parents of a missing five-year-old girl were indicted on seven counts (one count for conspiracy to make false statements to law enforcement and six counts for making false statements to law enforcement) following an investigation into their daughter's disappearance, which aroused suspicions against the Aisenbergs.[107]

The investigation into the Aisenbergs led to the application for electronic surveillance due to the alleged existence of probable cause that the defendants murdered or sold their child.[108] Following the surveillance, the United States served the Aisenbergs with subpoenas to appear before a grand jury, despite their stated intent to invoke their Fifth Amendment right against self-incrimination if summoned.[109] While the Aisenbergs moved to suppress the evidence gathered against them, the court never considered the motion because the United States dismissed the indictment.[110]

The Aisenbergs moved for an award for attorney's fees and other litigation expenses, which the district court granted.[111] In the same order, however, the district court ordered that the government file and disclose all grand jury transcripts based not on any exception listed in Rule 6(e) but, rather, pursuant to the court's inherent authority.[112]

The Eleventh Circuit ultimately rejected the district court's disclosure on the basis that the district court could not show that "the material [sought in the request was] needed to avoid a possible injustice in another judicial proceeding;" "the need for disclosure

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106 United States v. Aisenberg, 358 F.3d 1327, 1346–52 (11th Cir. 2004).
107 *Id.* at 1331–32.
108 *Id.*
109 *Id.* at 1332.
110 *Id.* at 1333–34.
111 *Id.* at 1335.
112 *Id.* at 1336–1338.

[was] greater than the need for continued secrecy;" and "[the] request [was] structured to cover only material so needed."[113] In doing so, the Eleventh Circuit set an important precedent: Grand jury materials must only be disclosed through its extratextual inherent authority when (1) possible injustice would occur in another judicial proceeding if no disclosure was authorized, (2) the countervailing need for disclosure outweighs the need for secrecy, and (3) the request is narrowed such that only the material needed is disclosed.[114]

C. *What's Past is Prologue:* Pitch v. United States

1. THE THIRTEENTH STROKE OF THE CLOCK: THE FIRST *PITCH* PANEL

Pitch v. United States (*Pitch I*) was the last decision in the Eleventh Circuit where the court found that a district court within its jurisdiction appropriately withheld the release of grand jury materials outside the exceptions to grand jury secrecy enumerated in Rule 6(e).[115] In *Pitch I*, the Eleventh Circuit found that district courts have the "'inherent power beyond the literal wording of Rule 6(e)' to disclose grand jury material not otherwise covered by the exceptions,"[116] upholding its grand jury disclosure precedent set in *Hastings*,[117] over the objection of the United States.[118]

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[113] *Id.* at 1348.

[114] *Id.*

[115] Pitch v. United States (*Pitch I*), 915 F.3d 704, 713 (11th Cir. 2019), *vacated*, 953 F.3d 1226 (11th Cir. 2020).

[116] *Id.* at 708 (quoting *In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1268 (11th Cir. 1984)).

[117] *Hastings*, 735 F.2d at 1268.

[118] *Pitch I*, 915 F.3d at 707–08 ("The government argues that the district court erred in invoking its inherent authority to disclose the grand jury records.").

Pitch I, however, unlike *Hastings*[119] or *Aisenberg*,[120] did not involve a request for grand jury materials directly related to a former criminal defendant such that they were parties in the operative proceeding to release grand jury materials.[121] In *Pitch I*, historian and author Anthony Pitch petitioned the Middle District of Georgia to unseal grand jury records revolving around the last mass lynching in American history.[122] In the Eleventh Circuit's own words, the deplorable actions of unknown persons and the tragic events that unfolded at Moore's Ford are briefly summarized:

> In 1946, a crowd of people in Walton County, Georgia gathered as two African American couples were dragged from a car and shot multiple times. Many consider this event, known as the Moore's Ford Lynching, to be the last mass lynching in American History. Racial tensions in Georgia were high. African American citizens were allowed to vote in a Georgia Democratic Party primary for the first time that year. The murders occurred shortly after the primary and immediately garnered national media attention. National outrage, including condemnation from then Special Counsel to the NAACP Thurgood Marshall, ultimately led President Harry Truman to order an FBI investigation. In late 1946, a district court judge in Georgia convened a grand jury. But

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[119] *See Hastings*, 735 F.2d at 1264 (appeal of order granting an Eleventh Circuit investigatory committee's request to receive the grand jury materials presented to the indicting grand jury as it related to former criminal defendant, Federal District Court Judge Alcee Hastings).

[120] *See* United States v. Aisenberg, 358 F.3d 1327, 1336–37 (11th Cir. 2004) (appeal of order granting disclosure of grand jury materials to former criminal defendants where government dismissed charges against them).

[121] *See Pitch I*, 915 F.3d at 707 (appeal of order granting petitioner-historian's request to unseal grand jury records revolving around an unsolved crime from 1946 of great historical importance).

[122] *Id.* ("Over seven decades later, Anthony Pitch, an author and historian, petitioned the Middle District of Georgia for an order unsealing the grand jury transcripts.").

> after sixteen days of witness testimony, no one was ever charged. The case remains unsolved.[123]

The historical significance of the Moore's Ford Lynching, what many consider to be the very last mass lynching in American history, cannot be overstated. Specifically atrocious is that the bigoted few who committed such heinous crimes were never indicted by a grand jury.[124] While not expressly stated in the court's opinion, Mr. Pitch, "an accomplished author and historian,"[125] undoubtedly sought to uncover at least some of the mystery surrounding the Moore's Ford Lynching while researching for his book about the event.[126] As such, the district court granted Mr. Pitch's petition and disclosed the requested grand jury records.[127] The United States appealed, arguing that the district court erred in its disclosure of the grand jury material based on its inherent powers to disclose such materials under exceptional circumstances.[128]

While the Eleventh Circuit affirmed the district court's decision, it did so seemingly because it was forced to follow its own precedent.[129] The court held that (1) it had no authority to disclose grand jury materials pursuant to its statutory authority under Federal Rule of Criminal Procedure 6(e),[130] (2) it had the "'inherent power beyond the literal wording of Rule 6(e)' to disclose grand jury material

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123 *Id.*

124 *Id.*

125 *Id.* at 711.

