
Jessica Vedrani
Suffolk University

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CRIMINAL PROCEDURE—NIGHT AT THE MUSEUM: THE BALANCE BETWEEN LEARNING FROM HISTORY AND MAINTAINING THE SECRECY SURROUNDING GRAND JURY PROCEEDINGS—LEPORE V. UNITED STATES (IN RE ORDER DIRECTING RELEASE OF RECS.), 27 F.4TH 84 (1ST CIR. 2022).

The Fifth Amendment of the United States Constitution guarantees the right to grand jury proceedings. This right is underpinned by the importance of secrecy, ensuring that the contents of these proceedings remain undisclosed to the public. Despite the interest in maintaining

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1 See U.S. CONST. amend. V. (establishing grand jury proceedings in United States courts). The text of the Fifth Amendment states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .” Id. The role of the grand jury is two-fold: (1) to investigate and gather evidence of crimes, and (2) to decide whether the prosecutor has enough evidence to charge someone with a crime. See H. Brent McKnight, Jr., Note, Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy, 70 DUKE L.J. 451, 451-52 (2020) (explaining purpose of grand jury); Brent McKnight, Jr., Note, Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency, 130 HARV. L. REV. 1205, 1206-07 (2017) (noting dual function of grand jury). Generally speaking, the grand jury consists of local citizens who listen to and determine the sufficiency of testimony and evidence used to charge an individual of an offense. See Nicole Smith Fadell, Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence, 123 DICK. L. REV. 1, 20 (2018) (explaining role of grand jury). But see Fred. A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury, 69 N.Y.U. L. REV. 563, 569 (1994) (arguing courts have allowed purpose of grand jury to wither, rendering them ineffective procedural devices); Peter Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication, 78 MICH. L. REV. 463, 474 (1980) (remarking few practitioners and scholars take grand jury processes seriously); James P. Shannon, The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?, 2 N.M. L. REV. 141, 166-67 (1972) (asserting grand juries act to protect officers rather than innocent citizens).

2 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, 16 (1996) (remarking Fifth Amendment implicitly required secrecy of grand juries). Although the text of the Fifth Amendment does not explicitly state grand jury proceedings must be kept a secret, such values were carried over from the English monarchy. See id. at 12-16. Common law further ingrained secrecy in the functions of grand jury proceedings. See McKnight, supra note 1, at 460 (explaining “strong grand jury secrecy norm” in early 1900’s). Eventually, in 1946, the Federal Rules of Criminal Procedure explicitly adopted this requirement. See Kadish, supra, at 23-24. The rationale for secrecy includes: 1) hesitancy of witnesses to voluntarily come forward with information, 2) ensuring truthful testimony, 3) prevention of witnesses from fleeing, and 4) ensuring no public ridicule of the accused. See Lepore v. United States, 27 F.4th 84, 87-88 (1st Cir. 2022) (citing Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979)).
secrecy, Rule 6(e) of the Federal Rules of Criminal Procedure establishes circumstances when courts may unseal records of grand jury proceedings.\(^3\) Outside of this enumerated list, some courts and scholars emphasize the ability and value of unsealing records for historical purposes as a method to inform and teach the public.\(^4\) Nevertheless, in *Lepore v. United States*,\(^5\) the First Circuit declined to follow this interpretation and held that even if courts have inherent authority to unseal records under Rule 6(e), such authority does not include disclosure based on an underlying historical interest in the records.\(^6\) As a result of this decision, the general public is left with gaps in history, deepening the already pervasive public distrust of the justice system, and heightening the risks of learning curated lessons from the past.\(^7\)

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3 See *Fed. R. Crim. P. 6* advisory committee’s note (continuing grand jury secrecy except in instances permitting disclosure); see generally *Fed. R. Crim. P. 6(e)(3)* (establishing exceptions to grand jury secrecy). This section of the Federal Rules notes five explicit circumstances where a “court may 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;
(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.

*Fed. R. Crim. P. 6(e)(3)(E)(i)-(v).*


5 27 F.4th 84 (1st Cir. 2022).

6 See *id.* at 94 (rejecting argument of unsealing grand jury records based on historical significance).

7 See *Brief for Am. Hist. Ass’n et al. as Amici Curiae Supporting Petitioner at 4-6, Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc) [hereinafter *Brief of Am. Hist. Ass’n*] (explaining disclosure of historic grand jury materials better serves public by offering more complete record). This complete record not only benefits the education system, but also the public by offering transparency, inclusiveness, and ultimately public trust of the justice system. See *Meghan J. Ryan, Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1546 (2022) (noting benefits of transparent criminal justice system). For example, there has been cited value in...
In 1971, Daniel Ellsberg assisted the New York Times in publishing the Pentagon Papers, a collection of classified documents providing an internal assessment of the United States’ involvement in the Vietnam War, fundamentally challenging America’s understanding of the divisive war.\(^8\) Alongside the ensuing legal action—ultimately establishing one of the most notable First Amendment cases in history, New York Times, Co. v. United States\(^9\)—an individual named Samuel Popkin was called to testify before a grand jury regarding the allegations against Ellsberg.\(^10\) As a grand jury

