No. _______

In the Supreme Court of the United States

STUART A. MCKEEVER,

Petitioner,

v.

WILLIAM P. BARR,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 6(e) imposes an "obligation of secrecy" on specific, listed persons connected to a grand jury, including government attorneys, grand jurors, and court reporters—but not district courts. The Rule also contains several express "Exceptions" to this secrecy obligation, which allow disclosure of grand jury materials in certain circumstances.

Openly disagreeing with the Second, Seventh, and Eleventh Circuits, the D.C. Circuit below held that Rule 6(e)'s secrecy obligation categorically binds district courts, and it thus denied that district courts have any "authority outside Rule 6(e) to disclose grand jury matter." App. 17a. In those other circuits, however, district courts retain inherent authority over grand jury records and may release such records in limited circumstances not expressly covered by Rule 6(e)—including, as relevant here, in historically significant cases when continued secrecy no longer serves a meaningful purpose.

The question presented is:

Whether district courts have inherent authority to release grand jury materials in extraordinary circumstances, such as when the case is historically significant and the public interest strongly favors disclosure.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner states that there are no proceedings directly related to the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stuart A. McKeever respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a–27a) is reported at 920 F.3d 842 (D.C. Cir. 2019). The order of the court of appeals denying rehearing en banc (App. 41a) is unreported. The district court's memorandum opinion and order denying release of grand jury materials (App. 28a–40a) is unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on April 5, 2019. App. 1a. On July 22, 2019, the court of appeals denied a timely petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE PROVISION INVOLVED

Federal Rule of Criminal Procedure 6(e) is reproduced at App. 42a–48a.

INTRODUCTION

This case raises important questions about the inherent authority of federal courts, the transparency of our judicial system, and the public's ability to understand important events in our Nation's history. For decades, courts of appeals have recognized that district courts have inherent authority to disclose grand jury records in special circumstances where the public interest outweighs any need for continued secrecy. Pursuant to that authority, courts have allowed the American public to learn important

information about such seminal events as the Moore's Ford lynching of African Americans in Georgia, Alger Hiss's espionage for the Soviet Union, intelligence leaks during World War II, and the Watergate scandal.

In this case, however, a divided panel of the D.C. Circuit held that Federal Rule of Criminal Procedure 6(e) eliminates that inherent authority to release grand jury materials—even when the records at issue have significant historical value and the need for secrecy has dissipated over the course of decades. Over a dissent from Judge Srinivasan, the court openly created a circuit split with decisions by the Second, Seventh, and Eleventh Circuits. It also rejected the position of the Advisory Committee on Criminal Rules, which recently confirmed that Rule 6(e)'s secrecy obligation does not directly apply to the district court. This Court should grant certiorari to resolve this split and correct the D.C. Circuit's misinterpretation of the Rule.

Rule 6(e)'s terms are straightforward. Rule 6(e)(2)(A) provides the baseline for grand jury secrecy: "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Rule 6(e)(2)(B), in turn, requires that specific, listed persons "not disclose a matter occurring before the grand jury" "[u]nless these rules provide otherwise." That list includes various persons connected to the grand jury, including government attorneys, grand jurors, and court reporters. *See* Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e)(3) then lists various "Exceptions" to the secrecy requirement.

Notably, the district court that supervises the grand jury is *not* on Rule 6(e)(2)(B)'s list of persons governed by the Rule's "obligation of secrecy." The

Second, Seventh, and Eleventh Circuits have thus held that Rule 6(e) leaves room for district courts to exercise their established inherent authority to release grand jury records when the need for disclosure far outweighs the interest in continued secrecy. The First and Tenth Circuits have signaled that they would reach the same conclusion. Indeed, that is the only result consistent with the Rule's text, which unequivocally forbids courts from recognizing any "obligation of secrecy . . . except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A).

The D.C. Circuit below, however, understood the Rule very differently. Even though Rule 6(e)(2)'s secrecy obligation applies—by its terms—*only* to the listed persons, the court nonetheless read that list as *also* covering the district court. Based on that atextual premise, the court held that district courts have no authority to disclose grand jury materials outside the scope of the Rule. The D.C. Circuit reached this conclusion in open defiance of the circuits that have ruled the other way.

This Court should review that decision for three overarching reasons. *First*, the D.C. Circuit's interpretation of Rule 6(e) avowedly "differs from that of some other circuits." App. 15a (citing, *inter alia*, *In re Petition of Craig for Order Directing Release of Grand Jury Minutes* ("*In re Craig*"), 131 F.3d 99, 105 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 767 (7th Cir. 2016); *In re Petition to Inspect & Copy Grand Jury Materials* ("*In re Hastings*"), 735 F.2d 1261, 1272 (11th Cir.), *cert. denied*, 469 U.S. 884 (1984)). The disagreement is sharpest between the D.C. and Seventh Circuits: The D.C. Circuit called the Seventh Circuit's "account of Rule 6 . . . difficult to square with the text," App. 12a, whereas the

Seventh Circuit said the D.C. Circuit's approach "makes no sense." *Carlson*, 837 F.3d at 764. The circuit split will not disappear on its own.

Second, the D.C. Circuit's holding is mistaken. This Court does not "lightly assume" that Federal Rules eliminate a court's inherent authority. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (citation omitted). And Rule 6(e)'s text and history show that it continued—and did not extinguish—district courts' preexisting authority over grand jury records, including the ability to release such records in special circumstances. The government argued in favor of that understanding of the Rule decades ago, and it accords with the Advisory Committee's longstanding interpretation, as reaffirmed most recently in 2011.

Third, the question presented in this case is important. Our judicial system rightly prizes grand jury secrecy. But there are narrow circumstances in which the need for secrecy has dissipated and the public interest favors disclosure. District courts should be empowered to exercise reasoned discretion to authorize limited disclosure of grand jury materials in those circumstances, just as they have for decades. Those disclosures can vindicate important public values of transparency and historical understanding, and they advance public confidence in the judicial system. The government itself recognized as much in 2011, when it urged the Advisory Committee to amend the rule to expressly authorize the kind of disclosure at issue here.

The Advisory Committee ultimately rejected that request—but only because it believed that district courts already had inherent authority to release historically significant grand jury materials. In doing

so, the Committee relied on comments from esteemed judges and prosecutors, including now-retired District Judge D. Lowell Jensen and former Attorney General (and District Judge) Michael Mukasey, who uniformly opined that district courts have carefully and responsibly exercised that authority for decades.

The Advisory Committee's conclusion was absolutely right, and the D.C. Circuit lost its way in rejecting it. This Court should grant review to correct that error and hold that Rule 6(e)'s text does not preclude district courts from disclosing historically significant grand jury materials in the sorts of circumstances presented here.

STATEMENT OF THE CASE

Petitioner Stuart A. McKeever is an 82-year-old researcher and writer who has devoted decades of his life to uncovering the truth behind the 1956 Galíndez affair, a significant episode of twentieth century United States history that remains shrouded in mystery decades later. As part of that quest, he is seeking a limited release of grand jury materials from a related criminal prosecution that concluded more than sixty years ago. The district court (Lamberth, J.) recognized its authority to grant his request, but the D.C. Circuit reversed.

A. The Galíndez Affair

1. On March 12, 1956, Jesús de Galíndez vanished from New York City. A scholar and lecturer at Columbia University, Galíndez was also an outspoken critic of General Rafael Trujillo, then the dictator of the Dominican Republic. Galíndez had previously fled his native Spain during the Civil War, first to France and then to the Dominican Republic.

Although he had worked for a time as a legal advisor to the Trujillo regime, he became disenchanted with its excesses and left for the United States in 1946. *See* Alan A. Block, *Violence, Corruption, and Clientelism: The Assassination of Jesús de Galíndez, 1956*, 16 Social Justice 64, 79 (1989).

In 1956, Galíndez presented his doctoral dissertation, *The Era of Trujillo*, a harsh critique of the dictator's rule. *See id.* at 79–80; Milton Bracker, *Trujillo's Rule Denounced in Missing Scholar's Book*, N.Y. Times, May 29, 1956, at 1. Thirteen days after that presentation, Galíndez disappeared without a trace. *See* Block, *supra*, at 80; Bracker, *supra*, at 1. He was never seen or heard from again.

At the time, it was widely suspected that Trujillo's henchmen had kidnapped Galíndez, taken him to the Dominican Republic, and murdered him. *See, e.g.*, *Federal Jury Pushing Quiz of Galindez Case*, N.Y. Post, May 14, 1957. The plot thickened still further in December 1956, when American pilot Gerald Murphy disappeared as well. Graham Hovey, *Intrigue in Dominican Republic: Mystery Thriller Without Solution*, Minneapolis Tribune, Dec. 23, 1957.[1] Murphy had piloted the plane that spirited Galíndez from New York to the Dominican Republic. Herbert L. Matthews, *Galindez Case: New Chapter in Dominican Mystery*, N.Y. Times, Dec. 15, 1957, at 6B.

After Murphy vanished, the Trujillo regime announced that he had been murdered by his co-pilot, who then conveniently hanged himself in a

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[1] *See also The Story of a Dark International Conspiracy*, Life, Feb. 25, 1957, at 24.

Dominican jail. Hovey, *supra*. American authorities quickly suspected that the Trujillo regime was to blame, however, and those suspicions were eventually confirmed by a prison warden who had witnessed Murphy's murder. Tad Szulc, *Witness Tells of Galindez Pilot's Death*, N.Y. Times, Apr. 6, 1964, at 12; *see also* Foreign Relations of the United States, 1955–1957 (Volume VI), *American Republics: Multilateral; Mexico; Caribbean* 884 (John P. Glennon ed., 1987).

2. By early 1957, a federal grand jury in the District of Columbia was investigating the Galíndez–Murphy case. A key subject of the inquiry was John Joseph Frank, an ex-FBI agent and former lawyer for the CIA whom Trujillo had paid to investigate Galíndez. *See* Hovey, *supra*.[2] But the evidence indicated that Frank had done far more than just investigate: Using the pseudonym "John Kane," he had paid for the chartered plane (piloted by Murphy) that carried Galíndez to the Dominican Republic. *See Costly Whitewash of Black Charges*, Life, June 9, 1958, at 105–06; Matthews, *supra*, at 6B.

The United States considered charging Frank with conspiring to kidnap Galíndez. Foreign Relations, *supra*, at 913–14, 916. In the end, though, Frank was indicted only for failing to register as an agent of a foreign power. A Washington jury convicted Frank, but the D.C. Circuit overturned the conviction because the prosecutor had linked him to the "disappearance of the Dominican exile Galíndez

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[2] *See also, e.g.*, Milton Bracker, *U.S. Jury Pushes Galindez Inquiry*, N.Y. Times, Aug. 22, 1957, at 6; Morrey Dunie & Albon B. Hailey, *Dominican Probe Holds D.C. Lawyer*, Washington Post & Times-Herald, May 14, 1957.

and the aviator Gerald Murphy," whose "disappearance in circumstances that suggested murder was a matter of common knowledge." *Frank v. United States*, 262 F.2d 695, 696 (D.C. Cir. 1958).

Frank's retrial ended in a *nolo contendere* plea; he paid a modest fine and served no jail time. Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as Amended, for the Period January 1, 1955 to December 31, 1959, at 10–11 (June 1960).[3] Frank died almost thirty years ago, in 1991.

3. The Galíndez affair has been called "one of this century's more fantastic real-life mysteries," Hovey, *supra*, and "[o]ne of the great mystery stories of modern times," *New Chapter, Old Mystery*, Newsweek, Dec. 30, 1957. At the time, the kidnapping and likely murder provoked national outcry and an "outpouring of American media and congressional attention," as well as FBI and State Department interest in the police investigation. *See* Block, *supra*, at 80; Foreign Relations, *supra*, at 877–79.[4]

Galíndez's disappearance has captured the public imagination for many years. It has been discussed in scholarly articles and works of history, and it was the subject of a 2002 documentary film, *Galíndez* (Ana

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[3] Available at https://www.justice.gov/nsd-fara/page/file/991956/download.

[4] *See also, e.g.*, Dwight D. Eisenhower, *The President's News Conference of April 25, 1956*, *in Public Papers of the Presidents of the United States* 440–41 (1956) (reporter asking the President whether Galíndez "was assassinated by agents of the Trujillo dictatorship" on U.S. soil); 103 Cong. Rec. 13405–06, 13410–11, 14959–60 (1957).

