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Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Via Email: RulesCommittee_Secretary@ao.uscourts.gov

Re: Suggestion To Add a Residual Exception to Fed. R. Crim. P. 6(e)

Dear Ms. Womeldorf,

I am a third-year student at Duke University School of Law writing with regard to the proposals submitted by the Public Citizen Litigation Group, et al.,[1] and the Reporters Committee for Freedom of the Press, et al.,[2] suggesting that the Advisory Committee on Criminal Rules amend Rule 6(e). Like those proposals, I also support an amendment to Rule 6(e). However, in my view, the Committee should consider adding a residual exception to the Rule rather than, or at least in addition to, an exception tailored to grand jury materials of significant historical interest. A residual exception would not only cover those materials but would also cover other situations in which disclosure might be appropriate.

This suggestion and the reasoning behind it are detailed in my paper, *Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy*, 70 DUKE L.J. 451 (2020), which is enclosed. It argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, caution against judge-made exceptions to grand jury secrecy. Yet, it recognizes there may be instances where disclosure is appropriate even though the Rule does not allow it. To provide for these situations, the Committee should consider adding a residual exception to give courts flexibility and discretion, but also a clear source of authority and guidance, when considering requests for disclosure outside the Rule's enumerated exceptions.

Thank you for considering this suggestion. I would be happy to discuss it further with the Committee.

Sincerely,

Brent McKnight

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[1] Letter from Allison M. Zieve, Dir., Pub. Citizen Litig. Grp., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc., No. 20-CR-B (March 2, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-b_suggestion_from_allison_zieve_-_rule_6_0.pdf.

[2] Letter from Reps. Comm. for Freedom of the Press to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc., No. 20-CR-D (April 7, 2020), available at https://www.uscourts.gov/sites/default/files/20-cr-d_suggestion_from_reporters_committee_for_freedom_of_the_press_-_rule_6_0.pdf.

KEEPING SECRETS: THE UNSETTLED LAW OF JUDGE-MADE EXCEPTIONS TO GRAND JURY SECRECY

H. BRENT MCKNIGHT, JR.†

ABSTRACT

Federal Rule of Criminal Procedure 6(e) functionally binds everyone who is present during grand jury proceedings (except witnesses) to secrecy. But questions arise when courts are asked to make exceptions to grand jury secrecy outside those enumerated in the rule, such as exceptions for Congress or for the release of historically significant grand jury records.

This Note examines the propriety of judge-made exceptions to grand jury secrecy. Contrary to some courts authorizing disclosure outside of Rule 6(e), this Note argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, caution against this practice. The tension between the current practice of some courts and the apparent meaning of Rule 6(e) renders the law of grand jury secrecy unsettled. To clarify the law, the Advisory Committee on Criminal Rules should add a residual exception to Rule 6(e) that would not only give courts flexibility and discretion but also a clear source of authority on which to authorize disclosures.

INTRODUCTION

The grand jury, which traces its history back to twelfth-century English common law,[1] traditionally functions as both a sword and a

† Duke University School of Law, J.D. expected 2021; University of North Carolina at Chapel Hill, B.A. 2016. Many thanks to Professors Sara Sun Beale and Jeremy Mullem for their insightful comments, edits, and suggestions. Also, many thanks to *Duke Law Journal* editors Catie Carberry, John Hall, Katie Lew, Jamie Noel, and Kaitlin Ray for their feedback and edits. The views and mistakes herein are, of course, my own.

1. *See* 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, 5–12 (1996) (tracing the history of the grand jury from the Assize of Clarendon in 1166 to the 1600s and its adoption in the United States).

shield.[2] As a shield, the grand jury protects the innocent from unmerited criminal charges.[3] By contrast, the grand jury functions as a sword by using its subpoena power and the ability to grant immunity to witnesses to help prosecutors investigate potential crimes.[4] Grand jury proceedings are largely obscured from public view by longstanding secrecy rules. Federal Rule of Criminal Procedure 6(e)(2) provides a list of people who, "[u]nless these rules provide otherwise, . . . must not disclose a matter occurring before the grand jury."[5] The burden of secrecy falls not only upon the grand jurors themselves, but also onto interpreters, court reporters, operators of recording devices, transcribers, government attorneys, and those to whom disclosure is made pursuant to certain exceptions to the rule.[6] Functionally, it binds everyone present during grand jury proceedings, except for witnesses.[7] The rule attempts to prevent targets of investigation from fleeing, to protect the freedom and independence of the grand jurors' deliberations, to protect against "subornation of perjury or tampering with the witnesses," to encourage free disclosure by witnesses, and "to protect [the] innocent accused . . . from disclosure of the fact that he has been under investigation."[8]

But questions arise when courts are asked to make exceptions to grand jury secrecy outside those enumerated in the rule. For example, in *McKeever v. Barr*,[9] lawyer and historian Stuart McKeever[10]

2. *See, e.g.*, SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, GRAND JURY LAW AND PRACTICE § 1:7 (2d ed. 1997), Westlaw GJURLAW (last updated Nov. 2019) (discussing the grand jury as both a sword and shield); Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1273 (2006) [hereinafter Kuckes, *The Democratic Prosecutor*] (same).

3. *See* BEALE ET AL., *supra* note 2, § 1:7 (saying that after an individual is accused of criminal conduct, the grand jury "determine[s] whether there is sufficient evidentiary support to justify holding the accused for trial on each charge"). *But see id.* § 1:1 ("In many states the grand jury is no longer the principal pretrial check against unfounded charges.").

4. *See id.* § 1:7 (describing the grand jury's investigative role as a sword when it acts "to discover and attack criminal conduct").

5. FED. R. CRIM. P. 6(e)(2)(B).

6. FED. R. CRIM. P. 6(e)(2)(B)(i)–(vii).

7. *See infra* note 73 and accompanying text.

8. MICHAEL A. FOSTER, CONG. RSCH. SERV., R45456, FEDERAL GRAND JURY SECRECY 6 (2019) (alteration in original) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958)); *see also* BEALE ET AL., *supra* note 2, § 5:1 (identifying additional rationales such as "preventing prejudicial leaks of information to potential defendants").

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

10. *Bio*, STUART A. MCKEEVER, AUTHOR, http://www.stumckeever.com/bio [https://perma.cc/7DX4-JXJP].

petitioned the District Court for the District of Columbia for the release of grand jury records he believed would aid his research into the unsolved disappearance of Columbia University Professor Jesús de Galíndez Suárez in 1956.[11] When Galíndez disappeared, some in the news media suggested that Rafael Trujillo, the dictator of the Dominican Republic, had kidnapped and murdered Galíndez in retaliation for Galíndez's criticism of the Trujillo regime.[12]

McKeever believed that "John Joseph Frank, a former FBI agent and CIA lawyer who later worked for Trujillo," had orchestrated the disappearance.[13] In 1957, a grand jury indicted Frank for violations of the Foreign Agents Registration Act of 1938 but did not indict him for any crimes related to Galíndez's disappearance and murder.[14] At trial, the prosecution introduced evidence implying "that [Frank] was connected with [Galíndez's] disappearance."[15] On appeal, the court reversed Frank's conviction and remanded his case for a new trial on the basis that this evidence was too prejudicial to have been properly admitted.[16] However, the discussion of the evidence at trial and on appeal supported McKeever's theory of Frank's involvement and the possibility that the grand jury records would hold even more information.

The district court held that although Rule 6(e) did not authorize McKeever's request, the court had inherent authority to go beyond the rule "to disclose historically significant grand jury matters."[17] Even so, the district court denied the request as overbroad.[18] In a split decision on appeal, the D.C. Circuit affirmed but on different grounds.[19] The D.C. Circuit ruled that the exceptions in Rule 6(e) are an exhaustive

11. *McKeever*, 920 F.3d at 843.

12. *See id.* ("News media at the time believed Galíndez, a critic of the regime of Dominican Republic dictator Rafael Trujillo, was kidnapped and flown to the Dominican Republic and there murdered by Trujillo's agents."); *see also* Frank v. United States, 262 F.2d 695, 696 (D.C. Cir. 1958) ("[Galíndez's] disappearance in circumstances that suggested murder was a matter of common knowledge.").

13. *McKeever*, 920 F.3d at 843.

14. *Id.* at 843–44.

15. *Frank*, 262 F.2d at 696.

16. *Id.* at 697.

17. *McKeever*, 920 F.3d at 843.

18. *Id.*

19. *Id.*

list,[20] and moreover, district courts have no inherent authority to order disclosure outside the confines of the rule.[21]

Although access to sixty-year-old grand jury materials for historical research into a little-known case may seem innocuous, allowing judge-made exceptions authorizing disclosure, especially within the D.C. Circuit, would have had broader implications. For example, Rule 6(e) contains no explicit exception for Congress.[22] Unless courts have inherent authority to disclose information outside of the rule, Congress might be denied access to grand jury materials, even if those materials would be useful to a congressional investigation.

This tension between grand jury secrecy and Congress's desire for information came to the fore at the conclusion of Special Counsel Robert Mueller's investigation.[23] After completing his investigation, Mueller submitted a confidential final report to Attorney General William Barr.[24] Congressional leaders requested the full report, ostensibly because the four-page summary provided by the attorney general was insufficient.[25] Barr agreed to provide the report, but only after making redactions, including of information subject to Rule

20. *See id.* at 845 ("The only rule to [allow disclosure] is Rule 6(e)(3). Rules 6(e)(2) and (3) together explicitly require secrecy in all other circumstances.").

21. *Id.* at 850.

22. FOSTER, *supra* note 8, at 1–2.

23. Acting Attorney General Rod Rosenstein appointed Robert Mueller as special counsel to investigate possible ties between the Trump campaign and the Russian government in connection with Russian interference in the 2016 election as well as whether President Trump or others obstructed Mueller's investigation. *See* Rod J. Rosenstein, Acting Att'y Gen., U.S. Dep't of Just., Ord. No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://www.justice.gov/opa/press-release/file/967231/download [https://perma.cc/E8VJ-2LW8].

24. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019), https://www.justice.gov/storage/report.pdf [https://perma.cc/BC55-NMKZ]. Confidentiality was required. 28 C.F.R. § 600.8(c) (2020) (requiring "a confidential report explaining the prosecution or declination decisions reached by the Special Counsel").

25. *See* Jeff Mason & Susan Heavey, *Democrats Push for Mueller Report to Congress by Next Week, Republicans Resist*, REUTERS (Mar. 25, 2019, 9:41 AM), https://reut.rs/2TBe56I [https://perma.cc/6KSC-VTCB] (describing Democratic leaders' push for Barr to release the report).

6(e).[26] The House Judiciary Committee subpoenaed the full report, but Barr ignored the order.[27]

Around the same time Congress and the Department of Justice began to fight over the report's release, the D.C. Circuit handed down its decision denying McKeever's request for grand jury materials.[28] *McKeever* foreclosed the possibility that Chief Judge Beryl Howell, who presided over the Mueller grand jury, could order materials to be disclosed to Congress outside of an enumerated exception to Rule 6(e). It was not until the House began an impeachment inquiry that Chief Judge Howell authorized disclosure of some of the materials under an exception that allows disclosure preliminarily to or in connection with a judicial proceeding.[29] The D.C. Circuit affirmed.[30] Without the impeachment inquiry, Congress would likely not have had access to those materials.

However, not all courts agree with *McKeever*'s reasoning and outcome. Indeed, a circuit split exists over whether judges may authorize disclosure of grand jury materials outside the bounds of Rule 6(e).[31] This Note explores such judge-made exceptions to grand jury

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26. Letter from William P. Barr, Att'y Gen., U.S. Dep't of Just., to Lindsey Graham, Chairman, Senate Comm. on the Judiciary & Jerrold Nadler, Chairman, House Comm. on the Judiciary 1 (Mar. 29, 2019), https://www.justice.gov/ag/page/file/1153021/download [https://perma.cc/WXB9-Y8G9].

27. *See* David Morgan, *Second Deadline for DOJ To Give Congress Full Mueller Report Expires*, REUTERS (May 6, 2019, 9:19 AM), https://reut.rs/2vCKuAv [https://perma.cc/7RZA-SMW6] (reporting on Barr's noncompliance).

28. *See* McKeever v. Barr, 920 F.3d 842, 842 (D.C. Cir. 2019) (decided Apr. 5, 2019), *cert. denied*, 140 S. Ct. 597 (2020); Mason & Heavey, *supra* note 25 (noting Congress's push for release of documents from the Mueller investigation in March 2019).

29. *In re* Application of Comm. on the Judiciary, 414 F. Supp. 3d 129, 137, 147, 182 (D.D.C. 2019), *aff'd*, 951 F.3d 589 (D.C. Cir. 2020), *cert. granted*, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020).

30. *Comm. on the Judiciary*, 951 F.3d at 603.