reopening the 1960’s civil rights era cases to afford legal accountability. See Winston Williams & Amy H. McCarthy, Breaking the Wall of Silence – Balancing Grand Jury Secrecy with Legitimacy and Transparency in Pitch v. United States, 28 GEO. MASON L. REV. 1129, 1142-43 (2021) (citing Margaret M. Russell, Cleansing Moments and Retrospective Justice, 101 MICH. L. REV. 1225, 1226 (2003)) (remarking benefits include “exposing individual and governmental malfeasance… to ‘correct the record’ so that the legitimacy of the legal system itself is not further undermined.”). As such, grand jury proceedings have been disclosed to use the information to institute change in attitudes, conduct, or policy, stemming from knowledge about the truth behind notorious historical events. See Carlson v. United States, 109 F. Supp. 3d 1025, 1035 (N.D. Ill. 2015) (demonstrating grand jury records were important to supplement “robust public debate surrounding the government’s prosecution of members of the press for violations of the Espionage Act.”), aff’d, 837 F.3d 753, 753 (7th Cir. 2016); see also Williams & McCarthy, supra note 7, at 1141 n.94 (citing In re Am. Hist. Ass’n, 49 F. Supp. 2d 274, 295 (S.D.N.Y. 1999)) (explaining transparency enhances historical accuracy and builds public confidence).


\(^9\) 403 U.S. 713 (1971) (establishing “heavy presumption against prior [governmental] restraint,” even in cases involving national security).

\(^10\) See Lepore, 27 F.4th at 86-87 (demonstrating historical significance of grand jury testimony). Daniel Ellsberg originally worked for the RAND Corporation as a strategic analyst of national security, but then left to work as an analyst of the United States military efforts for the Department of Defense. See Michael Ray, Daniel Ellsberg: American Military Analyst and Researcher, BRITANNICA (Jan. 18, 2023), https://perma.cc/SA4K-Y6XM (last visited May 6, 2023) (elaborating on Ellsberg’s background before Pentagon Papers). Eventually, Ellsberg worked for the State Department, where he worked on U.S. Decision-Making in Vietnam, 1945-68, a top-secret report commissioned by the Secretary of Defense. See id. However, Ellsberg began photocopying its content and then earned national recognition when he secretly photocopied a classified account of the Vietnam War that the Department of Defense commissioned and leaked it to Congress and the New York Times. See Heidi Kitrosser, What if Daniel Ellsberg Hadn’t Bothered?, 45 IND. L. REV. 89, 89 (2011) (explaining historical relevance of Ellsberg). Ellsberg was subsequently indicted and tried under the Espionage Act, facing upwards of 115 years in prison. See Ray, supra. Ultimately, all charges were dropped due to gross government misconduct. See Kitrosser, supra, at 89-90. Not only did Ellsberg’s actions make history, but the seventeen-day turnaround for a Supreme Court hearing and decision, as well as the outcome on prior-restraint, led to one of the most significant court cases in history. See The Editors of Encyclopedia Britannica, Pentagon Papers, BRITANNICA (Feb. 19, 2020), https://perma.cc/7FVK-4FKL (last visited May 6, 2023) (remarking historical importance of Pentagon Papers and Ellsberg). Accordingly, Lepore could establish the importance of Popkin’s testimony in relation to New York Times Co. because Popkin
witness, Popkin’s experience was rather unusual.\footnote{See Lepore, 27 F.4th at 87 (noting Popkin refused to testify to some events which placed him in contempt of court). As a witness, Popkin’s refusal to answer nine questions, which was primarily based on the relevance of the government’s inquiries and his First Amendment privilege not to reveal sources of his information, placed him in jail for eight days. See United States v. Doe, 460 F.2d 328, 330-31 (1st Cir. 1972); see also Bill Kovach, Harvard Professor Jailed in Pentagon Papers Case, N.Y. TIMES (Nov. 22, 1972), https://perma.cc/8MGF-PTVL (last visited May 6, 2023) (noting Popkin is first American scholar to be jailed for protecting sources of information).}

Later, in 2018, the aberrant nature of these grand jury proceedings piqued the interest of Jill Lepore, a Harvard history professor and renowned journalist.\footnote{See Lepore, 27 F.4th at 87 (explaining why Lepore became interested in Popkin’s testimony). Lepore was writing a book about Popkin’s former employer, Simulmatics Corporation, when she learned Popkin was involved in grand jury investigations. See id.; JILL LEPORIE, IF THEN: HOW SIMULMATIC CORPORATION INVENTED THE FUTURE, at 1 (Liveright 2020) (discussing Lepore’s research on Popkin’s former employer which led to this case).} Through her investigation, Lepore discovered Popkin’s grand jury proceedings were held at the National Archives in Boston and decided “that she needed to know more.”\footnote{See Lepore, 27 F.4th at 87 (intending to supplement research regarding Simulmatics Corporation).}

Following this inquiry, Lepore filed a Freedom of Information Act (“FOIA”) request to release the grand jury records which were under indefinite seal.\footnote{See Lepore, 27 F.4th at 87 (referring to court order keeping certain information confidential for unspecified period of time).} However, the National Archives denied Lepore’s FOIA request, citing the need “to preserve the secrecy of grand jury proceedings per 5 U.S.C. § 552(b)(3), pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.”\footnote{Lepore, 27 F.4th at 87; see also 5 U.S.C. § 552 (outlining discretion of agencies to make information publicly available). Under FOIA, agencies lack the authority to disclose matters that are “specifically exempted from disclosure by statute . . . if that statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” See 5 U.S.C. § 552(b)(3)(A)(i)-(ii). Since statutory authority governing grand jury proceedings explicitly establishes criteria for disclosure, FOIA did not apply. See FED. R. CRIM. P. 6(e).}