Díez director, 2002).[5] It has also lived on in various works of fiction. For example, Manuel Vázquez Montalbán won Spain's National Prize for Fiction for his novel *Galíndez*, in which an American Ph.D. candidate investigates the mystery.[6] Galíndez's death is a plot point in Nobel laureate Mario Vargas Llosa's *The Feast of the Goat*.[7] And Galíndez's likely fate—"gagged, bagged, and dragged" to the Dominican Republic—is also described in Junot Díaz's Pulitzer Prize-winning novel, *The Brief Wondrous Life of Oscar Wao*.[8]

Yet despite the public attention, the full truth of what happened to Galíndez—and who was responsible—has never been fully revealed.

B. Facts And Procedural History

1. McKeever is an author and retired lawyer who has been researching and writing about the Galíndez case since 1980. App. 2a. He included a chapter on the subject in his book *The President's Private Eye* (1990), a biography of the New York City detective who had investigated Galíndez's disappearance in the 1950s. In the ensuing decades, McKeever dug deeper into the case, scouring archives and interviewing

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[5] *See* Block, *supra*; David Talbot, *The Devil's Chessboard: Allen Dulles, the CIA, and the Rise of America's Secret Government* 316–30 (2015); Tim Weiner, *Enemies: A History of the FBI* 487 (2012).

[6] Manuel Vázquez Montalbán, *Galíndez* (Carol & Thomas Christensen trans., 1992) (1990).

[7] Mario Vargas Llosa, *The Feast of the Goat* 81–90 (Edith Grossman trans., 2001) (2000).

[8] Junot Díaz, *The Brief Wondrous Life of Oscar Wao* 96–97 & n.11 (2007).

witnesses. He eventually explored the subject in a full-length book, Spanish-language and expanded editions of which were published, respectively, by the Dominican Academy of History and the City University of New York's Dominican Studies Institute. *See* Stuart A. McKeever, *The Galindez Case* (2013); Stuart A. McKeever, *El rapto de Galíndez y su importancia en las relaciones entre Washington y Trujillo* (2016); Stuart A. McKeever, *Professor Galíndez: Disappearing from Earth* (2018).

Over the years, however, one invaluable source of information has remained off-limits to McKeever: the records of the grand jury that indicted Frank over sixty years ago. McKeever believes that those records could shed light on whether agents of the U.S. Government were involved in the kidnapping and whether witnesses lied during the investigation.

2. In 2013, while completing his book, McKeever filed a *pro se* motion asking the U.S. District Court for the District of Columbia—which had convened and supervised the Frank grand jury—to release the records. App. 2a. He argued that release was in the public interest due to their historical significance. *Id.* at 38a–39a. McKeever also explained that the long passage of time had eliminated any need for continued secrecy. *Id.* at 37a. Accordingly, McKeever asked the district court to order release of the records either under Federal Rule of Criminal Procedure 6(e) or pursuant to its inherent authority. *Id.* at 28a.

The government opposed McKeever's motion. It correctly observed that no provision of Rule 6(e) governed McKeever's request. The government then argued, first and foremost, that the request was improper because "no disclosure of grand jury

information is permissible outside the strictures of Rule 6(e)." *Id.* at 34a.

In May 2017, Judge Lamberth rejected the government's Rule 6(e) argument as "unconvincing." *Id.* His decision noted that ever since a 1973 Second Circuit opinion by Chief Judge Friendly, a long line of authority has "recognized there may be 'special circumstances' in which release of grand jury records is appropriate even outside the boundaries of the rule." App. 32a (quoting *In re Craig*, 131 F.3d at 102, in turn quoting *In re Applications for Orders Directing the Review or Release of Certain Grand Jury Testimony of Biaggi* ("*In re Biaggi*"), 478 F.2d 489, 494 (2d Cir. 1973) (Friendly, C.J., Suppl. Op.)); *see id.* at 32a–33a (discussing, *inter alia*, *Carlson*, 837 F.3d at 76, and *In re Hastings*, 735 F.2d at 1268–69). Judge Lamberth also stressed that these authorities are "consistent with . . . the text and history of the rule." *Id.* at 35a.

Judge Lamberth's opinion then made clear that many reasons favor discretionary release of the grand jury records that McKeever sought. He agreed that "[a] case involving lethal operations by United States citizens acting as foreign agents inside the United States" is historically significant, *id.* at 38a–39a, and that McKeever is a bona fide author seeking the records for the legitimate purpose of furthering his research into the Galíndez case, *id.* at 37a. He also found that "[n]early sixty years have passed since the grand jury held its hearings," and hence "the principals and witnesses who might be affected by disclosure of the records are likely deceased." *Id.*

Even though Judge Lamberth recognized the strength of McKeever's request and his inherent authority to grant it, he denied the request as

overbroad. He did so based on his understanding that McKeever was "presumptively" seeking access to "all" of the testimony and records in the Frank grand jury file. *Id.* at 39a–40a. Judge Lamberth did not consider whether McKeever's *pro se* request could be narrowed to the testimony of particular witnesses.

3. On appeal to the D.C. Circuit, McKeever clarified that instead of demanding the entire Frank file, he was seeking only the testimony of eight specific individuals who he believed had testified before the grand jury. Motion to Expand Record at 1, *McKeever v. Barr*, No. 17-5149 ("*McKeever*") (D.C. Cir. filed Sept. 18, 2017). The government's principal response was to urge the court to reject Judge Lamberth's interpretation of Rule 6(e) and hold that district courts categorically lack authority to disclose grand jury material outside the terms of that Rule. In a split decision issued in April 2019, the D.C. Circuit agreed with the government's broad legal theory and rejected McKeever's request solely on that basis.

The majority reached its conclusion based on its understanding of Rule 6(e). It began by explaining that "Rule 6(e)(2)(B) instructs that persons bound by grand jury secrecy must not make any disclosures about grand jury matters '[u]nless these rules provide otherwise.'" App. 4a–5a (alteration in original). And "[t]he only rule to 'provide otherwise' is Rule 6(e)(3)," *id.* at 5a, which lists "Exceptions" to Rule 6(e)(2)'s secrecy obligation but conveys no express "authority to order disclosure of grand jury matter outside [of them]," *id.* at 6a. Hence, according to the majority, "Rules 6(e)(2) and (3) together explicitly require secrecy in all other circumstances." *Id.* at 5a. The majority further held that although the district court is not among the entities contained in Rule 6(e)(2)(B)'s

list of those bound by the secrecy obligation, it is nonetheless subject to that obligation, at least "as a practical matter," because grand jury records are in the custody of government attorneys who *are* so bound. *Id.* at 11a.

The majority frankly admitted that its "view of Rule 6(e) differs from that of some other circuits"—namely the Second, Seventh, and Eleventh Circuits. *Id.* at 15a (citing, *inter alia*, *In re Craig*, 131 F.3d at 105, *Carlson*, 837 F.3d at 767, and *In re Hastings*, 735 F.2d at 1272). And it specifically criticized Chief Judge Wood's recent analysis of Rule 6(e) for the Seventh Circuit as "difficult to square with the text." *Id.* at 12a. The majority did assert, however, that its analysis of Rule 6(e) was consistent with decisions from the Sixth and Eighth Circuits, which it characterized as having "turned down an invitation to craft and exception to grand jury secrecy outside the terms of [Rule 6(e)]," *id.* at 15a; *see id.* at 16a (citing *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991), and *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009)), as well as with dicta from three other circuits, *id.* at 16a & n.4.

Judge Srinivasan dissented. In his view, one consideration was dispositive: In *Haldeman v. Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc), the D.C. Circuit had "faced the contention that a district court's authority to disclose grand jury materials is confined to the exceptions in Rule 6(e)," App. 23a, and had "affirmed [the district court's] understanding that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions," *id.* at 26a. Judge Srinivasan also emphasized that the majority's decision had created a circuit split. *See id.* at 27a ("[M]y reading of

Haldeman squares with the reading of the decision adopted by each our sister circuits to have interpreted it.").[9]

REASONS FOR GRANTING THE WRIT

This case satisfies all the traditional criteria for certiorari. *See* Sup. Ct. R. 10(a). In holding that Federal Rule of Criminal Procedure 6(e) imposes a secrecy obligation on district courts and that the Rule's exceptions to that obligation are exhaustive, the D.C. Circuit expressly disagreed with the Second, Seventh, and Eleventh Circuits. The decision below is also in significant tension with rulings from the First and Tenth Circuits, though it claimed to find support in rulings from the Third, Fourth, Fifth, Sixth, and Eighth Circuits. However one looks at it, the confusion and disarray in the federal appellate courts is palpable. The undisputed, clear circuit split is reason enough for this Court to grant review.

Certiorari is also warranted because the D.C. Circuit misconstrued Rule 6(e)'s text and history. The Rule imposes a secrecy obligation on certain persons, but not on the district court that convenes and supervises the grand jury. The "Exceptions" found in the Rule thus have no bearing on district courts' power to release grand jury materials in special circumstances. Instead, as numerous courts, the Advisory Committee on Criminal Rules, and the government itself have previously observed, Rule 6(e) continues courts' preexisting authority over grand jury records. That includes the power to disclose

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[9] The D.C. Circuit denied McKeever's subsequent petition for rehearing en banc. App. 41a.

them, when appropriate, in unusual cases of historical significance.

Finally, the question presented here is important. Nobody—not even the government—disputes that there are circumstances outside of Rule 6(e) in which grand jury materials *should* be released. But the D.C. Circuit's flat prohibition prevents courts from even considering such disclosures, even when there is a strong public interest in them and no countervailing need for secrecy.

The D.C. Circuit's interpretation of Rule 6(e) has no sound basis in law or policy. The petition should be granted.

A. The D.C. Circuit Openly Created A Circuit Split Over The Question Presented

The D.C. Circuit below admittedly created a circuit split on the question whether district courts have inherent authority to release grand jury records in limited circumstances not covered by Rule 6(e). The court's decision expressly acknowledged its disagreement with the Second, Seventh, and Eleventh Circuits—and the decision is also in serious tension with rulings by the First and Tenth Circuits. This Court's intervention is needed to resolve the split and restore a uniform interpretation of Rule 6(e).

1. For decades until the D.C. Circuit's decision in this case, other federal courts of appeals had repeatedly and explicitly recognized that district courts have inherent authority to release grand jury records in extraordinary circumstances.

a. The Second Circuit came first. In *In re Biaggi*, a mayoral candidate who had testified before a grand jury asked that his testimony be publicly released to rebut allegations that he had asserted his Fifth

Amendment privilege against self-incrimination. 478 F.2d 489, 490–91 (2d Cir. 1973). In an opinion by Chief Judge Friendly, the court interpreted Rule 6(e) to embody a tradition of grand jury secrecy that is "older than our Nation itself." *Id.* at 491 (quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959)). And, the court said, grand jury materials should usually be released only when authorized by one of Rule 6(e)'s exceptions to grand jury secrecy—none of which, it conceded, applied. *Id.* at 492–93. But the court nonetheless held that the rule favoring secrecy was not absolute, and that disclosure was appropriate. It reasoned that "under the special circumstances of this case," *id.* at 494, including the candidate's misleading public statements, disclosure was in the public interest and would not harm the values protected by "the rule of secrecy," *id.* at 493.

The Second Circuit later reiterated its inherent authority holding in *In re Craig*, 131 F.3d 99 (2d Cir. 1997). Writing for the court, Judge Calabresi recognized that "Rule 6(e)(3) governs almost all requests for the release of grand jury records," but that "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." *Id.* at 102 (quoting *In re Biaggi*, 478 F.2d at 494). Moreover, the court made clear, "historical or public interest alone" can "justify the release of grand jury information" if, for example, the "historical interest . . . overwhelm[s] any continued need for secrecy." *Id.* at 105.

b. The Eleventh Circuit has also recognized district courts' "inherent power beyond the literal wording of Rule 6(e)," calling it "amply supported." *In re Hastings*, 735 F.2d 1261, 1268 (11th Cir.), *cert.*

denied, 469 U.S. 884 (1984). In *In re Hastings*, the district court granted a Judicial Council Investigating Committee access to the records of a grand jury that had returned a bribery indictment against a federal judge. *Id.* at 1263. The court acknowledged that Rule 6(e) is "normally controlling," and that no provision of the Rule expressly allowed disclosure. *Id.* at 1268. It discerned, however, that "the rule is not the true source of the district court's power with respect to grand jury records." *Id.* Rather, Rule 6(e) codifies "standards pertaining to the scope of the power entrusted to the discretion of the district court" and has been "shaped" over time by the exercise of that discretion. *Id.* Thus, the Eleventh Circuit held, "it is certain that a court's power to order disclosure of grand jury records is not strictly confined to instances spelled out in the rule." *Id.* It ultimately affirmed the district court's balancing of the need for the grand jury records against the interest in secrecy. *See id.* at 1273–75.