31. Some circuits, like the *McKeever* court, hold that courts cannot make disclosures outside the bounds of the rule. *See, e.g.*, Pitch v. United States, 953 F.3d 1226, 1241 (11th Cir. 2020) (en banc) ("Rule 6(e) is exhaustive. District courts . . . do not possess the inherent, supervisory power to order the release of grand jury records in instances not covered by the rule."), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020); United States v. McDougal, 559 F.3d 837, 841 (8th Cir. 2009) (same); *In re* Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) (same).

Other circuits disagree and hold that courts have inherent authority to authorize the disclosure. *See, e.g.*, Carlson v. United States, 837 F.3d 753, 767 (7th Cir. 2016) ("Rule 6(e)(3)(E) does not displace [the district courts'] inherent power. It merely identifies a permissive list of situations where that power can be used."); *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997) ("[T]here are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of [Rule 6(e)(3)]." (quoting *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion))); *cf. In re* Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005)

secrecy.[32] Contrary to some courts' practice of authorizing disclosures outside of Rule 6(e), this Note argues that the text and development of Rule 6(e), along with limitations on courts' inherent authority over grand jury procedure, show that courts lack clear authority to do so. Of course, there may be circumstances where policy considerations would justify the disclosure.[33] The Advisory Committee on Criminal Rules should clarify the law and provide for these circumstances by adding a residual exception to Rule 6(e) that would not only give courts flexibility and discretion but also a clear source of authority on which to authorize these disclosures.

Part I introduces the grand jury, focusing on its unique position as a quasi-judicial and quasi-executive, but ultimately independent, body

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(holding that district courts have inherent power to impose a secrecy requirement even when Rule 6(e) does not provide for it).

32. Plenty has been written on grand jury secrecy. This Note's primary contribution, however, is its close analysis of Rule 6(e) and its proposed amendment to the rule in light of the tension between the rule and current practice. For a discussion of other topics, see generally FOSTER, *supra* note 8; R. Michael Cassidy, *Silencing Grand Jury Witnesses*, 91 IND. L.J. 823 (2016); Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1 (2018); Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994); Kadish, *supra* note 1; Kuckes, *The Democratic Prosecutor*, *supra* note 2; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004); William B. Lytton, *Grand Jury Secrecy—Time for a Reevaluation*, 75 J. CRIM. L. & CRIMINOLOGY 1100 (1984); John M. Nataro, *Grand Jury Secrecy: Prohibitions on Witness Disclosure*, 2 NU F. 29 (1997); Daniel C. Richman, Essay, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999); Lori E. Shaw, *The USA PATRIOT Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy*, 35 SETON HALL L. REV. 495 (2005); Fred A. Bernstein, Note, *Behind the Gray Door:* Williams*, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563 (1994); M.R.K., Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 VA. L. REV. 1623 (1984); JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237 (1997); Andrea M. Nervi, Comment, *FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. CHI. L. REV. 221 (1990); Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury:* United States v. Williams, 43 CATH. U. L. REV. 311 (1993); Alex Thrasher, Comment, *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 (2018).

In addition, there is a recent piece examining the courts' supervisory authority over grand jury procedure. *See generally* Rebecca Gonzalez-Rivas, Comment, *An Institution "at Arm's Length": Reconsidering Supervisory Power over the Federal Grand Jury*, 87 U. CHI. L. REV. 1647 (2020). Although that piece and this Note cover many similar topics, the two part ways in several respects, especially regarding the clarity of Rule 6(e)'s text and some of the reasons why courts may lack inherent authority to create exceptions outside the rule.

33. The policy rationales that would justify disclosure depend largely on the circumstances. As a result, this Note has a primarily doctrinal focus.

within the legal system. It also examines the development of grand jury secrecy as well as introduces Rule 6(e)'s secrecy rule and exceptions. Part II examines the text of Rule 6(e), arguing that the rule limits the exercise of judicial power to create new exceptions. The language of the rule, the detailed and specific nature of the rule's exceptions, and the evolution of the rule over time suggest that Rule 6(e) covers the field of grand jury secrecy and departures from it.

Part III moves beyond the text of the rule to consider judges' inherent authority to regulate grand jury procedure. It argues that because of the grand jury's independence, limitations on courts' inherent authority over grand jury procedure are greater than those on courts' inherent authority to regulate their own proceedings. As a result, these limitations indicate courts should be wary of creating grand jury procedural rules outside the bounds of Rule 6(e).[34] Finally, Part IV surveys efforts to amend the rule and proposes that the Advisory Committee clarify this area of grand jury procedure by adding a residual exception to Rule 6(e).

I. BACKGROUND

The courts' role in maintaining grand jury secrecy and authorizing disclosure is defined, in part, by the unique role the grand jury plays as an independent body in the legal system and the way in which long-standing secrecy rules developed into Federal Rule of Criminal Procedure 6(e). This Part surveys both.

A. The Grand Jury's Unique Constitutional Role

The grand jury's dual sword and shield functions make it a special institution in the criminal justice system.[35] The grand jury both investigates whether there is probable cause that a crime has been

34. This Note focuses on federal courts, but the same conclusion may be true of some state courts. *See, e.g.*, Goldstein v. Superior Ct., 195 P.3d 588, 589–90 (Cal. 2008) ("[W]e hold that California courts do not have a broad inherent power to order disclosure of grand jury materials to private litigants . . . . '[T]he superior court's powers to disclose grand jury testimony are only those which the Legislature has deemed appropriate.'" (quoting Daily J. Corp. v. Superior Ct., 979 P.2d 982, 989 (Cal. 1999))); *In re* 38 Studios Grand Jury, 225 A.3d 224, 239–40 (R.I. 2020) ("There is no inherent authority in the Superior Court to disclose grand jury materials beyond that which is permitted by the Superior Court Rules of Criminal Procedure.").

35. *See* United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) ("The grand jury occupies a unique role in our criminal justice system. It . . . 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" (quoting United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950))).

committed and protects the innocent against "unfounded criminal prosecutions."[36] These twin roles are denoted the "investigative" and the "indicting" grand jury, respectively.[37] The same group of impaneled jurors plays both roles.

The grand jury responds to two branches of government: the executive and judiciary.[38] As "a tool of the Executive,"[39] the investigating grand jury has a role "akin to that performed by the police."[40] It is a "grand inquest . . . the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."[41] Procedural and evidentiary rules for trials generally do not apply.[42] The grand jury neither needs probable cause to issue a subpoena[43] nor requires authorization from the court to begin an investigation or return an indictment.[44] Further, the Double Jeopardy Clause does not apply to grand jury proceedings,[45] and many circuits have held that the right to counsel does not extend to testifying witnesses.[46] In short, the investigating grand jury is a powerful tool for scrutinizing potentially criminal behavior.[47]

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36. Branzburg v. Hayes, 408 U.S. 665, 686–87 (1972); *see* United States v. Dionisio, 410 U.S. 1, 16–17 (1973) (stating the grand jury's "mission is to clear the innocent, no less than to bring to trial those who may be guilty").

37. BEALE ET AL., *supra* note 2, § 1:7.

38. *See* Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1266 ("[T]he federal grand jury occupies an uneasy middle ground, operating in the zone between prosecutorial and judicial action.").

39. United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

40. BEALE ET AL., *supra* note 2, § 1:7.

41. Blair v. United States, 250 U.S. 273, 282 (1919).

42. *See* United States v. R. Enters., Inc., 498 U.S. 292, 298 (1991) ("[M]any of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions."); *cf.* United States v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983) (explaining the grand jury has immense powers to investigate and to self-direct its efforts).

43. *R. Enters.*, 498 U.S. at 297.

44. United States v. Williams, 504 U.S. 36, 48 (1992).

45. *Id.* at 49.

46. *See, e.g.*, *In re* Grand Jury Proceedings, 713 F.2d 616, 617 (11th Cir. 1983) (per curiam) (citing United States v. Mandujano, 425 U.S. 564, 581 (1974)) ("Grand jury witnesses have no right to the presence of counsel in the [grand] jury room during questioning."); *In re* Grumbles, 453 F.2d 119, 122 (3d Cir. 1971) (per curiam) (citing *In re* Groban, 352 U.S. 330, 333 (1957)) (finding a witness's claim to the right to counsel during grand jury questioning to be meritless).

47. For more information on how typical rules do not apply to grand juries, see Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1181–82 (2008).

In contrast, the indicting grand jury is similar to "a judicial officer at a preliminary hearing . . . screening the evidence."[48] The grand jury "reviewing an accusation"[49] to protect the innocent ostensibly ensures justice is done through the grand jury's work. The grand jury's investigative powers help fulfill this role. The investigative functions are "incidents of the judicial power of the United States"[50] because the grand jury's subpoena power is derived from the court,[51] and such investigative powers are often necessary to reveal that a charge is unfounded.[52] Because the grand jury derives its power from the court, "[t]he grand jury is an arm of the court," and its mention in the Fifth Amendment "makes the grand jury a part of the judicial process."[53]

The Constitution guarantees the use of the grand jury in the Fifth Amendment,[54] but it commits the grand jury neither to the executive nor to the judiciary exclusively.[55] Instead, the Supreme Court has explained that the grand jury "is a constitutional fixture in its own right."[56] An independent institution, it responds both to the judicial and executive branches but belongs to neither. To fulfill its purpose, the grand jury must be "free, within constitutional and statutory limits, to operate 'independently of either prosecuting attorney or judge.'"[57]

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48. BEALE ET AL., *supra* note 2, § 1:7.

49. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1275.

50. Blair v. United States, 250 U.S. 273, 280 (1919).

51. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1272.

52. *See* United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (describing the grand jury's broad powers as necessary to fulfill both its investigative and indicting functions).

53. Levine v. United States, 362 U.S. 610, 617 (1960). Some argue prosecutorial misuse and grand jurors passively capitulating to prosecutors' requests has thwarted this role. *See, e.g.*, BEALE ET AL., *supra* note 2, § 1:1 ("In recent years critics have charged that the grand jury has lost its traditional independence and does little more than rubber stamp the prosecutor's decisions."); Futrell, *supra* note 32, at 25–26 (discussing the prosecutor's relationship to the grand jury and concluding that "prosecutors have significant control over the direction and outcome of the grand jury process, and secrecy serves to obscure the nuance of that control").

54. 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 . . . .").

55. *See* United States v. Williams, 504 U.S. 36, 47 (1992) (discussing the grand jury's position in the legal system based on its placement in the Constitution); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1460 (1984) ("[T]he grand jury is not assigned to any one of the three branches of government.").

56. *Williams*, 504 U.S. at 47 (quoting United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977)).

57. *Sells Eng'g*, 463 U.S. at 430 (quoting Stirone v. United States, 361 U.S. 212, 218 (1960)).

As Part III discusses, the grand jury's independent position affects judges' authority to create rules of grand jury procedure.[58]

B. Codifying Grand Jury Secrecy in Rule 6(e)

For the first 140 years of the federal judiciary, there were no unified federal procedural rules, and what rules existed were dictated primarily by Congress.[59] The Court acceded to congressional rulemaking, holding that the Necessary and Proper Clause gave Congress the power to regulate federal judicial procedure.[60] The Court generally construed the judiciary's power narrowly and treated Congress's rules as authoritative.[61] Congress continued to be the primary source of procedural rules until the 1930s.[62]

During this same period of time, federal common law included a strong grand jury secrecy norm.[63] But some defendants challenged grand jury secrecy on grounds that the evidence the grand jury considered could not support the indictment.[64] To address this, courts asserted "discretionary power" to allow parties in some cases to inspect grand jury materials to determine an indictment's validity.[65] However, courts held that this power should be rarely exercised.[66]

In the 1930s, Congress authorized the Supreme Court to create uniform rules of civil and criminal procedure.[67] The new criminal rules,

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58. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1274 (noting that who controls the grand jury bears on the extent to which judges can regulate grand jury procedure).

59. Beale, *supra* note 55, at 1436. The Judiciary Act of 1789 and the Process Act passed shortly thereafter are early examples. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73; Process Act of 1789, ch. 21, 1 Stat. 93; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 747–48 (2001) (noting that the Process Act came quickly after the Judiciary Act to limit judicial discretion over procedure).

60. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825); *see also* Pushaw, *supra* note 59, at 752–54 (discussing *Wayman*, related cases, and the Court's deference to Congress).

61. *See* Beale, *supra* note 55, at 1438–39 (describing the Court's deference to Congress and the few exceptions to it).

62. *Id.* at 1436. Even so, the only uniform rules were those of equity and of admiralty, which the Supreme Court created not via its inherent authority but rather "[p]ursuant to express statutory authority." *Id.* at 1437.

63. FOSTER, *supra* note 8, at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. The Supreme Court was authorized to make civil procedural rules so long as the rules did not "abridge, enlarge, nor modify the substantive rights of any litigant." Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064. Authority to create rules of criminal procedure followed soon after in 1940. Act of June 29, 1940, Pub. L. No. 76-675, 58 Stat. 688. The statutory authorization for promulgating both civil and criminal rules of procedure was consolidated in 28

enacted in 1944,[68] codified common law grand jury secrecy into Rule 6(e).[69] The rule has been amended a number of times.[70] It currently states:

> (2) *Secrecy*.
> (A) No obligation of secrecy 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).[71]

In short, the rule provides that, unless otherwise specified, the group of persons listed in (2)(B) must keep grand jury materials secret. The list encompasses those present during grand jury proceedings except witnesses,[72] who are free to disclose their testimony.[73]

U.S.C. §§ 2071–2077 by the Judicial Improvements and Access to Justice Act, §§ 401–407, Pub. L. No. 100-702, 102 Stat. 4642, 4648–52 (1988).