Rather than appealing the Boston National Archives’ decision, Lepore filed a petition in the United States District Court for the District of Massachusetts seeking release of the records pursuant to Federal Rule of Criminal Procedure 6(e).\footnote{See Lepore v. United States, No. 18-mc-91539-ADB, 2020 WL 13043221, at *5 (D. Mass. Feb. 4, 2020) (outlining conditions for release of documents), rev’d, 27 F.4th 84 (1st Cir. 2022). In} The district court granted Lepore’s petition and released the records subject to specific redactions.\footnote{See Lepore, 27 F.4th 87 (noting Popkin is first American scholar to be jailed for protecting sources of information).} Despite this
ruling, the district court stayed its order pending appeal by the government to the First Circuit.\textsuperscript{18}

While colonial America informally utilized grand juries, the first official implementation of this practice in the United States occurred after the ratification of the Fifth Amendment.\textsuperscript{19} The Constitution never explicitly mentioned the concept of secrecy, and early colonial courts valued openness.\textsuperscript{20} Nevertheless, secrecy slowly became ingrained in legal process and practice via common law.\textsuperscript{21} With the increased contentions over secrecy and a focus on the court’s “discretion,” Congress authorized the Supreme Court to create a uniform set of rules for criminal procedure.\textsuperscript{22} As a result,

addition to redacting the records for witnesses that favored the release, the records may also be redacted if the government can demonstrate a compelling interest to protect the surviving families of deceased witnesses. See id. at *8.

\textsuperscript{18} See Lepore, 27 F.4th at 86 (describing procedural history of case).

\textsuperscript{19} See Kadish, \textit{supra} note 2, at 9-12 (discussing historical development of grand jury system in United States). Prior to the Fifth Amendment, grand juries were utilized in England with individuals acting as informants to the monarchy, eventually including the sword and shield function we see today in the United States. See \textit{id.} at 6 (explaining implementation of grand jury system); see also Williams & McCarthy, \textit{supra} note 7, at 1134 (2021) (tracing grand jury system back to colonial times). Nonetheless, colonial America was slow to embrace this judicial process, as it adopted its first regular grand jury system in 1635. See Kadish, \textit{supra} note 2, at 9 (describing United States’ adaptation of English grand jury system).

\textsuperscript{20} See Richmond Newspapers v. Virginia, 448 U.S. 555, 567 (1980) (highlighting openness of trials was fundamental to English system and American colonial system); Press-Enterprise Co. v. Super. Ct. (Press-Enterprise II), 478 U.S. 1, 10 (1986) (comparing secret grand jury proceedings to open preliminary hearings in criminal trials); see also U.S. CONST. amend. V. (omitting any language of grand jury secrecy). While there is no explicit mention of secrecy, the Grand Jury Clause of the Fifth Amendment “made grand jury secrecy an implicit part of American criminal procedure.” See Kadish, \textit{supra} note 2, at 16.


Congress adopted the Supreme Court’s rule for grand jury secrecy, officially codifying the rules in 1946.\(^{23}\)

The courts developed policy rationales and procedural safeguards for parties involved in grand jury proceedings alongside grand jury secrecy codification.\(^{24}\) Despite court reasoning, the Federal Rules of Criminal Procedure outlined specific instances when disclosure trumps the need for secrecy.\(^{25}\) Although this list authorizes the specific instances where the secrecy veil may be pierced, parties seeking production of grand jury documents must also demonstrate the degree in which disclosure of such information is necessary.\(^{26}\) As such, just because a need for disclosure falls under an enumerated exception, it does not automatically permit release without judicial balancing of the particularized need—adding an extra level of precaution for divulging the secrecy of this process.\(^{27}\)

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\(^{23}\) See Fed. R. Crim. P. 6 (outlining rules for grand jury proceedings). Two grand jury secrecy provisions are outlined within these rules. See Wilkins & Triffin, supra note 20, at xi; see generally Fed. R. Crim. P. 6(e)(2) (establishing all parties involved shall uphold grand jury secrecy).

\(^{24}\) See United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954) (outlining five reasons for requiring grand jury secrecy). Various courts have cited the required reasons are:

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


\(^{26}\) See Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 222 (1978) (defining “particularized need” test). The test requires 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.” Id.

\(^{27}\) See United States v. Baggot, 463 U.S. 476, 479-80 (1983) (prohibiting disclosure because “particularized need” test was not met). Even though the reason for disclosure meets the criteria governing the type outlined in Rule 6(e), disclosure may not be granted if the degree from the “particularized need” test is not met. See United States v. McDougal, 559 F.3d 837, 840-41 (8th Cir. 2009) (alleging grand juries will not properly function without secrecy). The avenue to disclose records—even those authorized in the enumerated list—is a narrow one. See William B. Lytton, Grand Jury Secrecy—Time for a Reevaluation, 75 J. Crim. L. & Criminology 1100, 1116 (1984) (explaining proponents of disclosing sealed documents must meet “particularized need” test); see also Chi. Council of Laws. v. Bauer, 522 F.2d 242, 252 (7th Cir. 1975) (indicating public disclosure must be balanced with strict maintenance of secrecy).
Even with the list of enumerated exceptions, courts still grapple with whether inherent judicial authority exists to unseal grand jury proceedings outside of Rule 6(e). Some circuits read beyond the text of Rule 6(e); one of which, the Second Circuit, greatly considers historical significance for disclosure. However, many circuit courts still grapple with whether