The Eleventh Circuit has reaffirmed these principles in subsequent cases, too. In *United States v. Aisenberg*, for example, the district court "ordered wholesale disclosure" of grand jury transcripts largely to give the public insight into police and prosecutorial misconduct that had come to light. 358 F.3d 1327, 1336 (11th Cir.), *cert. denied*, 543 U.S. 868 (2004). Although the Eleventh Circuit reversed the district court's order, it reaffirmed *In re Hastings*'s holding that "district courts have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material." *Id.* at 1347.[10]

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[10] A panel of the Eleventh Circuit later applied *In re Hastings* and upheld the release of grand jury materials relating

c. Most recently, the Seventh Circuit joined the Second and Eleventh Circuits in holding that district courts have "inherent supervisory authority . . . to unseal grand jury materials in circumstances not addressed by" Rule 6(e). *Carlson v. United States*, 837 F.3d 753, 766–67 (7th Cir. 2016). There, a historian sought, and the district court released, records from a grand jury that had investigated the leak of a Navy communiqué during World War II. *See id.* at 756–57.

On behalf of the court, Chief Judge Wood first recognized that courts have long exercised inherent supervisory authority over the grand jury, which "has historically included the discretion to determine when otherwise secret grand-jury materials may be disclosed." *Id.* at 762. The court then noted that "[t]he advent of the Criminal Rules did not eliminate a district court's inherent supervisory power," either "as a general matter" or with respect to the grand jury specifically. *Id.* at 762–63.

The Seventh Circuit rejected the government's counterargument that the phrase "[u]nless these rules provide otherwise" in Rule 6(e)(2)(B) shows that courts may not disclose grand jury records except as specified in Rule 6(e)(3)(E). *Id.* at 763–64 (alteration in original) (citation omitted). The court found that

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to the 1946 Moore's Ford Lynching—considered by some to be the "last mass lynching in American history"—in which "two African American couples were dragged from a car and shot multiple times." *Pitch v. United States*, 915 F.3d 704, 707 (11th Cir. 2019); *see id.* at 709–11. The Eleventh Circuit subsequently granted rehearing en banc in *Pitch*, vacating the panel opinion and asking the parties to submit briefs addressing the scope of a district court's authority to release grand jury materials. *See Pitch v. United States*, 925 F.3d 1224 (11th Cir. 2019). The case is still pending.

that argument "makes no sense, either as a reading of Rule 6(e) or as a general matter of statutory (or rule) construction." *Id.* at 764. Among other things, the court said, "the government provides no explanation why a limitation buried in [Rule 6(e)(2)(B)] secretly applies to the rule as a whole, or even worse . . . to an entirely different subpart." *Id.*

Finally, the Seventh Circuit stressed that "[t]he few hints . . . in the text of Rule 6(e) all indicate that the list in subpart (3)(E) is *not* exclusive," and that its reading of Rule 6(e) accords with the views of the Advisory Committee on Criminal Rules and every court that had considered the issue. *Id.*; *see id.* at 765–66. Accordingly, it upheld the district court's release of the grand jury records at issue, which undisputedly had significant historical value. *Id.* at 767.

d. In addition to the courts noted above, the First and Tenth Circuits have issued decisions signaling that they too believe that district courts can release grand jury materials in appropriate cases. Although these courts have not yet expressly granted such a disclosure, their analyses confirm the majority view that Rule 6(e) does not extinguish the inherent authority of district courts with respect to grand jury secrecy.

In *In re Grand Jury Proceedings*, for example, the First Circuit held that district courts may impose a secrecy obligation on grand jury witnesses—even though Rule 6(e)(2)(A) states that "[n]o obligation of secrecy may be imposed on [them]." 417 F.3d 18, 26 (1st Cir. 2005) (Boudin, C.J.), *cert. denied*, 546 U.S. 1088 (2006). The court refused to read Rule 6(e) to wipe out the district court's authority to regulate grand jury secrecy, holding that the Rule's "phrasing

can, and should, accommodate rare exceptions premised on inherent judicial power." *Id.* In doing so, the court endorsed the Eleventh Circuit's statement that "[a]lthough Rule 6(e)(3) enumerates the exceptions to the traditional rule of grand jury secrecy . . . the district courts have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material." *Id.* at 26 n.9 (second alteration in original) (quoting *Aisenberg*, 358 F.3d at 1347).

Similarly, in *In re Special Grand Jury 89-2*, the Tenth Circuit recognized that Rule 6(e) does not curtail district courts' inherent authority over grand jury disclosures. 450 F.3d 1159, 1178 (10th Cir. 2006). There, grand jurors bound by a secrecy obligation asked for permission to release information. The Tenth Circuit indicated that "some relief may be proper under the court's inherent authority," although it remanded the case to the district court to consider that issue in the first instance. *Id.*

2. There is no question that the D.C. Circuit's ruling in this case directly conflicts with the decisions highlighted above. Indeed, the court forthrightly acknowledged the circuit split, conceding that its "view of Rule 6(e) differs from that of [the Second, Seventh, and Eleventh] circuits." App. 15a (citing, *inter alia*, *In re Craig*, *Carlson*, and *In re Hastings*); *see also, e.g.*, *Proctor v. Nat'l Archives & Records Admin.*, __ F.R.D. __, 2019 WL 2163004, at *5 (N.D. Cal. 2019) (noting the circuit split); *accord* 36 West's Criminal Law News–NL 15, *District court did not have inherent authority to disclose grand jury records* (May 3, 2019) (same).

The D.C. Circuit's decision grappled at greatest length with the Seventh Circuit's decision in *Carlson*.

After summarizing Chief Judge Wood's opinion, the court dismissed her reasoning as "difficult to square with the text of the Rule." App. 12a. Instead, it agreed with Judge Sykes's dissenting opinion, which it quoted extensively. *Id.* at 13a.

Notably, the D.C. Circuit claimed that five other circuits supported its own view that Rule 6(e) is exclusive and bars district courts from exercising inherent authority to release grand jury materials. The court asserted that both the Sixth and Eighth Circuits had "turned down an invitation to craft an exception to grand jury secrecy outside the terms of the Rule" (albeit in factual circumstances quite unlike those at issue here). *Id.* at 15a; *see id.* at 16a (citing *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991), and *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009)). The D.C. Circuit also claimed that "[a]t least three other circuits have expressed the same view in dicta." App. 16a & n.4 (citing *United States v. Educ. Dev. Network Corp.*, 884 F.2d 737, 740 (3d Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990), *In re Grand Jury Subpoenas, Apr., 1978, at Baltimore*, 581 F.2d 1103, 1108–09 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979), and *In re J. Ray McDermott & Co.*, 622 F.2d 166, 172 (5th Cir. 1980)).[11]

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[11] As McKeever noted in his petition for rehearing en banc, the Sixth and Eighth Circuit decisions identified by the D.C. Circuit are distinguishable, insofar as (1) *In re Grand Jury 89-4-72* addressed only Rule 6(e)'s "judicial proceedings" exception, 932 F.2d at 483; and (2) *McDougal* declined a request to unseal records of a defendant's contempt hearing, 559 F.3d at 839–40. McKeever agrees that the discussion of the district court's authority in the Third, Fourth, and Fifth Circuit decisions is dicta at best.

The bottom line is that at least five circuits have weighed in on the question presented and concluded that district courts have inherent authority in matters of grand jury secrecy, including the power to release grand jury materials in appropriate circumstances. On the other side of the split, the D.C. Circuit—and, by that court's telling, at least five *other* circuits—have held the opposite.

There is obviously no reason Rule 6(e)'s grand jury provisions should be applied differently across the country. Indeed, this Court has often granted certiorari to resolve disputes over the proper interpretation of the Criminal Rules. *See, e.g.*, *United States v. Davila*, 569 U.S. 597, 605, 609–12 (2013) (resolving split over the consequences of a violation of Fed. R. Crim. P. 11(c)(1)); *Henderson v. United States*, 568 U.S. 266, 270, 279 (2013) (resolving split over Fed. R. Crim. P. 52(b)'s plain error standard); *Irizarry v. United States*, 553 U.S. 708, 713–16 (2008) (resolving split over the applicability of Fed. R. Crim. P. 32(h) to Sentencing Guidelines variances). The Court should do the same thing here.

B. The D.C. Circuit Misinterpreted Rule 6(e)

Certiorari is also warranted because the D.C. Circuit's understanding of Rule 6(e) is mistaken.

1. Although the grand jury is functionally independent from the judiciary, *United States v. Williams*, 504 U.S. 36, 48 (1992), it is still "an arm of the court," *Levine v. United States*, 362 U.S. 610, 617 (1960), and operates "under general instructions from the court to which it is attached," *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). It "therefore acts under the inherent supervision of the court." *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676,

680 n.4 (8th Cir. 1986) (citing, *inter alia*, *Levine*, 362 U.S. at 617). To be sure, courts' inherent supervisory authority over the grand jury is "very limited." *Williams*, 504 U.S. at 50. But courts have nonetheless exercised it in matters "rang[ing] from the mundane to the weighty." *Carlson*, 837 F.3d at 762; *see id.* (giving examples).

Numerous courts have recognized that grand jury records are court records. *See id.* at 758–59; *Standley v. Dep't of Justice*, 835 F.2d 216, 218 (9th Cir. 1987); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983); *United States v. Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 684–85 (1958) (Whittaker, J., concurring). And just as courts have always had the inherent authority to control access to their other records, they have long been able to disclose grand jury records when, in their "sound discretion," they conclude that "the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233–34 (1940); *see Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

2. Although "the exercise of the inherent power of lower federal courts can be limited by statute and rule," the Federal Rules do not, as a general matter, eliminate that power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991); *see Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–32 (1962). When analyzing whether a Rule eliminates inherent authority as to a particular subject, this Court typically looks for a "clear[] expression of purpose" in the Rule, *Link*, 370 U.S. at 631–32, or for contradiction between the power and the Rule, *see Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). Rule 6(e) does not clearly evince a purpose to

eliminate courts' long-established inherent authority to release grand jury materials. Nor does it necessarily conflict with the exercise of that authority.

Rule 6(e) itself does not cut off district courts' preexisting authority to release grand jury materials. Rule 6(e)(2)(A) defines the scope of grand jury secrecy, reading: "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." That subpart, in turn, requires that, "[u]nless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury." It goes on to list seven categories of "persons"—including government attorneys, grand jurors, and court reporters—who are connected to the grand jury. Notably, Rule 6(e)(2)(B) does not include the district court. As a result, Rule 6(e)(2)(A) forbids placing an "obligation of secrecy" on it.

Over forty years ago, the government espoused the same interpretation of Rule 6(e) that McKeever advances here. In *Haldeman v. Sirica* ("*Haldeman*"), 501 F.2d 714 (D.C. Cir. 1974) (en banc), the Watergate grand jury asked that its report be turned over to the House Judiciary Committee, and the district court obliged. *See In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1221 (D.D.C. 1974). Arguing in favor of that result on appeal, the government told the D.C. Circuit:

> [T]he wording of [Rule 6(e)] itself makes entirely clear that it simply does not apply to a case such as this, where disclosure by the *court* is involved. Instead the rule is a housekeeping provision intended to restrict disclosure of information only by jurors,

> attorneys and other court personnel, subject to the discretion of the Court. This restriction, *which does not apply to the court itself*, is expressly made exclusive . . . .