126 *Id.* at 707.

127 *Id.* at 707.

128 *Id.* at 707–10.

129 *See id.* at 707 ("Because we are bound by our decision in *Hastings*, we affirm."). In concluding as it had, the court relied upon its decision in *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1174 (11th Cir. 2018) (per curiam) (quoting *Fla. League of Pro. Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996)) for the proposition that "our precedent—in particular, our precedent about precedent—is clear: '[W]e are not at liberty to disregard binding case law that is . . . closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.'"

130 *Pitch I*, 915 F.3d at 708.

not otherwise covered by the exceptions,"[131] and (3) the historical significance of the event provided an exception such that the district court did not err in disclosing the materials.[132]

Addressing the historical significance of the disclosure, the Eleventh Circuit adopted and applied a non-exhaustive list of factors a trial court should consider when choosing whether to disclose grand jury materials due to their historical importance, borrowed from *In re Petition of Craig*.[133] In *Pitch I*, the court considered the following factors:

> (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.[134]

Weighing these factors against the government's countervailing interest in maintaining the sanctity of grand jury secrecy, the court concluded that Mr. Pitch's petition was of significant historical importance, meaning that an exceptional circumstance existed warranting the release of the requested grand jury records.[135] Despite the historical significance of the Moore's Ford Lynching, the Eleventh

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131 *Id.* (quoting *In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1268 (11th Cir. 1984)).

132 *Id.* at 710, 713.

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

134 *Pitch I*, 915 F.3d at 711 (quoting *Craig*, 131 F.3d at 106).

135 *Id.* at 713.

Circuit—under the current regime—was mistaken in ordering the release of otherwise secret grand jury materials through the extra-textual application of an "exceptional circumstance" exception to Rule 6(e).[136]

But *Pitch I* was not unanimous. Judge Jordan concurred and joined in the court's opinion due to the binding nature of the court's precedent in *Hastings* but warned against rehearing that precedent en banc.[137] Judge Jordan outlined four reasons why the court should not reconsider its precedent en banc.[138] First, the Eleventh Circuit's conclusion is not solely its own.[139] Second, secrecy was not always seen as an absolute.[140] Third, the test found in *Craig* is generally applicable such that courts could reasonably follow its guidance.[141] Finally, because the attempt to amend Rule 6 was unsuccessful, the court should not sway against its precedent.[142] Judge Graham dissented, stating that he would have reversed the district court's disclosure on the basis that district courts do not have the inherent authority to release grand jury records outside the exceptions found in Rule 6(e).[143]

2. TO ABROGATE, OR NOT TO ABROGATE, THAT IS THE QUESTION: REHEARING *PITCH* EN BANC

Despite Judge Jordan's reluctance to revisit *Hastings* en banc,[144] in *Pitch II*, the Eleventh Circuit vacated *Pitch I* and granted a rehearing en banc.[145] In choosing to rehear *Pitch I* en banc, the Eleventh

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136 *See id.*
137 *Id.* at 713 (Jordan, J., concurring).
138 *Id.* at 713–15.
139 *Id.* at 713.
140 *Id.* at 714.
141 *Id.*
142 *Id.* at 715.
143 *Id.* at 716 (Graham, J., dissenting).
144 *Id.* at 713 (Jordan, J., concurring).
145 *See* Pitch v. United States (*Pitch II*), 925 F.3d 1224, 1224–25 (11th Cir. 2019).

Circuit presented itself the opportunity to move away[146] from *Hastings* and reject the notion that district courts may disclose grand jury materials in circumstances other than those found in Rule 6(e)(3). The Eleventh Circuit seized its moment,[147] but it fell just short of effectuating widespread change.

3. NORMALCY STRIKES BACK: *PITCH* AFTER REHEARING EN BANC

Judge Gerald Tjoflat, writing for the majority of the en banc court, finally held that Rule 6(e)'s list of exceptions to grand jury secrecy is exhaustive.[148] In *Pitch III*, the Court succinctly held that "[d]istrict courts may only authorize the disclosure of grand jury materials if one of the five exceptions listed in Rule 6(e)(3)(E) applies; they do not possess the inherent, supervisory power to order the release of grand jury records in instances not covered by the rule."[149] While the court's decision to move away from *Hastings* and follow Rule 6(e)'s plain text is laudable, the en banc court missed an opportunity to call for Rule 6(e)'s amendment, especially considering the Supreme Court seemingly avoided the issue.[150] This is not to say, however, that the court did not have the opportunity to consider that it could expressly recommend that the Rules Committee propose an amendment to Rule 6(e)(3) that would allow the disclosure of historically significant grand jury materials; it did. In fact, and most interestingly, Judge Jordan made such a recommendation,

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[146] *See, e.g.*, United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." (first citing Cargill v. Tupin, 120 F.3d 1366, 1386 (11th Cir. 1997); and then citing United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993))); *Cargill*, 120 F.3d at 1386 ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." (citing United States v. Woodard, 938 F.2d 1255, 1258 (11th Cir. 1991))).

[147] *See* Pitch v. United States (*Pitch III*), 953 F.3d 1226, 1241 (11th Cir. 2020) (ruling that Rule 6(e)'s list of exceptions to grand jury secrecy was exhaustive).

[148] *See generally id.* at 1228–42 (majority opinion fails to recommend that Advisory Committee on Criminal Rules amend Rule 6(e) to provide district courts with statutory authority to disclose grand jury materials of historical significance).

[149] *Id.* at 1241.

[150] *Id.* at 1234–37.

but no other judge joined in his concurrence.[151] As Judge Jordan expressly stated, "I therefore urge the Advisory Committee on Criminal Rules to consider whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance and, if so, under what circumstances."[152]

Following Judge Jordan's lead, this Article argues that the Advisory Committee on Criminal Rules amend Rule 6(e)(3) to provide for a historical significance exception to grand jury secrecy. Before the Article does so, however, it looks to how other circuits have resolved this issue.