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28 See Dietz v. Boulton, 579 U.S. 40, 45 (2016) (establishing inherent judicial authority in civil context outside Federal Rules). Although “[t]he Federal Rules of Civil Procedure set out many of the specific powers of a federal district court[,] . . . they are not all encompassing.” See id.; see also 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, 587 (2018) (“[N]o aspect of grand jury secrecy has caused more difficulty than determining the permissible scope of disclosure of grand jury matter to third parties. . . .”). But see Daniel Aronsohn, Note, The Need for a Historical Exception to Grand Jury Secrecy in the Federal Rules of Criminal Procedure, 53 LOY. L.A.L. REV. 949, 959 (2020) (noting despite Dietz, circuit split remains over inherent judicial authority within Rule 6(e)); see also Pitch v. United States, No. 17-15016, 2020 U.S. App. LEXIS 9619, at *31 (11th Cir. Mar. 27, 2020) (declining to read historical significance exception into Rule 6(e)); McKeever v. Barr, 920 F.3d 842, 845 (D.C. Cir. 2019) (declining to go beyond Rule 6(e) explicit exceptions); McDougal, 559 F.3d at 841 (holding request failed to satisfy “particularized need” test for authorized disclosure); In re Grand Jury 89-4-72, 932 F.2d 481, 488 (6th Cir. 1991) (refusing to interpret Rule 6(e) beyond what is explicitly stated); cf. In re Craig, 131 F.3d 99, 103 (2d Cir. 1997) (declining to adhere only to six exceptions); Carlson v. United States, 837 F.3d 753, 766 (7th Cir. 2016) (declaring Rule 6(e) as permissive, not exhaustive).

29 See e.g., In re Craig, 131 F.3d at 99 (permitting disclosure of grand jury charges against public official accused of being communist spy); Carlson, 837 F.3d at 767 (unsealing grand jury records for author writing book about Chicago Tribune trial); In re Kutler, 800 F. Supp. 2d 42, 50 (D.C. Cir. 2011) (disclosing Nixon’s grand jury testimony for historical purposes); In re Nat’l Sec. Archive, 104 F. Supp. 3d 625, 628 (S.D.N.Y. 2015) (permitting disclosure because of historical significance of Rosenberg trial); In re Am. Hist. Ass’n, 49 F. Supp. 2d 274, 297 (S.D.N.Y. 1999) (disclosing transcripts related to espionage investigation of Alger Hiss); In re Unsealed Dockets Related to the Indep. Couns’. 1998 Investigation of President Clinton, 308 F. Supp. 3d 314, 335 (D.D.C. 2018) (releasing grand jury records pertaining to Monica Lewinsky’s sexual harassment charges against Bill Clinton); Brief for Am. Hist. Ass’n, Am. Soc. For Legal Hist., supra note 7, at 4-5 (remarking unsealed records from Rosenberg, Watergate, and Alger Hiss grand jury proceedings). These cases argue that historical significance affords the value of transparency, legitimacy, and trust within the system, as opposed to causing individual harm. See Ariela Gross, When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument, 96 CALIF. L. REV. 283, 286 (2008) (noting value of filling gaps of historical events); Tom R. Tyler, Legitimacy and Criminal Justice: The Benefits of Self-Regulation, 7 OHIO ST. J. CRIM. L. 307, 319 (2009) (remarking procedural justice can restore legitimacy in criminal justice system); James Baldwin, Black English: A Dishonest Argument (1980), in BLACK ENGLISH AND THE EDUCATION OF BLACK CHILDREN AND YOUTH, 54, 55 (Geneva Smitherman ed., 1981) (indicating value of learning from historical events). These scholars argue that “‘[i]f you don’t trust the grand jury: . . . you don’t trust your neighbors.”’ Sean Flynn, The Tamir Rice Story: How to Make a Police Shooting Disappear, GQ MAG., (July 14, 2016) https://perma.cc/4ZH-ZMEU (last visited May 6, 2023) (remarking secrecy of grand juries breeds distrust). However, some scholars argue even further than historical significance, stating any issues of public interest should also afford disclosure. See Letter from Reps. Comm. for Freedom of the Press to Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & P. 1, 5 (Apr. 7, 2020) [hereinafter Reporters Committee Proposal], https://perma.cc/BSG8-NL8 (last visited May 6, 2023) (arguing for amendment of Rule 6(e) to include these exceptions).
historical significance should factor into their decision to unseal records at all. Nonetheless, the Second Circuit identified nine factors in its historical significance analysis that unsealing courts find persuasive:

(1) the identity of the party seeking disclosure; (2) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (3) why disclosure is being sought in the particular case; (4) what specific information is being sought for disclosure; (5) how long ago the grand jury proceedings took place; (6) the current status of the principals of the grand jury proceedings and that of their families; (7) the extent to which the desired material, either permissibly or impermissibly, has been previously made public; (8) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; (9) the additional need for maintaining secrecy in the particular case in question.