Haldeman Mem. for the United States 18–19 (filed Mar. 21, 1974) (footnotes omitted); *see Haldeman* Transcript of Oral Argument at 41 (filed Mar. 21, 1974) (arguing that the district court "exercis[ed] his historic inherent power as the judge" in deciding that "the public interest" in disclosure "outweighed the historic function to be served by secrecy").[12]

That understanding of the Rule makes perfect sense. As this Court has recognized, "Rule 6(e) is but declaratory" of the principle that disclosure of grand jury materials is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co.*, 360 U.S. at 399.

And the Rule's history confirms this understanding. At the time the Rule was adopted, the Advisory Committee on Criminal Rules made clear that the Rule would simply "continue[] the traditional practice of secrecy . . . except when the court permits a disclosure." Fed. R. Crim. P. 6(e) advisory committee's note to 1944 adoption. The Committee endorsed a then-recent decision holding that district courts have "discretion" to "relax[] the rule of secrecy" when appropriate. *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940); *see also Murdick v. United*

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[12] Excerpts of these documents are part of the D.C. Circuit's docket for this case. *See McKeever* Addendum to Reply Brief for Court-Appointed Amicus Curiae in Support of Appellant (filed June 25, 2018).

States, 15 F.2d 965, 968 (8th Cir. 1926) (recognizing that a court's "inherent power" gives it "the right to go behind the secrecy imposed upon a grand jury . . . where the interests of justice demand it"), *cert. denied*, 274 U.S. 752 (1927). This history shows that Rule 6(e) was never intended to "strictly confine[]" the instances in which disclosure of grand jury materials is appropriate. *In re Hastings*, 735 F.2d at 1268; *see id.* at 1269.

The Advisory Committee recently reaffirmed its longstanding view. In 2011, the Department of Justice proposed an amendment to Rule 6(e) that would have expressly allowed courts to disclose historically significant grand jury materials in certain circumstances. *See* Advisory Comm. on Crim. Rules, Agenda Book 217–26 (Apr. 2012) ("Agenda Book").[13] After surveying Rule 6(e)'s text, history, precedent, and policy—and considering detailed submissions from former Attorney General (and District Judge) Michael Mukasey and now-retired District Judge D. Lowell Jensen, among others—the Committee rejected the proposed amendment as unnecessary. *Id.* at 210; *see id.* at 209–71. The Committee explained that "in the rare cases where disclosure of historically significant materials had been sought, *district judges had reasonably resolved applications by reference to their inherent authority*." Advisory Comm. on Crim. Rules, Minutes 7 (Apr. 2012) ("Minutes") (emphasis added).[14]

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[13] Available at https://www.uscourts.gov/sites/default/files/fr_import/CR2012-04.pdf.

[14] Available at https://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2012.pdf.

3. The D.C. Circuit's contrary opinion rests on a flawed reading of Rule 6(e). The court below correctly recognized that, under Rule 6(e)(2), "persons bound by grand jury secrecy must not make any disclosures about grand jury matters '[u]nless these rules provide otherwise.'" App. 4a–5a (alteration in original). Its takeaway: Since Rule 6(e)(3) is "[t]he only rule to 'provide otherwise,'" the "Exceptions" found in Rule 6(e)(3) are necessarily exhaustive and thus eliminate any inherent authority the district court otherwise might have to disclose grand jury materials. *Id.* at 5a.

That reasoning is mistaken. Rule 6(e)(3)(E)'s "Exceptions" are to the rule of secrecy established in Rule 6(e)(2). But Rule 6(e)(2) imposes a secrecy obligation only on a specific list of people connected to the grand jury—such as grand jurors, government attorneys, and court reporters. Crucially, the list does *not* include the district court itself. Rule 6(e)(3)(E)'s exceptions to Rule 6(e)(2) therefore have no bearing on district courts' inherent authority over grand jury records—as the government itself made clear in *Haldeman*. *See supra* at 24–25.

The D.C. Circuit tried to evade this textual point by asserting that "Rule 6 assumes the [grand jury's] records are in the custody of the Government, not that of the court." App. 11a. On this view, Rule 6(e)(2)'s secrecy obligation—which does apply to government attorneys—also binds the court, at least as "a practical matter." *Id.* But that is simply not the case. Rule 6(e)(1) states that "an attorney for the government will retain control" of grand jury materials "[u]nless the court orders otherwise." A court may thus take possession of the materials itself, at which point it is outside the scope of Rule 6(e)(2)'s prohibition on disclosures by government attorneys.

That is precisely what other courts have sanctioned, and what McKeever seeks here.

The D.C. Circuit's other arguments also lack merit. For example, the court asserted that recognizing district courts' inherent authority to disclose grand jury materials would render Rule 6(e)(3)'s "detailed list of exceptions" to grand jury secrecy "merely precatory." *Id.* at 6a. Not so. Rule 6(e)(3) serves (at least) two purposes. *First*, it lists common scenarios in which disclosure of grand jury materials is allowed. And *second*, it informs district courts' exercise of discretion on disclosure requests, whether or not specifically addressed by Rule 6(e). *See Carlson*, 837 F.3d at 764–65 (rejecting this argument); *see generally Carlisle v. United States*, 517 U.S. 416, 426 (1996).

Nor do this Court's precedents weigh against inherent authority. *See* App. 6a–8a. Although the D.C. Circuit cited several of this Court's cases, it acknowledged that "the Court has not squarely addressed the present question." *Id.* at 7a. In fact, the cited cases never "addressed the present question" at all. None of them even purported to analyze the scope of district courts' inherent authority to disclose grand jury materials. This Court has not answered the question presented, implicitly or explicitly, and the court below was wrong to suggest otherwise.

Finally, the D.C. Circuit's concern about the proliferation of disclosure requests—and the potential for rampant over-disclosure—is overblown. App. 14a–15a. Like all inherent powers, the inherent power to disclose grand jury materials "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44. That's especially true in this context, since, "[u]nlike an ordinary judicial inquiry, . . . grand

jury proceedings are secret." *Levine*, 362 U.S. at 617; *see In re Craig*, 131 F.3d at 104 ("[W]hether to make public the ordinarily secret proceedings of a grand jury investigation is one of the broadest and most sensitive exercises of careful judgment that a trial judge can make."). In considering disclosure requests, courts must adhere to a "baseline presumption against disclosure," *In re Craig*, 131 F.3d at 104, seek guidance and constraints in the policies underpinning grand jury secrecy, and order disclosure only when a strong showing of need outweighs the interest in continued secrecy. *See Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222–23 (1979); *Procter & Gamble Co.*, 356 U.S. at 681 n.6; *In re Craig*, 131 F.3d at 106.

All available evidence indicates that courts have reasonably exercised their inherent power to disclose grand jury materials. For example, even though the Department of Justice proposed to delimit courts' authority to release historically significant grand jury records, *see supra* at 26, it admitted that courts' exercise of their inherent authority had been "rare," Agenda Book 223.

Former Attorney General Mukasey has agreed with that assessment. In opposing the Justice Department's 2011 proposal to amend Rule 6, he carefully reviewed district courts' disclosure practices in recent decades. Judge Mukasey opined that the track record "reflect[s] careful and informed exercise by courts of the authority to authorize disclosure even outside the four corners of Rule 6(e)"—and it emphatically does not show judges "running amok and forcing unwarranted disclosures." *Id.* at 253. As he rightly concluded: "Rule 6(e) ain't broke," so there is "no reason to fix it." *Id.* Other esteemed

commentators—including Judge Jensen (who previously chaired the Advisory Committee) and former U.S. Attorneys Robert Fiske and Otto Obermaier—have echoed his view. *See id.* at 211–12, 235–45. The D.C. Circuit should have heeded their counsel.

C. The Question Presented Is Important And Warrants This Court's Review

Whether district courts have inherent authority to release grand jury records is an important question that implicates fundamental constitutional values, the transparency of judicial proceedings, and the public's ability to understand important events in our Nation's history.

Court records and proceedings—particularly in criminal cases—are presumptively open, and for good reason: "[T]he public has an intense need and a deserved right to know about the administration of justice," which implicates First Amendment and other constitutional values. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring in the judgment).

The presumptive secrecy of grand jury proceedings is an important and justified departure from the norm—but it is not absolute. That secrecy should give way when it no longer serves a significant purpose and the public interest favors disclosure. *See, e.g.*, *In re Craig*, 131 F.3d at 105.

The Department of Justice acknowledged as much when it proposed to amend Rule 6(e) in 2011. *See supra* at 26. At the time, it agreed that "the public's interest in access to the primary-source records of our national history" will sometimes "'overwhelm any continued need for [grand jury] secrecy.'" Agenda

Book 221 (quoting *In re Craig*, 131 F.3d at 105). After the Advisory Committee rejected the government's proposal, the Department's representative stated that although "the Department will continue to object to requests for disclosure" based on inherent authority, it "does think the prudent policy is to permit release under appropriate circumstances." Minutes 8.

The government has not backtracked from that policy view: In this very case, it informed the D.C. Circuit that "[t]he government agrees that grand jury secrecy ought not last forever." *McKeever* Br. for Appellee 14 (filed June 4, 2018). And in *Carlson*, the government stated:

> As a matter of policy, the United States shares the district court's sense that, in criminal cases of enduring historical importance, the need for continued grand jury secrecy may eventually be outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government.

Corrected Br. for Respondent-Appellant United States 40–41, *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016) (No. 15-2972), ECF No. 16.

The Department of Justice is not alone in its support of that policy. The Archivist of the United States, for one, "has welcomed the development by the courts of the special circumstances exception to Rule 6(e) for historically significant grand-jury material," because it allows "public access to highly sought-after grand-jury materials from a small number of the criminal case files that are permanently preserved in the National Archives." Agenda Book 257.

Indeed, as far as McKeever is aware, *nobody* favors a blanket prohibition on disclosure of historically significant grand jury materials. And that's for good reason. The small number of authorized disclosures for reasons of historical significance have concerned momentous events in our Nation's history—including the "last mass lynching in American History," *see supra* note 10; spying by government officials for the Soviet Union, *see In re Petition of Am. Historical Ass'n, et al. for Order Directing Release of Grand Jury Minutes*, 49 F. Supp. 2d 274, 278–79, 291–97 (S.D.N.Y. 1999); a major intelligence leak during World War II, *see Carlson*, 837 F.3d at 756–57; and Watergate, *see In re Petition of Kutler*, 800 F. Supp. 2d 42, 43–44, 48–49 (D.D.C. 2011).

Moreover, grand jury records have contributed significantly to the public's understanding of these events. After a district court released grand jury records from the Alger Hiss espionage investigation, for example, the public definitively learned that then-Congressman Richard Nixon had "blatantly lobbied grand jurors to indict Hiss," but had used a "more subtle and sophisticated . . . approach than his critics ha[d] ever given him credit for."[15] And after the Seventh Circuit decided *Carlson*, records revealed that a Navy Admiral had "torpedoed" the grand jury investigation into a reporter who had leaked the Navy's own secrets.[16]

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[15] Benjamin Weiser, *Nixon Lobbied Grand Jury to Indict Hiss in Espionage Case, Transcripts Reveal*, N.Y. Times, Oct. 12, 1999, at A25.

[16] Katherine Rosenberg-Douglas, *1942 Tribune Story Implied Americans Cracked Japanese Code. Documents Show*

These important facts might well have remained sealed forever had courts not wisely granted access to grand jury records. That result would serve no one—least of all the American public.

* * *

The D.C. Circuit's categorical bar on disclosure leaves no room to consider circumstances that could justify release of grand jury records in particular cases. That anti-textual, anti-historical, one-size-fits-all approach misreads Rule 6(e)'s language and disserves the public's compelling interest in knowing our Nation's past. This case offers an ideal opportunity for this Court to overturn the D.C. Circuit's outlier ruling and ensure that Rule 6(e) is applied uniformly—and correctly—across the country.

Why Reporter Not Indicted, Chicago Tribune (Oct. 28, 2017), https://www.chicagotribune.com/news/breaking/ct-met-tribune-espionage-act-book-web-post-out-20171024-story.html; *see also* Elliot Carlson, *Stanley Johnston's Blunder: The Reporter Who Spilled the Secrets Behind the U.S. Navy's Victory at Midway* (2017).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 2019

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UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Stuart A. MCKEEVER, Appellant

v.

William P. BARR, Attorney General, Appellee

No. 17-5149

Argued September 21, 2018

Decided April 5, 2019

920 F.3d 842

Before: Srinivasan and Katsas, Circuit Judges, and GINSBURG, Senior Circuit Judge.