68. Order, 327 U.S. 825 (1946) (incorporating the 1944 rules into the first Federal Rules of Criminal Procedure).

69. Illinois v. Abbott & Assocs., 460 U.S. 557, 566 n.11 (1983) ("The General Rule of Secrecy codifies a longstanding rule of common law which we have recognized as 'an integral part of our criminal justice system.'" (quoting Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 n.9 (1979))); *see also* FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966).

70. *See* 18 U.S.C. app. at 440–49 (2018) (describing amendments to Rule 6(e)).

71. FED. R. CRIM. P. 6(e)(2). For the significance of the structure of the rule as reproduced here, see *infra* Part II.A.

72. *Compare* FED. R. CRIM. P. 6(d)(1) (allowing prosecutors, the witness, interpreters, and a court reporter or an operator of a recording device to be present during a grand jury session), *with* FED. R. CRIM. P. 6(e)(2)(B) (omitting the witness from the list of those bound to secrecy).

73. BEALE ET AL., *supra* note 2, § 5:5 (noting that witnesses are free to disclose their testimony but may not be compelled to do so, including in separate proceedings).

Notably, judges are not included in the list of persons subject to grand jury secrecy, for two reasons. First, judges are not listed among those who may be present while the grand jury is in session, and who are then made subject to grand jury secrecy. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) ("No judge presides to monitor [the grand jury's] proceedings."); FED R.

Subsection (3) governs "Exceptions," of which there are two categories: those that allow the attorney for the government to disclose materials without prior authorization and those that require approval from the court. First, subparagraphs (3)(A) to (D) provide exceptions that do not require judicial authorization. Rule 6(e)(3)(A) allows disclosure of grand jury materials, except for the jurors' deliberations and votes, to (i) a government attorney "for use in performing that attorney's duty," (ii) any government personnel that a government attorney needs "to assist in performing that attorney's duty to enforce federal criminal law," or (iii) any person authorized under 18 U.S.C. § 3322,[74] which governs disclosure to enforce certain financial and banking laws.[75] Those who receive grand jury information under the latter two exceptions are also bound to secrecy.[76] In addition, Rule 6(e)(3)(C) allows government attorneys to disclose grand jury materials to other federal grand juries.[77] Finally, Rule 6(e)(3)(D) permits disclosure of materials related to foreign intelligence and national security.[78]

CRIM. P. 6(d)(1) (making no allowance for judges to be present). The majority in *Pitch v. United States* went so far as to say that "Rule 6 does not permit the district judge to be present in the grand jury room at all." *Pitch*, 953 F.3d 1226, 1237 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). Judges do not "participa[te] in the grand jury proceedings, and thus [are] not ordinarily privy to those proceedings unless and until a party raises an issue having to do with the grand jury, or the district court is called upon by the grand jury to enforce a subpoena." *Id.* (citing FED R. CRIM. P. 6(e)(3)(E)(ii)).

Second, judges have a limited role in grand jury proceedings. "The extent of the district court's 'involvement . . . has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office,' or to enforcing grand jury subpoenas." *Id.* (quoting United States v. Williams, 504 U.S. 36, 47–48 (1992)). The court impanels the grand jury, instructs it, gives it the subpoena power, and discharges it when it is finished. Kuckes, *The Democratic Prosecutor*, *supra* note 2, at 1272. The prosecutor controls the rest, including the cases the grand jury considers, the evidence it sees, and the charges on which it votes. *Id.* The prosecutor is also the grand jury's legal adviser. *Id.* at 1273. Because judges have a limited role in the grand jury's work and are not present during the proceedings, explicitly including judges in the general secrecy rule is unnecessary. Plus, judges do not make the actual disclosure, they merely authorize it.

74. FED. R. CRIM. P. 6(e)(3)(A)(i)–(iii).

75. 18 U.S.C. § 3322 (2018).

76. FED. R. CRIM. P. 6(e)(2)(B)(vii) (providing that the secrecy rule applies to those "to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)").

77. FED. R. CRIM. P. 6(e)(3)(C).

78. FED. R. CRIM. P. 6(e)(3)(D).

Second, some exceptions require judicial authorization. Rule 6(e)(3)(E) provides:

> (E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
> (i) preliminarily to or in connection with a judicial proceeding;
> (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;
> (iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;
> (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or
> (v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.[79]

The rule uses a permissive "may," signifying that although judicial authorization is required, the judge may refuse.[80] When the judge does authorize disclosure, she is free to impose time, manner, and other restrictions.[81]

To move for disclosure under one of the exceptions requiring judicial authorization, parties must show "particularized need" for the disclosure.[82] In *Douglas Oil Co. of California v. Petrol Stops*

79. FED. R. CRIM. P. 6(e)(3)(E).

80. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive . . . .").

81. FED. R. CRIM. P. 6(e)(3)(E).

82. United States v. Baggot, 463 U.S. 476, 480 (1983).

Northwest,[83] the Court defined the test as requiring parties to "show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."[84] Thus, although exceptions codified in Rule 6(e)(3)(E) define the "*kind* of need that must be shown,"[85] the particularized need test defines the "*degree*" to which a party must have that need to justify disclosure.[86] At its core, the test weighs the need for disclosure under an enumerated exception against the need for continued secrecy and requires that the request for disclosure be tailored to the need.

In sum, Rule 6(e) provides a general secrecy rule followed by a detailed list of enumerated exceptions, some requiring judicial authorization and some that do not. When a party moves for disclosure under an exception requiring judicial authorization, the party must show a particularized need for that disclosure. The question remains whether Rule 6(e) allows judges to authorize disclosure not otherwise provided for in the rule's text.

II. TEXTUAL LIMITATIONS ON DISCLOSURE OUTSIDE OF RULE 6(E)

The text of Rule 6(e) suggests there is no basis for authorizing disclosure outside of its enumerated exceptions. Rule 6(e)(2)(A) states that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)."[87] Rule 6(e)(2)(B) gives the general secrecy rule and provides a list of people who "[u]nless these rules provide otherwise, . . . must not disclose a matter occurring before the grand jury."[88] Then, Rule 6(e)(3)(E) stipulates that "[t]he court may authorize disclosure—at a time, in a manner, and subject to

83. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211 (1979).

84. *Id.* at 222.

85. *Baggot*, 463 U.S. at 480.

86. *Id.*; *see also* United States v. McDougal, 559 F.3d 837, 840–41 (8th Cir. 2009) ("A request for disclosure that falls under one of these specified exceptions must also contain a 'showing of particularized need for grand jury materials' before disclosure becomes appropriate." (quoting United States v. Sells Eng'g, Inc., 463 U.S. 418, 443 (1983))); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (explaining the moving party must show "a compelling necessity . . . with particularity"). For more on this test, see Lytton, *supra* note 32, at 1115–17 (explaining the mechanics of the test and the difficulties in passing it).

87. FED. R. CRIM. P. 6(e)(2)(A).

88. FED. R. CRIM. P. 6(e)(2)(B).

any other conditions that it directs—of a grand-jury matter" and lists five situations in which the court may allow the disclosure.[89] Two provisions bear on whether the text permits disclosure outside the bounds of the rule: the "unless these rules provide otherwise" language that limits the general secrecy rule and the exception providing for judicially authorized disclosure.

A. Textual Limits on the General Secrecy Rule

Grand jury secrecy is not absolute. Rather, secrecy is required "[u]nless these rules provide otherwise,"[90] which they do in a list of exceptions following the secrecy rule. Judges grappling with the rule's text have disagreed over the reach and strength of the phrase "unless these rules provide otherwise." Some have reasoned that the phrase limits disclosure of grand jury material to only those situations allowed by the enumerated exceptions in Rule 6(e)(3).[91] Others have said the phrase limits only the types of people who must keep grand jury materials secret, while the list of exceptions requiring judicial authorization gives courts guidance without being exclusive.[92] The former reading better adheres to the text and structure of the rule. This Section first looks at the plain text meaning of the secrecy rule before showing that the history of the rule supports that plain text reading.

1. *Plain Text Meaning of Rule 6(e).* The word "unless" introduces the rule's limiting language. Typically, words should be given "their ordinary, contemporary, common meaning,"[93] except when "the context indicates that they bear a technical sense."[94] There is no indication that "unless" has a technical meaning here. It functions as a conjunction.[95] In this usage, "unless" means "except under the

89. FED. R. CRIM. P. 6(e)(3)(E).

90. FED. R. CRIM. P. 6(e)(2)(B).

91. *See* Pitch v. United States, 953 F.3d 1226, 1234 (11th Cir. 2020) (en banc) (stating that Rule 6(e) "is not merely permissive" but "instructs that deviations . . . are not permitted '[u]nless these rules provide otherwise'" (quoting FED. R. CRIM. P. 6(e)(2)(B))), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020); McKeever v. Barr, 920 F.3d 842, 845–46 (D.C. Cir. 2019) ("[D]eviations from the detailed list of exceptions in Rule 6(e) are not permitted . . . ."), *cert. denied*, 140 S. Ct. 597 (2020).

92. *See* Carlson v. United States, 837 F.3d 753, 764 (7th Cir. 2016) (finding this reading "far more reasonable").

93. Perrin v. United States, 444 U.S. 37, 42 (1979).

94. SCALIA & GARNER, *supra* note 80, at 69–77 (explaining the ordinary-meaning canon).

95. *See Unless*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/215075 [https://perma.cc/5UGB-HKMZ] (illustrating uses of "unless" as a conjunction).

circumstances that."[96] Using this definition, the general secrecy rule might be rewritten as "except under the circumstances that these rules provide, the following persons must not disclose a matter occurring before the grand jury." Thus, rather than limiting the group of people who are bound to secrecy, this language refers to situations in which disclosure would be appropriate.

Rule 6(e)(2)(A), which comes just before the secrecy rule and its limiting language, supports this reading. It says no person may be obligated to secrecy except those listed in Rule 6(e)(2)(B).[97] Effectively, the rule binds everyone, besides witnesses, who is in the room during the grand jury proceedings and thus would have information to disclose.[98] If the limiting language means essentially the same thing—that it only restricts the group of people who are bound to secrecy—then either it or Rule 6(e)(2)(A) must be superfluous. Yet, statutes generally should be interpreted so that "'no clause' is rendered 'superfluous, void, or insignificant.'"[99] If Rule 6(e)(2)(A) and the limiting language both restrict who has an obligation to keep grand jury materials secret, then one of them is unnecessary.

Taking the ordinary meaning of "unless" together with the need to avoid surplusage, the limiting language refers to the circumstances when those bound to secrecy may break their silence by pointing the reader forward to the exceptions in Rule 6(e)(3). This forward outlook fits the structure of Rule 6(e)(2). After all, Rule 6(e)(2)(A) explicitly points the reader forward to 6(e)(2)(B). Within that provision, 6(e)(2)(B)(vii) explicitly points the reader forward to two of the exceptions in 6(e)(3).[100] Further, the limiting language modifies the entire phrase following it, which states that "the following persons must not disclose a matter occurring before the grand jury."[101] As the general

96. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2080 (2d ed. 2001); *see also* OXFORD ENG. DICTIONARY, *supra* note 95 (defining "unless" to mean "except" or "except if" when it is "followed by an adverb, phrase, or participial clause without verb, expressing the manner, place, time, or other circumstance in which an exception to a preceding (or following) statement applies").

97. FED. R. CRIM. P. 6(e)(2)(A).

98. *See supra* notes 72–73 and accompanying text (explaining that witnesses and judges are not listed among those bound by secrecy).

99. Young v. UPS, Inc., 575 U.S. 206, 226 (2015) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)); *see also* SCALIA & GARNER, *supra* note 80, at 174–79 (explaining the surplusage canon).

100. FED. R. CRIM. P. 6(e)(2)(B)(vii) (requiring that "a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)" is bound to secrecy).

101. FED. R. CRIM. P. 6(e)(2)(B).

prohibition against disclosure, this is the secrecy rule's core.[102] The prohibition itself must be followed unless the rules provide exceptions.

One problem with this reading is that it emphasizes a phrase that limits the general secrecy rule, but which is located in a subpart within the rule. As one court explained, the government in that case failed to show "why a limitation buried in subsection (B) of subpart (2) of Rule 6(e) secretly applies to the rule as whole, or even worse . . . to an entirely different subpart."[103] Certainly, the general presumption is that language within a subpart relates only to that subpart and language indented underneath it.[104] The presumption raises a question of why the limiting language in *subsection* (2)(B) should apply to a different *subpart* of the rule—Rule 6(e)(3)—rather than apply only to the *subsection* where it is located.