IV. TALLYING THE SPLIT AMONG THE CIRCUITS

While the Eleventh Circuit corrected its course on the issue,[153] it is worth noting that the District of Columbia Circuit had expressly rejected an interpretation of the extratextual in between *Pitch I* and *Pitch III*.[154] But the Eleventh Circuit was certainly not alone in its interpretation of its authority to go beyond the explicit grand jury disclosure constraints found in Rule 6(e).[155] This Part reviews the other circuit courts of appeals' interpretations of Rule 6(e)'s exceptions before ultimately proposing an amendment to Rule 6(e)(3) in the final Part.[156]

A. *Even the Darkest Night Will End: The District of Columbia, Eighth, and Sixth Circuits*

With its decision in *Pitch III*, the Eleventh Circuit joined the District of Columbia Circuit, Eighth, and Sixth Circuits in rejecting an extratextual inherent authority to release grand jury materials.[157] This Article reviews each circuit's seminal decision in turn:

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[151] *Id.* at 1248–51 (Jordan, J., concurring in the judgment).

[152] *Id.* at 1250.

[153] *See Pitch III*, 953 F.3d at 1241.

[154] *See infra* notes 157–80 and accompanying text.

[155] *Infra* Section IV.B–C.

[156] *Infra* Part V.

[157] *See* McKeever v. Barr, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020) (mem.); United States v. McDougal, 559 F.3d 837 (8th Cir. 2009); *In re* Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991).

1. THE DISTRICT OF COLUMBIA CIRCUIT

In *McKeever v. Barr*, the D.C. Circuit held that no inherent authority to release grand jury records exists outside the exceptions listed in Federal Rule of Criminal Procedure 6(e).[158] In rendering its decision, the court, in a 2-1 decision, explicitly rejected the Eleventh Circuit's pre-*Pitch III* precedent, citing to both *Hastings* and *Pitch I* as antitheses to the court's decision.[159]

In *McKeever*, similarly to the court in *Pitch*, the D.C. Circuit was tasked with determining whether the district court was within its discretion to deny a petition for the disclosure of grand jury records related to a supposed historically significant event.[160] Specifically, the petitioner, Stuart McKeever, who was researching and writing about the disappearance of Columbia University professor Jesús de Galíndez Suárez in 1956, requested grand jury records in a case against a former FBI agent and CIA lawyer who the petitioner believed was behind the disappearance.[161] The district court denied McKeever's request, despite its "'inherent supervisory authority' to disclose grand jury matters that are historically significant."[162] The district court applied the very same non-exhaustive multifactor test found in *Craig*[163] and adopted in *Pitch*;[164] however, while "several of the nine non-exhaustive factors favored disclosure, the district court read McKeever's petition as seeking release of all the grand jury 'testimony and records in the Frank case' . . . [as] overbroad."[165]

While the D.C. Circuit affirmed the district court's order,[166] it did so on different grounds, particularly because the district courts do not have the inherent authority to release grand jury materials outside the express exceptions listed in Federal Rule of Criminal

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158 *McKeever*, 920 F.3d at 850.
159 *Id.*
160 *Id.* at 843–44.
161 *Id.* at 843.
162 *Id.* at 844.
163 *In re* Petition of Craig, 131 F.3d 99, 106 (2d Cir. 1997).
164 Pitch v. United States (*Pitch I*), 915 F.3d 704, 711 (11th Cir. 2019) (quoting *Craig*, 131 F.3d at 106), *vacated*, 953 F.3d 1226 (11th Cir. 2020).
165 *McKeever*, 920 F.3d at 844.
166 *Id.* at 850.

Procedure 6(e).[167] The court noted that allowing for such an expansive interpretation of Rule 6(e)(3) "would render the detailed list of exceptions merely precatory and impermissibly enable [district] court[s] to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure."[168]

Despite a seemingly unequivocal rejection of extratextual authority to disclose grand jury materials beyond the confines of Rule 6(e), the D.C. Circuit's decision was not unanimous.[169] Judge Srinivasan respectfully dissented on the grounds that the D.C. Circuit was bound by its decision in *Haldeman v. Sirica*[170] and, therefore, could not reject the understanding that "a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions."[171] Judge Srinivasan concluded by noting that, due to the court's decision in *Haldeman*, the court erred in questioning the district court's inherent authority to go beyond Rule 6(e)'s exceptions.[172]

Subsequently, McKeever petitioned the Supreme Court for a writ of certiorari;[173] however, the Court denied the petition.[174] In the Court's statement denying McKeever's petition, Justice Breyer acknowledged the salient conflict among the circuit courts of appeal as to whether district courts may wield inherent authority as ripe for consideration;[175] nevertheless, the court refused to grant McKeever

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[167] *Id.*

[168] *Id.* at 845.

[169] *See id.* at 853–55 (Srinivasan, J., dissenting).

[170] *See generally* Haldeman v. Sirica, 501 F.2d 714, 715 (D.C. Cir. 1974) (holding that district courts retain discretion to release grand jury materials to a House Committee in the specific context of an impeachment proceeding).

[171] *McKeever*, 920 F.3d at 855 (Srinivasan, J., dissenting).

[172] *Id.*

[173] *See* Supreme Court Docket No. 19-307 (Sept. 5, 2019), available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-307.html.

[174] McKeever v. Barr (*McKeever II*), 140 S. Ct. 597, 597 (2020) (denying petition for writ of certiorari).

[175] *See id.* at 598 ("[The D.C. Circuit's] decision is in conflict with the decisions of several other Circuits, which have indicated that district courts retain inherent authority to release grand jury material in other appropriate cases." (first citing Carlson v. United States, 837 F.3d 753, 766–67 (7th Cir. 2016); then citing *In re* Petition of Craig, 131 F.3d 99, 105 (2d Cir. 1997); and then citing *In re*

a writ of certiorari.[176] Instead, the Court highlights the importance of the question before it[177] and states that, "the Rules Committee both can and *should* revisit [the question]."[178] Therefore, despite the important roles grand juries play in contemporary American politics[179] and the public's interest in obtaining grand jury materials to accurately document historically significant events,[180] the Court left the question as to whether district courts may authorize the release of grand jury materials outside of Rule 6 in the hands of the Rules Committee.

Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1271–72 (11th Cir. 1984))).

[176] *See id.* at 597 ("The petition for a writ of certiorari is denied.").

[177] *Id.* at 598 ("Whether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules . . . is an important question.").

[178] *Id.* (emphasis added).

[179] *See, e.g.*, Spencer S. Hsu, *U.S. Judge Denies News Media Request for Mueller Grand Jury Materials, Citing Recent Appeals Court Ruling*, WASH. POST (Sept. 26, 2019, 11:33 PM), https://www.washingtonpost.com/local/legal-issues/us-judge-denies-news-media-request-for-mueller-grand-jury-materials-citing-recent-appeals-court-ruling/2019/09/26/6696994a-e09e-11e9-b199-f638bf2c340f_story.html (noting that a federal judge denied a petition for the release of special counsel Robert Mueller's final report based on the District of Columbia Circuit's decision in *McKeever*, which rejected district courts' inherent authority to release grand jury materials); Brianne Gorod & Ashwin Phatak, *How Congress Can Get Around a New Ruling That Threatens the Release of the Mueller Report*, SLATE (Apr. 5, 2019, 5:56 PM), https://slate.com/news-and-politics/2019/04/mckeever-barr-mueller-report-grand-jury.html (arguing that, while the District of Columbia Circuit's decision in *McKeever* was in error, Congress may still be able to get grand jury materials from special counsel Robert Mueller's investigation).

[180] *See, e.g.*, Miami Herald Pub. Co. v. Marko, 352 So. 2d 518, 523 (Fla. 1977) ("Implicit in the power of the grand jury to investigate and expose official misconduct is the right of the people to be informed of its findings."); 2011 Letter Recommending Amendment to Rule 6, *supra* note 13, at 1 (acknowledging "the public's legitimate interest in preserving and accessing the documentary legacy of our government"); Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PENN. L. REV. 73, 90 (1987) ("The grand jury report can therefore be viewed as a democratic device furthering the public's right to know about government and holding public officials accountable for noncriminal violations of the public trust").

2. THE EIGHTH CIRCUIT

In *United States v. McDougal*, the Eighth Circuit affirmed the Eastern District of Arkansas's denial of a request to disclose grand jury records that fell outside the list of exceptions set forth in Rule 6(e)(3).[181] There, the court held that the petitioner, a witness who was called to testify before a grand jury and was charged with refusing to testify,[182] was not entitled to obtain records from her civil contempt proceeding in which she was charged with refusing to testify before a grand jury because her request did not fall "under one of the enumerated exceptions to the grand jury requirement [outlined in Rule 6(e)(3)]."[183]

3. THE SIXTH CIRCUIT

In *In re Grand Jury 89-4-72*, the Sixth Circuit considered whether the Eastern District of Michigan erred in granting "the Michigan Attorney Grievance Commission's [(the "MAGC")] request for disclosure of all evidence presented to the grand jury that might relate to possible criminal or unethical conduct by a Michigan attorney" it was investigating.[184] The district court authorized the disclosure to the MAGC pursuant to the predecessor to Rule 6(e)(3)(E)(i),[185] which provides that a grand jury matter may be disclosed "preliminarily to or in connection with a judicial proceeding . . . ."[186] After finding that the MAGC's investigation and disciplinary proceedings were administrative and not judicial in nature,[187] the Sixth Circuit expressly stated that "without an unambiguous statement to the contrary from Congress, [courts] *cannot, and*

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181 United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009).

182 *Id.* at 838.

183 *Id.* at 841.

184 *In re* Grand Jury 89-4-72, 932 F.2d 481, 481 (6th Cir. 1991).

185 *Id.* at 483.

186 Fed. R. Civ. P. 6(e)(3)(E)(i).

187 *In re Grand Jury 89-4-72*, 932 F.2d at 488 ("[H]aving chosen an administrative scheme to regulate the practice of law, [the MAGC] has curtailed its access to grand jury materials because as an administrative body with only discretionary review by the state supreme court, the [MAGC] falls within the same category as

must not, breach grand jury secrecy for any purpose other than those embodied by [Rule 6]."[188]

B. Misinterpretation Loves Company: The Seventh and Second Circuits

Both the Seventh and Second Circuits embrace an extratextual reading of Rule 6(e)(3).[189] Both courts have found that Rule 6(e)(3) provides a "permissive, not exclusive,"[190] or otherwise "non-exhaustive list of factors that a trial court might want to consider . . . ."[191] This Article addresses both circuit's decisions in turn:

1. THE SEVENTH CIRCUIT

Akin to the Eleventh Circuit's pre-March 2020 precedent, the Seventh Circuit in *Carlson v. United States* held that "[t]he grand jury is not a free-floating institution, [but rather] an 'arm of the court,' and thus . . . under the supervisory authority of the district court."[192] Moreover, the Seventh Circuit held that Federal Rule of Criminal Procedure 6(e) "is permissive, not exclusive,"[193] and that, ultimately, district courts have the "power to exercise [their] discretion to determine whether to release . . . requested grand jury materials."[194]

Carlson, too, involved a compelling narrative upon which the petitioners requested grand jury materials: to uncover the intricacies of the criminal investigation into the Chicago Tribune following its publication of its June 7, 1942, article revealing that the United States had cracked Imperial Japanese codes.[195] The district court

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do all administrative agencies which are denied access to federal grand jury material . . . even though the [MAGC's] purview includes the regulation of the right to practice law.").

188 *Id*.

189 *See* Carlson v. United States, 837 F.3d 753, 761 (7th Cir. 2016); *In re* Petition of Craig, 131 F.3d 99, 106 (2d Cir. 1997).

190 *Carlson*, 837 F.3d at 767.

191 *Craig*, 131 F.3d at 106.

192 *Carlson*, 837 F.3d at 761.

193 *See id.* at 763.

194 *Id.* at 767.