Dissenting opinion filed by Circuit Judge Srinivasan.

Ginsburg, Senior Circuit Judge:

Historian Stuart A. McKeever appeals an order of the district court denying his petition to release grand jury records from the 1957 indictment of a former agent of the Federal Bureau of Investigation, which McKeever sought in the course of his research for a book he is writing. The district court, lacking positive authority, asserted it has inherent authority to disclose historically significant grand jury matters but denied McKeever's request as overbroad. On appeal, the Government argues the district court does not have the inherent authority it claims but rather is limited to the exceptions to grand jury secrecy listed in Federal Rule of Criminal Procedure 6(e).

We agree with the Government. Accordingly, we affirm the order of the district court denying McKeever's petition for the release of grand jury matters.

I. Background

In 1956 Columbia University Professor Jesús de Galíndez Suárez disappeared from New York City. 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. *Witness Tells of Galindez Pilot's Death*, N.Y. TIMES (Apr. 6, 1964); Dwight D. Eisenhower, The President's News Conference of April 25, 1956, in Public Papers of the Presidents of the United States 440–41 (1956). To this day, the details of Galíndez's disappearance remain a mystery.

Stuart McKeever has been researching and writing about the disappearance of Professor Galíndez since 1980. In 2013 McKeever petitioned the district court for the "release of grand jury records in the Frank case," referring to the 1957 investigation and indictment of John Joseph Frank, a former FBI agent and CIA lawyer who later worked for Trujillo, and who McKeever believed was behind Galíndez's disappearance. The grand jury indicted Frank for charges related to his failure to register as a foreign agent pursuant to the Foreign Agents Registration Act of 1938 but never indicted him for any involvement in Galíndez's murder. *See Frank v. United States*, 262 F.2d 695, 696 (D.C. Cir. 1958).

The district court asserted it has "inherent supervisory authority" to disclose grand jury matters that are historically significant, but nevertheless denied McKeever's request after applying the multifactor test set out *In re Craig*, 131 F.3d 99, 106 (2d Cir. 1997). Although several of the nine non-exhaustive factors favored disclosure, the district court read McKeever's petition as seeking release of

all the grand jury "testimony and records in the Frank case," which it held was overbroad. McKeever duly appealed.[1]

We review de novo the district court's assertion of inherent authority to disclose what we assume are historically significant grand jury matters. *Cf. United States v. Doe*, 934 F.2d 353, 356 (D.C. Cir. 1991). Because we hold the district court has no such authority, we need not determine whether it abused its discretion in denying McKeever's petition as overbroad.[2]

II. Analysis

The Supreme Court has long maintained that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). That secrecy safeguards vital interests in (1) preserving the willingness and candor of witnesses called before the grand jury; (2) not alerting the target of an investigation who might otherwise flee or interfere with the grand jury; and (3) preserving the rights of a

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[1] McKeever appeared pro se in the district court but on appeal has been ably assisted by a court-appointed amicus curiae.

[2] Although the records at issue here were transferred from the Department of Justice to the National Archives, we understand the DOJ has legal control over them. *See* FED. R. CRIM. P. 6(e)(1) ("Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes"). An order directing the Attorney General to release the records would, therefore, redress McKeever's alleged injury.

suspect who might later be exonerated. *Id.* at 219, 99 S.Ct. 1667. To protect these important interests,

> [b]oth the Congress and [the Supreme] Court have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized.

United States v. Sells Engineering, *Inc*., 463 U.S. 418, 425, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983).

As we have said before, Federal Rule of Criminal Procedure 6(e) "makes quite clear that disclosure of matters occurring before the grand jury is the exception and not the rule" and "sets forth in precise terms to whom, under what circumstances and on what conditions grand jury information may be disclosed." *Fund of Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 868 (D.C. Cir. 1981). The full text of Rule 6(e) is reproduced in the Appendix. Of particular relevance here, Rule 6(e)(2)(B) sets out the general rule of grand jury secrecy and provides a list of "persons" who "must not disclose a matter occurring before the grand jury" "[u]nless these rules provide otherwise." Rule 6(e)(3) then sets forth a detailed list of "exceptions" to grand jury secrecy, including in subparagraph (E) five circumstances in which a "court may authorize disclosure . . . of a grand-jury matter." As McKeever does not claim his request comes within any exception, the question before us is whether the list of exceptions is exhaustive, as the Government argues.

We agree with the Government's understanding of the Rule. Rule 6(e)(2)(B) instructs that persons bound

by grand jury secrecy must not make any disclosures about grand jury matters "[u]nless these rules provide otherwise." The only rule to "provide otherwise" is Rule 6(e)(3). Rules 6(e)(2) and (3) together explicitly require secrecy in all other circumstances. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S.Ct. 1905, 64 L.Ed.2d 548 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

That the list of enumerated exceptions is so specific bolsters our conclusion. For example, the first of the five discretionary exceptions in Rule 6(e)(3)(E) permits the court to authorize disclosure of a grand jury matter "preliminarily to or in connection with a judicial proceeding." Rule 6(e)(3)(E)(i). The second exception allows for disclosure "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." Rule 6(e)(3)(E)(ii). The other three exceptions provide that a court may authorize disclosure to certain non-federal officials "at the request of the government" to aid in the enforcement of a criminal law, Rule 6(e)(3)(E)(iii)-(v); those provisions implicitly bar the court from releasing materials to aid in enforcement of civil law. Each of the exceptions can clearly be seen, therefore, as the product of a carefully considered policy judgment by the Supreme Court in its rulemaking capacity, and by the Congress, which in 1977 directly enacted Rule 6(e) in substantially its present form. *See Fund for Constitutional Gov't*, 656 F.2d at 867. In interpreting what is now Rule 6(e)(3)(E)(i), for example, the Supreme Court stressed that the

exception "reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983).

As the Government emphasizes, McKeever points to nothing in Rule 6(e)(3) that suggests a district court has authority to order disclosure of grand jury matter outside the enumerated exceptions. The list of exceptions in Rule 6(e)(3) does not lead with the term "including," nor does it have a residual exception. *Cf., e.g.*, FED. R. CIV. P. 60(b) (permitting the court to relieve a party from a final judgment or order for five listed reasons as well as "any other reason that justifies relief").

The contrary reading proposed by McKeever – which would allow the district court to create such new exceptions as it thinks make good public policy – would render the detailed list of exceptions merely precatory and impermissibly enable the court to "circumvent" or "disregard" a Federal Rule of Criminal Procedure. *Carlisle v. United States*, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996); *see also Dietz v. Bouldin*, ––– U.S. ––––, 136 S.Ct. 1885, 1888, 195 L.Ed.2d 161 (2016) (The exercise of an inherent power "cannot be contrary to any express grant of, or limitation on, the district court's power contained in a rule or statute").

In an effort to limit the natural consequences of his proposal, McKeever explains that the district court should be allowed to fashion new exceptions to grand jury secrecy only if they are "so different from the types of disclosures addressed by Rule 6(e)(3)(E) that no negative inference can be drawn." Amicus Reply Br. 14-16. That reasoning, however, ignores

the likelihood that disclosures "so different" from the ones explicitly permitted by the rule are so far removed from permissible purposes of disclosure that the drafters saw no need even to mention them.

Our understanding that deviations from the detailed list of exceptions in Rule 6(e) are not permitted is fully in keeping with Supreme Court precedent. Though the Court has not squarely addressed the present question, its Rule 6 opinions cast grave doubt upon the proposition that the district court has authority to craft new exceptions. McKeever does not cite any case – and we can find none – in which the Supreme Court upheld a disclosure pursuant to the district court's inherent authority after Rule 6 was enacted. The Supreme Court once suggested in a dictum that Rule 6 "is but declaratory" of the principle that disclosure of a grand jury matter is "committed to the discretion of the trial judge," *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959), but none of the cases it cited suggests a court has discretion to disclose grand jury materials apart from Rule 6. To the contrary, the Court said "any disclosure of grand jury [materials] is covered" by Rule 6(e). *Id.* at 398, 79 S.Ct. 1237. The disclosure sought in that case – in order to cross-examine a witness in civil litigation – plainly fell within the exception for use "in connection with a judicial proceeding." *Id.* at 396 n.1, 79 S.Ct. 1237 (quoting rule). The only "discretion" at issue involved the district court's determination whether the party seeking material covered by the exception had made a sufficiently strong showing of need to warrant disclosure. *See id.* at 398-99, 79 S.Ct. 1237; *see also Douglas Oil*, 441 U.S. at 217-24, 99 S.Ct. 1667

(describing same discretion). Indeed, the Court has at least four times since suggested the exceptions in Rule 6(e) are exclusive. In *Baggot*, 463 U.S. at 479-80, 103 S.Ct. 3164, the Court prohibited disclosure of a witness's grand jury testimony for use in a civil investigation by the Internal Revenue Service. The Court held a civil tax audit was not "preliminary to [n]or in connection with a judicial proceeding" and therefore did not come within the exception in what is now Rule 6(e)(3)(E)(i). In reaching its conclusion, the Court explained that the exception at issue is "on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Id.* at 479, 103 S.Ct. 3164; *see also Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983) (Rule 6(e)(3)(C) "authorize[s]" the court "to permit certain disclosures that are otherwise prohibited by the General Rule of Secrecy"); *United States v. Williams*, 504 U.S. 36, 46 n.6, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (describing Rule 6(e), which "plac[es] strict controls on disclosure of 'matters occurring before the grand jury,'" as one of those "few, clear rules which were carefully drafted and approved by this Court and by the Congress to ensure the integrity of the grand jury's functions"); *Sells Engineering*, 463 U.S. at 425, 103 S.Ct. 3133 ("In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized").

Our understanding of Rule 6(e) is also supported by this court's precedents, which require a district court to hew strictly to the list of exceptions to grand jury secrecy. For example, *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986), we said Rule 6(e)(2) "provides that disclosure of 'matters occurring before

the grand jury' is prohibited unless specifically permitted by one of the exceptions set forth in Rule 6(e)(3)." A few years later, we reiterated this point *In re Sealed Case*, 250 F.3d 764, 768 (D.C. Cir. 2001), when we held that statements made by government attorneys to a qui tam court about a witness's grand jury testimony were an impermissible disclosure outside the strictures of Rule 6(e). In so holding, we rejected the Government's then-position that there is a place for implied exceptions to the Rule: "the Rule on its face prohibits such a communication because it does not except it from the general prohibition." *Id.* at 769. It would be most peculiar to have stressed then that the exceptions in Rule 6(e) "must be narrowly construed," *id.* 769, yet to hold now that they may be supplemented by unwritten additions.[3]

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[3] McKeever and our dissenting colleague cite *Haldeman v. Sirica,* 501 F.2d 714 (D.C. Cir. 1974) – which permitted the disclosure of a sealed grand jury report to aid in the inquiry by the House Judiciary Committee into possible grounds for impeachment of President Nixon – as stepping outside the strict bounds of Rule 6(e). As the dissent acknowledges, however, our opinion in "*Haldeman* . . . contains no meaningful analysis of Rule 6(e)'s terms." Rather, the court's opinion is ambiguous as to its rationale, expressing only a "general agreement" with the district court's decision. *Id*. at 715. The reasoning of the district court is itself ambiguous; its holding that "[p]rinciples of grand jury secrecy do not bar this disclosure" is based in part upon various policy considerations; in part upon the view that grand jury matters may lawfully be made available to the House of Representatives as "a body that in this setting acts simply as another grand jury"; and in part upon the view that it "seems incredible that grand jury matters should lawfully be available to disbarment committees and police disciplinary investigations and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation." *See In re Report & Recommendation of June 5, 1972 Grand Jury*

McKeever makes three arguments to the contrary. The first is that Rule 6(e) imposes no obligation of secrecy upon the district court itself because the district court is not on the list of "persons" to whom grand jury secrecy applies per Rule 6(e)(2). *See* Rule 2(e)(2)(A) ("No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)"). Therefore, the argument goes, the two *Sealed Cases* discussed above are inapplicable here because they deal with disclosures by government attorneys, not by the court itself, and the court has authority to order disclosure of grand jury matters because these materials are "judicial records" over

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Concerning Transmission of Evidence to House of Representatives, 370 F.Supp. 1219, 1228-30 (D.D.C. 1974); *id*. at 1228 n.39 (citing *Special Feb. 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 897 (7th Cir. 1973) (police disciplinary investigation)), and *id*. at 1229 n.41 (citing *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958) (disbarment committee)), both decided per the "judicial proceeding" exception in Rule 6(e).