The answer lies in the rule's design. The rule's drafters placed the general secrecy requirement that is the focus of subpart (2) in a subsection within that part. The text of subpart (2) is merely the title, "Secrecy,"[105] of the subsections underneath it, just as subpart (3), "Exceptions,"[106] is merely the title of the subsections following it. Instead of placing the general rule directly after the title, as the drafters did in subpart (1),[107] the drafters placed the secrecy rule in a subsection under its title, as it did for all of the exceptions.[108] Thus, language limiting the secrecy requirement naturally appears in the subsection alongside the primary secrecy rule. By recognizing that subparts 6(e)(2) and 6(e)(3) are each structured as a short title followed by enumerated subsections, the language limiting the general secrecy rule is not "buried" in a subsection but is placed next to the core rule, which itself is no more buried than any of its exceptions.

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102. McKeever v. Barr, 920 F.3d 842, 844–45 (D.C. Cir. 2019) ("Rule 6(e)(2)(B) sets out the general rule . . . . Rule 6(e)(3) then sets forth a detailed list of 'exceptions' . . . ."), *cert. denied*, 140 S. Ct. 597 (2020); *see also* Pitch v. United States, 953 F.3d 1226, 1234 (11th Cir. 2020) (en banc) (describing the structure of the Rule), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

103. Carlson v. United States, 837 F.3d 753, 764 (7th Cir. 2016); *see Pitch*, 953 F.3d at 1255 (Wilson, J., dissenting) (arguing the same). For the text of the rule, see *supra* notes 71, 79 and accompanying text.

104. *See* SCALIA & GARNER, *supra* note 80, at 156 (describing the scope-of-subparts canon).

105. FED. R. CRIM. P. 6(e)(2) (emphasis omitted).

106. FED. R. CRIM. P. 6(e)(3) (emphasis omitted).

107. *See* FED. R. CRIM. P. 6(e)(1) ("*Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device.").

108. *See* FED. R. CRIM. P. 6(e)(3)(A)–(G) (being placed under the title "*Exceptions*").

2. *Drafting History of Rule 6(e)*. The history of Rule 6(e) supports the plain text reading. Similar to the current iteration, the 1976 rule allowed disclosure to government attorneys without judicial authorization.[109] The rule then imposed a secrecy requirement on those in the courtroom, except for witnesses, during grand jury sessions, saying that disclosure could occur "only when so directed by the court" under two circumstances.[110] The first was preliminarily to or in connection with a judicial proceeding, and the second was at the request of a defendant who could show there might be a reason to challenge an indictment's validity based on the grand jury's proceedings.[111]

That same year, the Advisory Committee tried to amend the rule to define "attorneys for the government" according to Rule 54(c) and to allow disclosure without judicial authorization to other government personnel necessary to helping government attorneys with their work.[112] When the amendment was sent to Congress, the House Judiciary Committee became concerned because critics of the amendment argued "it would permit too broad an exception to the rule of keeping grand jury proceedings secret."[113] The concern was that "lack of precision" regarding the scope of the amendment would lead to prosecutorial "misuse of the grand jury."[114] Indeed, both the House and Senate committees agreed that because the rule did "not clearly

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109. Labeled "Secrecy of Proceedings and Disclosure," the Rule provided, in part,

> Disclosure of matters occurring before the grand jury . . . may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist . . . may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977).

110. FED. R. CRIM. P. 6(e), 383 U.S. at 1196.

111. FED. R. CRIM. P. 6(e), 383 U.S. at 1196.

112. SUBCOMM. ON CRIM. JUST., H.R. COMM. ON THE JUDICIARY, 95TH CONG., AMENDMENTS: FEDERAL RULES OF CRIMINAL PROCEDURE TRANSMITTED TO CONGRESS ON APRIL 26, 1976, at 1 (Comm. Print 1977).

113. *See* H.R. REP. NO. 95-195, at 4 & n.8 (1977) (noting critics' concerns). Indeed, the Subcommittee on Criminal Justice surveyed U.S. attorneys' offices and found that "there [was] no consistent practice concerning what things can be disclosed, to whom they can be disclosed, and under what circumstances they can be disclosed." *Id.* at 4.

114. *See* S. REP. NO. 95-354, at 6–8 (1977) ("[C]riticism . . . seemed to stem more from the lack of precision in defining . . . the intended scope of the proposed change than from a fundamental disagreement with the objective.").

spell out when, under what circumstances, and to whom grand jury information can be disclosed," it needed "to be rewritten entirely."[115]

The 1977 rule was the product of Congress's redrafting. For the first time, the rule was split into two subparts, one for the general rule and one for the exceptions.[116] Although the exceptions were no longer in the same subpart as the general rule, Congress added language to the general secrecy rule limiting disclosure, saying that persons identified by the rule "shall not disclose matters occurring before the grand jury, *except as otherwise provided for in these rules*."[117] In the exceptions requiring judicial authorization, Congress reiterated the secrecy rule, saying "[d]isclosure otherwise prohibited by this rule . . . may also be made[] (i) when so directed by a court preliminary to or in connection with a judicial proceeding; or (ii) when permitted by a court at the request of the defendant" to challenge the defendant's indictment.[118] Thus, Congress set out the secrecy rule and cabined exceptions to those listed in the rules. Congress emphasized this by adding language in each set of exceptions that referred back to the general secrecy rule, just as the limiting language in the rule pointed readers forward to the exceptions.

This general structure remained the same until 2002, when the Advisory Committee restyled the language and structure of rule.[119] The changes were "intended to be stylistic," except as provided in the Advisory Committee's notes.[120] The stylistic changes rewrote the limiting language to what it is presently: "[u]nless these rules provide otherwise."[121] The restyling also dropped the repetitive phrase "[d]isclosure otherwise prohibited by this rule" in the rule's

115. *Compare* H.R. REP. NO. 95-195, at 5 ("Rule 6(e) is unclear. . . . It ought to be rewritten entirely."), *with* S. REP. NO. 95-354, at 7 ("In this state of uncertainty, the Committee believes it is timely to redraft subdivision (e) of Rule 6 to make it clear.").

116. FED. R. CRIM. P. 6(e)(1), Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319, *reprinted in* 18 U.S.C. app. at 1386 (Supp. II 1979) (superseded 1979).

117. FED. R. CRIM. P. 6(e)(1), 91 Stat. 319 (emphasis added).

118. FED. R. CRIM. P. 6(e)(2)(C), 91 Stat. 319–20. Congress used identical language related to prohibited disclosure in the section listing exceptions not requiring judicial authorization. FED. R. CRIM. P. 6(e)(2)(A), 91 Stat. 319.

119. One smaller structural change occurred in 1979 when Rule 6(e)(1) was added to require the proceedings to be recorded and the general secrecy rule became Rule 6(e)(2). *See* FED. R. CRIM. P. 6(e) advisory committee's note to the 1979 amendment (discussing the content and benefits of the then-proposed Rule 6(e)(1)).

120. FED. R. CRIM. P. 6(e) advisory committee's note to 2002 amendment.

121. FED. R. CRIM. P. 6(e)(2)(B), 535 U.S. 1175, 1185 (2002), *reprinted in* 18 U.S.C. app. at 1387 (Supp. II 2004) (superseded 2006).

exceptions.[122] Yet these two changes were not meant to change the meaning of the rule—namely, that Rule 6(e) provides the exclusive grand jury secrecy rule and exceptions to it.

B. The Exceptions Requiring Judicial Authorization

Although the limiting language in Rule 6(e) cabins exceptions to grand jury secrecy to those enumerated, the exceptions requiring judicial authorization might still allow judges to disclose material outside of the rule. Under Rule 6(e)(3)(E), "[t]he court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter."[123] It then lists five circumstances in which the court may allow the disclosure. Because the circumstances are specific and wide-ranging, the rule should be read as providing an exhaustive list of exceptions.

Generally, "[t]he expression of one thing implies the exclusion of others."[124] However, this is the case only when what is specified "can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved."[125] This determination largely depends on context.[126] However, "[t]he more specific the enumeration, the greater the force of the canon."[127] The exceptions requiring judicial disclosure go beyond simply giving judges discretion to authorize the disclosure. Rather, they list the circumstances in which a judge may do so. Those circumstances are specific, allowing judges to authorize disclosure "(i) preliminarily to or in connection with a judicial proceeding;" "(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;" at the request of the government for (iii) aiding a criminal investigation "by a foreign court or prosecutor," (iv) to enforcing the criminal law of other specified jurisdictions, or (iv) if the materials may show a violation of the Uniform Code of Military Justice.[128] These circumstances both cover a wide range of possibilities and are specific, often listing who may request the disclosure, what a party must show to obtain disclosure, and for what purpose a disclosure may be used.

122. FED. R. CRIM. P. 6(e)(3)(A)–(C), 535 U.S. at 1186 (superseded 2004).
123. FED. R. CRIM. P. 6(e)(3)(E).
124. SCALIA & GARNER, *supra* note 80, at 107 (explaining the negative-implication canon).
125. *Id.*
126. *Id.*
127. *Id.* at 108.
128. FED. R. CRIM. P. 6(e)(3)(E)(i)–(v).

Within these circumstances, judges have discretion whether to authorize the disclosure and whether to impose time, manner, or other conditions on it.[129]

Finally, the Supreme Court has spoken directly to the type of rule structure at issue here, saying that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition," as is the case with Rule 6(e), then "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[130] Thus, by negative implication, the rule does not contemplate judges authorizing disclosure outside of the enumerated circumstances.

Nevertheless, some courts have held that the enumerated circumstances are merely a nonexclusive list of examples setting out "frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances."[131]As mere examples, then, the authority to authorize disclosure presumably comes not from the rule, but from courts' inherent authority, which Part III discusses in detail. After all, any inherent authority the court might have to create new exceptions predated the adoption of Rule 6(e). And, as Part III explains,[132] for a rule to limit courts' inherent authority, it must do so by "a much clearer expression" than a negative implication.[133] The tension, then, between the strong negative implication in Rule 6(e) and courts' longstanding exercise of inherent authority renders the law unsettled. Congress has enumerated specific exceptions outside of which courts arguably should not venture. Yet courts have long created new exceptions to grand jury secrecy under their inherent authority, and something more than a negative implication is necessary to limit that authority.

Two considerations arguably tip the scale toward foreclosing judge-made exceptions to the rule. First, the rule relies on more than just a negative implication. The general secrecy rule contains limiting

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129. FED. R. CRIM. P. 6(e)(3)(E).

130. *Cf.* Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980).

131. Carlson v. United States, 837 F.3d 753, 764–65 (7th Cir. 2016); *see also In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997) ("[B]y delimiting the exceptions . . . Rule 6(e)(3) governs almost all requests[, but] . . . there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." (quoting *In re* Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion))); *In re* Hastings, 735 F.2d 1261, 1269 (11th Cir. 1984) ("[W]e do not believe that the district court's power . . . must stand or fall upon a literal construction of the language of Rule 6(e)."), *overruled by* Pitch v. United States, 953 F.3d 1226 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

132. *See infra* Part III.A.

133. Link v. Wabash R.R. Co., 370 U.S. 626, 630–32 (1962).

language, described in detail above, that limits exceptions to grand jury secrecy to those circumstances enumerated in the rule, including those requiring judicial authorization. Second, Congress's role in the evolution of Rule 6(e) shows concern for specifying exactly when, and to whom, disclosures may be made.[134] As a result, Rule 6(e) is the exclusive grand jury secrecy rule and the exhaustive list of exceptions to it.

III. COURTS' INHERENT AUTHORITY TO REGULATE GRAND JURY PROCEEDINGS

Beyond the text of Rule 6(e), federal courts have relied on inherent supervisory authority to promulgate rules of grand jury procedure.[135] This authority is one "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs."[136] It is power that courts have simply by being courts. However, there is no consensus regarding the source or scope of this power.[137] In the context of grand jury secrecy, courts have asserted inherent authority to authorize disclosures outside of Rule 6(e) at least since the 1970s. But even then, not all judges agreed about doing so. For example, when the Second Circuit ruled on *In re Biaggi*[138] in 1973, Chief Judge Henry Friendly held the court could "rest[] on the exercise of a sound discretion under the special circumstances" of a case to order disclosure.[139] In dissent, Judge Paul Hays pointed out that Rule

134. *See supra* note 115 and accompanying text. Congress was particularly concerned about prosecutorial abuse. *See* S. REP. NO. 95-354, at 8 (1977) (noting the redrafted rule tried to "allay the concerns of those who fear that [prosecutorial power to disclose grand jury materials] will lead to misuse of the grand jury to enforce non-criminal Federal laws"). But as detailed above, Congress paid close attention to judge-ordered disclosures as well in redrafting the rule. *See supra* note 118 and accompanying text.

135. BEALE ET AL., *supra* note 2, § 9:29.

136. Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016) (quoting *Link*, 370 U.S. at 630–31).