In essence, these nine factors establish a method for judges to weigh whether the historically significant material corresponds with the “particularized need” test. Therefore, all federal courts agree that unsealing
records will achieve justice, whether a court reads exclusively into the Rule 6(e) exceptions, exercises its inherent authority, or finds inherent authority extends beyond the explicit exceptions.\footnote{See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940)) (“Certainly ‘disclosure is wholly proper where the ends of justice require it.’”). The question then left for debate is whether justice is achieved by informing the public about historical events or by preserving the notions of secrecy for the grand jury process to properly function. Compare \textit{In re Craig}, 131 F.3d at 105 (identifying focus on public interest), with \textit{Pitch}, 953 F.3d at 20 n.9 (noting policy rationale for not making exception for historically significant matters).}

In \textit{Lepore v. United States}, the First Circuit framed the central issue as whether a district court can unseal grand jury records for historical purposes, assuming that inherent authority existed.\footnote{See \textit{Lepore}, 27 F.4th at 91 (refusing to analyze issue of inherent authority). The court proceeded under the assumption that district courts have inherent authority within Rule 6(e) to narrowly tailor its analysis to whether historical significance is among those situations authorized by inherent authority. \textit{See id.}} Despite the court’s concession that public knowledge of historical events is an important public interest, the court pinpointed the overarching reasoning behind Rule 6(e).\footnote{See \textit{id.} at 92 (remarking purpose of Rule 6(e) is to further interests of justice). The court itself cites to Lepore’s own article to concede that the interests of justice can be broadly furthered via improvements of public knowledge. \textit{See id.} (explaining Lepore’s reasoning for striving to unseal documents); Jill Lepore, \textit{These Truths: A History of the United States} [PAGE] (2018) (describing how knowledge of judicial history can serve public good). However, a court cannot exercise disclosure unless it is a “‘reasonable response to the problems and needs’ confronting the court’s fair administration of justice.” Dietz v. Bouldin, 579 U.S. 40, 45 (2016) (quoting Degen v. United States, 517 U.S. 820, 823-24 (1996)) (arguing district courts do not possess all-encompassing power). \textit{But see} David Weissbrodt, \textit{The Administration of Justice and Human Rights}, 1 CITY U. H.K. L. Rev. 23, 24 (2009) (remarking administration of justice has significant impact on ordinary individuals). Nonetheless, the \textit{Lepore} court emphasizes that the ultimate purpose behind disclosing grand jury proceedings can only be the protection or furtherance of the fair administration of justice, as opposed to serving a social value. \textit{See Lepore}, 27 F.4th at 92 (limiting permissible purposes for disclosure of grand jury materials).}

Concentrated on the concept of the “fair administration of justice,” the court cited various circumstances prior to the 1944 adoption of Rule 6(e) where courts adhered to this theory.\footnote{See \textit{Lepore}, 27 F.4th at 91 (remarking deeply rooted concept of promoting fair administration of justice); \textit{see also} Socony-Vacuum Oil, 310 U.S. at 233-34 (opining disclosure is proper where “the ends of justice require it”); Metzler v. United States, 64 F.2d 203, 206 (9th Cir. 1933) (noting veil of secrecy can be pierced when ends of justice can be furthered). Courts have identified numerous instances where disclosure of confidential grand jury materials was necessary for the fair administration of justice. \textit{See} McKinney v. United States, 199 F. 25, 27 (8th Cir. 1912) (disclosing to prevent abuse of judicial process); \textit{Socony-Vacuum Oil}, 310 U.S. at 233-34 (disclosing to refresh witness’s recollection at trial).} The court found further validation in its decision by asserting the “fair administration of justice” standard aligns with

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\footnote{See \textit{Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940)) (“Certainly ‘disclosure is wholly proper where the ends of justice require it.’”). The question then left for debate is whether justice is achieved by informing the public about historical events or by preserving the notions of secrecy for the grand jury process to properly function. Compare \textit{In re Craig}, 131 F.3d at 105 (identifying focus on public interest), with \textit{Pitch}, 953 F.3d at 20 n.9 (noting policy rationale for not making exception for historically significant matters).}
the First Circuit’s own precedent. The First Circuit assumed that courts possess inherent authority to disclose grand jury proceedings, but must only do so for purposes of fair administration of justice, protecting the integrity of the legal system, or facilitating prosecutions.

Shifting from this overarching analysis on the “fair administration of justice,” the First Circuit narrowed in on disclosure based on historical significance, centering primarily on the Second Circuit’s analysis. The court argued that Craig opened the door for ambiguity, preventing the formation of a bright-line rule to determine historical significance and resulting in increased judicial discretion. Moreover, the court criticized that Craig failed to account for any of the traditional contours of inherent authority when determining whether such records may be disclosed. Furthermore, the court proposed a few additional policy questions of their own, inquiring when disclosure is permitted, even after criticizing Craig’s fair policy question. Given these policy questions and overbreadth of

37 See In re Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005) (relying on inherent authority of sealing documents under Rule 6(e)). This matter dealt with an order to seal records based on continued abuse of an individual who had already demonstrated the intent and capability of tampering with the ongoing grand jury investigation. See id. at 27 (holding exercise of inherent power was justified based on fair administration of justice).

38 See Lepore, 27 F.4th at 92 (limiting permissible purposes for disclosure of grand jury materials). The court remarks “Rule 6(e)—which, as Lepore herself argues, ‘reflects rather than creates the relationship between federal courts and grand juries.’” Id. (quoting In re Craig, 131 F.3d 99, 102 (2d Cir. 1997)).

39 See id. (remarking Second Circuit in Craig was first to embrace disclosure based on historical significance). Despite citing to various district court cases disclosing records based on this purpose, the court narrows its analysis to Craig’s rationale. See id.; see also In re Craig, 131 F.3d at 105 (“It is, therefore, entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information.”).

40 See Lepore, 27 F.4th at 92 (criticizing Craig as departing from restrained, traditional approach to disclosure). Despite this criticism, Craig developed nine non-exhaustive factors to guide the court in determining whether sufficient historical significance exists to justify disclosure. See In re Craig, 131 F.3d at 106.