195 *Id.* at 757.

granted the petition,[196] relying on and going through the non-exhaustive list of factors outlined in *Craig*,[197] and the circuit court affirmed.[198] In doing so, the Seventh Circuit "join[ed] with [its] sister circuits in holding that Rule 6(e)(3)(E) does not displace that inherent power[;] it merely identifies a permissive list of situations where that power can be used."[199]

Again, however, the Seventh Circuit's opinion was not unanimous. Judge Sykes dissented on the grounds that Federal Rule of Criminal Procedure 6 "comprehensively governs the conduct of grand-jury proceedings, and subpart (e) of the rule requires that all matters occurring before the grand jury must be kept secret, subject to certain narrow exceptions."[200] Like Judges Graham,[201] Ginsberg, and Katsas (the majority in *McKeever*),[202] Judge Sykes reads the exceptions outlined in Rule 6(e)(3)(E) as a limitation on district courts' authority to disclose grand jury materials[203]—in line with the correct reading of Rule 6 in its current state.

2. THE SECOND CIRCUIT

Of seemingly grand importance to courts wanting to expand judicial authority over the release of grand jury materials, the Second Circuit's decision in *In re Petition of Craig*[204] authorized district courts to exceed the exceptions listed in Federal Rule of Criminal Procedure 6 so long as special circumstances existed that warranted release.[205] The court arrived at this conclusion despite acknowledging that "[t]here is a tradition in the United States, a tradition that is

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196 *Id.*

197 *See In re* Petition of Craig, 131 F.3d 99, 106 (2d Cir. 1997).

198 *Carlson*, 837 F.3d at 767.

199 *Id.*

200 *Id.* (Sykes, J., dissenting).

201 Pitch v. United States (*Pitch I*), 915 F.3d 704, 715–17 (11th Cir. 2019) (Graham, J., dissenting), *vacated,* 953 F.3d 1226 (11th Cir. 2020).

202 McKeever v. Barr, 920 F.3d 842, 843–50 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020).

203 *See Carlson*, 837 F.3d at 769 (Sykes, J., dissenting).

204 *In re* Petition of Craig, 131 F.3d 99 (2d Cir. 1997).

205 *See id.* at 103.

'older than our Nation itself,' that proceedings before a grand jury shall generally remain secret."[206]

In *Craig*, a doctoral candidate petitioned the district court to release grand jury materials related to the investigation of a former Assistant Secretary of the Treasury, who was accused of being a communist spy in 1948.[207] Mr. Craig, as a third party petitioner, based his request, not on any specific exception listed in Rule 6(e), but rather under the court's "'inherent supervisory authority' over grand juries to release the [materials] because of the public interest in the document[s]."[208]

While the Second Circuit affirmed the denial of the petitioner's request and confirmed that district courts enjoy the inherent authority to release grand jury materials,[209] the court set out the aforementioned and consistently relied upon[210] "non-exhaustive list of factors that a trial court might want to consider when confronted with . . . highly discretionary and fact-sensitive 'special circumstances' motions . . . ."[211] These factors intend to balance the importance of the secrecy of grand jury proceedings while acknowledging that, sometimes, disclosures are necessary, despite the requirements for secrecy.[212] The Second Circuit's fundamental flaw, however, is its conclusion that district courts may release grand jury materials outside the exceptions listed in Rule 6 in its current form.[213]

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206 *Id.* at 101 (quoting *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973)).

207 *Id.*

208 *Id.*

209 *Id.*

210 *See, e.g.*, Pitch v. United States (*Pitch I*), 915 F.3d 704, 711 (11th Cir. 2019) (quoting *Craig*, 151 F.3d at 106 ("The district court asserted it has 'inherent supervisory authority' to disclose grand jury matters that are historically significant, but nevertheless denied McKeever's request after applying the multifactor test set out in [*Craig*].")), *vacated,* 953 F.3d 1226 (11th Cir. 2020); McKeever v. Barr, 920 F.3d 842, 844 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020).

211 *Craig*, 131 F.3d at 106.

212 *See Craig*, 141 F.3d at 106–07.

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

C. *A Distinction Without a Difference: The First Circuit*

In *In re: Petition for Order Directing Release of Records* (*Lepore*),[214] the First Circuit punted the question whether courts in its jurisdiction have an inherent authority to disclose grand jury materials in circumstances not enumerated in Rule 6(e)(3).[215] There, the First Circuit was tasked with considering whether the District of Massachusetts erred by releasing archived grand jury materials related to the grand jury investigations concerning the Pentagon Papers to a historian, Petitioner Jill Lepore.[216] While the First Circuit ultimately reversed the district court, finding that the district court was not authorized to release grand jury materials under the circumstances in that particular case,[217] the court expressly left open the exact extent to which courts within its jurisdiction have an inherent authority to disclosure grand jury materials outside the circumstances outlined in Rule 6(e)(3).[218]

Ms. Lepore sought certain grand jury materials concerning a political scientist who received a grand jury subpoena in connection with the Pentagon Papers investigation.[219] Ms. Lepore initially sought the information through a request pursuant to the Freedom of Information Act ("FOIA"),[220] which was denied "[i]n short order"[221] pursuant to § 552(b)(3), which provides that an agency need not comply with a FOIA request when the matter is "specifically exempted form disclosure by statute . . . if that statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ."[222] "Rather than appealing the denial of

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[214] *In re* Petition for Order Directing Release of Records (*Lepore*), 27 F.4th 84 (1st Cir. 2022).

[215] *Id.* at 88.

[216] *Id.* at 86–87.

[217] *Id.* at 95.

[218] *Id.* at 94 ("[W]e need not and do not define the exact contours of a court's inherent power to disclosure grand jury materials when the fair administration of justice in a proceeding is at issue.").

[219] *Id.* at 87.

[220] 5 U.S.C. § 552.

[221] *Lepore*, 27 F.4th at 87.