137. *See id.* ("[T]his Court has never precisely delineated the outer boundaries of a district court's inherent powers . . . ."); Beale, *supra* note 55, at 1455–62 (describing the use of supervisory power by lower federal courts—generally, not just specifically for the grand jury—and saying the "source" of that authority "has not been identified"). Professor Sara Sun Beale outlines the possible sources of authority for general supervisory power, which include the federal common law, the Supreme Court's own authority, and the authority derived from being a part of the judiciary. *Id.* at 1464. Beale argues, however, that these are not sufficient, especially given how lower courts use supervisory power. *Id.* at 1464–68. Inherent authority at least derives from the judicial power granted by Article III as an implied ancillary judicial power, but the Supreme Court "has had little occasion to focus on the scope of that implied authority." *Id.*

138. *In re* Biaggi, 478 F.2d 489 (2d Cir. 1973).

139. *Id.* at 494 (supplemental opinion).

6(e) "forbids disclosure of grand jury proceedings with certain carefully limited exceptions."[140] He chided the majority for creating an exception "without the support of any" statute or precedent.[141] In Hays's view, the court should have relied on "rules of law" rather than a judge's view of "what 'the public interest' may require."[142] The Second Circuit affirmed *Biaggi* decades later, crafting a test for "'special circumstances' in which" judges may release grand jury records outside of Rule 6(e).[143]

This Part considers courts' inherent authority regarding grand jury secrecy rules. It briefly surveys the source, scope, and limits of courts' inherent authority over their own proceedings before arguing that Supreme Court precedent likely places additional limitations on this power in the grand jury context. Finally, it considers and rejects a counterargument that Rule 6(e)'s common law history, in conjunction with Federal Rule of Criminal Procedure 57(b), justifies exceptions made via courts' inherent authority. Ultimately, this Part concludes that courts' inherent authority over grand jury procedure is sufficiently limited so as to cast doubt on the propriety of judge-made exceptions outside the boundaries of Rule 6(e).

A. Overview of the Source, Scope, and Limitations of Courts' Inherent Authority

Courts' inherent authority stems from the Vesting Clause in Article III of the Constitution.[144] Although its scope is unclear, it generally encompasses powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[145] Because the Article III power is vested in each individual court, the power is inherently a local power necessary for administering a court's

140. *Id.* at 493 (Hays, J., dissenting).

141. *Id.* at 494.

142. *Id.*

143. *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997).

144. Beale, *supra* note 55, at 1468 (arguing, based on Supreme Court precedent, "authority to regulate judicial procedure is an incidental or ancillary power implied in the article III" Vesting Clause); *see supra* note 137. The Article III Vesting Clause provides, "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

145. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

own proceedings.[146] Thus, the substance of a procedural rule adopted using "inherent procedural authority lies fundamentally within the discretion of the adopting court" and applies to that specific court's proceedings, though they are reviewable on appeal.[147]

The degree of necessity justifying the use of inherent authority is unclear. Some suggest that the use of inherent authority is bound by strict necessity.[148] Others take a broader approach, noting that the Supreme Court has delineated an inviolable core of inherent judicial authority rather than defined its outer bounds.[149] However, those taking a broader view still acknowledge that courts' inherent authority is limited, recognizing that in most cases courts should defer to contrary rules made by Congress.[150] This Note assumes the latter, broader view.[151]

The authority to craft procedural rules is not exclusive to the judicial branch. Congress has broad authority to regulate judicial procedure via the Necessary and Proper Clause.[152] For example, Congress passed legislation authorizing the Supreme Court to promulgate the federal rules of civil and criminal procedure.[153] This statutory authority has become the primary mechanism to create and ensure uniformity in federal judicial procedure.[154] Because the rules stem from a congressional authorization, they carry significant weight, such that lower courts "have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions."[155] It follows that courts may only use their inherent

146. Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 817 (2008) (arguing that "any procedural authority conferred by Article III is entirely local" because it only "empowers a court to regulate its own proceedings").

147. *Id.*

148. *See, e.g.*, Pushaw, *supra* note 59, at 847 (arguing inherent authority can be used only if courts cannot otherwise adequately "perform their express constitutional functions").

149. *See, e.g.*, Barrett, *supra* note 146, at 880–81 (arguing that requiring strict necessity "overread[s]" the cases).

150. *See id.* at 816 (stating Congress has authority to regulate procedure, but likely cannot regulate over and against "some small core of inherent [judicial] procedural authority").

151. The broader view reflects how courts actually operate. *See* Pushaw, *supra* note 59, at 849 (saying the use of inherent authority outside of strict necessity has become "entrenched").

152. Beale, *supra* note 55, at 1472.

153. *See supra* note 67 and accompanying text; *see also* 28 U.S.C. § 2072(a) (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

154. Barrett, *supra* note 146, at 887.

155. Bank of N.S. v. United States, 487 U.S. 250, 255 (1988).

authority to create procedural rules for matters on which neither the Constitution nor Congress has already spoken.[156] However, the Court held in *Link v. Wabash Railroad Co.*[157] that when a rule's purpose is to "abrogate" what was previously an area regulated under courts' inherent authority, it must do so by "a much clearer expression" than a negative implication.[158]

In 2016, the Court summarized several previous cases and affirmed this general framework in *Dietz v. Bouldin*.[159] There, the Court held that district courts have inherent power outside of enumerated procedural rules to manage their "own affairs."[160] However, two limitations constrain the use of inherent authority: (1) exercises of inherent supervisory authority "must be 'a reasonable response to the problems and needs' confronting the court's fair administration of justice," and (2) they "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[161] The latter requirement prohibits both directly contradicting a rule and indirectly circumventing it.[162] And *Dietz* did not alter the earlier requirement that a rule must contain more than a negative implication to abrogate courts' inherent authority.[163]

B. Limitations on Inherent Authority over Grand Jury Procedure Specifically

The *Dietz* Court did not expressly say whether courts' inherent authority over their own proceedings extends to grand jury procedure. Because the grand jury is an "arm of the court,"[164] courts' inherent

156. *Id.* at 254.

157. Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

158. *Id.* at 630–32 (holding Federal Rule of Civil Procedure 41(b) could not abrogate inherent authority merely on the basis of a negative implication); *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 46–49 (1991) (stating that inherent power can be limited by a rule but a court will "not lightly assume that Congress has intended" to so limit that power).

159. Dietz v. Bouldin, 136 S. Ct. 1885, 1891–92 (2016).

160. *Id.* at 1891 (quoting *Link*, 370 U.S. at 630) (affirming that district courts may use inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (quoting *Link*, 370 U.S. at 630–31)).

161. *Id.* at 1892 (quoting Degen v. United States, 517 U.S. 820, 823–24 (1996)).

162. Carlisle v. United States, 517 U.S. 416, 426 (1996) (stating inherent authority cannot be used "to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure").

163. *See supra* note 158 and accompanying text.

164. *See supra* note 53 and accompanying text.

authority, bound by *Dietz*, likely does extend to the grand jury.[165] However, because the grand jury is independent, belonging neither to the executive nor the judiciary,[166] grand jury proceedings are not wholly a court's own proceedings. As a result, they are different than the inherent authority to regulate local procedure contemplates.[167] Due to this structure, limitations in addition to those in *Dietz* narrow the extent to which courts may use inherent authority to create grand jury procedural rules.[168]

In the grand jury context, the Supreme Court has invoked the principle that courts cannot use inherent authority contrary to an express rule. And the Court later went beyond this rule to restrict inherent authority in grand jury proceedings even when there was no express rule restricting the court's action. First, in *Bank of Nova Scotia v. United States*,[169] the district court used its inherent authority to dismiss an indictment for prosecutorial misconduct during the grand jury proceedings even though the misconduct was not prejudicial to the defendant.[170] The dismissal circumvented Federal Rule of Criminal Procedure 52(a), which provides that courts should ignore harmless errors.[171] The Supreme Court held that district courts cannot use inherent authority to avoid Rule 52(a) and thereby dismiss an indictment for nonprejudicial prosecutorial misconduct during grand

165. One other indication that it applies is that *Dietz* cites *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), discussed *infra*, as an example of the proposition that "inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz*, 136 S. Ct. at 1892. Because *Bank of Nova Scotia* involved the grand jury, there is some evidence the *Dietz* Court intended its two-part framework for inherent power to apply to grand jury procedure.

166. *See supra* Part I.A.

167. *See* Beale, *supra* note 55, at 1492–93 ("[G]rand jury proceedings are not simply an extension of the judicial proceedings regulated by the federal courts' ancillary authority.").

168. BEALE ET AL., *supra* note 2, § 9:31 ("In practical terms, the most significant limitations flow from the Congressionally authorized adoption of a comprehensive general framework of procedural rules, including the Federal Rules of Criminal Procedure."). In light of Congress's broad power to regulate judicial procedure—and concerns about whether a supervisory power over judicial procedure even extends to grand jury procedure—"it is doubtful whether this authority is broad enough to legitimate all of the supervisory power rulings establishing procedural rules for grand jury proceedings." *Id.*; *see infra* note 181 and accompanying text.

169. Bank of N.S. v. United States, 487 U.S. 250 (1988).

170. *Id.* at 253.

171. FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

jury proceedings.[172] In short, lower courts cannot avoid explicit rules by invoking inherent authority.

Second, in *United States v. Williams*,[173] the Court relied on *Bank of Nova Scotia* to again limit courts' inherent authority over grand jury proceedings.[174] Here, the district court granted the defendant's motion to receive all exculpatory grand jury transcripts.[175] After the disclosure, the defendant moved for, and the district court granted, dismissal of the indictment based upon the prosecution's failure to show the grand jury evidence negating an element of the crime charged.[176] The circuit court affirmed, relying on an earlier circuit decision in which the court had used inherent authority to impose a duty on prosecutors to disclose exculpatory information to the grand jury.[177] The Supreme Court reversed.[178]

Summarizing the holding in *Bank of Nova Scotia*, the Court stated that district courts may not use their inherent authority "as a means of prescribing . . . standards of prosecutorial conduct in the first instance" as they could for regulating "prosecutorial conduct before the courts themselves."[179] Thus, the circuit court erred by establishing "standards of prosecutorial conduct" for grand jury proceedings.[180] Given that judges do not preside over grand jury proceedings, generally "no such 'supervisory' judicial authority exists."[181] Further, because the grand jury is an independent body, the Court hesitated to allow inherent authority to be "a basis for prescribing modes of grand jury procedure."[182] Thus, whatever authority courts may have to create such

172. *See Bank of N.S.*, 487 U.S. at 254 (disallowing the use of inherent authority "to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)").

173. United States v. Williams, 504 U.S. 36 (1992).

174. *See id.* at 46–47 (describing the holding of *Bank of Nova Scotia*). *See generally* Schiappa, *supra* note 32 (exploring the *Williams* decision and its aftereffects).

175. *Williams*, 504 U.S. at 39.

176. *See id*. (describing how the trial court dismissed the indictment because the exculpatory evidence created a reasonable doubt about defendant's guilt).

177. *Id.* at 43 & n.4; *see also* Schiappa, *supra* note 32, at 315–16 (stating that before the Court's holding, a majority of circuits held there was no duty to disclose exculpatory information because "an accused's guilt or innocence" should be determined at trial).

178. *Williams*, 504 U.S. at 55.

179. *Id.* at 47 (emphasis omitted).

180. *See id.* ("It is this latter exercise [of prescribing conduct] that respondent demands.").

181. *Id.*

182. *Id.* at 49–50.

rules "is a very limited one, not remotely comparable to the power they maintain over *their own proceedings*."[183]

The Court's decision in *Williams* differs from *Bank of Nova Scotia* in at least one key respect. In *Bank of Nova Scotia*, the lower court used inherent authority to avoid applying an express rule. But, in *Williams*, the circuit court's imposition of a duty on prosecutors did not contradict or circumvent an existing rule or statute. Nevertheless, the Court held that the circuit court's use of its inherent authority was improper. This suggests a stronger constraint on the use of inherent authority in relation to the grand jury than the limits summarized in *Dietz*, which prohibited the use of inherent authority "contrary to any *express* grant of, or limitation on," courts' inherent authority and even then only to solve a problem of the administration of justice.[184] *Williams* shows that in the grand jury context, courts also cannot act contrary to some *implicit* grants of or limitations on inherent authority.[185]

The circuit court's decision to impose a duty on prosecutors may not have violated an explicit procedural rule, but it was contrary to implicit rules governing the "relationships between the prosecutor, the constituting court, and the grand jury itself."[186] Grand juries do not determine the merits of the accused's guilt or innocence but make an independent assessment as to whether a charge is appropriate.[187] Imposing a duty to disclose exculpatory evidence alters the role of the grand jury to be an adjudicator of guilt and innocence.[188] This would be a fundamental change in what grand juries are impaneled to accomplish.[189]

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183. *Id.* at 50 (emphasis added).