41 See Lepore, 27 F.4th at 92 (“[The] courts’ inherent authority concerns the administration of justice in our legal system . . . not to serve some more expansive notion of the public good.”). Due to Craig’s failure to meaningfully analyze the implications of exercising the court’s inherent authority for purposes beyond what is necessary for the fair administration of justice, the Lepore court criticized Craig overstepped prudential constraints on judicial powers. See id. at 93. In short, Lepore criticized Craig’s determination that courts can exercise inherent power for merely public good—something beyond just resolving a case or controversy. See id. at 92-93.

42 See id. at 93 (noting disclosure would permit unyielding judicial authority to determine whether records are historically significant). The court outlines examples of questions courts must ask, including:

How does a court determine whether particular records are historically significant? Can an affected party exercise veto power even if the general public has a strong interest in
judicial discretion, the court concluded that the “endeavor strikes us as too far removed from the more specific interest—the court’s fair administration of justice,’” thus refusing to adopt the extension of inherent authority as established in Craig.43

By narrowly defining the fair administration of justice to only include occurrences within the courtroom, the First Circuit erred in its decision in Lepore.44 First and foremost, the language of “fair administration of justice” is never mentioned in Rule 6(e), yet court precedent has shaped the rule to incorporate such a notion.45 Nevertheless, court precedent has never explicitly stated that this fair administration of justice is restricted to only the four corners of the courtroom as opposed to extending justice of the legal system to the public.46 Nothing explicitly restricts legal proceedings to

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 disclosure? And when has enough time passed—both to make records a matter of “history” and to sufficiently diminish the countervailing interest in grand jury secrecy?

See id.

43 Id. at 93 (noting traditional approach provides a principled limitation on disclosure). The court ultimately rejects the arguments asserting historical significance as within the bounds of inherent judicial authority because the “court abuses its discretion when it releases grand jury materials based on ‘an evaluation entirely beyond [the court’s] expertise.’” Id. at 94 (quoting Douglas Oil Co. v. Petrol Stores Nw., 441 U.S. 211, 228-29 (1979)). The court goes on to mention that the administration of justice, in certain proceedings, is within the purview and expertise of a court, whereas gauging the significance of historical events is not. See id. Questions of historical significance of grand jury proceedings are best left for Congress or the Rules Committees. See id. The court concludes its analysis of the issue by noting the authority to conduct statutory interpretation of the rule belongs to the courts, remarking “reporters to the Advisory Committee on Criminal Rules more recently opined that ‘the issue of inherent authority is a question of the constitutional authority of Article III courts, which the Committee has no authority to resolve.’” Id. at 95 (quoting Memorandum from Professors Sara Sun Beale & Nancy King, Reporters, to the Members of the Advisory Comm. On Crim. Rules, at 13 (Oct. 6, 2021)). But see 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, at 6, 9 (Oct. 18, 2011), https://perma.cc/33FR-N9R9 (last visited May 6, 2023) (outlining proposal for adding historical significance as exception for disclosure under Rule 6(e)); McKeever v. Barr, 140 S. Ct. 597, 598 (2020) (Breyer, J., concurring) (“Whether 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.”).

44 Compare Lepore, 27 F.4th 84, 92 (1st Cir. 2022) (restricting “fair administration of justice” to only incorporate conduct within walls of courtroom), with Chi. Council of Laws. v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (“[P]ublic justice is no less important than an accused’s right to a fair trial.”).

45 See Fed. R. Crim. P. 6(e) (outlining proper disclosure of grand jury records); see also McKnight, supra note 1, at 485 (conceding Rule 6(e) has been shaped by court precedent).

only involve court actors; rather numerous actors, such as “judges, lawyers, court clerks, police, penitentiary officials, and policymakers, all play a role in the administration of justice.”

Similarly, nothing demonstrates that the fair administration of justice may be compromised by unsealing grand jury proceedings years after the proceedings concluded. Thus, the Lepore court premises its primary holding on a vague and theoretical definition rather than concrete rationales.

Without access to historical knowledge, it is impossible for individuals to engage in educated discourse, learn from the past, and ensure that tragic events never happen again. With the increasing distrust in the criminal justice system, the federal government, and public officials, unsealing such historically relevant documents may provide resolution to this ubiquitous issue. For example, cases pertaining to critical events

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47 See Weissbrodt, supra note 35, at 23 (elaborating on key players for fair administration of justice). Further defined, the administration of justice includes numerous actors, such as “judges, lawyers, court clerks, police, penitentiary officials, and policy makers.” See id. Even if policy makers—who are members of the general public—are left in the dark as to what occurs within the walls of the courtroom, fair administration of justice is unlikely to prevail. See id.

48 Compare Lepore v. United States, 27 F.4th 84, 87 (1st Cir. 2022) (establishing disclosure was requested after proceedings concluded), and Craig v. United States, 131 F.3d 99, 101 (2d Cir. 1997) (noting petition for transcript was after proceedings), with United States v. Providence Trib. Co., 241 F. 524, 525 (D.R.I. 1917) (noting information was disseminated while proceedings were ongoing). It is evident through these cases, and many others, that timing is a critical Craig factor to be analyzed when determining whether disclosure is proper. See Aronsohn, supra note 28, at 974 (“To be sure, the passage of time is not dispositive in a disclosure inquiry, but it is a sweeping first step in displacing privacy concerns.”).

49 See Aronsohn, supra note 28, at 976 (“There is no evidence that a witness would be deterred from testifying—or a grand juror would be deterred from deliberating honestly—if she knew her name would be publicized or her statements might be disclosed after her death.”).