[222] § 552(b)(3)(A(ii).

her FOIA request," Ms. Lepore petitioned the District of Massachusetts to release the requested grand jury materials "pursuant to . . . [Rule] 6(e)."[223] But Ms. Lepore did not argue that Rule 6(e) expressly authorized the disclosure she requested; rather, she argued that the district court possessed the inherent authority to disclose the records sought.[224] The district court agreed and relied on two rationales: "First, the court held that Rule 6(e)(6) authorized the disclosure[s, and s]econd, it held that, apart from Rule 6, the court's inherent authority authorized the disclosure because of the records' possible interest to historians and the absent of any remaining practical countervailing considerations."[225] The First Circuit outright rejected the district court's reading of Rule 6(e)(6) as it "does not directly address the questions of when and how disclosure is authorized."[226]

The court then turned to address whether courts have an "inherent authority to release the records in circumstances not enumerated in Rule 6(e)(3)."[227] Ultimately, the court did not squarely address the issue.[228] Instead, the Court merely assumed without deciding that courts possess such authority[229] and held that district courts within its jurisdiction may not disclose grand jury materials due to their claimed historical significance.[230]

The First Circuit framed the issue before it as a separation of powers issue.[231] It flatly rejected the notion that Article III judges

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223 *Lepore*, 27 F.4th at 87.

224 *Id.*

225 *Id.*

226 *Id.* at 88.

227 *Id.*

228 *See id.* at 88–95.

229 *Id.* at 92 ("The purposes for which a court may disclose grand jury materials under Rule 6(e) invariably relate to administrating judicial proceedings, protecting the integrity of the legal process, and facilitating the prosecution of a criminal offense." (citing FED. R. CIV. P. 6(e)(3)(E))).

230 *Id.* at 88 ("[E]ven assuming such authority exists, it does not empower a court to order disclosure based only on a finding that historical interest in grand jury materials outweighs any countervailing considerations.").

231 *Id.* at 93.

should determine whether specific grand jury materials are historically significant.[232] Rather, it stated that "the gauging of historical significance . . . [is] an endeavor . . . better suited to Congress, or the Rules Committees."[233]

Ultimately, the First Circuit accepted that courts maintain some inherent authority to disclose grand jury materials outside the circumstances set forth in Rule 6(e)(3). But this should come as no surprise when considering the First Circuit has held that Rule 6(e)(2)(A)'s list of persons who must not disclose grand jury matters was a non-exhaustive list.[234]

V. A PROPOSAL: AMEND, DO NOT BEND THE RULE

The disagreement among the circuit courts of appeals reveals one great truth: The circumstances under which courts may disclose grand jury materials enumerated in Rule 6(e)(3) do not meet the moment. Courts seem want for more power to disclose grand jury materials concerning historically significant investigations—so much so that courts have been forced to rely on an extratextual inherent authority to disclose grand jury materials outside those circumstances enumerated in Rule 6(e)(3).[235] And yet, Rule 6(e)(3) remains unamended.[236] While each court that decides it has inherent authority to go beyond the grand jury disclosure exceptions listed in Rule 6(e)(3) does so in error, the courts are right to want such authority—they should have it—but under the current regime, they do not.

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[232] *Id.* ("[T]he more apt question, in our view, is whether a federal judge should be the one to decide and act on that question, and in so doing resolve the additional questions that must be answered to limn the boundaries of what is disclosable based on assessments of historical significance.").

[233] *Id.* at 94.

[234] *In re* Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005) ("We now decide that [Rule 6(e)(2)(A)'s] phrasing can, and should, accommodate rare exceptions premised on inherent judicial power.").

[235] *See, e.g.*, *Pitch I*, 915 F.3d 704, 704 (11th Cir. 2019); Carlson v. United States, 837 F.3d 753, 763–67 (7th Cir. 2016); *In re* Petition of Craig, 131 F.3d 99, 99 (2d Cir. 1997).

[236] *Lepore*, 27 F.4th at 93 n.9.

District courts are faced with difficult requests for disclosure of grand jury materials, as exemplified in *Pitch*.[237] *Pitch* involves a request for grand jury materials to uncover truth in one of the most gruesome and tragic events in American history,[238] and yet, as it stands, Rule 6(e)(3) ties a district court judge's hands (at least it is meant to) when it should facilitate the public consumption of historically important information.[239] As a result, seeing the overly restrictive nature of the disclosure exceptions, the Eleventh Circuit relied on its precedent, which allowed for the extratextual disclosure of grand jury materials,[240] and granted Mr. Pitch's petition under its supposed "inherent authority."[241] While the Eleventh Circuit was wrong to initially affirm the district court's order—and the court's decision in *Pitch I* was appropriately reversed—the Rule 6(e) should be amended to allow district courts to disclose grand jury materials upon a showing that the materials are of historical significance.

The Advisory Committee on the Criminal Rules, however, has at least twice rejected such amendment proposals, despite courts' willingness and ability to disclose historically significant grand jury materials and the public's interest in contextualizing and memorializing those events.[242] Most recently, the Advisory Committee on the Criminal Rules accepted a subcommittee's recommendation that Rule 6(e)(3) not be amended to adopt a proposal that would allow a court to disclose grand jury materials older than forty years that it expressly found could be released without outweighing the public interest in retaining secrecy.[243] The Advisory Committee on the

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[237] *See, e.g.*, Pitch I, 915 F.3d at 707.

[238] *Id.*

[239] *See supra* note 180 and accompanying text.

[240] *See In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1268 (11th Cir. 1984) ("The district court's belief that it had inherent power beyond the literal wording of Rule 6(e) is amply supported.").

[241] *Pitch I*, 915 F.3d at 707.

[242] *E.g.*, 2011 Letter Recommending Amendment to Rule 6, *supra* note 13; Report of the Judicial Conference, Committee on Rules of Practice and Procedure 77–80 (Apr. 28, 2022), https://www.uscourts.gov/sites/default/files/criminal_rules_agenda_book_april_28_2022_1.pdf [hereinafter April 2022 Report of the Judicial Conference] (discussing rejected 2020 proposal to amend Rule 6(e)(3) to allow for disclosure of grand jury materials of historical significance).

[243] April 2022 Report of the Judicial Conference, *supra* note 242, at 78–79.