184. *See* Dietz v. Bouldin, 136 S. Ct. 1885, 1888, 1891–92 (2016) (emphasis added) (explaining how "the Court has recognized certain limits" on courts' inherent authority). Although *Dietz* was decided more than a decade after *Williams*, the limitations on inherent authority that it announced were not new. Rather, they merely summarized prior case law, which allows for the comparison made here.

185. By "implicit," this Note refers to something uncodified, though it might be "express" in the sense that court precedent reflects its existence.

186. *See Williams*, 504 U.S. at 50 (stating "that any power" a court might have to create grand jury procedural rules "would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself").

187. *Id.* at 51.

188. *Id.*

189. *See id.* at 53 ("We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor.").

On one reading, contrary to the one presented in Part II,[190] using inherent authority to create new exceptions to Rule 6(e) does not directly contradict an explicit provision in the rule. However, secrecy is a core rule of grand jury procedure, and so there is an implicit limit on judges creating new exceptions, at least when the exception would undermine core grand jury functioning.[191] The key roles of the grand jury as sword and shield depend upon the secrecy of its proceedings.[192] If a grand jury's proceedings were public or its records could be easily disclosed, witnesses might not be fully candid for fear of retribution, and targets of the investigation might be more likely to flee or influence the grand jurors' votes.[193] Concerns such as these are not surface level but rather implicate core grand jury functions. Secrecy is an important procedural rule that protects the twin roles of the grand jury. If a judge-made exception to Rule 6(e) would erode the secrecy rule in a way that undermines these core functions, courts may lack inherent authority to create it.

In sum, courts' inherent authority over grand jury procedure is subject to three limitations. First, any exercise of it must be a reasonable solution to a problem of the administration of justice. Second, it cannot be contrary to or an attempt to circumvent an express federal rule. And finally, a judge-made procedural rule may not contravene implicit limits on interfering with or changing core functions of the grand jury.

The first limitation cuts against judge-made exceptions to grand jury secrecy in many cases because requests for disclosure outside the bounds of Rule 6(e) are not problems of judicial administration as much as reflections of needs by parties outside the grand jury to access those materials. Problems of judicial administration, such as needing grand jury materials for other judicial or grand jury proceedings, already have enumerated exceptions, making the use of inherent

190. *See supra* Part II (arguing for a different reading based on the text, structure, and history of the rule).

191. *Cf.* BEALE ET AL., *supra* note 2, § 9:31 (saying, with respect to "general procedures [that] do not involve the interpretation or application of any procedural rule, statute, or constitutional provision," that "it is doubtful whether there is authority for supervisory power rulings of this nature that . . . impair the effectiveness, independence, or traditional functions of the grand jury").

192. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

193. *Id.* at 219.

authority unnecessary.[194] Judge-made exceptions may implicate the second limitation insofar as they circumvent the limiting language in the rule.[195] And as discussed in this Section, judge-made exceptions may very well run afoul of the third limitation.

C. Rule 6(e)'s Common Law History

Some courts using inherent authority to create exceptions to grand jury secrecy have justified doing so, in part, based on Federal Rule of Criminal Procedure 57(b). Entitled "Procedure When There Is No Controlling Law," the rule states that "[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."[196] Relatedly, grand jury secrecy is a common law doctrine that was later codified into Rule 6(e).[197] When the rule was first promulgated in 1944, the Advisory Committee recognized the common law history of the rule, explaining that the "rule continues the traditional practice of secrecy . . . except when the court permits a disclosure."[198] Before the rule was codified, courts relied on inherent authority to disclose grand jury materials when they deemed it appropriate.[199]

Courts have used this common law history in conjunction with Rule 57(b) to authorize disclosure outside of Rule 6(e). For example, in *Carlson v. United States*,[200] the Seventh Circuit noted it could not contradict an express rule under *Dietz*.[201] And because, in the court's view, Rule 6(e) does not expressly forbid creating new exceptions to grand jury secrecy, the court reasoned that, under Rule 57(b), it could use its inherent authority to authorize disclosure.[202] In addition, the

194. FED. R. CRIM. P. 6(e)(3)(C), (E)(i).

195. *See supra* Part II.A (discussing the rule's limiting language).

196. FED. R. CRIM. P. 57(b).

197. *See supra* Part I.B.

198. FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rule.

199. This was often framed in terms of judges' discretion. *See, e.g.*, United States v. Oley, 21 F. Supp. 281, 281 (E.D.N.Y. 1937) ("The court has power in its sound discretion to grant a motion for the inspection of grand jury minutes. This discretion should be rarely exercised."); *In re* Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa. 1933) (stating that grand jury secrecy is "relaxed . . . whenever the interest of justice requires," a "determination . . . rest[ing] largely within the discretion of the court").

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

201. *Id.* at 762.

202. *See id.* at 763 (explaining that Rule 57(b) allows a court to authorize disclosure absent a "clear[] expression" of intent to abrogate a court's inherent authority (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 631 (1962))).

court quoted the 1944 Advisory Committee Notes, reading the phrase "except when the court permits a disclosure" as permission to craft exceptions to the rule.[203] Finally, the court noted that many of Rule 6(e)'s amendments codified exceptions created by courts using inherent authority.[204]

One way to read Rule 6(e) in light of its common law history is to compare it to common law statutes, which are often defined by two features.[205] First, they are built on the common law tradition, and second, they are written in "sweeping, general terms,"[206] leaving room for courts to define their content.[207] Although Rule 6(e) is not a statute per se, it is a rule promulgated by the Supreme Court and approved by Congress that carries the force of a statute.[208] And because rules carry similar force to statutes, rules that carry the same characteristics as common law statutes should be treated similarly.

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203. *See id.* at 765 (quoting FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rule). Although the 1944 Advisory Committee Notes use the "except when the court permits a disclosure" language, the 1944 rules already had exceptions requiring judicial authorizations. FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966). This could just as easily refer to those exceptions as to inherent authority to create disclosures.

204. *See Carlson*, 837 F.3d at 765 (explaining that the Committee has updated the rule "in response to court practices"); *In re* Kutler, 800 F. Supp. 2d. 42, 44–45 (D.D.C. 2011) (explaining that the "exceptions . . . have 'developed historically alongside the secrecy tradition'" such "that courts' authority regarding grand jury records reaches beyond Rule 6(e)'s literal wording" (quoting *In re* Craig, 131 F.3d 99, 102 (2d Cir. 1997))). *But see* McKeever v. Barr, 920 F.3d 842, 850 (D.C. Cir. 2019) ("[T]he district court has no authority outside Rule 6(e) to disclose grand jury matter."), *cert. denied*, 140 S. Ct. 597 (2020).

205. Treating a rule of criminal procedure as a common law statute is not unheard of. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1378 & n.84 (1988) (suggesting that *Harris v. United States*, 382 U.S. 162 (1965), was interpreting a common law statute). In *Harris*, the Court overturned an earlier precedent through an interpretation of Federal Rule of Criminal Procedure 42(a). *Harris*, 382 U.S. at 162–63, 167.

206. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting). *But see* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 90 (Shyamkrishna Balganesh ed., 2013) (arguing that neither trait particularly delineates common law statutes as a specific category).

207. *See* Lemos, *supra* note 206, at 95 (explaining that Congress writes common law statutes in broad terms so that "federal courts [will] interpret them by developing legal rules on a case-by-case basis in the common law tradition" (quoting *Guardians Ass'n*, 463 U.S. at 641 n.12)). The Sherman Antitrust Act is a classic example. *Id.*

208. *See* Bank of N.S. v. United States, 487 U.S. 250, 255 (1988) (holding that "Rule 52 is . . . as binding as any statute duly enacted by Congress, and federal courts" cannot disregard the Rule any more than they can "disregard constitutional or statutory provisions").

A statute built on the common law codifies a law developed by the courts over time.[209] A codification of common law "might signal an implicit delegation to courts" to continue developing the doctrine.[210] Rule 6(e)'s general secrecy rule codified long-standing common law.[211] And a number of the rule's amendments codified exceptions adopted by courts after the rule was first promulgated in 1944. For example, a 1977 amendment added an exception allowing disclosure to government personnel necessary to assist a government attorney with the enforcement of criminal law.[212] In the notes accompanying that amendment, the Advisory Committee cited *In re William H. Pflaumer & Sons, Inc.*,[213] in which the judge allowed disclosure of grand jury materials to IRS agents in connection with an investigation.[214] The Advisory Committee noted that the "trend seems to be in the direction of allowing disclosure" and codified the exception.[215]

In addition to being derived from the common law, these statutes are written in broad, sweeping terms, leaving room for courts to develop the doctrine.[216] One reading of the original 1944 Advisory

209. *See* Lemos, *supra* note 206, at 98–99 ("Most of the statutes that appear regularly on the 'common law' list codify legal principles that had been developed by the courts as common law.").

210. *Id.*; *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 43–44 (1985) (explaining that, absent specific intent otherwise, Congress codifying common law should be understood as a delegation of common law power to courts).

211. *See supra* note 1 and accompanying text; *see also supra* Part I.B.

212. FED. R. CRIM. P. 6(e) Senate Committee on the Judiciary's notes to 1977 amendment; *In re* Hastings, 735 F.2d 1261, 1268 (6th Cir. 1984) (describing the development of this amendment), *overruled by* Pitch v. United States, 953 F.3d 1226 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). See *Hastings* for another example regarding a 1983 amendment. *Id.* at 1268–69.

213. *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971).

214. *Id.* at 476–77 (providing "IRS agents access to the records so long as they remain under the aegis of attorneys for the government"). When *Pflaumer* was decided, Rule 6(e) allowed disclosure "to the attorneys for the government for use in the performance of their duties." FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977). But the focus was on *attorney* use, not on other government personnel. *Pflaumer*, and cases like it, allowed disclosure to *nonattorney* government personnel necessary to the attorney's work. Allowing disclosure to nonattorney government personnel was a recognition of the realities of the attorneys' work, but it was also a new exception to the secrecy norm. Seeing this trend, the Advisory Committee proposed to codify the exception into what is now Rule 6(e)(A)(ii). *See generally* FED. R. CRIM. P. 6(e) advisory committee's note to proposed 1977 amendment. The committee's proposal prompted Congress to rewrite Rule 6(e), but the rewriting ultimately included this new exception. *See supra* Part II.A.2.

215. FED. R. CRIM. P. 6(e) advisory committee's notes to 1977 amendment. See *supra* note 214 for the history of the Advisory Committee's proposed adoption of the rule, followed by Congress's rewriting.

216. *See supra* note 207 and accompanying text.

Committee Notes indicates the rule invited courts to further develop grand jury secrecy rules in precisely this way.[217] However, two considerations suggest that the current version of the rule is no longer written in broad, sweeping terms and no longer invites judge-made exceptions. First, as discussed earlier,[218] Congress rewrote Rule 6(e) in 1977 because the rule did "not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed."[219] The resulting rule included limiting language both with the general secrecy rule and with the exceptions, limiting disclosures to those listed in the rule.[220] Thus, Congress's intent to write a clear, specific rule may indicate that the 1977 rewriting was a break with the sentiment expressed in the 1944 Notes.

Second, the current language of the rule is detailed and specific. The general secrecy requirement includes limiting language pointing the reader forward to a set of specific, enumerated exceptions. The exceptions differentiate between those circumstances requiring judicial authorization and those that do not,[221] provide a specific set of rules governing disclosure for use in foreign intelligence and national security,[222] provide for disclosure from one grand jury to another,[223] and define cases in which those who receive disclosure are bound to secrecy.[224] And finally, the rule covers many instances where courts might authorize disclosure for the purposes of administrability.[225] This

217. The notes accompanying the original 1944 rules stated that Rule 6(e) "continues the traditional practice of secrecy on the part of members of the grand jury, except when a court permits a disclosure." FED. R. CRIM. P. 6(e) advisory committee's note to 1944 rules. Some courts have interpreted the line "except when a court permits a disclosure" to be an invitation for courts to recognize new exceptions to grand jury secrecy when appropriate. *See, e.g.*, Carlson v. United States, 837 F.3d 753, 765 (7th Cir. 2016) (noting that the history of the rule and the same phrase from 1944 committee notes supported the court's conclusion that it could authorize disclosure outside the rule).

218. *See supra* notes 112–18 and accompanying text.

219. *See* H.R. REP. NO. 95-195, at 5 (1977) (noting the concerns of the House Judiciary Committee); *supra* note 115 and accompanying text.

220. *See supra* notes 117–118 18 and accompanying text.

221. *Compare* FED. R. CRIM. P. 6(e)(3)(A) (permitting certain disclosures without judicial authorization), *with* FED. R. CRIM. P. 6(e)(3)(E) (listing disclosures requiring the court's permission).

222. FED. R. CRIM. P. 6(e)(3)(D).

223. FED. R. CRIM. P. 6(e)(3)(C).

224. FED. R. CRIM. P. 6(e)(2)(B)(vii).

225. *See supra* note 194 and accompanying text.

specificity suggests courts should no longer treat Rule 6(e) as a common law statute.[226]

Many statutes leave gaps or ambiguous language implying a delegation of rulemaking authority to courts.[227] But that is categorically different than the type of language and rulemaking in focus here.[228] Creating an exception to Rule 6(e) to allow disclosure of historically significant grand jury materials, for example, does not resolve an ambiguous term or fill an obvious gap that currently exists in the rule.