50 See Lepore v. United States, No. 18-mc-91539, 2020 WL 13043221, at *5 (D. Mass. Feb. 4, 2020) (noting lack of comprehensive access to public records inevitably leads to fragmented historical knowledge). Therefore, “[t]he fragmentary public record, or the opportunity to ask elderly people to recall events from half a lifetime ago, are not substitutes for providing a historian with access to primary sources relevant to her work and to American history more generally.” Id.; see also Brief of Am. Hist. Ass’n, supra note 7, at 4-5 ( remarking public value of obtaining complete judicial records). For example, the unsealed grand jury records in the Tribune case offered a more comprehensive understanding while providing the capability to draw parallels to contemporary events under the Espionage Act. See Reporters Committee Proposal, supra note 29, at 5 (explaining importance of accessing grand jury records for news purposes).

51 See Futrell, supra note 1, at 50 (“[C]riminal justice trust and legitimacy is already a deeply fraught concept rooted in a collective experience and history.”). Nevertheless, this distrust can be remedied through transparency by unsealing historical records as “the maintenance of trust in our criminal justice system lies at the heart of these proceedings, with implications affecting the continuing vitality of our core beliefs in fairness and impartiality . . . .” Id. at 33; see Ryan, supra note 7, at 1544 (noting transparency provides benefits such as civic education, systemic reform, and confidence); see also Williams & McCarthy, supra note 7, at 1142 (explaining importance of grand jury proceedings to uncover sociopolitical truths in contemporary debates); Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989) (“[O]penness leads to a better-informed
concerning social justice issues that are kept behind closed doors may foster
greater distrust and fear of abuse of power within the government.52 The
policy argument of protecting the interest of justice is persuasive; however,
does justice even exist if the public is kept in the shadows of the intricacies
of the system itself?53 How can the general public avoid cycling through
pervasive and systemic problems in United States history if our history books
and shared knowledge fails to account for the complete picture?54 With a
criminal justice system premised on the notion of transparency, the
heightened focus of grand jury secrecy are at odds with the system as a
whole, creating a breeding ground for systemic distrust.55

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52 See Williams & McCarthy, supra note 7, at 1142 (explaining value of grand jury disclosure).
Disclosing grand jury materials in such cases can provide legal accountability, exposing
governmental malpractice, facilitating racial healing, and “correct[ing] the record’ so that the
legitimacy of the legal system itself is not further undermined.” Id. at 1142-43 (quoting Margaret
see also MARTHA MINOW, supra note 4, at 118-33 (establishing attempts to achieve justice via
legal processes to unveil history); Gross, supra note 29, at 303 (noting value of historical
information to resolution of modern political issues).

53 See Lepore v. United States, 27 F.4th 84, 92 (1st Cir. 2022) (remarking link between public
disclosure and justice). Overall, visibility, access, and transparent decision-making—no matter
how long ago the decisions arose—provide a path for positive public opinions of legitimacy and
procedural justice. See Williams & McCarthy, supra note 7, at 1147 (discussing positives stemming
from access to historical information); see also Tyler, supra note 29, at 319-20
demonstrating importance of procedural justice to members of minority groups); Bibas, supra note
21, at 916, 923 (explaining how insider systemic knowledge fosters distrust from outsiders).

54 See Flynn, supra note 29 (elaborating on secret nature of grand jury proceedings).

Only the beginning and the end of the [grand jury] process ... are truly public.
Everything in between is either cloaked in legal secrecy or dribbled out in carefully
choreographed press releases. And when it’s over, when the details are sufficiently
blurred and the story is effectively muddled, the prosecutor can take refuge behind those
anonymous grand jurors when he declares the whole episode to be nothing more than a
sad accident.

Id. Grand jury secrecy leaves the public, who have likely seen and experienced the criminal act in
some way, left in the dark with no way of reconciling the grand jury’s decision, thus fostering a
sense of distrust in the system. See Futrell, supra note 1, at 1-2 (noting negative impact stemming
from inherent secrecy of grand-jury proceedings); see also Shannon, supra note 1, at 166-67
(emphasizing arbitrariness, secrecy, and failure to incorporate community’s voice within grand
juries).

55 See Ryan, supra note 7, at 1544 (noting criminal justice system rooted in transparency rather
than secrecy). The Fourth, Fifth, Sixth, and Eighth Amendments carved out rights for individual
privacy, but also transparency and fairness within criminal procedure. See id. at 1544-47 (noting
comprehensive secrecy is contradictory to transparency foundations). As a result, “[b]y confining
most [procedural] safeguards to a stage of the process that most defendants never reach, the courts
have seriously diluted the basic values of our [criminal justice] system.” Arenella, supra note 1, at
522 (noting significant lack of access to information relevant to major decisions); see also
Although the First Circuit argues that judges do not have the expertise to determine whether documents are historically significant, *Craig* provides a foundation utilized by other courts to help reduce this deficit.  

Regardless of the subjective view of significance, the nine factors laid out for the court demonstrate objective concerns and standards which may be remedied—ultimately falling within the discretion and expertise of the judge.  

Additionally, the test in *Craig* permits the courts to take a flexible approach, focusing on public interest while weighing factors that may impede justice.  

Even though the court states that *Craig* fails to abide by the traditional contours of Rule 6(e), this argument lacks foundation as the Advisory Committee provides power to courts in the matter of disclosure.  

Moreover, if “fair administration of justice” regarding the parties is a true concern, the court may safeguard these interests with the *Craig* factors...