The dissent also notes that the district court in *Haldeman* favorably cited Judge Friendly's opinion *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), which authorized a disclosure not covered by any Rule 6(e) exception. But *Biaggi* was carefully limited to the "special circumstances" of that case, *id.* at 494, in which a grand jury witness, who is not subject to any secrecy obligation in the first place, sought disclosure only of his own testimony. *See id.* at 492-93. Judge Friendly carefully noted that, if the witness had not sought his own testimony, then disclosure would have been improper "[n]o matter how much, or how legitimately, the public may want to know" how the witness had testified. *Id.* at 493.

In any event, we read *Haldeman* as did Judge MacKinnon in his separate opinion concurring in part, as fitting within the Rule 6 exception for "judicial proceedings." *See* 501 F.2d at 717. Doing so reads the case to cohere, rather than conflict, with the Supreme Court and D.C. Circuit precedents discussed above, which both predate and postdate *Haldeman*.

which the court has inherent authority. Amicus Br. 24-25 (citing, inter alia, *Carlson v. United States*, 837 F.3d 753, 758-59 (7th Cir. 2016) (concluding grand jury records are "records of the court" over which the district court can exercise inherent authority because the grand jury is "part of the judicial process")).

We do not agree that the omission of the district court from the list of "persons" in Rule 6(e)(2) supports McKeever's claim. Rule 6 assumes the records are in the custody of the Government, not that of the court: When the court authorizes their disclosure, it does so by ordering "an attorney for the government" who holds the records to disclose the materials. *See* Rule 6(e)(1) ("Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript" of the grand jury proceeding). Because an "attorney for the government" is one of the "persons" subject to grand jury secrecy in Rule 6(e)(2)(B), the Rule need not also list the district court as a "person" in order to make the court, as a practical matter, subject to the strictures of Rule 6. Indeed, as the Government explains, a district court is not ordinarily privy to grand jury matters unless called upon to respond to a request to disclose grand jury matter. As to whether records of a grand jury proceeding are "judicial records" – a term not found in Rule 6 – we note the teaching of the Supreme Court that although the grand jury may act "under judicial auspices," its "institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length," *Williams*, 504 U.S. at 47, 112 S.Ct. 1735; it is therefore not at all clear that when Rule 6(e)(2)(B) mentions a "matter appearing before the grand jury," it is referring to a "judicial record." The Supreme

Court has never said as much, and we, albeit in another context, have twice said the opposite: "[T]he concept of a judicial record 'assumes a judicial decision,' and with no such decision, there is 'nothing judicial to record." *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013) (quoting *United States v. El-Sayegh*, 131 F.3d 158, 162 (D.C. Cir. 1997)).

McKeever's second argument, which was recently accepted by the Seventh Circuit in *Carlson*, is that the advent of Rule 6 did not eliminate the district court's preexisting authority at common law to disclose grand jury matters because courts "do not lightly assume" a federal rule reduces the "scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (citation omitted). A federal rule that "permits a court to do something and does not include any limiting language" therefore "should not give rise to a negative inference that it abrogates the district court's inherent power without a 'clear[] expression of [that] purpose.'" *Carlson*, 837 F.3d at 763 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 631-32, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)) (alterations in original). In this telling, because Rule 6 did not contain a "clear expression" that it displaced the district court's preexisting authority, the court remains free to craft new exceptions; the rulemakers simply furnished the list of detailed exceptions "so that the court knows that no special hesitation is necessary in those circumstances." *Id.* at 764-65.

That account of Rule 6 is difficult to square with the text of the Rule, which we have examined above. The "limiting language," *id.* at 763, the Seventh Circuit sought is plain: Rule 6(e)(2) prohibits disclosure of a grand jury matter "unless these rules

provide otherwise." Yet the Seventh Circuit dismisses this instruction because a limitation "buried" in Rule 6(e)(2) could not "secretly appl[y]" to "an entirely different subpart," *Carlson*, 837 F.3d at 764, never mind that this subpart follows immediately after Rule 6(e)(2) as Rule 6(e)(3). Because we believe it is necessary to read the exceptions in subpart (e)(3) in conjunction with the general rule in subpart (e)(2), we agree with Judge Sykes's dissent in *Carlson*:

> As my colleagues interpret the rule, the limiting language in the secrecy provision has no bearing at all on the exceptions. . . . But the two provisions cannot be read in isolation. They appear together in subpart (e), sequentially, and govern the same subject matter. The exceptions plainly modify the general rule of nondisclosure. Treating the exceptions as merely exemplary puts the two provisions at cross-purposes: If the district court has inherent authority to disclose grand-jury materials to persons and in circumstances not listed in subsection (e)(3)(E), the limiting phrase "unless these rules provide otherwise" in the secrecy provision is ineffectual.

Id. at 769.

McKeever's third contention is that the purposes of grand jury secrecy would not be served by denying disclosure in this case; the passage of time and likely death of all witnesses in Frank's grand jury proceeding have rendered continued secrecy pointless. Of course, these considerations are irrelevant if the district court lacks authority to create new exceptions to Rule 6(e). In any event, it is not

clear that continued secrecy serves no purpose in this case. First, privacy interests can persist even after a person's death. *See New York Times Co. v. Nat'l Aeronautics & Space Admin.*, 920 F.2d 1002, 1009-1010 (D.C. Cir. 1990). Second, as the Supreme Court noted in *Douglas Oil*, there is likely to be a chilling effect on what a witness is willing to say to a grand jury if there is a risk the court will later make the witness's testimony public. 441 U.S. at 219, 99 S.Ct. 1667. The effect of an exception must be evaluated *ex ante*, not *ex post*. For example, if a witness in Frank's grand jury proceedings had known that the public might learn about his testimony in the future – and that his words could be immortalized in a book – then his willingness to testify "fully and frankly," *id.*, could have been affected. Furthermore, the risk of a witness's testimony being disclosed would grow as district courts continue over time to create additional exceptions to grand jury secrecy.

Our concern is not merely hypothetical; as the Government points out, there has been a steady stream of requests for disclosures since the district court first claimed inherent authority *In re Petition of Kutler*, 800 F.Supp.2d 42, 50 (D.D.C. 2011) (granting request to disclose President Nixon's grand jury testimony about Watergate due to its historical importance). *See In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton*, 308 F.Supp.3d 314, 335-36 (D.D.C. 2018) (ordering disclosure of grand jury materials related to the investigation of President Clinton's business dealings and his relationship with a White House intern); *Sennett v. Dep't of Justice*, 962 F.Supp.2d 270, 283-84 (D.D.C. 2013) (permitting the FBI to withhold grand jury

information in response to a Freedom of Information Act request despite the requester's argument for an exception to grand jury secrecy for historically important material); *In re Nichter*, 949 F.Supp.2d 205, 212-13 (D.D.C. 2013) (denying disclosure of certain grand jury records about Watergate in part because at least one of the subjects of the testimony was alive); *In re Shepard*, 800 F.Supp.2d 37, 39-40 (D.D.C. 2011) (denying as overbroad a request for disclosure of "all testimony and materials associated with *every* witness before *three* [Watergate] grand juries").

We recognize that our view of Rule 6(e) differs from that of some other circuits. *See, e.g.*, *Carlson*, 837 F.3d at 767, discussed above; *In re Craig*, 131 F.3d at 105 (recognizing it is "entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information" because they constitute "special circumstances" in which release of grand jury records is appropriate outside the bounds of Rule 6); *In re Hastings*, 735 F.2d 1261, 1272 (11th Cir. 1984) (allowing a district court to "act outside the strict bounds of Rule 6(e), in reliance upon its historic supervisory power" to disclose grand jury matters to a judicial investigating committee); *Pitch v. United States*, 915 F.3d 704, 707 (11th Cir. 2019) (affirming an order to unseal historically significant grand jury matter "[b]ecause we are bound by our decision in *Hastings*"). For all the reasons set forth above, we simply cannot agree.

Instead, we agree with the Sixth Circuit, which has turned down an invitation to craft an exception to grand jury secrecy outside the terms of the Rule:

> We are not unaware of those commentators who have urged the courts to make grand jury materials more accessible to administrative agencies in an effort to reduce duplicative investigations. Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule.

In re Grand Jury 89-4-72, 932 F.2d 481, 488 (1991) (citation omitted). The Eighth Circuit expressed the same view in *United States v. McDougal*, 559 F.3d 837, 840 (2009):

> McDougal's argument invoking . . . the "[c]ourt's supervisory power over its own records and files" is unpersuasive. . . . "[B]ecause the grand jury is an institution separate from the courts, over whose functioning the courts do not preside," *United States v. Williams*, 504 U.S. 36, 47 [112 S.Ct. 1735, 118 L.Ed.2d 352] (1992), courts will not order disclosure absent a recognized exception to Rule 6(e) . . . .

Just so.[4]

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[4] At least three other circuits have expressed the same view in dicta. *See United States v. Educ. Dev. Network Corp.*, 884 F.2d 737, 740 (3d Cir. 1989); *In re Grand Jury Subpoenas, Apr., 1978, at Baltimore*, 581 F.2d 1103, 1108–09 (4th Cir. 1978); *In re J. Ray McDermott & Co., Inc.*, 622 F.2d 166, 172 (5th Cir. 1980).

III. Conclusion

Because the district court has no authority outside Rule 6(e) to disclose grand jury matter, the order of the district court denying McKeever's petition is

Affirmed.

Appendix

Federal Rule of Criminal Procedure 6: The Grand Jury

(e) Recording and Disclosing the Proceedings.

(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. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(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).

(3) Exceptions.

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

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

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

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

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign

intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with

the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against–

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to–

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

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

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

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

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

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

[Remainder of Rule 6 omitted.]

Srinivasan, Circuit Judge, dissenting:

The central issue in this case is whether a district court can authorize the release of grand jury materials in circumstances beyond those expressly identified in Rule 6(e) of the Federal Rules of Criminal Procedure. If not, grand jury materials falling outside Rule 6(e)'s exceptions cannot be released even if there is a strong public interest favoring disclosure and no enduring interest in secrecy. My colleagues read Rule 6 to compel that result. In my respectful view, however, our court's en banc decision in *Haldeman v. Sirica*, 501 F.2d 714 (1974), allows for district court disclosures beyond Rule 6(e)'s exceptions.

Rule 6(e) "codifies the traditional rule of grand jury secrecy." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). The Rule imposes an obligation of secrecy on certain persons, Rule 6(e)(2), but then sets out five exceptions to that obligation, Rule 6(e)(3)(A)–(E). The first four exceptions allow for disclosure without a need for district court authorization. The last exception describes five circumstances in which "[t]he *court may* authorize disclosure . . . of a grand-jury matter." Rule 6(e)(3)(E)(i)–(v) (emphasis added). None of those circumstances applies in this case.

The crucial question for our purposes, then, is whether Rule 6(e)(3)'s exceptions identify the only circumstances in which a district court may authorize disclosure of grand jury materials. Or, alternatively, does a court retain inherent discretion to consider releasing grand jury materials in other circumstances—potentially including, as relevant here, for reasons of historical significance?

In *Haldeman*, this court, sitting en banc, faced the contention that a district court's authority to disclose grand jury materials is confined to the exceptions in Rule 6(e). The district court in that case had ordered the disclosure of materials from the Watergate grand jury to the House Judiciary Committee for its consideration in investigating the possible impeachment of President Nixon. Only one of the exceptions in Rule 6(e) even arguably applied: when disclosure occurs "preliminarily to or in connection with a judicial proceeding." *See* Rule 6(e)(3)(E)(i).

The petitioners in *Haldeman* asked our court to prohibit the district court from releasing the grand jury materials to the House Judiciary Committee. We declined to do so and instead sustained the district court's disclosure order. 501 F.2d at 716. Our decision thus settled that a district court retains discretion to release grand jury matter to a House Committee in the specific context of an impeachment inquiry.