Criminal Rules cited concerns regarding, *inter alia*, the "undermining" of the grand jury as "an institution critical to the criminal justice system" and "the increased risk[s] to witnesses and their families that would result from even a narrowly tailored amendment . . . ."[244] It continued by stating that, "[a]lthough many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases."[245] Respectfully, the Advisory Committee is mistaken in this regard.[246]

True, an amended Rule 6(e)(3) must direct the precise circumstances under which a court may wield its discretion to disclose the requested grand jury materials. Otherwise, courts would be free to interpret the amended Rule 6(e)(3) as they please, which would lead to arbitrary results that vary wildly jurisdiction to jurisdiction.[247] For instance, an amended Rule 6(e)(3) could incorporate the "non-exhaustive list of factors" set forth in the Second Circuit's opinion in

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[244] *Id.* at 79.

[245] *Id.* at 80.

[246] Indeed, "the concept of grand jury secrecy is not as neat as" the Advisory Committee on the Criminal Rules suggests. *See* Pitch v. United States (*Pitch III*), 953 F.3d 1226, 1248 (11th Cir. 2020) (Jordan, J., concurring in the judgment).

[247] To be sure, there are those who propose amending Rule 6(e) to include a "catch-all" provision that allows district courts to authorize the disclosure of grand jury materials in unidentifiable "exceptional circumstances" based on courts' inherent supervisory authority over grand juries. *See* Letter from Allison M. Zieve, Dir., Pub. Citizen Litig. Grp., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc. 11 (Mar. 2, 2020), https://www.citizen.org/wp-content/uploads/PCLG-letter-to-Rules-Committee.pdf (proposing an amendment to Rule 6(e) that would expressly authorize disclosure of grand jury materials in exceptional circumstances pursuant to "whatever inherent authority the district courts possess to unseal grand-jury record . . . ."); H. Brent McKnight, Jr., Note, *Keeping Secrets: The Unsettled Law of Judge-Made exceptions to Grand Jury Secrecy*, 70 DUKE L.J. 451, 491 (2020) ("The Advisory Committee should add a residual exception to Rule 6(e) rather than an exception focused only on historical grand jury materials. A residual exception would provide courts with discretion to order disclosure of historically significant records and offer flexibility in other unforeseen circumstances."). I respectfully submit that such a proposed "exception" would swallow the rule of grand jury secrecy.

Craig, which encapsulates a great deal of the countervailing interests between maintaining secrecy and disclosure.[248]

A proposed amendment should require that a petitioner requesting grand jury materials of exceptional historical significance expressly state the reasons for making such a request.[249] The burden must be on the petitioner to describe with reasonable particularity what materials are requested and show that those materials concern a historically significant event.[250] To this end, this Article respectfully disagrees with the First Circuit that gauging historical significance is "a task better suited to Congress or the Rules Committees."[251] Rather, this Article posits that courts are uniquely positioned to make determinations concerning historical significance as they are, from time to time, expected to do in other similarly serious analyses.[252]

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[248] *In re* Petition of Craig, 131 F.3d 99, 106 (2d Cir. 1997).

[249] *See id.* ("(i) [T]he identity of the party seeking disclosure . . . .").

[250] *See id.* ("(iii) [W]hy disclosure is being sought in the particular case; (iv) what specific information is sought for disclosure . . . .").

[251] *Lepore*, 27 F.4th 84, 94 (1st Cir. 2022).

[252] *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022) ("In keeping with [*District of Columbia v.*] *Heller*, [554 U.S. 570 (2008),] we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, *the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation*. *Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude* that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" (emphasis added) (citing Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 (1961))); Coal. Against a Raised Expressway, Inc. v. Dole, 835 F.2d 803, 810 (11th Cir. 1988) (recognizing that, under section 4(f) of Department of Transportation Act of 1966, 23 U.S.C. § 134, a court must determine whether a proposed highway "'substantially impairs' the public utility or *historical significance of the property in question*." (emphasis added) (first citing Citizen Advocs. for Responsible Expansion, Inc. v. Dole, 770 F.2d 423, 441 (5th Cir. 1985); and then citing Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982))); St. Michael Press Publ'n Co. v. One Unknown Wreck Believed to Be the Archangel Michael, No. 12-80596-Civ-Brannon, 2013 WL 12171821, at *5 (S.D. Fla. Oct. 29, 2013) (finding that plaintiff seeking salvage award and exclusive right to salvage alleged shipwreck failed to present "evidence from which the Court could conclude that anything of value or *historical significance* actually exists" (emphasis added)).

An amendment should state that petitioners may only request the disclosure based on historical significance if the case associated with the grand jury proceeding ended more than twenty-five years[253] prior to the date of the request, so long as all other conditions are met.[254] It is also greatly important that a court, as the supervisor of their grand juries,[255] retain broader discretion over the disclosure of grand jury materials newer than seventy-five years due to the importance of maintaining the sanctity of grand jury secrecy.[256] Therefore, no historically significant grand jury materials should be kept

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Turning back to *Bruen* for a moment, the Supreme Court expressly required that the Government demonstrate that "a firearm regulation is *consistent with this Nation's historical tradition. Only when a firearm regulation is consistent with this Nation's historical tradition may a court conclude* that the individual's conduct falls outside" that individual's Second Amendment rights—meaning that courts must affirmatively determine whether a firearm regulation is consistent with *historical* traditions in the United States, which requires that the court engage in an extensive historical analysis. *See Bruen*, 142 S. Ct. at 2126 (emphasis added); *see also* United States v. Rahimi, 61 F.4th 443, 453 (5th Cir. 2023) ("*Bruen* instructs how to proceed . . . . To evaluate the challenged law, the Supreme Court employed a historical analysis, aimed at 'assess[ing] whether modern firearms regulations are consistent with the Second Amendment's text and *historical understanding*.'" (emphasis added) (citing *Bruen*, 142 S. Ct. at 2122, 2131)).

[253] The federal government releases classified materials after ten years, and up to twenty-five years, of their original classification if the classification is extended by reviewing authorities. *See* Exec. Order No. 13526, 75 C.F.R. 705, 709 (2010). It is not beyond reason—and certainly not unprecedented—therefore, to require a period of twenty-five years to pass prior to disclosing sensitive and prejudicing grand jury materials to interested parties under an amended Rule 6(e).

[254] *See Craig*, 131 F.3d at 106 ("(v) [H]ow long ago the grand jury proceedings took place . . . .").