Further, cases decided before the promulgation of the Federal Rules of Criminal Procedure now carry a different weight, to the extent their holdings conflict with the rules.[229] For example, *United States v. Socony-Vacuum Oil Co.*,[230] decided four years before the creation of the Federal Rules of Criminal Procedure, held that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[231] Rule 6(e) neither places a time limit on grand jury secrecy nor does it include an exception for disclosure where "the ends of justice require it."[232] Instead, the original 1944 rule established exceptions to grand jury secrecy specifying which ends warrant it.

The 1944 rule gave courts discretion to authorize disclosure "preliminarily to or in connection with a judicial proceeding,"[233] an

226. *See* McKeever v. Barr, 920 F.3d 842, 845 (D.C. Cir. 2019) (reasoning that Rule 6(e)'s specificity supports reading the rule as exhaustive, foreclosing the use of inherent authority), *cert. denied*, 140 S. Ct. 597 (2020); *see also* Pitch v. United States, 953 F.3d 1226, 1236 (11th Cir. 2020) (en banc) (saying the exceptions cannot be "merely precatory" because "[i]t is hard to imagine why Congress and the Rules Committee would bother to craft and repeatedly amend these detailed exceptions if they were meant only to be an illustration" and not exhaustive), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

227. *See* Lemos, *supra* note 206, at 95 (stating that in the absence of a governing agency, judges are left with the job of filling gaps and resolving ambiguities in statutes).

228. *See id.* at 90 (arguing the differences between developing a common law statute and merely resolving ambiguity and filling gaps is one of degree, not of categorical difference).

229. Regarding the "bootstrapping rule" in *Glasser v. United States*, 315 U.S. 60 (1942), the Court stated that "*Glasser* . . . w[as] decided before Congress enacted the Federal Rules of Evidence in 1975," which "now govern the treatment of evidentiary questions in federal courts." Bourjaily v. United States, 483 U.S. 171, 177–78 (1987).

230. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

231. *Id.* at 234; *accord* Carlson v. United States, 837 F.3d 753, 762 (7th Cir. 2016).

232. *Socony-Vacuum*, 310 U.S. at 234.

233. FED. R. CRIM. P. 6(e), 327 U.S. 826, 837–38 (1946) (superseded 1966) ("[A] juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury . . . when so directed by the court preliminarily to or in connection with a judicial proceeding . . . .").

exception that still exists today.[234] After the rules went into effect, the Court continued to use the "ends of justice" language, but then in connection with the judicial-proceedings exception. For example, in *Pittsburgh Plate Glass Co. v. United States*,[235] the Court authorized disclosure of grand jury materials to defense counsel for use on cross-examination.[236] The Court said that a judge could exercise discretion to allow grand jury minutes to be used at trial when the "ends of justice require it."[237] As an example of that longstanding use, the Court cited *United States v. Procter & Gamble Co.*,[238] which examined a request for discovery of grand jury materials in a civil case, that is, in a specific type of judicial proceeding.[239] Although the Court has continued to use language from cases predating the rules, this does not necessarily indicate that Rule 6(e) is a common law statute. Rather, the use of the language changed, becoming a way to define when courts should allow disclosure pursuant to the enumerated exceptions requiring judicial authorization.[240] Thus, although Rule 6(e) has historically been shaped by court precedent, the current rule is sufficiently different from the original 1944 rule that courts should hesitate before relying on the rule's common law history as a source of authority to formulate new exceptions.[241]

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234. FED. R. CRIM. P. 6(e)(3)(E) ("The court may authorize disclosure . . . preliminarily to or in connection with a judicial proceeding . . . .").

235. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). For a similar discussion of this case, see Gonzalez-Rivas, *supra* note 32, at 1683–85.

236. *Pittsburgh Plate Glass*, 360 U.S. at 400.

237. *Id.* (quoting *Socony-Vacuum*, 310 U.S. at 234).

238. United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

239. *See id.* at 678 (describing how defendants moved for discovery of grand jury minutes to use in preparation for trial).

240. *See* McKeever v. Barr, 920 F.3d 842, 846 (D.C. Cir. 2019) (explaining that *Pittsburgh Plate Glass* "plainly fell within the exception for use 'in connection with a judicial proceeding'" (quoting *Pittsburgh Plate Glass*, 360 U.S. at 396 n.1), *cert. denied*, 140 S. Ct. 597 (2020))); Pitch v. United States, 953 F.3d 1226, 1238 (11th Cir. 2020) (en banc) (same), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020). *But see Pitch*, 953 F.3d at 1251, 1254 (Wilson, J., dissenting) (referencing *Pittsburgh Plate Glass* for the proposition that Rule 6 simply declares the common law rule that judges have discretion to order disclosure of grand jury materials). However, the particularized need test, *see supra* notes 82–86 and accompanying text, may have replaced the "ends of justice" analysis. Even so, the particularized need test is only invoked once a party has requested disclosure under one of the rule's enumerated exceptions.

241. For a different view of how Rule 6(e)'s common law history influences courts' supervisory authority, but which ultimately arrives at the same conclusion, see Gonzalez-Rivas, *supra* note 32, at 1682–83 (describing a "common law plus" conception of Rule 6(e) in which the rule codified the common law rules and thus "absorbed [any inherent] power" to authorize disclosure of otherwise secret materials (citing 2 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 18:2 (West 2d ed. 2019))).

In sum, courts have relied on inherent authority to authorize disclosure outside of the rule. They cite the rule's common law history as an invitation to do so in the absence of an explicit statement limiting their inherent authority, and they cite Rule 57(b) as further permission.[242] However, the grand jury's independence, the Court's restrictions on the use of inherent authority, and the uncertainty of Rule 6(e)'s status as a common law statute make it unclear that courts can justifiably rely on inherent authority to authorize disclosure outside the bounds of the rule.

IV. A RESIDUAL EXCEPTION TO RULE 6(E)

Regardless of whether courts may authorize disclosure outside of the enumerated exceptions, there may be instances where the need for disclosure for the sake of the public interest is so great or the interests of grand jury secrecy so diminished that disclosure might be warranted even when Rule 6(e) does not provide for it. Although the policy considerations that justify disclosure will vary with the circumstances, the Advisory Committee on Criminal Rules should clarify the law and provide flexibility and discretion to judges to address these situations by amending Rule 6(e). This Part surveys efforts to change the rule before arguing that the Advisory Committee should adopt a residual exception to the rule. It concludes by illustrating how a residual exception would function by reprising the earlier examples of requests for disclosure by Stuart McKeever and Congress.

A. Proposed Amendments to Rule 6(e)

In 2011, then-Attorney General Eric Holder proposed that the Advisory Committee amend Rule 6(e) to include an exception for materials of historical interest.[243] Holder explained that none of the rule's enumerated exceptions authorized the disclosure of grand jury records "based solely on the records' historical significance,"[244] but he argued that current doctrine allowing courts "unbounded discretion"

242. This Note, however, argues for a different reading of Rule 6(e)'s text. *See supra* Part II. If correct, Rule 6(e)'s limiting language may foreclose a line of reasoning that relies on Rule 57(b) as a source of authority.

243. Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to the Hon. Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Crim. Proc. 5–9 (Oct. 18, 2011), https://www.uscourts.gov/sites/default/files/fr_import/11-CR-C.pdf [https://perma.cc/HP9L-R47H].

244. *Id.* at 2–3.

to "entertain motions for disclosure under their inherent authority" was "untenable."[245] Thus, he proposed adding an exception for historically significant grand jury records.

Holder's proposal contained several components. First, it divided records into separate age categories. Courts would not be able to hear requests for disclosure of records younger than thirty years old.[246] Records older than thirty years but younger than seventy-five years could be disclosed after a judge "determine[d] that the requirements of grand-jury secrecy are outweighed by the records' historical significance."[247] Records seventy-five years or older would automatically become available to the public under the standards for public records used by the National Archives and Records Administration ("NARA"), which would house the records.[248]

For those records in the thirty- to seventy-five-year age category, the proposal required courts, before authorizing disclosure, to find by a preponderance of the evidence that (1) the moving party only sought archived grand jury materials; (2) the materials have "exceptional" historical significance; (3) the case files have been closed for at least thirty years; (4) "no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions" or other reasonable means; (5) "disclosure would not impede any pending government investigation or prosecution;" and (6) there is no other public interest that warrants continued secrecy.[249] In addition, Holder maintained that these specific factors would not preclude looking at additional criteria, such as those already established in case law.[250]

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245. *Id.* at 5.

246. *Id.* at 6, 9.

247. *Id.* at 6.

248. *Id.*

249. *Id.* at 9.

250. *Id.* at 7. Holder refers to *In re Craig*, 131 F.3d 99 (2d Cir. 1997), as listing factors considered in "the paradigm examples of disclosure to date," such as the releases of "the Nixon, Rosenberg, and Hiss grand-jury testimony." *Id. Craig* provides the following "non-exhaustive" list:

> (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.

Upon consideration, the Advisory Committee decided not to amend the rule.[251] In the discussion, the Committee noted that cases requesting disclosure were relatively rare, that district courts had appropriately resolved the cases under their inherent authority,[252] and that creating a nationally applicable rule was premature.[253] In addition, the subcommittee was concerned that creating a presumption of public availability after seventy-five years would be a major change to the presumption that grand jury records would always be "secret absent an extraordinary showing in a particular case."[254] And the subcommittee members agreed that NARA should not be "the gatekeeper for grand jury materials."[255]

After the Advisory Committee declined to act on Holder's proposal, the issue laid relatively dormant until 2020. When the Supreme Court denied certiorari in *McKeever v. Barr*, Justice Breyer wrote separately to highlight the question of courts' inherent authority to disclose grand jury materials outside of Rule 6(e).[256] Noting that the D.C. Circuit's decision created a circuit split, Justice Breyer wrote that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules . . . is an important question. It is one I think the Rules Committee both can and should revisit."[257] Shortly after Justice Breyer issued this statement, the Eleventh Circuit deepened the circuit split when it handed down *Pitch v. United States*.[258] The court's en banc decision overruled earlier precedent to hold that Rule 6(e) is

Id. at 106.

251. Memorandum from the Hon. Reena Raggi, Chair, Advisory Comm. on Fed. Rules of Crim. Proc., to the Hon. Mark R. Kravitz, Chair, Standing Comm. on Rules of Prac. & Proc. 20 (May 17, 2012), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE - JUNE 2012, at 629, 648 (2012) [hereinafter Hon. Reena Raggi Memorandum], https://www.uscourts.gov/sites/default/files/fr_import/ST2012-06_Revised.pdf [https://perma.cc/GEG6-3H47] (agenda book).

252. Of course, this conclusion assumes the propriety of courts authorizing disclosure under their inherent authority. As this Note argues, however, that assumption may not be as settled as the Committee's conclusion indicates. *See supra* Part III.

253. Hon. Reena Raggi Memorandum, *supra* note 251.

254. Advisory Comm. on Crim. Rules, Draft Minutes 7 (Apr. 22–23, 2012), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE - JUNE 2012, *supra* note 251, at 653, 659.

255. *Id.*

256. McKeever v. Barr, 140 S. Ct. 597, 597–98 (2020) (statement of Breyer, J.).

257. *Id.*

258. Pitch v. United States, 953 F.3d 1226, 1241 (11th Cir. 2020) (en banc), *petition for cert. filed*, No. 20-224 (U.S. Aug. 21, 2020).

exhaustive and exclusive and that district courts do not have inherent authority to act outside its bounds.[259]

At the same time, the Public Citizen Litigation Group and the Reporters Committee for Freedom of the Press, on behalf of themselves and other organizations, separately proposed amendments to Rule 6(e). First, the Public Citizen Litigation Group proposed amending Rule 6(e) along the same lines as the Holder proposal.[260] This new proposal was nearly identical to Holder's proposal except that it shifted the time frames involved. It would allow a court to authorize disclosure, under the same factors, after twenty years, not thirty, and would allow records to become public after sixty years.[261]

Second, the Reporters Committee for Freedom of the Press, on behalf of a number of news organizations, also proposed that the Advisory Committee amend Rule 6(e).[262] Instead of following the Holder proposal, the Reporters Committee's proposal was significantly broader, since it would apply both to historical records and to other issues of "public interest."[263] It is thus more like a residual exception of the type this Note advocates rather than an exception focused only on historical materials. As criteria for authorizing disclosure, the Reporters Committee proposed using the factors from the balancing test announced by the Second Circuit in *In re Craig*.[264] Those factors include considerations such as who is seeking disclosure, "whether the defendant to the grand jury proceeding or the government opposes the disclosure," "why disclosure is being sought," "what specific information is being sought," "how long ago the grand jury proceedings took place," and whether witnesses to the proceedings might be affected by the disclosure.[265]

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259. *Id.*

260. *See* Letter from Allison M. Zieve, Dir., Pub. Citizen Litig. Grp., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc. 10–11 (Mar. 2, 2020) [hereinafter Public Citizen Litigation Group Proposal], https://www.citizen.org/wp-content/uploads/PCLG-letter-to-Rules-Committee.pdf [https://perma.cc/CZ67-QLKF] (proposing an amendment to Rule 6(e)).