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Bernstein, *supra* note 1, at 565 (regarding criminal justice system as theoretically open but closed in practice); *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency, supra* note 1, at 1210 (noting grand juries are known to “indict a ‘ham sandwich’”). By indicting a “ham sandwich,” grand juries fail to protect citizens by failing to only prosecute meritorious cases.  

*See Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency, supra* note 1, at 1210.  

56 *See* sources cited *supra* note 31 and accompanying text (identifying *Craig’s* nine factors); *Thrasher, supra* note 28, at 604 (remarking even *Craig* acknowledged blanket statements of public interest as insufficient). Nevertheless, even in instances for historic research, it is evident that Rule 6(e) demonstrates public interest is a consideration for disclosure, regardless of the rationale behind the request.  

*See* Aronsohn, *supra* note 28, at 961 (providing instances depicting leverage of *Craig* factors to disclose materials solely based on historical interest). Two considerations tend to govern whether disclosure is proper in the exceptions of Rule 6(e): “(1) whether there are any living individuals named in the grand jury materials whose privacy would be jeopardized upon disclosure, and (2) how the petitioner aims to use the sought information to benefit the public.” *Id.*  

57 *See* Williams & McCarthy, *supra* note 7, at 1149 (demonstrating feasibility of assessment with factors). The authors further suggest courts should consider harm to the grand jury process as well to meet the requirement for “fair administration of justice.” *See id.*  

58 *See In re Craig v. United States, 131 F.3d 99, 106 n.10 (1997)* (remarking factor consideration is consistent with *Douglas Oil*). The *Douglas Oil* court explicitly established that the decision to disclose is contextual, based on balancing the need for disclosure and the public interest in secrecy.  

*See* Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 223 (1979); *see also* Thrasher, *supra* note 28, at 605 (recognizing *Craig* factors do not limit fact-intensive review by judges).  

When a court has the ability to balance the interests of those involved in the proceeding alongside historical significance, they should ultimately conduct this fact intensive analysis instead of automatically ruling to maintain secrecy.  

*See* Thrasher, *supra* note 28, at 605.  

59 *See* Fed. R. CRIM. P. 6 advisory committee’s note to Subdivision (e) (“This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits disclosure. . .”). Although the Committee provides minimal guidance on proper disclosure, it still establishes courts are neither strictly confined to the rule itself nor the rule’s literal interpretation.  

alongside proposed redactions in the document to maintain confidentiality where necessary.\footnote{Compare Lepore v. United States, No. 18-me-91539-ADB, 2020 WL 13043221, at *8 (D. Mass. Feb. 4, 2020) (proposing government redact documents for those witnesses who favored release), with In re Nichter, 949 F. Supp. 2d 205, 213 (D.D.C. 2013) (arguing materials disclosing living individuals’ identities and testimony should remain sealed). But see In re Kutler, 800 F. Supp. 2d 42, 49 (D.D.C. 2011) (explaining privacy interests were dispositive). Preserving secrecy in grand jury proceedings both encourages future grand jury witnesses to testify without fear and protects identities of those involved. See id. (explaining privacy interests can outweigh other interests). It is important to note that despite the decision in Nichter, the court remarked that utilizing the Craig factors, the court may have reached a different result if privacy interests were not at stake. See Nichter, 949 F. Supp. 2d at 213 (admitting there may be historical significance interest in disclosure). Consequently, “[d]isclosure may be appropriate following the death of all persons named in the grand jury materials. The Court would also reconsider its ruling if it was presented with evidence that the named individuals had consented to release.” Id. at 213 n.14. Using this rationale from Nichter, the district court in Lepore properly abided by the Craig factors and issued conditions to protect the identity and vulnerability of parties. See Lepore, 2020 WL 13043221, at *6 (permitting government objections and protections conditional to release, as opposed to “unfettered access”).}

As a result, the Lepore court’s differing opinion from Craig and analysis of “fair administration of justice” is unfounded and lacks rational justification.\footnote{See United States v. Doe, 460 F.2d 328, 331-32 (1st Cir. 1972) (establishing First Circuit disclosure of grand jury proceedings). Here, the court disclosed aspects of grand jury proceedings based on public statements by the witnesses. See id at 330-31. Since this instance consisted of press coverage and previously disclosed information to the public, the release was less about “fair administration of justice” and more about fully informing the public. See Lepore, 2020 WL 13043221, at *6; see also Futrell, supra note 1, at 1 (“Grand jury secrecy leaves those who have seen and experienced the act...through activism and social media with no way of reconciling the grand jury’s decision with what they saw.”); Douglas Oil Co., 441 U.S. at 223 (noting when relevancy of secrecy depletes there is lower burden for unsealing records).}

Although upholding the sanctity and preservation of the grand jury system is vital, learning from significant historical events is objectively more important. Scholars, students, and the public should be afforded full access to history to meaningfully engage in discourse and learn from the past. Instead, they are left with only certain pieces of the puzzle, with some pieces locked away from the public, concealing a complete picture of what truly occurred. Without a complete picture of momentous events in United States history, Americans lose opportunities to think critically about the past to forge an improved future. Lepore not only greatly limits the power of the district courts to unseal grand jury proceedings, but also limits the resources historian’s and the public can utilize to analyze the past and furthers the pervasive mistrust of the criminal justice system rooted within society. Moreover, this decision leaves future debates over inherent powers of the district courts unsettled, furthering the circuit split and opening the door for Supreme Court review to address these questions and establish uniformity.
Jessica Vedrani