[255] *See In re* Petition to Inspect & Copy Grand Jury Materials (*Hastings*), 735 F.2d 1261, 1267–68 (11th Cir. 1984) ("[The Court enjoys] general supervisory authority over grand jury proceedings and records.").

[256] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 687 n.6 (1958) (outlining some of the reasons for maintaining grand jury secrecy: "'(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 untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from

secret from any petitioner after seventy-five years following the final disposition of the case associated with the grand jury proceeding.[257] The amended rule, thereafter, should require the petitioner to notify an attorney for the government and allow the court to designate on its own or on the party's motion certain individuals whose interests may be implicated any grievances may be appropriately considered by the court.[258]

Because Rule 6(e) allows judges to exercise discretion in *applying* the listed exceptions,[259] the amended rule should allow the district court to exercise discretion to determine whether the request is reasonable, would not unduly prejudice any other party,[260] and the public's interest in continued secrecy justifies maintaining the grand jury materials secret.[261]

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disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'" (quoting United States v. Rose, 215 F.2d 617, 628–29 (3d Cir. 1954))).

[257] *See* 2011 Letter Recommending Amendment to Rule 6, *supra* note 13, at 10 (proposing the following amendment to Federal Rule of Criminal Procedure 6(e)(2): "(C) Nothing in this Rule shall require the Archivist of the United States to withhold from the public archival grand-jury records more than 75 years after the relevant case files associated with the grand-jury records have been closed.").

[258] *Craig*, 131 F.3d at 106 ("(viii) [W]hether witnesses to the grand jury proceeding who might be affected by disclosure are still alive.").

[259] *See* FED. R. CRIM. P. 6(e)(3)(E) ("The court *may* authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . ."(emphasis added)).

[260] *See Craig*, 131 F.3d at 106.

[261] *See id.* ("(ix) [T]he additional need for maintaining secrecy in the particular case in question.").

An amendment providing district courts the authority to disclose historically significant grand jury materials may reasonably read as follows:

> **Rule 6. The Grand Jury**
>
> . . . .
>
> (e) **Recording and Disclosing the Proceedings.**
>
> . . . .
>
> (3) ***Exceptions.***
>
> . . . .
>
> (E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter ***only***:
>
> . . . .
>
> (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 the matter may disclose is to an appropriate military official for the purpose of enforcing that law~~.~~*;*
>
> ***(vi) at the request of any interested person who shows that the requested material has historical significance and at least 75 years have passed since the relevant case files associated with the grand jury have been closed; or***
>
> ***(vii) at the request of any interested person if:***

(a) the petitioner expressly states the reasons for making the request and, with reasonable specificity, identifies the grand-jury matters requested;

(b) the petitioner shows that the grand-jury matters sought have exceptional historical significance;

(c) more than 25 years but less than 75 years have passed since any relevant case files associated with the grand jury have been closed;

(d) disclosure would not unduly prejudice any living person and such prejudice could not be avoided through redactions; and

(e) the justifications for disclosing the requested disclosure outweigh the public's interest in continued secrecy.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i), ***(vi), or (vii)*** must be filed in the district where the grand jury convened and:

(i) Unless the hearing ***on a petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i)*** is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

~~(i)~~ ***(a)*** an attorney for the government;

~~(ii)~~ ***(b)*** the parties to the judicial proceeding; and

~~(iii)~~ ***(c)*** any other person whom the court may designate.

> ***(ii) A petitioner requesting the disclosure of a grand-jury matter under Rule 6(e)(3)(E)(vi) or (vii) must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:***
>
> ***(a) an attorney for the government; and***
>
> ***(b) any other person whom the court may designate on its own or on a party's motion.***[262]

CONCLUSION

The adoption of an amendment to Rule 6 of similar substance to the amendment proposed herein guarantees that courts cannot view Rule 6(e)(3) to allow them to disclose grand jury materials at their discretion outside those exceptions expressly enumerated therein while ensuring that events of historical significance that occur behind the shroud of a grand jury proceeding are not lost to recorded history. No longer would petitioners who seek answers to burning questions lost to the vault of long-entombed grand jury proceedings, like Mr. Pitch, Mr. McKeever , and Ms. Lepore, need to rely on a judicial geographical lottery, hoping that the circuit in which they are requesting extratextual disclosure accepts an expansive (and incorrect) view of Rule 6(e)(3) as drafted.

While, in its en banc rehearing of *Pitch*,[263] the Eleventh Circuit was within its right to affirm the district court's holding in *Pitch*[264] based on its precedent—especially considering the Supreme Court denied certiorari in *McKeever II*[265]—it chose not to and, instead,

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[262] FED. R. CRIM. P. 6(e)(3)(E), (F). Deleted text is stricken and additions are italicized and bolded. Headings have not been modified.

[263] *See* Pitch v. United States (*Pitch II*), 925 F.3d 1224, 1224–25 (11th Cir. 2019).

[264] *See* Pitch v. United States (*Pitch I*), 915 F.3d 704, 709 (11th Cir.), *vacated*, 925 F.3d 1224, 1224–25 (11th Cir. 2019).

[265] McKeever v. Barr (*McKeever II*), 140 S. Ct. 597 (2020) (denying petition for a writ of certiorari).

overruled *Hastings*.[266] The Eleventh Circuit certainly righted a wrong in its jurisprudence in *Pitch III*—because Rule6(e)(3) provides an exhaustive list of when courts may disclose grand jury materials—Rule 6(e)(3) should be amended to expressly allow for the disclosure of historically important grand jury materials.[267] Otherwise, the secrecy guarding the "essential preliminary"[268] would forever cloak documents of historical documents significance in nearly impenetrable secrecy—lest courts continue to disregard the parameters of Rule 6(e)(3)'s exceptions and wield their supposed "inherent authority" to continue to disclose grand jury materials.

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266 Pitch v. United States (*Pitch III*), 754 F.2d 1226, 1241 (11th Cir. 2020).

267 *See supra* note 261 and accompanying text.

268 Madison, June 8, 1789, Address to First Congress, *supra* note 1.