But what are the implications of our decision in *Haldeman* for a district court's authority to release grand jury materials outside the impeachment context? And, in particular, does a district court possess inherent discretion to consider disclosure beyond the specific exceptions set out in Rule 6(e)—including, as relevant here, for reasons of historical significance?

The petitioners in *Haldeman* argued no. They believed the district court lacked discretion to disclose the grand jury materials to the House Judiciary Committee unless the circumstances fit within the Rule 6(e) exception for judicial proceedings. They "asserted, both in the District Court and here, that the discretion ordinarily reposed in a trial court to

make such disclosure of grand jury proceedings as he deems in the public interest is, by the terms of Rule 6(e) . . . limited to circumstances incidental to judicial proceedings and that impeachment does not fall into that category." *Id.* at 715.

In rejecting the petitioners' argument, we said that the district judge, Chief Judge Sirica, "ha[d] dealt at length with this contention," that we were "in general agreement with his handling of the[] matter[]," and that "we fe[lt] no necessity to expand his discussion." *Id.* Our decision thereby subscribed to Chief Judge Sirica's rationale for his disclosure order. The question for our purposes, then, is whether he ordered the disclosure on an understanding that he had inherent discretion to release grand jury materials outside the Rule 6(e) exceptions, or whether he instead believed he was confined to those exceptions but that the disclosure to the House Judiciary Committee fit within the exception for judicial proceedings.

I understand Chief Judge Sirica to have adopted—and thus our court to have ratified—the former understanding. He began his analysis by stating that, as to "the question of disclosure," "judicial authority" is "exclusive." *In re Report & Recommendation of June 5, 1972 Grand Jury*, 370 F.Supp. 1219, 1226 (D.D.C. 1974). He noted decisions that had assessed the propriety of disclosure by weighing, "among other criteria, judicial discretion over grand jury secrecy, the public interest, and prejudice to persons named by the [grand jury] report." *Id.* at 1227. Those considerations led him to conclude "that delivery to the Committee is eminently proper, and indeed, obligatory." *Id.*

Judge Sirica identified the "only significant objection to disclosure" to be "the contention that release . . . is absolutely prohibited by Rule 6(e)." *Id.* He emphasized, though, that the "rule continues the traditional practice of secrecy on the part of members of the grand jury, *except when the court permits a disclosure*." *Id.* (emphasis in original). He reviewed decisions addressing the exception for judicial proceedings and concluded that the "difficulty in application of Rule 6(e) to specific fact situations likely arises from the fact that its language regarding 'judicial proceedings' can imply limitations on disclosure much more extensive than were apparently intended." *Id.* at 1229.

Of particular salience, Judge Sirica favorably referenced a then-recent "opinion written by Chief Judge Friendly" in which "the Second Circuit held that Rule 6(e) did not bar public disclosure of grand jury minutes[] *wholly apart from judicial proceedings*." *Id.* (emphasis added). The Second Circuit had found that the judicial-proceeding exception was "inapplicable" because the court had "not been told of any judicial proceeding preliminary to or in connection with which the . . . grand jury testimony may be relevant." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973). But the court still allowed disclosure, even though no Rule 6(e) exception applied. *Id.* at 492–93; *see id.* at 493–94 (Hays, J., dissenting) (noting that the majority allowed disclosure even though it "concede[d] that the present situation does not present a case for the application of any of the exceptions specified in the Rule").

Judge Sirica, in concluding that "[p]rinciples of grand jury secrecy do not bar [the] disclosure" at issue in *Haldeman*, explained that he was "persuaded to

follow the lead . . . of Judges Friendly and Jameson" in *Biaggi*. 370 F.Supp. at 1230. He also listed additional decisions he was "persuaded to follow" in which disclosure had been authorized. *Id.* Those decisions, like *Biaggi*, did not involve disclosures justified on the theory that they fell within any Rule 6(e) exception. I thus understand Judge Sirica to have ordered disclosure on the understanding that he retained inherent discretion to release grand jury materials outside of Rule 6(e)'s exceptions.

Granted, Judge Sirica at one point described the House Judiciary Committee as "a body that in this setting acts simply as another grand jury." *Id.* But, as his reliance on *Biaggi* and the other decisions shows, he did not compare the Committee to "another grand jury" on any theory that the Committee's investigation implicated the judicial-proceedings exception. In fact, the Advisory Committee later added an exception allowing disclosures from one grand jury to another, reasoning that such a transfer fell outside the pre-existing judicial-proceedings exception. *See* Rule 6(e)(3)(C) advisory committee's note to 1983 amendment. Rather, Judge Sirica compared the Committee to "another grand jury" to convey that the Committee likewise would "insure against unnecessary and inappropriate disclosure." 370 F.Supp. at 1230.

For those reasons, when our court in *Haldeman* endorsed Judge Sirica's approach, we in my view affirmed his understanding that a district court retains discretion to release grand jury materials outside the Rule 6(e) exceptions. To be sure, *Haldeman*—unlike my colleagues' careful opinion in this case—contains no meaningful analysis of Rule 6(e)'s terms. But Rule 6(e) has not changed since

Haldeman in any way material to the issue we address today. And my reading of *Haldeman* squares with the reading of the decision adopted by each of our sister circuits to have interpreted it. *See Pitch v. United States*, 915 F.3d 704, 710 n.5 (11th Cir. 2019); *Carlson v. United States*, 837 F.3d 753, 766 (7th Cir. 2016). It also squares with the Advisory Committee's evident reason for declining to add a Rule 6(e) exception for historically-significant materials—viz., that district courts already authorized such disclosures as a matter of their inherent authority. *See Pitch*, 915 F.3d at 715 (Jordan, J., concurring). It is also consistent with various decisions relied on by my colleagues, *see supra* at 845–47 & n.3, none of which dealt with whether courts can order disclosures outside of Rule 6(e)'s exceptions.

Because my colleagues conclude that district courts lack authority to release grand jury materials outside the Rule 6(e) exceptions, they have no occasion to decide whether, if district courts do have that authority, the district court in this case appropriately declined to exercise it. I therefore do not reach that issue either. But on the threshold question of whether district courts have discretion to consider disclosures beyond Rule 6(e), I respectfully dissent from my colleagues' view based on my different reading of our decision in *Haldeman*.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE PETITION OF STUART MCKEEVER	)))))	**Misc. Action No. 13-54 (RCL)**

MEMORANDUM OPINION & ORDER

Before the Court is petitioner's Motion for Release of Grand Jury Testimony and Records in the Matter of United States vs. John Joseph Frank a/k/a/ "John Kane" [1]. Upon consideration of the motion, the government's opposition [10] and reply thereto [13], and the applicable law, the Court will deny the motion, for the reasons set forth below.

I. BACKGROUND

Stuart McKeever, an independent researcher and author, is seeking the release of grand jury testimony and records related to the indictment of John Joseph Frank in May 1957. Petitioner argues that both Federal Rule of Criminal Procedure 6(e) and the Court's "inherent supervisory authority" over grand juries empower the Court to order the requested disclosure.[1] He further raises the nine-factor

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[1] The Court observes that the petitioner has cited to a non-existent subsection of the Federal Rules of Criminal Procedure, § 6(e)(3)(c)(i), as the basis of his rule-based argument. The petitioner also curiously did not incorporate paragraphs 18 or 19 of his complaint into his argument concerning the Court's inherent authority. Nevertheless, this Court construes liberally motions filed by *pro se* litigants, and will accordingly do so here. *See Bowman v. lddon,* 848 F.3d 1034, 1039 (D.C. Cir. 2017).

balancing test articulated by the Second Circuit in *In re Petition of Craig,* 131 F.3d 99 (2d Cir.1997), as militating in favor of that disclosure. The government opposes the petition, arguing 1) the requested disclosure falls outside the exceptions to grand jury secrecy set forth in Federal Rule of Criminal Procedure 6(e), 2) the *Craig* court's analysis is contrary to Supreme Court precedent, and 3) that, in any event, the Frank case lacks the historical significance that weighed in favor of disclosure in other cases.

The material at issue concerns former law enforcement agent and attorney John Joseph Frank, allegedly also known as "John Kane." According to news reports, Frank graduated from Georgetown University and Georgetown University Law Center, spent nearly eight years as a Special Agent of the Federal Bureau of Investigation in the 1940s, a few more years as a lawyer for the Central Intelligence Agency, and then left government service for the private practice of law. [13-4][2]

On May 13, 1957, a federal grand jury in the District of Columbia indicted Frank for failure to register as a foreign agent under the Foreign Agents Registration Act of 1938 (FARA), June 8, 1938, ch. 327, 52 Stat. 631 (22 §§ 611 to 621), accusing Frank of acting on behalf of the regime of Dominican dictator Rafael Trujillo. The grand jury that indicted Frank was reportedly investigating the disappearances of

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[2] Petitioner's reply [13] includes 19 pages of uncited narrative, except to the petitioner's own prior work, explaining the historical significance of the Galindez matter. The Court makes no findings as to the accuracy or truth of either the narrative or the attached press reports.

Jesus Maria de Galindez, a Columbia University professor critical of the Trujillo regime, and Gerald Murphy, an American pilot suspected of having something to do with Galindez's disappearance. Galindez was last seen in New York City on March 12, 1956.

Petitioner has been researching the Galindez disappearance and surrounding events since 1980. Motion for Release of Grand Jury Testimony and Records at *2 [1]. His research has led him to conclude that Frank masterminded the Galindez kidnapping on orders from Trujillo, using Murphy to covertly fly Galindez from New York to the Dominican Republic to be tortured and murdered by Dominican agents. *Id.* at *3. Murphy himself was then killed in the Dominican Republic in December 1956, petitioner claims, by Dominican agents to keep him from talking about the Galindez kidnapping.

Frank was never charged with having a role in the Galindez or Murphy disappearances, but was convicted by a jury on the FARA charges. That conviction was reversed by the Court of Appeals, however, because prosecutors made prejudicial statements during trial linking Frank to the "Galindez-Murphy affair." *Frank v. U.S.,* 262 F.2d 695 (D.C. Cir. 1958).

II. DISCUSSION

In *In re Petition of Stanly Kutler,* 800 F.Supp.2d 42 (D.D.C., 2011), this Court authorized the disclosure of President Richard Nixon's grand jury testimony and associated materials of the Watergate Special Prosecution Force (WSPF), subject to the review procedures of the National Archives and Records Administration (NARA). Mr. McKeever asks

the Court to find that his requested materials also merit disclosure under the standards articulated in *Kutler*. For its part, the government, which did not appeal the *Kutler* ruling, argues here that this Court was wrong to grant disclosure in the former case, that the Second Circuit was wrong in its articulation of the "special circumstances" doctrine that this Court applied, and that, regardless of the above, disclosure outside of Rule 6(e) would be inappropriate here.

A. Standard for Disclosure of Grand Jury Records

There is a tradition in the United States—one that is "older than our Nation itself"—that proceedings before a grand jury should remain secret. *In re Biaggi,* 478 F.2d 489, 491 (2d Cir. 1973) (quoting *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 295, 399 (1959)). This tradition is codified in Federal Rule of Criminal Procedure 6(e). *See Douglas Oil Co. v. Petrol Stops Nw.,* 441 U.S. 211, 218–19 n.9 (1979). The rule of secrecy is justified by a number of law enforcement and criminal justice objectives, including:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; [and] (5) to protect

> [the] 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.

United States v. Procter & Gamble Co., 356 U.S. 677, 681–82 n. 6, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) (quoting *United States v. Rose,* 215 F.2d 617, 628–29 (3d Cir.1954)).

But the rule of grand jury secrecy is not without exceptions. These exceptions, which "have developed historically alongside the secrecy tradition," are codified in Rule 6(e)(3). *In re Petition of Craig,* 131 F.3d 99, 102 (2d Cir.1997). The exceptions recognized in Rule 6(e)(3) were codified to promote the efficiency of law enforcement and the criminal justice process after a series of overly restrictive judicial rulings that preceded the rule's enactment. *See* S. Rep. 95-354, 1977 U.S.C.C.A.N. 527; *Carlson,* 837 F.3d at 765 (according the Committee notes "some weight"). The enacted Rule 6(e) did not "define" prosecutors' abilities to disclose grand jury material, but merely "facilitate[d]" it in light of some rulings to the contrary. S. Rep. 95-354, 1977 U.S.C.C.A.N. at 529-32.