261. *Id.*

262. Letter from Reps. Comm. for Freedom of the Press to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. & Proc. 1 (Apr. 7, 2020) [hereinafter Reporters Committee Proposal], https://www.rcfp.org/wp-content/uploads/2020/04/4.7.2020-RCFP-Letter-to-Advisory-Committee.pdf [https://perma.cc/RR2M-RZS2].

263. *See id.* at 7 (proposing to amend Rule 6(e)(3)(E) to permit disclosure "on petition of any interested person for reasons of historical or public interest").

264. *Id.* at 2.

265. *In re* Craig, 131 F.3d 99, 106 (2d Cir. 1997). For the full list, see *supra* note 250.

In addition to these proposed exceptions, both groups suggested adding a blanket statement in Rule 6 that would read, "Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."[266] Although this general provision would supersede the textual indications that Rule 6(e) is the exclusive and exhaustive rule, it would not fully resolve the matter of inherent authority because it provides no affirmative grant of authority. By qualifying "inherent authority" with "whatever," the proposed provision assumes, without deciding, that such inherent authority exists. Further, the term "whatever" leaves the quantum of authority indeterminate.[267] As such, it provides no guidance on how much inherent authority district courts actually have over grand jury procedure. Because courts' inherent authority to disclose grand jury materials outside of Rule 6(e) is unsettled and perhaps very limited,[268] the proposed phrasing would do no more than push the question beyond the text of the rule itself.

Thus, with respect to historically significant grand jury materials, the Public Citizen Litigation Group proposal would resolve the current circuit split. However, with respect to courts' inherent authority to disclose grand jury materials in other circumstances,[269] the proposal pushes the discussion beyond the text of the rule but does not clarify the law. Because of its broader scope, the Reporters Committee's proposal functions more as a residual exception and so would be more successful since it would give courts not only guidance and clarity but an affirmative grant of authority in a wide range of circumstances. As a result, the need for a separate provision about inherent authority would be diminished, since it would only need to be invoked for circumstances not falling under the "historical or public interest."[270]

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266. *Compare* Public Citizen Litigation Group Proposal, *supra* note 260, at 11 ("Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."), *with* Reporters Committee Proposal, *supra* note 262 (using nearly identical language).

267. *See Whatever*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/228087 [https://perma.cc/4DT9-ZPTA] (defining whatever, when used "[a]s nominal relative, in a generalized or indefinite sense," to be an adjective indicating "[a]ny . . . at all").

268. *See supra* Part III.B.

269. Requests by Congress are an example of another circumstance where courts might be asked to rely on inherent authority but for which a clear grant of authority would be helpful. *See infra* Part IV.B.2.

270. *See* Reporters Committee Proposal, *supra* note 262 (proposing an amendment granting explicit authority to disclose materials "of historical or public interest").

B. Proposal for a Residual Exception

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. Residual exceptions are already used in other areas of the law, such as in the evidentiary hearsay rules.[271] Adding one to Rule 6(e) would have the benefit of giving courts a clear, affirmative source of authority on which to rely when considering whether to authorize a disclosure not otherwise covered by an exception to Rule 6(e). Moreover, it would do so while avoiding the need for courts or the Advisory Committee to decide the source and scope of courts' inherent authority over grand jury procedure. Finally, adding a residual exception is important because unless a disclosure falls under an exception not requiring judicial authorization, all other disclosures must be authorized by the court. As a result, if there is no clear authority on which to authorize disclosure outside the current exceptions, some grand jury materials may remain secret despite great public interest in their disclosure.

A residual exception would also guide courts and parties seeking disclosure about how to approach the decision. First, a residual exception could ask judges to consider whether disclosure would be contrary to the policies supporting grand jury secrecy.[272] This ensures that the disclosure would not contravene implicit rules vital to the grand jury's core functioning.[273] Second, the rule could ask courts to consider whether disclosure would serve the "ends of justice,"[274] invoking the language used by the Supreme Court both before and after the original promulgation of Rule 6(e).[275] Finally, the rule could require courts to use the particularized need test, thus keeping the exception consistent with the way disclosures under the other exceptions are already adjudicated. The moving party would have to show that the need for continued disclosure outweighs the need for

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271. *See, e.g.*, FED. R. EVID. 807 (providing a "Residual Exception" and allowing admission of otherwise inadmissible hearsay if a judge determines the hearsay to be sufficiently probative and trustworthy).

272. *See supra* Introduction (listing policies underlying grand jury secrecy).

273. This factor attempts to bring the residual exception within the guidance given by the Supreme Court in *United States v. Williams*. For a discussion of *Williams*, see *supra* Part III.B.

274. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

275. *See supra* Part III.C.

secrecy and that the request is tailored to include only the materials needed.[276] This balancing test encompasses the considerations set out in *Craig*, but expressly stating those factors in Rule 6(e) might provide greater clarity.[277]

Reprising two earlier examples illustrates how a residual exception could operate.

1. *Stuart McKeever's Request for Disclosure*. A residual exception could have been used to decide whether to release grand jury materials to Stuart McKeever to aid his research into the murder of Professor Galíndez. First, disclosure of sixty-year-old grand jury materials probably would not undermine any core rules necessary to the functioning of a grand jury. After all, the investigation into Agent Frank had long finished, and most people associated with the case are probably no longer alive. However, setting a precedent that materials might be disclosed, even after sixty years, could make witnesses in future investigations less forthcoming and candid, thus impeding the functioning of future grand juries.

Second, the ends of justice are served by disclosure. If the materials would help to solve the disappearance and murder of Professor Galíndez, then justice is served, even if it is long overdue. Finally, if McKeever's request was tailored specifically to materials pertaining to Professor Galíndez or circumstances surrounding his disappearance and murder, and McKeever could show that such information was not reasonably obtainable by some other source, then there would be a particularized need for disclosure. In this case, analysis under a residual exception would probably favor disclosure, especially given the age of the materials in question.

2. *Requests for Disclosure by Congress*. Requests for disclosure of more contemporaneous grand jury information could also be considered under a residual exception. For example, the need for Congress to have access to grand jury materials for the sake of an investigation might be important to the public interest. Yet there is no general exception allowing disclosure to Congress within Rule 6(e). Currently, Congress's primary access to grand jury materials is through

276. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979). Though the *Douglas Oil* test has a prong for whether the material "is needed to avoid a possible injustice in another judicial proceeding," this prong would unduly narrow a residual exception. *Id.*

277. For a list of the *Craig* factors, see *supra* note 250.

an impeachment inquiry—such as those of Presidents Nixon and Trump—which courts have held to fall under the exception allowing disclosure preliminarily to or in connection with a judicial proceeding.[278]

Yet there may be other times when it would be valuable, and in the public interest, for Congress to have access to grand jury records.[279] Although Congress has its own broad investigative power and could have the same witnesses testify that appeared before the grand jury,[280] disclosure of grand materials might still be warranted. For instance, an impeachment is a grave undertaking. Allowing a House committee to see a select portion of grand jury materials in advance of an inquiry might either justify or allay concerns that the impeachment inquiry is necessary. But this might not fall under an exception in Rule 6(e) because it might not yet be preliminary to a judicial proceeding.

Congress might also seek disclosure of grand jury materials outside the impeachment context. For example, in the late 1970s, the Department of Justice used a grand jury to investigate whether Gulf Oil was in violation of the Sherman Act for participating in uranium price fixing.[281] Although prosecutors recommended indictments, the grand jury returned none. Instead, an information was filed against the company, which pleaded nolo contendere to a misdemeanor violation of the Act.[282] Concerned about this outcome, the Senate Judiciary

278. *See, e.g.*, *In re* Application of Comm. on the Judiciary, 414 F. Supp. 3d 129, 137, 147, 182 (D.D.C. 2019), *aff'd*, 951 F.3d 589 (D.C. Cir. 2020) (authorizing disclosure of Mueller grand jury materials to the House Judiciary Committee in connection with its impeachment inquiry regarding President Trump), *cert. granted*, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020); *see also* Haldeman v. Sirica, 501 F.2d 714, 716–17 (D.C. Cir. 1974) (MacKinnon, J., concurring in part, dissenting in part) (suggesting that disclosure of grand jury materials to the House during Watergate could be justified as "being made 'preliminarily to [and] in connection with a judicial proceeding'" (alteration in original) (quoting FED. R. CRIM. P. 6(e), 383 U.S. 1195, 1196 (1966), *reprinted in* 18 U.S.C. app. at 1410 (1976) (superseded 1977))); McKeever v. Barr, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019) (adopting Judge MacKinnon's view in *Haldeman*), *cert. denied*, 140 S. Ct. 597 (2020).

279. Rule 6(e)(3)(D) authorizes disclosure, without needing judicial authorization, of foreign intelligence and counterintelligence related to "federal law enforcement, intelligence, protective, immigration, national defense, or national security official[s]." FED. R. CRIM. P. 6(e)(3)(D). Members of Congress may perhaps fit under this exception in some situations.

280. *See* FOSTER, *supra* note 8, at 35–36 (surveying Congress's investigative power).

281. William E. Weinberger, Note, *Congressional Access to Grand Jury Transcripts*, 33 STAN. L. REV. 155, 155 (1980).

282. *Id.* For context, an "information" is a criminal charge brought by a prosecutor without an indictment by a grand jury. *See Information*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the federal context, misdemeanors can be charged by indictment, information, or complaint. *See* FED. R. CRIM. P. (7)(a)(1)(B), 58(b)(1).

Subcommittee on Antitrust investigated whether foreign government influence or some limitation in antitrust law had prevented the grand jury from returning felony indictments.[283] The subcommittee brought Assistant Attorney General John Shenefield to testify before the full Senate Judiciary Committee.[284] Shenefield refused to discuss the investigation, citing grand jury secrecy.[285] The District Court for the District of Columbia then denied disclosure of grand jury records to the Judiciary Committee on grounds that it did not fit within any enumerated exception.[286]

If this were happening now, disclosure to investigate foreign government influence might fall under the exception allowing disclosure of matters related to foreign intelligence and national security.[287] However, this would not cover materials related to defects in antitrust law. Under a residual exception, a court could consider this request. Whether the ends of justice favored disclosure might turn on whether the congressional investigation was connected to a "valid legislative purpose."[288] Further, the court could consider whether the request was tailored to the legislative purpose and whether similar information could not be obtained from other sources, thus indicating a particularized need for the disclosure. Finally, the court could weigh whether disclosure to Congress would impair the proper functioning of the grand jury. In this case, it would probably be a close call. On the one hand, disclosure might chill corporate cooperation with grand jury proceedings and lead to less than full and frank testimony in the future. On the other hand, a disclosure tailored to Congress's needs might minimize the adverse impact on future grand juries.

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283. Weinberger, *supra* note 281, at 155.

284. *Id.*

285. *Id.*

286. *Id.* at 156–57.

287. FED. R. CRIM. P. 6(e)(3)(D). This was added in 2002 as part of the USA PATRIOT Act of 2001. FED. R. CRIM. P. 6(e)(3)(D) advisory committee's notes to 2002 amendment.

288. FOSTER, *supra* note 8, at 35–36. Foster notes that although in other contexts a "valid legislative purpose" may protect a congressional committee from judicial scrutiny under the Speech and Debate Clause, this has only twice been successfully used to justify disclosing grand jury materials. *Id.* 35–39 (first citing *In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1307 (M.D. Fla. 1977); and then citing *In re* Grand Jury Proceedings of Grand Jury No. 81-1 (Miami), 669 F. Supp. 1072, 1075 (S.D. Fla. 1987)). Foster further notes that the D.C. Circuit and the Department of Justice take the position that grand jury materials may only be released to Congress if Rule 6(e) permits. *Id.* at 38–39. Because in other contexts a valid legislative purpose gives weight to congressional investigations, analysis under a residual exception might properly consider whether Congress's request is in pursuit of such a purpose.

CONCLUSION

Secrecy is a long-standing part of grand jury procedure and is integral to its proper functioning. Although grand jury secrecy began as a common law rule, it is now codified in Rule 6(e), which, by its text and evolution, covers the field of grand jury secrecy and the departures from it. Beyond Rule 6(e), courts have limited inherent authority to craft new exceptions to the rule. Nevertheless, historical and current practice in many circuits is to authorize disclosure outside the rule when, in the judge's discretion, such disclosure is warranted. The tension this creates between doctrine and practice renders the law of grand jury secrecy unsettled. The Advisory Committee should settle the law by adding a residual exception to Rule 6(e). Doing so would provide a clear grant of authority for courts to authorize disclosure while also giving courts and litigants guidance on what to consider when making a disclosure determination.