In addition to those exceptions articulated in Rule 6(e)(3), courts have recognized there may be "special circumstances in which release of grand jury records is appropriate even outside the boundaries of the rule." *Craig,* 131 F.3d at 102 (quoting Biaggi, 478 F.2d at 494 (supplemental opinion) (internal quotations omitted) (holding that Rule 6(e) did not bar the public disclosure of grand jury minutes, even where no Rule 6(e) exception applied, when sought by the grand jury witness himself)). In *Craig,* the Second

Circuit embraced the "special circumstances" exception first recognized by Chief Judge Friendly in Biaggi, holding that "permitting departures from Rule 6(e) is fully consonant with the role of the supervising court and will not unravel the foundations of secrecy upon which the grand jury is premised." *Id.* at 103.

The *Craig* court explained that the special circumstances exception "is consistent with the origins of Rule 6(e), which reflects rather than creates the relationship between federal courts and grand juries." *Id.* (citing *Pittsburgh Plate Glass Co.,* 360 U.S. at 399, 79 S.Ct. 1237 (explaining that "Rule 6(e) is but declaratory" of the principle that the disclosure of grand jury materials is "committed to the discretion of the trial judge")). Judge Calabresi, writing for the court, noted that the Second Circuit was not alone in this view. *See id.* at 103 & nn.3–4 (citing *In re Hastings,* 735 F.2d 1261, 1268–69 (11th Cir.1984) (describing courts' "inherent power" to authorize the disclosure of grand jury records outside of Rule 6(e))). Since *Craig,* the Seventh Circuit has likewise declared that circuit's recognition of district courts' inherent authority to disclose grand jury information outside of the strictures of Rule 6(e). *Carlson v. United States,* 837 F.3d 753 (7th Cir. 2016).

In granting the Kutler petition to unseal President Nixon's grand jury testimony, this Court agreed that "special circumstances" may justify the release of grand jury materials outside the bounds of Rule 6(e). The Court found that the special circumstances exception, first applied in the Second Circuit, is well-grounded in district courts' inherent supervisory authority to order the release of grand jury materials. Moreover, the exception, by its very nature, applies

only in exceptional circumstances, requiring a nuanced and fact-intensive assessment of whether disclosure is justified.

The government's argument that no disclosure of grand jury information is permissible outside the strictures of Rule 6(e) remains unconvincing. The government relies heavily on the Supreme Court's instruction that a district court's inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle v. United States,* 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (holding that a district court had no authority to grant a motion for judgment of acquittal filed one day outside of Rule 29(c)'s time limit); *see also Bank of Nova Scotia v. United States,* 487 U.S. 250, 254–55, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) (holding that a district court could not invoke its supervisory power to circumvent Rule 52(a)'s harmless error standard). But that principle is inapplicable here, where the relevant rules are silent as to other circumstances that may merit disclosure. *See also Carlson,* 837 F.3d at 755 ("We find nothing in the text of Rule 6(e) (or the criminal rules as a whole) that supports the government's exclusivity theory, and we find much to indicate that it is wrong.").

Indeed, *Carlisle* dealt with a district court that had "contradicted the plain language" of Rule 29(c) by "effectively annull[ing]" its specified time limit. *Carlisle,* 517 U.S. at 426, 116 S.Ct. 1460. In contrast, courts have historically exercised their supervisory power to develop appropriate exceptions to the rule of grand jury secrecy. *See In re Hastings,* 73 5 F .2d 1261, 1268–69 (11th Cir.1984) (tracing the history of how courts' inherent power has shaped Rule 6(e)); *In*

re Report and Recommendation of June 5, 1972 Grand Jury, 370 F.Supp. 1219, 1229 (D.D.C.1974) (citing *Biaggi* for the proposition that Rule 6(e) "remains subject to the law or traditional policies that gave it birth"). Nothing in *Carlisle* precludes the exercise of that power in "exceptional circumstances consonant with the rule's policy and spirit." *Hastings,* 735 F.2d at 1269.

Contrary to the facts of *Carlisle,* the Court's decision today is consistent with, or at least certainly does not contradict the text and history of the rule.[3] *See also Carlson.* at 764–65. Further, the fact remains that it would make little sense for a rule of criminal procedure to include provisions for permissive disclosure for purposes other than contemporary law enforcement and criminal justice functions that constitute at least four of the five interests the tradition of grand jury secrecy is meant

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[3] It is noteworthy that the inherent supervisory power of the Court over a grand jury is also implicitly recognized in more than a dozen provisions of Rule 6. See, e.g., §§ (a)(l) (summoning grand juries), (a)(2) (providing for judicial discretion as to alternate grand jurors); (c) (appointing a foreperson); (e)(l) (determining control of records of proceedings); (e)(3)(B) (oversight of Rule 6(e)(3)(A)(ii) disclosures); (e)(3)(D)(ii) (oversight of Rule 6(e)(3)(D) disclosures); (e)(3)(E) (discretion to authorize contemporary disclosures for ongoing proceedings or law enforcement purposes); (e)(3)(F) (oversight of Rule 6(e)(3)(E)(i) disclosures); (e)(5) (closing hearings "to the extent necessary" to prevent disclosure of a matter occurring (in the present tense) before a grand jury); (e)(7) (discretion concerning contempt findings); (g) (discharging grand juries); (h) (discretion to excuse grand jurors). In addition, the history of the Notes of the Advisory Committee on Rules are replete with acknowledgements of courts' discretion concerning disclosure of grand jury information in a variety of circumstances.

to protect.[4] *Cf. Procter & Gamble,* 356 U.S. at 681–82 n. 6. *See also* S. Rep. 95-354, 1977 U.S.C.C.A.N. at 531 (indicating that the restrictions on disclosure enumerated in Rule 6(e) sought "to allay the concerns of those" who feared the possibility of prosecutorial misconduct via improper disclosures of grand jury investigations, *not* abuses of judicial discretion).

Instead, it is left to the district court's sound discretion, as it was prior to 1977, to hear petitions for disclosure on their merits, and grant them, in whole or in part, if and when it is appropriate to do so. The factors enumerated in *In re Petition of Craig,* 131 F.3d 99 (2d Cir. 1997), appropriately guide a district court in the exercise of its discretion to unseal grand jury records. These factors include:

> (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

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[4] Indeed, although there is no First Amendment right of access to grand jury proceedings, *In re Motions of Dow Jones & Co.,* 142 F.3d 496, 499 (D.C. Cir. 1998), it is antithetical to our system of government to say that some class of public records is, forever and always, off-limits even from consideration for public release, even after the underlying practical needs for secrecy in the records has long since lapsed. In a constitutional democracy that values openness and transparency in government records, no matter how sensitive, *Cf.* 5 U.S.C. § 552; Exec. Order. 13526, § 3.l(a), it is imperative that the Court look to the underlying purpose of any rule calling for nearly unqualified secrecy of a class of records for perpetuity.

> 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.

Id. at 106. *See also Carlson v. United States,* 837 F.3d 753 (7th Cir. 2016).

B. Merits of the Petition

The *Craig* factors enumerated above properly balance special circumstances that might justify disclosure against the need to maintain grand jury secrecy. In *Kutler,* this Court found the relevant factors to weigh in favor of unsealing President Nixon's testimony and associated WSPF materials. Specifically, the Court held that the undisputed historical interest in the narrowly-tailored request for records outweighed the need to maintain the secrecy of those records. Here, too, the Court will consider those factors in determining whether petitioner has demonstrated that the disclosure of grand jury records related to John Frank is justified.

The court finds several of the *Craig* factors would favor disclosure in this case. Mr. McKeever himself is a bona fide author who has been researching this case since 1980, and has published a book on it. Disclosure is being sought for reasons in accord with that purpose – furthering Mr. McKeever's research on the topic. Nearly sixty years have passed since the grand jury held its hearings, and the principals and witnesses who might be affected by disclosure of the records are likely deceased.

The government argues, however, that even under *Craig's* special circumstances test, the petition fails to meet that test because the historical value of the Frank case does not rise to the level of meriting release. Although not by itself determinative, "the government's position should be paid considerable heed." *In re Craig,* 131 F.3d at 106. The government's opposition, however, would best be framed in the context of the historic reasons for the tradition of grand jury secrecy. *Cf. Procter & Gamble,* 356 U.S. at 681–82 n. 6. Instead, the government's main focus is on the historic value of the requested records, or lack thereof. *See, e.g.,* Memorandum in Opposition at *24 [10] (arguing there is "no basis to believe that the records here are of exceptional historic importance.").

Any qualitative judgment about what events are properly considered "historic" necessarily includes a great degree of subjectivity. The Court agrees with the government to the extent that it is objectively true that the Galindez kidnapping does not carry the lasting impact on the structure of our civics and culture that the Watergate scandal does. But it also is simply not credible to argue that there is not historic value in studying the details of a case involving an individual who served as a federal agent in what is arguably the nation's premier law enforcement agency, then an attorney at what is arguably the nation's premier intelligence agency, who was subsequently employed by and took orders from an unfriendly foreign government, possibly to include the abduction from the United States and murder of a refugee. A case involving lethal operations by United States citizens acting as foreign

agents inside the United States is not merely "interesting." *Id.* at **22, 23.[5]

Nevertheless, Mr. McKeever's petition seeks a far broader range of records than what was sought in *Kutler,* and the sheer breadth of Mr. McKeever's petition renders disclosure outside of Rule 6(e) inappropriate. *See also In re Shepard,* 800 F.Supp.2d 37 (D.D.C. 2011). Rather than the grand jury testimony of a single witness, Mr. McKeever seeks the release of unspecified, and thus presumptively all, "testimony and records in the Frank case . . ." Motion for Release of Grand Jury Testimony and Records at** 1, 4 [1]. "There are obvious differences between releasing one witness's testimony, the full transcript, or merely the minutes of the proceeding." *Craig,* 131 F .3d at 106. Indeed, the government represents that such disclosure would amount to "thousands of pages of documents and numerous witnesses." Memorandum in Opposition *2 [10]. Thus, the fourth *Craig* factor, which addresses the scope of information sought, weighs heavily against disclosure.

Furthermore, the sheer volume of material requested implicates at least one of the secrecy concerns recognized by the Supreme Court – that of protecting the privacy of individuals who may have been subjects of the grand jury's investigation, but were never indicted. *See United States v. Procter & Gamble Co.,* 356 U.S. 677, 681–82 n. 6, 78 S.Ct. 983,

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[5] The Court notes that, if there is indeed a credible factual basis for petitioner's allegation that then-active U.S. government agents were also involved, *see* [1] at **6-7; [13] at **14-15, 29, that would tend to weigh even more heavily in favor of disclosure. Mere speculation, however, can be accorded no weight.

2 L.Ed.2d 1077 (1958) (noting that, among the goals achieved by grand jury secrecy is protecting an innocent accused who has been exonerated "from disclosure of the fact that he has been under investigation") (quoting *United States v. Rose,* 215 F.2d 617, 628–29 (3d Cir.1954)). *See also In re Nichter,* 949 F.Supp.2d 205, 213-14 (D.D.C. 2013). Although most privacy protections do not extend to deceased individuals, the involvement of persons in criminal proceedings who themselves are never indicted or tried nevertheless is presumed to merit continued secrecy, with only the rarest of exceptions, as recognized in *Kutler*. Additionally, Mr. McKeever' s blanket request for all the records associated with the case makes it impossible for the Court to assess the status of the families of the principals or witnesses involved in the Frank investigation.

III. CONCLUSION

For these reasons, it is hereby

ORDERED that Mr. McKeever's Petition [1] is DENIED.

SO ORDERED this 22nd day of May, 2017.

s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5149 **September Term, 2018**
1:13-mc-00054-RCL
Filed On: July 22, 2019

Stuart A. McKeever,
Appellant

v.

William P. Barr, Attorney General,
Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Federal Rule of Criminal Procedure 6(e)

Rule 6. The Grand Jury

* * *

(e) Recording and Disclosing the Proceedings.

(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. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(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).

(3) *Exceptions*.

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

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

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

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

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines

issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term ”foreign intelligence information” means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of

the United States.

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

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

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

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner

must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

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

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment.* The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to

prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records*. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt*. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

* * *